

Your reference

Our reference TP:TL



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Dear Mr Lodge

Review of the Health Act 1958

Thank you for the opportunity to comment on the draft policy paper dated November 2005.

I attach Victoria Legal Aid's comments for you to consider. Please note that we have restricted this submission to those aspects of the review that most affect our clients.

If you would like to discuss any of our comments please contact me on 9269 0244 or Tonye Lee (Policy Officer) on 9269 0246.

Yours faithfully

TONY PARSONS

Managing Director

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1. About Victoria Legal Aid

Victoria Legal Aid (VLA) is a leading force for social justice. Our mandate is to protect legal rights, with a particular emphasis on the rights of the marginalised and economically disadvantaged.

VLA employs 189 lawyers who provide legal services from our fourteen offices in metropolitan and rural Victoria. This makes us the largest and most accessible criminal law and family law practice in the state. We also practice in the area of human rights and civil law and provide specialist legal services to children and young people.

In 2004-05, VLA provided:

- 25,666 grants of assistance for legal representation by private lawyers
- 12,202 court cases conducted by VLA lawyers
- 57,187 duty lawyer services across a range of courts
- 52,860 legal advice sessions
- 75,917 telephone information sessions, conducted in 14 languages
- 590,825 legal education publications or website downloads
- family law alternative dispute resolution service.

2. Executive summary

VLA supports the following recommendations:

- the principle of proportionality
- the decision not to introduce a 'risk to health' offence
- consulting stakeholders about enforcing some offences through the PERIN system
- requiring a warrant before apprehending a person who fails to comply with a public health order
- requiring that a person apprehended under a warrant be advised of their rights
- the decision not to re-enact the offence of knowingly infecting another person.

VLA does not support the following recommendations:

- broadening the enforcement powers to cover non-infectious health risks
- extending the maximum emergency period to six months
- broadening the incident, epidemic and emergency powers, without adequate checks and balances
- having appeals on the merits heard by the supreme court rather than VCAT
- no appeals on the merits against emergency powers
- power to order involuntary medical treatment.

3. Previous submission

In November 2004, VLA provided a submission to the Department of Human Services in response to the *Review of the Health Act 1958: Discussion Paper*.

4. Principle of proportionality

Recommendation 13(e): Acts taken and decisions made by officials under the public health Act should be proportionate to the harm to be prevented, minimised or controlled. Where action is necessary to protect public health, the action chosen must be the least intrusive means available to achieve that goal and must not be imposed in an arbitrary way.

VLA fully supports this recommendation.

5. Risk to health offence

Recommendation 82: That the public health Act not introduce a 'risk to health' offence.

VLA fully supports this recommendation.

6. Enforcement powers

6.1 Non-infectious health risks

Recommendation 118(a): That the public health Act provides for additional powers where the Chief Health Officer is of the view that there is a serious risk to public health...

VLA acknowledges that broad enforcement powers may be necessary to deal with infectious diseases because of the urgent need to prevent the spread of illness to large numbers of people. However VLA does not believe that enforcement powers should be broadened to cover non-infectious health risks (eg. toxic exposure).

Enforcement powers must properly balance the civil liberties of individuals against the risk to public health. It is critical to get this balance right when the proposed powers are so intrusive, eg:

- 'incident powers' include the right to enter and search without warrant and to compel the provision of information
- 'epidemic powers' include the right to treat or vaccinate a person
- 'emergency powers' include the right to detain a person or give 'any other direction'.

VLA does not consider that the use of these powers is justified for non-infectious health threats—where there is unlikely to be the same urgency, nor the same potential for spread of illness. No

evidence is presented in the *Discussion Paper* or the *Draft Policy Paper* to show that current co-operative strategies are inadequate to protect public health in these circumstances.¹

We note that the *Discussion Paper* identified bio-terrorist attack as a potential gap in the current Act. We point out that the *Terrorism (Community Protection) Act 2003* already gives police extensive powers to respond to bio-terrorism, including the power to:

- enter, search and seize
- copy, photograph or record
- test or sample any thing.

6.2 Emergency period

Recommendation 123(b): That the governing council may proclaim an emergency relation to specify who, as a result of a serious risk to public health. Such proclamation...May be extended for four-week period up to a maximum of six months.

VLA opposes the proposal to extend the maximum emergency period to six months. The current maximum of four weeks effectively deals with the urgency of the situation by allowing immediate action. If any further extension is required, Parliament or a Court should assess the situation. We believe that independent scrutiny is essential to safeguard the fundamental civil liberties of (potentially) large numbers of Victorians.

6.3 Checks and balances

Recommendation 119: That in the event that the Chief Health Officer (CHO) determines that there is a serious risk to public health, the CHO can, in order to lessen or prevent serious risk to public health, authorise an authorised officer to exercise the following 'incident powers'...

Recommendation 120: That in the event that the CHO determines that an epidemic or the risk of an epidemic poses a serious risk to public health, the CHO may, in order to lessen or prevent serious risk to public health, authorise an authorised officer (who is a registered medical practitioner) to exercise the following 'epidemic powers'...

Recommendation 124: If there is such a proclamation of emergency by the Governor in Council, the CHO may, in order to lessen or prevent serious risk to public health, authorise an authorised officer to exercise the following 'emergency powers'...

VLA is concerned that there are insufficient checks and balances in the system to ensure that the proposed enforcement powers are used appropriately. We endorse the comment made by the

¹ *Review of the Health Act 1958: Discussion paper*, August 2004 at page 46.

Australian Medical Association that *'individual freedoms must be protected from the unfair or arbitrary use of these powers.'*²

We refer to the comments made in our recent submission to the Victorian Parliament Law Reform Committee *Inquiry into Warrant Powers and Procedures* (copy previously provided) and the recommendations made in the VPLRC's final report.³ Many of these comments and recommendations can also be applied to enforcement powers under the *Health Act*. In particular, we reiterate the need for:

- 'reasonable grounds' to justify any arrest, search or seizure (recommendation 13)
- detailed guidelines about enforcement practices and procedures (recommendations 7, 17, 47 and 83)
- independently accredited and monitored training of authorised officers (recommendations 48, 90 and 137)
- record keeping and reporting of enforcement activities (recommendations 48, 90 and 137)
- accountability mechanisms such as an audit/compliance system (recommendations 21 and 25).

7. Penalties

7.1 Penalty enforcement by registration of infringement notice (PERIN)

Recommendation 130: That there be the capacity for contraventions of some provisions of the public health Act to be enforced through the PERIN system.

Recommendation 131: That during the development of the relevant regulations that determine which offences are subject to the PERIN system, the DHS consult closely with local government and other relevant stakeholders.

If some provisions of the *Health Act* are to be enforced through the PERIN system, then VLA strongly supports consultation with stakeholders to determine which offences may be appropriate for inclusion. VLA is currently consulting with the Department of Justice about expanding the PERIN system to cover other offences generally. We look forward to consulting with DHS about the inclusion of public health offences.

7.2 Penalty levels

Recommendation 132: That the public health Act set penalty levels that reflect the seriousness of the public health consequences of the breach and be sufficient to deter conduct that creates an unacceptable risk to public health.

² *Review of the Health Act 1958: Draft Policy Paper*, Department of Human Services, November 2005 at paragraph 4.10

³ *Warrant Powers and Procedures: Final Report*, Victorian Parliament Law Reform Committee, November 2005

VLA does not object to this statement of principle. However, VLA suggests that DHS should consult further with relevant stakeholders when it is able to specify the proposed penalty for each offence.

8. Appeals

8.1 Supreme Court appeals

Recommendation 139: That a person may appeal to the Supreme Court against the exercise of a [public health] order (but not a testing or examination order) made under the equivalent section to section 121.

Recommendation 140: That the review mechanism regarding incident and epidemic powers be similar to the current approach for reviewing public health orders (internal review to the Secretary and external review to the Supreme Court)(modelled on section 122 of the Health Act).

VLA considers that appeals (on the merits) for relevant public health orders and incident and epidemic powers should be heard by VCAT—because it is a less formal and more cost-effective forum for appeal. However, if these appeals will continue to be heard by the Supreme Court, then VLA suggests the following strategies to ensure that vulnerable appellants have adequate access to justice:

- the Secretary should inform the person of their rights to internal review, judicial review and appeal to the Supreme Court
- the Secretary should inform the person that they may seek legal advice and ensure that the person has a reasonable opportunity to do so
- VLA should receive sufficient funding to enable it to make grants of legal assistance for advice and representation in appropriate cases.

8.2 Appeals against emergency powers

Recommendation 141: That there are no appeal provisions in relation to the exercise of emergency powers (though the proclamation of emergency by the Governor in Council would be a disallowable instrument and the provision would not oust judicial review)

VLA opposes this recommendation. Appropriate checks and balances are essential when a public authority exercises powers that may affect the freedom of movement or liberty of citizens. The emergency powers have the potential to affect large numbers of Victorians for periods of up to six months. Restricting review of these powers arguably infringes basic human rights. The *International Covenant on Civil and Political Rights* states that:

*'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'*⁴

9. Public health orders for the control of infectious diseases

9.1 Involuntary treatment

Recommendation 172(g): That the public health Act include a power for the Chief Health Officer to make an order that may require a person to...undergo treatment.

VLA opposes this recommendation because it significantly infringes on civil liberties. Currently, people have the right to make informed decisions to refuse medical treatment in most circumstances. For some types of disease, the spread of infection can be prevented without enforced treatment (eg. by isolation). For other types of disease, enforced treatment will not stop the spread of infection. Given these limitations, we do not believe such an extreme proposal is warranted. We believe there should be greater focus on less punitive responses such as:

- community education (particularly prevention campaigns)
- preventative measures (eg. needle exchange programmes)
- accessible and affordable medical treatment
- ancillary social supports (eg. drug rehabilitation).

If the power to order involuntary treatment is retained, then VLA suggests the following safeguards:

- the power should only be exercised by a court. We believe that court procedures (such as the right to be heard and represented; rules of evidence; and standards of proof) are the best way to ensure that the proper balance is maintained between individual rights and potential risk to public health.
- there must be rigorous checks and balances on the exercise of the power (eg. the procedures specified in the *Mental Health Act* 1986 for involuntary treatment of mentally ill people).

9.2 Isolation and detention

Recommendation 172(h): That the public health Act include a power for the Chief Health Officer to make an order that may require a person...be isolated and detained.

If the power to make an order for isolation or detention is retained, then VLA suggests the following safeguards:

- the power should only be exercised by a court (for the reasons set out above)

⁴ Article 9(4) *International Covenant on Civil and Political Rights*, ratified by Australian on 10 December 1975.

- there should be clear guidelines about:
 - the criteria for making the order
 - the criteria for extending the order under s.121(8)
 - the living conditions of the person during isolation or detention.

9.3 Use of force

Recommendation 175: That reasonable use of force may be exercised by an authorised officer or the police to enforce the public health order made under this section. If an authorised officer exercises the power, the person may obtain the assistance of any member of the police force.

Where the use of force is necessary as a last resort, VLA agrees that authorised officers or police should carry out the use of force. However, it is essential that the relevant officers and police receive initial and ongoing training that is independently accredited and monitored. The training must address the special needs of people who may be unwell and other vulnerable people such as:

- children
- people with language or literacy problems
- people with intellectual, psychiatric or physical disabilities.

9.4 Power to apprehend

Recommendation 177: That the public health Act provides that an authorised officer who is a registered medical practitioner may seek a warrant to apprehend a person who fails to comply with a public health order and take the person to a place named in the warrant.

VLA supports the requirement to obtain a warrant before apprehending a person in these circumstances.

Recommendation 178: That the public health Act provides that a person on a public health order who is apprehended must be advised of his or her rights and obligations.

VLA supports this recommendation.

9.5 Offences

Recommendation 179: That the public health Act not re-enact the offence of knowingly and recklessly infecting another person with an infectious disease, and instead rely on the Crimes Act 1958 for prosecutions of this nature.

VLA supports this recommendation. VLA also suggests that it should no longer be a criminal offence to fail to comply with a public health order. The public health purposes of the Act can be fully achieved by using the proposed powers to order involuntary testing, detention or treatment.

10. Further information

For further information please contact:

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