

ACON & PLWHA NSW Inc.
Submission to Review of the *Public Health Act*

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Summary of Recommendations

Recommendation 1

That the Act include a statement of objectives which reflect:

- the outcomes the Act seeks to achieve;
- the context of the Act – role of health promotion in effective public health outcomes as outlined in the *Ottawa Charter*;
- the need to balance effective protection for the community from public health risks with the need to minimise infringing individual rights and liberties.

Recommendation 2

That Part 3 of the Act commence with a statement of principles which underpin the regulation of infectious diseases based upon section 119 of the Health Act 1958 (Victoria).

Recommendation 3

That in principal support is given to development of a framework of 'core' public health provisions, which enable specific public health issues to be addressed by regulation. However, this approach would need to ensure effective scrutiny of regulations.

Recommendation 4

That the Act is amended to clarify the role of local government in achieving public health outcomes.

Recommendation 5

That a mechanism to improve co-ordination between Health and local government is developed. Such a mechanism need to include not only the specific roles local government play in regulating public health, but also those roles such as planning which can impact upon the achievement of public health outcomes.

Recommendation 6

That the current system for privacy protection in the Act is retained.

Recommendation 7

That section 13 of the Act is repealed.

Recommendation 8

That the review recommend repeal of the diseases specific criminal offence created by section 36 of the NSW *Crimes Act*.

Recommendation 9

That the review recommend the enactment of a general criminal offence of 'Recklessly Endangering Life or Risking Serious Harm' ("Reckless Endangerment").

Recommendation 10

That the review recommend the development of a protocol, between the Police Service, the Director of Public Prosecutions (DPP) and the Health Departments, to ensure an integrated approach to the application of criminal and public health laws in circumstances where it is alleged that a person has placed another at risk of a sexually transmissible medical condition and that such a protocol is enshrined in appropriate legislation.

Recommendation 11

That the Act include the requirement that pre test and post test counselling is provided and that HIV testing of individuals should only be carried out with their informed consent.

Recommendation 12

That the Act be amended to provide that public health orders should be characterised by a graded series of interventions, with isolation as last resort. We recommend that the provisions be modelled on the relevant NSW Health Department Circular section 121 of the Victorian *Health Act*.

Recommendation 13

That section 23 of the Act is amended to provide that, to make a public health order, an authorised medical practitioner must be satisfied on reasonable grounds that a person has an infectious disease and is likely to transmit that disease. We recommend that the amendment be modelled on section 121 (1) of the *Health Act (Vic)*.

Recommendation 14

That section 22 of the Act is amended to provide that, to require a medical examination, the Director General must also be satisfied on reasonable grounds not only that the person suffers from the condition, but that the person is also likely to transmit that disease. We recommend that the amendment be modelled on section 121 (1) of the *Health Act (Vic)*.

Recommendation 15

That detention under an order, or as a consequence of breach of an order, ought to be within a hospital facility and that consideration ought to be given development of a 'scheduling' procedure.

Recommendation 16

That the Act should be amended to provide that, notwithstanding the *Administrative Decisions Act*, a person who is the subject of a public health order has an unrestricted right of appeal to an appeal panel of the ADT on the merits of the case.

Recommendation 17

That the Act should be amended to require that appeals against public health orders be heard and determined with expedition.

Recommendation 18

That the Act is amended to include procedures to be followed where disease notifications are received under the Act.

Submission to the Review of the *Public Health Act 1991*

Introduction

The AIDS Council of NSW (ACON) is a community-based HIV/AIDS organisation which provides a wide range of education and health promotion programs and care and support services for people living with HIV/AIDS (PLWHA) and those most at risk of HIV infection. We play a lead role in advocating for a public policy, legislative and social environment which protects the rights of PLWHA and those most at risk and which supports HIV prevention efforts.

ACON auspices the **Sex Workers Outreach Project**. SWOP provides a range of health, safety, support and information services for sex workers, management, clients and partners of sex workers to minimise transmission of sexually transmitted diseases and HIV/AIDS in the NSW sex industry.

People Living With HIV / AIDS (NSW) Inc. is a non-profit community organisation representing the interests of people living with HIV and AIDS in NSW. Advocacy and lobbying are our primary functions while promoting a positive image of people with HIV and AIDS. We provide information and referral. Major projects of the organisation include the Positive Speakers Bureau and the Publications Unit.¹ The Association employs research and community development officers and develops policies and community resources through its volunteer working groups.

This submission responds to those discussion points in the *Issues Paper* which relate to regulation of infectious diseases, and HIV/AIDS in particular, with some additional comment on matters of broad principles where appropriate.

Discussion Point 1 – Objectives of the Public Health Act

We support the inclusion of a statement of objectives in the NSW *Public Health Act* ('the Act') which reflect the outcomes the Act seeks to achieve, such as protection of the community from public health risks by responding to and minimising such risks and reducing the incidents of disease. The statement of objectives should also reflect the need to balance the protection of the community from public health risks with the need to minimise infringing individual rights and liberties.²

The *Ottawa Charter* provides the broad context within which public health regulation should be understood. Modern public health legislation should acknowledge the importance and effectiveness of strategies which enable people to increase control over and improve their own health, both as individuals and as communities. The effectiveness of such strategies is amply demonstrated by the active role played in Australia's HIV/AIDS response by communities most affected by HIV. People living with HIV/AIDS, gay men, people who inject drugs and sex workers have been at the forefront of developments in HIV education and provision of peer education programs which have demonstrated a significant capacity to reach those most at risk and ensure they have the skills and information to prevent the transmission of HIV. Such strategies have been vital to reducing transmission rates. Recognising the role of health promotion in reducing public health risk in the Act itself will

¹ The Positive Speakers Bureau - positive people speaking to community and professional groups and to schools about their experiences. The Publications Unit produces *Talkabout* magazine, a monthly publication about issues of interest for positive people and *Contacts*, a quarterly HIV service directory to NSW.

² For example, the ACT *Public Health Act* explicitly acknowledges both that the Act aims to protect the public from public health risks and the need to avoid undue infringement of individual liberty and privacy in the performance of functions under the Act.

support the need to ensure that public health regulation does not undermine health promotion efforts.

The Act also needs to include provisions which clearly articulate the principles underpinning the regulation of individual behaviour to minimise the transmission of infectious diseases and provide safe guards for protection of human rights.³ Such clarity is needed given the broad powers to regulate individual behaviour contained in the Act. A legislative statement of principle would be consistent with the recommendations of bodies which have reviewed our public health laws in the light of the HIV/AIDS epidemic.⁴

Relevant NSW Health Department circulars do provide some articulation of principles which inform the procedures in place to implement some aspects of public health laws.⁵ These principles would have far greater strength within the Act itself. Courts pay attention to the principles underpinning requirements set out in a statute but not otherwise. The Victorian *Health Act* provides a good example of a statement of principles which, applied to the regulation of infectious diseases, ensures that the rights of individuals are recognised and balanced with the recognition of the need to minimise risk to the community.⁶

Recommendation 1: That the Act include a statement of objectives which reflect:

- the outcomes the Act seeks to achieve;
- the context of the Act – role of health promotion in effective public health outcomes as outlined in the *Ottawa Charter*;
- the need to balance effective protection for the community from public health risks with the need to minimise infringing individual rights and liberties.

Recommendation 2: That Part 3 of the Act commence with a statement of principles which underpin the regulation of infectious diseases based upon section 119 of the *Health Act* 1958 (Victoria).

Discussion Point 2 – Structure of the Act

We agree with the view that piecemeal amendment to the Act has undermined the coherence of the Act. We support, in principal, structuring the Act around a set of ‘core’ public health provisions which provide a framework within specific public health issues can be addressed by regulation. However, we are concerned that this approach may reduce the level of scrutiny of these specific responses contained in regulation, than is the case for legislative amendments.

Given the kind of powers embodied in public health legislation, such as authorising compulsory medical examinations and detention of individuals, adequate scrutiny of regulations is essential. While we recognise that the *Sub-ordinate Legalisation Act* sets out the requirements for new regulations, the *Public Health Act* itself would need to be improved before such requirements would be meaningful. For example, *Sub-ordinate Legalisation Act* includes that the regulations must accord with the objectives of the Act. This emphasises the need to include objectives in the Act which balance protecting the community from public health risks with minimising the infringement of individual rights and liberties. The *Sub-ordinate Legalisation Act* also provides for review of regulations every five years. Consideration could be given to enabling review of public health regulations or specific regulations within the Act more regularly.

³ Such a legislative statement of principles underpinning the regulation of infectious diseases should be incorporated into the Act for the purposes of application, operation and interpretation of Part 3 of the Act.

⁴ The Intergovernmental Committee on AIDS, Legal Working Party (IGCA LWP) *Final Report*, recommendation 2.6.1. In its report (p.20), *The Courage of Our Convictions* (Sydney, 1993), the NSW Minister for Health’s Legal Working Party which considered the recommendations in the IGCA LWP *Final Report*, as they relate to NSW laws, supported the recommendation and indicated that such amendments should be made in line with Victorian legislation.

⁵ Eg, *Management of People with HIV Infection who Risk Infecting Others* (Circ.#97/3, October 1997).

⁶ *Health Act* 1958 (Victoria), section 119.

Recommendation 3: That in principal support is given to development of a framework of 'core' public health provisions which enable specific public health issues to be addressed by regulation. However, this approach would need to ensure effective scrutiny of regulations.

Discussion Points 5 & 6 – Improving co-ordination with Local Government and Links with the planning system

We agree that there is a need to improved co-ordination between Health and local government. We support clarification, in the Act, of the role and responsibilities of local government with respect to public health legislation. Given the overlapping roles of local and state government roles in public health regulation and enforcement, clear delineation is needed. However, there are also other functions of local government which impact, at times adversely, on effective public health regulation and programs. The *Issues Paper* recognises that planning decisions have the potential to impact on the health of the general community. In our experience local government's role in planning can also have an adverse impact upon the achievement of public health objectives.

For example, sex industry reform in 1995 resulted in the decriminalisation of brothels. Effective health promotion and HIV prevention relies upon our capacity to reach those who engaged in risk activities. Legal brothels are far more easily monitored for compliance with the Health and Safety Guidelines for Brothels in NSW and the *Occupational Health and Safety Act 1983* when they are registered and have stable locations.⁷ The public health benefits of a regulated sex industry was one of the primary motivations for such reform.⁸

However, it is our experience that many local councils have developed brothel policies, either formal or informal, which are aimed at discouraging the sex industry and do not support the reforms.⁹ Many local councils regularly reject development applications from brothels as a matter of course forcing brothel owners to pursue their case in the Land and Environment Court. This has created a climate that discourages existing brothels operators from applying for development consent. When development consent is refused or never sought, brothels continue to operate illegally, thwarting the public health benefits that can be derived from effective regulation of brothels.¹⁰

So too, local governments have forced the closure, relocation or scaling down of a number of needle and syringe programs (NSPs), reducing the ability of services to reach people who inject drugs. Such responses at local level undermine HIV and hepatitis C prevention efforts and fly in the face of clear evidence that NSPs are the most effective way of preventing HIV transmission.¹¹

There is a need then to develop a mechanism to improve coordination between public health units and local governments in addressing public health risks. We recommend further consideration be given to adapting the Victorian public health plans model as suggested in

⁷ Research clearly demonstrates that when brothels operate illegally, it makes implementing effective HIV and other STD prevention strategies and ensuring health and safety standards very difficult. Alexander, P. *Sex work and Health : A question of Safety in the Workplace*, JAMWA Vol. 53, No. 2, Cohen, J. *Transmission of HIV in Prostitutes*, January 1994.

⁸ "The Government cannot legislate to control moral values of the community, and prostitution per se is not illegal. However, the Government can and should legislate to reduce public health risks to both prostitutes and their clients..." Hansard, Mr Whelan, Second reading speech on *Disorderly Houses Amendment Bill*, 20th September 1995, Assembly at page 1187.

⁹ Examples of local council resistance to reforms is well documented in many articles in local media including: *City on the Hooks*, The Newcastle Herald 18th February 1999; *No Exemption Council's Red Light on Brothels*, Glebe and Inner Western Weekly 17th February 1999; *Brothels face big crackdown*, *The Champion*, The Weekly Edition Suburban Newspaper from Liverpool 10th March 1999; *Council sees red over brothel zone*, Inner Western Weekly 10th February 1999, *Council deflates brothel boom*, St George Leader, 24th June 1999.

¹⁰ SWOP case studies 1997 - brothels owners in Southern Sydney, Southern Beaches and Blacktown areas.

¹¹ S. Hurley, D. Jolley, J. Kaldor, *The Lancet* - Effectiveness of needle exchange programs for prevention HIV infection.

the *Issues Paper*.¹² In our view such a coordination mechanism would be better operationalised at regional rather than local level, with public health units working in collaboration with local governments in a given region to identify common problems, agree action and where possible implement joint strategies. This would maximise the sharing of resources, policy and procedure, program initiatives and organisational capacity to support best practice. Such an approach needs to encompass not only the specific roles local government play in regulating public health, but also those roles such as planning which can impact upon the achievement of public health outcomes.

Recommendation 4: That the Act is amended to clarify of the role of local government in achieving public health outcomes.

Recommendation 5: That a mechanism to improve co-ordination between Health and local government is developed. Such a planning mechanism need to include not only the specific roles local government play in regulating public health, but also those roles such as planning which can impact upon the achievement of public health outcomes.

Discussion Point 9 – Privacy Protection

We strongly endorse the view that “successful public health practice requires co-operation rather than coercion. People are more likely to co-operate if they trust the system, and in the case of infectious disease control in particular, the protection of patient privacy is the most important element around which trust needs to be built.”¹³

It is well documented that discrimination against people living with HIV/AIDS (PLWHA) is widespread.¹⁴ Given the stigma associated with HIV, effective privacy protection is essential to support PLWHA access to health care and the right to chose whether to disclose their serostatus. Privacy protection is also critical to maintaining an environment, which encourages people at risk of HIV to test. Failure to maintain privacy protection would be counter-productive, alienating PLWHA from access to information and support services and undermining testing. Where people remain unaware of their serostatus and/ or do not have access to information and support to enable behaviour change to reduce the risk of transmission, the scene is set for the ‘silent’ spread of HIV.

In our view the current system of privacy protection in the Act is effective and should be retained. The relevant provisions strike the rights balance between protecting the privacy of individuals and ensuring access to information to enable monitoring of public health and identification of risks to public health.

Recommendation 6: That the current system for privacy protection in the Act is retained.

Discussion Point 18 – Scheduled Medical Conditions

The views in this section of the *Issues Paper* attributed to ACON were our preliminary comments provided to the review process in February 1997. In the intervening years, ACON has also provided a submission to the team commissioned to prepare a paper to scope the issues for the Review. ACON and PLWHA (NSW) have recently undertaken a detailed analysis of necessary reform to the Act, in anticipation of this review, with a particular focus on the roles of both criminal and public health laws in responding to people who are alleged to have placed others at risk of HIV transmission. Our current position is not inconsistent with early submissions, but provides a more comprehensively set of recommendations in response to concerns raised previously.

¹² Review of the *Public Health Act* 1991 – *Issues Paper*, at page 30.

¹³ *Issues paper*, *op cit* at page 42, quoting Bidmeade I & Reynolds, R *Public Health Law in Australia*, June 1997, NPHP.

¹⁴ *Discrimination - The Other Epidemic : Report of the Inquiry into HIV/AIDS related discrimination*, NSW Anti-Discrimination Board, April 1992. S. Kippax et al, *Discrimination in the context of AIDS : disease and deviance*, Macquarie University AIDS Research Unit, A Unit of the National Centre for HIV Social Research, NSW, July 1991.

18.1 New approaches to the role of public health law

In the past, the ways in which all societies have responded to risk of harm posed by members of the community is to regulate and to sanction. Traditional public health law models were highly prescriptive and emphasised sanctions over other measures to address risk of harm posed by people with infectious disease. One of the social changes brought about in modern society by the HIV/AIDS epidemic has been to rethink this approach.

The taboos and stigma associated with HIV/AIDS and the risk of HIV/AIDS (including perceptions of infection and of risk), and the particularly intimate and often stigmatised nature of the vectors of transmission, mean that reliance for disease prevention upon regulation and sanctions is likely to be counter-productive and cause instead the 'silent' spread of disease.

Consequently, many societies and communities have responded to the risk of harm caused by HIV disease transmission by establishing mechanisms for peer support, counselling and culturally appropriate education. The HIV/AIDS community sector has generally favoured:

- the use of public health, rather than criminal, laws in responding to people who risk infecting others; and
- general, as opposed to disease specific, criminal offences.

This approach has been supported by Australian and international processes for review of and recommendations for appropriate HIV/AIDS laws.¹⁵

Despite numerous reports recommending reform to public health and criminal laws, the Act is contradictory in its approach to regulation of individual behaviour to minimise the transmission of infectious diseases. The Act contains a public health offence— a criminal offence – relevant to HIV which is highly prescriptive regarding disclosure of infection in sexual settings, with sanctions for failure to do so.¹⁶ The Act also provides for public health interventions in the form of public health orders.¹⁷ Such interventions range from counselling through to isolation, with differing degrees of impact on liberty being applied as the circumstance in each case require. The latter approach is more consistent with a modern approach to regulating individual behaviour by ensuring people have sufficient information and support to enable sustained behaviour change, thereby reducing the risk of infection to others. But there are also improvements which are needed in relation to public health orders. (Addressed at discussion point 19 below).

18.2 Section 13 – The Public Health Offence

The public health offence is contained in section 13 of the Act and provides –

A person who knows that s/he suffers from a sexually transmissible medical condition is guilty of an offence if s/he has sexual intercourse with another person unless, before intercourse take place, the other person:

- (a) has been informed of the risk ; and
- (b) has voluntarily agreed to accept the risk.

ACON has consistently raised concerns about the limited effectiveness of section 13 in preventing HIV transmission, particularly when weighed against the negative impact created by this duty of disclosure.

¹⁵ Intergovernmental Committee on AIDS, Legal Working Party (IGCA LWP) established by the Commonwealth Government as part of the First National HIV/AIDS Strategy to review all relevant laws and recommend necessary reform in light of the HIV epidemic. *Final Report*, Canberra 1992 ; *The Courage of Our Convictions*, The NSW Health Minister's Legal Working Party (NSW LWP) 1993, Sydney 1993; *HIV/AIDS and Human Rights International Guidelines*, Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Program on HIV/AIDS, United Nations *HIV/AIDS and Human Rights International Guidelines*, New York & Geneva, 1998.

¹⁶ Section 13, NSW *Public Health Act*.

¹⁷ Division 6, NSW *Public Health Act*.

Criminalising HIV transmission or exposure, whether within public health or criminal legislation results in:

- further stigmatising people with HIV by placing blame on one party;
- reducing incentives for people at risk of contracting HIV to take responsibility and all measures to reduce that risk;
- discouraging people from becoming aware of their serostatus, which in turn reduces the extent to which people with HIV will access treatments and information and support to reduce the risk of transmission to others.

While it may be argued that the existence of a public health offence can provide leverage in counselling people to comply with safe sex practices, this can equally be achieved by the existence of a general criminal offence (discussed below), without creating a duty of disclosure on the part of people living with HIV/AIDS. The *Crimes Act* already provides that it is an offence to maliciously cause or attempt to cause another person to contract a grievous bodily disease.¹⁸ We propose below that this section should be replaced with a general offence of reckless endangerment which applicable in cases of reckless exposure to HIV. Irrespective of whether this reform is achieved, a criminal sanctions exist for those small proportion of cases where the circumstances require such action.

The fact is that the duty of disclosure created by section 13 is very difficult to 'police' and to our knowledge, no one has ever been charged with this public health offence for failing to disclose. The definition of sexual intercourse for the purpose of Section 13, encompasses sexual activity involving negligible risk of transmission (oral intercourse) and the section fails to provide for safe sex measures as a defence.

The existence of this offence increases stigmatisation of PLWHA, undermines educational messages for gay men which emphasise shared responsibility, thereby reducing the incentives for people at risk of contracting HIV to take steps to reduce that risk and discourages people becoming aware of their status. It is critical that public health laws provide an environment which supports the culture of 'shared responsibility' which has been fostered within the gay community. This is particularly so given that gay men have been and continue to be the most affected by HIV. It is estimated that 85% of all PLWHA in NSW are gay and homosexually active men.¹⁹

Modern public health laws should recognise that minimising transmission of HIV is best achieved through strategies which enable people to effect behaviour changes in preventing transmission of HIV. For the reasons outlined above, we do not support the existence of a specific HIV or disease specific criminal offence. We recommend the repeal of section 13. At the very least, safe sex practices should operate as a full defence. However, we believe that this does not go far enough in addressing the deleterious impact of this offence and consider that, in the context of the package of reforms proposed, repeal of section 13 is justified and appropriate.

Recommendation 7: That section 13 of the Act is repealed.

18.3 Criminal law reform – responding to deliberate or reckless infection or exposure to HIV

As indicated above, the NSW *Crimes Act* 1900²⁰ already provides that a person who maliciously causes or attempts to cause another person to contract a grievous bodily disease is liable to penal servitude for 25 years. This offence borders on being a specific HIV offence. HIV specific laws are contrary to the recommendations of the Australian and international bodies set up to review and recommend appropriate HIV/AIDS laws.

¹⁸ Section 36 of the NSW *Crimes Act* 1900 provides that a person who maliciously causes or attempts to cause another person to contract a grievous bodily disease is liable to penal servitude for 25 years. "Grievous bodily disease" is not defined but is generally considered to be intended to embrace HIV infection.

¹⁹ It is estimated that 85% of all PLWHA in NSW are gay and homosexually active men. *Australian HIV Surveillance Report* Vol 14 No. 3 July 1998, National Centre in HIV Epidemiology and Clinical Research.

²⁰ Inserted in the *Crimes Act* by the *Crimes Injury Amendment Act* 1990 (NSW).

These bodies recommended:

Special, as opposed to existing general criminal law sanctions, should be carefully considered by State Governments because of the danger of stigmatising already alienated groups.²¹

Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases.²²

For the reasons given above as to why criminalising HIV transmission is dangerous and in line with the recommendations of the law review bodies, it is recommended that the diseases specific criminal offence created by section 36 of the NSW *Crimes Act* be repealed.

We do, however, recognise that the concept of 'shared responsibility' for avoiding disease transmission does not apply to all circumstances. A woman who perceives herself to be a monogamous relationship is unlikely to take precautions to avoid risk, because she is unaware she is at any risk. There may be power inequities between the parties which make the concept of 'shared responsibility' inapplicable.

We recognise that there may be a role for the criminal law in cases where:

- a public health intervention has been considered and deemed inappropriate, for example in cases of significant power inequality between individuals or impaired capacity to give consent to risk of transmission; and
- there has been intentional or reckless disease transmission or exposure of another to risk of disease transmission.

There is a need to ensure that there is an appropriate criminal offence to address those cases where the criminal law legitimately has a role to play in sanctioning conduct which amounts to deliberate or reckless transmission of HIV or exposure of a person to the risk of contracting HIV, whether through sex or otherwise.

In the event that section 13 of the *Public Health Act* and section 36 of the *Crimes Act* are repealed, there is no existing general criminal offence which would adequately meet this need. Unlike the position elsewhere in Australia,²³ there is no general criminal offence of Conduct Endangering Life in the NSW *Crimes Act*. It is interesting to note that in Victoria, despite the fact that an HIV specific criminal offence exists,²⁴ the bulk of prosecutions have used the general criminal offence of Reckless Conduct Endangering Life, rather than the specifically created offence.

We recommend that a general criminal offence of 'Recklessly Endangering Life or Risking Serious Harm' ("Reckless Endangerment") be enacted which can be applied in cases of reckless infection or risk of infection. The reform proposal is detailed in the Appendix. We are pursuing the need for criminal law reform with the Attorney General.

Even if criminal law reform proposed is not achieved, the *Crimes Act* already provides that it is an offence to maliciously cause or attempt to cause another person to contract a grievous bodily disease.²⁵ Given this, the repeal of section 13 of the *Public Health Act* does not need to be consequent upon achieving this reform.

²¹ Recommendation 2.5.4, IGCA LWP *op cit* at page 22

²² *HIV/AIDS and Human Rights International Guidelines*, *op cit* at paragraph 29(a).

²³ NT *Criminal Code Act* 1983, s.154(1); SA *Criminal Law Consolidation Act* 1935, s.29; Vic *Crimes Act* 1958, s.22.

²⁴ By s.19A *Crimes Act* (Vic), a person who, without lawful excuse, intentionally causes another person to be infected with a very serious disease is liable to imprisonment for 5 years. "Very serious disease" means HIV within the meaning of the *Health Act* 1958.

²⁵ Section 36 of the NSW *Crimes Act* 1900 provides that a person who maliciously causes or attempts to cause another person to contract a grievous bodily disease is liable to penal servitude for 25 years.

Recommendation 8: That the review recommend repeal of the disease specific criminal offence created by section 36 of the NSW *Crimes Act*.

Recommendation 9: That the review recommend the enactment of a general criminal offence of Recklessly Endangering Life or Risking Serious Harm' ("Reckless Endangerment").

18.4 Policy framework – Integrating criminal and public health responses

Public health and criminal laws should be part of an integrated approach when responding to people who may be placing others at risk of HIV transmission, or indeed exposure to any sexually transmissible medical condition. Public health interventions should be the first consideration and the preferred approach. Application of the criminal law should be considered only in cases where a public health intervention has been considered and deemed inappropriate and where there has been intentional or reckless disease transmission or exposure of another to risk of disease transmission.

In order to achieve this integrated approach a clear protocol between the Police Service, the Director of Public Prosecutions (DPP) and the Health Department about application of criminal and public health laws, is needed.

Such a protocol would:

- outline serious concerns associated with the use of the criminal law in the context of sexual relationships;
- outline the risk that unwarranted prosecutions will undermine those public health strategies which are based on the notion of shared responsibility;
- outline the procedures to be adopted in cases of reported or suspected exposure to a sexually transmissible medical condition in circumstances of fault;
- establish a formal liaison protocol between public health authorities and police to ensure that at the level of response, the matter is handled by the person with the most appropriate skills;
- identify the authorities whose consent would be required for the bringing of criminal proceedings; and
- ensure appropriate ongoing support and information is provided to both the complainant and the person against whom the complaint has been made.

It recommended that this protocol should be enshrined in appropriate legislation or regulations.²⁶ One means of doing so may be to formalise approval of prosecutions by the Director of Public Prosecutions issuing guidelines to the Commissioner of Police in relations to police decisions to lay charges pursuant to section 14 of the *Director of Public Prosecutions Act 1986* and /or establish a mechanism within *Public Health Act* or regulations for Chief Public Health Officer's approval prior to criminal charges being laid.

Recommendation 10: That a protocol is developed, between the Police Service, the Director of Public Prosecutions (DPP) and the Health Departments to ensure an integrated approach to the application of criminal and public health laws in circumstances where it is alleged that a person has placed another at risk of a sexually transmissible medical condition and such a protocol is enshrined in appropriate legislation.

18.5 Informed consent to testing

The requirement for informed consent before a person is tested for the presence of HIV or antibodies to HIV is considered basic in Australia. However, in NSW the requirement to

"Grievous bodily disease" is not defined but is generally considered to be intended to embrace HIV infection.

²⁶ A protocol between the Police and Health Departments has existed in Victoria, although it appears that police and prosecuting authorities have not always used the protocol in practice. This underscores the need to enshrine the protocol in appropriate legislation.

obtain informed consent by provision of pre test counselling is embodied in no more than NSW Health Department circulars.²⁷ There should be inserted in the Act a requirement that HIV testing of individuals should only be carried out with their informed consent (ie, with pre-test counselling), except in specific cases of mandatory and compulsory testing authorised by law. There are precedents for such legislative requirements.²⁸

This approach is supported by the recent review of testing policy undertaken by the Australian Council on AIDS and Related Diseases and the by the earlier recommendations of the IGCA LWP.²⁹ The NSW Health Minister's Legal Working Party (NSW LWP) 1993 supported retaining this requirement and pre and post test counselling within Departmental guidelines, the reason given is that there is a common law requirement for informed consent therefore there is no need to develop a statutory basis for informed consent.

We do not agree with this proposition. It is important to address the need for informed consent within the Act itself for two reasons. The first requires an examination of the context within which blood is taken and tested. Pre test counselling is necessary to ensure that consent is not limited to the taking of blood. The common problem is not that consent to take blood is not sought, but rather that blood, once taken with consent, is tested for HIV without consent. Usually, blood is taken for a whole range of tests.

The common law only provides protection where blood is taken without consent, it does not however address the issue of blood taken with consent and tested for HIV without consent. There remains a lack of clarity to ensure that consent to testing for HIV is given and capacity is then provided for pre test counselling. Given the significance of HIV testing, the requirement for informed consent should be part of the legislation and be supported by the guidelines which already exist.

Secondly, legal opinion is that even where there are ways of enforcing the requirement to obtain informed consent to testing by resort to the common law, the ways are not straight-forward and usually require proof of damage as a result of failure to obtain informed consent. Absence of a legislative statement of a duty to obtain informed consent before testing for HIV is a poor reflection on the state of our public health law.

Recommendation 11: That the Act include the requirement that pre and post test counselling is provided and that HIV testing of individuals should only be carried out with their informed consent (ie with pre-test counselling), except in specific cases of mandatory and compulsory testing authorised by law.

Discussion Point 19 – Public Health Orders

The Act provides for public health interventions, range from counselling through to isolation, with differing degrees of impact on liberty being applied in cases where a person is placing another at risk of transmission. Public health orders can involve a form of civil detention, that is, the subject of the order will not have committed a crime but their liberty will still be restrained. It is for this reason that particular care must be taken to ensure that the procedure by which a public health order is placed is fair to the intended subject of the order. Improvements are needed in relation to the public health orders provisions.

19.1 Graded Interventions

We note that the Issues Paper argues that the public health order provisions “represent a staged approach...That Act clearly envisages that the least restrictive option must be considered first and must be inappropriate...before the more restrictive order is made”.³⁰

²⁷ NSW Health Department's Circular No 92/20, *Guidelines for counselling associated with HIV antibody testing* provides that "All HIV antibody testing should be accompanied by pre and post-test counselling."

²⁸ Eg, sections 7 & 14 *HIV/AIDS Preventive Measures Act* 1993 (Tas).

²⁹ HIV Testing Policy, ANCARD and IGCARD, Commonwealth Department of Health and Aged Care, September 1998 at pages 7 – 8, and recommendation 2.4.1, IGCA LWP *op cit* at page 16.

³⁰ Issues paper, *op cit* at page 61.

We do not share this interpretation of the relevant provision. Section 23 (3) provides a range of interventions one or more of which may be included in any one order and subsection (3A) requires the authorised medical practitioner to *take into account* the guidelines relating to public health orders (emphasis added). In our view, this does not enshrine in legislation the graded approach described in the *Issues Paper* – that is, employing more restrictive measures only after the less serious measures available have been tried and failed. There is no legislative requirement that isolation be used only as last resort.

However, NSW Health Department guidelines have been developed which provide that public health orders should be characterised by a graded series of interventions and only used in exceptional circumstances, with isolation as last resort.³¹ These guidelines do not have the force of law.

Recommendation 12: That the Act be amended to provide that public health orders should be characterised by a graded series of interventions, with isolation as last resort. We recommend that the provisions be modelled on the relevant NSW Health Department Circular section 121 of the *Health Act (Vic)*.

19.2 Basis for making a Public Health Order

The Act provides very wide powers to make a public health order – if an authorised medical practitioner is satisfied on reasonable grounds that a person has a relevant condition and “is behaving in a way that is endangering, or is likely to endanger, the health of the public”.³²

The Victorian *Health Act* provides more appropriate grounds upon which to base a public health order³³:

If the Secretary reasonably believes that -

- (a) a person has an infectious disease or has been exposed to an infectious disease in circumstances where a person is reasonably likely to contract the disease; and
- (b) if infected with that infectious disease, the person is likely to transmit that disease; and
- (c) there is a serious risk to public health.

In our view the Victorian *Health Act* provides more appropriate grounds upon which to basis a public health order, providing a graded system of orders, coupled with a reasonable belief that the person is likely to transmit the disease.

Recommendation 13: That section 23 of the Act is amended to provide that, to make a public health order, an authorised medical practitioner must be satisfied on reasonable grounds that a person has an infectious disease and is likely to transmit that disease. We recommend that the amendment be modelled on section 121 (1) of the *Health Act (Vic)*.

19.3 Power to Require Medical Examination

The power to require medical examinations is very broadly framed. Section 22 of the Act provides that the Director-General of Health need only be satisfied on reasonable grounds that the person suffers from a particular condition.³⁴ There is no requirement that the Director General reasonably believes that the person required to undergo medical examination is likely to transmit that disease or poses any risk to public health. Such a condition for exercise of the power to make a person submit to a medical examination should be inserted.³⁵

³¹ Recommendation 2.5.1, IGCA LWP *op cit* at page 21.

³² Section 23, *Public Health Act (NSW)*.

³³ Section 121(1) *Health Act (Vic)*. See the whole of s.121.

³⁴ Described as “a category 4 or category 5” medical condition, namely Tuberculosis, Typhoid, HIV or AIDS.

³⁵ Section 121(1) *Health Act (Vic)* is a good model.

This approach means that, where a person does not risk transmission to another, there is no power to coerce a person to test for HIV, even where there is a reasonable belief that the person is infected. Such an approach is consistent with the need to protect the rights of the individual to choose to test and treat and only allow coercive measures where this can be justified on the grounds of that the person is likely to transmit the disease.

Recommendation 14: That section 22 of the Act is amended to provide that, to require a medical examination, the Director General must also be satisfied on reasonable grounds not only that the person suffers from the condition, but that the person is also likely to transmit that disease. We recommend that the amendment be modelled on section 121 (1) of the *Health Act (Vic)*.

19.4 Procedures on breach of orders

We note the issues raised in the Issues Paper regarding appropriate facilities for detaining people where a public health order has been breached.³⁶ We agree that detention under an order, or as a consequence of breach of an order, ought to be within a hospital facility. We agree that consideration ought to be given development of a 'scheduling' procedure.

Recommendation 15: That detention under an order, or as a consequence of breach of an order, ought to be within a hospital facility and that consideration ought to be given development of a 'scheduling' procedure.

19.5 Restriction on appeals from public health orders

There is provision for public health orders made in respect of HIV/AIDS to be confirmed by a judicial member of the Administrative Decisions Tribunal (ADT).³⁷ The order expires if the person is not served with a copy of an application to the Tribunal within three business days of the making of the order and the Tribunal is required to hear the application "as soon as practicable". The Tribunal is empowered to confirm, revoke or vary the order. There is provision for appeal to an appeal panel of the ADT by a person the subject of a public health order which has been confirmed by a member of the Tribunal.³⁸

Provision was first made for public health orders in 1989.³⁹ In 1991, the current *Public Health Act* replaced the 1902 *Public Health Act*. At the same time, a right of appeal was inserted against public health orders which had been confirmed (then by a magistrate).⁴⁰ The right of appeal was to the District Court and was unrestricted; in other words, the appeal could be on the merits of making the order as well as any legal question.⁴¹

In 1997, when the ADT was created in NSW, many rights of appeal to courts and to other tribunals were transferred to the ADT. It was in this context that the requirement that a public health order be confirmed by (a magistrate in) the Local Court was changed to a requirement that it be confirmed by the ADT comprising a judicial member, and the right of appeal from a confirmed public health order to (a judge in) the District Court was changed to a right of appeal to an Appeal Panel of the ADT.

A consequence of making these changes was that the procedural provisions of the ADT now apply to judicial review of public health orders. One such provision is that which requires that an appeal to an appeal panel of the ADT can be on a legal question automatically but on the merits of the case only by leave of the panel.⁴²

³⁶ *Issues Paper, op cit* at page 62.

³⁷ Sections 24 & 25 *Public Health Act* and cl.6 of Part 4, schedule 2 *Administrative Decisions Tribunal Act 1997*.

³⁸ Section 25(6) *Public Health Act* and sections 112 & 113 *Administrative Decisions Tribunal Act*.

³⁹ *Public Health (Proclaimed Diseases) Amendment Act 1989*.

⁴⁰ Section 41 *Public Health Act* (since repealed).

⁴¹ The absence in s.41 of any words restricting the subject-matter of the appeal meant that it could be on the merits as well as on the law: *R v Longshaw* (1990) 20 NSWLR 554.

⁴² Section 113(2)(b) 113 *Administrative Decisions Tribunal Act*.

The AIDS organisations were not consulted about this change. It means that there can be an appeal from confirmation of a public health order which reconsiders the facts of the case only if a majority of an appeal panel decides such a course should be permitted, rather than as of right.

It is invidious that a person should be made the subject of a public health order, even one which is confirmed, without having an automatic and unfettered right of appeal on the merits of the making of the order.

Recommendation 16: That the Act should be amended to provide that, notwithstanding the *Administrative Decisions Act*, a person who is the subject of a public health order has an unrestricted right of appeal to an appeal panel of the ADT on the merits of the case.

19.6 Expedition of appeals from public health orders

It is often the case that appeals to courts and tribunals can take a long time before they are heard and decided. It would also be invidious that a person's appeal against a public health order which might be intrusive of their person or restrictive of their liberty is not given priority over other cases which do not involve such issues. The requirement already exists that the hearing for confirmation of a public health order take place "as soon as practicable".⁴³ However, there is no similar requirement in respect of the hearing and determination of appeals against public health orders. This would accord with a recommendation of the Australian body which reviewed HIV/AIDS laws and bring NSW law into line with Victorian law on this point.⁴⁴

The shift in 1997 of the jurisdiction for appeals against public health orders from the District Court to the ADT resulted also in repeal of the provision for appeals on questions of law from the District Court to the Supreme Court. However, the same sort of avenue of appeal on questions of law exists from an ADT appeal panel of the to the Supreme Court.⁴⁵ The Supreme Court already has power to expedite appeals and the presence in the *Public Health Act* of a requirement that appeals to an ADT appeal panel be heard and determined with expedition should be sufficient indication that an appeal to the Supreme Court from an ADT appeal panel should likewise be dealt with expeditiously.

Recommendation 17: That the Act should be amended to require that appeals against public health orders be heard and determined with expedition.

19.7 Costs on Appeals

Legal proceedings cost money, sometimes lots of it. But a person who loses a court case can also end up being ordered to pay the winning party's costs. The ADT can order the losing party pay the winning party's costs "only if it is satisfied there are special circumstances warranting an award of costs".⁴⁶

The Australian body which reviewed HIV/AIDS laws recommended⁴⁷ that appellants should have their costs covered. The NSW body which reviewed implementation of that report in NSW thought that it would be difficult to justify this proposal given the cost disincentives many people are exposed to in similar settings. This is considered to be a sound analysis.

Provisions similar to the statutory restriction upon an award of costs by the ADT against the losing party have usually resulted in an award of costs only against a party which can afford to pay them and which has behaved particularly badly in bringing the proceedings (not in the conduct being reviewed).

⁴³ Section 25(1) *Public Health Act*.

⁴⁴ IGCA Legal Working Party *Final Report* recommendation 2.6.3. and see Section 122(5) *Health Act* (Vic).

⁴⁵ Section 118 *Administrative Decisions Tribunal Act*.

⁴⁶ Section 88(1) *Administrative Decisions Tribunal Act*.

⁴⁷ IGCA Legal Working Party *Final Report* recommendation 2.6.5.

Given the new restriction on awarding costs against an unsuccessful appellant against a public health order, it is considered quite unlikely that persons the subject of public health orders would have costs orders made against them. Accordingly, there is no longer a need to press for law reform on this subject.

Discussion Point 20 – Notifications

We note the issues raised regarding the Act being silent on the action that may be taken by public health units where they receive notification. Given that public health units do undertake a range of actions including counselling, contact tracing and issuing warnings, guided by the Department's Infectious Diseases manual, we agree that the Act should set out procedures to be followed where disease notifications are received under the Act. Such provision will ensure accountability for Public Health Units.

<p><i>Recommendation 18:</i> That the Act is amended to include procedures to be followed where disease notifications are received under the Act.</p>
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Discussion Point 21 – Medical Examinations

The issues raised under this discussion point have been addressed above under discussion point 19.

Appendix

Proposal to enact a new criminal offence of Reckless Endangerment

In the event that section 13 *Public Health Act* and section 36 *Crimes Act* are repealed, there is no existing general criminal offence which would adequately meet this need so far as concerns recklessly causing harm. We intend to pursue reform to the criminal law.

We recommend that a general criminal offence of Recklessly Endangering Life or Risking Serious Harm' ("Reckless Endangerment") is enacted which can be applied in cases of reckless infection or risk of infection. With some exceptions, this proposal is in line with the proposal developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC).⁴⁸

Recklessness is the risk-taking awareness of the accused to the likely results of his or her conduct: awareness of the likely outcome but engaging in the conduct anyway.⁴⁹

We propose that the offence based upon the MCCOC-recommended offence would look like this -

Danger of death or serious harm – Interpretation

- (1) For the purpose of this division, conduct that may give rise to a danger of death or serious harm includes exposing a person to the risk of catching a disease that may give rise to the danger of death or serious harm.
- (2) For the purpose of this Division, conduct gives rise to a danger of death or serious harm if it is ordinarily capable of creating a real, and not merely a theoretical, danger of death or serious harm.
- (3) In the prosecution of an offence under this Division, it is not necessary to prove that a person actually placed in danger of death or serious harm by the conduct concerned.

Reckless endangering life

A person:

- (a) whose conduct gives rise to a danger of death to any person; and
- (b) who is reckless as to the danger of death to any person that arises from that conduct,
is guilty of an offence.

Maximum penalty: imprisonment for 10 years

Reckless endangering serious harm

A person:

- (a) whose conduct gives rise to a danger of serious harm to any person; and
- (b) who is reckless as to the danger of serious harm to any person that arises from that conduct,
is guilty of an offence.

Maximum penalty: imprisonment for 7 years

⁴⁸ *Non Fatal Offences Against the Person: Report* (Canberra, 1998) pp.32, 74, 64-71, 75-87.

⁴⁹ MCCOC Report p.67.

Defences

For the purpose of this Division, it shall be sufficient defence to a charge of reckless endangering life or serious harm if:

- (a) the person exposed to the danger of death or serious harm voluntarily accepted the risk of such danger of death or serious harm, or
- (b) all reasonable measures were taken to prevent serious harm or death.

Changes made to the MCCOC-recommended offence

There are two changes made to the offence as drafted and recommended by MCCOC. The first is to omit a qualification by MCCOC of the requirement in the interpretation section that the risk of harm be real and not theoretical. The MCCOC qualification is this –

Conduct may give rise to a danger of death or serious harm whatever the statistical or arithmetical calculations of the degree of risk of death or serious harm involved.

Sub-section (2) of the interpretation provision creates an evidentiary onus, whereby the prosecution must establish the reality of the danger by appropriate evidence. The inclusion of the MCCOC-recommended qualification as to lack of relevance of arithmetical calculations would result in the reducing the need to establish that the conduct created 'a real, and not merely theoretical, danger of death or serious harm' to such an extent as to make sub-section (2) meaningless.

The second change is to insert the provision as to defences. A defence of consent to the risk of harm seems an obvious necessity.⁵⁰ A defence of, in essence, safe sex precautions may be debatable if, as could be argued, the very taking of precautions will mean that there has not been an exposure to risk of harm and thus the substantive offence could not have been committed. At present, however, it is considered that such a defence should be provided for more abundant caution.

As with the defences to a new offence in NSW of Reckless Endangerment, the precise terms of the offence itself may require further consideration in light of the extent to which such reform is achieved generally. Fundamentally, the proposal is to repeal the existing HIV-specific criminal offence, principally in order to reduce stigmatisation of positive people, and to replace that provision with a general criminal offence which may be applied in those cases where there is a role for the criminal law.

⁵⁰ It could easily be that this is an aspect of absence of fault which is considered by the MCCOC in one of its other reports or reports yet to come.