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VICTORIA
LEGAL AID

4 November 2004

By email to: jacqueline.goodall@dhs.vic.gov.au

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Dear Dr Goodall

Review of the Health Act 1958

Thank you for the opportunity to comment on the *Health Act 1958*.

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

A handwritten signature in black ink, appearing to read 'Tony Parsons'.

TONY PARSONS
Managing Director

Encl.

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1. Victoria Legal Aid's criminal and civil law clients

Victoria Legal Aid is the state's largest criminal law practice. We employ 130 lawyers who practise criminal law from our twelve offices in metropolitan and rural Victoria. In 2003-04 we provided the following services to our criminal law clients:

- Multilingual telephone information services
- Face-to-face legal advice at our offices and at most of Victoria's prisons
- 37,629 duty lawyer services at the Magistrates' Court
- Legal representation in 7,518 cases.

VLA has a substantial civil law practice covering a broad range of areas, including mental health, discrimination, guardianship and administration and PERIN. In 2003-04 we provided these services to our civil law clients:

- 7,115 advice sessions
- duty lawyer services for:
 - the special circumstances PERIN list
 - the guardianship list at VCAT
 - the Mental Health Review Board.

2. Enforcement powers

2.1 Question 48: Should all enforcement powers be brought together in one part of the Act?

VLA supports this proposal because we believe it will make the Act clearer.

2.2 Question 49: Should the enforcement provisions of the Health (Infectious Diseases) Regulations 2001 be broadened to cover other public health threats not involving infectious diseases?

VLA does not believe the enforcement provisions should be broadened. Enforcement powers must properly balance the rights of the individual against the risks to public health. It is critical to get this balance right when the powers granted are extensive (eg: the right to enter and search without warrant and the right to compel provision of information). These powers should not be extended unless there is a demonstrated need to do so. There is no evidence presented in the discussion paper to show that the current powers are inadequate to protect public health. On the contrary, the paper concedes that the public is generally co-operative.¹

VLA acknowledges that the current 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, we do not believe those powers are justified for non-infectious health threats (eg: carcinogenicity as a result of chronic exposure) where there is unlikely to be the same urgency, nor the same potential for spread of illness.

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

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2.3 *Question 50: Are the enforcement powers in the Health Act appropriate to allow authorised officers and environmental health officers to carry out their duties?*

Question 51: In addition to the power to take samples and make copies of seized documents, are there any other additional powers that should be included in the new Act?

Question 52: Should the power to search for and seize goods without a warrant be widened to allow the Secretary to search for and seize things are other than goods, such as records, biological agents or other items?

The current legislation² includes the power to:

- enter and inspect
- stop and detain any person, animal or vehicle
- seize any substance or thing.

VLA considers that these powers are more than sufficient. We believe the power to take samples and make copies of seized documents may already be covered in section 401(1)(e). We believe the power to search for and seize things other than goods may already be covered by regulation 15 as the term 'goods' is not defined.

VLA is concerned that there are insufficient checks and balances in the system to ensure that the current powers are used appropriately. We refer to our recent submission to the Victorian Parliament Law Reform Committee Inquiry into Warrant Powers and Procedures (copy attached). Many of the concerns we raised in that submission are relevant to enforcement powers under the Health Act. In particular, we reiterate our submissions about the need for:

- 'reasonable grounds' to justify any arrest, search or seizure
- detailed guidelines about enforcement practices and procedures
- independently accredited and monitored training of officers
- recordkeeping and reporting of enforcement activities
- accountability mechanisms such as an audit/compliance system.

3. Emergency powers

3.1 *Question 58: Should emergency powers be general for 'public health emergencies' or be specific to infectious diseases?*

Question 62: Should the secretary be given a catch-all power in a public health emergency such as 'any other order deemed necessary'?

² Health Act 1958 s.400 - 401.

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The current legislation³ includes the power to:

- arrest and detain people
- seize land, buildings and things
- disinfect or destroy land, buildings or things.

We do not believe the emergency powers should be widened to cover non-infectious health emergencies. We note that the paper identifies bioterrorist attack as a potential gap in the current Act. We point out that the *Terrorism (Community Protection) Act 2003* already gives police extensive warrant powers to respond to bioterrorism including the power to:

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

We also note that section 14 of that Act expressly sets out the intention of Parliament that “no unnecessary restrictions on personal liberty or personal privacy should be imposed”. We suggest that a similar statement should be included in the Health Act.

3.2 *Question 59: Should the proclamation of an emergency be extended to four weeks, with renewal periods not exceeding two weeks, to a maximum of six months?*

The current powers allow an emergency period of two weeks with the possibility of one further renewal of up to two weeks. As discussed above (at paragraph 2.2), we do not consider these powers should be extended in the absence of demonstrated need. The current period 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.

3.3 *Question 61: Should the Secretary be given powers in a public health emergency to compel examination, testing, vaccination, treatment (including preventative treatment), isolation and quarantine?*

See later comments at paragraph 7.

4. A new offence of ‘risk to health’

Question 66: Should the new Act include a new offence of ‘risk to health’?

VLA does not support the creation of a new offence of risk to health. We believe that all relevant conduct is already adequately covered by other offences such as:

³ Ibid s.124

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- intentionally causing a serious disease
- intentionally or recklessly causing injury
- reckless conduct endangering life / serious injury
- knowingly or recklessly infecting another person with an infectious disease.

No specific examples were given in the discussion paper of conduct that would not be covered by the existing offences. However, if an example is identified, any new offence should be narrowly drawn to address that gap only.

We are concerned that the creation of an additional broad (overlapping) offence may lead to the practice of laying alternative charges. We believe that practice causes confusion and unnecessarily adds to the costs of justice for the prosecution, defence and Courts.

5. On the spot fines (PERIN)

Question 72: Should the new Act introduce Perin for suitable offences?

We agree that on the spot fines are inappropriate where offences include subjective elements or contain a number of exceptions. They are also unsuitable where there are additional complications such as disputes about the identity of the offender. We would need to see a list of the proposed offences before commenting further on their suitability for on the spot fines.

VLA has serious concerns about the current Perin system for enforcing on the spot fines. We refer again to our recent submission to the VPLRC Inquiry into Warrant Powers and Procedures. In particular, we reiterate our submissions about the need for:

- all debtors to be clearly advised of their rights, options and potential consequences at each stage of the process.
- financially disadvantaged debtors to be given option to pay by instalments before 'processing' costs are added to the fine.
- guidelines about dealing with 'special circumstances' debtors (eg: debtors with language and literacy problems; intellectual psychiatric or physical disabilities; or drug and alcohol problems).

We note that the Department of Justice is currently reviewing the Perin system, including considering whether any new offences should be brought under the system. That review will have the advantage of considering specific offences in the context of the strengths and weaknesses of the entire Perin system. This review should not pre-empt the DoJ review.

6. Greater penalties

Question 73: Should public health offences attract similar penalties to those attracted by offences under the environment protection legislation?

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Much of the *Environment Protection Act 1970* targets corporate or commercial entities that cause serious damage to the environment or pose a serious threat to public health.⁴ However, some of the offences under the *Health Act* (and in particular the proposed offence of risk to health) cover conduct by individuals that affects just a few people. In these circumstances, we do not believe that an increase in penalties across the board is warranted. We would need to see a list of proposed penalties for each offence before we could comment further.

7. Public health orders and the management of infected people

7.1 *Question 87: Should the new Act provide a power for involuntary testing with reasonable use of force? If so, should it be exercised by an authorised officer, a delegate of the Secretary and/or the police?*

We suggest that the Act should enshrine the stated principle that 'education and information is an essential first step'⁵ We support the proposal that consent should be sought for testing and examination wherever practicable before an order is made.

If an order for involuntary testing is made, then we believe authorised officers or police should carry out the use of force. However, it is essential that the relevant officers 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.

It may be impracticable to ensure that medical officers and other delegates have the appropriate skills and training to use reasonable force appropriately.

We also suggest that an independent third person should be present during testing of vulnerable people.

If the power to make an order for isolation or detention under s.121(4) & (5) is retained, 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.

7.2 *Question 88: Should the Act contain a list of the types of restrictions that may be imposed by an order of the secretary?*

We support this proposal because it will make the Act clearer. We also suggest that s.121(3)(d) should be clarified. At present the meaning of 'appropriate and responsible behaviour' is vague

⁴ Eg: *Environment Protection Act 1970* s.59E

⁵ Discussion paper, op cit. at page 67

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and subjective. There is a broad spectrum of legal behaviour (particularly sexual behaviour) that may not meet mainstream notions of propriety. However, people should be free to act as they choose unless it puts another person in danger (without that person's informed consent). We suggest written guidelines about the legal/medical definitions of appropriate behaviour.

7.3 Question 89: Should the new Act introduce a power to order that a person undergo treatment when treatment is refused? If so, what limits should be placed on the use of power?

This proposal raises significant civil liberties issues. 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. 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).

7.4 Question 91: Should any or all public health orders require Court/Tribunal confirmation?

We understand that public health orders are sometimes invoked in circumstances that are not particularly urgent (eg: sexually transmitted diseases). However, orders for involuntary testing, isolation and detention constitute the most serious infringements of civil liberties. We consider that a Court should make all such orders. 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.

7.5 Question 92: Should there be a power for the police to apprehend a person who fails to comply with the public health order, rather than merely the ability to provide assistance to the medical officer? If so, should there be a requirement to obtain a warrant to apprehend person?

As discussed at paragraph 7.1, appropriately trained officers should carry out enforcement. It may not be practicable to ensure that all medical officers have the appropriate skills and training.

As discussed at paragraph 7.4, Court scrutiny is essential to safeguard individual rights. For the same reasons, we believe warrants should be required to apprehend a person.

7.6 Question 93: Should the new Act continue to provide that it is an offence for a person to fail to comply with an order?

If involuntary testing is authorised, in addition to the existing powers to isolate and detain, there will be no need to retain this offence.

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7.7 *Question 94: What appeal and external review processes should be made available under the new Act?*

If the power to make public health orders remains with the Secretary, then we believe there is a need for a quick and cheap method of merits review. We agree that VCAT would be a more appropriate forum than the Supreme Court. The appellant should have the right to choose a hearing in camera.

8. Further information

For further information please contact **Tonye Lee** (Policy Officer) [REDACTED]

[REDACTED]