

REVIEW OF HEALTH ACT 1958

The Australian Nursing Federation (ANF) Vic Branch represents over 40,000 Registered Nurses across Victoria and makes this submission on behalf of our members. We represent, both professionally and industrially, Registered Nurses in Division 1, 2, 3, 4, and 5 of the Register held by the Nurses Board of Victoria

At the outset, it should be noted that the discussion paper does not propose specific legislative amendments and consequently, it is difficult to precisely ascertain what amendments are proposed and in what form. The precise impact of any legislative changes cannot be ascertained until the Australian Nursing Federation (Vic Branch) has been provided with a Draft Bill. Once the Bill is available, further review and comments will be required.

Part 3 – Overarching framework

3.4.6 – Polluter pays principle

The Discussion Paper provides for the principle that the polluter pays full costs for activities that may present risk to the public is open for abuse. Whilst the principle may encourage people to undertake an assessment of their activities and expose them to the financial liability they may incur should they breach the Act, the ANF (Vic Branch) submits the principle is too wide and could potentially be used to argue for the recovery of costs against individuals who have contributed to their own poor health, or have an infectious disease.

Part 4 – Intersectoral relationships

4.1 Functions of the Secretary

The Discussion Paper proposes that the new Act will include a power for the Secretary to conduct inquiries into matters of public health concern and poses the question of who should have the power to direct that an inquiry be conducted.

Section 384 of the current *Health Act* adequately deals with this by giving the Secretary broad powers to conduct inquiries into matters of public concern. The ANF (Vic Branch) submits that Section 384 of the current *Health Act* does not need amending.

4.3 Partnerships in public health

The ANF (Vic Branch) does not oppose the concept of partnerships between state and local government, and government and non-government entities if the purpose of the partnership is solely to improve the public health sector and does not lead to consumers being required to pay for services and/or the privatisation of the public health sector.

We strongly oppose the public/private partnership model being embodied in legislation and regulation as there may be instances where this model is inappropriate in the provision of health services and regulation.

4.7 Authorised Officers

It is very difficult to make a submission in relation to authorised officers without viewing the draft legislation. It is our submission the Act should prescribe the education and training and experience for those officers who will be required under the Act to enter, search, seize and question. The Discussion Paper proposes that the new Act may refer to persons authorised by the municipal council who may not be employed by the council but are providing services to the council, who would have similar powers to the authorised officers.

The ANF (Vic Branch) submits that this authorisation is very broad, and the section should be prescriptive of who can be an authorised officer, the education, training and experience required to fulfill this role.

Part 5 – Health Information

The collection of health information should be in accordance with the *Health Records Act 2001* and the *Information Privacy Act 2000*. The current powers under the *Health Act* in relation to the collection of health information are adequate to ensure access to comprehensive and reliable data necessary to monitor and assist in the protection of public health. We are unable to make a submission in relation to the setting up of registers and databases as the information provided in the Discussion paper is not adequate to make an informed comment.

5.2 Privacy protection for health information

The Discussion Paper states that the new Act will provide for the collection of comprehensive data on health issues in a manner that is consistent with the *Health Records Act* and the *Information Privacy Act*. The ANF (Vic Branch) supports this submission.

5.3 Consultative Councils

The Health Act currently provides for the establishment of Consultative Councils. These councils comprise health professionals who are expert in the issues within the council's defined terms of reference, and who are well regarded by their professional peers. The Discussion Paper states that the new Act may not have prescriptive provisions regarding the membership of these Consultative Councils.

The ANF (Vic Branch) submits that the provisions of the current *Health Act* are adequate and should not be amended. It is imperative that the Consultative Council members comprise health professionals who are expert within their area of health and meet the defined terms of reference. Less prescriptive provisions may result in members being appointed to the Consultative Council who are not adequately educated and experienced in the area they are expected to consult on.

The ANF (Vic Branch) supports the proposed amendments to consolidate the provisions regarding Consultative Councils so that provisions are standardised, create a power to make recommendations, power to investigate and to provide an annual report of Consultative Council's work.

The ANF (Vic Branch) requires more information and discussion on the setting up of sub-committees before comment can be made.

5.3.4 Mandatory reporting of certain matters to consultative councils

The ANF (Vic Branch) does not support mandatory reporting by clinicians, hospitals and any other health services. The current provisions in the *Health Act* adequately cover situations where reporting is necessary, for example, the reporting of births, stillbirths and disease notification.

The proposed amendments are very broad and impinge on the right to privacy and confidentiality. The reporting requirements will be onerous on clinicians with no defined outcome. The State Coroner of Victoria has very defined powers under the *Coroners Act 1985* and we submit it is unnecessary to duplicate any of these powers within the new *Health Act*.

Part 7 – Statutory duties, powers, offences and defences

Para 7.2 - Statutory Duty of Care

It is proposed that the Act be amended to provide a Statutory Duty of Care which would apply to all persons whose actions may adversely affect the public's health. In other words, the Act as amended would introduce a tort (negligence) for such conduct. Currently, the negligence that would arise from such an action would arise at Common Law and not as a result of any statute such as the Health Act. Non compliance with the proposed statutory duty would provide a basis for the issuing of infringement notices.

The duty is stated as being "*a person must not undertake any activity that may result in harm to health of another person, unless the person takes all reasonable and practical measures to eliminate the possibility of that harm occurring*".

Without examining the Draft Bill, it is impossible to provide any comment on the scope of the proposed Statutory Duty and what damages may flow as a result of any breach of any such duty or whether the current Common Law principles of negligence as they currently operate, are more than satisfactory to deal with any public health risk scenario.

The Discussion Paper states that "*public health extends beyond traditional sanitation and environmental boundaries, into communicable disease control and 'lifestyle' issues. How a duty of*

care might be applied to these areas (and the consequences if the duty were so extended) must also be considered".

The scope of that duty includes "personal behaviours and lifestyle issues". These terms are not elaborated on or defined. The ANF (Vic Branch) submits that the amendment is too broad and is an unnecessary encroachment on individual rights, which paragraph 3.4.5 of the Discussion Paper provides that the new Act is trying to avoid.

The *Crimes Act 1958* provides for the spreading of communicable diseases and Section 19A of the *Crimes Act 1958* provides as follows: - "*a person who, without lawful excuse, intentionally causes another person to be infected with a very serious disease is guilty of an indictable offence*".

The maximum term of imprisonment for such an offence is 25 years. The term "very serious disease" means HIV. The statutory duty provisions which are proposed for in the new *Health Act* would be in addition to those contained within the current *Crimes Act* and would be much broader as they would extend to circumstances beyond cases involving the transmission of HIV.

7.3 Duty to abate a nuisance

The Discussion Paper provides for the amendment of the definition of 'nuisance' or omitting it all together. The discussion of what the likely changes are to be is very confusing. The intention seems to be that the spreading of communicable diseases could become part of the scope of the term 'public health nuisance' whereby creating offences for individuals. The Discussion Paper states that the current definition of nuisance is shaped by case law and traditional boundaries may not be resilient to cover 'the emerging problems that the department or councils may wish to rectify'. The Paper does not elaborate on what emerging problems it foresees and therefore the ANF (Vic Branch) is unable to make submission on any amendment to the definition of nuisance until more information is provided.

7.7 Enforcement powers

The Discussion Paper provides for authorisation for 'authorised officers' (undefined) to enter 'premises' (undefined) without warrant, and have the power to take 'samples' (undefined). The discussion is very general in nature and could be applied to the spread of communicable diseases such as HIV, TB, Hepatitis B and C. This has significant implications for human rights.

7.8 Emergency powers

The Discussion Paper provides for the expansion of the Sections 36A, 123 and 124 of the current *Health Act* which provides for the emergency powers of the Secretary and Governor during a public health emergency. The Discussion Paper does not provide great detail of the varying type of public health emergencies envisaged.

The ANF (Vic Branch) submits that the emergency powers should be limited to catastrophic public health emergencies and be specific to infectious diseases. The term 'catastrophic public health emergencies' should be defined within the legislation. The amendments proposed are very broad.

We submit the framework for these powers should be specific and descriptive and in line with international standards on public health and human rights.

It should be noted that other public health emergencies are already covered by the *Emergency Management Act 1986* and *Terrorism (Community Protection) Act 2003* and does not require duplication within the new *Health Act*.

7.9 Cost recovery

The Discussion Paper provides where an agency (or a person under the direction of an agency) incurs costs in responding to or abating a public health risk, the new Act could include specific provisions or recovery of costs from the person who caused the risk or has the responsibility for addressing the risk.

The ANF (Vic Branch) supports cost recovery that is limited to where there has been a conviction under the *Health Act*.

Part 8 – Control of Infectious Diseases

8.3 - Powers for Investigation and Control of Infectious Diseases

Section 119 of the *Health Act* sets out the principles which govern the management and control of infectious diseases. It is proposed to retain Section 119 in its current form; however, it is proposed that amendments be made to this section to deal with the issue of "contact tracing". It is proposed that a power be introduced which extends to requiring organisations to provide lists of persons, eg. patient lists, for the purposes of "contact tracing". It is said that tracing ensures that contacts are made aware of their exposure to a public health risk and will provide them with the necessary information and education to help them prevent the further spread of disease. The discussion paper acknowledges that it is preferable that the person with the condition undertake the contact tracing, however where this is not possible or where there is a refusal to do so, the health professional (nurse) may either ask the person to undertake such a process or will assist the person to do so. The paper envisages that the health professional may undertake the contact tracing on behalf of the individual, or there will be a power to compel a person to provide information about relevant contacts. This power may extend to requiring patient lists from doctors, hospitals and community health centres for the purposes of contact tracing.

It is proposed that the amendments to the Act will clearly set out the action that may be taken by the health professional (nurse) when contact tracing is authorised, as well as the protections provided to individuals that may be required to provide personal information under these provisions. It is further proposed that "authorised officers" would be given the powers to undertake contact tracing (except in the case of sexually transmitted diseases, where only authorised officers of the Department of Human Services would have these powers). It is also proposed to introduce offence provisions for persons who fail to comply with a lawful direction of an authorised officer exercising these powers. To reiterate, the term "authorised officers" is not defined and it is

unknown at this stage, whether it will extend to nurses. The ANF (Vic Branch) would only support contact tracing as long as the contacting and receipt of information was within the confines of the *Health Records Act* and the *Information Privacy Act*. We will need to await receipt of the Draft Bill to respond to this in a more thorough way.

8.4 Incidents Involving Care Givers

Please refer to the ANF (Vic Branch) submission on Section 120 of the *Health Act* submitted on the 29th October 2004.

8.5 Public Health Orders and the Management of Infected Persons

It is proposed to provide for Public Health Orders which could be implemented and aimed at preventing transmission of communicable diseases and protecting the public. This would include the implementation of compulsory examination and detention of individuals. It is proposed that the Act be amended to provide for the consent of a person before testing and examination occurs. The current Act (Section 121(5)) enables the Secretary to make orders to detain persons for the purposes of examination and testing where there is a refusal to do so. It is proposed that this section be amended to provide a power to use "reasonable force" in order to obtain a sample and to detain a person in order to collect a sample. It is unknown at this stage, whether the power to use reasonable force is to be exercised by an "authorised officer" (possibly including a nurse), and a delegate of the Secretary or the police. It is unclear whether the power to undertake involuntary testing with reasonable use of force will require a Court Order before such power is exercised.

The paper states that the review of these sections of the Act should have regard for the significant impact on human right that powers such as compulsory examination and detention have on individuals, and must balance these human rights with the need to protect the community.

The paper does not discuss where these detainees will be held for compulsory examination and detention and treatment. ANF (Vic Branch) submits that detention of these people in public hospitals would be inappropriate as waiting lists are long and availability of beds is limited. Further, nurses are not custodians. Does the government intend to build purpose built detention centres? The Discussion Paper does not state who will treat these people, for example doctors and/or nurses. The Paper does not discuss the cost of implementing such regulations.

The paper details the powers to order counselling, restriction on a person's behaviour and/or movements, isolation and detention. Part 8.5.4 discusses the power to order treatment. Part 8.5.5 deals with the power to apprehend, the power to seek a warrant to apprehend a person failing to comply with a public health order. This warrant would include the power to 'break, enter and search' premises where a person is believed to be located and take the person to a place named in the warrant within a reasonable time.

These amendments will place a lot of power in the hands of people who may not be significantly educated. It should be the responsibility of the police to 'break, enter and search' and not an

authorised officer (as yet undefined). This should only occur after a warrant has been issued by the courts.

An offence section will also be incorporated to deter offenders.

The ANF (Vic Branch) does not support these amendments as described in the Discussion Paper as they are onerous and significantly impact on human rights. Even though the Discussion Paper states that the new sections to the Act would not be used to order treatment for risk behaviour such as 'libido', the language used in the Discussion Paper is very general, and therefore the new Act could be applied in very flexible ways and may be possible to use against an individual for "personal behaviour and lifestyle issues".

8.5 Notifiable Diseases

The ANF (Vic Branch) supports the introduction of new notification requirements by an Order of the Governor in Council where it is necessary to respond quickly to new and emerging diseases. We do not support the amendment requiring hospitals to have processes in place to ensure that notification requirements are met as the requirements under the current *Health Act* and *Health (Infection Diseases) Regulations 2001* adequately provide for the system of notification.

The ANF (Vic Branch) does not support the change to the term 'notifiable disease' to be replaced with 'notifiable condition' as the term is too broad and the Discussion Paper does not provide a definition to the term.