Submission No 16

INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020

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Standing Committee on Law & Justice
NSW Legislative Council
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***Mandatory Disease Testing Bill 2020* (NSW)**

This submission addresses the *Mandatory Disease Testing Bill 2020* (NSW) under consideration by the Legislative Council Standing Committee on Law & Justice.

The submission reflects my teaching of health, privacy and tort law at the University of Canberra. It does not represent what would be reasonably construed as a conflict of interest.

The Bill recognises concerns among frontline workers and the broader community regarding potential exposure to serious harms in the course of law enforcement, delivery of health services and other activity of public benefit. It provides for a non-justiciable disregard of bodily integrity, a key facet of privacy and dignity. Such a disregard, in this instance through mandatory collection of a blood sample from someone who may have/lack capacity, is only justifiable in exceptional circumstances where it is both necessary and proportionate. It must be implemented in a way that minimises the potential for abuse.

At an administrative level the Bill presents several concerns that should be addressed in operational protocols and oversighted by both the NSW Ombudsman and Information & Privacy Commission NSW.

Misplaced Confidence

Testing in the immediate aftermath of a deliberate exposure to a serious blood-borne disease will not necessarily determine whether the offender is infectious.

Measures to provide comfort to frontline workers, including paramedicine professionals who are often 'the forgotten people' in terms of support and law enforcement personnel who operate in an often invidious environment, are commendable.

The NSW Government and Parliament should however be conscious of the importance of not building a misplaced confidence among those on the frontline and the broader community. One response is to build resilience through education and ready access to post-exposure prophylaxis regarding HIV alongside preemptive immunisation for Hepatitis A and B.

Misplaced Anxiety

Regrettably, despite two decades of community education, there are ongoing anxieties among parts of the community regarding transmission mechanisms, notably that HIV is readily transmitted through saliva – for example when a corrections inmate or person in the process of arrest spits at a representative of the government. In implementing the Bill those anxieties must be addressed through education.

Spitting, throwing stored urine and faeces, intended harm in the form of threatened injury using a contaminated syringe or other implement are indeed reprehensible. They are deserving of criminal sanctions that serve to deter further behaviour and signal through the criminal justice system that the community considers such behaviour is unacceptable.

We should not however be fostering anxieties that lack a substantive basis and accordingly potentially lead to inappropriate action on the part of the frontline.

Stigma

Wariness about inappropriate action reflects a succession of official reports, independent studies and case law about values and practice on the frontline. It is for example disquieting that NSW Police personnel at the operational level continue to have difficulty in embracing directions from the policy level regarding strip searches despite more than a decade of media criticism and adverse findings by courts and inquiries.

In implementing the proposed legislation it is important that those on the frontline be conscious of stigma regarding minority groups, including Indigenous peoples and LGBTIQ people. In particular, mandatory testing should not be used as a punitive mechanism to reinforce erosion of the dignity of anyone who is accused of deliberately exposing anyone on the frontline.

Privacy and Inadmissibility

The Bill envisages oversight at an agency basis (eg within the NSW Police) and by the NSW Ombudsman. That oversight presents two concerns, particularly given that the mandatory testing is non-justiciable.

The first is adequate resourcing of the oversight. The second is the need to keep in sight the *Privacy & Personal Information Protection Act 1998* (NSW) and the *Health Records & Information Privacy Act 2002* (NSW), including scope for investigation by the Information & Privacy Commission NSW.

Inadmissibility for other purposes of a blood sample obtained under the proposed Act is necessary and thus commended.

Evidence Base

Within Australia there has been a drift to mandatory testing after deliberate exposure of a range of people, including paramedicine professioinals, SES volunteers and lifesavers. We thus have the *Criminal Law (Forensic Procedures) (Blood Testing for Diseases) Amendment Act 2015* (SA), *Public Health & Wellbeing Act 2008* (Vic) Pt 8 Div 5 and *Mandatory Testing (Infectious Diseases) Act 2014* (WA) s 8.

What we do not have – and should be seeking as the basis for fact-based policy making and evaluation – is comprehensive data regarding the number of exposure incidents, the number of mandatory tests, the demographics of people who deliberately engaged in exposure and the number of people whose health was compromised through deliberate exposure.

Disregard of autonomy, in other words an individual's decision not to provide a blood sample, can be justified. It is important however that policy has an empirical basis rather than because stakeholders require legislatures to 'do something'.

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