

Question 1:

The Hon. SCOTT FARLOW: Dr McMullan, I am wondering whether the AMA's position on the concerns you have raised with respect to bodily autonomy and the intrusion of blood tests extends to the Road Transport Act provisions for mandatory testing.

Answer 1:

We do not have a position on blood tests conducted under the Road Transport Act.

Mandatory disease testing is proposed as a means of reducing psychological stress of the frontline worker who has been exposed to bodily fluids through a deliberate act. As outlined in our submission regarding Mandatory Disease Testing, we do not support mandatory blood tests where there is no clinical benefit to either the person being tested or the person who had been affected by the behaviour. The results of the mandatory disease tests would be inconclusive if negative, given there is a window period where BBV are not detected, and if positive, the results could have the unintended effect of increasing psychological distress of the emergency worker where there is still zero to low probability of infection depending on the exposure incident.

Also, as stated in our submission, the results of the tests should not change the treatment protocol following an exposure incident.

Question2:

The Hon. GREG DONNELLY: AMA, thank you very much for your submission. I will take you to the first page of the your submission, the penultimate paragraph, which makes reference to the other jurisdictions—Western Australia, South Australia, Queensland and Victoria—and goes on to make some comment. Are you able to elucidate on those jurisdictions and the regime that applies there? Or is that just some general information you have received?

Answer 2: To date, five other state and territories have passed legislation regarding mandatory testing of blood borne viruses: Western Australia, South Australia, Queensland, Victoria and the Northern Territory.

Western Australia

Western Australia legislated the Mandatory Testing (Infectious Diseases) Act in 2014. In summary, it allows a senior police officer to give a disease test approval in order to detain and take blood from the suspected transferor. To note is that while the application is determined, the police officer can detain the person 'as long as is reasonably necessary'¹. The police officer may seek a disease test approval in if there are 'reasonable grounds for suspecting that there has been a transfer of bodily fluid', as a result of an assault, lawful detention, or 'Any other prescribed circumstance'². Children can be subject to the law, given a magistrate's approval.

The WA laws are broad. The grounds of testing include any suspicion of transfer of bodily fluids. The proposed NSW legislation is even broader wherein a mandatory testing order can be sought where the worker has simply 'come into contact with the bodily fluid of the third party.' No suspicion of transfer is needed under the proposed legislation.

The WA laws are used frequently, more often than initially thought. An FOI by the National Association of People with HIV Australia (NAWPHA) showed that there were 387 requests made over

¹ Mandatory Testing (Infectious Diseases) 2014 (WA), Part 2 Division 2 (9)

² Mandatory Testing (Infectious Diseases) 2014 (WA), Part 1 Preliminary 4

the period from January 2015 to mid-December 2018, with 377 approvals³. This is roughly 100 approvals per year. This is concerning, given the Explanatory Memorandum associated with the Bill stated that “In 2013, there were 147 incidents recorded where officers were exposed to bodily fluids during the course of policing. However, only a small number of these cases will result in a requirement to take a blood sample under a disease test authorisation.”⁴ It seems that rather than a small number of these cases leading to a disease test authorisation, it is the majority.

South Australia

South Australia amended the Criminal Law (Forensic Procedures) Act 2007 in 2016 to allow for mandatory testing. A police officer may issue a mandatory testing order if the accused has committed a prescribed offence (including assault, causing harm or serious harm, endangering life, riot, affray) and an emergency worker has been exposed to ‘biological material’ capable of communicating or transmitting disease.⁵ While having a similarly broad definition to the WA laws, if the accused fails to comply with the order, the police must apply to a magistrate to issue a warrant for the person’s arrest. Under the proposed NSW legislation, no such oversight is needed for a non-vulnerable person.

The real-world uptake of mandatory testing orders in SA is low, perhaps given the requirement for a magistrate’s approval to forcibly collect blood. From February 2017 to May 2018, mandatory testing laws were only applied 8 times⁶.

Queensland

Queensland’s laws around mandatory testing do not centre around emergency workers, rather they involve the mandatory testing of a person who is accused of committing sexual assault, or serious assault involving ‘blood, saliva or other bodily fluids penetrating skin or mucous membranes’. The relevant legislation is located within Chapter 18 of the Police Powers and Responsibilities Act 2000. The legislation specifically rules out assaults where bodily fluids do not ‘penetrate the anus, vagina, mucous membrane or the skin’ and well as not applying to ‘spitting saliva onto intact skin’⁷. The specificity of the criteria more closely matches the evidence regarding transmission of BBVs than other states. Furthermore, the police officer must apply to a magistrate in all cases, and the accused have the right to be represented with a lawyer. No public information is available regarding real world use of mandatory testing in Queensland.

Victoria

Victoria’s *Public Health and Wellbeing Act 2008* governs mandatory testing for the state. The Victorian laws differ from other states on the heavy focus on gaining consent for testing and a variety of safeguards. If consent is unable to be given, approval of the Victorian Chief Health officer

³ Cameron, S. *The System is Broken: Audit of Australia’s Mandatory Disease Testing Laws to Test for HIV*, HIV Justice Network and the National Association of People with HIV Australia, 2019.

⁴ Mandatory Testing (Infectious Diseases) Bill 2014 Explanatory Memorandum (WA), Page 1

⁵ Criminal Law (Forensic Procedures) Act 2007 (SA), Division 2 (14)

⁶ Ombudsman SA, *Audit of compliance with the Criminal law (Forensic Procedures) Act 2007*, <https://www.ombudsman.sa.gov.au/wp-content/uploads/Audit-of-compliance-with-the-Criminal-Law-Forensic-Procedures-Act-2007.pdf> Accessed 22/2/21.

⁷ Police Powers and Responsibilities Act 2000 (Qld), Chapter 17 Part 1 (538)

is needed for a mandatory testing order. Between July 2014 and July 2020, no mandatory orders for tests have occurred.^{8, 9, 10}

Northern Territory

Division 7AA of the *Police Administration Amendment Act 2016* provides the legislative basis for mandatory testing in the Northern Territory. A police officer may authorise a blood test if there are grounds for suspecting transfer of bodily fluids through broken skin a mucous membrane.

Concerningly, the healthcare provider who takes the blood sample must perform this act, unless serious harm would be caused to the accused or anyone else¹¹. The Northern Territory is the only jurisdiction where healthcare providers are compelled. To note is that there is no publicly available data regarding real world uptake of mandatory testing in the Northern Territory.

Summary of Requirements for Mandatory Testing¹²

	<i>For all people (unless otherwise stated)</i>	<i>A protected person (child or lacking capacity to consent)</i>	<i>If use of force required</i>
<i>Northern Territory</i>	Police	Magistrate	
<i>Queensland</i>	Magistrate		
<i>South Australia</i>	Police		Magistrate
<i>Victoria</i>	Chief Health Officer	Magistrate	Magistrate
<i>Western Australia</i>	Police	Magistrate	

Yours Sincerely,

Dr Danielle McMullen
President, AMA (NSW)

⁸ Department of Health and Human Services Annual Report 2018-19, State of Victoria, Australia (Department of Health and Human Services).

⁹ Department of Health and Human Services Annual Report 2010-20, State of Victoria, Australia (Department of Health and Human Services).

¹⁰ Cameron, S. The System is Broken: Audit of Australia's Mandatory Disease Testing Laws to Test for HIV, HIV Justice Network and the National Association of People with HIV Australia, 2019.

¹¹ Police Administration Amendment Act 2016 (NT), Division 7AA Subdivision 4 (147FR) (3)

¹² Cameron, S. The System is Broken: Audit of Australia's Mandatory Disease Testing Laws to Test for HIV, HIV Justice Network and the National Association of People with HIV Australia, 2019