

11 December 2020

NSW Ministry of Health
Locked Bag 2030
ST LEONARDS NSW 1590
MOH-PublicHealth@health.nsw.gov.au

To the NSW Ministry of Health,

**Submission into the Public Health Act 2010 Statutory Review of section 62 and 79:
Discussion paper**

Thank you for the opportunity to provide feedback on the Public Health Act 2010 Statutory Review of section 62 and 79: Discussion paper. We are:

Positive Life NSW (Positive Life) is the lead peer-based agency in NSW representing people living with and affected by HIV in NSW. We provide leadership and advocacy in advancing the human rights and quality of life of all people living with HIV (PLHIV), and to change systems and practices that discriminate against PLHIV, our friends, family, and carers in NSW.

The HIV/AIDS Legal Centre (HALC) is the only not-for-profit, specialist community legal centre of its kind in Australia. We provide free and comprehensive legal assistance to people in NSW with HIV or Hepatitis-related legal matters and undertake Community Legal Education and Law Reform activity in areas relating to HIV and Hepatitis.

Background

The NSW Ministry of Health released in October 2020 a discussion paper to consult with stakeholders to review amendments made to sections 62 and 79 of the *Public Health Act 2010* (NSW) ('the Act') in 2017. Positive Life and HALC, as well as a number of other community organisations in the HIV sector, contributed submissions in 2016 and 2017 to the *Public Health Amendment (Review) Act 2017* ('the 2017 amendments'). We commend the NSW Ministry of Health for continuing to engage and consult with community and other stakeholders to review the Act and ensure the outcomes are in the best interests of the Australian public.

1. Is section 79 of the Public Health Act 2010 (NSW) operating effectively? Are any changes required?

The 2017 amendments to the Act were an important step towards ensuring that NSW's approach to HIV and other sexually transmitted infections (STI) is focused on strong public health outcomes. The previous requirement of disclosure posed a number of threats to public health, notably the contribution to stigma and discrimination of conditions such as HIV and the deterrence of people undertaking testing.

The current section requiring a person to take reasonable precautions against spreading a sexually transmitted condition is appropriate and acknowledges that individuals taking

shared responsibility for their sexual health, as opposed to disclosure, results in stronger public health outcomes.

Although HALC and Positive Life welcomed the removal of disclosure requirements in the 2017 amendments, we submit that a statement of principles, which acknowledges mutual responsibility of all persons to avoid transmitting or contracting an STI should replace the current section 79. The current section does not consider the fact that more than 90% of PLHIV in NSW and Australia more broadly, are on treatment and have an undetectable viral load posing no risk of onward transmission. We consider that people who are unaware of their HIV status pose a greater risk to onward transmission than PLHIV, but under the act are not required to take reasonable precautions. We submit that it is the responsibility of both those with an infectious disease and those at risk of contracting an infectious disease to reduce the risk of transmission, which is not currently reflected within the Act.

A statement of principles outlining mutual responsibility of all persons would also address issues surrounding the early stages of HIV transmission and other STIs which are generally asymptomatic.

2. Should section 79 be amended to clarify what actions are required in order to comply with the requirement to take reasonable precautions against the spread of an STI?

Further to the above, HALC and Positive Life suggest that a statement of principles, which include mutual responsibility of all persons to avoid transmitting or contracting a sexually transmitted infection, would be beneficial to the operation and effectiveness of section 79.

We agree that a requirement to use reasonable precautions to prevent contracting or transmitting HIV is appropriate, however it is important that rigorous medical and scientific evidence is considered in what constitutes reasonable precautions in the context of HIV transmission, and that guidance is further clarified within the legislation. We refer to the Australian Medical Consensus Statement, endorsed by the Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM), which recommends that any one of the following strategies should be considered to constitute reasonable precautions in respect of HIV: correct use of condoms, having an undetectable viral load, or the negative partner taking pre-exposure prophylaxis (PrEP) correctly.¹

For the purposes of clarifying what actions comply with the requirements to take reasonable precautions against the spread of an STI, we suggest the following amendments:

- i. Amend section 40(a) of the *Public Health Regulations 2012* ('the regulations') to state 'the means of minimising the risk of infecting other people and the reasonable precautions that should be taken against spreading the disease or condition...'
- ii. Add an additional clause within the Act that states 'For the purposes of section 79(1) of the Act, the regulations prescribe what may constitute reasonable precautions against spreading the disease or condition.'

¹ Boyd et al, Sexual Transmission of HIV and Law: An Australian Medical Consensus Statement, *Med J Aust* (2016); 205(9) 409-412. Full text available at <http://www.ashm.org.au/products/product/HIV%20Consensus>

- iii. Add an additional clause within the regulations that states 'For the purposes of section 79(1) of the Act, reasonable precautions includes precautions taken on the advice of a medical practitioner under section 40 of the regulations.'

These amendments would ensure that 'reasonable precautions' are not only defined for the purposes of section 78 whereby medical practitioners are to provide information to patients with sexually transmitted infections, but also to section 79.

We suggest that if section 79 is amended to clarify what actions are required in order to comply with the requirement to take reasonable precautions against the spread of HIV, that it explicitly states it is a non-comprehensive list that only provides some examples of such actions. Future advancements in methods of prevention must be allowed for interpretation of the legislation.

We further note that it is not clear what might constitute reasonable precautions for other STIs.

3. Are the maximum penalties (100 penalty units (\$11,000) and/or 6 months imprisonment) in section 79 appropriate?

It is the strong opinion of HALC and Positive Life that the punitive penalties under the section are excessive and may have negative implications to public health. The amended section doubled the fines and added a possible term of imprisonment in comparison to the previous section 79.

We continue to highlight that there is no evidence the application of criminal law to HIV transmission achieve public health goals.² According to a World Health Organisation Report, not only do criminal laws fuel stigma and discrimination against PLHIV and deter people from testing, but the practice "may actually increase rather than decrease HIV transmission."³ This is further supported by the Australian Medical Consensus Statement authored by a group of HIV medical and scientific experts, which notes the benefits of a public health management approach rather than criminal penalties. The statement acknowledges that instances of PLHIV being dismissive of their need to protect others from protection is rare, and that currently there are very effective public health management approaches towards PLHIV in place Australia-wide.⁴

In NSW, there is a highly sophisticated and effective health management framework for situations where PLHIV put others at risk of infection under the *Public Health Act 2010*. These measures include the imposition of public health orders or referral to police if criminal charges are appropriate. Provisions already exist under the *Crimes Act 1900* to deal with the situation of transmission of HIV recklessly or intentionally.

To our knowledge there has only been one successful prosecution under s79 prior to the 2017 amendments. We assert that despite the small number of prosecutions, the threat encompassed within the section disproportionately impacts the community of PLHIV, particularly after the 2017 amendments where the fine was doubled, and a possible term of

² Sexual Health, Human Rights and the Law, *World Health Organisation 2015*. Full text available at http://www.who.int/reproductivehealth/publications/sexual_health/sexual-health-human-rights-law/en/

³ Ibid.

⁴ Boyd et al, Sexual Transmission of HIV and Law: An Australian Medical Consensus Statement, *Med J Aust* (2016); 205(9) 409-412. Full text available at <http://www.ashm.org.au/products/product/HIV%20Consensus>

imprisonment was introduced. Anecdotally, we are aware of one other case currently before the courts listed for a defended hearing; in that case the defendant was denied bail in the first instance and a new bail application was not heard for 42 days. This period of time in custody on remand is entirely disproportionate to the probable sentence that they could face. This case demonstrates the lack of understanding that the courts, police, and other legal representatives have of the application of s79 and of how notifiable conditions are transmitted more generally.

HALC continues to receive a number of direct requests from clients for legal advice or assistance in respect of the requirements in s79(1), including from people seeking clarification as to what will or will not constitute 'reasonable precautions'. Further, PLHIV, healthcare, and community organisations continue to invite us to present sessions to explain the public health provisions in relation to HIV, demonstrating the ongoing concern within the community of PLHIV.

4. Does section 62 of the Public Health Act 2010 (NSW), in relation to public health orders that relate to contact order conditions, strike the appropriate balance between protecting the public and protecting individual rights and liberties?

As HIV is not classified as a contact order condition under the Act, Positive Life and HALC have no comment on this question.

5. Should section 62 of the Public Health Act 2010 (NSW) be amended to allow a public health order that relates to a contact order condition to be made if an authorised medical practitioner reasonably suspects that a person has been exposed to a contact order condition and is behaving in a way that places the public at risk?

HALC and Positive Life assert that the current criteria that the authorised medical officer has to be 'reasonably satisfied that the person has been exposed to a contact order condition' is an appropriate threshold in this section. We do not think that it should be amended to the lower threshold of 'an authorised medical practitioner may suspect or have serious concerns that a person may have been exposed to a contact order condition but not to the level of being reasonably satisfied'.

The NSW Ministry of Health has effectively dealt with the COVID-19 pandemic thus far at this threshold, and we believe in the interests of both public health and civil liberties it is appropriate.

6. Does the insertion of section 62(3)(g) into the Public Health Act 2010 (NSW) (which enables a public health order to require a person to undergo a specified kind of medical examination or test) strike the appropriate balance between protecting the public and individual rights?

It is our belief that Section 62(3)(g) should be amended in line with similar provisions in section 61 of the Act. Section 61 states a person may be directed to undergo a specified kind of medical examination or test 'relating to the Category 4 or 5 condition.' This application limits the type of medical examination or test to only relevant examinations or tests of the specific condition.

We reiterate a previous example provided in our submissions dated 5 May 2020 and 17 August 2020 whereby under the current section, a person with COVID-19 who is at risk of infecting others with COVID-19 could be directed through a public health order to undergo a HIV or Hepatitis test, even where the person does not present any risk of transmitting HIV or Hepatitis.

We recommend the section be amended as follows:

Section 62(3) A public health order may require the person subject to the order to do any one or more of the following -

(g) to undergo a specified kind of medical examination or test relating to the Category 4 or 5 condition or contact order condition.

7. Additional feedback and comments

We recognise that a strong health management framework is required within the Act, regulations, and Department policies to ensure people who put others at risk can be managed effectively. It is also important to recognise that public health laws are also subject to the same misuse as criminal laws particularly in relation to their more coercive aspects such as detention orders. Similar to criminal laws, coercive public health measures may drive away people most in need of services leading to a failure of public health goals of prevention through behaviour change, care and health support.

In line with this, we believe that section 62 should be strengthened to better protect individual rights and liberties while still protecting the interests of the public. We recommend the following:

- i. Section 62(2) outlines the information that must be contained within a public health order. We believe this should also include informing the person subject to the order of any right to appeal and representation.
- ii. Section 62(6)(a) should be amended to state that 'the principle that any restriction on the liberty of a person should be imposed only as a matter of last resort and only if it is the most effective way to prevent a serious risk to public health'.

If additional information or citations in relation to this submission are required, please feel free to contact Jane on janec@positivelife.org.au or Alexandra on alexs@halc.org.au.

Yours sincerely,



Jane Costello
Chief Executive Officer
Positive Life NSW



Alexandra Stratigos
Principal Solicitor
HIV/AIDS Legal Centre