

10 June 2022

Dr Kerry Chant PSM
Chief Health Officer
Deputy Secretary, Population and Public Health
Ministry of Health
1 Reserve Rd
St Leonards NSW 2065

Sent by email: MOH-PublicHealth@health.nsw.gov.au

Dear Dr Chant

Community consultation on Chief Health Officer's guidelines for actions under the Mandatory Disease Testing Act 2021

Thank you for the opportunity to provide comment and feedback on the draft Chief Health Officer's guidelines for actions under the Mandatory Disease Testing Act 2021.

We again reiterate that we continue to hold concerns around the enactment of this legislation and the vulnerable and marginalised people that will like be disproportionately affected by this legislation. We welcome the implementation of guidelines to best ensure that such people are not disproportionately affected and that the legislation is only used when it is medically necessary to do so.

About Us

HIV/AIDS Legal Centre (HALC) is the only not-for profit, specialist community legal centre of its kind in Australia. HALC provides free and comprehensive legal assistance to people in NSW with HIV or hepatitis-related legal matters. Free legal assistance is also provided to PLHIV in Queensland through a partnership arrangement between QPP and HALC. Community Legal education and Law Reform activities are also carried out in areas relating to HIV and hepatitis.

HALC has represented clients in discrimination matters nationwide. This has included representation at NSW anti-discrimination, the NSW Civil and Administrative Tribunal, the Queensland Human Rights Commission, the Equal Opportunity Commission – Western Australia, the South Australian Civil and Administrative Tribunal, the full court of the Federal Court of Australia, the Supreme Court of NSW, the Fair Work Commission and the Australian Human Rights Commissions. HALC have represented clients who have been discriminated against by employers, health care workers and other service providers.

The National Association of People with HIV Australia (NAPWHA) is the national peak, non-government organisation representing community-based groups of people living with HIV (PLHIV) across Australia. NAPWHA's membership of national networks and state-based organisations reflects the diverse make-up of the HIV-positive community and enables NAPWHA to confidently represent the positive voice in Australia. NAPWHA's vision is of a world where people with HIV live their lives to their full potential, in good health and free from discrimination.

Our submissions

The following submission will address the current draft guidelines and also make recommendations for additions to the guidelines. Please note that we have had the benefit of consulting with community partners including: ACON, Positive Life NSW, ASU, ASHM and SWOP, and we can state that as a community we are in broad agreement in relation to the problematic clauses of these guidelines. We also note that we have had the benefit of reviewing ACON's submission and we are in agreement with same.

1. Medical Practitioners

We assert that a relevant medical practitioner should be a specialist in infectious diseases, namely an S100 prescriber. We suggest that ASHM would be the organisation best placed to nominate suitably qualified medical practitioners who would be in a position to appropriately counsel the worker on risks and usefulness of seeking an MDT order. Misapprehensions about BBV/STI transmission risk are common in non-specialist clinical professionals so it is imperative that 'relevant medical practitioner' refer only to infectious diseases experts.

The guidelines should include that workforce officers requesting mandatory disease testing orders should be immediately referred for mandatory workplace psychological support and counselling to correct stigmatising misapprehensions about BBV/STI risk, to reassure them that transmission risk is low and that mandatory disease testing cannot provide reassurance for the reasons stated above.

We also note that an infectious diseases expert may be best placed to provide suitable counselling and support to a worker seeking the orders.

Furthermore, the medical independence of health professionals being asked to perform the tests should be emphasised in the guidelines. The guidelines should also articulate the right of medical professionals to refuse to conduct a test. Further, the consent to be tested (or absence of it) should be clearly communicated to the health professional prior to the request to perform a mandatory test.

2. Transmission risk matrix

We recommend review of the matrix at Figure 1 of 3.3.2; we suggest that this matrix does not accurately reflect risk and a suitably qualified medical professional should review same; we would suggest ASHM are best placed to conduct this review and provide an accurate matrix for inclusion in the publication.

3. Right of the 'third party'

We strongly recommend that a third party be provided with clear information about their rights and that certain rights be afforded to the third party.

Third parties need to be informed of their appeal rights in clear plain language terms

Third parties ought to be afforded the right to access a legal representative and a support person.

The definition of 'vulnerable third party' should be expanded to include people who:

- are from culturally and linguistically diverse backgrounds;
- identify as Aboriginal or Torres Strait Islander;
- appear to be under the influence of an intoxicating substance including prescription or illicit substances and/or alcohol;
- are illiterate; or
- anyone else who in the opinion of the senior officer or medical practitioner appear to be having difficulty with understanding the nature and purpose of the orders.

If a third party is identified as vulnerable the senior officer must make a legal representative and any other appropriate support or other person (eg interpreter) available.

Any information provided to a medical practitioner, senior officer, the CHO or any other person in the carrying out of the order or the process of seeking the order should be kept private and confidential and should be unable to be used for a secondary purpose, eg cannot be included in any criminal proceedings (associated with the act or not) or passed onto the worker.

We note that the guidelines fail to acknowledge or refer to the obligations under the *Public Health Act* to provide pre and post test counselling to a person who is undertaking an HIV test.

We also note that there is no reference in the guidelines to how a third party will receive their test results, we suggest that the third party should receive the results first and those results should be given by a suitably qualified medical practitioner who can carry out any duties as described under the *Public Health Act*.

4. Training and education

The guidelines should articulate the need for regular workforce training for the NSW Police, corrective services and other relevant organisations in BBV/STI transmission risk, prevention and treatment conducted by appropriate organisations such as ASHM, ACON or Positive Life NSW. The training should include information about the effectiveness of Post-Exposure Prophylaxis for occupational exposure to HIV, and the access pathways to it. Information about the curability (and treatment access) for Hepatitis C should also be included. Finally the training should include information about the fact that tests results from a mandatory disease tests should not 1) reassure the concerned officer because they do not accurately indicate the disease status of the person subject to the order (they may be in a window period in which disease cannot be detected but is nevertheless transmissible) and 2) should not be used to make decisions about treatment for workplace exposure to BBVs/STIs because, if there is a genuine risk, treatment must be commenced as soon as possible regardless of the outcome of the mandatory disease test.

5. Deliberate action

The act and guidelines remain silent on the assessment of 'deliberate action'. We recommend that the guidelines define 'deliberate action', and that that definition be:

An intentional act committed by the third party, where the intent was to expose the worker to a bodily fluid.

We note that the above definition is consistent with the ordinary meaning of the phrase 'deliberate action' and would therefore be the meaning adopted should any appeal against the decision of the CHO be conducted.

We also recommend that the senior officer must be of the view that that definition was satisfied on the information available to them. We further recommend that the information which the senior officer uses to form the basis of the decision be documented and made available to the CHO and the third party. We again reiterate that any information collected by a medical practitioner, senior officer, CHO or any other party for the purpose of determining whether a MDT order is made be confidential and unable to be used for a secondary purpose.

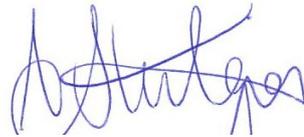
6. Reporting

The guidelines should describe reporting requirements. The numbers of mandatory disease orders requested and granted should be collected, documented, published and made public regularly in an annual report on the subject. The reasons for the tests should also be collected and published as well as demographic information about those subject to the orders, who is requesting them and who is authorising them. Numbers of positive tests and numbers of transmissions should also be recorded and included.

Yours sincerely,



Aaron Cogle NAPWHA Executive Director



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HIV/AIDS Legal Centre