



**PositiveLifeNSW**  
the voice of people with HIV since 1988



**bobby  
goldsmith  
foundation**

practical emotional  
financial support



**Submission to:**

NSW Department of Health on the  
draft *Public Health Bill 2010*

April 2010

## Introduction and General Comments

This submission to the *Public Health Bill 2010* represents the views of key organisations involved in prevention, health promotion, education, treatment and support and advocacy initiatives for NSW citizens who are at-risk of acquiring Human Immunodeficiency Virus (HIV), viral hepatitis, and Sexually Transmitted Infections (STIs), as well as NSW citizens who are living with or affected by HIV, Hepatitis, and STIs and are in need of appropriate, accessible health services free from stigma and discrimination.

These key NGOs are effectively engaged in community-based primary health care, particularly early intervention, prevention, care and support, supported accommodation and health promotion activities and represent the broad HIV and blood borne viruses (BBV) sector in NSW as well as specific communities or sections of the community including the gay, lesbian bisexual and transgender community, people with HIV, sex workers, intravenous drug users, and people with hepatitis.

The organisations represented within this submission are ACON, the Bobby Goldsmith Foundation (BGF), Positive Life NSW, NSW Users & AIDS Association (NUAA), and Hepatitis NSW. Descriptions of the role of each of these non-government organisations can be found on the last page of this Submission.

The partner organisations to this submission welcome the opportunity to make a submission towards this very important matter that will affect the public health of NSW citizens and look forward to any opportunities for further dialogue with NSW Health in relation to any issues identified within this submission.

The draft *Public Health Bill 2010* (the *Bill*) poses significant changes to the current *Public Health Act*. While many changes are supported, there are areas of particular concern that may adversely impact on the health, wellbeing and human rights of the patients, clients and communities that we, as partner organisations to this submission, serve.

There are unique elements and differences between HIV, STIs, hepatitis and other infectious diseases that impact public health; more recently, airborne diseases have dominated discussion. These differences in disease type, transmission route, and risk and public health impacts need to be cautiously and carefully articulated in the *Public Health Bill*.

Currently, the parties to this submission believe there needs to be improvements in areas of the *Bill* to more effectively discuss some of these elements and the public health response they require. Particular issues of concern are addressed below including privacy protections, public health orders, the role of local government and the mandated disclosure of HIV and other STI status.

### Part A. Privacy Protections

Strong protection of patient privacy is fundamental to reducing barriers of access for marginalised populations, engendering trust to maximise care and respecting the human rights of individuals. Parties to this submission welcome the retention of some privacy protection provisions from the current *Public Health Act 1991* (the *Act*) in the *Bill*.

The proposed *Bill* does however weaken current privacy provisions for patients with a category 5 condition (HIV/AIDS). The current *Act* requires the Director-General to seek

approval from a District Court to order disclosure of a patient's name and address if that patient has a category 5 condition. The draft *Bill* dramatically increases the ability for the Director General to order disclosure by only requiring that, "the Director-General considers that:

- a) the person concerned has a Category 5 condition, and
- b) identification of the person is necessary in order to safeguard public health."

The language of the clause does not adequately protect the privacy rights of patients as it only requires that the Director-General "considers" it necessary, rather than it actually being necessary as assessed by an independent judge based on an objective standard of "reasonable grounds," which is the case currently.

Section 54(4)(c) has similar wording for another clause of privacy protection. This clause reads, "if the Director-General suspects that failure to disclose the information would be likely to be a risk to public health". This clause also relates to a category 5 specific protection, and again compromises privacy protection when compared with the current *Act*.

Such dramatic changes in privacy protection to grant the Director-General with significantly broader powers to disclose private information in relation to HIV is not necessary for effective public health responses. In fact these measures can hamper public health efforts that aim to encourage higher rates of HIV testing and reduce barriers of access for people with HIV.

Discrimination on the ground of HIV status is still prevalent in Australian society. This discrimination also occurs in the health system, with 26.4% of respondents to a 2009 research study experiencing HIV discrimination in health services.<sup>1</sup> Discrimination, coupled with privacy concerns, can serve as a strong disincentive for patients to access health services, or to be tested for (and thus possibly be diagnosed with) HIV.

Empowering marginalised communities to take responsibility for their health has been a key component of the response to HIV in NSW. Since the advent of the HIV/AIDS epidemic in Australia, and NSW more directly, our sector, that being the HIV, Viral Hepatitis and STIs sector, has worked within a public health approach that upholds the principles of a partnership model in order to tackle the determinants that affect the transmission of HIV, viral hepatitis and STIs across the population groups most at risk. Partnerships extend to include the NSW Government, university research centres, health professionals (such as general practitioners and medical specialists), other NGOs and peak bodies, as well as the affected communities themselves.

NSW is the only state in Australia to be able to achieve this.<sup>2</sup> Such efforts have been assisted by large numbers of the groups at risk of HIV being regularly tested for HIV. A real or perceived reduction in privacy and confidentiality protections may undermine willingness to test for HIV for people, thus putting the continued success of the NSW HIV response at risk.

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<sup>1</sup> J Grierson, J Power, M Pitts *et al.*, *HIV Futures Six: making positive lives count*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2009), p. 58.

<sup>2</sup> A McDonald, *2009 Annual Surveillance Report HIV/AIDS, viral hepatitis and sexually transmissible infections in Australia*, National Centre in HIV Epidemiology and Clinical Research,

UNAIDS recognises that an “individual’s interest in his/her privacy is particularly compelling in the context of HIV... by reason of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status is disclosed.”<sup>3</sup> It thus states that countries have a duty to ensure “that information on HIV status is not disclosed to third parties without the consent of the individual.”<sup>4</sup>

NSW Department of Health’s own *Report on the Review of the Public Health Act 1991* recommended retaining current privacy provisions generally and the current procedure in dealing with identifying information in relation to sexually transmissible infections.<sup>5</sup>

Given the significant harms to individuals and public health outcomes that may result from the identification of people with HIV and the perception that privacy protections are weakened, a return to the protections in the current *Act* which requires independent judicial review based on more objective standards would be welcomed.

Recommendation 1: That s54(4)(c) and s55 be removed from the *Public Health Bill 2010* to be replaced with provisions based on relevant provisions of the existing *Public Health Act 1991* (NSW).

## Part B. Public Health Orders

The use of public health orders to limit the liberties of an individual, for example detaining the individual, is a significant deprivation of a person’s liberty and should only be used as a last resort. Due to the significant impact on individual rights, a strong framework determining when public health orders can be used is required.

The draft *Bill* proposes language that significantly lowers the threshold on the creation of public health orders. The test of “reasonableness” has been removed with s59 of the Bill only requiring that the authorised medical practitioner be satisfied that a person may be a risk to public health because of the way the person behaves. The precise language of the section is:

“(1) An authorised medical practitioner may make a public health order in respect of a person if satisfied that the person:

- (a) has a Category 4 or 5 condition, and
- (b) because of the way the person behaves may, as a consequence of that condition, be a risk to public health.”

The corresponding provision in the current *Public Health Act 1991* (NSW) is:

“(1) An authorised medical practitioner may make a written public health order in respect of a person if satisfied on *reasonable grounds* that the person:

- (a) is suffering from a Category 4 or Category 5 medical condition, and
- (b) is behaving in a way that is endangering, or is likely to endanger, the health of the public because the person is suffering from that medical condition.” [Emphasis added]

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<sup>3</sup> UNAIDS, Office of the High Commissioner for Human Rights, *International Guidelines on HIV/AIDS and Human Rights*, (2006), p. 90.

<sup>4</sup> *Ibid.*, p. 91.

<sup>5</sup> NSW Department of Health, *Report on the Review of the Public Health Act 1991*, (2005), pp. 62-64.

A comparison shows that the criteria for public health orders have been significantly relaxed, with no additional safeguards. For already stigmatised groups, such as people with HIV, such a change is of great concern.

The broad powers and the capacity for significant curtailing of individual rights calls for an objective test on “reasonable grounds” rather than the more subjective “satisfied” test, and that the threat pose a “danger” to public health rather than an unquantified “risk” to public health.

The *Report on the Review of the Public Health Act 1991* recognised that public health orders based on Category 5 conditions are significantly different to those based on Category 4 conditions, which are much more easily spread. In recognition of this fact, it is unhelpful that Category 5 conditions share the same criteria for public health orders as the much more contagious conditions such as swine influenza. To preserve proportionality whilst still having an effective public health response, separating Category 5 conditions from Category 4 conditions would be useful in the context of public health orders, with Category 5 conditions warranting a much higher threshold.

The parties to this submission strongly support the retention of a review by the Administrative Decisions Tribunal for public health orders relating to Category 5 conditions. Although this mechanism does provide some protections to persons placed under a public health order relating to a Category 5 condition, the review does not necessarily change the threshold upon which a public health order is made. Thus it is still important for the *Public Health Bill* to retain the higher threshold for making public health orders in the current *Act* reflecting the standard of “reasonableness”.

Recommendation 2: That public health orders based on Category 5 conditions meet the threshold of having “reasonable grounds” and is “likely to endanger” public health than the current provisions in s59.

## Part C. Forced Medical Examinations

HIV testing is an invasive procedure with significant consequences on the patient’s mental, physical, social and economic wellbeing. It is for this reason that international law requires HIV testing to be conducted with the informed consent of patients.<sup>6</sup>

The draft *Bill* further reduces the threshold required for the Director-General to order a person to undergone medical examination. In the case of HIV, where the risk of transmission is much lower compared to Category 4 infections, further lowering of the threshold represents an unwelcomed intrusion into the rights of people with HIV and “suspected” people with HIV.

The rationale for a lower threshold in the case of Category 5 conditions is unclear. Parties to the submission would welcome information on the necessity of broadened powers to order forced medical examinations. A more collaborative approach based on the provision of community education, health promotion and more accessible methods of testing (such as rapid testing) would be the preferred approach to increasing HIV testing and promotion of better public health.

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<sup>6</sup> UNAIDS, Office of the High Commissioner for Human Rights, *International Guidelines on HIV/AIDS and Human Rights*, (2006), pp. 90-91.

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.”<sup>7</sup>

Australia has ratified the *International Covenant on Civil and Political Rights*, which includes the right to privacy and the right to security of persons.<sup>8</sup> A threshold that only requires the Director-General to “reasonably suspect” that a person may have HIV and be a risk to public health could represent an infringement on the rights to privacy and security of persons.

Considering the different modes of transmission between Category 5 and Category 4 conditions, and the differential impact on individual rights and public health, Category 5 conditions should be considered within a more rigorous framework than the one contained in the current *Bill*.

Recommendation 3: That the *Public Health Bill* establish a process for the Director-General to request a person to undergo medical examination based on a Category 5 condition through the District Court, with proper concern for individual human rights and circumstances.

## Part D. Local Governments

This submission supports the recognition of the important role that local governments play in public health in the draft *Bill*. In the field of HIV and other blood borne viruses, two particular aspects of local governance have significant impacts on the public health of the community; regulation of the sex industry and needle and syringe programs. Adding public health responsibilities to local governments recognises the power and impact that local governments have in promoting better public health.

Since the decriminalisation of the sex industry in 1995 through the *Disorderly Houses Amendment Act*, regulation of the sex industry in NSW now rests with local governments. Improving the public health impacts of the sex industry was one of the main reasons for the reforms to decriminalise the sex industry, including brothels.

Different local governments have taken differing approaches to regulating the sex industry, usually through local environment plans and the development approval process. In ACON’s experience, many local governments attempt to indirectly prohibit or restrict brothels through restrictive local environment plans or arbitrarily rejecting development approvals submitted by brothels. In these circumstances, brothels have to pursue the matter in the costly Land and Environment Court to operate as legal brothels. This is a concern to public health as this approach is more likely to yield a higher number of illegal brothels with more sex workers working in less safe environments, including on the street.

A less restrictive approach would enable health service providers to be able to engage in providing sexual health promotion to sex workers in these environments. Brothels are also more likely to provide a safer environment for sex workers than those sex workers working privately or on the street, thus improving the occupational and sexual health of sex workers

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<sup>7</sup> *Ibid.* p. 27.

<sup>8</sup> Articles 17 and 9, *International Covenant on Civil and Political Rights*,

and reducing risks for their clients. The benefits of decriminalising the sex industry in NSW has been improved access to sex workers to educate them about sexually transmissible infections including HIV, and provide resources such as condoms to prevent the spread of HIV and other STIs.

Local governments also play a significant role in the availability of needle and syringe programs (NSPs) and the safe disposal of needles. Supporting NSPs in their local government area is important to ensure that efforts to prevent the spread of HIV and hepatitis C are not undermined by a lack of access.

NSPs have played a key role in the prevention of HIV and Hepatitis C. A national report on the effectiveness of NSPs from the Department of Health and Ageing estimated that 32,050 new HIV infections and 96,667 new Hepatitis C infections were averted due to NSPs in the decade from 2000 to 2009.<sup>9</sup> The reductions in secondary infections further increased these figures.<sup>10</sup> The success of prevention efforts represents an estimated \$1.28 billion in savings of healthcare costs.<sup>11</sup> Supporting NSPs in local areas would align with all stated objectives of the *Bill*, particularly in prevention of the spread of infectious diseases, and would additionally reduce the cost burden on hospitals and other health services.

Incorporating public health responsibilities into the work of local governments is important, however, sufficient funding and coordination with state bodies need to be considered to ensure local governments understand the complex public health issues and to make decisions that compliment state and national public health objectives.

## Part E. AIDS as a Scheduled Condition

This submission supports the submission from the Australian Society of HIV Medicine to remove 'Acquired Immune Deficiency Syndrome (AIDS)' from both category 2 and category 5 of 'scheduled medical conditions' (schedule 1) and from 'notifiable diseases' (schedule 2). AIDS is no longer the necessary end point of a HIV infection, given that highly active anti-retroviral drugs can prevent the onset of AIDS for many people for decades, or treat the symptoms of AIDS that some patients will cease to exhibit AIDS symptoms. For this reason AIDS thus may no longer necessarily be a useful indicator for HIV related disease and should be deleted from a modern and forward looking *Public Health Bill*.

Recommendation 4: Remove AIDS from schedule 1 and schedule 2 of the *Public Health Bill 2010*.

## Part F. Mandated STI Disclosure

The current draft *Bill* retains the provision that mandates the disclosure of HIV or other sexually transmissible infection (STI) status to a sexual partner prior to sex. This provision carries a penalty of up to 6 months imprisonment.

This submission opposes the retained provision of mandatory disclosure in the *Bill* and strongly supports the submission made by the coalition of HIV agencies on Section 76 of the

<sup>9</sup> National Centre in HIV Epidemiology and Clinical Research, *Return on investment 2: evaluating the cost-effectiveness of needle and syringe programs in Australia*, Department of Health and Ageing, (2009), p. 8.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

*Bill* on behalf of a number of organisations across the HIV and STI sector (including parties to this submission) in opposition to this provision being retained. The threat of criminal penalties acts as a form of stigma against people with HIV or other STIs and can create negative public health impacts. The parties to this submission notes that the existence of legislated mandated disclosure has not had the effect of a higher disclosure rate in NSW compared to other jurisdictions in Australia that do not have such provisions.<sup>12</sup>

The threat of imprisonment acts as an incentive for people not to know their HIV and/or STI status in order to shield themselves from the operation of this provision, thus possibly leading to an increase in transmission rates. Such provisions also create a disincentive for people to take responsibility for their health by being regularly tested for HIV and other STIs, and from using risk reduction techniques such as consistent condom use.

In addition, the reliance on people with HIV to disclose may increase stigma and discrimination against people with HIV. HIV negative men who relied more on sero-status disclosure were more likely to hold stigmatising attitudes towards HIV-positive men. These men were also more likely to report higher perceptions of risk of HIV transmission with a HIV-positive partner of unknown viral load regardless of the actual sexual practices that were engaged in.<sup>13</sup> This suggests that greater reliance on, and confidence in, HIV disclosure among potential sexual partners, contributes to negative attitudes towards people living with HIV as well as exaggerated fears of HIV risk from HIV-positive partners.<sup>14</sup>

In relation to sex work specifically, this provision puts sex work safe-houses and brothels that provides a safer space for sex workers to work in at risk. The likely impact of enforcing this provision is that sex workers will be pushed into street-based sex work which traditionally has lower rates of condom use and it places increased danger to sex workers, their clients and the local environment.

Recommendation 5: That the *Public Health Bill* remove section 76.

Recommendation 6: If section 76 is retained, that section 76 is replaced with either option recommended in Annexure A made by the coalition of HIV agencies submission.

## Part G. Principles to Guide Decision Making

The current *Bill* significantly expands the power of the government to intervene in public and private life on public health grounds. Whilst certain circumstances may require government intervention, proper consideration on the impact of these measures on human rights is required to ensure an optimal balance between effective public health response and respect for individual rights and liberties.

The Victorian *Health and Wellbeing Act 2008* incorporated a range of principles regarding public health and human rights. In the NSW context, privacy, accountability and

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<sup>12</sup> D Wilson, A Hoare, D Regan, H Wand, M Law, *Mathematical models to investigate recent trends in HIV notifications among men who have sex with men in Australia*, National Centre in HIV Epidemiology and Clinical Research, (2008).

<sup>13</sup> J de Wit, D Murphy, S Donohoe & S Adam, *Vicious circle of self-protection: reliance on serostatus disclosure to reduce risk of HIV is associated with greater stigma among HIV negative MSM in Australia*. Poster accepted to XVIII International AIDS Conference, Vienna (Abstract number 11886), (forthcoming July, 2010).

<sup>14</sup> J de Wit & D Murphy, personal communication, (4 April 2010).

proportionality are some examples of principles that could be considered in the public health context.

Recommendation 7: That the *Public Health Bill* be amended to include a set of principles for consideration for officials exercising functions under any provisions of the *Bill*.

## List of Recommendations

1. That s54(4)(c) and s55 be removed from the *Public Health Bill 2010* to be replaced with provisions based on s18 and s19 of the *Public Health Act 1991* (NSW).
2. That public health orders based on Category 5 conditions meet a higher threshold of having “reasonable grounds” and is “likely to endanger” public health than the current provisions in s59.
3. That the *Public Health Bill* establish a process for the Director-General to request a person to undergo medical examination based on a Category 5 condition through the District Court, with proper concern for individual human rights.
4. Remove AIDS from schedule 1 and schedule 2 of the *Public Health Bill 2010*.
5. That the *Public Health Bill* removes section 76.
6. If section 76 is retained, that section 76 is replaced with either option recommended in Annexure A made by the coalition of HIV agencies submission.
7. That the *Public Health Bill* be amended to include a set of principles for consideration for officials exercising functions under any provisions of the *Bill*.

## About Us

**ACON** (formerly known as the AIDS Council of NSW) was formed in 1985 as part of the community response to the impact of the HIV/AIDS epidemic in Australia. Today, ACON is Australia's largest community-based gay, lesbian, bisexual and transgender (GLBT) health and HIV/AIDS organisation. ACON provides information, support and advocacy for the GLBT community and people living with or at risk of acquiring HIV, including sex workers and people who use drugs. ACON is home to the Lesbian Gay Anti-Violence Project (AVP), the Community Support Network (CSN), the Positive Living Centre (PLC) and the Sex Workers Outreach Project (SWOP). ACON has its head office in Sydney as well as branches in the Illawarra, Northern Rivers, the Hunter region and the Mid North Coast.

Formed initially as a support group in 1991, **Hepatitis NSW** is the independent, community-based non-government organisation funded by NSW Health since 1994 to provide information, support, referral, advocacy, workplace development and capacity building services for all people in NSW affected by hepatitis C. Striving to be representative of, supportive and accessible to people affected by hepatitis C, the Council works actively in partnership with other organisations and the affected communities to bring about improvement in the quality of life, information, support and treatment for the affected communities, and to prevent hepatitis C transmission.

**Positive Life NSW** is a community based NGO that has represented the interests of people living with HIV in New South Wales since 1988. We provide advocacy, peer support, HIV prevention and health education campaigns and resources that focus on the experiences of people with and affected by HIV. We work to promote a positive image of people affected by HIV with the aim of eliminating prejudice, isolation, stigmatisation and discrimination.

The **Bobby Goldsmith Foundation** (BGF) is Australia's oldest HIV charitable organisation and the only one of its kind. Founded in 1984, it provides direct financial and practical assistance, financial counselling, housing and employment support to people directly disadvantaged by HIV in New South Wales.

The **NSW Users & AIDS Association's (NUAA)** is a not-for-profit NSW-based drug user organisation. NUAA advocates for people who use drugs, particularly those who inject drugs and people on pharmacotherapy treatment programs. The peak drug user organisation in NSW, NUAA was formed in 1989 in the face of a growing HIV epidemic. A group of drug users, their friends, families and supporters established NUAA as an independent, user-driven community-based organisation.