Submission No 8

INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020

Organisation: Australian Services Union NSW & ACT (Services) Branch

Date Received: 18 December 2020

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Hon Wes Fang MLC
Chair
Standing Committee on Law and Justice

Dear Mr Fang

INQUIRY INTO THE MANDATORY DISEASE TESTING BILL 2020

The Australian Services Union NSW & ACT (Services) Branch (the "ASU") represents workers in NSW and the ACT throughout the not-for-profit and the social and community services sector. Our members work in local community services, regional and state-wide organisations, community partnerships and hubs, all the major charitable organisations and trusts, all the social and community sector peak organisations, campaigning and advocacy organisations and all of the major faith-based organisations.

Many of our members and the organisations for which they work have made their own detailed submissions to this Inquiry, based upon their professional expertise. We respect the experience and skill of our members expressed in those submissions. Our members are best placed to address this Inquiry's terms of reference in relation to the specific clientele and communities with whom they work. Where appropriate, we have incorporated into our submission statements by our members and the organisations for which they work. However, the Union's submission is deliberately not a case study of individual troubles. It is a statement about mandatory disease testing as a public issue.

It is our very strong view that the proposed legislation, *The Mandatory Disease Testing Bill 2020* does not serve the purpose for which it is intended.

The ASU would support any legislation that genuinely protects the health, safety and wellbeing of frontline workers. Many frontline workers are members of the ASU which is a very active and outspoken advocate for stronger workplace health and safety standards. Indeed, we have been calling for a much stronger commitment by government to workplace health and safety training and a much stronger compliance regime.

However, the evidence is that mandatory disease testing is both ineffective and counterproductive. It does not address the real occupational health and safety issues confronting frontline workers. It is therefore an unjustifiable attack on the human rights and civil liberties of people who may have specific vulnerabilities, and those who are most likely to be stigmatised.

In his second reading speech, the Minister referred to the risks confronted by police officers, emergency services personnel and other frontline healthcare professionals and correctional officers. Many of those frontline workers are in fact members of the ASU. We agree with the minister. Frontline workers are often confronted by an unacceptable level of risk arising from their occupation. As the ultimate employer of those workers, the Government does indeed have a legislated responsibility to do everything possible to provide a safe workplace and to prevent workplace injury to those workers.

Frontline workers – indeed all workers, should always have ready access to personal protective equipment (PPE), infection control and other safety training, based upon strong

scientific evidence. It has been a matter of public scandal and shame, exposed in evidence to recent parliamentary inquires that this has not been the case, even during the current pandemic.

We certainly do not seek to trivialise the risks and trauma faced by frontline and emergency services workers who regularly encounter difficult and confronting situations. We do not condone assaults against emergency services personnel in any form, including spitting or biting, and condemn any assault against any worker, regardless of health risk. However, Australian and international evidence, some of which will be considered in this paper, including that of the Australian Medical Association, demonstrates unequivocally that mandatory disease testing is entirely ineffective in preventing or reducing harm or risk to people involved in potential exposure incidents.

The ASU represents workers in almost every community-based not-for-profit organisation across the state. Our members are employed as specialist practitioners, peer support workers and advocates in organisations that work with individuals, families and communities impacted by blood borne diseases, including HIV, hepatitis, and other viruses, specifically referenced in the proposed legislation. Our members are employed by organisations that work with people who are members of LGBTIQ+ communities, people who are homeless, in the youth justice system or penal system, First Nations peoples, young people, and people living with intellectual, cognitive, and physical disabilities, including mental health issues. The Union is therefore in a unique position to respond to the terms of reference for this Inquiry.

When we asked their views, our members have been overwhelming in their response to your current Inquiry. They have told us that they want their Union – the ASU – to make a submission. We therefore thank the Committee for conducting this very important Inquiry and for providing an opportunity for the ASU to make this submission, which we hope will make a positive and constructive contribution to your deliberations and work.

Yours sincerely

Natalie Lang
Branch Secretary
Australian Services Union NSW & ACT (Services) Branch

Australian Services Union
NSW & ACT (Services) Branch

ASU Submission

The Mandatory Disease Testing Bill 2020

Inquiry by Standing Committee of Law and Justice

Submitter: Natalie Lang, Branch Secretary
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Address: Level 1, 39-47 Renwick Street
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Date: 18 December 2020

The ASU and our members

The Australian Services Union NSW & ACT (Services) Branch (the "ASU") represents workers throughout the social and community services sector. Of specific relevance to this Inquiry, the ASU represents workers who are employed in the following areas:

- Youth and child protection
- Out of home care
- LGBTIQ+ communities
- Refuges for women, children, families, young people and men
- Homelessness, housing and tenancy services
- Family support services
- Disability services
- Health and mental health
- Alcohol, gambling and other drugs of addiction and rehabilitation
- Aged care
- Rape, domestic and family violence
- First Nations people's services
- Migrant and settlement services
- Prisoner rehabilitation
- Community Legal Services
- Community and neighbourhood services
- Policy and advocacy services
- Community transport
- Sydney Water, Hunter Water, Water NSW
- Sydney Trains
- Transport for NSW

ASU members are highly skilled practitioners. They hold qualifications in law, psychology, management, social sciences, welfare work, disability work, social work, youth work, child protection, aged care and community work, mental health, drugs and alcohol counselling and a long list of other specialist qualifications. Our members also include clergy of many faiths. They work to protect vulnerable babies, children, young people and families in their own homes, in out-of-home care, in refuges and in after care. Our members also work to protect those same people when they are homeless, and in other dangerous circumstances. Our members provide case work, crisis intervention, referral, financial and other support for individuals of all ages and families experiencing poverty, isolation and homelessness, gambling, drug and alcohol addictions, disabilities, mental health issues, overwhelming legal and financial problems, very young parents, and those who are refugees or have other settlement issues. They work with children and young people who are experiencing or escaping violence and those who are trying to deal with their cultural or sexual identity.

Of specific relevance to this Inquiry, we pay our particular respect to the work of our members and submissions made by organisations for whom they work, including but not limited to: ACON, AFAO, NADA, NUAA, SWOP, Bobbie Goldsmith Foundation, Scarlet Alliance, NAPWAH, the HIV Justice Network, Positive Life NSW, Hepatitis NSW, National LGBTIQ Health Alliance, Twenty-Ten, Aboriginal Legal Service, and NSW Council on Intellectual Disability, among many others.

Executive Summary

On 11 November 2020, the NSW Government introduced the *Mandatory Disease Testing Bill* (2020) into NSW Parliament. The proposed legislation purports to be a means to deal with occupational exposure by frontline workers to blood borne diseases, specifically HIV, Hepatitis B and Hepatis C.

The proposed legislation is not supported by scientific evidence.

- There is no evidence that mandatory disease testing will prevent exposure to, or transmission of blood borne diseases.
- It does not take account of evidence that the risk and likelihood of transmitting blood borne viruses (BBVs) – Hepatitis C, Hepatitis B, and HIV – through contact with saliva or spitting is effectively zero.

The proposed legislation does not take account of existing successful frameworks for managing occupational exposure to blood borne viruses, including HIV and Hepatitis. Nor does it consider the counterproductive and negative consequences of mandatory disease testing.

There is an urgent need for legislative reform to address the very real occupational health and safety issues confronting frontline workers that have been identified by evidence-based research. However, the proposed legislation does not address these issues.

- The proposed legislation is extremely narrow in its focus, prioritising issues not supported by scientific evidence over issues identified and supported by evidence-based research.
- The proposed legislation initiates new risks to frontline workers.
- The proposed legislation will likely have unintended consequences leading to poor public health outcomes, specifically in relation to testing and transmission of HIV, Hepatitis B and Hepatitis C.
- The proposed legislation is an unjustifiable attack on the human rights and civil liberties of people who may have specific vulnerabilities, and those who are most likely to be stigmatised.

We take this opportunity to pay our respects to the expert stakeholder organisations that have provided their own expert submissions and also informed our submission, including, but not limited to NAPWAH, AFAO, NUAA, Hepatitis NSW.

Implementation of the proposed legislation

When introducing the proposed legislation to the House, Minister for Police and Emergency Services, David Elliot said:

> *"Police and other frontline workers are one step closer to being better protected and supported from the risks of the job after the Legislative Assembly passed the Mandatory Disease Testing Bill 2020. The scheme will be available to frontline workers including the NSW Police Force, Corrective Services NSW, Youth Justice NSW, Fire and Rescue NSW, NSW Rural Fire Service, State Emergency Service, NSW Health, St John Ambulance and the Office of the Sheriff of NSW.*
>
> *A person subject to a Mandatory Testing Order will be required to provide a blood sample for testing if their bodily fluid has come into contact with an enforcement, health, or emergency services worker as a result of the person's deliberate action, and the worker is at risk of contracting a blood-borne disease as a result. A Mandatory Testing Order will require the subject of the order to provide a blood sample within two days or face a maximum penalty of more than $10,000 and/or 12 months' imprisonment."*
>
> *Minister for Counter Terrorism and Corrections Anthony Roberts said these laws will make a significant difference to those on the frontline protecting our community. "The Bill is designed to support all frontline workers such as police and correctional staff, emergency personnel and health workers," Mr Roberts said. "There is no excuse for deliberately exposing a person to disease and this measure will go a long way to help protect the people most likely to face this danger."* [1]

Existing procedures for management of occupational exposure to HIV and Hepatitis

NSW Ministry of Health

NSW already has a highly effective health framework for the management of occupational exposure to HIV and Hepatitis - *HIV, Hepatitis B and Hepatitis C: Management of Health Care Workers Potentially Exposed.* (NSW Ministry of Health, 2017).[2] This framework outlines the appropriate procedures for health care workers following exposure to potential disease transmission, including blood borne viruses (BBVs). The NSW Ministry of Health's procedures align with Australia's national response with respect to voluntary testing, stating *'informed consent for testing must be obtained from the source patient…if the patient does not provide consent, testing cannot occur'* (NSW Ministry of Health, 2017).[3]

The NSW Ministry of Health further identifies that '*there have been no confirmed cases of HIV infection in a health care worker following an occupational exposure in NSW since 1994 and nationally since 2002.'* (NSW Ministry of Health, 2017).[4]

NSW Workplace Health and Safety legislation and regulations

SafeWork NSW is responsible for administering workplace health and safety (WHS) acts and regulation codes in NSW and enforcing related laws, including carrying out prosecutions. According to SafeWork NSW, best practice for disease testing in the management of potential exposure to Hepatitis and HIV in the workplace includes acquiring informed consent prior to any testing of either the source or the person exposed Testing is furthermore '*to be voluntary and (is) bound by privacy and antidiscrimination* legislation' (SafeWork NSW, 2018).[5]

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[1] https://www.dcj.nsw.gov.au/news-and-media/media-releases/mandatory-disease-testing-for-those-who-attack-frontline-workers-passes-lower-house#

[2] https://www1.health.nsw.gov.au/pds/activepdsdocuments/pd2017_010.pdf

[3] Ibid.

[4] Ibid.

[5] https://www.safeworkaustralia.gov.au/system/files/documents/1702/nationalcodeofpractice_control_workrelatedexposure_hepatitis_hivviruses_nohsc2010-2003_pdf.pdf

The Albion Centre
The Albion Centre is a recommended referral service on SafeWork NSW's website and funded by the NSW Ministry of Health. The Centre operates a 24/7 blood and body fluid exposure phoneline service in NSW for *'NSW based health care workers, paramedical workers and emergency services workers who sustain a needlestick injury and/or experience occupational exposure to blood and body fluids.'*[6]

Albion's *Procedure for the Management of Occupational Blood and Body Fluid Exposure* advises that *'the decision to start treatment should not be delayed due to waiting on test results from the source of exposure.'* [7]. Albion operates under the principles of informed consent, and in the case where consent from the source of exposure is denied, the person exposed should assume the source is positive and begin treatment based on risk assessment.[8]. The Albion Centre further advises that it is preferable not to test the source of exposure *'unless the health worker demonstrates signs of infection (unlikely for low-risk exposures). This reduces costs to the health facility and anxiety for both the source and the exposed person.'*[9]

Corrective Services NSW
The response by Corrective Services NSW to exposure of bodily fluids in custodial settings does not mandate the testing of the source of exposure. Officers who experience an incident are provided support to decontaminate and encouraged to see their General Practitioner (GP) for medical advice. A similar process applies to *inmates 'in the event of an inmate sustaining a needle-stick injury, or a blood-spill exposure, the affected inmate will be referred to Justice Health & Forensic Mental Health Network for counselling and testing'* (Corrective Services NSW, 2015)[10].

The Australia New Zealand Policing Advisory Agency
The Australia New Zealand Policing Advisory Agency (ANZPPA) and Australasian Society for HIV Medicine (ASHM) produced a resource for Police Officers across Australia on BBVs and best practice response.

ANZPPA & ASHM reaffirm an evidence-based informed best practice model, which states that *"officers should not delay having a risk assessment from a qualified health professional for any possible exposure. [and] Waiting for the source's test results is not necessary and may delay treatments which needs to begin as soon as possible."* [11]

The Crimes Act and the Public Health Act
Transmission of a BBV is primarily a health issue and the need for justice responses are extremely rare. In the rare circumstance that people who intentionally or recklessly put others at risk by exposure to BBVs, there are already a number of existing remedies available in Australian law, both in the Crimes Act and the Public Health Act. Under the Crimes Act 1900, *'grievous bodily harm'* is defined to include *'any grievous bodily disease' that can cause a 'person to contract a grievous bodily disease'.* Provisions for circumstances where a person intentionally or recklessly transmits HIV to another person would be covered under Section 33(1)(b) (maximum penalty: 25 years imprisonment) and Section 35(1)(a) (maximum penalty: 14 years imprisonment) of the Crimes Act 1900.[12]

Public Health Orders
HIV and AIDS are classified as Category 5 conditions under the Public Health Act 2010, and as such are covered under Division 4 Section 62:

[6] https://www.shil.nsw.gov.au/health-Professionals/Referral-Manual-(1)/Needlestick-Injury-Hotline
[7] http://thealbioncentre.org.au/wp-content/uploads/2018/07/BBFE-MOE-procedure2015.pdf
[8] Ibid.
[9] Ibid.
[10] https://www.justicehealth.nsw.gov.au/publications/continuum-of-carev2.pdf
[11]: https://www.anzpaa.org.au/about/general-publications/blood-borne-viruses)

[12] https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1900-040

(1) An authorised medical practitioner may make a public health order in respect of a person if satisfied, on reasonable grounds, that—
(a) the person has a Category 4 or 5 condition and because of the way the person behaves may, as a consequence of that condition, be a risk to public health, (Public Health Act, 2010)[13].

Category 5 scheduled medical conditions within the Public Health Act include HIV and AIDS. This provision already allows a qualified medical practitioner to order the testing of a source for HIV in the case they are a serious risk to public health. While this is not ideal, it is better than the proposed legislation. Given that police officers and other senior officers specified in the proposed legislation are not qualified medical practitioners, the expansion of police powers to permit mandatory disease testing is unnecessary, inappropriate and unsound.

Misunderstanding how Blood Borne Viruses are transmitted

HIV is transmitted through *'blood, semen, vaginal fluid or breast milk of an infected person'*, it is not possible to transmit HIV through saliva.[14] (NSW Ministry of Health, 2017). Moreover, there have been no cases of saliva being a transmission route for HIV in Australia.[15] The risk of Hepatitis B, Hepatitis C and HIV transmission from a known positive source through blood and saliva to unbroken skin and skin-to-skin contact is zero[16] (NSW Ministry of Health, 2017). The proposed legislation therefore perpetuates misunderstanding about how HIV and other BBVs can be transmitted.

Being a frontline worker or emergency services worker does mean being confronted by a range of occupational risks. This is a very real workplace health and safety issue. It is both confronting and distressing. However, consistent medical evidence is that the chance of these workers being exposed to HIV during their ordinary working lives is extraordinarily low. Fewer than 0.1% of the Australian population is living with HIV and HIV is not easily transmitted. There is no possibility of HIV transmission via contact with the saliva of an HIV-positive person (including biting or spiting); no possibility of HIV transmission via contact with the saliva of an HIV-positive person where the saliva contains a small quantity of blood (including biting or spiting); and negligible to no possibility of HIV transmission from biting where the HIV-positive person's saliva contains even a significant quantity of blood, *and* their blood comes into contact with a mucous membrane or open wound in the frontline worker, *and* their viral load is not low or undetectable.[17]

This means that in effect, almost all frontline and emergency services workers will never come into contact with HIV in the course of their careers and, if they do, the chance of HIV transmission is either impossible or vanishingly small. Further, if against all the odds transmission of HIV was to occur, modern prevention treatments administered according to best practice (meaning that the frontline worker needs to be tested and treated by a medical practitioner – not the potential source) in a timely manner would prevent *seroconversion*. Put simply, the risk of an emergency service officer becoming HIV positive through occupation-related spitting or biting is so small as to be almost impossible in real world scenarios. The risk of HIV transmission from an occupational exposure involving other bodily fluids is also extremely low, as evidenced by the fact that there has not been a notification of HIV transmission in any occupational setting since 2002. Even in this case, the occupational nature of the exposure is not certain. It is important to note that despite extensive investigation over many years, the combined efforts of many HIV service and research organisations have never been able to identify a case of HIV transmission to a police officer.

[13] https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2010-127
[14] https://www.health.nsw.gov.au/Infectious/factsheets/Pages/HIV-infection.aspx
[15] https://www.ashm.org.au/about/what-we-do/position-statements/hiv-not-transmitted-via-spitting/#:~:text=However%20iatrogenic%20transmission%20is%20not,person.%E2%80%9D%20%5Bii%5D
[16] https://www1.health.nsw.gov.au/pds/activepdsdocuments/pd2017_010.pdf
[17] Barré-Sinoussi, et al., 2018.

Mandatory testing is not effective or conclusive

Communicable Diseases Network Australia (CDNA) *National Guidelines for Public Health Units* refer to *'window periods'* that affect the reliability of testing for blood borne viruses, including HIV and Hepatitis. Window periods are *'the period from infection to its detection, during which time the individual has the virus, and is therefore capable of transmitting HIV, but tests for HIV are negative because antigen and antibody are present at low undetectable levels or are yet to be produced'*.[18] These window periods are listed in the Australia New Zealand Policing Advisory Agency (ANZPAA) & Australasian Society for HIV Medicine's (ASHM) information resource on police and bloodborne viruses.[19]

If there was a potential exposure risk, forcibly testing the person who is the possible source of infection could therefore only be considered preliminary. A negative result would not be conclusive if the person being tested had *seroconverted* but was still within the window period. Further, this test would not affect the treatment and testing requirements for the frontline worker. Even if a positive BBV result is returned for a source, it would not establish whether the frontline worker had contracted a BBV unless they were tested themselves. Unfortunately, despite the Minister's justification for the proposed legislation, its mechanisms will in fact do nothing to address stress for police or other frontline workers or their families who believe they have been put at risk of BBV infection.

Criminalisation of people who refuse to be tested

A key concern arising from the proposed legislation is that it is not clear how it will be determined if a person *'intentionally'* exposes a frontline worker, including police and others to their body fluids. It must be said that people who *'intentionally'* expose bodily fluids to police or emergency services personnel and are experiencing substance use issues, and/or mental health issues at the time of exposure, are also likely to have impaired cognitive capacity to make sound and reasonable decisions. In these circumstances, they are highly unlikely to be dissuaded from their action by the existence of legislation mandating diseases testing – if in fact they are even conscious of it. There is no public benefit to prosecuting people who are vulnerable and who have not been able to engage with community services to receive the care and support they need.

A further key concern arising from the proposed legislation is that it is unclear how mandatory testing would be enforced if a person resists testing. Taking blood from someone without consent would constitute assault. According to NSW Ministry of Health's *Consent to Medical Treatment – Patient Information Policy Directive 'treating a competent patient who has validly refused treatment could constitute an assault or battery.'* [20](NSW Ministry of Health, 2005).

It is likely that healthcare practitioners will not agree to test a person who refuses to consent, particularly where use of force is involved, given restraining a person to undertake a blood test is not necessarily possible or safe, may not be for the benefit of the patient, and goes against ethical codes of medical practice. Concerns also remain that by the time a person is being tested, processes of coercion relating to mandatory testing orders may not be transparent to the person taking the blood sample.

The proposed legislation will further target marginalised and vulnerable populations such as people who live with a mental illness, people who inject drugs, sex workers, and people who are homeless; populations of which are already overrepresented in Australian prisons. Criminalisation of a person who refuses to be tested for diseases is a major cause of concern among specialist organisations that work with those vulnerable communities with a higher risk of criminal offences.

The proposed new powers have the clear potential to further discriminate against those vulnerable populations, increase detainments-in-custody and incarcerations. The

[18] https://www1.health.gov.au/internet/main/publishing.nsf/Content/cdnasongs.htm
[19] https://www.ashm.org.au/products/product/978-1-920773-39-7 and https://www.anzpaa.org.au/about/general-publications/blood-borne-viruses)
[20] https://www.health.nsw.gov.au/policies/manuals/Pages/consent-manual.aspx

criminalisation and potential incarceration of people living with HIV and Hepatitis as an outcome of mandatory testing legislation is entirely counterproductive. It also further stigmatises and discriminates against people living with HIV and Hepatitis and other vulnerable marginalised communities who are at risk of committing criminal offences.

Stigma and discrimination

Living with HV, Hepatitis B or Hepatitis C is difficult at many levels. One of the most serious concerns is the fear of being 'exposed' as a person with one of these viruses. The stigma that attaches to living with HIV or Hepatitis is one of the greatest obstacles facing effective public health education, testing and treatment. If people are fearful of being 'branded', they are likely to avoid being tested or presenting for treatment. Mandatory testing laws not only exacerbate the fear, stigma and discrimination associated with these viruses, they also create a new stigma – the potential for enforced testing and being criminalised. This significant new stigma will inevitably constrain the ability of health services to target and engage people at risk of HIV, Hepatitis B and Hepatitis C. The proposed legislation fails to recognise the very real success of the current positive and proactive approach to BBVs by the NSW Ministry of Health and specialist, community-based organisations, which encourages regular, voluntary testing and good health practices compared to a punitive approach with traumatic implications for often vulnerable people with multiple and complex health issues.

Stigma and discrimination are exacerbated because many of the communities prioritised by the current Ministry of Health public health campaigns, including LGBTIQ+ communities, people who inject drugs, sex workers, people from culturally and linguistically diverse backgrounds and Aboriginal and Torres Strait Islander people, already experience stigma and discrimination on the basis of these other attributes.

Dangerous health consequences of mandatory testing

Because of the new and enhanced stigma associated with HIV, Hepatitis B and Hepatitis C, the implementation of mandatory testing will create new and powerful disincentives to voluntary community testing, treatment and healthcare. This will very clearly have a detrimental impact on the ability of NSW Health and other specialist, community-based organisations to address the viral hepatitis epidemics. It is a particular problem in relation to Hepatitis B, since it is estimated that around 40% of those living with this virus are undiagnosed.[21]

In the context of the current COVID-19 pandemic, it is worth noting that influenza is one of 99 infectious diseases listed on NSW Ministry of Health website.[22] Influenza is also one of 76 notifiable diseases under Schedule 1 Scheduled Medical Conditions of the Public Health Act 2010.[23] Despite the highly infectious nature of influenza, particularly given the potentially fatal outcome of COVID and the other community implications during the pandemic, it would be highly unlikely that mandatory testing legislation be enlivened on the basis of exposure to common diseases such as influenza. In fact, the highly successful community health approach to the COVID pandemic and to seasonal influenza is premised upon encouraging widespread voluntary testing and community-based public health education. Frontline workers are far more likely to come into contact with influenza and COVID in the course of their work than HIV or Hepatitis. Both influenza and COVID are serious viruses. They are more highly prevalent in the community than either HIV or Hepatitis and both are highly contagious, with potentially long term and fatal consequences.

Unlike the other BBVs specified in the proposed legislation, there have been cases of occupational transmission of influenza and COVID from clients to frontline workers. Yet there is no suggestion that either of these should involve mandatory disease testing, or criminalisation for refusal to be tested. The NSW State Government's approach to COVID is rightly held out globally to be a model for others to follow. This highly successful model is one

[21] https://www.who.int/news-room/fact-sheets/detail/hepatitis-b
[22] https://www.health.nsw.gov.au/infectious/influenza/Pages/default.aspx and https://www.health.nsw.gov.au/Infectious/Pages/notification.aspx
[23] https://www.health.nsw.gov.au/Infectious/Pages/notification.aspx

premised on a well-resourced public health approach, including voluntary testing, public health education, and avoiding stigmatisation of those who become ill.

Criminalisation initiates a heightened threat of exposure for the community and for frontline workers

The expansion of police powers exposes vulnerable communities to unnecessary detainment, violence, and discrimination. Aboriginal and Torres Strait Islander people are already significantly overrepresented in Australian prison populations, accounting for 24% of the prison population in NSW and 27% nationally.[24] Similarly, the gaps in funding and lack of resources for community-based and public mental health, mean that people living with mental health issues, while less likely to be conscious of the proposed legislation, are more likely to be at risk of offending and of criminalisation. The failure of both the recent federal of state budgets to address affordable housing and homelessness again means that the number of people without safe housing is likely to increase and their risk of offending and criminalisation will also increase.

People who are marginalised, sick, homeless, living in poverty, have alcohol and other drug issues or mental health issues, are more likely to be in contact with police and other frontline workers. They are less likely to be aware that they can be subject to mandatory testing. They are also less likely to consider before they act. In other words, the very people being targeted by this proposed legislation are the least likely to be deterred from their actions. Further, anything that deters those same people from timely access to testing and treatment is entirely counterproductive. Any obstacle to good public health management of BBVs is a very bad decision for community health and for frontline workers, because they are much more likely to be exposed to people living with an undiagnosed and/or untreated condition.

Australian medical experts and specialist services oppose mandatory testing and criminalisation

The Medical Journal of Australia, which is the professional journal of the Australian Medical Association, has confirmed that *'there is no possibility of HIV transmission from contact with the saliva of a HIV-positive person through spitting or biting… and no transmission of this kind has ever been documented in Australia.'*[25] This specialist and expert source further recommends exercising caution against the prosecution of people with HIV, since it is scientifically proven that there is limited likelihood of transmission, and that media fear mongering of criminal trials increases stigma and discrimination against people living with HIV, while public health management processes, such as counselling and education have proven highly effective.

The Australian Medical Association's (AMA) position on BBVs further highlights the consequences of prosecuting people living with BBVs due to the increase of stigma and discrimination, and the consequent barriers this poses for people living with BBVs to access appropriate health care.[26] The AMA further states that *'there is no evidence that laws which criminalise BBV transmission function to prevent or deter BBV transmission'*, going so far as to identify the risk criminalisation poses to public health initiatives aimed at eliminating BBV transmission.[27]

It is therefore remarkable that the legislation does not require medical advice of an infectious disease expert to be included in the application for a mandatory test. ACON, which is a national peak specialist organisation for people living with HIV, points out that under the proposed legislation, a person who has appealed a decision made by a senior officer must *still* undergo venepuncture under threat of a fine or gaol. A person who is detained can have force used against them to ensure this occurs.[28] Mandatory HIV testing is an invasive

[24] https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13
[25] https://www.mja.com.au/journal/2016/205/9/sexual-transmission-hiv-and-law-australian-medical-consensus-statement
[26] https://ama.com.au/position-statement/blood-borne-viruses-bbvs-2017
[27] Ibid.
[28] https://www.medianet.com.au/releases/193872/

procedure that is contrary to national testing policy and illegal unless specifically allowed by legislation. Yet the proposed legislation enables testing to be ordered based on the supposition of a person who is not a medical expert who believes that a person may have been exposed to bodily fluids, including saliva. That is, they may have been exposed to bodily fluids, not they have been, exposed to bodily fluids that do not necessarily include a risk of HIV transmission. Mandatory testing can therefore be ordered where there is no risk of HIV transmission at all. Where this happens, it is the perceived risk of transmission (where none actually exists), informed by stigma and not science, that is driving the decision. Specialist HIV clinicians, the people most qualified to identify where HIV/BBV transmission is a possibility, are largely excluded from the decision-making process. This means that under the current system, decisions to test for HIV/BBV are particularly vulnerable to stigma and not informed by the latest medical knowledge.

The clear advice of medical experts is that mandatory testing is ineffective, unnecessary and potentially dangerous to frontline workers, who may believe that they do not need further testing or treatment because the potential source has tested negative. In fact, the medical advice is that anyone, including frontline workers who believe that they may have been exposed to a BBV, should themselves be tested and where appropriate, treated by a qualified medical practitioner.

ACON also raises concern that children as young as 14 years of age will fall within the scope of the legislation. Yet NSW reported only three infections among children in this age group in the previous year. On any assessment of risk, that minors are included in the Bill is an overreach and unconscionable. ACON CEO, Nicolas Parkhill said: *"The handful of people likely to have any risk of HIV infections in this age group – and the likelihood these young people will be on treatment – represents perhaps the most egregious aspect of this Bill."* [29]

Lack of accountability

The management of blood borne viruses such as HIV, Hepatitis B and Hepatitis C is a matter of public health that has been successfully managed to date within existing public health frameworks. Where laws relating to health issues are located outside health departments, such as the mandatory testing proposed by this legislation, there is minimal to no monitoring mechanism in place to assess the use, effectiveness (or lack thereof) or any unintended consequences of the mandatory disease testing laws. This lack of structure suggests a disinterest in the experience of persons who are subject to mandatory testing, a lack of genuine interest in the usefulness of mandatory testing to improve the welfare of officers and other staff, a lack of understanding of the complexity of mechanisms routinely integrated into HIV health management, programming and monitoring systems, and a disregard for cost or cost/benefit of the mandatory testing systems.[30]

Taking into account the important issues of privacy and confidentiality, unless there is a mechanism within the proposed legislation to assess whether people are testing positive for BBVs (accused, emergency or frontline worker), this structural failure means the system cannot be effectively monitored and evaluated. It is, therefore, unaccountable. We cannot know if the system is working because the very reason it exists cannot be measured. This also raises larger questions, including why the proposed legislation should be introduced, if there is no means to ascertain or monitor test outcomes.

[29] https://www.medianet.com.au/releases/193872/

[30] The System is Broken: Audit of Australia's Mandatory Disease Testing Laws at: https://napwha.org.au/wp-content/uploads/2019/09/2019_NAPWHA_TheSystemIsBroken.pdf

Recommendations

The proposed legislation should not be introduced

Mandatory testing is not founded on scientific evidence. It is not supported by experts or specialist organisations. There is no reliable evidence that the specified viruses can be transmitted via occupational exposure. There is no evidence that the legislation will prevent assaults on frontline and emergency service workers, which may result in occupational exposure. Mandatory testing is expensive to operate and lacks accountability. The proposed legislation is not in line with current and successful federal and state frameworks for dealing with blood borne viruses. It is counterproductive and initiates new threats to the safety of frontline workers and the community. The proposed legislation unjustifiably threatens the civil rights of vulnerable communities that are already stigmatised and suffer discrimination.

Consultation with expert community based and other stakeholder groups

There is consistent support across all stakeholders for frontline workers and essential services personnel. There is consistent support and strong evidence for effective public health measures to eliminate BBVs.

The State government should:

- establish strong consultation networks and processes with expert stakeholder groups in order to inform evidence-based policies;
- adopt evidence-based prevention policies and practices to manage frontline workers and emergency service personnel risk of duty-related infections;
- increase investment in educating frontline workers and emergency service personnel and police officers on routes of transmission of BBVs, and best practice in responding to exposure to bodily fluids;
- invest in preventive programs that capture at-risk people in community-based settings to reduce the risk of offences.

Provide better funding for SafeWork NSW

SafeWork NSW is the statutory authority with education and compliance functions in relation to workplace health and safety. SafeWork needs to have a significantly expanded budget to enable it to engage in genuine consultation with experts in relation to strategies for dealing with occupational violence, psychological injury and related issues.

Introduce amendments to workplace health and safety legislation and regulations

Frontline and emergency services personnel are exposed to occupational violence that impacts their physical and mental health. Current legislation and regulations do not adequately reflect the need for training and support for both management and staff, particularly those exposed to the risk of violence, trauma, and vicarious trauma.

Access to the state stockpile of Personal Protective Equipment (PPE)

Frontline and emergency services personnel are most likely to be exposed to seasonal and other infections, including COVID. During the current pandemic it took many weeks before access to the national stockpile of PPE was available to these workers. Both public and community sector frontline organisations need to have ready access to appropriate PPE and infection control training as a matter of best practice workplace health and safety and good public health practice.

Recognition of mental health risk, trauma and vicarious trauma support

Frontline and emergency services personnel are most likely to be at risk of exposure to trauma, vicarious trauma and other mental health issues. These serious and debilitating risks to mental health need to be recognised. Specialist strategies and services must be funded, for both public and community sector workers.

The State Government should establish a 24/7 specialist trauma hotline for public and community sector frontline and emergency services personnel to assist those workers who are exposed to occupational trauma and vicarious trauma.

Glossary

ACON AIDS Council of NSW
AFAO Australian Federation of AIDS Organisations
NADA Network of Alcohol and other *Drugs* Agencies
NAPWA National Association of People Living With Aids
NUAA NSW Users and AIDS Association
SWOP Sex Workers Outreach Project