Submission No 11

INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020

Organisation: Positive Life NSW

Date Received: 18 December 2020

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Standing Committee on Law and Justice
Legislative Council
Parliament of New South Wales

Dear The Standing Committee on Law and Justice,

Re: Inquiry into Mandatory Disease Testing Bill (2020)

We are writing in response to the Mandatory Disease Testing Bill (2020) introduced into the New South Wales Parliament by the NSW Government on 11 November 2020.

Positive Life NSW (Positive Life) is the lead peer-based agency representing all people living with and affected by HIV in NSW. We provide leadership and advocacy in advancing the human rights and quality of life of all people living with HIV (PLHIV), and to change systems and practices that discriminate against PLHIV, our friends, family, and carers in NSW.

We note in "Definitions" that "blood-borne disease means HIV infection, hepatitis B, hepatitis C, or other blood-borne disease prescribed by the regulations." Positive Life confines its comments to HIV infection.

We acknowledge the importance of maintaining the health and safety of health, emergency, and public sector workers. We also acknowledge that health, emergency, and public sector workers can and will encounter offensive and confronting behaviours from members of the public. We in no way minimise the anxiety and trauma resulting from these incidents or endorse or legitimise antisocial behaviours towards health, emergency, and public sector workers.

However, Positive Life joins with many other qualified stakeholders in our ongoing strong opposition to the mandatory disease testing of people whose bodily fluids come into contact with health, emergency, and public sector workers in NSW. This opposition is based on the extremely low risk of HIV being transmitted from a third party's bodily fluids to a health, emergency, or public sector worker while at work. Our commitment to the principle of consent in testing is also relevant.

The Bill introduced into Parliament requires significant further work, and we commend the Standing Committee on Law and Justice in its diligent investigations of the potential harms that will be created by the Bill in this current form, and in making thorough amendments before its passage through Parliament and into law.

This Bill is not evidence-based, and is not consistent with multiple state, national, and international policies and guidelines, including the current NSW HIV Strategy 2016 – 2020. Furthermore, there has been continued advocacy to include measures relating to stigma and discrimination of people living with HIV in the soon to be released NSW HIV Strategy 2021 – 2025. This Bill will serve to contribute to and exacerbate unfounded fears and does nothing to educate and inform health, emergency, and public sector workers about the actual risks associated with bodily fluids.

We will continue to support health, emergency, and public sector workers, and simultaneously advocate for evidence-based responses to be followed in any instances of

assault to these workers, including where they come into contact with bodily fluids from another person. These incidents are already covered by existing laws, policies, and procedures – all of which are based on evidence and have long been proven to be effective. Additionally, we have contributed to the development and delivery of a range of education and information initiatives for health, emergency, and public sector workers. These initiatives are better placed to address the objectives of this Bill; namely reducing fear, risk, and concern of blood-borne virus (BBV) acquisition among these workers.

Mandatory HIV testing is inconsistent with human rights, civil liberties, and public health strategies, and is opposed by expert international bodies including UNAIDS and the WHO, who stated in 2017 that "Mandatory, compulsory or coerced testing is never appropriate, regardless of where that coercion comes from: health-care providers, partners, family members, employers, law enforcement officials or others".[1]

> Recommendation: Positive Life recommends the NSW Government reject the Mandatory Disease Testing Bill (2020), due to the Bill being not based on evidence, in opposition to public health objectives, and potentially harmful for people living with HIV and other blood borne viruses.

It is disappointing that there is bi-partisan support to introduce a Bill to establish a mandatory disease testing regime for frontline government workers in NSW. As such, should Inquiry Committee recommend that the Mandatory Disease Testing Bill (2020) be passed into law then Positive Life urges the Bill to be amended substantially to align with an evidence-base and reduce the risk of harm to marginalised communities and people within NSW, ensuring their civil liberties and human rights are upheld.

The Bill as it currently stands infringes on the human rights of NSW citizens and will exacerbate stigma and discrimination faced by people living with HIV and other BBVs.

Specific concerns related to the Bill are as follows:

Definition of Deliberate Action

Part 1, clause 3 (a) (i) and (ii) and Part 2, clause 1 (b) (ii) of the Bill refer to "deliberate action" of a third party in determining whether the circumstances of the incident are covered under this Bill. Furthermore, Part 2, clause 9 (1) (e) outlines that to make an application for mandatory disease testing, the applicant (worker) need only provide a written "statement that, in the opinion of the worker, the contact with the third party's bodily fluid was as a result of a deliberate action of the third party". However, neither of these sections, nor Part 1, clause 4 *Definitions* provide clarity on when the transfer of fluids from a third party is considered a "deliberate action".

This term "deliberate action" is the catalyst for a range of follow-on processes that under this definition are included within the Bill. Non-consensual medical procedures including HIV testing must not occur based on the opinion of a health, emergency, or public sector worker and their senior officer without specialist HIV and BBV expertise. This is particularly the case for those individuals who are unaware of the established evidence around BBV transmission that Positive Life and other organisations in the HIV sector have provided in previous submissions and policy briefs to the NSW Government in recent years.

> *Recommendation:* We propose that a definition of "deliberate action" is developed, with a limited scope of meaning, that includes principles of evidence including but not limited to eyewitness accounts. "Opinion" is not evidence and can be widely

[1] World Health Organisation, *Statement on HIV testing services: WHO, UNAIDS highlight new opportunities and ongoing challenges*, 2017, accessible at: https://www.who.int/hiv/topics/vct/hts-new-opportunities/en/

subjective. In developing this definition, Positive Life suggests that the HIV/AIDS Legal Centre (HALC) be consulted with for appropriate wording. This definition should be included in Part 1, clause 4 *Definitions.* Additionally, Part 2, clause 9 (1) (e) should be amended to remove the ability to make an application based on subjective opinion and should instead reference the definition and any evidentiary requirements under the definition.

Recommendation: Positive Life endorses HALC's Recommendation 3 that clause 10 (5) and clause 14 be amended to require that the senior officer/magistrate be reasonably satisfied that:

-The worker came into contact with the third party's bodily fluid as a result of the person's deliberate action; and
-Taking into consideration the advice of the medical practitioner the worker is at a real risk of contracting a blood borne virus as a result of the person's deliberate action; and
-The exposure to the bodily fluid occurred in the execution of the workers duties.

Mandatory Testing Orders

Part 5, clause 2 (a) states that a mandatory testing order can be made in most circumstances by "a senior officer for the worker concerned". This would include a range of differing ranked officials depending on the relevant organisation the worker is employed by.

The NSW Chief Health Officer currently has a number of functions and powers including managing strategies to promote and protect the health and wellbeing of all NSW citizens. These include the power to make orders that restrict individuals' freedom in order to protect the community. Accordingly, it is essential that the power to approve an order for mandatory disease testing either reside with the NSW Health system administered through the office of the Chief Health Officer, or with judicial oversight through the court system.

Ensuring a senior qualified medical professional or a magistrate (with expert evidence submitted by a qualitied blood borne virus and infectious diseases specialist) approves and administers the mandatory BBV testing of individuals is the only way the public can be assured that decisions which may affect freedoms and liberties of citizens are made based upon current, robust evidence and protect the health and wellbeing of workers.

Recommendation: Positive Life recommends an amendment to the proposed Bill so that all mandatory testing requires the order of the NSW Chief Health Officer or independent arbiter, under the guidance of the Chief Health Officer, who has the requisite skills and knowledge to assess potential risk or a court, as well as the affirmative recommendation of a qualified blood borne virus and infectious diseases specialist, with police and other senior officers prevented from ordering mandatory tests, to ensure the tests cannot be misused as extra-judicial means of punishment and that there is no conflict of interest.

Recommendation: Positive Life endorses HALC's Recommendation 2 regarding Judicial Oversight of the Bill, that further provisions be added or amended within the Bill to reflect provisions within the Crimes (Forensic Provision) Act 2000 that HALC have outlined within their submission.

Definition of Bodily Fluids

The Dictionary section of the Bill defines "bodily fluids" as "bodily fluid means blood, faeces, saliva, semen or other bodily fluid or substance prescribed by the regulations." As previous submissions by Positive Life and other HIV sector organisations have provided evidence regarding the low risk of transmission in an occupational setting, we do not intend to repeat

this evidence in full, except to say that HIV can only be transmitted through certain bodily fluids including blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, and breast milk. These bodily fluids need to come into contact with a mucous membrane or damaged tissue or be directly injected into the bloodstream from a needle or syringe. Mucous membranes are found inside the rectum, vagina, penis, and mouth. The proposed legislation does not define what "contact" means, in the context of "the worker has come into contact with the bodily fluid of the third party."

99% of people living with HIV attending GP clinics and 95% attending sexual health clinics in NSW are taking effective antiretroviral treatment, and of these, 92.33% have an undetectable HIV viral load (i.e., they are unable to transmit HIV by a prescribed bodily fluid).[2]

Saliva is **not** a bodily fluid that can transmit HIV.

> *Recommendation:* Positive Life endorses ACON's recommendation that the Bill be amended to ensure that Mandatory Testing Orders can only be made when an *actual* risk of transmission occurs, and that the circumstances of such risk are listed and checked off with supporting documentation to guide evidence-based decision making.
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> *Recommendation:* The legislated definition of bodily fluids must only include those which can transmit BBVs. The legislation should define separate lists for each BBV covered under the Bill, according to the relevant bodily fluids that can transmit that BBV, and the corresponding contact point in the worker. For example, the definition of "bodily fluids" in the Dictionary section of the Bill could state: "bodily fluids, as relating to the transmission of HIV, means blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, and breast milk only where those fluids come into contact with a mucous membrane or damaged tissue or be directly injected into the bloodstream from a needle or syringe." Additional evidence-based definitions of bodily fluids should be included, as relating to Hepatitis B and Hepatitis C.
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> *Recommendation:* The legislation add a definition of "contact" to the Dictionary section of the Bill, which makes clear that the relevant bodily fluids of the third party has to come into contact with specific areas of the worker's body to be considered an exposure risk and trigger the possibility of an application for mandatory testing to be made, including a mucous membrane or damaged tissue or be directly injected into the bloodstream from a needle or syringe. Mucous membranes are found inside the rectum, vagina, penis, and mouth.

Age of Third Party

Part 2, clause 7 (2) of the proposed Bill states that "an application may not be made if the third party is under the age of 14 years." As such, the proposed legislation will apply to **children** aged under 18 years, and as young as 14 years. This is unconscionable and must be amended.

Prevalence rates for HIV in children aged under 18 years in Australia are negligible. Furthermore, the Bill does not adequately address meaningful parental or guardian involvement in the process. To involve the Children's Court system is both costly and burdensome on an already over-extended system. Given the low rates of HIV and BBVs in minors, the application of this legislation would contribute to cyclical recidivism and systematic racism.

[2] NSW Ministry of Health, *NSW HIV Strategy 2016 – 2020 Quarter 4 & Annual 2019 Data Report*, 2019, accessible at: https://www.health.nsw.gov.au/endinghiv/Publications/q4-2019-and-annual-hiv-data-report.pdf

Recommendation: The minimum age applicable must be 18 years of age.

Medical Opinion Requirement

Part 2, clause 7 (3) states that "An application may be made only if the worker has consulted a relevant medical practitioner in accordance with section 8." Clause 8 then goes on to outline the timeline and requirements of consulting a "relevant medical practitioner". However, the Bill does not require the "relevant medical practitioner" providing this medical advice to be an infectious disease expert.

Only a qualified, specialist medical practitioner who has experience in HIV and other BBVs will be equipped with the most recent evidence-base around transmission risks.

Currently, the definition of a "relevant medical practitioner" in the Dictionary section of the Bill is:

> (a) a medical practitioner with qualifications or experience in blood-borne diseases, or
> (b) if a medical practitioner with qualifications or experience in blood-borne diseases is not available at the time the worker requires a consultation, under section 8 this is applied to a 'relevant' medical practitioner.

Positive Life has grave concerns that unspecialised General Practitioners (GP) or nurses do not have the necessary expertise to accurately assist in assessing the frontline worker about the risk of contracting a BBV. We are also concerned that the advice that a frontline worker may receive from a GP or a nurse without specialist training will further create increased fear and unnecessary harm and may potentially delay effective treatment that should be practised as a standard of care to protect frontline workers.

Antiretroviral therapy for HIV and other BBV infections can only be prescribed by specialist consultants or a GP who has been specifically trained and accredited in HIV diagnosis, treatment, and care. The training and accreditation for GPs is conducted by the Australasian Society of HIV Medicine (ASHM). GPs are required to undergo rigorous training and continuous professional development if they are to be accredited and operate as an HIV s100 Community Prescriber. S100 Community Prescribers are also trained in other BBV infections such as hepatitis B and C.

> *Recommendation:* Positive Life recommends that the definition within the Dictionary of the Bill of a "relevant medical practitioner" must be amended to only include a person who has specialist infectious disease medical training. There must be no provision for an alternative, un-specialised medical practitioner fulfilling the role of a "relevant medical practitioner" under this Bill. Such an amendment could be worded as follows: "accredited HIV Specialist doctor (s100 Prescriber) or where it is impracticable to consult an accredited HIV Specialist doctor, an Emergency Room Registrar".

Additionally, Part 2, clause 9 (1) (h) of the Bill does not require this consultation advice to be included in the application for a mandatory disease test:

> 9 (1) An application for a mandatory testing order must be made in writing and contain the following—
> (h) a copy of written advice received from the relevant medical practitioner, if any.

> *Recommendation:* The consultation with the relevant medical practitioner must include a copy of written advice by the practitioner that constitutes a mandatory part of the "content of application for mandatory testing order" as a requirement, not a suggestion. This report must include an expert determination of BBV acquisition to

the threshold of the medical practitioner being reasonably satisfied as to the acquisition risk.

Post-Exposure Prophylaxis

In addition to the requirements already included in Part 2, clause 8 of the Bill to consult with a relevant medical practitioner, the Bill must also require that the medical practitioner discuss treatment, prevention, and transmission risks as well as a referral for the worker to an Emergency Department or sexual health clinic in order to obtain post-exposure prophylaxis (PEP) medication within the 72 hour efficacy window if it is clinically indicated. The use of PEP has been shown to be effective in preventing HIV infection. It is now well accepted that by taking a short course of HIV medications (31 days) very soon after a potential exposure, HIV infection can be prevented. PEP must however be started within three days (72 hours), or it will not be effective.

Any use of PEP to prevent sero-conversion if it is clinically indicated as outlined above, will need to commence within 72 hours, and preferably within 24 hours. However, Part 2, clause (1) and (2) allow for a worker to consult with a relevant medical practitioner up to 72 hours after the contact occurred.

Undertaking the entire mandatory testing process outlined in the Bill:

- from consulting a medical practitioner—up to 72 hours later, according to Part 2, clause (1) and (2);
- to a worker making an application—within 5 business days after the contact, according to Part 2, clause 7 (4);
- to determination of an application by the senior officer—within 3 business days or "unless a longer period is necessary in the circumstances" according to Part 3, clause 10 (2);
- to an application for a review by the Chief Health Officer by either the worker or the third party—within 1 business day of being notified of the senior officer's decision, according to Part 7, clause 22 (2) and (4);
- to the determination of the Chief Health Officer—within 3 business days, according to Part 7, clause 24 (1), albeit if the determination is in relation to a senior officer having made a mandatory testing order, Part 7, clause 23 (1) states that "the mandatory testing order continues to have effect and the third party must comply with the order", which will be discussed in a later section;
- to Local Court or Children's Court determination of an application—of which a timeframe is not outlined in the legislation within Part 4 of the Bill;
- to the third party being served with a mandatory testing order—"as soon as reasonably practicable but no later than 5 business days after a mandatory testing order is made" according to Part 5, clause 18 (1), or even in some cases "sent by post to the third party or to another person" according to Part 5, clause 18 (3) (c)
- to mandatory testing of the third party—of which a timeframe is not outlined in the legislation within Part 6, clause 19 of the Bill;
- and receiving results—specified as "as soon as reasonably practicable" within Part 6, clause 21 of the Bill;

will undoubtedly take longer than the 72 hours after exposure contact required to commence PEP if clinically indicated. Indeed, the whole process is likely to take upwards of three weeks if the Bill's proposed timelines are adhered to strictly.

Regardless of whether the third party is tested for BBVs or not, will not affect the decision for whether the worker should be prescribed a course of PEP. Additionally, any negative HIV test result provided by mandatory testing of the third party will not necessarily be "proof" enough to negate the use of PEP where it is clinically indicated, as the third party may themselves be in the window period before an HIV diagnosis can be made via HIV testing. It

is our concern that this legislation will distract from the immediacy of initiating PEP when it is clinically indicated.

In all scenarios, the intended outcome of reducing stress and anxiety for the worker and their families will **not** be achieved by mandatory testing of a third party. The worker will still be required to consult a medical practitioner and commence and complete a course of PEP if appropriate.

> *Recommendation:* The Bill should be amended to require the worker to attend a qualified specialist blood borne virus medical practitioner with 24 hours of the incident by removing clause 8 (2).

> *Recommendation:* Appropriate and existing public health guidance for workers who are potentially exposed to BBVs in the course of their work continues to be followed. Workers are to continue to be referred to HIV specialist medical practitioners or emergency room registrars to be assessed, counselled, and prescribed PEP where clinically indicated. The unnecessary, time-consuming, costly, and punitive processes of mandatory testing should be disallowed.

> *Recommendation:* That funding be provided to HIV- and other BBV-specialist community organisations, such as Positive Life NSW, to provide a comprehensive training and development program delivered to health, emergency and public sector workers to assist in achieving the Bill's stated Object in Part 1, clause 3 (b) "to encourage health, emergency and public sector workers to whom this Act applies to seek medical advice and information about the risks of contracting a blood-borne disease while at work". A consistent and evidence-based approach to frequent professional development for health, emergency and public sector workers about BBVs is best placed to achieve both the Object in Part 1, clause 3 (c) "to protect and promote the health and wellbeing of health, emergency and public sector workers to whom this Act applies" and the aim of reducing the stress and anxiety that workers and their families may feel when coming into contact with a third person's bodily fluids when they are misinformed of the negligible risk of contracting a BBV in these situations.

Determination of an Application

The Bill must specify the process by which the senior officer must provide an opportunity to the third party or their parent or guardian where appropriate, to make submissions based on the application.

The Bill stipulates in Part 3, clause 10 (2) that "The senior officer must determine an application within 3 business days after receiving the application, unless a longer period is necessary in the circumstances." It then goes on to state in Part 3, clause 10 (3) "Before determining an application under subsection (1)(a), the senior officer must— (a) provide the third party and the third party's parent or guardian, if any, with an opportunity to make submissions, and (b) consider the submissions received."

As such, there is no timeframe stipulated in the Bill to state how much time the third party or their parent or guardian must be provided with to receive the notice and make their submission in time for the senior officer to properly consider the submission prior to making their determination. There is also no provision for information to be provided to the third party or their parent/guardian as to their right to make submissions, review an order, and seek legal and medical advice.

> *Recommendation:* The Bill must legislate as additional clauses in Part 3, clause 10 (3): that the third party be made aware of the application submitted to the senior

officer as soon as reasonably practicable but not longer than 24 hours after the application is made; that the third party must be fully informed as to what the application means to them, the considerations, potential repercussions, their opportunities to make a submission, review processes, timelines, and that they are advised to seek legal and medical advice and where to obtain that advice; that the third party must be provided 48 hours to make a submission to the senior officer; and that their submission be considered in the determination of the application. The inclusion of these requirements to the process must extend the timeframe that the senior officer has between receiving an application and making a determination by at least 24 hours.

Refusal of an Application

Part 3, clause 11 (1) of the Bill states that "A senior officer may refuse an application for a mandatory testing order if, after making reasonable inquiries, the senior officer cannot locate the third party in relation to whom the application relates." The Bill **must** require a senior officer to refuse an application in a situation where the third party cannot be located, rather than providing discretion on this matter. All third parties must be given access to their grounds of recourse as outlined in the Bill, and if they have not been provided with this recourse, should not be subject to a mandatory disease test or the penalties associated with "refusing" a mandatory disease test.

Recommendation: That Part 3, clause 11 (1) of the Bill be amended to read "A senior officer must refuse an application for a mandatory testing order if, after making reasonable inquiries, the senior officer cannot locate the third party in relation to whom the application relates."

Recommendation: That Part 3, clause 12 (2) of the Bill that currently reads "The senior officer is not required to give written notice under subsection (1)(b) or (c) if the senior officer cannot locate the person" be removed from the Bill, and replaced with a clause that states the mandatory testing order will be revoked and no penalties will apply if the senior officer cannot locate the third party, and the worker continue to be treated according to specialist, best-practice, and evidence-based medical advice.

Definition of Vulnerable Third Persons

Under the Dictionary section of the Bill it is stated that the definition of a "vulnerable third party means a third party who—

(a) is at least 14 years of age but under 18 years of age, or
(b) is suffering from a mental illness or mental condition, or is cognitively impaired, within the meaning of the Mental Health (Forensic Provisions) Act 1990, which significantly affects the vulnerable third party's capacity to consent to voluntarily provide blood to be tested for blood-borne diseases."

Due to the power imbalanced nature of this Bill, preferencing the rights of workers over and above third parties, the definition of "vulnerable third persons" in the limited scope proposed above is insufficient.

Recommendation: expand the scope of "vulnerable persons" to also include those who are currently incarcerated; and those who are statistically over-represented in incarceration settings, including but not limited to Aboriginal and Torres Strait

Islander people[3,4], people from culturally and linguistically diverse backgrounds[5], and people who are homeless.[6]

Furthermore, the Bill proposes that the additional layer of scrutiny in the mandatory testing application process for vulnerable third parties is to have the application heard by a court, according to Part 4 of the Bill. Presenting to court is a highly stressful situation for any person, and particularly so for already vulnerable persons. This also has the potential to contribute to the cycle of recidivism, particularly for those already involved in the criminal justice system.

> *Recommendation:* the Bill establishes an alternative additional layer of scrutiny to mandatory testing application processes for vulnerable third parties, such as a second independent infectious disease specialist practitioner who provides an additional expert opinion of BBV exposure and transmission risk. This is in addition to all mandatory testing requiring the order of the NSW Chief Health Officer, as well as the affirmative recommendation of the initial infectious disease specialist practitioner, and the vulnerable person's parent, guardian, carer, or power of attorney present for all decision making processes.

Detained and Incarcerated Persons

Positive Life has significant concerns regarding the transportation and detention of people in police custody and other incarceration settings under the operations of this Bill. This includes the ability of people in custody to make a written application for review, extended detention timeframes whilst waiting for appropriate testing facilities to become available and is particularly pertinent in rural and regional areas of NSW.

> *Recommendation:* The Bill must legislate a clear pathway and timeframe, with additional supports and/or time provided as necessary, for people in incarceration settings and rural and remote areas to provide submissions and make a review appeal.

We are also very concerned about the use of force allowed under the proposed Bill, and urge the amendment of Part 6, clause 20 (2) to remove the allowance of use of force, whether it is termed "reasonable" or otherwise. Our concerns stem from the history of over-policing and incarceration rates of Aboriginal and Torres Strait Islander people in particular who are significantly overrepresented in our prison system. The Deaths Inside Database highlights that at least 463 Aboriginal and Torres Strait Islander people have died in custody since the Royal Commission into Aboriginal Deaths in Custody ended in 1991.[7] If the third party may be coming into contact with sexual health services for the first time through a mandatory testing order this may affect their ability to engage, and predispose them to

[3] Michael McGowan and Christopher Knaus, *'Essentially a cover-up': why it's so hard to measure the over-policing of Indigenous Australians*, Guardian Australia, 2020, accessible at: https://www.theguardian.com/australia-news/2020/jun/13/essentially-a-cover-up-why-its-so-hard-to-measure-the-over-policing-of-indigenous-australians

[4] Michael McGowan, *Motorcycle gang laws overwhelmingly target Indigenous Australians, police watchdog reveals*, Guardian Australia, 2020, accessible at: https://www.theguardian.com/australia-news/2020/dec/08/motorcycle-gang-laws-overwhelmingly-target-indigenous-australians-police-watchdog-reveals

[5] Leanne Weber, *Systemic racism, violence, and the over-policing of minority groups in Victoria*, Monash University, 2020, accessible at: https://lens.monash.edu/@politics-society/2020/06/22/1380706/systemic-racism-violence-and-the-over-policing-of-ethnic-minority-groups

[6] The Gilbert + Tobin Centre of Public Law, *Homelessness and the Law*, UNSW Sydney, accessible at: http://www.gtcentre.unsw.edu.au/resources/homelessness-legal-rights/homelessness-and-law

[7] The Guardian Australia, *Deaths inside: Indigenous Australian deaths in custody 2020*, (2020), accessible at: https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody

disengage from services in the future to manage their sexual health, thus harming the public health response in NSW further.

> *Recommendation:* Part 6, clause 20 (2) be removed entirely.

UNAIDS and the World Health Organisation advocate for elimination of all mandatory and non-voluntary forms of testing for blood borne viruses on the basis of public health. They particularly note that "there should be no compulsory or mandatory testing of members of key populations at higher risk of HIV infection and other vulnerable populations, including pregnant women, people who inject drugs and their sexual partners, men who have sex with men, sex workers, prisoners, migrants, refugees and internally displaced persons, and transgender people."[8] Furthermore, the power imbalance that exists between incarcerated persons and officers in custodial settings calls into question the free and voluntary consent that can be gained from an incarcerated third party.

> *Recommendation:* To gain legitimate and non-coerced consent from an incarcerated third party for blood borne virus testing, the request for testing must come from a health professional not connected to the applicant or the person who may be making the order and must be accompanied by information of the process for testing and counselling, the services that will be available depending on the results, and their right to refuse testing.

Additionally, the Bill does not allow provision for pre- and post-test counselling for the third party subject to a mandatory disease testing order, such as is usually available for testing of Category 5 scheduled medical conditions (which currently only includes HIV). This, again, is particularly the case for people in incarceration settings and those in rural and regional areas. If a person has been detained and transported for testing, they should be able to receive their results in line with best practice which other NSW citizens are entitled to. The proposed legislation should ensure a duty of care to both the individual being tested and the frontline worker potentially exposed.

> *Recommendation:* Pre- and post-test counselling for the person being mandatorily tested must be legislated in the Bill as an additional section in Part 6, clause 19 'Carrying out of blood test'.

Provision of test results

There is currently no provision in the proposed Bill for the mandatory test results to be provided to the third party whom the results belong to, only to a nominated medical practitioner. This is at odds with current HIV testing guidelines and principles of data sovereignty.

> *Recommendation:* An additional section be added to Part 6, clause 21 to include "the third party" in the list of those who must receive the blood test results from the pathology laboratory.

Review by Chief Health Officer

Under the proposed legislation, the review by the Chief Health Officer must be applied for by the third party within one business day. This is insufficient time for the person to understand the order and seek review, particularly those who are most marginalised and will most likely be disproportionately affected by the Bill.

[8] World Health Organisation, *Statement on HIV testing and counseling: WHO, UNAIDS re-affirm opposition to mandatory HIV testing*, (2012), accessible at: https://www.who.int/hiv/events/2012/world_aids_day/hiv_testing_counselling/en/

Recommendation: Part 5, clause 17 (1) must be amended to include that on any mandatory disease testing order there must be clear instructions for the third party on how to seek advice, further information, and request a review by the Chief Health Officer. Part 7, clause 22 (4) must be amended to allow for significantly more than one business day after being notified of a senior officer mandatory testing decision to apply for a review by the Chief Health Officer. No less than two business days, but ideally four business days must be allowed for this.

Additionally, Part 7, clause 23 of the Bill requires that a person who has appealed a decision made by a senior officer to the Chief Health Officer, must still undergo venepuncture under threat of a significant fine or gaol. We submit that the mandatory testing order made by a senior officer must not continue to have effect until such time as the outcome of the appeal.

Recommendation: Part 7, clause 23 of the Bill must be amended so that an application for review by the Chief Health Officer must automatically make the mandatory disease testing order unenforceable until the Chief Health Officer rules on the application.

Guidelines

Part 9, clause 32 (3) of the Bill outlines a list of officials that must be consulted with by the Chief Health Officer in writing Guidelines for the Bill. Notably absent from this list is anyone with infectious disease expertise.

Recommendation: We endorse the recommendation in ACON's submission to this inquiry that Part 9, clause 32 (3) of the Bill be amended to include: the Anti-Discrimination Board of NSW, the Mental Health Commissioner of NSW, Aboriginal Affairs NSW, Multicultural NSW, The Corporate Sponsor for LGBTI Issues in NSW Police, the Corporate Sponsor Aboriginal Engagement in NSW Police, Australasian Society for HIV Medicine, ACON, and Positive Life NSW, as well as Hepatitis NSW, Multicultural HIV and Hepatitis Service, NSW Users and AIDS Association (NUAA), and two independent infectious disease specialist practitioners.

Additionally, the guidelines for determining an application for mandatory testing must be legislated and include a clear determination of risk of blood borne virus transmission as it relates to evidence.

Recommendation: Positive Life endorses ACON's recommendations that: the legislation must include the decision-making process for determining whether an order is made; any guidelines require evidence of a plausible route of transmission to be established before an order is made; and should the process for determining whether an order is made not be legislated, that an order cannot be made until the guidelines are published.

Costs

Currently there is only provision for costs incurred under the Bill to be covered where a mandatory testing order is made. This has the effect of discouraging a third party from consenting voluntarily to testing, and financially disadvantaging a third party who consents to testing.

Recommendation: Part 9, clause 33 of the Bill be amended to include an addition section that allows for the costs incurred by a third party in voluntarily consenting to testing be covered by the funding provider for the worker concerned. This includes reasonable travel costs and expenses incurred by the third party in getting tested, and the cost of testing a third party's blood for blood-borne diseases in a pathology laboratory accredited by the National Association of Testing Authorities.

Training Requirements and Delegation
The proposed Bill currently does not have any training requirements for senior officers or their delegates in implementing the legislation. This is an oversight that needs to be rectified to ensure safety of all parties involved and avoid misuse of the expanded powers this Bill will provide.

> *Recommendation:* An additional clause should be added into the Bill under Part 9 'Administration', detailing that any senior officer implementing the Bill must undergo training on the application of the legislation which includes training on BBV transmission risks and routes by a specialist BBV health provider and/or specialist BBV community organisation. Furthermore, an additional clause should be added into Part 9, clause 34 of the Bill detailing that any delegate of the senior officer must also undergo such training before they are able to be delegated tasks under the Bill. Both the senior officer and/or the delegated officer must provide evidence that they have undertaken such training.

Furthermore, Part 9, clause 34 of the Bill does not restrict the delegation of powers under the legislation from being delegated to a worker involved in the incident relating to the application. This is an obvious conflict of interest that must be avoided.

> *Recommendation:* Part 9, clause 34 of the Bill must be amended so that a senior officer may not delegate any aspects of the Bill in relation to an application to any officer or staff involved in, or connected to, the incident that is the subject of the application.

> *Recommendation:* Positive Life endorses HALC's Recommendation 6 that the ability to delegate a function of a Senior Officer should be restricted by the bill. The bill should state that delegation of a function cannot be to:
> -Any person of a lower level of seniority as the Senior Officer; and
> -Any person that directly works with or for the worker making an application.

Penalties
Part 8, clause 26 of the Bill outlines significant penalties for third parties who do not comply with a mandatory testing order. These penalties represent a severe coercion to undergo an invasive procedure and would call into question any principles of consent or bodily autonomy remaining in this Bill. These penalties also duplicate existing punitive measures that are already in place that criminalise various aspects of the incidents covered by this Bill, such as assault and recklessly or intentionally transmitting a BBV. Positive Life strongly argues for the removal of penalties and criminalisation under this Bill, and instead frame compliance in terms of public health.

> *Recommendation:* Part 8, clause 26 (1) and (3) be removed entirely. Amendment of the clauses to ensure compliance should be done in consultation with the HIV/AIDS Legal Centre, focusing on a public health lens.

Admissible evidence
Part 8, clause 28 and clause 30 relate to disclosure of information and admissible evidence in proceedings against a third party. Neither clause explicitly protects a third party from criminalisation as a result of a positive BBV test result gathered from mandatory testing. The results of any mandatory test must not be admissible evidence in proceedings before any court, tribunal, or similar process, regardless of whether the third party tests positive or negative for any BBV, or whether transmission occurs to the worker in relation to the incident.

Recommendation: Removal of Part 8, clause 28 (1) (e) to ensure disclosure of information is regulated by the Bill instead of the guidelines.

Recommendation: Part 8, clause 28 (2) be amended to read: "Subsection (1)(c), (d), (e) and (f) do not authorise the disclosure of information that a third party …".

Recommendation: Part 8, clause 30 (1) be amended to include: "(c) whether a third party has been, is to be or is required to be tested for a relevant Category 5 condition, (d) whether a third party has, or has had, a relevant Category 5 condition, and (e) any other personal or health information pertaining to the third party."

Oversight and accountability

The proposed Bill has minimal monitoring processes in place to assess the use, effectiveness, and any unintended consequences of the Bill. Part 10, clause 35 of the Bill must legislate for inclusion of monitoring processes to ensure oversight of: the experiences of third parties who are subject to mandatory testing; the evaluation of mandatory testing to achieve the aim of improving the welfare of workers; the integration with mechanisms involved with HIV health management and monitoring systems in the NSW public health framework; and the associated costs and cost/benefit of the mandatory testing system.

Recommendation: Legislation must mandate the collection of data which facilitates accountability and an assessment of the efficacy of the scheme. Part 10, clause 35 of the Bill be amended to include robust monitoring requirements, including collection of data on but not limited to: the location of where the test was conducted; background information on the individual tested, including whether third parties being mandatorily tested are of Aboriginal and/or Torres Strait Islander background; the cost of the entire process in operation and implementation; the risk factors used to determine the test's necessity; and the result of any mandatory test. It is essential all data is collected and reported in ways which make it impossible to determine the identity of people mandatorily tested, regardless of result. This data must be decoupled so no individuals can be identified to comply with privacy provisions in other legislation.

Recommendation: Part 10, clause 35 of the Bill must specify a condition that results of the above monitoring be published publicly annually.

Recommendation: Part 10, clause 36 (3) review period be amended to allow a balanced evaluation of the success of the legislation and associated regulations, with the report due no later than four years from commencement of the Bill.

Conclusions

This Bill will overwhelmingly impact marginalised populations negatively and not provide adequate provision to protect and uphold their human rights and civil liberties. Positive Life has concerns that the provisions of the Bill are ineffective as both a deterrent to committing the assault, as well as promoting the health and wellbeing of frontline workers. Given the evidence provided in previous submissions, there is the potential for this Bill to cause real harm in the use of mandatory testing of third parties, as well as the broader communities of people living with HIV and other BBVs and public health initiatives.

Ultimately, this Bill inappropriately criminalises a health issue which has been successfully dealt with over the last few decades through evidence-based and best-practice policy. NSW has a strong and proud tradition of responding to pandemics by following evidence, trusting experts, and supporting frontline workers. This Bill, on the other hand, does not take into account the latest science and evidence-base, will encourage fear, foster stigma and discrimination, and will further marginalise already vulnerable people.

Positive Life would like to commend the Standing Committee on Law and Justice for their comprehensive consultation process with the aim of making the government and community response to BBVs as strong and equitable as possible for all Australians including those of us living with HIV.

We would welcome the opportunity to meet to discuss our submission on the Bill in further detail and contribute our more than 30 years of experience in representing people living with HIV in NSW and working with governments to eliminate the transmission of HIV.

We look forward to hearing from you.

Sincerely,

Jane Costello
Chief Executive Officer