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Further submissions in response to the proposed Public Health Bill
Public Health Orders in relation to HIV positive persons

As a small Community Legal Centre we were unable to develop submissions covering the entirety of the draft Bill in time for the 19 April submission deadline. We were not a party to the submissions being developed by ACON, Positive Life, NUAA, Hepatitis Council and BGF. We endorse those submissions.

We have now had the opportunity to read those submissions and further consider the draft Bill. We take this opportunity to make further submissions on the draft Public Health Bill in addition to our submission already provided.

We are very concerned that the draft Bill foreshadows dramatic and retrograde changes in public health policy in NSW. We are hopeful that this moment of opportunity will be grasped by the NSW Government to steer this process toward best practice in public health and improve the Public Health Act from its current form to generate fresh impetus for public health improvements in HIV necessary for the 21st Century.

Public Health Orders

Administrative orders are a very powerful form of Government power to curtail individual rights. Jurisprudence has not yet progressed to provide appropriate oversight in this area of law. There is currently limited judicial restraint placed on administrative action of this kind.

Public Health Orders are potentially significant curtailments of individual and human rights and civil liberties. It is therefore crucial for the Executive and the Legislature to act with restraint and circumspection in making provision for the imposition of administrative orders to maintain balance in the government system and for the protection of human and individual rights. Such orders should only be used as a last resort, and suitable constraints, checks and balances should be included in any legislation that provides for such orders.

Division 4 includes provisions with respect to the powers of an authorised medical practitioner to

a) direct a person to undergo a medical examination (section 58), and
b) to make a public health order in respect of a person with HIV/AIDS (section 59). This includes an order to detain a person with HIV/AIDS.

a) Forced medical examination – section 58

In the context of HIV infection, this section of the Bill relates to powers to require a person whom the Director General reasonably suspects of having HIV, and to be a risk to public health, to undergo an HIV test.

UNAIDS recommends "public health legislation should ensure that HIV testing of individuals should only be performed with the specific informed consent of that individual. Exceptions to voluntary testing would need specific judicial authorisation, granted only after due evaluation of the important considerations involved in terms of privacy and liberty."[1]

The International Covenant on Civil and Political Rights (ICCPR) includes the right to privacy and the right to security of persons. The ICCPR has been ratified by Australia. The reduction of the standard required such that the Director General only has to 'reasonably suspect' that a person has HIV and is a risk to the public impacts negatively on the rights encompassed in the ICCPR.

Section 22 of the Public Health Act gives the Director General the power to require medical examination of a person when he or she

> "believes on reasonable grounds that the person is suffering from a Category 4 or Category 5 medical condition"

The draft Bill provides at section 58 (1) that the Director General has the power to require medical examination of a person when he or she

> "reasonably suspects that a person may have a Category 4 or 5 condition and may, on that account, be a risk to public health", and considers that the nature of the suspected condition is such as to warrant medical examination."

Under the current Act, the penalty for failure to comply with a medical examination is 50 penalty units. We note with concern the significant increase in penalty in the draft Bill to 1000 penalty units and/or 12 months imprisonment.

We submit that the standard of "reasonably suspects" provides an unacceptable level of discretion to allow an invasive medical procedure to be undertaken without the individual's consent. As such, the existing standard of "believes on reasonable grounds" should be retained. We further note that no judicial authorisation is required to enforce a medical examination. We submit that the legislation should provide a framework whereby the District Court is required to authorise such forced examination.

The Queensland Public Health Act for example provides clearly that any order for a medical examination, (and also for behavioural orders or detention orders) must be made through a magistrate. It is our submission that medical examination orders requiring a person to undergo HIV testing have such a significant intrusion on the human rights of an

[1] UNAIDS, Office of the High Commissioner for Human Rights, International Guidelines on HIV/AIDS and Human Rights, (2006), page 127

individual, that at the very least a Magistrate should authorise such testing, and preferably, the District Court would be the appropriate jurisdiction to authorise such an order. Such judicial oversight is in accordance with UNAIDS principles as described above.

b) Public health orders – section 59

Section 23 of the current Act, and section 59 of the draft Bill allow for Public Health Orders to be made in respect of persons with a category 4 or 5 conditions. This includes people with HIV/AIDS.

The Orders available are as follows, with the least invasive being a requirement to refrain from specified conduct, and the most restrictive requiring detention at a specified place for the duration of the order.

a) to refrain from specified conduct,
b) to undergo specified treatment,
c) to undergo counselling by one or more specified persons or by one or more persons belonging to a specified class of persons,
d) to submit to the supervision of one or more specified persons or of one or more persons belonging to a specified class of persons,
e) to undergo specified treatment at a specified place.
f) To be detained at a specified place for the duration of the order.

The draft Bill significantly reduces the legal standard that applies to the placing of a Public Health Order. This change is strongly opposed by HALC. Given the huge implications of depriving a person of their liberty in the case of the most serious of the orders, it is crucial that there are sufficient safeguards to prevent the improper use of such wide ranging powers.

Any person who is detained in a prison environment for a breach of the criminal law has to be proven to have committed the crime charged to the standard of "beyond reasonable doubt". This high standard recognises the seriousness of removing a person's civil liberties by imprisonment by the state. Further, all but the most dangerous criminals are given a finite sentence, at which time their liberty is restored.

The problem with administrative detention of the kind allowed under Public Health legislation is that whilst it similarly deprives a person of their liberty, it does not carry with it the high legal test of "beyond reasonable doubt" and often has no finite timeframe, since orders for detention can be extended indefinitely[2]. The current standard requiring reasonable grounds is proposed to be lowered to require a mere satisfaction that a person poses a risk. We submit that this is unacceptable and the current standard should be maintained.

[2] Sharleen Spiteri, an HIV positive sex worker in NSW, spent most of 16 years either in detention or under 24 hour supervision beginning in 1989 and ending with her death in 2005 at which time she was under detention orders.

We note that the female sex worker detained under Public Health Orders in 1989 was in fact detained under valid Public Health Orders in 1989, and again from 2001 to 2005 when she died. However, in the intervening years, she was under 24hr supervision in the absence of any valid public health orders, in legal limbo with no independent review procedures or scrutiny of her detention in place.[3]

Section 23 of the current Public Health Act provides for a standard that requires an authorised medical practitioner to be "satisfied on reasonable grounds that the person is suffering from a Category 4 or Category 5 medical condition, and is behaving in a way that is endangering, or is likely to endanger, the health of the public…"

The corresponding section of the draft Bill reduces the standard, requiring an authorised medical practitioner to be "satisfied that the person has a Category 4 or Category 5 medical condition, and because of the way the person behaves may, as a consequence of that condition, be a risk to public health." (Emphasis added by author).

So the standard of "satisfied on reasonable grounds" has been reduced to merely "satisfied", and the behaviour of the person no longer needs to endanger public health, but merely be a risk to public health.

We note that the *Mental Health Act* 2007 deals with the detention of persons for their own safety or for the safety of others. At sections 14 and 15 this Act utilises the standard of "reasonable grounds" to conclude that a person should be detained. We submit that a similar standard should be maintained in the draft Public Health Bill.

The severity of such Orders is recognised in the legislation at section 59 (6) of the draft Public Health Bill which states

6) In deciding whether or not to make a public health order, the authorised medical practitioner must take into account:
   a) the principle that any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent any risk to public health, and
   b) any Departmental guidelines established for the purposes of this section.

However, we again note the relaxation of the standard from endangering public health to risk to public health.

HALC submits that the detrimental effect on human rights and liberties imposed by these Public Health Orders requires legislative safeguards to be put in place.

1. An objective standard of 'reasonable grounds" rather than the subjective "satisfaction" standard
2. A requirement that the threat to health be one that "endangers" rather than poses an unquantified "risk".

[3] As reported in "Shutting Down Sharleen" ABC National Radio 21 March 2010 http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm

3. A requirement for judicial oversight at a higher level than the Administrative Decisions Tribunal for such orders. We would advocate for Magistrates Court, or preferably District Court oversight and authorisation for behavioural orders and detention orders.

We note that at present the Administrative Decisions Tribunal (ADT) has oversight of Orders made under the Public Health Act, and this is to continue in the draft Bill.

Section 60 of the draft Bill provides that an Order expires within 3 working days unless the person is served with an application to the ADT to confirm the Order under section 61. We suggest that the ADT is an inappropriate jurisdiction to make decisions of such magnitude. It is not a court, and so the question of the constitutionality of its determination on detention arises. Further, the ADT has no particular expertise in such matters. Only a couple of such matters have been before the Tribunal previously, so it has no significant experience or expertise in the area. The ADT would not ordinarily be a jurisdiction handling matters in relation to detention or custodial penalties.

The *Mental Health Act* 2007 has similar provisions in relation to detention of persons against their will for their safety or the safety of others. Under the *Mental Health Act*, a person can be detained for a maximum of 3 working days before they are brought before a Magistrate. We submit that a Magistrate or preferably a District Court judge would be the most appropriate judicial member to authorise the imposition of such an order. That court has appropriate experience and would afford appropriate consideration to the complex issues involved in such matters.

UNAIDS recommends in its International Guidelines that if detention is required, it should only be employed as a last resort and for discrete periods of time for people whose behaviour puts others at risk of infection. It is preferable for such detention to be court ordered or at least court-authorised within a short period of time, for example 3 working days, after which time they lapse if not validated by a court, rather than being simply a power exercised by health authorities. Civil confinement should only proceed after a fair and impartial hearing with a guarantee of appropriate due process protections[4], .

The constitutional right from being detained without a court order has been considered by the High Court5. The High Court discusses the individual's right to freedom from detention except pursuant to a judgment by a court. This constitutional right was recognised in the joint judgment of Brennan, Deane and Dawson JJ in Chu Kheng Lim v Minister for Immigration6. Their honours held that there existed "a constitutional immunity from being imprisoned ... except pursuant to an order by a court"[7]

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[4] Handbook for Legislators on HIV/AIDS, Law and Human Rights, UNAIDS and IPU, 1999 at page 46, International Guidelines on HIV/AIDS and Human Rights at Guideline 3 page 27.

[5] *Kruger* (1997) 190 CLR 1 at 110, *Al- Khateb v Godwin* (2004) 219 CLR 562, *Re Woolley* (2004) 210 ALR 369

[6] (1992) 176 CLR 1.

[7] (1992) 176 CLR 1 at 28- 29.

Later decisions in *Kruger* and *Al-Khateb* appear to have eroded this immunity except where it applies to punitive detention. Given that detention orders under Public Health legislation are imposed when a person has failed to comply with other less coercive measures, and significant penalties apply to any breach of such orders, these orders can be classified as punitive in nature. As such, we submit that any detention orders should be authorised by a court, preferably the District Court, but in the alternative, the Magistrate's Court.

In summary, HALC opposes the following areas of the draft Bill in relation to forced medical examination and behavioural and detention orders:

1. The threshold at which orders can be imposed has been reduced significantly from that in the current Public Health Act (the Act).
2. In respect of forced medical examination, there is currently no requirement for judicial oversight or authorisation of such an order (section 58)
3. While there is provision for the Administrative Decisions Tribunal to vary, revoke or confirm behaviour or detention orders, the District Court or Magistrate's court would be a more appropriate jurisdiction to authorise decisions that have such a drastic impact on a person's liberty and human rights.
4. The penalties imposed for non-compliance with the sections have been dramatically increased.

We strongly urge that the current draft Bill be redrafted in line with these submission and those of the other HIV community, service and medical organisations.

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