Hon Wes Fang MLC
Chair
Standing Committee on Law and Justice

9 March 2021

Dear Mr Fang

Mandatory Disease Testing Bill 2020 – request for further information

Thank you for the opportunity to appear before the Law and Justice Committee on 1 February. We hope that we have been able to contribute in a positive manner to your important deliberations.

In relation to the request for further information, please find set out here our responses. Please do not hesitate to contact me if we can be of any further assistance at all.

We wish you well in your deliberations.

Yours sincerely

Natalie Lang
Branch Secretary
Australian Services Union NSWACT (Services) Branch

Hon Anthony D'Adam: I invite you to outline some of the areas that might be appropriate amendments for Parliament to consider to perhaps mitigate against the more adverse elements of this bill.

ASU response:

Overall recommendation: All aspects of the legislation should reflect 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 MDT 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. The Legislation should be public health legislation, not police legislation.

Rationale

➔ NSW is a leader in HIV and BBV responses:

- Our systems are protecting frontline workers from HIV and BBV transmissions:
    - There has not been an occupational transmission of HIV in 17 years, and never for a police officer.
    - At the time of writing, a search of available materials has not found any record or report of any evidence of transmission of hepatitis C or hepatitis B from a third party to a frontline worker in the course of their duties in the manner contemplated by this proposed legislation. We are aware of cases of transmission from worker to patient due to poor infection control procedures.
- Effective prevention methods are available:
    - For HIV, PEP (Post-Exposure Prophylaxis) is effective at preventing HIV transmission after a risk exposure.
    - A vaccine is available for hepatitis B that prevents infection. Among people who contract hepatitis B, around 95% will clear the infection. A comprehensive new-born, childhood and catch-up vaccination program has been in place since 2000. In the event of infection as a result of blood-to-blood or sexual transmission, hepatitis B vaccination can be used as a post-exposure prophylaxis.

I. Health professionals should assess if there is a risk and decide on MDT orders

Suggested amendment 1: 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.

Rationale

- ➔ NSW is a leader in HIV and BBV responses – there has not been an occupational transmission of HIV in 17 years, and never for a police officer. At the time of writing, there is no available evidence of transmission of hepatitis B or hepatitis C from a third party to a frontline worker by the means contemplated by this proposed legislastion. MDT should not disrupt our successful response and should only occur where there is an actual risk of transmission.

- ➔ Expertise in blood-borne diseases is a highly specialised area, and a medical practitioner without this specific experience may not be able to accurately assess transmission risk associated with a specific exposure to bodily fluids. Further, specialised qualifications are required for the prescription of HIV and hepatitis B treatment. This is vital, particularly if the prescribed worker tests positive for a BBV or is properly assessed of having experienced a high-risk incident requiring PEP.

- ➔ The number of people estimated to be living with hepatitis C in NSW is around 48,000 representing 0.6% of the population. There is a cure for hepatitis C that has been universally available on the PBS since March 2016. Since becoming available, more than 30,000 people living with hepatitis C have been cured, representing approximately 42% of the estimated total community living with hepatitis C. The majority of people now living with hepatitis C are those over 50 years of age. Since 2015, the prevalence of hepatitis C among the injecting drug user community has dropped from 51% to 16% as at 2019.

- ➔ The Justice Health and Forensic Mental Health Network (the Network) provides hepatitis C screening and treatment services to those in state controlled custodial settings, including juvenile detention centres. The Network has reported the effective elimination of hepatitis C in four (4) correctional centres.

Suggested amendment 2: 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.

Rationale

- ➔ No mandatory test should be carried out where the privacy of the third party is compromised. This is particularly relevant in small country towns where only one family GP or health service may be available for example.

Suggested amendment 3: Amend Part 1.4 and Dictionary (p. 21) to remove saliva from the list of bodily fluids currently included in the proposed legislation as potential sources of transmission for BBV's and HIV.

Rationale

- ➔ HIV does not get passed on through saliva. HIV 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.

- ➔ Hepatitis B and hepatitis C are not passed on through saliva. For transmission to occur, there must be a viable point of entry into the body and blood to blood contact. Hepatitis B can be sexually transmitted, however not through saliva when kissing.

Suggested amendment 4: 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.

Rationale

- ➔ The legislation in its current form gives little guidance to the decision maker to assess whether or not the testing is 'justified in all the circumstances.' The wording provided above is taken from the Victorian Public Health legislation 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.

II. Transport & Detention

Suggested amendment 5: 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.

Rationale

➔ MDT should not be used as punishment. Using MDT as extra-judicial detention contradicts civil rights protections and is contrary to the objects of this Bill.

III. Review / Appeals

Suggested amendment 6:

Part 7, section 22 of the Bill should be amended so that appeals against a mandatory blood test order of the Chief Health Officer are conducted by the Local Court to be heard *de novo*. An additional provision should be included so that the hearing and decision is to be held in the absence of the public.

Rationale

➔ The legislation should comply with principals of natural justice including provisions to provide the person subject to mandatory testing with an effective appeal mechanism. The Local Court is the most effective mechanism to determine appeals in an efficient and timely manner and similar provisions can be found within other jurisdictions including Victoria, Queensland, Northern Territory and Western Australia. We note the concerns of what has been described as a 'lengthy court-based appeal process'. Courts are often required to make urgent applications and have the resources and structures in place to do so already.

➔ Additionally, any hearing and decision made by the Local Court should be held in the absence of the public. Similar provisions under the *Public Health Act 2010* (NSW) (Section 80) exist where disclosure of a person's BBV status is relevant to the proceedings. Other jurisdictions including Queensland, Western Australia and Northern Territory include these provisions within their Mandatory Disease Testing Legislation to ensure privacy and to tackle any potential stigma and discrimination for both the emergency worker and third party.

Suggested amendment 7 The Bill should be amended so that an order must be sought by the Chief Health Office from the Local Court if reasonable force for the purpose of enforcing the order on people in detention is required. The Court should be satisfied that the circumstances are so exceptional that the making of the order to use reasonable force is justified.

Rationale

➔ The right to bodily autonomy should be a paramount consideration in any mandatory testing order decision and safeguards should be in place to ensure this is protected. A similar provision can be found within the Victorian *Public Health and Wellbeing Act 2008* (Section 134 (4)). Additional safeguards can also be found within the Victorian

Public Health legislation including a provision requiring the use of measures that are the least restrictive on the rights of the person where they are equally effective in ensuring the rapid diagnosis and clinical management for any person affected (Section 134 (11)).

Suggested amendment 8: 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.

Rationale

➔ Any powers within the bill should be proportionate and necessary to the aims of the bill, taking into consideration a person's right to bodily autonomy. As a matter of procedural fairness, the right to appeal the decision is fundamental and the appeal body, such as a court, should have the power to stay any order until a final determination is made. 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 party under the legislation.

Suggested amendment 9: To assist appeals by persons with literacy, language mental health or cognitive disability, assistance from a qualified support person will be provided to enable them to make an informed decision, understand their rights and submit an appeal.

Rationale

➔ The legislation is likely to impact vulnerable populations who are over-represented in arrest statistics and require additional assistance to understand their rights. A lack of assistance may lead to unnecessary escalations.

IV. *Rights and Liabilities of Medical Professionals Conducting Blood Draw*

Suggested amendment 10: 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.

Rationale

➔ Alongside concerns about professional ethics, medical practitioners 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.

➔ Additional consultation with the Australian Health Practitioner Regulation Agency (AHPRA) and medical liability insurance companies will be required to determine medical liability should a doctor or other health worker: agree to perform MDT and be charged with assault; agree to perform MDT against institutional health and safety

procedures; agree to perform MDT and injure another health worker or a police officer; agree to perform MDT and be injured; and/or refuse to perform MDT.

Suggested amendment 11: 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.

Rationale

- ➔ 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.

Suggested amendment 12: Sections 31(1) and 31(3) of the Bill should be amended to specifically include and name medical practitioners, nurses and blood collectors (phlebotomists).

Rationale

- ➔ Medical practitioners 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.

V. HIV and BBV information and access to prevention

Suggested amendment 13: Section 18 of the Bill should be amended to require the third party to be provided with information about BBVs, a referral to a medical practitioner with specific expertise in BBVs, and a referral to counselling. This should be done at the same time the third party is personally served the mandatory testing order.

Rationale

- ➔ Good public health requires education on BBV and HIV and access to prevention and treatment across the entire community. Third parties mandatorily getting tested for BBV, such as viral hepatitis and HIV should have the same rights as any other patient getting tested.

Suggested amendment 14: 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 BBV's/HIV with specialist organizations, including ASHM, Positive Life, ACON and Hepatitis NSW. This information and supporting education sessions should be mandatorily made available by employers and trade unions representing frontline workers covered by the legislation.

Rationale

- ➔ 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.

VI. Age

Suggested amendment 15: Amend part 2, section 7 so that no person under the age of eighteen (18) years is subject to mandatory disease testing.

Rationale

- ➔ The very low prevalence of HIV and BBVs in minors does not justify the conduct of MDT, balanced against the physical and psychological trauma involved to the young person potentially involved.

Suggested amendment 16: There must be 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. (*this amendment may be suggested should amendment 15 not be accepted*)

Rationale

- ➔ 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.

Data Collection and Utilization

Suggested amendment 17: Section 28 should be amended so that any and all information and data collected or utilized, including any test results and/or any medical information must be managed by the Chief Health Officer, observing all public health procedures and protocols, not by police.

Rationale

➔ HIV and BBV 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.

Suggested amendment 18: Section 28 should be amended so that any information or data collected or utilized, including any test results and/or any medical information cannot be used by police or in any other criminal matter.

Rationale

➔ MDT should only be used to satisfy the objects of the Bill, in accordance with public health objectives. Allowing police to utilize MDT results for other purposes may lead to an unjustified increase in MDT orders.

Hon Trevor Khan and Hon Shayne Mallard: Perhaps have a look at the evidence of Ms Bashir from the Bar Association and see whether you agree or disagree with some of the propositions that she put forward with regard to tweaking the bill, if I could describe it that way.

We believe that this was not intended as a specific inquiry in relation to the submission of the Bar Society, but rather as a suggestion that we might consider those amendments in developing our own amendments. In particular there was reference made in this exchange, to:

- the age at which the legislation should apply (see suggested amendment 15)
- the appeals process and (see suggested amendments 6, 7, 8 and 9)
- the inclusion of saliva as a means of disease transmission (see suggested amendments 3 and 14)

Each of these issues has been specifically addressed in the detailed amendments above as referenced.

Hon Trevor Khan: You say that children should not be subject to this regime. Does that mean somebody under the age of 18 or does it mean somebody under the age of 16?

Please see suggested amendment 15.