

**Submission  
No 12**

## **INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020**

**Organisation:** HIV AIDS Legal Centre

**Date Received:** 20 December 2020

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18 December 2020

The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street, Sydney  
NSW 2000



Dear The Hon Wes Fang MLC,

## **Submission into the Mandatory Disease Testing Bill 2020 Inquiry**

Thank you for the opportunity to provide submissions on the inquiry into the Mandatory Disease Testing Bill 2020 ('the Bill'). These submissions further reiterate and build upon our submissions dated 29 May 2020 on the Mandatory Disease Testing Bill 2020 proposed at that time.

### **The HIV/AIDS Legal Centre**

*The HIV/AIDS Legal Centre* (HALC) is the only not-for-profit, specialist community legal centre of its kind in Australia. We provide free and comprehensive legal assistance to people in NSW with HIV or Hepatitis-related legal matters and undertake Community Legal Education and Law Reform activity in areas relating to HIV and Hepatitis.

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# 1. Our Submissions

As we noted in our previous submissions in May 2020, HALC has enormous respect for emergency service workers and acknowledge the need for effective and appropriate measures to ensure they feel safe and protected in their work environments. However, the bill lacks any evidentiary support that mandatory testing is an appropriate measure to do so. We submit that the bill does not serve to alleviate fears and concerns of workers but would have detrimental impacts on public health outcomes.

Specifically, the bill fails to take into consideration evidence of the following:

- The way Blood Borne Viruses (BBV's), including Hepatitis B (HBV), Hepatitis C (HCV) and HIV are transmitted, the actual risk of transmission, prevention and treatment;
- The time period from the point of infection to when the virus can be detected in the blood (the window period); and
- Other, more effective policies and procedures to manage risks of transmission.

Current scientific evidence shows that BBV's can only be transmitted in very specific circumstances. The below table shows how each BBV is transmitted, treated and if any effective vaccinations exist.<sup>1</sup>

How Hepatitis and HIV are Transmitted			
BBV	Transmission	Vaccination/Immunity	Treatment
<b>Human Immunodeficiency Virus (HIV)</b>	Blood-to-blood contact: <ul style="list-style-type: none"> <li>- Injecting equipment</li> <li>- Needle-stick injury</li> <li>- Open wounds</li> <li>- Tattooing and body piercing equipment</li> </ul> Sexual Contact (unprotected anal or vaginal sex)  Mother to baby  Infected blood products (all blood in Australia has been screened since 1970)	There is no vaccine for HIV  HIV infection cannot be cleared by the body and infection is for life	Treatment available with antiretroviral drugs.  Treatment does not cure HIV infection, but minimises damage to the immune system and progression to AIDS.  If exposed you can access PEP (post exposure prophylaxis) if taken within 72 hours.
<b>Hepatitis B (HBV)</b>	Blood-to-blood contact: <ul style="list-style-type: none"> <li>- Injecting equipment</li> <li>- Needle-stick injury</li> <li>- Open wounds</li> <li>- Tattooing and body piercing equipment</li> </ul>	HBV can be prevented by vaccination  95% of adults infected with HBV naturally clear the virus and become immune for life	If exposed and have not been immunised prior, you can access a shot of immunoglobulin within 72 hours (this reduces your chance of contracting HBV)

<sup>1</sup> Information sourced from:

'Emergency Service Providers and Blood-Borne Viruses' Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM) <https://ashm.org.au/resources/sexual-health-resources-list/emergency-service-providers-and-blood-borne-viruses/>; and

'Position Paper: Mandatory testing of people whose bodily fluids come into contact with police and/or emergency service personnel' (2018), ACON, ASHM, Positive Life NSW, AFAO, NAWPHA, SWOP, Hepatitis NSW, NUAA and BFG

	<p>Sexual Contact (unprotected anal or vaginal sex)</p> <p>Mother to baby</p> <p>Saliva in the mouth, eyes and bites that break the skin</p> <p>Infected blood products (all blood in Australia has been screened since 1970)</p>		<p>Long-term antiviral treatment is available for chronic HBV to prevent liver damage.</p> <p>Treatment does not cure HBV.</p>
<b>Hepatitis C (HCV)</b>	<p>Blood-to-blood contact:</p> <ul style="list-style-type: none"> <li>- Injecting equipment</li> <li>- Needle-stick injury</li> <li>- Open wounds</li> <li>- Tattooing and body piercing equipment</li> </ul> <p>Not considered sexually transmitted unless blood contact occurs</p> <p>Mother to baby</p> <p>Infected blood products (all blood in Australia has been screened since 1970)</p>	<p>There is no vaccine for HCV</p> <p>25% of adults infected with HCV clear the virus naturally but do not become immune</p>	<p>HCV treatment effects a complete cure for over 95% of people with few or no side effects (Hepatitis C Virus Infection Consensus Statement Working Group, 2018)</p>

We note that there is no risk of transmission of HBV when an emergency service worker is vaccinated and immune, and the risk of transmission of HIV may not be relevant when a person living with HIV (PLHIV) is on treatment and has an undetectable viral load (UVL). We also wish to highlight that neither HIV nor HCV can be transmitted by saliva.

In the second reading speech of the bill, the Minister for Police and Emergency Services states that the risk of transmission ‘can be the cause of significant stress and anxiety for the work and their families’ and that ‘an exposure incident can result in a long period of uncertainty for the worker before it can be confirmed whether transmission occurred.’<sup>2</sup> We acknowledge that emergency workers may feel anxious about possible transmission and that confirmation of transmission can take 3 to 6 months, depending on the BBV, to confirm due to window periods, but the mandatory testing of the third party is not an appropriate vehicle to alleviate fears or stress.

A person who is potentially exposed to a situation in which transmission may have occurred from a known positive source cannot confirm actual contraction of a BBV for 3 to 6 months despite knowing the BBV status of the third party. In the alternative, a third party who may have recently been exposed to a BBV and provide a negative test result due to the window period may provide false comfort to the emergency service worker.

We recognise that waiting for accurate test results may be stressful, which is why policies and procedures are already in place to mitigate concerns. For example the ‘*HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*’ from the NSW Ministry of Health where immediate care of the health worker and a risk assessment of the exposure are undertaken which includes assessment of post exposure prophylaxis (PEP) requirements within

<sup>2</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 November 2020 (David Elliot)

72 hours of exposure.<sup>3</sup> We reiterate our examples provided in our previous submissions in May regarding the risk of HIV transmission:

*If a worker has an incident (e.g. spit onto clothing), and their doctor within 24 hours, advises them that the risk of transmission is incredibly low, and no treatment is advised, nothing changes in regards to the next steps that they would take (not taking treatment, follow up testing, etc.) from knowing a third party's test results, a week later. If it turned out the 3<sup>rd</sup> Party did have HIV that was transmissible, by then it is too late to start a course of Post exposure Prophylaxis (PEP), and most importantly, the **risk of transmission remains the same**. An Order in these circumstances would not assist with a Worker's feeling of stress or anxiety.*

*If a worker has an incident at work (e.g. is bitten, drawing blood), and their doctor within 24 hours, advises them that the risk of transmission is high and that treatment is advised, nothing changes in regards to the next steps that they would take (start a course of PEP, follow-up testing, etc.) from knowing the third party's test results, a week later. If it turned out that the 3<sup>rd</sup> Party did have HIV that was transmissible, it would not matter because emergency PEP must be initiated within 72 hours of the incident, based on the transmission risk.*

Australia's world-leading response to the HIV epidemic, and most recently to the COVID-19 pandemic, has been guided by research and evidence with a clear public health focus. Mandatory testing is opposed by expert international bodies including UNAIDS and the World Health Organisation (WHO)<sup>4</sup> and the mandatory testing of HIV has never been introduced in Australia even at the height of the HIV epidemic. The current *National HIV Strategy* states:

*Testing for all people at risk of HIV must be based on the principles of voluntary testing, informed consent and confidentiality which have underpinned the improvements in testing coverage achieved in Australia to date.<sup>5</sup>*

Similarly, the *National Hepatitis C Strategy* notes:

*The principles of quality testing in Australia include that informed consent is required at all times, including in custodial settings; and that testing is*

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<sup>3</sup> 'HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed' NSW Ministry of Health

<sup>4</sup> 'Statement on HIV Testing Services: New Opportunities and Ongoing Challenges' (2017), WHO & UNAIDS [https://www.unaids.org/en/resources/documents/2017/2017\\_WHO-UNAIDS\\_statement\\_HIV-testing-services](https://www.unaids.org/en/resources/documents/2017/2017_WHO-UNAIDS_statement_HIV-testing-services)

<sup>5</sup> 'Eighth National HIV Strategy: 2018-2022' Australian Government, Department of Health [https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/\\$File/HIV-Eight-Nat-Strategy-2018-22.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/$File/HIV-Eight-Nat-Strategy-2018-22.pdf)

voluntary, accessible, non-discriminatory, confidential and of clear benefit to the individual being tested.<sup>6</sup>

Informed consent is a fundamental requirement of the principles of quality testing in Australia. Obtaining real, informed consent in line with the high standards and ethics of medical practitioners is not possible under circumstances in which a failure to test would be punishable with a term of imprisonment and/or a large fine or threatened with the use of ‘reasonable force’.

The mandating of BBV testing infringes upon fundamental human rights and perpetuates stigma and discrimination for people with BBV’s. This would be a significant step back in Australia’s public health response to HIV and other BBV’s, and the introduction of mandatory testing would undermine Australia’s current public health responses to these BBV’s. Mandatory Testing may have negative consequences on Australia’s response to be one of the first countries in the world to eliminate HCV as a public health threat by 2030<sup>7</sup> and may negatively impact rates of testing for HBV and HIV as fears of discrimination and stigma may dissuade people from testing and engaging in healthcare.

Priority populations acknowledged in the *National HIV Strategy* including gay men, sex workers, trans and gender diverse people; and priority populations recognised in both the *National HIV Strategy* and *National Hepatitis C strategy* including Aboriginal and Torres Strait Island people, people who inject drugs and people from culturally and linguistically diverse backgrounds already experience stigma due to these attributes and are populations that are already over represented in the Australian prison system. The introduction of mandatory testing is likely to disproportionately impact these communities and undermine the work of the Australian healthcare system to create an environment in which these marginalised populations feel safe to access services.

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<sup>6</sup> ‘*Fifth National Hepatitis C Strategy: 2018-2022*’ Australian Government, Department of health  
[https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/\\$File/Hep-C-Fifth-Nat-Strategy-2018-22.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/$File/Hep-C-Fifth-Nat-Strategy-2018-22.pdf)

<sup>7</sup> *Ibid*

## 2. Our Recommendations

### 2.1 The bill not be passed

HALC strongly supports the use of evidence-based and scientific led public policy responses that effectively balance the rights of individuals and public health. As set out above, the bill fails to alleviate fears and stress of emergency service workers and is not supported by any evidence or current national and international policies. The bill will only serve to further stigmatise and marginalise vulnerable communities and in its current form is open to abuse of power.

***Recommendation 1: The Bill not be passed***

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Although HALC does not support the Bill for the above reasons, if the bill is to proceed through parliament, we make the below recommendations:

### 2.2 Judicial Oversight of the Bill

HALC strongly believes that the bill in its current form lacks any judicial oversight which would be expected of a bill which undermines basic human rights and may have serious criminal implications for those who refuse mandatory testing. We are concerned that without proper oversight by the court, the bill's application may be used as a form of extrajudicial punishment.

We note that in the second reading speech the minister stated:

*'There is no avenue for statutory appeal included in the bill. Decisions under the mandatory disease testing [MDT] scheme need to be made in a timely way to ensure the best possible advice is provided to the worker about risks and actions to be taken to mitigate risks. Allowing for a lengthy court-based appeal process would undermine the need for the testing to take place quickly.'*<sup>8</sup>

HALC rejects the notion that decisions made under the bill should be rushed without any judicial oversight to gain the test results from the third party as to inform the medical advice given to the worker. Clause 8 of the bill requires a worker to consult with a medical practitioner about the risk of contraction and the appropriate actions to be taken to mitigate the risk of contracting and transmitting a BBV within 24, or in some circumstances 72 hours.

As we have noted in our above submissions, the advice given to the worker by a medical practitioner would not change if the test results were to return positive or negative a week later as immediate actions (i.e. the administration of PEP) would have occurred within 72 hours of possible transmission. We also note that the advice of the medical practitioner can only be definitive when the worker themselves returns a test result outside of the window period of the BBV.

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<sup>8</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 November 2020 (David Elliot)

It is for this reason that we believe the provisions within the bill should be in line with the *Crimes (Forensic Procedures) Act 2000* ('the Crimes (FP) act'). The Crimes (FP) Act takes into consideration the need to balance the civil liberties of suspects and the ability for police to effectively investigate a crime. We acknowledge that under the current bill before the standing committee, no charge must be brought in order to make an application for a mandatory testing order and HALC strongly opposes such a provision as to avoid an incentive to charge third parties. However, we believe that the same rights afforded to those under the Crimes (FP) Act should also apply to third parties under the proposed bill.

Under the Crimes (FP) Act, intimate forensic procedures, including the taking from a person a sample of the person's blood, may only be carried out with the informed consent of a suspect or with an order from a magistrate or other authorised officer.<sup>9</sup> Other safeguards that can be found within the Crimes (FP) Act and which should be included in the proposed bill include:

- Clear criteria for consideration by the magistrate to be 'reasonably satisfied' that an order is justified in the circumstances.<sup>10</sup> (Please also see '*Consideration of Senior Officer and Magistrate when making an order*' section below)
- Specific safeguards for incapable persons and people who identify as an Aboriginal person or Torres Strait Islander including the right to representation by a legal representative and interview friend.<sup>11</sup>
- The right to legal representation by anyone whom an order has been made in regard to.<sup>12</sup>
- The right to cross-examine the applicant for the order.<sup>13</sup>
- The requirement of all procedures to be carried out in a manner consistent with appropriate medical or other relevant professional standards.<sup>14</sup>
- Presence of a legal representative or interview friend during the procedure if the suspect is a child (a person between the age of 10 or 18), an incapable person or identifies as an Aboriginal person or Torres Strait Islander.<sup>15</sup>
- Only the number of police officers that is deemed 'reasonably necessary' may be present during the carrying out of a procedure.<sup>16</sup> We note this section would only be relevant for detained third parties.

The proposed bill before the standing committee contains cherry-picked provisions from the Crimes (FP) Act but delegates the responsibilities of magistrates and authorised officers (magistrate, registrar of the Local Court or an authorised employee of the Attorney General's Department) under the Act to 'Senior Officers', which includes police officers of the rank of Inspector. The Bill also fails to include any of the above provisions to ensure procedural fairness in a situation whereby a person's liberty and human rights may be violated. HALC is seriously concerned that the bill in its current form may easily be used as an extrajudicial form of punishment with little to no avenues of review by the courts.

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<sup>9</sup> *Crimes (Forensic Procedures) Act 2000* Part 3 and 5

<sup>10</sup> *Crimes (Forensic Provision) Act 2000* s24 (2) and (4)

<sup>11</sup> *Ibid*, s30 (2)

<sup>12</sup> *Ibid*, (5)

<sup>13</sup> *Ibid*, (6)(a)

<sup>14</sup> *Ibid*, s47

<sup>15</sup> *Ibid*, s54, 55

<sup>16</sup>



**Recommendation 2:** *The bill be amended to require all applications for a mandatory testing order be made to the court.*

*Further provisions be added or amended within the bill to reflect provisions within the Crimes (Forensic Provision) Act 2000.*

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### 3. Other Recommendations

If the bill is not amended to align with recommendation 2, we make the following recommendations for amendments to the bill:

#### 3.1 Considerations of Senior Officer and Magistrate when making an order

##### Deliberate Action

Under clause 7(1) of the bill, which outlines the objects of the act, a worker may apply for a mandatory testing order if the worker has come into contact with the bodily fluid of a third party as a result of a *deliberate action* of the third party without the workers consent.

The bill in its current form does not require the Senior Officer to make an assessment as to the deliberateness of the third party's actions. Rather, the bill requires the Senior Officer to *consider* the guidelines issued by the Chief Health Officer and other matters they consider relevant under clause 10(5). The Senior Office may make a mandatory testing order only if they are *satisfied* that the third party will not voluntarily provide blood to be tested and if the testing is justified in all the circumstances.

Similarly, under clause 14 the court may make a mandatory testing order for a vulnerable third party if satisfied that on the balance of probabilities, testing is justified in all the circumstances. In the court's determination, the court must take into consideration the best interests of the vulnerable third party, the vulnerable third party's wishes, the wishes of the third party's parent or guardian, submissions made by the Chief health Officer and other relevant matters.

At no time does the bill reference that the Senior Officer or Court must assess whether the contact with the bodily fluid of the third party was as a result of a deliberate action of the third-party, despite its clear reference in the objects of the act. The lack of any scrutiny as to whether the act was 'deliberate' is particularly concerning considering the term echoes the *mens rea* (intention) element of a criminal offence.

The fact that a *mens rea* element is included within the objects of the act infers that the Order can be sought as a type of extra-judicial punishment of a third party. HALC strongly opposes an extrajudicial form of punishment, administered as a public health measure, that has limited oversight from the judiciary or Senior Officer in regard to the 'deliberateness' of the act.

##### Risk of transmission

We also note that the bill does not require the Senior Officer/Magistrate to consider the advice of the medical practitioner to determine if there is any real risk of transmission. We submit that the legislation should clearly state that the medical advice of the medical practitioner be considered when determining if a mandatory testing order should be made. If a medical practitioner determines there is no real risk of transmission, no mandatory testing order can be justified.

**Recommendation 3:** Clause 10(5) and 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.
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## 3.2 Timeline and information provided for mandatory testing application and review

### Timeline for application and review

The bill currently does not note a timeframe in which a third party or a parent or guardian must provide submissions to the Senior Officer by, only that an opportunity to provide submissions must be provided under clauses 10(3) and (4). We note that clause 10(2) requires a decision to be determined by the Senior Officer within 3 business days, reduced from 5 days in previous versions of the draft bill. We also note that the timeframe for an application of review by the Chief Health Office by a third party or worker has been reduced from 2 days, in subsequent drafts, to 1 day under clause 22 of the current bill.

HALC is concerned about this amendment to the draft as we have previously advocated for the lengthening of this period, for both the application and review, from 5 days to 10 days. HALC advocated for this due to concerns that 5 days is a very limited timeframe for a person to receive legal advice. In order to effectively make submissions on the matter a third party should be offered the opportunity to seek legal advice as to what should be contained within the submissions. Securing legal representation from a Community Legal Centre, Legal Aid or a private solicitor even within 5 days would be a difficult task.

The timeframe also does not take into consideration any adverse impacts on the third party that may have occurred due to the situation leading to the mandatory disease testing order. People who have engaged with emergency service workers such as paramedics, police or the emergency department personnel would likely require further time to respond to a request for an order (e.g. if the person has been arrested, seriously injured or traumatised having been involved in another serious incident).

The lack of scrutiny and any judicial oversight for the making of an application order is inadequate, and limited timeframes create serious concerns for procedural fairness. The bill should require that decision makers give third parties every opportunity to provide informed submissions as to why their right to bodily autonomy should not be violated.

**Recommendation 4:**

- Clause 10(2) should be amended to give the Senior Officer 12 days from the notification of the third party to determine the application, unless a longer period is necessary in the circumstances

- Clause 10(3) and (4) should be amended to give the third party 10 days to make submissions
- Clause 22(2) and (4) should be amended to give the third party and worker 5 days to make a review application

### Information provided to third party

Little to no information under the current provisions of the bill is to be provided to the third party at the time an application for an order is made.

Clause 17 outlines the information that is to be provided within the mandatory testing order including the place for the third party to attend to provide blood, which BVB's are to be tested for and the penalty for failure to comply with the order. Currently the order does not require any information to be provided about the third party's right to review the order or where to seek medical and/or legal advice about the order.

**Recommendation 5:** *The bill include provisions providing for third parties, and their parents/guardians where appropriate, to be informed, both at the time a mandatory testing application has been sought and when a mandatory testing order is made, of the following:*

- *Advised to seek legal advice and provided information on where to obtain legal advice*
- *Advised to seek medical advice and provided information on where to obtain medical advice*
- *Be informed of the decision-making and review process and timeframe*

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### 3.3 Delegation of a function of Senior Officer

Under clause 43(1) of the bill, a senior officer may delegate a function of theirs under the bill to a person of a class prescribed by the regulations.

The decision to approve or reject an application for mandatory testing is one of a serious nature and carries serious penalties of imprisonment and/or a fine if the third party does not comply with the order. As such, the bill should have clear safeguards in place to restrict abilities to delegate functions of the Senior Officer 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.

**Recommendation 6:** *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.*

### 3.4 Written advice from medical practitioner

As per the objectives of the act, it is essential for the Senior Officer to determine whether the worker may be at risk of contracting a BBV. Under clause 9(h) of the bill, an application for a mandatory testing order must contain a 'copy of written advice received from the relevant medical practitioner, if any.'

HALC recommends that clause 9(h) be amended to remove the term 'if any'. In order to make an informed decision as to the actual risk of transmission of a BBV it is essential that the Senior Officer consider the advice of the medical practitioner. Written advice from the medical practitioner would also serve to assist the Chief Health Officer where an application for review is requested.

***Recommendation 7:*** Clause 9(h) be amended to state 'a copy of written advice received from the relevant medical practitioner assessing the workers risk of contracting a BBV'

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### 3.5 Detained third parties

Provisions within the bill for the use of 'reasonable force' to ensure a detained third party complies with mandatory testing is of serious concern considering the lack of oversight and scrutiny within the bill.

UNAIDS and WHO state that for testing purposes in custody, detainees should not be subjected to say no to a person of authority if they do not want to be tested due to the clear power imbalance between the detainee and the staff.<sup>17</sup> When we also consider that the detainee will be threatened with 'reasonable force' if they refuse to comply with a mandatory testing order, the ability for a third party to provide voluntary consent is drawn into question.

To ensure consent is voluntary the 'Senior Officer' seeking consent of a detained third party must be completely independent from the person seeking the application.

HALC is also concerned that people's first engagement with sexual health services could be through a mandatory testing order where they are subjected to the use of force. Mistrust in government services is a serious public health concern and the third party may choose not to engage in health services in the future due to fear of punishment or harm. This is a serious concern considering overrepresented populations in our prison system, including Aboriginal peoples and Torres Strait Islanders and people who inject drugs, are identified as a priority population in both the National Hepatitis C and HIV strategies and these measures may deter these populations from engaging in health services in the future.

Furthermore, failure to comply with an order is an offence under the act subjecting the third party to a fine and/or imprisonment for 12 months. Subjecting the detained third party to force while also penalising them for failure to comply would punish the detained third party twice.

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<sup>17</sup> 'HIV testing and counselling in prisons and other closed settings' Technical Paper, United Nations Office on Drugs and Crime co-published with UNAIDS and the World Health Organisation, 2009 [https://www.who.int/hiv/pub/idu/tc\\_prison\\_tech\\_paper.pdf?ua=1](https://www.who.int/hiv/pub/idu/tc_prison_tech_paper.pdf?ua=1)

We reiterate that the results from a blood test forcefully obtained would not change the advice or procedures undertaken by medical practitioners for the purposes of mitigating risks of transmission of a BBV to the worker. In contrast, similar provision under the Crimes (FP) Act exist due to the potential implications of the results, i.e. DNA evidence in a criminal matter to determine if the third party committed an offence.

**Recommendation 8:**

- *The removal of clause 20 from the bill*
  - *The seeking of voluntary consent from a detained third party, the service of a mandatory testing order and the carrying out of any law enforcement duties be conducted by a completely independent 'Senior Officer'.*
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### 3.6 Definition of Bodily Fluids

The bill defines 'bodily fluids' under the act as 'blood, faeces, saliva, semen or other bodily fluid or substances prescribed by the regulations.' We note that each BBV can only be transmitted through certain bodily fluids as prescribed in the above table. For example, neither HIV or HCV can be transmitted through saliva and therefore should not be classed as a 'bodily fluid' for the purposes of a mandatory testing order for these BBV's.

**Recommendation 9:**

- *The bill be amended to appropriately define the term 'bodily fluid' in relation to the transmission of each BBV.*
  - *The removal of ability to prescribe the definition of bodily fluids to the regulations.*
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### 3.7 Pre- and Post-Test Counselling for Third Party

The Bill does not contain a provision for the pre- and post-test counselling of third parties who are subject to a mandatory testing order. Considering the seriousness and sensitivity of the situation, we recommend a provision for pre- and post-test counselling for both third parties and workers be included to ensure they receive their tests results and any information about testing in a manner consistent with appropriate medical or other relevant professional standards.

**Recommendation 10:** *The inclusion of a provision for the pre- and post-test counselling of third parties and workers in a manner consistent with appropriate medical or other relevant professional standards.*

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### 3.8 Disclosure of Information

The information collected in the application of the bill will involve highly sensitive health information. As such, disclosure of information should only occur with the informed consent of the third party and worker and only for purposes required in the application of the act.

Clause 28 of the bill allows for the disclosure of information obtained in connection with the administration or execution of this Act if prescribed by the regulations (clause 28(1)(e)). HALC submits that this specific clause be removed. Any lawful disclosure of sensitive health information should be regulated by the Act and not the regulations.

***Recommendation 11: Removal of clause 28(1)(e) from the bill.***

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### 3.9 Mandatory Testing of Children

HALC strongly opposes any provision for the mandatory testing of children. We note that rates of HIV in children under the age of 18 are negligible and vaccination against HBV can begin at birth or through catch-up vaccinations. We are also concerned about the impact on people between the age of 14 and 18 who would be engaging with sexual health clinicians for the first time through a court order. The mandatory testing of people under the age of 18 is not justified or acceptable in the circumstances.

***Recommendation 12: The minimum age for mandatory testing be 18 years of age.***

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### 3.10 Disclosure in Annual Reports

Under the *Public Health Act 2010* (NSW), the Secretary must include the number of public health orders made under section 62 of the act in the annual report of the Ministry of Health. The provision allows for access to important data on the use of coercive powers that lack judicial oversight and HALC recommends a similar provision be included to require all departments to report on the number of mandatory testing orders requested, approved, refused, appealed/reviewed, approved on appeal/review and refused on appeal/review.

***Recommendation 13: Include a provision with the bill for the disclosure of the number of:***

- *requested mandatory testing orders;*
  - *approved mandatory testing orders;*
  - *refused mandatory testing orders;*
  - *appealed/reviewed mandatory testing orders;*
  - *approved on appeal/review mandatory testing orders; and*
  - *refused on appeal/review mandatory testing orders in relevant department's annual reports.*
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## 4. Summary of Recommendations

<b>Our Recommendations</b>	
<b>Recommendation 1</b>	The Bill not be passed
<b>Recommendation 2</b>	<p><i>The bill be amended to require all applications for a mandatory testing order be made to the court.</i></p> <p><i>Further provisions be added or amended within the bill to reflect provisions within the Crimes (Forensic Provision) Act 2000.</i></p>
<b>Other Recommendations</b>	
<b>Recommendation 3</b>	<p><i>Clause 10(5) and 14 be amended to require that the senior officer/magistrate be reasonably satisfied that:</i></p> <ul style="list-style-type: none"> <li>- <i>The worker came into contact with the third party's bodily fluid as a result of the person's deliberate action; and</i></li> <li>- <i>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</i></li> <li>- <i>The exposure to the bodily fluid occurred in the execution of the workers duties.</i></li> </ul>
<b>Recommendation 4</b>	<ul style="list-style-type: none"> <li>- <i>Clause 10(2) should be amended to give the Senior Officer 12 days from the notification of the third party to determine the application, unless a longer period is necessary in the circumstances</i></li> <li>- <i>Clause 10(3) and (4) should be amended to give the third party 10 days to make submissions</i></li> <li>- <i>Clause 22(2) and (4) should be amended to give the third party and worker 5 days to make a review application</i></li> </ul>
<b>Recommendation 5</b>	<p><i>The bill include provisions providing for third parties, and their parents/guardians where appropriate, to be informed, both at the time a mandatory testing application has been sought and when a mandatory testing order is made, of the following:</i></p> <ul style="list-style-type: none"> <li>- <i>Advised to seek legal advice and provided information on where to obtain legal advice</i></li> <li>- <i>Advised to seek medical advice and provided information on where to obtain medical advice</i></li> <li>- <i>Be informed of the review and decision-making process and timeframe</i></li> </ul>
<b>Recommendation 6</b>	<p><i>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:</i></p> <ul style="list-style-type: none"> <li>- <i>Any person of a lower level of seniority as the Senior Officer; and</i></li> <li>- <i>Any person that directly works with or for the worker making an application.</i></li> </ul>



<b>Recommendation 7</b>	<i>Clause 9(h) be amended to state 'a copy of written advice received from the relevant medical practitioner assessing the workers risk of contracting a BBV'</i>
<b>Recommendation 8</b>	<ul style="list-style-type: none"> <li>- <i>The removal of clause 20 from the bill</i></li> <li>- <i>The seeking of voluntary consent from a detained third party, the service of a mandatory testing order and the carrying out of any law enforcement duties be conducted by a completely independent 'Senior Officer'.</i></li> </ul>
<b>Recommendation 9</b>	<ul style="list-style-type: none"> <li>- <i>The bill be amended to appropriately define the term 'bodily fluid' in relation to the transmission of each BBV.</i></li> <li>- <i>The removal of ability to prescribe the definition of bodily fluids to the regulations.</i></li> </ul>
<b>Recommendation 10</b>	<i>The inclusion of a provision for the pre- and post-test counselling of third parties and workers in a manner consistent with appropriate medical or other relevant professional standards.</i>
<b>Recommendation 11</b>	<i>Removal of clause 28(1)(e) from the bill.</i>
<b>Recommendation 12</b>	<i>The minimum age for mandatory testing be 18 years of age.</i>
<b>Recommendation 13</b>	<p><i>Include a provision with the bill for the disclosure of the number of:</i></p> <ul style="list-style-type: none"> <li>- <i>requested mandatory testing orders;</i></li> <li>- <i>approved mandatory testing orders;</i></li> <li>- <i>refused mandatory testing orders;</i></li> <li>- <i>appealed/reviewed mandatory testing orders;</i></li> <li>- <i>approved on appeal/review mandatory testing orders;</i></li> <li><i>and</i></li> <li>- <i>refused on appeal/review mandatory testing orders in relevant department's annual reports.</i></li> </ul>

*Yours sincerely,*

Alexandra Stratigos  
Principal Solicitor  
HIV/AIDS Legal Centre