Guidelines for the management of people living with HIV who put others at risk

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Contents

Introduction

This document outlines the Department of Health and Human Services' policy in managing people who put others at risk of acquiring the Human Immunodeficiency Virus (HIV). While most people living with HIV conscientiously avoid behaviours that expose others to such risk, a small number of people undertake behaviours that require interventions to diminish disease spread. These guidelines are applied by the Chief Health Officer when exercising legal powers to manage this aspect of HIV transmission, so as to protect the Victorian community.

Invoking the law in this situation presents a wide range of complex legal and ethical issues. The overall aim is to strike the right balance between protecting the community and the rights of the individuals.

A number of disease control powers are vested in the Chief Health Officer by the *Public Health and Wellbeing Act 2008* (PHW Act). These powers include examination and testing, education and counselling, requiring certain assessments be undertaken (psychiatric or neurological), placing restrictions on certain behaviours or movements and, in extreme circumstances, detaining or isolating the person.

The primary objective of all measures is to reduce HIV transmission. It is acknowledged that in some instances people with mental illness, intellectual disability, substance abuse or a combination of conditions, might place others at risk of HIV infection even though they do not intend to do so.

It is important to identify these individuals who may lack capacity to alter risky behaviours and ensure the full range of supports and strategies are in place to contain these risks.

Alternatively there may be individuals who appear, at least initially, to be unwilling to change their behaviour. Such individuals may respond to counselling, education or other activities, with more coercive measures available to be applied if required.

Any person identified as 'intentionally' infecting others will be managed under the PHW Act and their alleged criminal behaviour immediately referred to police for investigation and, as appropriate, prosecution under the *Crimes Act 1958*.

Context

The Department of Health and Human Services (the department) recognises:

- HIV transmission only occurs following specific behaviours and does not occur through casual contact.
- Transmission of HIV is preventable. Information, education and prevention programs are necessary to encourage safe sex or safe injecting, including pre- and post-test information, which should explain these practices and advise of the legislative obligations to limit transmission.
- The right to privacy and confidentiality. This does not, however, prevent the department sharing essential information about a person placing others at risk with other agencies participating in their management (e.g. the sharing of information with interstate health authorities, if a person who is putting others at risk travels to a different state).
- The community as a whole has the right to appropriate protection against infection.
- Victorian laws should complement and assist education and other public health measures.
- Public health objectives will be most effectively realised if the cooperation of people with HIV infection and those most at risk is maintained. These objectives are best achieved through the establishment

of a working relationship based on respectful, equitable and non-discriminatory interactions, with the individual informed of their rights, including the right of appeal.

- For people with HIV who place others at risk, escalating interventions may be needed, with preference given to effective strategies that are the least restrictive.
- As HIV is a lifetime infection, managing individuals who put others at risk requires techniques that will be effective at modifying behaviours over the life course.

The following principles apply to the management and control of HIV under PHW Act:

- A person at risk of contracting HIV should take all reasonable precautions to avoid contracting the infectious disease.
- A person who is at risk of contracting HIV or has/suspects that they may have HIV, is entitled to receive information about HIV and appropriate treatments, and if infected, have access to appropriate treatments.
- A person, who has/suspects that they may have HIV, should ascertain whether they have HIV and what precautions they should take to prevent transmission. They should take all reasonable steps to eliminate or reduce the risk of any other person contracting HIV for them.
- The spread of HIV should be prevented or minimised with the minimum restriction on the rights of any person.

In accordance with the principles above, it is the expectation of the Chief Health Officer that persons with HIV or those who believe they may have HIV, will take all reasonable steps to eliminate or reduce their risk of transmission. Similarly, there is an expectation that all reasonable precautions should be taken by persons to avoid contracting HIV. It is therefore recommended by the Chief Health Officer that people always practice safe sex and safe injecting.

History of these guidelines

These guidelines were initially prepared in 1989 by a working party convened by the AIDS/STD Unit of the Health Department Victoria, with representatives from Community Services Victoria including: the Office of Intellectual Disability Services, the Office of the Public Advocate, the Guardianship and Administration Board and the Office of Psychiatric Services, and People Living with HIV/AIDS Victoria.

The guidelines were rewritten in 2002 with the involvement of a working party consisting of representatives of the then Department of Human Services and key stakeholder groups. These included the Victoria Police, the Office of Public Prosecutions, the Department of Epidemiology and Preventive Medicine (Monash University), the Department of Justice, Positive Women, PLWHA Victoria, Straight Arrows, the Victorian AIDS Council/Gay Men's Health Centre and an intellectual disability expert.

The next major revision occurred in 2008 following reviews undertaken in Victoria (Griew-Leach[1] and the Scott- Falconer[2] reviews) as well as the review of Policies for the management of people with HIV who risk infecting others, conducted by Associate Professor Griew and submitted to the Blood Borne Viruses and STI Sub-Committee of the Australian Population Health Development Principal Committee. This latter review formed the basis of the *National guidelines for the management of people with HIV who place others at risk*. These Victorian guidelines are consistent with the National guidelines.

[1] Review of the *Guidelines for the management in Victoria of people living with HIV who put others at risk* and the *Protocol for management of HIV*

[2] Review of Department of Health management of a specified group of HIV cases.

A further update was undertaken at the end of 2009 to account for the commencement of the PHW Act, which replaced the former *Health Act 1958*, under which these guidelines were first made.

There are several criminal offences in the *Crimes Act 1958* that are relevant; where a person's behaviour allegedly places others, deliberately or recklessly, at risk of contracting HIV. Allegations of this type may be reported to the Police and they may investigate the matter and determine whether it would be appropriate to lay charges.

Under sections 22 and 23 of the *Crimes Act 1958*, it is an offence for a person to recklessly engage in conduct that places or may place another person in danger of death or serious injury without a lawful excuse. There have been a number of cases brought under these sections after the receipt of complaints from people who have contracted HIV.

Under section 17 of the *Crimes Act 1958*, a person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.

Section 19A of the *Crimes Act 1958* was repealed in 2015, abolishing the specific offence of intentionally infecting another person with a 'very serious illness', defined exclusively to mean HIV.

It should be noted that under the *Crimes Act 1958*, the fact that a sexual partner is aware of the risk of HIV transmission and accepts this risk is not a defence. Negotiated consent may be relevant as a mitigating factor in sentencing, but this would be considered by each court on the facts of each case.

The enforcement of the criminal law by the Victoria Police is a separate and distinct function to the role of the Chief Health Officer which is to protect public health through the management and control of infectious diseases.

Privacy and confidentiality

Privacy rights in Victoria are protected by a number of laws, including the Health Records Act 2001, the *Privacy and Data Protection Act 2014* and the *Charter of Human Rights and Responsibilities Act 2006*. Patient confidentiality is also protected by the professional and ethical obligations and practices of Victoria's registered health and medical practitioners.

The right to the privacy of personal health information and patient confidentiality are recognised and respected by the department and a range of measures are in place to protect all personal information in the possession of the department from unauthorised and illegal use or disclosure.

The law also provides that individual rights to privacy and/or confidentiality may occasionally be limited, in specific ways, in order for appropriate agencies to address, for example, a serious risk to public health or safety or a law enforcement issue.

Careful and limited disclosure and use of private or confidential information may become necessary in managing a person living with HIV who puts others at risk. Such disclosure and use should occur where a clear public health need can be demonstrated and must only ever occur in accordance with the relevant laws.

This means that clinicians and other health professionals are able to notify the department if they believe a patient living with HIV is placing others at risk.

From time to time, Victoria Police have sought and obtained a search warrant from the Magistrates' Court seeking information held by the department for the purpose of enabling Victoria Police to exercise its functions under the *Crimes Act 1958*. Prior to the issuing of a search warrant, a Magistrate must be

satisfied that there are reasonable grounds for the making of the search warrant. To enable the department to comply with the search warrant, when a search warrant is issued, information requested in the search warrant is searched for and released to Victoria Police.

Cultural and linguistic barriers to effective management

Every effort will be made to ensure that throughout the management process, all clients and particularly those from culturally and linguistically diverse backgrounds will be provided with understandable information that is presented in a culturally appropriate manner. This will ensure that from first contact with the department, clients are clear of the processes involved, understand the system of rights and obligations in Victoria as laid out in the PHW Act and as clarified in these guidelines, and are suitably informed or directed to undertake the required behavioural changes to eliminate their risk behaviours. This clarity will assist in preventing unnecessary escalation to more coercive forms of management.

Where required, interpreters will be employed and official documents such as letters of warning or public health orders will be translated into the client's language.

For those with an intellectual disability, communication and information provision will be tailored to meet specific needs to optimise understanding and recall.

Request for intervention

Notification

Anyone concerned that a person is putting others at risk of HIV infection may request assistance from the Chief Health Officer, who will employ a public health approach to manage this risk, using the PHW Act. This request is made to the Partner Notification Officers (PNOs) who are specialist staff in the Office of the Chief Health Officer. The overwhelming majority of people who place others at such risk can be suitably managed using this approach which aims to achieve long term behavioural change and a sustained resolution of risk.

Alternatively, persons with concerns or complaints are able to direct these to Victoria Police who will respond under the *Crimes Act 1958*.

The role of the Partner Notification Officers (PNOs)

The role of the PNOs is to assist the Chief Health Officer to reduce HIV transmission and protect public health. The PNOs are the key point of contact for those concerned about people who may be putting others at risk of HIV transmission.

Assessing the notification

The PNOs' first task is to gather specific information from the individual notifying the department of their concerns, including:

- The notifier's name and their relationship with the person involved;
- Details of the behaviours of concern;
- Any evidence of the person's HIV status or transmission.

The PNO will contact the person about whom the allegation was made (the client) and organise an interview to assess whether the notification warrants further investigation or action. The interview will be conducted in a discreet, non-threatening and confidential manner. The PNO will introduce themselves and present photo identification to confirm their status as an Authorised Officer under the PHW Act. They will explain the process involved in investigating an allegation, including the relevant provisions in the PHW Act and provide the client with a summary sheet about these guidelines.

The client is given the opportunity to identify an independent advocate who can provide support throughout the interview. The PNO will advise that the information gathered during the interview will be used by the Chief Health Officer to assess whether their behaviour may be putting others at risk of HIV infection. The information necessary to help make this assessment includes:

- Confirmation of the client's HIV status;
- The client's response to allegation;
- Details of specific behaviours, such as unsafe sex or sharing of drug injecting equipment;
- Any evidence of HIV transmission;
- A brief mental state assessment;
- An assessment of social supports;
- Evidence of substance dependency or use.

If it is clearly established that the allegation has no basis, no further action is taken. Where the Chief Health Officer assesses that the client appears likely to put others at risk of HIV, then management continues under the five- stage approach.

If, after interviews, the client's HIV status remains unclear and there is no alternative means of confirming their status, then the Chief Health Officer may consider making an order requiring the person to be tested under section 113 of the PHW Act. Such an order may be made if it is believed the client has HIV, the person is likely to transmit HIV and thereby constitute a serious risk to public health, a reasonable attempt has been made to provide them with information about HIV (or it is not practicable to do so) and the order is necessary to ascertain if the person has HIV.

It is an offence not to comply with an Examination and Testing Order and the maximum court penalty for this offence is 60 penalty units (section 116, PHW Act). If a client has refused to undergo testing, the Chief Health Officer may order that they be detained, or detained in isolation, for a period not exceeding 72 hours to enable them to be examined and tested (section 113(3)(c), PHW Act). A member of Victoria Police may use reasonable force to detain and take a client who is subject to such an order to a place where a test is to be carried out (section 123(4), PHW Act).

If required, an application for a warrant may be made to the Magistrates' Court to arrest a client who is the subject of an Examination and Testing Order. The warrant may specify conditions and the client detained under these circumstances must be informed at the time of arrest of the reasons for being arrested or detained (section 123, PHW Act).

Ongoing client management

The PNOs maintain direct client contact and communicate any directions from the Chief Health Officer. They may coordinate counselling services or other community services that are required, especially for clients with multiple and complex needs. The PNOs play a role in providing clients with information about their legal obligations and the processes involved, as well as supporting and reinforcing the required behavioural change. They report the client's progress to the Chief Health Officer and, when required, to the HIV Case Advisory Panel.

The five-stage approach

The five-stage approach uses a range of measures to manage a person living with HIV who puts others at risk. The initial stages in this approach are aimed at modifying behaviour with the voluntary participation of the client, while the latter involve coercive public health management powers vested in the Chief Health Officer under the PHW Act. Deciding which measures are appropriate is an ongoing process. This is done through regular contact with the client, with the agencies involved in the client's management and, where appropriate, with the professional making the notification.

If alternative effective measures are available to minimise the risk that a client poses to public health, the measure which is the least restrictive of the client's rights should be chosen (section 112, PHW Act). In exceptional circumstances and when required, the stages may be applied in a non-sequential order (see Figure 1).

Information is collected to assess the client's response to the interventions employed. This includes:

- Details of ongoing specific risk behaviours, such as unsafe sex or sharing of drug injecting equipment;
- Any evidence of HIV transmission;
- Assessment of social supports and welfare needs mental status and drug and alcohol dependency or use.

The PNOs, the Medical Advisor of the Partner Notification and Support Unit, or the Chair of the HIV Case Advisory Panel (see Stage 2), may liaise with treating clinicians or services to assess the prevailing risks or in developing or coordinating management plans to modify risk behaviours and address their underlying drivers.

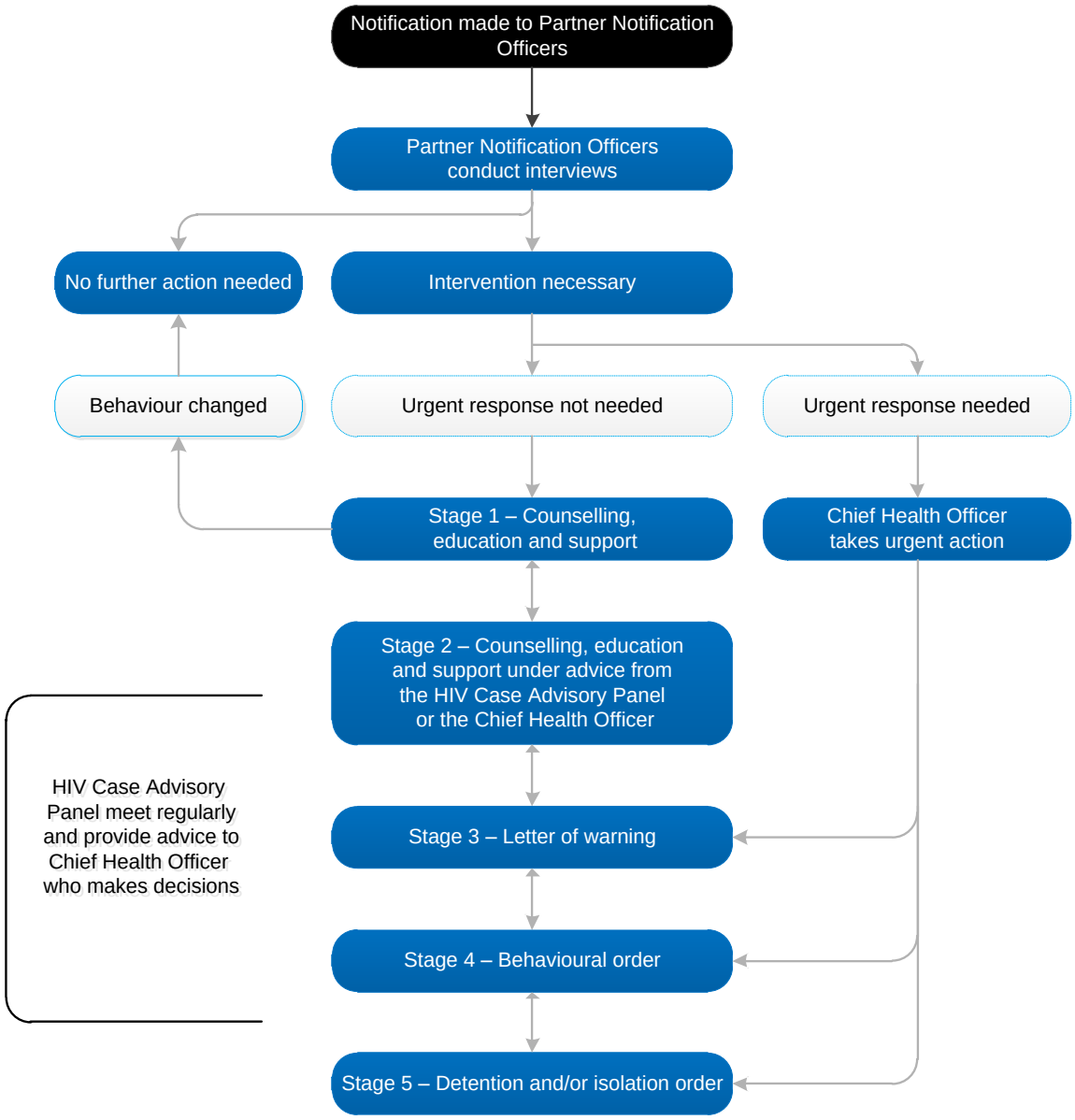
The decision to escalate the public health response to higher stages is made if there is an ongoing pattern of behaviour that puts others at risk of HIV infection. This may also be considered if there is an ongoing failure of the client to undertake the required actions to enable the Chief Health Officer to adequately monitor their risk. Isolation and detention is rarely required and is always a last resort.

At each stage of this process the following fundamental questions are considered:

- Have all voluntary options for the previous stage been exhausted?
- Have previous stages failed to modify behaviour and why?
- Do actions of this client continue to put others at risk of HIV infection?

During the five-stage approach, the PNOs maintain regular contact with the client. In practice, this may mean frequent visits until the client's management is stable.

Figure 1: The five-stage approach



Stage 1 – Counselling, education and support

Counselling, education and support are the first steps in the management of a person living with HIV who puts others at risk. Where possible, these services should be provided as extensions of services already provided, but more concentrated, specific and extensively resourced. Regular and intensive counselling should be encouraged and should be initially directed towards building a relationship that enables the counsellor to address the client's circumstances.

The PNOs play an important role in case coordination. In most instances they will have established a relationship with the client and will coordinate counselling services and specific interventions. Although the PNOs do not provide therapeutic counselling, they provide support and play a role in reinforcing appropriate behaviour.

All interventions are tailored to address the client's needs and take into account their age, health, socioeconomic status, cultural and linguistic background and level of social and cognitive functioning.

At this stage, the client voluntarily undertakes action to modify their behaviours and has no specific requirements placed upon them. The use of peer support and case conferences with other agencies will be undertaken as necessary.

During Stage 1, the PNOs provide support to the client's primary care provider and clarify if more specific intervention is required. Where required, the PNOs may assist in the referral of the client for:

- Counselling services to understand aspects of sexuality, improve skills around HIV status disclosure or negotiating safe sex, modify poor impulse control, or to help manage particular problematic behaviours;
- Support from peer based organisations;
- Access to condoms and safe injecting equipment;
- Medical, psychological, psychiatric, and drug and alcohol services;
- Housing or supported accommodation;
- Job training and placement;
- Training in budgeting and social skills;
- Financial assistance;
- Home care support such as shopping, cooking and cleaning.

If the client does not voluntarily engage with the PNOs in assessing and monitoring their risks, then the Chief Health Officer may require them to meet with the PNOs under the authority of a public health behavioural order (see Stage 4).

Stage 2 – Counselling, education and support under advice from the HIV Case Advisory Panel or the Chief Health Officer

The Chief Health Officer assesses the response to Stage 1 measures and if it is believed the client is not complying with these voluntary measures, or that the measures have not resulted in any meaningful or sustained behaviour change, then the Chief Health Officer may direct the PNOs to undertake further action or seek advice from the HIV Case Advisory Panel.

The HIV Case Advisory Panel

The HIV Case Advisory Panel ('the Panel') is made up of persons independent of the department. They are one source of advice that the Chief Health Officer considers when formulating actions to monitor evaluate and contain the risk clients pose to public health.

The Panel meets on a quarterly basis; however, it can be convened at any time at the request of the Chief Health Officer.

Panel members are appointed for three years and are eligible for reappointment. Specific groups may put forward names of people whom they believe would provide useful advice to the Chief Health Officer. Members are chosen to represent the interests of the community rather than simply to advocate on behalf of their organisation and all are required to sign a confidentiality agreement.

The Panel has the following members:

- Two persons living with HIV;
- Two medical practitioners (one hospital based, one community based) with infectious diseases experience;
- A psychiatrist;
- A health worker with mental health experience;
- A person with appropriate qualification in law;

Information on all clients who are being managed under these guidelines is presented to the Panel in a de-identified manner. Clients for whom the Chief Health Officer seeks advice (Stage 2 or above) are discussed in detail. An update is provided on all others at Stage 2 or above, while those at Stage 1 are listed for noting.

This Panel is free to raise any questions in relation to the management of clients and the Chair of the Panel may consider involving other professionals who may usefully inform the Panel's deliberations.

The Chief Health Officer attends the Panel meeting as an observer.

The Panel considers available and relevant medical or psychiatric assessments of the client.

The Panel's advice may outline one of the following options in relation to each case:

- That current measures continue;
- That current measures continue with the addition of further specific interventions;
- That current measures are inadequate and the client be moved to a higher stage;
- That there has been a positive response to the public health management and some measures may be relaxed or removed.
- That interventions have successfully resulted in sustained behaviour change and the client's file can be closed with no further involvement of the department.

The Panel's advice and any specific requirements of the client are recorded in the Panel minutes. The Chief Health Officer considers this advice, together with any other relevant information and advice, before making a decision on further action.

To maintain confidentiality, all clients are presented in a coded manner. If, however, a Panel member believes they may know the client being discussed, then this will be raised and consideration made by the Chair as to whether that member should remain in that portion of the meeting or be excused.

Stage 3 – Letter of warning

If it appears that the client is continuing to put others at risk of HIV infection despite previous counselling, education and support, or if the situation on first contact warrants it, the Chief Health Officer may issue a letter of warning. This letter advises the expectations of the Chief Health Officer, that persons with HIV take all reasonable steps to eliminate or reduce the risk of any other person contracting HIV.

In addition, the letter of warning describes the legal powers vested in the Chief Health Officer in certain specified circumstances (section 117, PHW Act) to impose public health orders and that such steps may be taken if the Chief Health Officer considers it necessary.

The PNOs deliver and read this letter to the client, using an interpreter where necessary; to ensure this formal communication from the Chief Health Officer is received and understood. The letter of warning is translated into the client's language when required.

Stage 4 – Public health orders (behavioural)

Where a client continues to put others at risk of HIV infection and it appears that all previous measures have been unsuccessful, the Chief Health Officer may consider issuing a public health order under section 117 of the PHW Act.

Public health orders that fall under Stage 4 (behavioural orders) include orders to:

- Participate in education or counselling;
- Undergo an assessment by a specified psychiatrist or specified neurologist;
- Refrain from carrying out certain activities;
- Refrain from specified forms of behaviour;
- Refrain from visiting a specified place or places;
- Reside at a specified place of residence at all times or during specified times;
- Notify the Chief Health Officer or a person nominated by the Chief Health Officer if there is a change in name or place of residence within three days of doing so;
- Submit to supervision by a person nominated by the Chief Health Officer by attending meetings, receiving visits or providing information relevant to the public health risk.

Such public health orders can be made for a period of up to six months from the day on which the order is made and must be proportionate to the risk that the client poses to public health (section 117(4), PHW Act).

The Chief Health Officer will review such orders at intervals of at least three months. The Panel may choose to be involved in more frequent reviews; however, the frequency of review depends on the individual circumstances of each case.

All clients at Stage 4 will be provided with information on the PHW Act, including their rights and entitlements under the Act and the process for review. They will be advised to seek legal advice and every effort will be made to ensure that the client understands the order, including, where required, using interpreters to explain the order and having the order translated into the person's first language.

The Chief Health Officer may review and extend an order by a written notice for a period not exceeding six months. The order may be extended as many times as the Chief Health Officer considers necessary (section 118(6), PHW Act).

The conditions included in a public health order may be varied by the Chief Health Officer and will have effect from the time the notice of variation is served on the client (section 118(4), PHW Act).

It is an offence for a client to not comply with a public health order made under section 117. The court may issue a fine up to 120 penalty units[3] regarding this offence (section 120, PHW Act).

Stage 5 - Public Health Orders (Detention and/or Isolation Orders)

If it appears that a client is repeatedly placing others at risk of HIV infection and is not complying with the requirements of their public health order (behavioural), the Chief Health Officer may issue an order that they be detained and/or isolated at a specific location (section 117(5)(k), PHW Act), in the interests of public health.

The Chief Health Officer will determine the appropriate facility and staff to best meet the needs of the client in detention and/or isolation.

Detention and isolation orders have the same legal requirements as behavioural orders detailed in the above section, namely:

- They can be made for a period of up to six months and must be proportionate to the risk that the client poses (section 117(4), PHW Act);
- The Chief Health Officer will review such orders at intervals of at least three months; however, the Panel may choose to be involved in more frequent reviews;
- Clients will be provided with information on the PHW Act, including their rights and entitlements under the Act and the process for review;
- Clients will be advised to seek legal advice;
- The Chief Health Officer may review and extend a detention and/or isolation order by a written notice for a period not exceeding six months. The order may be extended as many times as the Chief Health Officer considers necessary (section 118(6), PHW Act).
- It is an offence not to comply with a public health order and a court may issue a fine up to 120 penalty units regarding this offence (section 120, PHW Act).

If required, members of Victoria Police may use reasonable force to detain the client who is subject to such an order so as to take them to the place required under the order.

In addition, a warrant may be sought from the Magistrates' Court for police to arrest, detain and transport the client under a detention and/or isolation order to the required site. At the time of arrest, the client must be advised of the reason for this arrest and detention (section 123, PHW Act).

[3] 120 penalty points is $18,200 (as of 1 July 2015).

Review of public health orders

A public health order must be in writing and explain the client's rights and entitlements under the PHW Act, including their rights to seek legal advice and have the order reviewed.

Internal review by the Chief Health Officer

A client subject to a public health order can apply to the Chief Health Officer for a review of the order. This review must be conducted within seven days of receiving the application, at which time the Chief Health Officer will decide to revoke, vary or confirm the order (section 121, PHW Act).

Statement of reason and external review by the Victorian Civil and Administrative Tribunal (VCAT)

A client subject to a public health order has 28 days from the date of the order to request the Chief Health Officer to provide a written statement detailing the reasons why the order was made (section 122, PHW Act).

In addition, a client subject to a public health order may, at any time while the order is in force, apply to VCAT for a review of the Chief Health Officer's decision to make the order, in accordance with the VCAT Act (section 122, PHW Act).

Referral to the police

The majority of people who put others at risk can be managed in the public health system using the principles and powers outlined in these guidelines.

Some clients, however, may lack capacity to modify their behaviour due to cognitive impairment, mental illness or drug and alcohol use. Such clients are best managed under the PHW Act or, where appropriate, the *Mental Health Act 2014* or *Disability Act 2006*, thereby employing the full range of statutory powers and resources to contain the risks. Referral to Victoria Police in such a circumstance is not likely to be helpful in reducing the risk to the public.

Other clients may initially present as unwilling to change their behaviour. In these instances, intensive counselling and warnings regarding the consequences of their behaviours may result in the required behavioural changes. If not, escalation through progressively restrictive orders may be required. If, in spite of all interventions, the client continues to place others at risk, then referral to Victoria Police may be considered. Evidence of transmission would be one of the important factors to be considered in any referral to Victoria Police.

Any allegations of serious criminal behaviour identified by the department will trigger referral to Victoria Police. The triggers for such referrals include:

- Reasonable grounds for suspecting that a client has intentionally tried to infect others with HIV;
- Reasonable grounds for suspecting a serious criminal offence such as rape, child sexual abuse or involvement with child pornography.

Referrals would usually be made after consultation and advice from the Chair of the HIV Case Advisory Panel and the department's Legal Branch.