



# Determining whether to consent to HIV testing and treatment of HIV or AIDS related illnesses

The Public Guardian recognises there are significant social, psychological and legal implications associated with decision making in the areas of HIV testing and treatment for HIV or AIDS related illnesses. The Public Guardian is also aware of the possible discrimination, human rights violations and restrictive practice responses that may arise in relation to a positive HIV test result or a person suspected to be at risk of exposure to HIV. The Public Guardian is committed to working collaboratively with persons under guardianship and related stakeholders, to bring about outcomes that benefit persons under guardianship when making decisions in these areas.

This position statement:

- explains the legislative framework the Public Guardian operates within when making HIV-related decisions;
- outlines how this position statement relates to other policies and legislation in the HIV sector and;
- provides guidance about what information the Public Guardian requires prior to making a decision in these areas.

## RELEVANT LEGISLATION

### Commonwealth

Disability Discrimination Act 1992  
Equal Employment Opportunity Act 1987  
Privacy Act 1988  
Occupational Health and Safety Act 1991  
Sex Discrimination Act 1984

### New South Wales

Anti-Discrimination Act 1977  
Guardianship Act 1987  
Health Administration Act 1982  
Mental Health Act 1990  
Occupational Health and Safety Act 1983  
Privacy and Personal Information Protection Act 1998  
Property (Relationships) Act 1984 (Amended 1999)  
Public Health Act 1991

## POSITION STATEMENT

People under guardianship have the same right to access information about HIV-related testing and treatment that is available to other people in the community. It is the responsibility of the treating practitioner to determine whether a person under guardianship has capacity to provide informed consent to medical treatment. As with other medical decisions, if a treating practitioner is of the view a person under guardianship has the capacity to provide informed consent to HIV-related testing and treatment, the practitioner should advise the Public Guardian of this view prior to carrying out treatment.

A medical practitioner who believes a person under guardianship needs HIV testing or treatment is required to submit an application for consent to the Public Guardian when:

- the practitioner determines that a person under guardianship is incapable of providing informed consent to any proposed HIV-related testing or treatment, *and*
- the Public Guardian has a Medical and Dental Consent function.



Under Regulations of the *Guardianship Act 1987*, HIV testing is considered a 'major medical treatment'. HIV testing is therefore not defined as urgent medical treatment that may be carried out without consent or in an emergency situation. As such consent for HIV testing will not be given where a request for consent is made to the Public Guardian's after hours service. As a 'major medical treatment', applications for the Public Guardian's consent to HIV testing should be made, in writing, and provided to the Public Guardian during normal office hours.

Under Part 5 of the *Guardianship Act 1987*, consent to medical treatment, including HIV testing, only has effect if the treatment is carried out to promote and maintain the health and well-being of the person. Therefore the Public Guardian is unable to consent to HIV testing where the direct benefit of doing so belongs to a third party. This legislative position reflects the Principles that underline the Federal Government's National HIV Testing Policy.

## **FACTORS CONSIDERED BY THE PUBLIC GUARDIAN BEFORE MAKING A DECISION ABOUT HIV TESTING**

### **Views available**

- What are the person's views? Pre-test discussion between the treating practitioner and the person under guardianship is essential to determine the views of the person regarding HIV testing and disclosure of results. This may include identifying the views expressed by the person before he/she lost capacity.
- What approach did the treating practitioner take to explain the issues of testing and disclosure to the person having regard to his/her abilities?
- What are the views of the treating practitioner regarding the person's need for and benefit from HIV testing?

### **Information from service providers**

- Has the service provider developed an appropriate plan to support the person in the event the HIV testing result is either negative or positive?
- Support plans may include:
  - Consideration of the person's cultural and linguistic needs;
  - The person's access to a HIV specialist for pre- and post-test discussion;
  - A follow-up plan in the case of a negative result that addresses on-going educational needs of the person;
  - A proposed treatment plan in the case of a positive result;
  - Approach to care and treatment including any proposed restrictive practices or coercive strategies;
  - An assessment of the person's current supports including her/his emotional and/or advocacy support;
  - Information regarding who will advise the person and the Public Guardian about the test results, when and how;
  - Strategies for the prevention of inappropriate self-disclosure and support to assist the person to understand the consequence of this;
  - If required, the person's on-going specialist HIV management;
  - A commitment to continued service provision from the agency or individual responsible for the person's on-going care, and
  - Proposals for addressing the person's sexuality education needs.
- Does the service provider's policy on the management of confidential records include strategies to prevent inappropriate disclosure of HIV and AIDS related information to another person?



### Information from Treating Practitioner

- Does the person's illness remain undiagnosed despite extensive investigation?
- Do clinical indicators for HIV related illnesses exist?
- Has the treating practitioner clarified who will receive the test results, whether those results are positive or negative and who else, if anyone, will have access to these results? What evidence is there that a person may have been exposed to HIV?

### Other relevant issues

- Is there clear evidence that the person has had a high risk exposure to HIV? If so, advice can be sought from the Post Exposure Prophylaxis (PEP) Hotline 1800 737 669.
- HIV antibodies will not be detectable immediately after HIV infection as it can take up to three months for measurable quantities of HIV antibodies to be produced by the immune system. Consequently, a test taken during this three month "window period" may not be accurate and may indicate a negative result. To confirm the reliability of this result, a second test should be undertaken three months later. The results of both tests remain unreliable if a person has continued exposure to HIV through engaging in activities that may expose them to HIV.
- The Public Guardian considers issues of confidentiality and disclosure of information relating to HIV to be of major importance. The Public Guardian will view with caution any suggestion that anyone involved in the person's care has the right to know a person's HIV status and considers that all reasonable steps to prevent disclosure of the information to another person will be taken.

## CIRCUMSTANCES IN WHICH CONSENT MAY BE WITHHELD

### Duty of care

The Public Guardian is aware that no further or special precautions are required when working or living with a person who is HIV positive. Routine infection control procedures are advised. Requests for consent to HIV testing that arise from an organisation's infection control or occupational health and safety guidelines, are unlikely to demonstrate a benefit to the person under guardianship. In these cases consent will be withheld. When the Public Guardian declines consent to HIV testing on the grounds that there is no benefit to the client, it may be appropriate for those seeking consent to call the PEP Hotline and seek further advice about risk assessment and prophylactic treatment options. NSW Health maintains a policy directive, *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, recommending procedures in the event of exposure to blood and body fluids.

### "At risk" behaviours

The Public Guardian has an expectation that if a person under guardianship is presumed to be engaging in "at risk" behaviours, such as unsafe sex or intravenous drug use, then service providers will take all reasonable steps to support that person to minimise the potential negative consequences of such behaviours. For further information in this area, refer to the Office of the Public Guardian's Position Statement entitled *'Responding to proposals concerning a person living an "at risk" lifestyle'*. NSW Health maintains a policy directive, *HIV Infection Management of People Who Risk Infecting Others*, containing procedures for the protection of the public health where HIV-infected individuals are believed to be knowingly running the risk of infecting other people.

The Public Guardian considers that HIV testing and the related result, is not in itself an effective strategy to alter a person's "at risk" behaviours. Applications for consent to HIV



testing on these grounds are likely to be withheld unless there is sufficient evidence that the person has had a high-risk exposure to HIV.

## **OTHER RELATED POLICIES**

### **Office of the Public Guardian**

Determining whether to consent to an intervention and support plan concerning a person's behaviour

Determining whether to consent to proposed medical or dental treatment

Responding to proposals concerning a person living an 'at risk' lifestyle

Valuing the cultural, linguistic and religious background of the person under guardianship

### **Australian Government**

The National HIV/AIDS Strategy 2005 - 2008

National HIV testing Policy 2006

National Guidelines for the Management of People with HIV Who Place Others at Risk 2008

National Guidelines for Post Exposure Prophylaxis after Non – Occupational Exposure to HIV 2007.

Please note: For the latest Australian Government, Department of Health and Ageing Health publications please refer to the following link. [Department of Health and Ageing - Australian Government Department of Health and Ageing Action on HIV/AIDS](#)

### **NSW Health Department**

HIV/AIDS Strategy 2006-2009: Overview and Action Plan 2006-2009

HIV Antibody Testing – Counselling Guidelines 2005

HIV Confidentiality – A Guide to Legal Requirements 2005

HIV Infection Management of People Who Risk Infecting Others 2005

HIV, Hepatitis B and Hepatitis C - Management of Health Care Workers Potentially Exposed 2005

HIV, Hepatitis B or Hepatitis C - Health Care Workers Infected 2005

HIV Immunodeficiency Virus (HIV) – Management of Non-Occupational Exposure 2006.

Infection Control Policy 2007.

Please note: For the latest NSW Health Department publications please refer to the following link. [Policy Directives & Guidelines - NSW Department of Health](#)