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STANDING COMMITTEE ON LAW AND JUSTICE

Mandatory Disease Testing Bill 2020



Report 76

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Mandatory Disease Testing Bill 2020

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Terms of reference

That:

- (a) the provisions of the Mandatory Disease Testing Bill 2020 be referred to the Standing Committee on Law and Justice for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message from the Legislative Assembly,
- (c) the committee report by Wednesday 17 February 2021.¹

The terms of reference were referred to the committee by the Legislative Council on 17 November 2020.²

¹ The original reporting date was 17 February 2021 (*Minutes*, NSW Legislative Council, 17 November 2020, pp 1672-1674). The reporting date was later extended to 30 April 2021 (*Minutes*, NSW Legislative Council, 16 February 2021, p 1906).

² *Minutes*, NSW Legislative Council, 17 November 2020, pp 1672-1674.

Committee details

Committee members

The Hon Wes Fang MLC	The Nationals	<i>Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon Anthony D'Adam MLC	Australian Labor Party	
The Hon Scott Farlow MLC	Liberal Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Shayne Mallard MLC³	Liberal Party	
The Hon Taylor Martin MLC⁴	Liberal Party	
The Hon Rod Roberts MLC	Pauline Hanson's One Nation Party	
Mr David Shoebridge MLC	The Greens	

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³ The Hon Shayne Mallard MLC was a participating member from 23 November 2020 for the duration of the inquiry.

⁴ The Hon Taylor Martin MLC replaced the Hon Catherine Cusack MLC as substantive member of the committee from 15 March 2021.

Chair's foreword

The Mandatory Disease Testing Bill 2020 was introduced to Parliament in response to a rising trend of assaults and violent incidents encountered by police, correctional services and other frontline workers. These workers, performing roles that protect the community, may find themselves exposed, through a deliberate action against them, to another's blood and other bodily fluids. Such 'exposure incidents' generate fear of transmission of a blood-borne virus, and may lead to the worker undergoing a lengthy assessment and treatment process.

Unions representing police and correctional service workers are calling for mandatory disease testing as a way to provide some comfort, to these workers at a difficult time. Through this inquiry, the committee heard of the distress that 'exposure incidents' cause to workers, and indeed their families. Because of the time it takes for blood-borne viruses to show up in testing, workers cannot know with certainty whether they have contracted a blood-borne virus until six months after an incident. During this period they live with some uncertainty, and in some cases are being told to avoid contact with others for fear of passing on a disease.

Medical and legal professionals, on the other hand, raised questions about whether a mandatory disease testing scheme is necessary. This inquiry heard that risk of transmission of a blood-borne virus is low or non-existent in most situations faced by police and emergency workers, and that existing medical protocols following an incident would not be altered by knowledge of the third party's blood test result. Health professionals argued that the intention of this bill could be achieved through improved education about blood-borne viruses, and early access to best-practice medical treatment and counselling for workers.

Stakeholders in this inquiry were united in their concern for the health and wellbeing of frontline workers. They differed, though, in their views as to whether a mandatory disease testing scheme is likely to achieve its intended outcomes. The first part of this report outlines the arguments for and against a mandatory disease testing scheme as a way of protecting frontline workers. It highlights how there is a delicate balance of rights to observe – between the bodily autonomy and privacy of the third party, and the wellbeing of the affected worker. The second part of this report examines some specific concerns raised by stakeholders about the drafting of the bill, such as a need to ensure adequate protection for children and vulnerable people, effective oversight and review processes. The committee recommends that issues canvassed in this report be considered during debate in the House on this bill.

As Chair, I would like to thank my fellow committee members for their contributions to this inquiry. I would also like to thank all the inquiry participants who gave evidence. Their considered engagement with this inquiry provides important information to inform debate on this bill in the House.



The Hon Wes Fang MLC
Committee Chair

Recommendations

Recommendation 1

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That the Legislative Council proceed to debate the Mandatory Disease Testing Bill 2020, and that the concerns identified by stakeholders as set out in this report be addressed during debate in the House.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 17 November 2020.

The committee received 28 submissions.

The committee held two public hearings at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including transcripts of evidence, submissions, answers to questions on notice and correspondence relating to the inquiry.

Chapter 1 Overview

This chapter outlines the background and purpose of the Mandatory Disease Testing Bill 2020, and provides an overview of the bill's provisions.

Reference

- 1.1 The Mandatory Disease Testing Bill 2020 was introduced into the Legislative Assembly on 11 November 2020 by the Hon David Elliot MP, Minister for Police and Emergency Services. It was passed by the Legislative Assembly on 18 November 2020 with one amendment.⁵
- 1.2 The Legislation Review Committee's consideration of the bill raised a number of issues that it recommended Parliament consider.⁶ The Legislative Council's Selection of Bills Committee recommended that the bill be referred to the Standing Committee on Law and Justice.⁷ On 17 November 2020, the Legislative Council resolved to refer the bill to the Law and Justice Committee for inquiry and report by 17 February 2021.⁸ The reporting date was later extended to 30 April 2021.⁹

Background and purpose of the bill

- 1.3 This bill seeks to establish a mandatory disease testing scheme to assist frontline workers exposed to a risk of transmission of a blood-borne virus in the course of their duties by the deliberate action of a third party.¹⁰
- 1.4 According to the Minister for Police and Emergency Services, the bill's purpose is to provide some comfort to police and correctional service officers, emergency service personnel, and other frontline workers such as healthcare professionals, who may be exposed in their work to incidents in which they have contact with others' bodily fluids. Exposure to bodily fluids may give rise to the risk of transmission of HIV, Hepatitis B or Hepatitis C, which have window periods of three to six months during which the disease is present in the body but antibodies cannot be detected with confidence. The waiting period after an exposure incident can generate significant stress and anxiety for affected workers and their families. This scheme aims to reduce the stress and anxiety that police, corrections, and emergency workers may experience waiting for test results following an interaction which places them at risk of transmission of a blood-borne disease.¹¹

⁵ *Votes and Proceedings*, NSW Legislative Assembly, 18 November 2020, pp 1012-1013.

⁶ Legislation Review Committee, Parliament of NSW, *Legislation Review Digest No 24 of 57*, 17 November 2020, pp 26-32.

⁷ Selection of Bills Committee, NSW Legislative Council, *Report No 41*, 17 November 2021, p 2.

⁸ *Minutes No 69*, NSW Legislative Council, 17 November 2020, p 1658.

⁹ *Minutes No 74*, NSW Legislative Council, 16 February 2021, p 1906.

¹⁰ Submission 27, NSW Police Force, p 3.

¹¹ Submission 27, NSW Police Force, p 3.

- 1.5** The proposal for a mandatory disease testing scheme originates from a submission made by the Police Association of NSW to the 2017 Inquiry into Violence Against Emergency Services Personnel, conducted by the NSW Legislative Assembly Law and Safety Committee.
- 1.6** In its submission to that inquiry, the Police Association of NSW proposed mandatory disease testing of people whose bodily fluids come into contact with police officers and emergency services personnel in certain circumstances. This proposal was based on the stress that emergency services personnel experience waiting for test results following an interaction that could lead to infection with a serious disease like HIV or Hepatitis.¹²
- 1.7** The Legislative Assembly Law and Safety Committee recommended that:
- The NSW Government consider introducing legislation to allow mandatory disease testing of people whose bodily fluids come into contact with police and emergency services personnel, in consultation with affected stakeholders.¹³
- 1.8** Accompanying this recommendation was a finding that stated:
- Under any legislative scheme, the power to conduct mandatory testing should only be able to be enlivened in circumstances where there is a risk of transmission of listed diseases. The legislation should clearly define the factual circumstances in which there is a risk of transmission of listed diseases and this definition should be based on up to date medical evidence.¹⁴
- 1.9** The Law and Safety Committee's report noted that the proposal raised complex issues and required further consultation with all stakeholders, including health, legal and privacy experts. It also noted that any legislation would require careful drafting so that the powers could only be used in cases where there is a real risk of transmission of a listed disease, based on up to date evidence. It also noted stakeholder concerns that the proposal did not accord with up to date medical evidence about the way blood-borne viruses are transmitted, and that mandatory testing would not alleviate concerns of emergency services personnel who fear they have contracted infectious disease.¹⁵
- 1.10** The Law and Safety Committee also suggested a number of issues be addressed during consultation with affected stakeholders on the development of any legislative scheme, including:
- whether any testing power should be able to be enlivened by possible exposure itself, or whether the power should only be able to be triggered against a person who had first committed an offence
 - who should be able to make a decision to enliven any testing power

¹² Standing Committee on Law and Safety, NSW Legislative Assembly, *Violence Against Emergency Services Personnel*, August 2017, p 81.

¹³ Recommendation 7, Standing Committee on Law and Safety, *Violence Against Emergency Services Personnel*, August 2017, p 81.

¹⁴ Standing Committee on Law and Safety, *Violence Against Emergency Services Personnel*, August 2017, p 81.

¹⁵ Standing Committee on Law and Safety, *Violence Against Emergency Services Personnel*, August 2017, p 82.

- any operational guidelines and procedures to underpin the legislation
- whether there should be oversight of decisions, for example, any right of appeal to a court against an order for mandatory testing.¹⁶

1.11 The report also noted that guidance could be sought from the experience of other Australian jurisdictions where mandatory testing legislation exists, namely Queensland, South Australia and Western Australia.¹⁷

1.12 The NSW Government responded to the Law and Safety Committee's report by stating that it supported the recommendation for consideration of mandatory disease testing legislation. It also announced the intention to convene a cross-agency working group to draft an options paper, and consider stakeholder submissions.¹⁸

Overview of the bill's provisions

1.13 The proposed scheme applies to prescribed workers of the NSW Police Force, Corrective Services NSW, Youth Justice NSW, Fire and Rescue NSW, the NSW Rural Fire Service, the State Emergency Services, NSW Ministry of Health, the Office of the Sheriff, the NSW Ombudsman, the Office of the Inspector of Custodial Services, Official Visitors and St John Ambulance Australia (NSW).¹⁹

1.14 **Part One** of the bill sets out the purpose of the proposed Act (Clause 3), and defines a mandatory testing order (Clause 5).²⁰

1.15 **Part Two** of the bill sets out the process for a worker to apply for a mandatory testing order. It provides that a worker who has had contact with a third party's bodily fluid while at work must apply for a mandatory testing order within five business days after the incident (Clause 7). The worker must also consult with a medical practitioner with qualifications or experience in blood-borne disease before making the application (Clause 8).²¹

1.16 **Part Three** of the bill sets out the process for determination of an application for a mandatory disease testing order. It states that an application for a mandatory testing order will be decided by a senior officer within three business days (Clause 10). If it appears to the senior officer that the third party is a 'vulnerable third party', the senior officer may decide to apply to a court for a mandatory testing order, or refuse the application. If it does not appear to the senior officer that the third party is a 'vulnerable third party', the senior officer may make a mandatory testing order or refuse the application.²²

¹⁶ Standing Committee on Law and Safety, *Violence Against Emergency Services Personnel*, August 2017, p 84.

¹⁷ Standing Committee on Law and Safety, *Violence Against Emergency Services Personnel*, August 2017, p 85.

¹⁸ NSW Government Response to Recommendations from the Standing Committee on Law and Safety report, *Violence Against Emergency Services Personnel*, tabled 8 February 2018, p 14.

¹⁹ Submission 27, NSW Police Force, p 3.

²⁰ Explanatory Note, Mandatory Disease Testing Bill 2020, p 2.

²¹ Explanatory Note, Mandatory Disease Testing Bill 2020, p 2.

²² Explanatory Note, Mandatory Disease Testing Bill 2020, p 3.

- 1.17** A 'vulnerable third party' is defined as a person who is at least 14 years of age but under 18 years of age, or who is suffering from a mental illness or mental condition or is cognitively impaired, in a way that affects capacity to consent to voluntary testing.²³
- 1.18** **Part Four** of the bill sets out a process for applying for and deciding applications for mandatory testing of vulnerable third parties. It provides that a senior officer may apply to the Children's Court or Local Court as appropriate for a mandatory testing order (Clause 13).²⁴ The Court may only make a mandatory testing order if satisfied that, on the balance of probabilities, testing the vulnerable third party is justified in the circumstances, taking into account a range of factors (Clause 14).²⁵
- 1.19** **Part Five** of the bill sets out the information that must be contained in a mandatory testing order, and provides that a mandatory testing order must be personally served on the relevant third party within five business days after the order is made.²⁶
- 1.20** **Part Six** sets out procedures to be followed in carrying out mandatory testing. It authorises a person of a class approved by the Secretary of Health to take blood from a third party under a mandatory testing order, even if the third party does not consent. The third party's blood is required to be tested in an accredited pathology laboratory (Clause 19). It gives functions to police and correctional officers in relation to taking blood from a third party who is in custody, including use of 'reasonable force' (Clause 20). It requires a pathology laboratory carrying out blood testing under a mandatory testing order to provide the blood test results to the worker's authorised medical practitioner and the third party concerned (Clause 21).²⁷
- 1.21** **Part Seven** sets out a review process for decisions made by senior officers under the Act. It provides that a worker and a third party may apply to the Chief Health Officer for a review of a decision by a senior officer in certain circumstances (Clause 22). It provides that a mandatory testing order made by a senior officer continues to have effect until a review is determined by the Chief Health Officer (Clause 23). It requires the Chief Health Officer to determine a review within three business days, to provide the third party or their guardian an opportunity to make submissions (Clause 24), and to notify the parties of the results of a review (Clause 25).²⁸
- 1.22** **Part Eight** creates certain offences and penalties, in relation to a failure, without reasonable excuse, to comply with a mandatory testing order (Clause 26), the provision of false or misleading information (Clause 27) and disclosure information (Clause 28). The maximum penalty for all three offences is 100 penalty units (currently \$11,000) or 12 months' imprisonment, or both.²⁹

²³ Explanatory Note, Mandatory Disease Testing Bill 2020, p 3.

²⁴ Explanatory Note, Mandatory Disease Testing Bill 2020, p 3.

²⁵ Explanatory Note, Mandatory Disease Testing Bill 2020, p 3.

²⁶ Explanatory Note, Mandatory Disease Testing Bill 2020, p 3.

²⁷ Explanatory Note, Mandatory Disease Testing Bill 2020, p 4.

²⁸ Explanatory Note, Mandatory Disease Testing Bill 2020, p 4.

²⁹ Explanatory Note, Mandatory Disease Testing Bill 2020, p 4.

- 1.23** **Part Nine** sets out certain details in relation to administration of the Act. It requires the Chief Health Officer to issue guidelines to assist medical practitioners who consult with workers who make an application for a mandatory testing order and persons taking blood from third parties under mandatory testing orders (Clause 32). It requires costs associated with a mandatory testing order to be paid by the funding provider for the worker concerned (Clause 33).³⁰
- 1.24** **Part Ten** establishes an oversight role for the NSW Ombudsman to monitor and report on the operation and administration of the proposed Act, and requires the responsible Minister to review the Act as soon as practicable after the Ombudsman's first report. (Clauses 35 and 36).³¹

³⁰ Explanatory Note, Mandatory Disease Testing Bill 2020, p 4.

³¹ Explanatory Note, Mandatory Disease Testing Bill 2020, p 4.

Chapter 2 Key issues

This chapter outlines opposing views on the need for a mandatory disease testing scheme to protect frontline workers. It then explores some other issues that arose during the inquiry, including the impact of the bill on marginalised groups and whether the scheme could lead to unintended consequences, impacting efforts to combat blood-borne viruses in the community. The chapter then turns to specific drafting issues in the bill, and calls for greater clarity, procedural fairness, safeguards and oversight in relation to the legislation. Finally, the chapter considers other measures that could be used to promote the wellbeing of frontline workers in incidents where they may be exposed to a blood-borne virus.

Will a mandatory disease testing scheme protect frontline workers?

- 2.1** The main issue of contention in this inquiry was whether a mandatory disease testing scheme would benefit the frontline workers it is intended to help. The NSW Police Force, Police Association of NSW and Public Service Association of NSW all supported the establishment of a mandatory disease testing scheme as a way to support frontline workers, including police, correctional officers and emergency service workers, given the fears and stress they experience when exposed to bodily fluids during incidents.³²
- 2.2** By contrast, a majority of other stakeholders involved in this inquiry opposed the bill, arguing that mandatory disease testing is unlikely to provide real assistance to workers and would instead lead to a number of unintended consequences. Those opposed to the bill, predominantly health professional bodies and advocacy organisations, promoted the wellbeing of frontline workers, but argued that mandatory disease testing of third parties is not needed to provide effective treatment to workers, and could be counterproductive, by increasing fear and undermining public health approaches to combat blood-borne viruses.³³

Protecting the health and safety of frontline workers

- 2.3** This bill comes forward in the context of a growing number of assaults on police and corrective service workers in the course of their duties. The NSW Bureau of Crime Statistics and Research recorded 2,537 incidents of assault on police in 2019-2020. In 490 incidents, police employees were exposed to bodily fluids, including 69 bites and 29 needlestick injuries.³⁴
- 2.4** There is also a trend of increased assaults and the use of force in New South Wales prisons over the last six years, with assaults rising from 53 in 2014-15 to 250 in 2019-20, and incidents involving the use of force rising from 1,253 in 2014-15 to 2,243 in 2019-20. According to the Public Service Association of NSW, over the past three years there were 448 recorded incidents

³² Submission 27, NSW Police Force; Submission 20, Police Association of NSW; Submission 17, Public Service Association of NSW.

³³ See, for example, Submission 19, Australian Medical Association (NSW); Submission 14, ACON; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine; Submission 3, Law Society of NSW.

³⁴ Submission 27, NSW Police Force, p 6.

of officers being exposed to bodily fluids, including saliva, blood, semen, faeces and urine, including 32 needle stick injuries.³⁵

- 2.5** Exposure to bodily fluids can lead to long treatment plans to reduce the risk of contracting disease. Workers can get tested for infectious diseases, but HIV, Hepatitis B and Hepatitis C may not immediately show in the test results due to 'window periods' where the virus may be present, but not detected in tests. This can mean there is a period of several months in which workers do not know if they have contracted a disease. The Police Association of NSW said that police officers involved in an exposure incident are required to undergo 3-6 months of testing, and in some cases are being told to alter their behavior, for example, to avoid intimate contact and delay trying to start a family. Workers potentially exposed to HIV may be required to take a 28 day course of medication, known as post-exposure prophylaxis.³⁶
- 2.6** Mandatory disease testing aims to provide information about the source's disease status to inform the exposed worker's risk assessment and treatment. The Police Association of NSW said this bill would help frontline workers by 'providing valuable information to the risk assessment processes that emergency service workers must go through', and, 'if the test is negative, alleviating fear and anxiety as much as possible'.³⁷ The Police Association of NSW further noted that NSW Health's Policy Directive for health workers involved in exposure incidents (discussed at paragraph 2.30) recommends testing of the source patient to inform the need for continuation of post-exposure prophylaxis.³⁸
- 2.7** Uncertainty about the risk of disease transmission can cause significant distress to frontline workers. The NSW Police Force, Police Association of NSW and Public Service Association of NSW all highlighted the impact of exposure incidents on the mental health of workers and their families, including issues of stress and anxiety. They suggested that alleviating workers' stress and anxiety is a key driver for this bill.³⁹
- 2.8** Mr Malcolm Lanyon, Deputy Commissioner for Corporate Services, NSW Police Force, said, even in cases where there is negligible risk of actual disease transmission from the type of exposure (such as a spitting incident), the bill assists police officers deal with 'the psychological harm that attaches to that act'.⁴⁰ The Public Service Association of NSW noted high rates of post-traumatic stress disorder and other mental health issues among correctional service officers, with significant numbers of correctional service officers making claims for workers compensation due to exposure to violence.⁴¹

³⁵ Submission 17, Public Service Association of NSW, p 9.

³⁶ Submission 20, Police Association of NSW, p 3; See also Submission 27, NSW Police Force, p 5.

³⁷ Submission 20, Police Association of NSW, p 4.

³⁸ Submission 20, Police Association of NSW, p 3.

³⁹ Submission 20, Police Association of NSW, p 5; Submission 17, Public Service Association of NSW, p 3; Submission 20, Police Association of NSW, p 3. See also, Evidence, Mr Patrick Gooley, Secretary, Police Association of NSW, 11 February 2021, pp 2 and 8; Evidence, Mr Stewart Little, General Secretary, Public Service Association of NSW, 11 February 2021, p 3.

⁴⁰ Evidence, Mr Malcolm Lanyon, Deputy Commissioner for Corporate Services, NSW Police Force, 12 February 2021, p 7.

⁴¹ Submission 17, Public Service Association of NSW, p 11.

Prevalence and risk of transmission of blood-borne viruses

- 2.9** Health and medical experts involved in the inquiry contended that calls for a mandatory disease testing scheme reflect exaggerated fears and misunderstandings about the prevalence and transmission risk of HIV and Hepatitis B and C.⁴²
- 2.10** The Australian Medical Association (NSW) noted that all three diseases have relatively low prevalence in the community and have specific transmission pathways which mean the risk of transmission in most situations encountered by police and emergency services personnel is low.⁴³
- 2.11** In relation to HIV, the committee received evidence that:
- community prevalence of HIV in Australia is 0.14 per cent, with 80 per cent of those with HIV having a suppressed viral load due to treatment, meaning they pose a 'virtually 0 per cent' risk of transmission⁴⁴
 - HIV is not easily transmitted, and is not transmitted through saliva, whether or not it contains blood⁴⁵
 - there have been no published cases of HIV transmission in Australia through spitting or biting, and no cases of occupational transmission since 2002.⁴⁶
- 2.12** The evidence on Hepatitis B and C was that:
- community prevalence is low, with estimated prevalence of Hepatitis B at 1 per cent and Hepatitis C at 0.6 per cent of the New South Wales population⁴⁷
 - neither Hepatitis B nor C can be transmitted through saliva⁴⁸
 - Hepatitis C generally requires a large exposure to blood for transmission, with no infections reported with mucous membrane or intake skin exposure⁴⁹

⁴² For example, Evidence, Dr Nicholas Medland, President, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, 11 February 2021, p 16; Evidence, Dr Nicholas Parkhill, Chief Executive Officer, ACON, 11 February 2021, p 17; Evidence Professor Grulich, Head, HIV Epidemiology and Prevention Program, The Kirby Institute, UNSW Sydney, 11 February 2021, p 27; Evidence, Dr Danielle McMullen, President, Australian Medical Association (NSW), 11 February 2021, pp 32-33. See also Submission 2, Centre for Social Research in Health; Submission 9, Hepatitis NSW; Submission 15, Seear et al.

⁴³ Submission 19, Australian Medical Association (NSW), p 2.

⁴⁴ Submission 19, Australian Medical Association (NSW), p 2.

⁴⁵ Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 4; Evidence, Professor Anthony Grulich, Head, HIV Epidemiology and Prevention Program, The Kirby Institute, UNSW Sydney, 11 February 2021, p 26.

⁴⁶ Submission 19, Australian Medical Association (NSW), p 2. See also Supplementary Evidence, ACON, 11 February 2021: NAPHW 2019, *The System is Broken: Audit of Australia's Mandatory Disease Testing Laws*, p 10.

⁴⁷ Submission 9, Hepatitis NSW, p 5.

⁴⁸ Submission 9, Hepatitis NSW, p 5; Evidence, Professor Grulich, 11 February 2021, pp 27-28.

⁴⁹ Submission 19, Australian Medical Association (NSW), p 2; Evidence, Professor Grulich, 11 February 2021, pp 27-28.

- a vaccine for Hepatitis B has been available since 1986 and since 2000, New South Wales has had a comprehensive infant vaccination program⁵⁰
- police officers and paramedics in NSW are required to have a Hepatitis B vaccination on recruitment, making chance of transmission very low⁵¹
- there is no vaccine for Hepatitis C, but there has been a cure available since 2016, which is successful in 95-98 per cent of cases, and takes 8 to 12 weeks. This has led to decreased prevalence of Hepatitis C.⁵²

2.13 The Australian Medical Association (NSW) submitted that, taking into account the prevalence rates and transmission pathways of the specified diseases, the probability of police and emergency services being exposed to all three diseases is low:

The risk of exposure of a blood-borne virus can be calculated by multiplying the risk of transmission with the likelihood of a source having a blood-borne virus. Both of these probabilities are low in the scenarios police and emergency services personnel face.⁵³

2.14 For correctional officers, however, a potentially elevated risk of blood-borne virus transmission in prisons was put forward as one justification for the bill. The Public Service Association of NSW submitted that prisons are known to be a high risk setting for blood-borne virus transmission, placing both inmates and workers at increased risk of exposure. In particular, it suggested that the prevalence of Hepatitis C was between thirty to forty times higher among inmates compared to the general community.⁵⁴

2.15 In terms of data provided on this point, the Justice Health and Forensic Mental Health Network provided a number of estimates of prevalence of Hepatitis C among correctional centre inmates over the last four years, ranging from 10 to 15 per cent. Justice Health advised that 147 inmates have been confirmed as having contracted Hepatitis C in custody since 2017. It also noted that the prevalence of people living with Hepatitis C in prisons is now likely much lower than previously, due to an increase in treatment in correctional centres and the community.⁵⁵

2.16 Justice Health gave information about a number of programs designed to reduce prevalence of blood-borne viruses in NSW prisons, including a Hepatitis in Prisons Elimination Program. NSW Health noted the Hepatitis in Prisons Elimination Program, conducted between 2017 and 2019, virtually eliminated Hepatitis C from 12 participating correctional centres. NSW Health

⁵⁰ Submission 9, Hepatitis NSW, p 5.

⁵¹ Submission 19, Australian Medical Association (NSW), p 2.

⁵² Submission 9, Hepatitis NSW, p 5; Submission 19, Australian Medical Association (NSW), p 2; Answers to questions on notice, Dr Michelle Cretikos, Executive Director, COVID-19 Response, Population and Public Health, NSW Health, 3 March 2021.

⁵³ Submission 19, Australian Medical Association (NSW), p 2.

⁵⁴ Submission 17, Public Service Association of NSW, p 8. This estimate of Hepatitis C prevalence in prisons comes from a Kirby Institute survey done in 2017, Answers to questions on notice, Mr Little, 5 March 2021.

⁵⁵ Correspondence, Justice Health and Forensic Mental Health Network, received 26 February 2021.

further advised that there have been no incidents of Hepatitis C transmission to correctional centre staff, that it is aware of, since at least 2016.⁵⁶

- 2.17** For Hepatitis B, Justice Health did not provide specific incidence or prevalence data, but did note that it manages a Hepatitis B vaccination program. It further noted that all new-to-custody inmates undergo a reception screening assessment, and, if identified as at risk of blood-borne viruses, are tested (with consent) for HIV, Hepatitis B and Hepatitis C.⁵⁷
- 2.18** Figures provided by Justice Health showed that the prevalence of HIV in NSW correctional facilities is very low, with only one in 2,969 inmates testing positive to HIV in a 2 year period, suggesting a prevalence of 0.03%. NSW Health said that, as all known HIV positive inmates are on treatment, there is almost no risk of HIV transmission to another person.⁵⁸ The Public Service Association of NSW also acknowledged that HIV is rare among inmates, and transmission is extremely rare.⁵⁹
- 2.19** Relevant to the prevalence and risks associated with the transmission of blood-borne viruses, the committee also explored how many 'exposure incidents' reported by police and corrective services might be captured by the proposed mandatory testing scheme, and how many incidents might pose an actual risk of transmission of a blood-borne virus.
- 2.20** This was an area, however, where there seemed to be a paucity of data. The NSW Police Force and Corrective Services NSW provided data on the numbers of assaults and certain types of exposure incidents, however it was not clear how many of these involved 'deliberate' acts causing blood-to-blood exposure of a type that could cause disease transmission.⁶⁰ Ms Gayle Robson, Office of the Commissioner, Corrective Services NSW, explained that the data from Corrective Services NSW does not distinguish between possible exposure to a blood-borne virus and infection with a blood-borne virus, and that privacy considerations mean an officer is not required to disclose if they have contracted a virus.⁶¹
- 2.21** Research on mandatory disease testing schemes operating in other Australian states also noted difficulties experienced by the researchers collecting data.⁶² Dr Bruce Arnold, Assistant Professor, Law, University of Canberra, noted:

⁵⁶ Correspondence, Justice Health and Forensic Mental Health Network, received 26 February 2021; Answers to questions on notice, Dr Cretikos, NSW Health, 3 March 2021.

⁵⁷ Correspondence, Justice Health and Forensic Mental Health Network, received 26 February 2021.

⁵⁸ Correspondence, Justice Health and Forensic Mental Health Network, received 26 February 2021; Answers to questions on notice, Dr Cretikos, NSW Health, 3 March 2021, p 1.

⁵⁹ Submission 17, Public Service Association of NSW, p 8.

⁶⁰ For example, Evidence, Ms Robson, 12 February 2021, pp 19-20; Evidence, Mr Lanyon, 12 February 2021, p 2.

⁶¹ Evidence, Ms Robson, 12 February 2021, pp 19-20; Answers to questions on notice, Ms Robson, Corrective Services NSW, 4 March 2021.

⁶² Supplementary evidence, ACON, 11 February 2021; NAPHLA 2019, *The System is Broken: Audit of Australia's Mandatory Disease Testing Laws*, p 14.

What we do not have – and should be seeking as the basis for fact-based policy making and evaluation – is comprehensive data regarding the number of exposure incidents, the number of mandatory tests, the demographics of people who deliberately engaged in exposure and the number of people whose health was compromised through deliberate exposure.⁶³

Usefulness of knowing a third party's test result

- 2.22** Proponents of the bill argued that knowing the third party's blood-borne virus status is useful to guiding the medical care of a worker immediately following an exposure incident.
- 2.23** Representatives from the NSW Police Force and Police Association of NSW said that knowing the disease status of the third party may reduce the exposed worker's need to take prophylactic medications, minimising potential side effects and organ damage. They also contended that it would reduce the need for workers to make behavioral changes to avoid passing on any disease.⁶⁴
- 2.24** In addition, these stakeholders referenced NSW Health's Policy Directive on the management of healthcare workers potentially exposed to blood-borne viruses as evidence of the need to test the source person in an exposure incident.⁶⁵ The Policy Directive states: 'Following occupational exposures that carry a risk of blood-borne virus transmission, officer/s conducting the risk assessment should seek information on the blood-borne virus status of the source patient as soon as is practicable'. The guidelines also state: 'Informed consent for the testing must be obtained from the source patient ... If the patient does not provide consent, testing cannot occur'.⁶⁶
- 2.25** However, health representatives disagreed that testing the third party is necessary to guide the medical care provided to the exposed worker. The Australian Medical Association (NSW) was of the view that knowing the test result of the third party would not change the medical treatment of an officer, at least in the early phase following an exposure incident.⁶⁷ It stated that: '...testing of the source persons (whether that be mandatory or voluntary) does not alter the initial management of a potential blood-borne virus exposure'.⁶⁸
- 2.26** The Australian Medical Association (NSW) noted that post-exposure prophylaxis for HIV must commence within 72 hours of exposure, continuing for 28 days. As such, the course of post-exposure prophylaxis would be close to finished by the time a third party's blood results were known, under the procedures outlined in this bill.⁶⁹

⁶³ Submission 16, Dr Bruce Baer Arnold, Assistant Professor of Law, University of Canberra, p 2.

⁶⁴ Evidence, Mr Lanyon, 12 February 2021, p 2; Evidence, Mr Gooley, 12 February 2021, p 12.

⁶⁵ NSW Health, *Policy Directive: HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 4 May 2017, cited in Submission 20, Police Association of NSW, pp 6 and 9-10; Evidence, Mr Gooley, 11 February 2021, pp 2, 9 and 12.

⁶⁶ NSW Health, *Policy Directive: HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 4 May 2022, p 5.

⁶⁷ Submission 19, Australian Medical Association (NSW) pp 2-4; See also Submission 13, Australasian Society for Infectious Disease, p 1; Submission 12, HIV/AIDS Legal Centre p 13.

⁶⁸ Submission 19, Australian Medical Association (NSW), p 2.

⁶⁹ Submission 19, Australian Medical Association (NSW), p 3.

- 2.27** Dr Nicholas Medland, President, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, noted that a decision to put a patient on post-exposure prophylaxis is based on exposure risks, and that, while there may be some side effects, liver and kidney damage from taking a medication for 28 days would be 'extremely rare'.⁷⁰ He also noted that, because the bill includes types of exposure that pose no transmission risk, in many of the incidents potentially covered by this bill there would be no requirement for post-exposure prophylaxis.⁷¹
- 2.28** Mr Steven Drew, Chief Executive Officer, Hepatitis NSW, said that testing a source for Hepatitis B or C would have no impact on the medical treatment of an officer, especially for a spitting incident, which carries no risk of transmission. He noted that most frontline workers are vaccinated against Hepatitis B, and hence immune from transmission, and that, while chances of blood-to-blood transmission for Hepatitis C are higher, there is now a cure.⁷²
- 2.29** The Australian Medical Association (NSW) also advised that, for an unvaccinated worker, Hepatitis B post-exposure prophylaxis is initiated regardless of whether the source is positive, and needs to be given within 7 days, hence would not likely be affected by the process outlined in this bill.⁷³
- 2.30** Given these views, the committee questioned Dr Michelle Cretikos, Executive Director, COVID-19 Response, Population and Public Health, NSW Health, on why NSW Health's Policy Directive calls for testing of the source patient. Dr Cretikos stated that this is one of several considerations that may inform the management of people who have been exposed to blood-borne viruses, as it may provide some additional information, although it is unlikely to inform immediate management.⁷⁴
- 2.31** In terms of medical care for the potentially exposed worker, Dr Cretikos also noted:
- in all cases of occupational exposure to bodily fluids, it is important that the affected worker has rapid access to an appropriate health professional with experience managing blood-borne viruses, in order for a risk assessment to be conducted and appropriate management immediately commenced
 - a first step would be to determine whether there was, in fact, a risk of transmission based on the type of injury, body fluid, and a range of risk factors that may or may not be known about the source, with judgement about this being made by an appropriately trained and experienced practitioner
 - there are many circumstances involving bodily fluid exposure where there is no risk of transmission, meaning no further action would be required (such as testing the source patient, or behavior change on the part of the affected worker)

⁷⁰ Evidence, Dr Medland, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, 11 February 2021, p 19.

⁷¹ Evidence, Dr Medland, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, 11 February 2021, pp 16 and 19.

⁷² Evidence, Mr Steven Drew, Chief Executive Officer, Hepatitis NSW, 11 February 2021, p 11.

⁷³ Submission 19, Australian Medical Association (NSW), p 3.

⁷⁴ Evidence, Dr Cretikos, 12 February 2021, pp 23-24.

- knowing the virus status of the source may not affect the immediate management of the exposed person. In situations where there is a high-risk exposure, post-exposure prophylaxis must be taken immediately, and the blood-borne virus status of the source cannot be known confidently in this timeframe
- in cases where there is an exposure risk, NSW Health's practice is to obtain all information where possible, but only with the consent of the source patient.⁷⁵

2.32 Given the medical evidence, health professionals were of the view that existing policies, guidelines and procedures are sufficient in providing for appropriate, evidence-based treatment of workers exposed to a blood-borne virus, without requiring a mandatory blood test of a third party. Generally, these stakeholders contended that the best way to promote the health and wellbeing of frontline workers is to ensure immediate access to a qualified health practitioner who can provide evidence-based advice, counselling and support after an exposure incident, along with commencement of recommended aftercare treatment such as post-exposure prophylaxis.⁷⁶

Providing comfort to workers

2.33 Proponents of the bill contended that mandatory disease testing of a third party would provide support to frontline workers potentially exposed to a blood-borne virus, due to the distress experienced by a frontline worker after an exposure incident. In this regard, the NSW Police Force explained that the purpose of the bill is largely to promote the psychological, rather than the physical, care of the worker.⁷⁷

2.34 The Police Association of NSW and Public Service Association of NSW both said that, irrespective of whether knowing a third party's disease status would influence medical treatment, it would provide some psychological comfort to workers.⁷⁸ Mr Stewart Little, General Secretary, Public Service Association of NSW, stated that workers involved in an exposure incident are currently told to assume they have contracted a disease, and make certain behavior changes, until they are tested three months later. With mandatory testing, he said, a worker could be 95 per cent certain within days that they had not contracted a virus, which would assist their mental health.⁷⁹

⁷⁵ Evidence, Dr Cretikos, 12 February 2021, pp 16-17 and 23-24.

⁷⁶ Evidence, Mr Drew, Hepatitis NSW, 11 February 2021, p 18; Evidence, Dr Medland, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, 11 February 2021, p 16; Submission 19, Australian Medical Association (NSW), p 4; Evidence, Dr Cretikos, NSW Health, 12 February 2021.

⁷⁷ Evidence, Mr Malcolm Lanyon, 12 February 2021, p 7.

⁷⁸ Evidence, Mr Tony Bear, Manager, Strategy and Relationships, Police Association of NSW, 11 February 2021, p 13.

⁷⁹ Evidence, Mr Stewart Little, General Secretary, Public Service Association of NSW, 11 February 2021, pp 11 and 13.

- 2.35** Mr Craig Smith, Director, Western Region, Corrective Services NSW, similarly said that mandatory disease testing would lessen the psychological distress of corrective services workers, who 'assume the worst' after an incident, by reducing the length of waiting for results.⁸⁰ Both the NSW Police Force and the Public Service Association of NSW spoke of the increasing number of psychological injuries experienced by workers who have been assaulted, some of which have led to the worker leaving their job.⁸¹
- 2.36** Dr Cretikos, NSW Health, acknowledged that occupational exposure to blood and body fluids can be extremely stressful to workers, stating that it needs to be managed in an expert and timely way. She noted that NSW Health has a well-established approach to managing what is a significant workplace health and safety matter for NSW Health staff.⁸²
- 2.37** In particular, Dr Cretikos noted that NSW Health does not recommend mandatory disease testing as a way to alleviate staff stress. She explained that timely access to appropriately skilled medical advice and treatment is the best way to manage workers' anxiety:
- In all cases of occupational exposure to bodily fluids, it is important that the affected worker has rapid access to an appropriate health professional with experience in managing blood-borne viruses, in order for a careful risk assessment to be conducted and appropriate management immediately instituted ... It is NSW Health's experience that early access to an appropriately skilled and experienced practitioner is important not only for managing the risk but also to alleviate the anxiety of those affected.⁸³
- 2.38** Some medical and public health experts involved in the inquiry questioned whether mandatory testing of a third party would actually provide comfort to workers. Dr Danielle McMullen, President, Australian Medical Association (NSW), contended that the distress experienced by workers is unlikely to be alleviated by mandatory testing of the source. Reflecting on evidence from the Police Association of NSW and Public Service Association of NSW, she suggested that some workers may be receiving advice following an incident that is not up-to-date, leading to more distress.⁸⁴
- 2.39** Dr McMullen noted that medical practices on preventing blood-borne virus transmission have been evolving over the past 10 to 20 years, and education, as well as post-incident counselling and support, would benefit workers. Asked whether a worker should have the right to some reassurance from knowing the disease status of a person who attacked them, Dr McMullen said that a test, even if negative, would not provide psychological comfort to a worker, because theoretically it could be within the attacker's window period of infection:

⁸⁰ Evidence, Mr Craig Smith, Director, Western Region, Corrective Services NSW, 12 February 2021, p 16.

⁸¹ Evidence, Mr Lanyon, 12 February 2021, pp 12-13; Answers to questions on notice, Mr Lanyon, 4 March 2021, pp 12-13; Submission 17, Public Service Association NSW, p 11.

⁸² Evidence, Dr Cretikos, 12 February 2021, p 16.

⁸³ Evidence, Dr Cretikos, 12 February 2021, p 17.

⁸⁴ Evidence, Dr Danielle McMullen, President, Australian Medical Association (NSW), 11 February 2021, pp 33 and 36.

If we did not already know the status—it cannot reassure them; it should not reassure them. A negative test on that day could theoretically be within the window period of infection of the person who had done the attack. So even a negative test that day does not change our risk metric ... a test that is done even that day would not address their psychological discomfort because they would still need to be a little bit worried. It is not all over until that six-month test is done and it is over. So it would not change the psychological thing.⁸⁵

- 2.40** Dr Nicholas Medland, President, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, suggested that the bill risks increasing, rather than reducing, fear and anxiety, by perpetuating misinformation about how blood-borne viruses are transmitted, and that, where psychological injury is the issue, more psychological comfort should be given by providing expert assessment, supportive counselling, and education to workers about the actual risks.⁸⁶

Balancing the rights of frontline workers and third parties

- 2.41** A key issue for the inquiry was whether the bill strikes the right balance between promoting the welfare of workers and protecting the rights to bodily autonomy and privacy of others.
- 2.42** Stakeholders in favour of the bill argued that the rights of individuals are appropriately balanced. NSW Police Force Deputy Commissioner, Mr Malcolm Lanyon, told the committee this bill aims to balance an individual's right to not consent to a medical procedure against the rights of frontline workers who have potentially been put at risk by that person's deliberate action. He stated: 'We consider this bill appropriately balances an individual's rights and the rights of the frontline officer'.⁸⁷ He further suggested that only allowing mandatory testing in the case of a deliberate action against a worker is part of this balance. He said, 'we are not looking to punish people' who may spread bodily fluids by accident.⁸⁸
- 2.43** The Police Association of NSW and Public Service Association of NSW both suggested that the incursion on the rights of the third party is justified because they have deliberately exposed the worker to bodily fluids, often in violent circumstances. Mr Patrick Gooley, Secretary, Police Association of NSW, said that the bill balances the rights of a frontline worker 'against the rights of a miscreant who has deliberately applied a bodily fluid to an emergency service worker, often in violent circumstances'.⁸⁹
- 2.44** Mr Little, General Secretary, Public Service Association, expressed the frustration of corrective service staff that, where an inmate has spat in their face, they have to 'respect that person's privacy'.⁹⁰ He suggested that mandatory testing is justified as a measure to discourage 'deliberate, malicious' acts where bodily fluids are weaponised in correctional centres:

⁸⁵ Evidence, Dr Danielle McMullen, President, Australian Medical Association (NSW), 11 February 2021, p 37.

⁸⁶ Evidence, Dr Nicholas Medland, President, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, 11 February 2021, p 16.

⁸⁷ Evidence, Mr Lanyon, NSW Police Force, 12 February 2021, p 2.

⁸⁸ Evidence, Mr Lanyon, 12 February 2021, p 8.

⁸⁹ Evidence, Mr Gooley, 11 February 2021, p 2.

⁹⁰ Evidence, Mr Little, General Secretary, Public Service Association, 11 February 2021, pp 8-9.

It will add another element of exercising safety in that centre because it is not just about reducing attacks on officers, inevitably—and I will include juvenile facilities in this—it will bring better order to those centres because for people that want to engage in what is the most filthy, cowardly acts, there will be a consequence.⁹¹

- 2.45** By contrast, opponents of the bill, including the Law Society of NSW and Positive Life NSW, highlighted the intrusion on bodily autonomy and privacy of those subject to mandatory testing, and argued this is not justified by any real benefit to the worker.⁹²
- 2.46** The Public Interest Advocacy Centre noted that the right to bodily autonomy is reflected in international human rights law.⁹³ Ms Gabrielle Bashir SC, Senior Vice-President, Bar Association of NSW, highlighted that powers to mandatorily, and in some cases forcibly, take blood 'represent serious encroachments on the privacy and the bodily integrity of those subject to mandatory blood testing'.⁹⁴
- 2.47** Responding to the argument that some limitations to the right to privacy, bodily integrity and autonomy of third parties covered by this legislation are justified to protect the health and safety of workers, a group of senior academics who made a submission to the inquiry suggested that 'extraordinary limitations on other citizens' rights must be allowed only in exceptional circumstances ... This does not include situations where the risk of transmission ... is negligible or hypothetical'.⁹⁵
- 2.48** Stakeholders also highlighted how the principle of informed consent underpins the approach to most medical procedures. In this regard, the Australian Medical Association (NSW) noted that mandatory disease testing raises ethical questions for health professionals due to lack of informed consent, which is 'a pillar of health ethics'.⁹⁶ Indeed, several inquiry participants, including representatives of NSW Health and the Law Society of NSW, noted that informed consent is an important legal principle in relation to any medical procedure, with a small number of exceptions.⁹⁷
- 2.49** The Centre for Social Research in Health outlined that relevant local and international health guidelines for blood-borne virus treatment stress that testing should only take place with informed consent, in order to protect a person's dignity and privacy.⁹⁸ Ms Jane Sanders, Member, Law Society of NSW Criminal Law Committee, said that any kind of medical treatment without consent is an assault, unless justified by circumstances where the person's life is in danger and they cannot consent:

⁹¹ Evidence, Mr Little, General Secretary, Public Service Association, 11 February 2021, p 8.

⁹² For example, Submission 3, Law Society of NSW, Submission 11, Positive Life NSW.

⁹³ Answers to questions on notice, Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre, 25 February 2021, p 1.

⁹⁴ Evidence, Ms Gabrielle Bashir SC, Senior Vice-President, Bar Association of NSW, 11 February 2021, p 40; Submission 3, Law Society of New South Wales, p 1.

⁹⁵ Submission 15, Dr Kate Seear, Emily Lenton, Jen Johnson, Dr Sean Mulcahy, Professor Suzanne Fraser, Dr Adrian Farrugia, Dr Kylie Valentine, Dr Adam Bourne, Dr Jennifer Power, p 4.

⁹⁶ Submission 19, Australian Medical Association (NSW), p 4.

⁹⁷ Evidence, Ms Jane Sanders, Member, Law Society of NSW Criminal Law Committee, 11 February 2021; p 47, Evidence, Dr Cretikos, 12 February 2021, p 22; See also Submission 15, Seear et al, p 3.

⁹⁸ Submission 2, Centre for Social Research in Health, UNSW Sydney, p 2.

Any kind of forced medical treatment without the person's consent is an assault, unless of course it is justified by being emergency treatment to save someone's life in circumstances where they cannot consent because they are unconscious, for example. And just remember the mandatory testing of a person, the person who has done the allegedly deliberate act, is of no therapeutic value.⁹⁹

- 2.50** Concerns were also raised about the privacy of health information for the third parties subject to mandatory testing orders. The Australian Services Union NSW and ACT (Services) Branch noted that 'HIV and blood-borne virus test results are highly sensitive personal information, the disclosure of which can have serious consequences for those living with such diseases'.¹⁰⁰ It further suggested that inadequate privacy protections may lead to increased stigma and discrimination, thus hindering public health responses to HIV and blood-borne viruses.¹⁰¹

Impact on marginalised groups

- 2.51** Some stakeholders suggested that this bill risks generating additional stigma and discrimination towards people in the community affected by HIV, Hepatitis B and Hepatitis C. ACON and the Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine both suggested that this bill does nothing to educate and inform workers based on current evidence, but rather perpetuates 'decades-old fear' and stereotypes, thus contributing to ongoing stigma.¹⁰²
- 2.52** The Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine suggested that mandatory disease testing laws are likely to be used disproportionately against already marginalised communities that are more likely to come into contact with police, including homeless people, people with mental illness, people with addiction issues and Aboriginal and Torres Strait Islander peoples.¹⁰³
- 2.53** Similarly, the Australian Services Union NSW and ACT (Services) Branch noted that many of the communities targeted by public health campaigns on blood-borne viruses are communities that already experience stigma and discrimination, including LGBTIQ+ communities, people who inject drugs, sex workers, people from cultural and linguistically diverse backgrounds and Aboriginal and Torres Strait Islander people.¹⁰⁴ The NSW Users and AIDS Association's submission voiced similar concerns, contending that mandatory disease testing orders will be used disproportionately against people who use drugs and other marginalised communities.¹⁰⁵

⁹⁹ Evidence, Ms Sanders, 11 February 2021, pp 47-48.

¹⁰⁰ Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 9.

¹⁰¹ Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 9.

¹⁰² Submission 14, ACON and Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine; Evidence, 11 February 2021, pp 16-17.

¹⁰³ Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 6.

¹⁰⁴ Submission 8, Australian Services Union NSW and ACT (Services) Branch, p 11.

¹⁰⁵ Submission 18, NSW Users and AIDS Association, p 3.

- 2.54** In response to concerns that additional police powers would be used against members of marginalised communities, Mr Gooley from the Police Association of NSW stated:

We simply say there is no evidence that members of marginalised communities have a higher propensity or in any way are walking around the streets of New South Wales deliberately applying bodily fluids to emergency service workers.¹⁰⁶

Unintended consequences of the bill

- 2.55** As well as voicing concern over civil rights issues, opponents of the bill raised a number of other possible unintended consequences of a mandatory disease testing scheme that could make it counterproductive for the workers it seeks to protect. Some stakeholders argued that the bill could undermine public health approaches to combatting blood-borne viruses in the community, potentially increasing the risk of transmission both in the community and to frontline workers. Others argued that the scheme could create some new risks for some frontline workers, including health workers, by exposing them to a greater risk of occupational violence through involvement in mandatory testing.

Impact on efforts to combat blood-borne viruses in the community

- 2.56** Stakeholders highlighted a risk that this legislation undermines New South Wales's evidence-based approach to combatting blood-borne viruses. Health professionals and researchers noted that voluntary testing and counselling is a key element of New South Wales's world leading public health response to blood-borne viruses, in line with evidence of what works to build trust in healthcare and limit community transmission.¹⁰⁷ Dr Nicholas Medland of the Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine told the committee that New South Wales has been a world leader at reducing community HIV and Hepatitis transmission by rigorously adhering to the evidence and following the science, even when it seemed counter-intuitive.¹⁰⁸ Some stakeholders also noted that mandatory testing goes against relevant World Health Organisation guidelines, and Australia's national HIV testing policy.¹⁰⁹
- 2.57** Hepatitis NSW suggested that a bill not informed by the latest science is a risk to public health programs aimed at eliminating Hepatitis, by making it harder to reach affected populations:

¹⁰⁶ Evidence, Mr Gooley, 11 February 2021, p 2.

¹⁰⁷ For example, Submission 14 ACON, p 4; Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 5; see also Submission 15, Seear et al, pp 12-13; Submission 2, Centre for Social Research in Health, p 2.

¹⁰⁸ Evidence, Dr Medland, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, 11 February 2021, p 16.

¹⁰⁹ For example, Submission 19, Australian Medical Association (NSW), p 1; World Health Organisation, *Statement on HIV testing services: WHO, UNAIDS highlight new opportunities and ongoing challenges, 2017*, referenced in Submission 11, Positive Life NSW, p 2; See also Supplementary evidence, ACON, 11 February 2021: NAPHWA 2019, *The System is Broken: Audit of Australia's Mandatory Disease Testing Laws*, p 9.

This bill will potentially make it harder for us to reach the very people we need to make good our elimination. New South Wales is seen as a world leader in evidence-based responses to health epidemics including HIV and viral Hepatitis. In the interests of maintaining New South Wales's first State position as a leader, not a follower, the first steps in protecting and promoting the health and wellbeing of our front-line workers should reflect our world-leading response to public health issues.¹¹⁰

- 2.58** Dr Cretikos from NSW Health also suggested that a testing regime not designed for the benefit of patients, coupled with misinformation about blood-borne viruses, is 'likely to reduce people's trust in the health services that are being provided both within and outside of Correctional Services ... and may reduce access to treatment and access to care'.¹¹¹
- 2.59** Health experts suggested this bill will spread misinformation about the risk of blood-borne viruses, due to inconsistency with scientific evidence on transmission.¹¹² Several witnesses, including Professor Anthony Grulich, Dr Nicholas Medland and Ms Natalie Lang, suggested the bill could have a perverse outcome of making frontline workers even more anxious about transmission risk, even where none exists.¹¹³
- 2.60** Given HIV and Hepatitis have been associated with high levels of stigma, stakeholders argued that legislation for a mandatory testing scheme is likely to exacerbate and perpetuate stigma by encouraging a perception that these viruses are more dangerous or contagious than is the case.¹¹⁴ The Centre for Social Research in Health explained that stigma and discrimination are barriers to people seeking help, using effective prevention, engaging in treatment and remaining in care.¹¹⁵
- 2.61** Dr Cretikos from NSW Health advised that reducing stigma and discrimination is a key priority in NSW Health strategies for blood-borne viruses.¹¹⁶ She noted that stigma and discrimination result in reduced access to testing and treatment, thus impacting on efforts to reduce the impact of blood-borne viruses in the community:

Stigma and discrimination can be barriers to prevention, testing and treatment initiation, and retention in health care settings. In our experience, negative perceptions of health services and experiences of stigma and discrimination may result in reduced access to testing, reduced engagement with treatment and poor retention in treatment.¹¹⁷

¹¹⁰ Evidence, Mr Drew, 11 July 2021, p 18.

¹¹¹ Evidence, Dr Cretikos, 12 July 2021, p 22.

¹¹² Evidence, Dr Medland, 11 July 2021, p 16; Evidence, Professor Anthony Grulich, Head, HIV Epidemiology and Prevention Program, The Kirby Institute, UNSW Sydney, 11 July 2021, p 27.

¹¹³ Evidence, Professor Grulich, 11 July 2021, p 27; Evidence, Dr Medland, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, 11 February 2021, p 16; Evidence, Ms Natalie Lang, Branch Secretary, Australian Services Union NSW and ACT (Services) Branch, 11 July 2021, p 53.

¹¹⁴ Submission 2, Centre for Social Research in Health, UNSW, p 4. See also Submission 9, Hepatitis NSW, p 6; Submission 10, Sex Workers Outreach Project, pp 2-6; Submission 11, Positive Life NSW, pp 1-2; Submission 12, HIV/AIDS Legal Centre, p 5; Submission 14, ACON, p 7; Submission 15, Seear et al, pp 7-12; Submission 16, NSW Users and AIDS Association, p 4.

¹¹⁵ Submission 2, Centre for Social Research in Health, UNSW, p 4.

¹¹⁶ Evidence, Dr Cretikos, 12 February 2021, p 17.

¹¹⁷ Evidence, Dr Cretikos, 12 February 2021, p 17.

- 2.62** With a different view, the Police Association of NSW argued that the bill 'does nothing to stigmatise those who may be living with blood-borne viruses', suggesting instead that elevating the rights of a person who has applied a bodily fluid to a worker over the rights of the exposed worker would be a perverse outcome.¹¹⁸

Potential new risks for some frontline workers

- 2.63** Some stakeholders suggested that this bill could create new occupational risks for some frontline workers. Concerns were raised about physical as well as ethical risks for health workers, who may be asked to take blood in situations where force is used. It was also suggested the scheme could expose community workers to greater risk of exposure, as it could decrease the trust needed to manage the risk of blood-borne virus transmission in marginalised communities, and potentially lead to violent incidents.
- 2.64** Clause 19(2)(c) of the bill provides that health workers taking blood under a mandatory testing order must not use force (other than force ordinarily required) to take the blood. However, clause 20(2) provides that law enforcement officers may use 'reasonable force' on a detained third party to enable the taking of blood and prevent destruction of the sample.
- 2.65** The Australian Medical Association (NSW) stated that it is: 'concerned by the use of force by police and correction officers in carrying out mandatory testing orders and the potential safety risks this could pose to attending medical officers'.¹¹⁹ The Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine also suggested that allowing force to be used to take blood samples may place health care workers in 'unnecessarily dangerous situations'.¹²⁰ In a similar vein, the NSW Nurses and Midwives' Association expressed a particular concern that 'a nurse or midwife could potentially be directed by their employer to undertake a procedure which would put them at an unacceptable risk of harm'.¹²¹
- 2.66** Dr Nicholas Parkhill, Chief Executive Officer, ACON, suggested that a similar scheme in Western Australia has created new tensions between police and health staff, which creates anxiety as well as greater risk for health professionals.¹²²
- 2.67** The Australian Services Union NSW and ACT (Services) Branch suggested that a mandatory disease testing scheme potentially creates new and additional health and safety risks for frontline workers working with marginalised and vulnerable communities.¹²³ The Union's submission noted that any obstacle to good public health management of blood-borne viruses is bad policy for frontline workers in marginalised communities, who are more likely to be exposed to people living with an undiagnosed or untreated condition.¹²⁴ Ms Lang noted that community service

¹¹⁸ Evidence, Mr Gooley, 11 February 2021, p 2.

¹¹⁹ Submission 19, Australian Medical Association (NSW), p 4.

¹²⁰ Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 5; See also Evidence, Dr Medland, 11 February 2021, p 23.

¹²¹ Submission 28, NSW Nurses and Midwives' Association, p 5.

¹²² Evidence, Dr Nicholas Parkhill, Chief Executive Officer, ACON, 11 February 2021, p 23.

¹²³ Evidence, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 11 February 2021, p 51.

¹²⁴ Submission 8, Australian Services Union NSW and ACT (Services) Branch, p 11.

workers often help police engage with marginalised and vulnerable communities, relying on relationships of trust, and that such workers may be exposed to new forms of occupational violence as a result of this bill.¹²⁵

Specific issues in the drafting of the bill

2.68 Beyond disputing the merits of a mandatory disease testing scheme, stakeholders to this inquiry raised several issues with the drafting of the bill, suggesting additional clarity and safeguards in how the scheme would operate are necessary to achieve its intended purpose and minimise unintended consequences.

Definition and scope of 'deliberate action'

2.69 Clause 3 states that the bill's objective is to provide for mandatory disease testing of a person in circumstances where a prescribed worker has come into contact with a person's bodily fluids, and is at risk of contracting a blood-borne disease, as a result of that person's 'deliberate action'. Stakeholders raised concerns about the lack of definition of 'deliberate action' and what incidents may or may not be covered by the scheme.

2.70 The NSW Police Force explained that the scheme in this bill is designed to cover incidents where bodily fluids come into contact with a worker through that person's 'deliberate action', and is not intended to apply to accidental exposures such as those that might occur if a third party is convulsing. Mr Lanyon, NSW Police Force, suggested there would need to be a deliberate action *against police* (or other workers) for it to be covered by the bill.¹²⁶ That being said, the NSW Police Force also suggested that a 'deliberate action' does not necessarily mean the third party intended to expose the worker to bodily fluids. Nor is the scheme intended to be limited to actions that would meet the threshold of being a criminal assault.¹²⁷

2.71 A number of stakeholders, including academics and health advocates, contended that the bill is too vague on what constitutes a 'deliberate action'.¹²⁸ Indeed, the committee noted that there is no definition of 'deliberate action' in the bill's dictionary.

2.72 Clause 9(1)(e) provides that the evidence required to determine if an action is deliberate is 'a statement that, in the opinion of the worker, the contact with the third party's bodily fluid was as a result of the deliberate action of the third party'.¹²⁹ According to the Public Interest Advocacy Centre and the HIV/AIDS Legal Centre, there is no obligation on the part of decision

¹²⁵ Evidence, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 11 February 2021, pp 52-53.

¹²⁶ Evidence, Mr Lanyon, Deputy Commissioner, NSW Police Force, 12 February 2021, p 4.

¹²⁷ Submission 27, NSW Police Force, p 6.

¹²⁸ See, for example, Submission 2, Centre for Social Research in Health, p 2; Submission 14, ACON, p 8; Submission 15, Seear et al, p 6; Submission 9, Hepatitis NSW, p 7.

¹²⁹ Mandatory Disease Testing Bill 2020, cl 9(1)(e). Discussed in Submission 7, Public Interest Advocacy Centre, p 5.

makers to establish that the action was deliberate before issuing a mandatory disease testing order.¹³⁰

- 2.73** Some stakeholders, including the HIV/AIDS Legal Centre, suggested that a failure to adequately define what constitutes a 'deliberate' act opens the opportunity for subjective assessment by a frontline worker, or mandatory disease testing orders being used as a form of extrajudicial punishment.¹³¹ Some academics involved in the inquiry, and other stakeholders, suggested that a lack of clarity on determining if an action is 'deliberate' will create inconsistency, unpredictability, and the opportunity for bias, leading to unjust outcomes.¹³²
- 2.74** Mr Lanyon, NSW Police Force, told the committee that the bill is only intended to be enlivened 'in the context where a person conducts a deliberate act against a police officer or an emergency services worker'. He also suggested that decision-makers would be required to consider whether an act was 'deliberate' as part of their decision on whether issuing an order was 'justified in all the circumstances', as required by clause 10(7)(b). Mr Lanyon stated, 'I do not envisage that a senior officer would have any difficulty in deciding whether something is a deliberate act', and noted that assessing circumstances of an assault is a routine part of police work.¹³³
- 2.75** The committee heard, however, different views from witnesses on what might constitute a 'deliberate act'. Ms Nicole Jess, Senior Vice-President, Public Service Association of NSW, suggested the act of hiding a syringe may be considered 'deliberate', as may an act of self-harm that resulted in bodily fluid coming into contact with a corrections worker.¹³⁴ By contrast, Mr Bear of the Police Association of NSW stated that there would need to be a 'clear, deliberate act', therefore incidents of self-harm resulting in coincidental exposure of police to bodily fluids would not be considered 'deliberate'. However, Mr Bear also noted there could be instances where a person had self-harmed, and subsequently transmitted blood to a police officer in a deliberate act, which would then be covered by the bill. He noted: 'All the circumstances within each type of incident have to be taken into account on each individual time... it is subjective to each one of those...'¹³⁵
- 2.76** Reflecting on the views of other witnesses, Mr Paul Miller, Acting NSW Ombudsman, commented: 'I have listened to the debate about what "deliberate action" means in this context and I have to say I am none the wiser as to what that provision is intended to mean'.¹³⁶
- 2.77** Ms Jane Sanders, Law Society of NSW, noted that there seem to be no objective criteria for what constitutes a deliberate act for the purposes of this bill, and that it comes down to 'the opinion of the person who has been exposed to this'. She also noted that a person may commit

¹³⁰ Discussed in Submission 7, Public Interest Advocacy Centre, p 5; Submission 12, HIV/AIDS Legal Centre, p 9.

¹³¹ Submission 12, HIV/AIDS Legal Centre. See also Submission 9, Hepatitis NSW, p 7; Submission 18, NSW Users and AIDS Association, p 6.

¹³² Submission 15, Seear et al, p 6. See also Submission 18, NSW Users and AIDS Association, p 6.

¹³³ Evidence, Mr Malcolm Lanyon, 12 February 2021, p 8. See also Evidence, Mr Malcolm Lanyon, 12 February 2021, pp 2-4, 13, 14.

¹³⁴ Evidence, Ms Jess, Public Service Association of NSW, 11 February 2021 pp 4, 6.

¹³⁵ Evidence, Mr Bear, 11 February 2021, p 4.

¹³⁶ Evidence, Mr Paul Miller, Acting NSW Ombudsman, 12 July 2021, p 29.

an act that is 'deliberate' but lawful, such as in self-defence, and that determination of 'deliberate' may be difficult with, for example, a person who is mentally ill.¹³⁷

2.78 A wide range of suggestions were put forward to clarify this aspect of the legislation, and how it would work in practice, including:

- the need to clarify specifically in the legislation what is meant by 'deliberate action', potentially by having a specific definition in the bill¹³⁸
- a requirement that an application for a mandatory disease testing order include the factual basis or evidence for saying that an action was deliberate¹³⁹
- a requirement that a decision maker issue a mandatory testing order only if they are satisfied that the contact with bodily fluids was as a result of the third party's deliberate action¹⁴⁰
- the establishment of a standard of evidence that an action was 'deliberate'¹⁴¹
- the establishment of clear criteria to guide decisions on whether an order should be made.¹⁴²

Definition and scope of 'bodily fluids' and 'contact'

2.79 Under the bill, mandatory blood testing of a third party can be undertaken if a health, emergency or public sector worker 'has come into contact with the bodily fluid of the third party' in the course of their duty, and as a result of that person's deliberate action. In the dictionary, 'bodily fluid' is defined as 'blood, faeces, saliva, semen or other bodily fluid or substance prescribed by the regulations'.¹⁴³

2.80 Many submissions to this inquiry questioned why the bill is drafted to include bodily fluids such as saliva, faeces and urine, which carry no risk of transmission of the specified diseases, being HIV, Hepatitis B and Hepatitis C.¹⁴⁴ Several stakeholders suggested that, unless accompanied by a clearer understanding of the transmission risks associated with particular kinds of contact associated with specific bodily fluids, the bill will perpetuate false information about actual

¹³⁷ Evidence, Ms Jane Sanders, Law Society of NSW, 11 February 2021, p 44.

¹³⁸ Submission 9, Hepatitis NSW, p 7; Submission 10, Sex Workers Outreach Project, p 9; Submission 11, Positive Life NSW, p 2; Submission 18, NSW Users and AIDS Association, p 2; Submission 23, Bobby Goldsmith Foundation, p 4.

¹³⁹ Submission 14, ACON, p 9; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 7.

¹⁴⁰ Submission 10, Sex Workers Outreach Project, p 9; Submission 11, Positive Life NSW, p 3; Submission 14, ACON, p 9; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 7.

¹⁴¹ Submission 10, Sex Workers Outreach Project, p 9; Submission 11, Positive Life NSW, p 2; Submission 14, ACON, p 9.

¹⁴² Submission 15, Seear et al, pp 6-7.

¹⁴³ Mandatory Disease Testing Bill 2020, cl 7(1). See also cl 3, and Dictionary.

¹⁴⁴ Includes Submission 2, Centre for Social Research in Health; Submission 9, Hepatitis NSW; Submission 12, HIV/AIDS Legal Centre; Submission 15, Seear et al; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine.

transmission risks.¹⁴⁵ Hepatitis NSW suggested the bill is not in line with the Standing Committee on Law and Safety's recommendation that any legislation providing for mandatory disease testing should clearly define factual circumstances where there is a risk of transmission, and that any definition should be based on up-to-date medical advice.¹⁴⁶

- 2.81** The key bodily fluid which can transmit these viruses is blood. NSW Police Deputy Commissioner, Mr Malcolm Lanyon, said that police guidelines are 'emphatically clear' that with saliva, urine and faeces on their own there is no risk of transmission.¹⁴⁷ Corrective Services guidelines also state that you cannot get Hepatitis B, Hepatitis C or HIV through contact with faeces, urine or saliva alone.¹⁴⁸ Mr Lanyon explained that the concern for police with saliva is that 'in realistic situations the circumstances will be that there will be blood mixed in it', or that police officers will be uncertain if it had blood mixed in and believe there is a risk.¹⁴⁹ Mr Smith, Director, Western Region, Corrective Services NSW, similarly explained that the mixture of blood with other bodily fluids is also a concern for corrective services officers.¹⁵⁰
- 2.82** Some stakeholders, including ACON and the Australian Services Union NSW and ACT (Services) Branch, recommended that the bill be amended to require that a testing order can only be made when there is a real risk of actual transmission occurring.¹⁵¹ Hepatitis NSW submitted that: 'it is essential that the legislated definition of "bodily fluids" only include those fluids that may transmit blood-borne viruses ... there is no reason to include faeces or saliva'.¹⁵² Positive Life NSW also recommended that the legislated definition of bodily fluids should only include those which can transmit blood-borne viruses, and that: 'the legislation should define separate lists for each blood-borne virus covered by the bill, according to the relevant bodily fluids that can transmit that blood-borne virus, and the corresponding contact point of the worker'.¹⁵³
- 2.83** The Australian Services Union NSW and ACT (Services) Branch suggested that all aspects of the legislation should reflect current New South Wales public health procedures in relation to blood-borne viruses, and that 'testing should only occur where there is an actual risk of transmission, which should be assessed by medical/public health professionals'.¹⁵⁴

¹⁴⁵ For example, Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 6.

¹⁴⁶ Submission 9, Hepatitis NSW, p 5.

¹⁴⁷ Evidence, Mr Lanyon, 12 February 2021, p 6. These guidelines were provided in Answers to questions on notice, Mr Lanyon, NSW Police Force, received 4 March 2021.

¹⁴⁸ Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, *Correctional Officers and Blood-Borne Viruses*, provided in Answers to questions on notice, Ms Robson, 4 March 2021, p 5.

¹⁴⁹ Evidence, Mr Lanyon, NSW Police Force, 12 February 2021, p 7.

¹⁵⁰ Evidence, Mr Smith, Corrective Services NSW, 12 February 2021, p 19.

¹⁵¹ For example, Submission 14, ACON, p 10; Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 2.

¹⁵² Submission 9, Hepatitis NSW, p 7.

¹⁵³ Submission 11, Positive Life NSW, p 4.

¹⁵⁴ Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 2.

- 2.84** There were also concerns about lack of definition of 'contact' under the bill, which was not defined specifically in the bill's dictionary. Under clause 7 of the bill, a worker can apply for a mandatory testing order if the worker has come into 'contact' with the bodily fluid of a third party and the contact occurred in the execution of the worker's duty, and as a result of a deliberate action of the third party and without the consent of the worker.
- 2.85** The Centre for Social Research in Health stated that the concept of 'contact' with bodily fluids in the bill is poorly defined, and 'allows too many situations to be considered a risk for transmission, when it is unlikely or impossible'.¹⁵⁵
- 2.86** The committee heard from blood-borne virus expert Professor Anthony Grulich, the Kirby Institute UNSW, that the transmission risk from contact with blood only arises in certain circumstances, such as contact with an open wound. Even blood landing on intact skin cannot lead to transmission of any of these viruses.¹⁵⁶ On this point, it should be noted that both the NSW Police Force and Correctional Services NSW guidelines to staff on blood-borne viruses both state that blood and/or saliva landing on unbroken skin carry zero risk of infection.¹⁵⁷
- 2.87** Stakeholder suggestions in relation to the definition and scope of bodily fluids currently covered by the bill included:
- amending the bill to disambiguate the risks of transmission for specific diseases with specific kinds of exposures¹⁵⁸
 - amending the bill to ensure that testing orders can only be made when an actual risk of transmission occurs (taking account of the bodily fluid and the type of contact)¹⁵⁹
 - removing saliva from the definition of 'bodily fluids'.¹⁶⁰

Who makes the decision to issue an order?

- 2.88** The bill gives the power to issue a mandatory disease testing order to 'a senior officer for the worker concerned', except in the case of a 'vulnerable third party', where an application is to be decided by a court.¹⁶¹ The role given to 'senior officers' was a cause of concern for many stakeholders, who suggested that this puts decision making power in the hands of a person who is neither medically qualified nor independent.

¹⁵⁵ Submission 2, Centre for Social Research in Health, p 2.

¹⁵⁶ For example, Evidence, Professor Grulich, 11 February 2021, p 28.

¹⁵⁷ Answers to questions on notice, Ms Gayle Robson, 4 March 2021; Answers to questions on notice, Mr Lanyon, 4 March 2021.

¹⁵⁸ Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 12.

¹⁵⁹ Submission 14, ACON, p 10; Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 1.

¹⁶⁰ Submission 18, NSW Users and AIDS Association, p 2.

¹⁶¹ Mandatory Disease Testing Bill 2020, cl 5(2), cl 10-12.

- 2.89** Health researchers at the Centre for Social Research in Health were skeptical that all senior officers would be knowledgeable or qualified to assess likelihood of transmission.¹⁶² Hepatitis NSW were similarly concerned that the bill as drafted places a decision about medical science in the hands of a non-medically trained person.¹⁶³ In a similar vein, the Sex Workers' Outreach Project contended that only a person with specialised knowledge about blood-borne virus transmission risks should be able to make a judgement that a blood test of the third party is justified in the circumstances.¹⁶⁴
- 2.90** Legal experts were concerned about the independence of decision makers from the worker and incident in question. Ms Sanders, Law Society of NSW, said that: 'If the bill is to be enacted, at a very minimum we would advocate that the person who should be making the order should be an independent person, not a senior officer from the organisation that employs the worker'.¹⁶⁵ The HIV/AIDS Legal Centre suggested that putting the power to issue a mandatory disease testing order in the hands of 'senior officers', without judicial oversight, creates potential for the power to be used 'as an extrajudicial form of punishment with little to no avenues of review by the courts'. It pointed out that the power to order intimate forensic procedures such as the taking of blood under the *Crimes (Forensic Procedures) Act 2000* is with magistrates or other court officers, rather than police.¹⁶⁶
- 2.91** The ability for 'senior officers' to delegate their decision-making power was also a concern for some stakeholders.¹⁶⁷ Clause 34 of the bill allows a senior officer to delegate their decision making function to 'a person of a class prescribed by the regulations'.¹⁶⁸ Hepatitis NSW expressed concern that it is essential for a decision-maker to have necessary education and training, and be sufficiently independent of the staff member and incident in question.¹⁶⁹ The HIV/AIDS Legal Centre suggested the bill should have clear safeguards to restrict ability to inappropriately delegate the function of a senior officer.¹⁷⁰
- 2.92** Speaking for the NSW Police Force, Mr Lanyon suggested that the decision-making role of a 'senior officer' of police in this bill is consistent with the decision-making powers given to senior officers within a number of other Acts. He said that standard operating procedures and training would be developed to guide senior officers in understanding and interpreting the Act.¹⁷¹

¹⁶² See, for example, Submission 2, Centre for Social Research in Health, p 2; Submission 15, Seear et al, p 8; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, pp 8-9.

¹⁶³ Submission 9, Hepatitis NSW, p 8.

¹⁶⁴ (In line with requirements in clause 10(7)(b) of the bill). Submission 10, Sex Workers Outreach Project, p 10.

¹⁶⁵ Evidence, Ms Sanders, Law Society of NSW, 11 February 2021, p 41.

¹⁶⁶ Submission 12, HIV/AIDS Legal Centre, pp 7 and 12.

¹⁶⁷ Submission 7, Public Interest Advocacy Centre, p 9; Submission 11, Positive Life NSW, p 12; Submission 9, Hepatitis NSW, p 8; Submission 12, HIV/AIDS Legal Centre, p 11; Submission 14, ACON, pp 6, 14; Submission 15, Seear et al, pp 2, 8; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, pp 8-9.

¹⁶⁸ Mandatory Disease Testing Bill 2020, cl 34(1).

¹⁶⁹ Submission 9, Hepatitis NSW, p 9.

¹⁷⁰ Submission 12, HIV/AIDS Legal Centre, p 11.

¹⁷¹ Evidence, Mr Lanyon, 12 February 2021, pp 3, 5 and 7-8.

- 2.93** Stakeholder suggestions focused on ensuring the decision maker has sufficient medical expertise and independence and included:
- requiring a mandatory disease testing order to be made by an appropriate Court or Tribunal or other independent office holder¹⁷²
 - requiring a mandatory disease testing order to be made by the Chief Health Officer, or an independent arbiter delegated by the Chief Health Officer¹⁷³
 - amending the bill to require the decision-maker to obtain and consider the advice of a qualified medical practitioner in making their decision¹⁷⁴
 - putting the decision making power in the hands of a person with medical expertise, including the ability to assess complex information about transmission risk¹⁷⁵
 - ensuring that the decision maker has appropriate education and training, including in blood-borne virus transmission¹⁷⁶
 - limiting the ability to delegate to officers with appropriate training, and avoiding delegation to officers connected with the incident to avoid potential conflicts of interest.¹⁷⁷

Criteria and evidence required to issue an order

- 2.94** Another issue raised by legal stakeholders in the inquiry was the lack of clarity provided in relation to the specific criteria or standard of evidence required to issue a mandatory testing order under the bill. Clause 10(7) provides that a senior officer may make a mandatory testing order for a third party only if satisfied that the third party will not voluntarily provide blood, and 'testing the third party's blood for blood-borne diseases is justified in all the circumstances'.
- 2.95** Acting NSW Ombudsman, Mr Paul Miller, suggested the bill does not provide enough clarity on the criteria for issuing a mandatory testing order. He said more guidance from Parliament on how a senior officer should apply the test of 'justified in all the circumstances' is needed to enable effective oversight of the legislation.¹⁷⁸

¹⁷² Submission 12, HIV/AIDS Legal Centre, p 8; Evidence, Ms Sanders, Law Society of NSW, 11 February 2021, pp 41-42; Submission 7, Public Interest Advocacy Centre, p 6.

¹⁷³ Submission 14, ACON, p 10; Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 13; Submission 25, p 8; Answers to questions on notice, Ms Lang, 10 March 2021, p 3.

¹⁷⁴ Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 13; Submission 23, Bobby Goldsmith Foundation, p 4; Submission 1, Family Planning NSW, p 6.

¹⁷⁵ Submission 15, Seear et al, pp 8-9; Submission 2, Centre for Social Research in Health, p 2.

¹⁷⁶ Submission 9, Hepatitis NSW, p 9; Submission 14, ACON, p 6.

¹⁷⁷ Submission 9, Hepatitis NSW, p 9; Submission 14, ACON, p 6; Submission 15, Seear et al, pp 8-9.

¹⁷⁸ Evidence, Mr Paul Miller, Acting NSW Ombudsman, 12 February 2021, pp 29-30.

- 2.96** Likewise, Ms Bashir SC, NSW Bar Association, also noted that, in the legislation as drafted, there are no criteria guiding decisions to issue an order other than section 10(5), which states that a senior officer 'is to consider the guidelines issued by the Chief Health Officer...and other matters the senior officer considers relevant'. She suggested that 'criteria really should be in the legislation', noting that lack of clear criteria may mean decisions are more open to challenge.¹⁷⁹
- 2.97** Mr Lanyon, Deputy Commissioner, NSW Police Force, noted that the bill specifies the information that a worker must put in their application, and provides that the senior officer must assess the information in that application 'in all of the circumstances'. Although not explicitly stated in the bill, Mr Lanyon stated that a senior officer must consider circumstances including the nature of the 'deliberate act', and whether there is an actual exposure risk due to the nature of the contact, to decide if a mandatory blood test is 'justified in all of the circumstances'. He also suggested that standard operating procedures and training would be developed for senior police officers.¹⁸⁰
- 2.98** A particular concern of stakeholders was the lack of a specific requirement to take medical advice into account in determining if a mandatory testing order is 'justified in the circumstances'. Ms Bashir SC, NSW Bar Association, compared this to the Victorian *Public Health and Wellbeing Act 2008*, which states that an order cannot be made unless ...'the making of the order is necessary in the interest of rapid diagnosis and clinical management and, where appropriate, treatment for any of those involved'.¹⁸¹ She suggested that if this bill goes forward there should be stronger language to ensure medical opinion on transmission risk must be taken into account in deciding to make a mandatory testing order.¹⁸²
- 2.99** In addition to concerns about the lack of specified criteria to determine what constitutes 'deliberate action' (as outlined at paragraph 2.69), there were also concerns about what would be the threshold or standard of evidence that would need to be satisfied to issue an order. Ms Bashir SC suggested that the threshold as written in this bill is very low, using the term 'appears to' a senior officer, rather than specifying a threshold such as 'on the balance of probabilities', as would be the usual practice with a civil-based order. She suggested this is a matter of concern to ensure the legislation strikes the right balance.¹⁸³
- 2.100** The NSW Bar Association made a number of suggestions in relation to clarifying the grounds for decision making under the bill, including:
- inserting clear criteria that should guide decisions whether or not to issue an order in the legislation¹⁸⁴
 - requiring that medical opinion must be taken into account in a decision to issue a mandatory disease testing order¹⁸⁵

¹⁷⁹ Evidence, Ms Bashir SC, 11 February 2021, p 46.

¹⁸⁰ Evidence, Mr Lanyon, 12 February 2021, pp 13-14; p 5.

¹⁸¹ *Public Health and Wellbeing Act 2008* (Vic) s 134(1)(d).

¹⁸² Evidence, Ms Bashir SC, 11 February 2021, p 46; pp 42- 43; pp 45-46.

¹⁸³ Evidence, Ms Bashir SC, NSW Bar Association, 11 February 2021, p 45.

¹⁸⁴ Evidence, Ms Bashir SC, NSW Bar Association, 11 February 2021, p 46. See also Evidence, Mr Miller, A/NSW Ombudsman, 12 February 2021, p 30; Submission 15, Seear et al, p 6.

¹⁸⁵ Evidence, Ms Bashir SC, NSW Bar Association, 11 February 2021, p 42.

- requiring that a decision to issue an order can only be made when there is a real risk of transmission and it is necessary for rapid diagnosis, clinical management or treatment of any of those involved¹⁸⁶
- providing that, if alternative measures that are equally effective for the rapid diagnosis and clinical management of a worker are available, the measure that is least restrictive of the rights of the third party should be chosen.¹⁸⁷

2.101 Other stakeholders suggested the bill could be improved by:

- clarifying and ensuring consistency in the standard of proof required to make an order¹⁸⁸
- requiring that evidence of a deliberate action is required to issue an order.¹⁸⁹

Oversight and review of decisions

2.102 Stakeholders were concerned to see adequate procedural fairness and scrutiny of decision making under this bill, to protect the rights of third parties and prevent misuse of mandatory testing powers. There were particular concerns about the adequacy of the review process laid out in the bill, as well as lack of judicial oversight.

Reviews by the Chief Health Officer

2.103 Under clause 22, a person may apply to the Chief Health Officer to seek review of a decision by a 'senior officer' to issue or not issue a mandatory disease testing order. However, clause 23(1) provides that, even if an application for review is made by the third party, a mandatory disease testing order continues to have effect and the third party must comply with the order. This was a concern for a number of stakeholders.

2.104 Explaining why a mandatory testing order continues to have effect while a review is being determined, the NSW Police Force stated: 'This is important to ensure that the worker receives the best possible health advice within the shortest timeframe after the incident, without delays being contributed to by review processes'. It noted that according to clause 23(3) the blood test results would not be supplied to the worker's medical practitioner until the Chief Health Officer determined the review.¹⁹⁰

¹⁸⁶ Evidence, Ms Bashir SC, NSW Bar Association, 11 February 2021, p 43. See also Submission 11, Positive Life NSW, p 3; Submission 12, HIV/AIDS Legal Centre, p 10; Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 2.

¹⁸⁷ Submission 21, NSW Bar Association, p 3.

¹⁸⁸ Submission 15, Seear et al, pp 7-8.

¹⁸⁹ Submission 7, Public Interest Advocacy Centre, p 6.

¹⁹⁰ Submission 27, NSW Police Force, p 9.

- 2.105** Stakeholders, including ACON and the Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, were very concerned about a mandatory testing order continuing to have effect, despite a review being lodged, given that individuals must still undergo an invasive procedure under threat of fine or gaol.¹⁹¹
- 2.106** Hepatitis NSW stated that: 'It is unacceptable that a person who has appealed a decision is still required, and indeed may be forced, to undergo a mandatory test pending the outcome of the appeal that would have disallowed the test'. Other stakeholders submitted that this 'completely undermines the process of review', and 'is a gross violation of civil liberties' that impacts rights to bodily integrity and autonomy.¹⁹²
- 2.107** Some inquiry participants, including the HIV/AIDS Legal Centre, Public Interest Advocacy Centre and Seear et al, expressed concern that the review process in the bill lacks procedural fairness.¹⁹³ Some also suggested that the one-day timeframe to apply for a review is too short and may disadvantage those with limited literacy, fluency in English or are otherwise vulnerable and disadvantaged.¹⁹⁴ The NSW Users and AIDS Association suggested that: 'the severely insufficient timeframe and lack of clarity around the process creates serious concerns regarding the transparency, oversight and fairness of the proposed mandatory testing regime'.¹⁹⁵
- 2.108** In explaining the short timeframe for applying for a review, the NSW Police Force stated: 'Decisions under the mandatory disease testing scheme need to be made quickly so the best possible advice is provided to the worker about risks and actions to be taken to mitigate risks'.¹⁹⁶
- 2.109** Some stakeholders, including the Public Interest Advocacy Centre and Positive Life NSW, also suggested that the legislation needs clarification to ensure people in detention or vulnerable people can be supported to request a review.¹⁹⁷

¹⁹¹ Submission 14, ACON, p 13; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 11; See also Submission 1, Family Planning NSW, p 4; Submission 9, Hepatitis NSW, p 9.

¹⁹² Submission 9, Hepatitis NSW, p 9; Submission 7, Public Interest Advocacy Centre, p 9; Submission 15, Seear et al, p 10.

¹⁹³ Submission 15, Seear et al, p 10; Submission 7, Public Interest Advocacy Centre, p 8; Submission 12, HIV/AIDS Legal Centre, p 10; Submission 18, NSW Users and AIDS Association, p 9; Evidence, Ms Bashir SC, NSW Bar Association, 11 February 2021, pp 40-41.

¹⁹⁴ Submission 10, Sex Workers Outreach Project, p 10; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 11.

¹⁹⁵ Submission 18, NSW Users and AIDS Association, p 9.

¹⁹⁶ Submission 27, NSW Police Force, p 8.

¹⁹⁷ Submission 7, Public Interest Advocacy Centre, p 8; Submission 11, Positive Life NSW, pp 9-11. See also Submission 14, ACON, pp 12-13; Submission 23, Bobby Goldsmith Foundation, p 4.

Calls for judicial oversight

- 2.110** Some stakeholders, including the HIV/AIDS Legal Centre, called for judicial oversight in relation to the bill, to prevent improper use of mandatory disease testing orders.¹⁹⁸ The NSW Bar Association suggested that appeal rights should exist to ensure the opportunity for review by a court.¹⁹⁹
- 2.111** The NSW Police Force submission noted that it is open to a worker or third party to seek judicial review of decisions in the Supreme Court, but opposed giving a greater role to courts in decision making or appeal processes. It said: 'Allowing for additional lengthy court-based appeal processes would undermine the need for testing to take place quickly'.²⁰⁰ However, Ms Bashir SC, representing the NSW Bar Association, noted that courts have processes for dealing with urgent matters, and suggested that requiring reviews by a court is unlikely to cause delays.²⁰¹
- 2.112** There were some general concerns about the additional discretionary powers this bill gives police in particular, and calls to ensure particular scrutiny of police and corrective services by the courts.
- 2.113** The NSW Gay and Lesbian Rights Lobby suggested a need for additional oversight of police and correctional centres in particular, to ensure appropriate use of the powers.²⁰² The HIV/AIDS Legal Centre noted that under the *Crimes (Forensic Procedures) Act 2000*, intimate forensic procedures, including the taking of blood, may only be carried out with the informed consent of a suspect or with an order from a magistrate or other court-authorized officer.²⁰³
- 2.114** The HIV/AIDS Legal Centre also outlined a number of safeguards contained in the *Crimes (Forensic Procedures) Act 2000* that are not contained in this bill, including: clear criteria for establishing an order is justified; specific safeguards for Aboriginal and Torres Strait Islander people; the right to legal representation; and the right to cross-examine the applicant for the order.²⁰⁴
- 2.115** Related to calls for judicial oversight were concerns that the bill enables the use of reasonable force to take blood from people in detention. For example, the Australian Services Union NSW and ACT (Services) Branch suggested the bill should be amended so that an order must be obtained from the Local Court if 'reasonable force' for the purpose of enforcing the order on people in detention is required. It noted a similar provision exists at section 134 (4) of the Victorian *Public Health and Wellbeing Act 2008*.²⁰⁵ The HIV/AIDS Legal Centre suggested that provisions for use of 'reasonable force' to take blood from a detained third party are of serious

¹⁹⁸ For example, Submission 12, HIV/AIDS Legal Centre, p 6, Submission 25, NSW Gay and Lesbian Rights Lobby, p 8.

¹⁹⁹ Submission 21, NSW Bar Association, p 3.

²⁰⁰ Submission 27, NSW Police Force, p 8.

²⁰¹ Evidence, Ms Bashir SC, NSW Bar Association, 11 February 2021, p 47.

²⁰² Submission 25, NSW Gay and Lesbian Rights Lobby, p 5.

²⁰³ Submission 12, HIV/AIDS Legal Centre, p 7.

²⁰⁴ Submission 12, HIV/AIDS Legal Centre, p 7.

²⁰⁵ Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 5.

concern given lack of independent scrutiny or judicial oversight of the decision to issue an order.²⁰⁶

2.116 Responding to concerns about police use of discretionary powers, the NSW Police Force's submission noted the specific oversight role of the Ombudsman in monitoring administration of the act, and that existing oversight arrangements for police, through the Law Enforcement Conduct Commission, continue to apply.²⁰⁷

2.117 Specific stakeholder suggestions to enhance the review process and provide greater oversight included:

- amending the bill to provide that no mandatory blood tests should be required during the period in which a review application is being considered²⁰⁸
- amending the bill to lengthen the time frame to make a review application²⁰⁹
- amending the bill to provide that third parties are informed of the decision making and review process and timeframe, and where to seek medical and legal advice²¹⁰
- amending the bill to ensure detained people will have information to appeal a mandatory testing order²¹¹
- making decisions subject to judicial review²¹²
- enabling independent or judicial oversight, in particular for detained third parties²¹³
- removing provisions allowing the use of 'reasonable force' on detained third parties.²¹⁴

Inclusion of children under 18

2.118 The bill allows for mandatory disease testing of children over 14 but under 18.²¹⁵ Applications for a mandatory disease order on a child under 18 are to be dealt with in the Children's Court.²¹⁶

²⁰⁶ Submission 12, HIV/AIDS Legal Centre, pp 10-12.

²⁰⁷ Submission 27, NSW Police Force, pp 8 and 10-11.

²⁰⁸ Submission 7, Public Interest Advocacy Centre, p 9; Submission 14, ACON, p 14; Submission 18, NSW Users and AIDS Association, p 9; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 12.

²⁰⁹ Submission 12, HIV/AIDS Legal Centre, p 10; Submission 14, ACON, p 13; Submission 15, Seear et al, p 10; Submission 18, NSW Users and AIDS Association, p 9; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 12.

²¹⁰ Submission 12, HIV/AIDS Legal Centre, p 11.

²¹¹ Submission 23, Bobby Goldsmith Foundation, p 4, Submission 14, ACON, pp 5 and 13.

²¹² Submission 25, NSW Gay and Lesbian Rights Lobby, p 8; Submission 12, HIV/AIDS Legal Centre, pp 6-8; Submission 21, NSW Bar Association, p 3.

²¹³ Submission 12, HIV/AIDS Legal Centre pp 6-8.

²¹⁴ Submission 12, HIV/AIDS Legal Centre pp 12-13.

²¹⁵ Part 4 of the bill sets out a process for issuing mandatory disease testing orders for 'vulnerable third parties', which includes children over 14 but under 18. Mandatory Disease Testing Bill 2020, cls 13-16, dictionary.

²¹⁶ Mandatory Disease Testing Bill 2020, cl 15(3).

- 2.119** The NSW Police Force noted that the bill provides extra safeguards for children between the ages of 14-17, including that an order must be made by the Children's Court, and that, in considering an application, the Court must take into account the best interests of the third party, and the wishes of the third party and their parents or guardian.²¹⁷
- 2.120** Many stakeholders, including the NSW Bar Association, the Law Society of NSW, ACON, the Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, and Australian Services Union NSW and ACT (Services) Branch, strongly objected to the inclusion of children under 18 years of age in a mandatory disease testing scheme, on the grounds that children pose a particularly low risk in terms of transmitting a blood-borne virus, and exposing them to an invasive procedure not intended for their benefit is a disproportionate response.²¹⁸
- 2.121** Evidence from the Australian Medical Association (NSW) and the Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine was that the prevalence of HIV among children under 18 is negligible. NSW Health data show only four cases of HIV diagnosed in children under 19 in 2019. Current treatment practices mean those children would be on effective treatment within weeks, making it impossible for them to transmit HIV.²¹⁹
- 2.122** Prevalence of Hepatitis among children is also low. Hepatitis NSW noted that New South Wales has had a newborn vaccination program for Hepatitis B since 2000, and the number of children under 18 with Hepatitis B is negligible. It also said that the prevalence of Hepatitis C in people aged under 18 is exceptionally low.²²⁰
- 2.123** Legal witnesses noted that a child's unique vulnerability is recognised in many different contexts, including in the legal system, and children's right to privacy and bodily integrity is reflected in international and Australian law.²²¹ Witnesses from both the Law Society of NSW and the Bar Association of NSW suggested that, given the health evidence on low rates of the three diseases among children under 18, including them in a mandatory testing regime is not a 'reasonably proportionate' measure.²²²
- 2.124** Explaining their opposition to the bill covering children between 14 and 18, the NSW Bar Association stated:

In the Association's view, the application of the bill's mandatory disease testing regime to children would:

²¹⁷ Submission 27, NSW Police Force, p 8.

²¹⁸ Submission 21, NSW Bar Association, p 3; Submission 14, ACON, pp 10-11; Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, pp 6-7; Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 8 March 2021, p 8; Evidence, Ms Sanders, Law Society of NSW, 11 February 2021, p 42.

²¹⁹ Submission 19, Australian Medical Association (NSW) p 4, and note 18; Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, pp 6-7.

²²⁰ Submission 9, Hepatitis NSW, p 8.

²²¹ Answers to questions on notice, Bar Association of NSW, 2 March 2021, p 3.

²²² Evidence, Ms Sanders, Law Society of NSW, and Ms Bashir SC, NSW Bar Association, 11 February 2021, p 42.

- a) represent an arbitrary and unfettered interference with the privacy of those aged between 14 and 17 in that no account is taken of the extremely low prevalence of blood-borne diseases such as HIV among children;
- b) fail to recognise adequately the special status of children and the weight needed to be accorded to their best interests and their age when determining whether to subject them to invasive blood sampling; and
- c) amount to an unnecessary and/or wholly disproportionate means of protecting the health and wellbeing of key workers because the mandatory collection and testing of children's blood would provide little, if any, assistance with the rapid diagnosis, management and treatment of diseases.²²³

2.125 Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre, suggested the inclusion of children in a mandatory testing scheme would disproportionately affect Aboriginal and Torres Strait Islander young people, given they constitute a high proportion of the interactions between young people and with police and corrections.²²⁴

2.126 A large number of submission authors and witnesses suggested that the bill be amended to ensure it only applies to people over the age of 18 years.²²⁵

Treatment of vulnerable people

2.127 Part 4 of the bill sets out a process for obtaining a mandatory disease testing order for 'vulnerable third parties'. A 'vulnerable third party' (apart from children aged 14 to 17, discussed above) is defined as a person whose ability to voluntarily consent to provide blood is impaired due to mental illness, cognitive impairment or other mental condition.²²⁶ An application for a mandatory disease testing order for a person who 'appears to a senior officer' to be a vulnerable third party must be made to a court.²²⁷

2.128 Stakeholders raised various issues in relation to this provision, noting that workers covered by this bill are often dealing with people with complex emotional needs.²²⁸ The Bar Association of NSW suggested that there is no clear policy justification for the narrow definition of vulnerable person currently in the bill.²²⁹ In evidence, Ms Bashir SC suggested that the definition of

²²³ Answers to questions on notice, Bar Association of NSW, 2 March 2021, p 3.

²²⁴ Evidence, Mr Lawrie, 11 February 2021, p 43.

²²⁵ Submission 1, Family Planning NSW, p 4; Submission 2, Centre for Social Research in Health, pp 2-3; Submission 7, Public Interest Advocacy Centre, p 3; Submission 9, Hepatitis NSW, p 8; Submission 10, Sex Workers Outreach Project, p 8; Submission 11, Positive Life NSW, p 4; Submission 12, HIV/AIDS Legal Centre, p 14; Submission 14, ACON, p 11; Submission 18, NSW Users and AIDS Association, p 8; Submission 21, NSW Bar Association, p 3; Submission 23, Bobby Goldsmith Foundation, p 4; Submission 24, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, p 7; Answers to questions on notice, Ms Lang, Australian Services Union NSW and ACT (Services) Branch, 10 March 2021, p 8.

²²⁶ Mandatory Disease Testing Bill 2020, Dictionary, p 21.

²²⁷ Mandatory Disease Testing Bill 2020 cl 13.

²²⁸ Submission 3, Law Society of NSW, p 1; Submission 8, Australian Services Union NSW and ACT (Services) Branch, pp 2, 4, 9-10.

²²⁹ Submission 21, Bar Association of NSW, p 3.

vulnerable third party should be expanded to specifically include Aboriginal and Torres Strait Islanders, given their over-representation in custody, and that the bill is aimed at custodial settings.²³⁰

- 2.129** Positive Life NSW expressed concern about whether a court is the right place for considering a mandatory disease testing order against a vulnerable person, given the stress this may entail.²³¹ There were also concerns about the ability of vulnerable third parties to appeal a mandatory testing order, and calls to ensure vulnerable people are provided necessary information and support to appeal.²³²
- 2.130** Specific suggestions from stakeholders regarding the treatment of vulnerable people included:
- expanding the definition of 'vulnerable third party' to include, for example, those who identify as Aboriginal or Torres Strait Islander people²³³
 - providing an appeals mechanism for a mandatory testing order on a 'vulnerable third party', as a *de novo* hearing in the Local Court²³⁴
 - making provision in the bill for support to be provided to vulnerable third parties who lodge an appeal.²³⁵

Treatment of the blood sample

- 2.131** Another specific concern raised by the Bar Association of NSW was lack of attention in the bill to what happens to blood samples obtained for mandatory disease testing.
- 2.132** The Bar Association of NSW noted that there is no specific provision in the bill regarding the destruction of samples taken pursuant to a mandatory testing order. Asked about this, Acting NSW Ombudsman Mr Paul Miller, agreed that it would assist for the legislation, if passed, 'to clarify what is intended to happen to the sample'.²³⁶ Mr Lanyon of the NSW Police Force agreed that there is no specific provision in the bill as to what should happen to the blood sample, but said he 'would expect that the blood sample would be destroyed in accordance with [NSW Health] policy'.²³⁷ The Bar Association of NSW suggested that: 'The bill should require that all blood samples are compulsorily destroyed after completion of testing'.²³⁸

²³⁰ Evidence, Ms Bashir SC, 11 February 2021, p 39.

²³¹ Submission 11, Positive Life NSW, p 9.

²³² See Submission 21, Bar Association of NSW, p 3; Submission 9, Hepatitis NSW p 9.

²³³ Submission 21, Bar Association of NSW, p 3; Submission 10, Sex Workers Outreach Project, p 8; Submission 11, Positive Life NSW, p 8.

²³⁴ Submission 21, Bar Association of NSW, p 3.

²³⁵ Submission 9, Hepatitis NSW, p 9.

²³⁶ Evidence, Mr Paul Miller, Acting NSW Ombudsman, 12 February 2021, p 30.

²³⁷ Evidence, Mr Lanyon, NSW Police Force, 12 February 2021, p 8.

²³⁸ Submission 21, Bar Association of NSW, p 3.

- 2.133** The Bar Association of NSW also suggested that there needs to be specific protection to prevent other uses of the sample. The submission stated: 'To avoid any potential widening of the use of blood samples, there should be an absolute prohibition on the use of samples in any other type of testing (including DNA testing)'.²³⁹ Asked about whether there would be potential for the police to seek to use a sample taken under this legislation for other purposes, Mr Lanyon said that the purpose of taking the blood sample was specifically in connection with this Act, but could not point to a specific protection set out in the bill itself.²⁴⁰ In answer to a question on notice about this, the NSW Police Force said: 'The bill does not deal with the destruction of blood samples taken under an order', and referred to NSW Health for their processes on the retention or destruction of samples.²⁴¹
- 2.134** Given concerns about the treatment of the blood sample, the NSW Bar Association recommended that a specific provision in the bill be included requiring the destruction of the sample after testing and that there be a specific prohibition on use of the blood sample in any other testing to that required for the purposes of this legislation.²⁴²

Oversight of the scheme by the NSW Ombudsman

- 2.135** A number of inquiry participants stressed the importance of having an oversight mechanism in relation to the proposed mandatory testing scheme, to monitor use of the powers and effectiveness of the scheme.
- 2.136** Under clause 35, the NSW Ombudsman is tasked to monitor the operation and administration of the legislation. The Ombudsman is to prepare a report twelve months after commencement of the legislation, and every three years thereafter.²⁴³
- 2.137** Mr Lanyon, NSW Police Force, noted that the role and reporting requirements of the Ombudsman are an important safeguard in the bill.²⁴⁴
- 2.138** Stakeholders in this inquiry broadly welcomed the oversight role given to the NSW Ombudsman, although some suggested the role could be expanded. For example, Positive Life NSW, Seear et al and the NSW Users and AIDS Association suggested that the bill could require more explicit data collection and evaluation requirements, to ensure the effectiveness of the scheme in protecting the wellbeing of workers is evaluated, and that the law is not used disproportionately on certain communities or demographic groups, and that unintended negative impacts are monitored for.²⁴⁵ In addition, Seear et al and the Australian Services Union NSW and ACT (Services) Branch suggested that, while privacy concerns need to be respected, the Ombudsman needs to receive information on both how many people are ordered to receive

²³⁹ Submission 21, Bar Association of NSW, p 3.

²⁴⁰ Evidence, Mr Lanyon, NSW Police Force, 12 February 2021, p 9.

²⁴¹ Answers to questions on notice, NSW Police Force, received 3 March 2021, p 3.

²⁴² Submission 21, Bar Association of NSW, p 3.

²⁴³ Mandatory Disease Testing Bill 2020, cl 35(2).

²⁴⁴ Evidence, Mr Lanyon, NSW Police Force, 12 February 2021, pp 2, 8, 14-15.

²⁴⁵ For example, Submission 11, Positive Life NSW, p 13; Submission 15, Seear et al, p 16; Submission 18, NSW Users and AIDS Association, p 9.

tests and how many occupational transmissions occur, otherwise the system cannot be effectively evaluated.²⁴⁶

- 2.139** The NSW Ombudsman noted that it will only be able to carry out the functions prescribed if it is given additional resources, and is conferred the necessary powers to obtain information.²⁴⁷ The Ombudsman requested specific amendments to the bill to clarify its powers to obtain information, and protect people required to disclose information to the Ombudsman for the purpose of monitoring.²⁴⁸
- 2.140** In evidence, Mr Paul Miller, Acting NSW Ombudsman, suggested that conferring oversight functions on the Ombudsman without providing the necessary resources and powers, 'may do more harm than good insofar as it may give Parliament, stakeholders and the community a false confidence of independent oversight'. He reiterated the request for amendments to ensure that all the usual Ombudsman powers for information-gathering apply to this new function, and for a commitment to ensure resources will be made available to carry it out.²⁴⁹
- 2.141** Another matter raised by Mr Miller was a request for greater guidance from Parliament on how it expects the provisions of the bill to be interpreted and applied, in order to enable monitoring on whether the objectives of the bill are being achieved.²⁵⁰ Examples where the Ombudsman considered greater clarity is needed include things like: interpretation of 'deliberate', 'contact with bodily fluids', 'justified in all the circumstances', as outlined in previous sections of this report.
- 2.142** To enable execution of its oversight role, the Ombudsman asked Parliament to amend clauses 28 and 35 of the bill to ensure the Ombudsman has the necessary powers to obtain information and monitor and report on the legislation, and to ensure additional funding is provided to the Ombudsman's office from the next annual budget cycle.²⁵¹
- 2.143** Other suggestions from stakeholders to refine the oversight arrangements included:
- amending the legislation to include specific data collection and monitoring requirements, to enable accountability and assessment of the scheme's efficacy²⁵²
 - requiring the annual publication of monitoring data.²⁵³

²⁴⁶ Submission 15, Seear et al, p 16; Submission 8, Australian Services Union NSW and ACT (Services) Branch, p 12.

²⁴⁷ Submission 4, NSW Ombudsman, p 5.

²⁴⁸ Submission 4, NSW Ombudsman, p 13.

²⁴⁹ Evidence, Mr Miller, Acting NSW Ombudsman, 12 February 2021, p 29.

²⁵⁰ Evidence, Mr Miller, Acting NSW Ombudsman, 12 February 2021, p 29.

²⁵¹ Submission 4, NSW Ombudsman, p 6, pp 13-14.

²⁵² Submission 11, Positive Life NSW, p 13; Submission 15, Seear et al, p 16; Submission 18, NSW Users and AIDS Association, p 9.

²⁵³ Submission 11, Positive Life NSW, p 13.

Other ways of protecting workers

- 2.144** The perceived necessity for this bill raised a number of questions about how organisations employing frontline workers are meeting their work health and safety obligations. A number of submissions pointed out that work health and safety laws should be guiding workplace strategies, including risk mitigation, work practice design, training, vaccination and provision and use of personal protective equipment (PPE).²⁵⁴
- 2.145** Various stakeholders suggested that there should be a greater focus on work practices and the provision of necessary PPE and vaccinations, which could be used to limit the exposure risk faced by frontline workers.²⁵⁵
- 2.146** Many stakeholders, including the Australian Services Union NSW and ACT (Services) Branch, the Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, and Positive Life NSW, called for improved, evidence-based and up-to-date education to frontline workers to counter the myths associated with HIV and other blood-borne viruses.²⁵⁶ Seear et al suggested that better education programs would be a more effective way to address worker fear and anxiety around blood-borne viruses than this legislation, and that evidence-informed materials to support worker education are already available.²⁵⁷
- 2.147** As noted above, NSW Health has a framework for managing occupational exposure to blood-borne viruses, which many stakeholders pointed to as effective at preventing transmission. Police and corrective services also have guidance material available, which was shared with this committee.²⁵⁸ Justice Health informed the committee that the Chief Executive of Justice Health and Commissioner of Corrective Services have agreed there is a need to improve blood-borne virus and harm reduction training for staff in the New South Wales custodial system.²⁵⁹
- 2.148** In addition, stakeholders highlighted the critical importance of frontline workers being able to access prompt, expert medical and mental health treatment in the event of an exposure incident.

²⁵⁴ For example, Submission 9, Hepatitis NSW, pp 4, 6; Submission 8, Australian Services Union NSW and ACT (Services) Branch, p 13.

²⁵⁵ Submission 8, Australian Services Union NSW and ACT (Services) Branch, pp 4, 13; Submission 10, Sex Workers Outreach Project, p 12; Submission 9, Hepatitis NSW, pp 4, 6.

²⁵⁶ Submission 8, Australian Services Union NSW and ACT (Services) Branch, p 13; Submission 24, Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, p 5; Submission 11, Positive Life NSW, p 2.

²⁵⁷ Submission 15, Seear et al, pp 5-6, see also Submission 10, Sex Workers Outreach Project, p 8.

²⁵⁸ Answers to questions on notice, Mr Lanyon, 4 March 2021; Answers to questions on notice, Ms Robson, 4 March 2021.

²⁵⁹ Correspondence, Justice Health and Forensic Mental Health Network, received 26 February 2021.

- 2.149** Dr Cretikos, NSW Health, noted the importance of accessing expert medical care both to ensure appropriate clinical management, and also to alleviate mental distress, as fears may be unfounded.²⁶⁰ She suggested that accessing care through a GP or emergency department may not guarantee the right level of expert care or appropriate advice, and there have been incidents where people have been provided incorrect or delayed advice.²⁶¹
- 2.150** Noting that there is a seven-day-a-week Blood and Body Fluid Exposure Phonenumber available to health workers, Dr Cretikos suggested that the availability of seven-day telehealth services means there should be no barrier to other workers receiving appropriate and timely care.²⁶²

Committee Comment

- 2.151** The committee understands that the Mandatory Disease Testing Bill 2020 has come forward in the context of a rising trend of assaults on police, correctional service and other emergency workers, and the need to ensure frontline workers have safe workplaces and practices in place.
- 2.152** Incidents involving exposure to bodily fluids are unpleasant and upsetting for frontline workers. The discomfort is undoubtedly heightened by fears of catching a disease, even where the risk may be low. Waiting for test results to find out if a disease has been transmitted clearly causes stress to frontline workers.
- 2.153** The committee recognises that to some stakeholders, in particular police and correctional service workers, this bill offers the prospect of potentially exposed workers being provided with some information that may assist them to manage anxiety at a difficult time. We understand that for these stakeholders, the bill strikes the right balance between the rights of frontline workers exposed to violent incidents in the course of the work, and the rights of the people who have deliberately attacked them, possibly using bodily fluids to induce fear.
- 2.154** On the other hand, the committee acknowledges that there are concerns by other stakeholders as to whether the scheme is necessary given the low prevalence of Hepatitis B, C and HIV, and low risk of transmission. The committee also acknowledges that there are specific concerns in relation to the drafting of the bill, for example, in relation to the definition and scope of 'deliberate action', 'bodily fluids' and 'contact'.
- 2.155** We understand that various stakeholders have also called for greater clarity in terms of the criteria for issuing orders, to ensure mandatory testing is only used where needed to assist a worker's treatment. The committee also notes that stakeholders would like adequate safeguards to exist in terms of how the scheme operates, particularly in relation to the review process for decisions, the protections for vulnerable people and children, and independent oversight provided by the NSW Ombudsman.
- 2.156** The committee therefore recommends that the Legislative Council proceed to debate the Mandatory Disease Testing Bill 2020, and that the concerns identified by stakeholders as set out in this report be addressed during debate in the House.

²⁶⁰ For example, Submission 9, Hepatitis NSW, p 9; Evidence Dr Cretikos, NSW Health, 12 February 2021, pp 17 and 22.

²⁶¹ Evidence, Dr Cretikos, NSW Health, 12 February 2021, p 22.

²⁶² Evidence, Dr Cretikos, NSW Health, 12 February 2021, pp 17 and 22.

Recommendation 1

That the Legislative Council proceed to debate the Mandatory Disease Testing Bill 2020, and that the concerns identified by stakeholders as set out in this report be addressed during debate in the House.

- 2.157** The committee also believes that the high rate of Hepatitis C in prisons should result in the expansion of the Hepatitis in Prisons Elimination program to reduce the identified risks to inmates and prison officers. Given the success of these programs to date, this is the most effective way to meaningfully address this problem at the source.

Appendix 1 Submissions

No.	Author
1	Family Planning NSW
2	Centre for Social Research in Health, UNSW Sydney
3	The Law Society of New South Wales
4	Ombudsman New South Wales
5	United Services Union
6	Australian Federation of AIDS Organisations (AFAO)
7	Public Interest Advocacy Centre
8	Australian Services Union NSW & ACT (Services) Branch
9	Hepatitis NSW
10	Sex Workers Outreach Project
11	Positive Life NSW
12	HIV AIDS Legal Centre
13	Australasian Society for Infectious Diseases Limited
14	ACON
15	Dr Kate Seear, Emily Lenton, Jen Johnson, Dr Sean Mulcahy, Professor Suzanne Fraser, Dr Adrian Farrugia, Dr Kylie Valentine, Dr Adam Bourne, Dr Jennifer Power
16	Professor Bruce Arnold
17	Public Service Association of New South Wales
18	NSW Users and AIDS Association (NUAA)
19	Australian Medical Association (NSW) Ltd
20	Police Association of NSW
21	New South Wales Bar Association
22	Australian Salaried Medical Officers' Federation (NSW) (ASMOF)
23	Bobby Goldsmith Foundation
24	Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine (ASHM)
25	NSW Gay and Lesbian Rights Lobby
26	National Aboriginal Community Controlled Health Organisation
27	NSW Police Force
28	New South Wales Nurses and Midwives' Association

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Thursday 11 February 2021 Macquarie Room Parliament House, Sydney	Mr Patrick Gooley	Secretary, Police Association of NSW
	Mr Tony Bear	Manager, Strategy and Relationships, Police Association of NSW
	Mr Stewart Little	General Secretary, Public Service Association of NSW
	Ms Nicole Jess	Senior Vice-President, Chair, Prison Officers Vocational Branch, Public Service Association of NSW
	Dr Nicholas Medland (<i>by videolink</i>)	President, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine (ASHM)
	Dr Nicholas Parkhill	Chief Executive Officer, ACON
	Ms Karen Price	Deputy Chief Executive Officer, ACON
	Mr Steven Drew	Chief Executive Officer, Hepatitis NSW
	Dr Mary Ellen Harrod	Chief Executive Officer, NSW Users and AIDS Association (NUAA)
	Ms Kali Kanivale	Special Projects and Advocacy Specialist, NSW Users and AIDS Association (NUAA)
	Ms Jane Costello	Chief Executive Officer, Positive Life NSW
	Mr Neil Fraser	Deputy Chief Executive Officer, Positive Life NSW
	Professor Andrew Grulich	Head, HIV Epidemiology and Prevention Program, The Kirby Institute, UNSW Sydney
Mr Cameron Cox	Chief Executive Officer, Sex Workers Outreach Project (SWOP)	

Date	Name	Position and Organisation
	Dr Danielle McMullen <i>(by videolink)</i>	President, Australian Medical Association (NSW)
	Professor kylie valentine	Deputy Director, Social Policy Research Centre, UNSW Sydney
	Professor Martin Holt	Research Convenor, Centre for Social Research in Health, UNSW Sydney
	Dr Kari Lancaster	Scientia Senior Research Fellow, Centre for Social Research in Health, UNSW Sydney
	Mr Alastair Lawrie <i>(by videolink)</i>	Senior Policy Officer, Public Interest Advocacy Centre
	Ms Gabrielle Bashir SC	Senior Vice-President and Co-Chair of Criminal Law Committee, NSW Bar Association
	Ms Jane Sanders	Member, Law Society of NSW Criminal Law Committee
	Ms Natalie Lang	Branch Secretary, Australian Services Union NSW and ACT (Services) Branch
Friday 12 February 2021 Jubilee Room Parliament House, Sydney	Deputy Commissioner Malcolm Lanyon	Deputy Commissioner for Corporate Services, NSW Police
	Mr Mark Follett	A/Executive Director, Policy, Reform and Legislation, Department of Communities and Justice
	Ms Gayle Robson	Chief of Staff, Office of the Commissioner, Corrective Services NSW, Department of Communities and Justice
	Mr Craig Smith	Director, Western Region, Corrective Services NSW
	Dr Michelle Cretikos	Executive Director, COVID-19 Response, Population and Public Health, NSW Health
	Mr Paul Miller	Acting NSW Ombudsman

Appendix 3 Minutes

Minutes no. 30

Monday 23 November 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 1.03 pm

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (*by videconference, from 2.15pm*)

Mr D'Adam (*until 3.15pm*)

Mr Farlow

Mr Khan

Mr Mallard (*participating member for the inquiry into the Mandatory Disease Testing Bill 2020*)

Mr Mookhey (*participating member for the 2020 review of the workers compensation scheme, until 3.15 pm, and substituting for Mr D'Adam from 3.30pm*)

Mr Roberts

Mr Shoebridge

2. Draft minutes

Resolved, on the motion of Mr Farlow: That draft minutes no. 29 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 23 November 2020 – Email from the Hon Mark Buttigieg, Opposition Whip, to committee, advising that Mr Mookhey will substitute for Mr D'Adams when Mr D'Adams is not present in the hearing on the 23 November
- 17 November 2020 – Email from the Office of the Hon. Shayne Mallard to committee, requesting to participate in the Mandatory Disease Testing Bill 2020 inquiry
- 16 November 2020 – Email from Mr Michael Carapiet to secretariat, confirming he will be attending for the full time allocated to his hearing on 1 December 2020
- 13 November 2020 – Email from Mr Michael Carapiet to secretariat, acknowledging the correspondence from the Chair dated 13 November 2020
- 27 October 2020 – Various audio files from Ms Jennifer Lynch to committee, outlining her views about the workers compensation scheme.

Sent:

- 16 November 2020 – Email from secretariat to Mr Michael Carapiet, following up correspondence from the Chair dated 13 November 2020
- 13 November 2020 – Correspondence from the Chair to Mr Michael Carapiet, regarding the invitation to give evidence on 1 December 2020
- 9 November 2020 – Chair to Ms Jennifer Lynch, regarding her audio files and request to give evidence to the committee.

Resolved, on the motion of Mr Roberts: That:

- the audio files from Ms Jennifer Lynch to committee, received 27 October 2020, be kept confidential, as they contain identifying information
- any future audio files received from Ms Jennifer Lynch be kept confidential, and be available to members on request.

4. Inquiry into the provisions of the Mandatory Disease Testing Bill 2020

4.1 Terms of reference

The committee noted that the terms of reference for the inquiry are as follows:

That:

- (a) the provisions of the Mandatory Disease Testing Bill 2020 be referred to Standing Committee on Law and Justice for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message from the Legislative Assembly,
- (c) the committee report by Wednesday 17 February 2021.

4.2 Participating member

The committee noted that Mr Mallard has requested to be a participating member for the duration of the inquiry.

Resolved, on the motion of Mr Khan: That Mr Mallard, who has advised the committee that he intends to participate for the duration of the inquiry into the provisions of the Mandatory Testing Bill 2020, be provided with copies of all inquiry related documents and be entitled to participate in all deliberative meetings.

4.3 Proposed timeline and activities

The committee considered the timeline for the inquiry, including the potential for the inquiry to be extended and have a later reporting date than 17 February 2020.

Debate ensued.

Resolved, on the motion of Mr Khan: That submissions close on 21 December 2020, and a timeline be circulated via email regarding potential hearing dates.

Mr Mallard left the meeting.

4.4 Submissions, online questionnaire and proformas

Mr Khan moved: That the committee open submissions in the standard way, allowing individuals and organisations to make a submission, but not accept proformas or conduct an online questionnaire.

Mr Shoebridge moved: That the motion of Mr Khan be amended by omitting at the end 'but not accept proformas'.

Amendment put and negatived.

Original question put and passed.

4.5 Submission and witness invitations

Resolved, on the motion of Mr Shoebridge: That the following stakeholders be invited to make a submission and also be invited to appear as a witness, and that members be given until midday Thursday 26 November 2020 to nominate additional stakeholders/witnesses.:

- ACON
- Hepatitis NSW
- NSW Users and Aids Association
- Council for Civil Liberties
- Law Society of NSW
- NSW Bar Association
- Australian Lawyers for Human Rights
- Australian Medical Association NSW
- NSW Health
- Aboriginal Affairs NSW
- Multicultural NSW
- Positive Life NSW
- Sex Workers Outreach Project (SWOP)

- Mental Health Commission.

4.6 Advertising

The committee noted that the inquiry would be advertised via social media, stakeholder letters and a media release distributed to all media outlets in New South Wales.

5. 2020 combined Reviews of the Compulsory Third Party insurance scheme and Lifetime Care and Support scheme

5.1 Submissions

The committee noted that in accordance with the committee's previous resolution:

- submissions were reopened for the review of the CTP insurance scheme until 10 December 2020
- stakeholders for the review of the CTP insurance scheme have been invited to make a submission on the operation of the 6 month limitation period in which claimants are entitled to claim benefits irrespective of fault.

6. 2020 Review of the Workers Compensation Scheme

6.1 Answers to questions on notice

Resolved, on the motion of Mr Shoebridge: That the committee keep the second version of answers to questions on notice from Treasury NSW, dated 9 October 2020, confidential at this stage (this document being entitled 'Privileged – Treasury responses').

6.2 Video footage

The committee noted that in accordance with the committee's resolution, on 16 November 2020 Mr Nigel Freitas was provided with video footage of Mr Bhatia's evidence to the committee.

The committee further noted that Mr Peter McCarthy and Mr Chris McCann have also been provided with video footage on 19 November 2020 following agreement by email.

6.3 Support person

The committee noted that it agreed via email to the *in camera* witness bringing along a support person to the hearing.

6.4 Public Hearing

The witness was admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Mr Chris McCann, Former General Manager – Compliance, Fraud and Corruption Control, icare.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Peter McCarthy, Former Partner, Ernst & Young and Former Principal Actuary, NSW Workers Compensation System and CTP, SIRA.

The evidence concluded and the witness withdrew.

The public and media withdrew.

6.5 *In camera* hearing

The committee proceeded to take evidence *in camera*.

Persons present other than the committee: Ms Tina Higgins (*via videoconference*), Mr Sam Griffith, Mr Joseph Cho, Ms Angeline Chung, Mr Ky Chow (support person) and Hansard reporters.

The following witness was sworn and examined:

- Mr Nigel Freitas, Former Chief of Staff, NSW Treasurer.

The evidence concluded and the witness withdrew.

The hearing concluded at 5.06 pm.

7. Other Business

The committee considered the publication of evidence received *in camera*, noting a previous resolution to publish the evidence subject to redactions.

Resolved, on the motion of Mr Mookhey: That:

- the secretariat request Hansard to fast track the preparation of transcript of evidence received today *in camera*
- the transcript of the *in camera* evidence, if prepared by Hansard before icare's appearance on 2 December, be provided to icare on a confidential basis without any redaction
- the transcript of the *in camera* evidence be published on inquiry's webpage on the morning of 2 December prior to icare's appearance, with the names of all persons previously seconded from icare to the Treasurer's Office redacted (with the exception of Mr Edward Yap).

8. Adjournment

The committee adjourned at 5.16 pm until 1 December 2020 (Public hearing for the 2020 review of the workers compensation scheme).

Tina Higgins / Joseph Cho

Committee Clerks

Minutes no. 31

Tuesday 1 December 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 2.15 pm

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (*from 2.25pm*)

Mr D'Adam

Mr Farlow

Mr Khan

Mr Roberts

Mr Shoebridge (*from 2.19pm*)

Mr Mookhey (*participating member*)

2. Draft minutes

Resolved, on the motion of Mr Roberts: That draft minutes no. 30 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 November 2020 – Correspondence from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare, to secretariat, confirming additional icare witnesses for the hearing on 2 December 2020.
- 14 November 2020 – Email from Mr Leighton Barr to committee, regarding incomes rates and the workers compensation system.

4. **Inquiry into the provisions of the Mandatory Disease Testing Bill 2020**

4.1 **Timeline**

Resolved, on the motion of Mr Khan: That the Chair seek an extension of the reporting date from the House until the end of March 2021.

5. **2020 combined Reviews of the Compulsory Third Party insurance scheme and Lifetime Care and Support scheme**

5.1 **Timeline**

The committee considered adjusting the inquiry timeline, taking into account the new Bill inquiry it has been referred.

Resolved, on the motion of Mr Farlow: That the hearings be arranged in April / early May and the report be tabled by late July.

6. **2020 Review of the Workers Compensation Scheme**

6.1 **Partially confidential submission**

Resolved, on the motion of Mr Farlow: That the committee authorise the publication of submission no. 25, with the exception of identifying and/or sensitive information which is to remain confidential, as per the request of the author and the recommendation of the secretariat.

6.2 **Confidential submissions**

Resolved, on the motion of Mr Farlow: That the committee keep supplementary submission no. 25a confidential and submission no. 26 confidential, as per the recommendation of the secretariat, as it contains potential adverse mention.

6.3 **Report deliberative and tabling date**

The committee deferred the consideration of the tabling and report deliberative dates to the meeting scheduled on 2 December 2020.

6.4 **Transcript from 23 November**

The committee considered whether it wishes to have the transcript from 23 November 2020 reviewed by the secretariat before publication.

Resolved, on the motion of Mr Shoebridge: That the secretariat review the transcript from 23 November 2020, and in consultation with the Chair, circulate via email any proposed redactions of individual names and any suggestions in relation to allowing an individual / organisation to provide a written response to potential adverse mention, to provide for procedural fairness.

Ms Cusack joined the meeting.

6.5 **Public Hearing**

The witness was admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was examined on his former oath:

- Mr Michael Carapiet, Former Chair - icare Board.

Mr Mookey tendered the following documents:

- 1 - Letter -10 September 2020 - C Alexander - NSW Treasury - to C Morgan - icare - Appointment of John Robertson
- 2 - icare - information - Tuesday 4 August 2020 - entitled - Leadership change at icare'
- 3 - Confidential Board Report - icare - Board Effectiveness Review - 29 May 2020 - prepared by Challis and Co Pty Ltd
- 4 - Page from Gift register
- 5 - Board paper - Conflicts of Interest - Deep Dive - reference no item 3.4 - Meeting 24 May 2019
- 6 - Email from Gilbert and Tobin to John Nagle 7 May 2019

- 7 - Note from John Nagle to Kate - 13 May 2019
- 8 - icare letter dated 4 June 2019 - to Michael Pratt
- 9 - icare briefing for the board - Overseas travel to Las Vegas for Guidewire 2018
- 10 - Email from Michael Carapiet - to Larissa Auditore - cc Michael Carapiet - 23 April 2018
- 11 - Appendix 05 - Overseas travel - icare annual report 2018-19
- 12 - icare briefing for the board - current matters with ICAC - 29 Oct 2018
- 13 - icare briefing for the board - Insurance Technology platform - 25 October 2015
- 14 - Briefing for the board - Nominal Insurer Unified Technology Platform - 31 August 2015
- 15 - Letter from Wayne Smith, Contact Officer, Safety, Return to Work & Support to Mr Dave Matthews, Director Sales & Marketing Asia Pacific, FINEOS Corporation dated 17 August 2015
- 16 - Letter from Anthony Stevens, Corporate Council, Strategic Business Consulting to Mr Wayne Smith, NSW Safety, Return to Work and Support – dated 13 August 2015
- 17 - Email from Wayne Smith to Tara Moore, dated 7 August 2015 – CSC questions
- 18 - Letter from Mr Dave Mathews, Fineos Asia Pacific to Don Ferguson, Lifetime Care Support Authority dated 5 August 2015
- 19 - Meeting minutes – ITR Evaluation Committee – 21 July 2015
- 20 - SRWS Board paper cover - for discussion – SRWS & SICorp Technology Business Case – 31 March 2015
- 21 - icare article – Monday 27 July 2020 – icare provides further update on PIAWE remediation
- 22 - Letter from John Nagle, CEO & Managing Director, icare to Ms Carmel Donnelly, Chief Executive, SIRA, 4 March 2020 – Incorrect Weekly Payments to Injured Workers
- 23 - icare board meeting minutes – 25 November 2019
- 24 - icare board meeting – Minutes – 25 November 2019

The evidence concluded and the witness withdrew.

The public and media withdrew.

The hearing concluded at 4.30pm.

7. Adjournment

The committee adjourned at 4.35pm until 2 December 2020 (Public hearing for the 2020 review of the workers compensation scheme).

Joseph Cho

Committee Clerk

Minutes no. 33

Thursday 11 February 2021

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 9.04 am

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (*from 9.51am to 12.27pm*)

Mr D'Adam

Mr Farlow

Mr Khan

Mr Mallard (*participating member for Mandatory Disease Testing inquiry*) (*from 9.25 am*)

Mr Roberts

Mr Shoebridge (*from 9.28 am to 12.27pm and 1.58 pm to 2.25 pm*)

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no.31 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 24 September 2020 – Letter from Mr David Plumb, member of the icare board, to Chair, clarifying evidence given to the committee on 24 August 2020.
- 8 December 2020 - Email from Ms Michelle Falstein, Secretary, NSW Council for Civil Liberties, declining the invitation to make a submission to the Mandatory Disease Testing Bill 2020 inquiry.
- 13 January 2021 – Email from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare, to committee, advising of the new icare Chief Executive Officer.
- 19 January 2021 – Email from Mr Chris McCann to secretariat, providing a statement made as part of his workers compensation claim.
- 22 January 2021 – Letter from Mr Frank Zimmermann to Chair, responding to evidence provided by Mr Chris McCann on 23 November 2020.
- 25 January 2021 – Letter from Ms Samantha Liston, Group Executive People and Workplace, icare to secretariat, clarifying evidence given to the committee on 2 December 2020.

Sent:

- 18 December 2020 – Letter from Chair to Mr Greg Barnier, former Chief People Officer, icare, inviting a response to evidence provided to the committee on 23 November 2020.
- 21 December 2020 – Letter from Chair to Mr Gavin Pearce, former Group Executive Risk and Governance, icare, inviting a response to evidence provided to the committee on 23 November 2020.
- 12 January 2021 – Letter from Chair to Mr Frank Zimmermann, inviting a response to evidence provided to the committee on 23 November 2020.

Resolved, on the motion of Mr Khan: That the correspondence from Mr McCann to secretariat, providing a statement made as part of his workers compensation claim, be kept confidential as per the recommendation of the secretariat, as it contains identifying and sensitive information, and potential adverse mention.

4. 2020 Review of the Workers Compensation Scheme

4.1 Clarification of evidence

Resolved, on the motion of Mr Farlow: That the committee authorise the publication of the correspondence from Mr David Plumb, member of the icare board, clarifying the evidence given to the committee on 24 August 2020.

Resolved, on the motion of Mr Roberts: That the committee authorise the publication of the correspondence from Ms Samantha Liston, Group Executive People and Workplace, icare, to committee, clarifying the evidence given to the committee on 2 December 2020.

4.2 Provision of an opportunity for individuals to respond – procedural fairness

Resolved, on the motion Mr Farlow: That the committee authorise the publication of correspondence from Mr Frank Zimmermann, dated 22 January 2021, responding to a statement made by a witness on 23 November 2020.

4.3 Reporting Date

Resolved, on the motion of Mr Khan: That the committee table its report by the end of March 2021.

5. 2020 combined Reviews of the Compulsory Third Party insurance scheme and Lifetime Care and Support Scheme

5.1 Public submissions – Compulsory Third Party insurance scheme

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-10.

5.2 Public submissions – Lifetime Care and Support scheme

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-4.

6. Inquiry into the Mandatory Disease Testing Bill 2020

6.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-27.

6.2 Report deliberative date

Resolved, on the motion of Mr Khan: That the Chair seek an extension of time via the House to report until the end of April 2021.

6.3 Answers to questions on notice and supplementary questions

Resolved, on the motion of Mr Farlow: That the witnesses appearing at the hearings on 11 and 12 February 2021 be requested to return answers to questions on notice and/or supplementary questions from members within 14 days of the date on which questions are forwarded to witnesses by the committee clerk.

6.4 Public Hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Patrick Gooley, Secretary, Police Association of NSW
- Mr Tony Bear, Manager, Strategy and Relationships, Police Association of NSW
- Mr Stewart Little, General Secretary, Public Service Association of NSW
- Ms Nicole Jess, Senior Vice-President, Chair, Prison Officers Vocational Branch, Public Service Association of NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Nicholas Medland, President, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine (ASHM) (*by videolink*)
- Dr Nicholas Parkhill, Chief Executive Officer, ACON
- Ms Karen Price, Deputy Chief Executive Officer, ACON
- Mr Steven Drew, Chief Executive Officer, Hepatitis NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Mary Ellen Harrod, Chief Executive Officer, NSW Users and AIDS Association (NUAA)
- Ms Kali Kanivale, Special Projects and Advocacy Specialist, NUAA
- Ms Jane Costello, Chief Executive Officer, Positive Life NSW
- Mr Neil Fraser, Deputy Chief Executive Officer, Positive Life NSW
- Professor Andrew Grulich, Head, HIV Epidemiology and Prevention Program, The Kirby Institute, UNSW Sydney
- Mr Cameron Cox, Chief Executive Officer, Sex Workers Outreach Project (SWOP).

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Danielle McMullen, President, Australian Medical Association (NSW) (*by videolink*)
- Professor Kylie Valentine, Deputy Director, Social Policy Research Centre, UNSW Sydney
- Professor Martin Holt, Research Convenor, Centre for Social Research in Health, UNSW Sydney
- Dr Kari Lancaster, Scientia Senior Research Fellow, Centre for Social Research in Health, UNSW Sydney.

The evidence concluded and the witnesses withdrew.

Mr Shoebridge left the meeting.

The following witnesses were sworn and examined:

- Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre (*by videolink*)
- Ms Gabrielle Bashir SC, Senior Vice-President and Co-Chair of Criminal Law Committee, NSW Bar Association
- Ms Jane Sanders, Member, Law Society of NSW Criminal Law Committee.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Natalie Lang, Branch Secretary, Australian Services Union NSW and ACT (Services) Branch.

The evidence concluded and the witness withdrew.

The public and media withdrew.

The hearing concluded at 4.39 pm.

7. Adjournment

The committee adjourned at 4.52 pm until 9.15 am 12 February 2021 for the second public hearing for the Inquiry into the Mandatory Disease Testing Bill 2020.

Joseph Cho and Peta Leemen
Committee Clerks

Minutes no. 34

Friday 12 February 2021

Standing Committee on Law and Justice

Jubilee Room, Parliament House, Sydney at 9.18 am

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack, *from 9.25*

Mr D'Adam

Mr Khan

Mr Martin (*substituting for Mr Farlon*)

Mr Roberts

Mr Shoebridge, *from 9.28 to 11.38*

2. Apologies

Mr Mallard (*participating member for Mandatory Disease Testing inquiry*)

3. Inquiry into the Mandatory Disease Testing Bill 2020

3.1 Public Hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Deputy Commissioner Malcolm Lanyon, Deputy Commissioner for Corporate Services, NSW Police.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Mark Follett, A/Executive Director, Policy, Reform and Legislation, Department of Communities and Justice
- Ms Gayle Robson, Chief of Staff, Office of the Commissioner, Corrective Services NSW, Department of Communities and Justice
- Mr Craig Smith, Director, Western Region, Corrective Services NSW
- Dr Michelle Cretikos, Executive Director, COVID-19 Response, Population and Public Health, NSW Health.

The evidence concluded and the witnesses withdrew.

Mr Shoebridge left the meeting.

The following witness was sworn and examined:

- Mr Paul Miller, Acting NSW Ombudsman.

The evidence concluded and the witness withdrew.

The public and media withdrew.

The hearing concluded at 12.28 pm.

3.2 Public submission

Resolved, on the motion of Ms Cusack: That the committee accept and publish the following submission: submission no. 28.

3.3 Additional evidence

Mr D'Adam moved: That the committee hold an additional half-day hearing to hear from the Chief Health Officer and a representative from Justice Health.

Debate ensued.

The committee divided.

Ayes: Mr D'Adam and Mr Donnelly.

Noes: Ms Cusack, Mr Fang, Mr Khan, Mr Martin and Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That the committee write to Justice Health to request advice on current procedures for blood borne virus screening, detection and treatment in NSW prisons, and any relevant data they have on prevalence and transmission of blood borne viruses in NSW prisons.

4. Adjournment

The committee adjourned at 12.46 pm until 26 March 2021 (report deliberative for the 2020 review of the workers compensation scheme).

Peta Leemen
Committee Clerk

Draft minutes no. 35

Tuesday 27 April 2021

Standing Committee on Law and Justice Committee

Room 1043, Parliament House, 9.34 am

1. Members presentMr Fang, *Chair*Mr Donnelly, *Deputy Chair*

Mr D'Adam

Mr Farlow

Mr Khan

Mr Mallard (substituting for Mr Khan)

Mr Martin (from 9.36 am)

Mr Mookhey (participating member for the 2020 Review of the Workers Compensation Scheme)

Mr Roberts

Mr Shoebridge (from 9.35 am)

2. Committee membership

The committee noted that the Hon Taylor Martin replaced the Hon Catherine Cusack on the committee from 16 March 2021.

3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes nos. 31, 32, 33 and 34 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 5 December 2020 – Letter from a former icare employee to Chair, requesting redactions to the 23 November 2020 transcript
- 15 December 2020 – Email from Ms Vanessa Gill, Executive Officer, Office of the Auditor General to secretariat, providing a copy of the Central Agencies 2020 report for the committee's information
- 8 January 2021 – Letter from Mr Greg Barnier to committee, providing a response to matters raised at the hearing on 23 November 2020
- 11 February 2021 - Email from Felix Delhomme, Acting Manager - Policy, Strategy & Research, ACON, providing documents 'NAPWHA's The System is Broken' and 'ACON's Ending HIV-related Stigma for All'
- 23 February 2021 – Letter from Mr Simon Cohen, Independent Review Officer, Independent Review Office to Chair, informing the committee about the Workers Compensation Independent Review Office's re-establishment as the Independent Review Office
- 1 March 2021 - Email from Michelle Vo, Executive and Ministerial Services, NSW Health, on behalf of Gary Forrest, Chief Executive, Justice Health and Forensic Mental Health Network, to the committee, responding to the committee's request for information
- 10 March 2021 – Letter from the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the clerk of the Legislative Council, providing the Government response to the *WHS Amendment (Information Exchange) Bill* inquiry
- 24 March 2021 – Email from an injured worker to secretariat, requesting change to the workers compensation scheme based on her experience.

Sent

- 15 February 2021 – Letter from the Hon Wes Fang MLC, Committee Chair, to Gary Forrest, Chief Executive, Justice Health and Forensic Mental Health Network, requesting information on the current procedures for screening inmates for blood borne viruses, current programs or procedures in NSW

correctional facilities to diagnose and treat blood borne viruses, and any data relating to the prevalence, incidence, transmission and treatment rates of blood borne viruses in NSW correctional facilities.

Resolved, on the motion of Mr Shoebridge: That:

- the letter from a former icare employee to Chair, requesting redactions to the 23 November 2020 transcript be kept confidential, as per the recommendation of the secretariat, as it contains identifying information
- the email dated 24 March 2021, from an injured worker to the committee, requesting changes to the workers compensation scheme be kept confidential, as per the recommendation of the secretariat, as it contains identifying information
- the letter from Mr Barnier to the committee, dated 8 January 2021, be published.

5. 2020 Review of the Compulsory Third Party insurance and Lifetime Care and Support schemes

5.1 Pre-hearing questions

The committee noted that on 1 March 2021 SIRA and icare were forwarded the pre-hearing questions the committee agreed to via email. Responses are due 14 April 2021, ahead of the hearings on 25 and 26 May 2021.

6. 2020 Review of the Workers Compensation scheme

6.1 Answers to questions on notice

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Mr Vivek Bhatia, former Chief Executive Officer and Managing Director, icare, received on 7 January 2021
- answers to questions on notice from Mr Nigel Freitas, former Chief of Staff to the Treasurer, received on 8 January 2021
- answers to questions on notice from Mr Michael Carapiet, former Chair, icare Board, received on 20 January 2021
- answers to questions on notice from icare received on 25 January 2021.

Resolved, on the motion of Mr Shoebridge: That all documents provided as Mr McCann's answers to questions on notice be kept confidential, as they contain adverse mention and sensitive and identifying information, except for the cover page which can be published, with the exception of the last sentence.

6.2 Tabled documents

Resolved, on the motion of Mr Shoebridge: That:

- the document 'Appointment Letter – Receptionist – tendered on 23 November 2020' be kept confidential as it contains identifying and personal information.
- the document 'Icare letter 4 June 2019 – tendered on 1 December 2020' be accepted and published, with the name of Mr Nagle's wife removed.

Resolved, on the motion of Mr Farlow: That the document 'Allens Linklaters - Report on Investigation - Summary - 22 October 2018' be accepted and published, with the names of the individuals and businesses redacted.

6.3 Consideration of the Chair's draft report

The Chair submitted his draft report entitled '2020 Review of the Workers Compensation Scheme', which, having been previously circulated was taken as being read.

Chapter 1

Resolved, on the motion of Mr Shoebridge: That paragraph 1.10 be amended by:

- a) inserting 'and controversial' after 'were significant'
- b) inserting 'that were said' after 'introduced changes'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.25 be amended by inserting at the end: 'Importantly, the office of Independent Review Officer is a statutory office, appointed by the Governor, and the provisions of the Government Sector Employment Act 2013 relating to the employment of Public Service employees do not apply to that office. This ensures the office's independence'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.47 be amended by inserting at the end: 'The committee's work in holding public hearings to test the responses of icare management and the government to the concerns being raised in the public arena has had an important role in delivering accountability'.

Chapter 2

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 2.84, with the secretariat to include references:

'The committee received evidence that early and active intervention in cases with musculoskeletal injury that had a risk of delayed return to work has a significant positive impact on return to work rates. This in fact is the direction that NSW Health in particular have taken since 2015 when they began working with an array of academics and specialists using the WISE protocols.

The WISE protocols saw a 20 per cent reduction in days lost for workers who had total or partial incapacity to work, a 100 per cent sustained return to work at 6 months for those injured workers who had return to pre injury duties, a 20 percent reduction in long term costs to the employer and reduced long term disability and chronic pain for injured workers.

Despite the success in NSW Health, despite repeated positive international reviews of the outcomes and despite even receiving an award from EML and Workcover for the work, the WISE protocols on early intervention were not adopted by icare for the Nominal Insurer or the TMF. In fact icare went in exactly the opposite direction with the implementation of their new platform which radically reduced interactions with injured workers in the first stages of their injury, rather than increasing the number and types of interventions to assist with return to work.'

Resolved, on the motion of Mr Shoebridge: That the following new finding be inserted in the committee comments section in Chapter 2 in appropriate place:

Finding x

The implementation of the WISE protocols that deliver early and active intervention for injured workers with musculoskeletal injury that have a risk of delayed return to work has a significant positive impact on return to work rates, and despite this evidence being available to icare they have not been adopted in the Nominal Insurer or the Treasury Managed Fund.'

Resolved, on the motion of Mr Shoebridge: That paragraph 2.112 be amended by inserting 'injured workers' after 'potential to expose'.

Resolved, on the motion of Mr Farlow: That Finding 1 be omitted: 'That the multi-billion losses incurred recently by the Nominal Insurer and Treasury Managed Fund have been primarily caused by a collapse in return to work rates arising from icare's implementation of a new claims management model', and the following new Finding inserted instead:

'The multi-billion losses incurred recently by the Nominal Insurer and Treasury Managed Fund has been caused, in large part, by a collapse in return to work rates arising from icare's decision to introduce a new claims management model'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment and recommendation be inserted above paragraph 2.115:

'Committee comment

'The committee was especially concerned at the fact that icare's position throughout the inquiry was to look for external factors to explain the scheme's poor outcomes and to refuse to clearly accept responsibility for the outcomes of the scheme they manage. This inability to self-reflect and accept responsibility was seen at both a board and senior management level. This also meant that the dramatic falls in the RTW rates in both the TMF and the NI were not addressed with the urgency or thoroughness they deserved given the negative impact they have on injured workers and the financial sustainability of the scheme.

While we note that there has been a new Chief Executive Officer and Chair of the Board since then, the fact that the culture in icare is so unwilling to accept their agency in poor outcomes is of very real concern. For this reason, while we acknowledge the substantial change in the senior leadership, we remain extremely concerned and will be looking to keep a close eye on the scheme in the coming 12 months.

Recommendation x

That the Standing Committee on Law and Justice undertake a brief hearing to review the status of reforms in icare and the implementation of various reviews of the scheme towards the end of the 2021 calendar year'.

Chapter 3

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.3:

'Mr McCann gave his evidence in a clear, forthright and compelling fashion. His insights into the manner in which icare addressed risks, including regarding procurement and conflicts of interest, was of very real value to the committee, and through the committee, to injured workers, employers and the people of NSW.'

Resolved, on the motion of Mr Shoebridge: That paragraph 3.11 be amended by inserting 'that was presented to the icare Board' after 'business plan'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.17 be amended by inserting at the end: 'This was despite the unchallenged evidence before the committee that Mr Bhatia was present at the Board meetings where the Capgemini contract was considered and ultimately approved and there was no evidence to suggest either a conflict of interest declaration was made by Mr Bhatia or he excluded himself from any part of the Board's deliberations during these matters.'

Resolved, on the motion of Mr Shoebridge: That a new paragraph, drafted by the committee secretariat, be inserted after paragraph 3.13 outlining the reasons as to why Fineos withdrew from the tender process.

Resolved, on the motion of Mr Shoebridge: That the following paragraph 3.60 be omitted: 'Subsequent to this, the committee received written confirmation that Mr Craig, along with Mr Nagle, had unlimited delegation to contract in relation to the build of the Nominal Insurer Single Platform', and the following new paragraph be inserted instead:

'It is notable that Mr Plumb was also the head of the audit and risk committee of the icare Board's audit. When he was asked were you aware that an executive within icare had unlimited authority on behalf of icare in that matter, Mr Plumb responded:

No, I was not... My understanding is that the delegation is that contracts above \$10 million have to be approved by the board. Obviously, not physically signed—the board can delegate to that—but \$10 million is the board threshold.

[FOOTNOTE: Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28].

When Mr Plumb was asked what the risks are in having unlimited delegations at an executive level which informed a \$10 million policy, Mr Plumb replied:

The risks are, obviously, of concentration of approval that can obviously occur, and the risks of, if there is a process deficiency, that there is not that extra level of challenge and governance that deals to that.

[FOOTNOTE: Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28].

Mr Plumb was then asked 'were you kept in the dark, as the Chair of the Audit and Risk Committee, that a senior executive of icare, contrary to board policy, had unlimited delegations to contract on behalf of the Nominal Insurer?'. He responded:

I was not aware that there were unlimited delegations to contract on behalf of the Nominal Insurer. However, I am aware of the requirement that all contracts above \$10 million are required to be reported to the board— sorry, the board to approve those contracts. I am also aware of the requirement to report significant contracts to the board.[FOOTNOTE: Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28].

The evidence from icare was that this unlimited delegation was in regards to the construction of the Nominal Insurer single platform and the “transformation” program that followed it, having a total contract value in the end that exceeded \$300 million. This was confirmed in correspondence received from icare following the last hearing day.'

Resolved, on the motion of Mr Shoebridge: That paragraph 3.82 be amended by the committee secretariat, to acknowledge icare's use of psychological services.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.83 be amended by omitting 'Some' before 'concerns'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.85 be amended by omitting 'the documentation' and inserting instead 'any documentation'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.91:

'Mr Nagle last appeared before the Committee on 3 August 2020 when he commenced his evidence stating that he wanted “to thank the committee for the opportunity to correct the campaign of misinformation and accusations based on inaccuracies that has recently been generated.” He resigned from his position at icare at the conclusion of the hearing that day'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.125:

'Under the State Insurance and are Governance Act, the ICNSW Board has the following functions:

- (a) to give the Minister any information relating to the activities of ICNSW that the Minister requests,
- (b) to keep the Minister informed of the general conduct of ICNSW's activities and of any significant development in ICNSW's activities,
- (c) to determine general policies for ICNSW and to give directions to the chief executive of ICNSW in relation to the ICNSW's activities,
- (d) such other functions as are conferred or imposed on it by or under this or any other Act or law.

In addition, under section 6 of that Act, the Minister may give the ICNSW Board a written direction in relation to ICNSW if the Minister is satisfied that it is necessary to do so in the public interest. In the case of icare, the Minister in question has at all times been the 'Treasurer.'

Resolved, on the motion of Mr Shoebridge: That a new paragraph, drafted by the committee secretariat, be inserted after paragraph 3.141 in relation to the number of icare employees who receive or were entitled to bonuses.

Mr Shoebridge moved: That paragraph 3.142 be amended by inserting at the end: 'and that the funding for it came from money set aside to assist injured workers'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Donnelly, Mr Roberts, Mr Shoebridge.

Noes: Mr Fang, Mr Farlow, Mr Mallard, Mr Martin.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Farlow: That Finding 5 be amended by omitting 'systemically' and inserting instead 'too often'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after paragraph 4.65:

'We note that concerns regarding the implementation of PIAWE in the Nominal Insurer extend to the Treasury Managed Fund. Remediation efforts relating to PIAWE need to be addressed by icare in both the Nominal Insurer and Treasury Managed Fund as a matter of priority'.

Resolved, on the motion of Mr Donnelly: That:

- a) The draft report, as amended, be the report of the committee and that the committee present the report to the House;
- b) The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, summary report of the online questionnaire and correspondence relating to the inquiry be tabled in the House with the report;
- c) Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- d) Upon tabling, all unpublished transcripts of evidence, submissions, responses to the online questionnaire and summary report of these responses tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be kept confidential by the committee;
- e) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- f) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- g) Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- h) The report be tabled on Friday, 30 April 2021.

7. Inquiry into Mandatory Disease Testing Bill 2020

7.1 Answers to questions on notice

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre, received on 25 February 2021
- Ms Gabrielle Bashir SC, Senior Vice-President and Co-Chair of Criminal Law Committee, NSW Bar Association, received on 2 March 2021
- Dr Michelle Cretikos, Executive Director, COVID-19 Response, Population and Public Health, NSW Health, received on 3 March 2021
- Dr Mary Ellen Harrod, Chief Executive Officer, NSW Users and AIDS Association (NUAA), received on 4 March 2021
- Deputy Commissioner Malcolm Lanyon APM, Deputy Commissioner for Corporate Services, NSW Police, received on 4 March 2021
- Ms Gayle Robson, Chief of Staff, Office of the Commissioner, Corrective Services NSW, Department of Communities and Justice, received on 4 March 2021
- Mr Paul Miller, Acting NSW Ombudsman, received on 4 March 2021
- Mr Stewart Little, General Secretary, Public Service Association of NSW, received on 5 March 2021
- Dr Danielle McMullen, President, Australian Medical Association (NSW), received on 8 March 2021
- Ms Natalie Lang, Branch Secretary, Australian Services Union NSW and ACT (Services) Branch, received on 10 March 2021.

7.2 Consideration of the Chair's draft report

The Chair submitted his draft report entitled 'Mandatory Disease Testing Bill 2020', which, having been previously circulated, was taken as being read.

Chapter 2

Mr Shoebridge moved: That the following new paragraph be inserted after 2.44:

'The position of Mr Little, that the Bill would be useful to ensure there are consequences for inappropriate conduct, is at odds with the stated position of the Government, the NSW Police Force and the Police Association that this Bill is intended as a protective measure for frontline workers rather than a punitive measure to be used against third parties.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new paragraph be inserted after 2.64:

'Mandatory testing is in breach of the Australian National HIV, Hepatitis B or Hepatitis C Testing Policies, which state that "testing is conducted ethically, is voluntary and performed with the informed consent of, and is beneficial to, the person being tested". These policies state Australian clinical standards and ethical practice; therefore, a person taking blood from a third party under a mandatory testing order can only make a decision about whether their actions will be in breach of these standards if they are aware of their obligations under the Act, and whether a person has consented to be tested.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.64: 'Medical practitioners and other allied health professionals involved in taking blood for the purposes of carrying out a mandatory testing order under the Act may be open to civil and/or criminal liability as a result of their actions. The current version of the Bill does not specifically name medical practitioners, nurses and blood collectors (phlebotomists) as exempt from civil and/or criminal liability.'
- the following new recommendation be inserted after paragraph 2.67: 'Sections 31(1) and 31(3) of the Bill should be amended to specifically include and name medical practitioners, nurses and blood collectors (phlebotomists).'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new recommendation be inserted after paragraph 2.67: 'Section 19 of the Bill should be amended to explicitly state that no obligations under the Act are placed on the medical practitioner or pathologist. Health workers who may be asked to conduct a mandatory test should be provided with specific education and training about their professional rights to refuse.'
- the following new recommendation be inserted after paragraph 2.67: 'Section 19(2) of the Bill should be amended to require that the person taking blood from a third party under a mandatory testing order be informed that no obligations under the Act are placed on them, and informed of whether or not the person has consented to be tested.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after paragraph 2.87: 'Given the unambiguous evidence from the medical profession that saliva cannot transmit a BBV there is no valid reason to retain saliva in the bodily fluids listed in the bill. If there is evidence of blood being mixed with saliva then the presence of the blood itself would satisfy an amended definition of bodily fluids that included blood and excluded saliva. The bill should therefore be amended to remove saliva from the list of bodily fluids in the dictionary. Even putting aside the medical evidence regarding the absence of risk of transmission the inclusion of saliva perpetuates the myth around sources of transmission for HIV and so exacerbates stress for frontline workers who may have occupational exposure to saliva.'
- the following new recommendation be inserted after the new paragraph: 'That the Bill be amended to remove saliva from the definition of bodily fluid in the Act.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Mallard, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraphs be inserted after paragraph 2.93:

"The decision to make a mandatory testing order is clearly a medical decision, with the whole purpose of the Bill being to assist in the medical response to an incident rather than be a form of punishment of the third party. Therefore the decision should be made in a health context by the most appropriately qualified and informed medical practitioner. The experience of dealing with Covid-19 has shown how capable and competent NSW Health is in dealing with medical crises and the social response to them.

Expertise in blood-borne diseases is a highly specialised area, and a decision maker without this specific experience will not be able to accurately assess transmission risk associated with a specific exposure to bodily fluids. In light of the evidence we have received the Bill should therefore be amended to provide that any decision to make a mandatory testing order is made by the Chief Medical Officer or their delegate. To achieve this Part 3, sections 10-12 of the Bill should be amended so that any decision to impose a mandatory blood test is made by the Chief Health Officer, in consultation with a BBV/HIV specialist medical officer rather than police, regardless of seniority.'

- the following new recommendation be inserted after the new paragraphs:

"That the Bill be amended so that all decisions to make a mandatory testing order are made by the Chief Medical Officer and this includes any appropriately qualified medical professional acting as delegate of the CMO.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Mallard, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comments section at the end of the report:

"The Bill should be amended to require a mandatory disease testing order to be made by the Chief Health Officer, or an independent arbiter delegated by the Chief Health Officer who has relevant medical expertise, including the ability to assess complex information about transmission risk.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Mallard, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after paragraph 2.101: 'There are real privacy concerns raised where a third party who is proposed for testing comes from a small community, especially country towns with only one GP and a very small community. Any consideration of a mandatory disease test in these circumstances would need to include consideration of the privacy impacts before a testing order is made.'
- The following new recommendation be inserted after the new paragraph: 'Amend Part 3, sections 10 (5) of the Bill so that in determining an application, the decision maker should consider the impacts of carrying a test on the third party's privacy and be fully compliant with privacy legislation.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after paragraph 2.101: 'The lack of clarity surrounding the criteria under which a mandatory disease testing order can be made under the Bill is of concern. There are strong reasons for putting in place a more detailed legislative structure that guides a decision make and produced greater certainty. The Victorian Public Health legislation sets out a useful example in this regard and requires the decision maker to consider the clinical management of the affected worker and the third party while also creating safeguards to ensure alternative, less intrusive measures are considered. Similar provisions should be included in this Bill.'
- the following new recommendation be inserted:
'That Section 10(7) be amended so that any decision maker must also be satisfied that:
 1. The worker came into contact with the bodily fluid of the third party as a result of a deliberate action of the third party; and
 2. In considering the medical evidence, the making of the order is necessary in the interest of rapid diagnosis and clinical management and, where appropriate, treatment for any of those involved; and
 3. In considering the medical evidence, there are no alternative measures available which would be less restrictive of the rights of the third party and equally effective in ensuring the rapid diagnoses and clinical management for any person effected.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendations be inserted in the committee comments section at the end of the report:

- 'The Bill should be amended to provide that, if alternative measures that are equally effective for the rapid diagnosis and clinical management of a worker are available, the measure that is least restrictive of the rights of the third party should be chosen.'

- 'The Bill should be amended to require that a decision to issue an order can only be made when it is necessary for rapid diagnosis, clinical management or treatment of the worker.'
- 'The Bill should be amended to require that evidence of a deliberate action is required to issue an order'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- a new heading 'Issuing of orders' be inserted after paragraph 2.101
- the following new paragraph be inserted after paragraph 2.101: 'Third parties mandatorily getting tested for blood borne viruses under this scheme, such as viral hepatitis and HIV should have the same rights as any other patient getting tested. This should include provision of accurate information and access to support services where these are required.'
- the following new recommendation be inserted: 'Section 18 of the Bill should be amended to require the third party to be provided with information about blood borne viruses, a referral to a medical practitioner with specific expertise in these, and a referral to counselling. This should be done at the same time the third party is personally served the mandatory testing order.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following recommendations be inserted in the committee comments section at the end of the report:

- 'The Bill should be amended to provide that third parties are informed of the decision making and review process, relevant timeframes, and where to seek medical and legal advice.'
- 'The Bill should be amended to ensure detained people will have information to appeal a mandatory testing order.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.101: 'Mandatory disease testing should not be used as punishment. Using mandatory disease testing as extra-judicial detention contradicts civil rights protections and is contrary to the objects of this Bill.'

- the following new recommendation be inserted: 'Amend Part 6, section 20 (1) so that there is no unreasonable detention in order to transport the person for a mandatory test – particularly where the test is not consented to and an appeal is made.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.117: 'The legislation should comply with principals of natural justice including provisions to provide the person subject to mandatory testing with an effective appeal mechanism. This matches the Victorian, Queensland, Northern Territory and Western Australian provisions.'
- the following new recommendation be inserted: 'Part 7, section 22 of the Bill should be amended so that appeals against a mandatory blood testing order of the Chief Health Officer are conducted by the Local Court to be heard de novo.'
- the following new paragraph be inserted after 2.117: 'The current drafting of the legislation would allow an order to continue irrespective of any review process being undertaken and regardless of the fact procedural fairness may not have been provided to the third party under the legislation. This is contrary to the provisions in similar legislation in other jurisdictions and contrary to natural justice principles. In effect it makes the appeal rights contained in the Bill of no value.'
- the following new recommendation be inserted: 'Part 7 Section 23(1-3) be amended so that appeals held by the local Court, or any other appeal body, are to be held in a timely manner and power is given to the appeal body to put a stay on the order while the appeal is determined.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following recommendations be inserted in the committee comments section at the end of the report:

- 'The Bill should be amended to provide that no mandatory blood tests should be required during the period in which a review application is being considered.'
- 'The Bill should be amended to provide an appeals mechanism for a mandatory testing order on a 'vulnerable third party', as a de novo hearing in the District Court.'
- 'The Bill should be amended to provide an appeals mechanism for a mandatory testing order on a third party, as a de novo hearing in the Local Court.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.117: 'The Bill should be amended so that an order must be sought by the Chief Health Officer from the Local Court if reasonable force for the purpose of enforcing the order on people in detention is required. A similar provision is found within the *Victorian Public Health and Wellbeing Act* 2008 (Section 134 (4)). The Court should be satisfied that the circumstances are so compelling that the making of the order to use reasonable force is justified.'
- the following new recommendation be inserted: 'The Bill should be amended so that an order must be sought by the Chief Health Officer from the Local Court if reasonable force for the purpose of enforcing the order on people in detention is required.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to remove provisions allowing the use of 'reasonable force' on detained third parties'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.127: 'There are strong policy reasons to have additional protective measures in place for minors. This, together with the very low prevalence of HIV and blood-borne viruses in minors does not justify the conduct of mandatory disease testing on persons under the age of 18.'
- the following recommendation be inserted: 'Amend part 2, section 7 so that no person under the age of eighteen (18) years is subject to mandatory disease testing.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to ensure that mandatory tests for blood-borne diseases cannot be conducted on any person under the age of 18.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.127: 'The legislation in its current form gives little opportunity to children and vulnerable people to seek support from their parent or guardian. For many children this is likely to be their first time learning of BBV's and the protections that they should take to minimise risk of transmission. A safe environment that offers support systems for the child would assist encouraging the child to engage with healthcare facilities in the future. *The Crimes (Forensic Procedures) Act 2000* has safeguards in place which this legislation should look to as a guide including providing the right to representation by a legal representative and an interview friend during proceedings and during the procedure.'
- The following new recommendation be inserted: 'The Bill must include a requirement for the meaningful involvement of parents/guardians or a support person in all aspects of the legislation involving people under the age of eighteen (18) years.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new recommendation be inserted after 2.130:

'To assist appeals by persons with literacy, language mental health or cognitive disability, assistance from a qualified support person must be provided to enable them to make an informed decision, understand their rights and submit an appeal.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should make provision for support to be provided to vulnerable third parties who lodge an appeal'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new paragraph be inserted after 2.145:

'The best way to continuing preventing occupational transmissions and to reduce fear and anxiety about HIV and BBVs is to provide people with adequate health information. This includes information on levels of risks – including the fact that HIV, hepatitis B and hepatitis C does not get passed on through saliva – and on how to prevent transmissions and stay safe.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- a new heading 'Treatment of the test results and medical information' be inserted after 2.134.
- the following new paragraphs be inserted after 2.134: '

'HIV and blood borne virus test results are highly sensitive personal information, the disclosure of which can have serious consequences for those living with such diseases. Inadequate privacy protections may lead to increased stigma and discrimination, which will hinder public health responses to HIV and BBVs.'

'Data obtained through mandatory disease testing should only be used to satisfy the objects of the Bill, in accordance with public health objectives. Allowing police to utilise mandatory disease testing results for other purposes may lead to an unjustified increase in mandatory disease testing orders.'
- the following new recommendation be inserted:

'Section 28 should be amended so that any and all information and data collected or utilised, including any test results and/or any medical information must be managed by the Chief Health Officer, observing all public health procedures and protocols.'
- the following new recommendation be inserted:

'Section 28 should be amended so that any information or data collected or utilised, including any test results and/or any medical information cannot be used by police or in any other criminal matter.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should require that all blood samples are compulsorily destroyed after completion of testing and there should be an absolute prohibition on the use of samples in any other type of testing (including DNA testing).'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new recommendation be inserted after paragraph 2.150:

'All frontline workers, including those specified in the legislation should be provided with access and education on Hepatitis B vaccination and must participate in regular education on blood borne viruses including HIV with specialist organisations, including ASHM, Positive Life, ACON and Hepatitis NSW. This information and supporting education sessions should be mandatory.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted as committee comment:

'The high rate of Hepatitis C in prisons should result in the expansion of the Hepatitis in Prisons Elimination program to reduce the identified risks to inmates and prison officers. Given the success of these programs to date this is the most effective way to meaningfully address this problem at the source.'

Mr Shoebridge moved: That the following new paragraph be inserted after 2.154:

'There is a real risk that a Mandatory Disease Testing scheme will cause frontline workers to overestimate the risk of transmission of blood-borne diseases from those they deal with, this will have significant mental health impacts. Any new scheme must be accompanied by myth-busting to ensure saliva for instance is not considered a likely vector for such infections.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That recommendation 1 be omitted and the following recommendation inserted instead:

'That the Legislative Council not support the Mandatory Disease Testing Bill 2020 in light of the significant concerns identified by stakeholders including the fact that the diseases in question have very low prevalence in the community and are extremely unlikely to be transmitted in interactions with police and emergency service workers.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That a new recommendation 2 be inserted as follows:

'That the NSW Government should continue to review the expert evidence about measures to protect front line workers from blood-borne disease including changes to protective equipment, workplace setup, access to post-exposure prophylaxis and general procedure and policies.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That a new recommendation 3 be inserted as follows:

'That respect and dignity of people with blood-borne diseases is a central concern in any policies and procedures relating to blood-borne diseases.

If the Bill proceeds then any amendments to the legislation should be made to ensure it reflects current NSW public health procedures in relation to HIV and Blood Borne Viruses (BBVs). Testing should only occur where there is an actual risk of transmission, which should be assessed by medical/public health professionals.

Decisions to carry out Mandatory Disease Testing orders should sit with the NSW Chief Health Officer and adequate appeals and safeguards must be in place to avoid adverse impacts, particularly on the most vulnerable community members.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to ensure that testing orders can only be made when an actual risk of transmission occurs (taking account of the bodily fluid and type of contact).'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to expand the definition of 'vulnerable third party' to include those who identify as Aboriginal or Torres Strait Islander people'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new paragraph be inserted after 2.54:

'The concern of stakeholders other than the Police Association of NSW is not the conduct of marginalised communities, but the use of police discretion.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendations be inserted in the committee comment section at the end of the report:

- 'The Bill should be amended to clarify what is meant by 'deliberate action' by having a specific definition in the bill.'
- 'The Bill should be amended to insert clear criteria that should guide decisions on whether or not to issue an order including requiring that medical opinion must be taken into account in a decision to issue a mandatory disease testing order.'
- 'The Bill should be amended to clarify the standard of proof required to make an order.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to lengthen the time frame to make a review application.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Donnelly moved: That:

- The draft report [as amended] be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, responses to the online questionnaire and summary report of these responses tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be kept confidential by the committee;

- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- The report be tabled on Friday, 30 April 2021.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

8. Adjournment

The committee adjourned at 11.34 am, until 25 May 2021 (*public hearing for the 2020 reviews of the Compulsory Third Party insurance and Lifetime Care and Support Schemes*).

Tina Higgins and Peta Leemen
Committee Clerks

Appendix 4 Dissenting statements

Mr David Shoebridge MLC, The Greens

This inquiry was an important opportunity to consider the potential harms and pitfalls of the proposal to impose mandatory disease testing.

It could have been used to identify the amendments needed to ensure the proposed bill did not result in a damaging and discriminatory scheme, and that the priority was public health and access to accurate information. Unfortunately the final report and in particular the recommendations do not properly reflect this.

This committee received detailed written submission and engaged in hours of questioning of experts in the field who were near unanimous in their condemnation of the bill. From a health perspective there was not a single expert stakeholder who supported the bill in its current form.

Though they all argued the mandatory disease testing scheme should not be implemented, these witnesses made productive and positive suggestions for how the bill should be amended to create a scheme that would target where harm is possible or likely, remove unintended impacts, and protect the vulnerable.

We heard credible evidence that the proposed scheme would result in mental distress for the frontline workers it purports to help, and those living with blood borne viruses as well as any person unreasonably subject to a mandatory testing order.

The final decision maker in a scheme about public health should be an appropriately qualified medical practitioner, not a police officer or prison Governor. To propose police as decision makers in this Bill gives the impression that the primary function is not protection or information but punishment.

It is of note that the position advanced by the PSA, that the Bill would be useful to ensure there are “consequences” for inappropriate conduct, is at odds with the stated position of the Government, the NSW Police Force and the Police Association that this Bill is intended as a protective measure for frontline workers rather than a punitive measure to be used against third parties.

Likewise the failure to recommend to remove non-blood bodily fluids like saliva from the bill is concerning. The presence of saliva in the bill supports the prevalent but incorrect belief that it is possible to contract blood borne viruses from spitting or kissing. There is no evidence to suggest this is the case. Leaving this in the Bill works against more than three decades of work de-stigmatising people with blood borne viruses, especially people who are HIV positive.

I also have significant concerns that despite the evidence before the committee the final report does not recommend that people under 18 be excluded from the scheme. The prevalence of blood borne diseases in young people is extremely low and does not justify them having their blood forcibly taken and tested under this scheme.

The justification for this scheme within prisons has been provided as the higher than population level rates of hepatitis C in prisons. Given this is a treatable condition the priority should be increasing the resources to programs that are eliminating hepatitis in prisons.

The bill will put doctors in the invidious position of not knowing their rights regarding undertaking mandatory tests. Where they do such tests there are real risks that they might be exposed to legal actions in the courts as a result.

In summary this is a Bill that causes harm and damage and does not have a credible health purpose. It should be rejected by Parliament.

