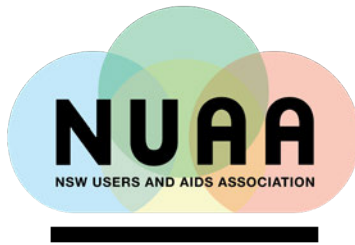


## **INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020**

**Organisation:** NSW Users and AIDS Association (NUAA)

**Date Received:** 17 December 2020

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To the Standing Committee on Law and Justice,

Thank you for the opportunity to submit into the *Mandatory Disease Testing Bill 2020* (NSW).

The NSW Users and AIDS Association (NUAA) is the peer based organisation representing drug users in NSW. Peer-based means that many of our staff and governance body have a former or current lived experienced of illicit drug use. NUAA was established in 1989 and has been continuously funded for over 30 years by NSW Health as part of the NSW response to the HIV epidemic. As recognised in the Eighth National HIV Strategy, through the application of best practice peer education and harm reduction, Australia has maintained the virtual elimination of HIV amongst people who inject drugs.

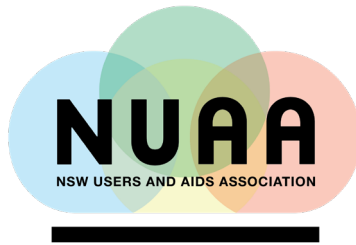
Our organisational mission is to advocate for the health, human rights, and dignity of people who use illicit drugs in NSW. We have a significant role in advocating for best practice harm reduction and prevention strategies that reduces the risks of BBV transmissions and increases access to treatment and care for people living with BBVs.

This submission represents the collective 30-year history of our organisation and reflects our understanding of the challenges faced by our stigmatised and marginalised community based on our continuous consultation with the community across NSW through our publications, education and training and community forums.

Please don't hesitate to contact us if you require any further information.

Best regards,

Mary Ellen Harrod  
(Chief Executive Officer)



## ***Executive Summary***

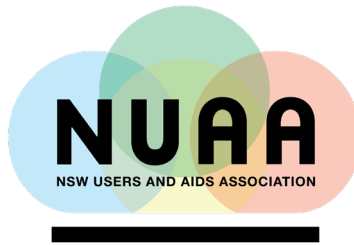
NUAA and the community we represent strongly support the right to safety and bodily integrity for all people, including police and other frontline workers. We value and recognise the incredible contribution our frontline workers make. It is critical that frontline workers are provided with evidence-based strategies to minimise the risk of disease infection while performing their work.

NUAA does not support the introduction of mandatory disease testing of third parties and the accompanying *Mandatory Disease Testing Bill 2020* (NSW) (hereafter referred to as '*the Bill*') as:

- NUAA is deeply concerned that the Bill's lack of clarity and specificity will allow for the discretionary application of the mandatory disease testing orders. As people who use drugs sit at the intersection of multiple communities and experience multiple forms of marginalisations, criminalisation, stigma and discrimination, people who use drugs are disproportionately more likely to be in contact with frontline workers and placed at risk of having testing applications ordered against us.
- It does not provide frontline workers who experience an occupational exposure to bodily fluids with any additional meaningful protection against BBVs or 'peace-of-mind'.
- It is in direct conflict with Australia's national BBV response which has being highly successful in retaining low rates of BBVs within the Australian community, including people who use drugs.

However, in recognition that mandatory disease testing may be instated despite its ineffectiveness, human rights violations, and the damage it will cause to Australia's best practice blood borne virus (BBV) response, NUAA strongly asserts that:

- Guidance is provided to frontline workers on what constitutes as 'deliberate action' by including a definition within the bill.
- Saliva is removed from the definition of 'bodily fluids' within *the Bill* as it is not a transmission route for HIV, hepatitis B or C.
- Testing orders are only issued by the CHO to ensure that the mandatory disease testing orders are not incorrectly applied.
- People under the age of 18 are not subjected to mandatory disease orders as it is unnecessary and a violation of young people's basic human rights.
- Third parties are provided with clear, fair and accessible avenues to challenge unnecessary and inappropriate mandatory disease testing orders made against them.
- Demographic information without identifiable data be reported on to track communities or populations that are being disproportionately affected by the orders when evaluating the outcomes of the testing regime.



***NUAA does not support the introduction of the Mandatory Testing Bill 2020 (NSW) because we are deeply concerned that it will be used disproportionately against people who use drugs and other marginalised communities, it is in direct conflict with Australia's world renowned, best practice response to BBVs, and it fails to provide any meaningful protection or 'peace-of-mind' to frontline workers against BBV transmission.***

*NUAA is deeply concerned that mandatory disease testing orders will be used disproportionately against people who use drugs and other marginalised communities.*

Previous experience and evidence demonstrate that overly discretionary police powers allow for the individual bias of the officer to direct their decision making, reducing fairness, transparency, and accountability of the process and violating the rights of communities. For example, the police powers granted for the enforcement of COVID-19 restrictions in each state and territory was widely criticised for being overly broad and discretionary. In assessing the enforcement outcomes of the COVID-19 restrictions, the Sun-Herald found that young Aboriginal and immigrant men were more likely to be fined for breaking lockdown restrictions.<sup>1</sup> They identified that:

“Half the fines and charges went to people living in the most disadvantaged suburbs, as defined by the Australian Bureau of Statistics. The postcodes in the bottom 10 per cent of socioeconomic status - including suburbs such as Mount Druitt and towns such as Kempsey on the Mid North Coast - accounted for nearly 20 per cent of the fines.”

While many of the fines and charges were issued against people living in the most disadvantaged suburbs, areas with high rates of COVID-19 infections were not targeted for fines, such as Mosman that received zero COVID-19 fines but was the fourth most infected postcode at the time.<sup>2</sup>

Additionally, analysis of strip search laws and outcomes found there is an overapplication of strip searches, with Aboriginal and Torres Strait Islander people experiencing 12% of the searches in NSW within a two year period despite only making up 3.4% of the State's population.<sup>3,4</sup> The discretionary application of police powers 'erode community relations' and leave people feeling 'traumatised, distraught, and scared of approaching the police when help is needed'.<sup>5</sup>

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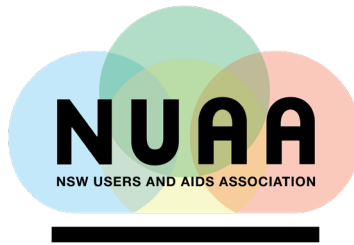
<sup>1</sup> Fitzsimmon, C., & Gladstone, N. (27 September 2020). The suburbs and towns that copped the most pandemic fines. *Sun Herald*. Retrieved from <https://www.smh.com.au/national/nsw/the-suburbs-and-towns-that-copped-the-most-pandemic-fines-20200919-p55x7j.html> on 15/11/20.

<sup>2</sup> Ibid.

<sup>3</sup> Redfern Legal Centre. (02 November 2020). RLC Media Release: Dramatic rise in police strip searches on Aboriginal and Torres Strait Islander people during COVID-19. Retrieved from <https://rlc.org.au/publication/rlc-media-release-dramatic-rise-police-strip-searches-aboriginal-and-torres-strait> on 15/12/20.

<sup>4</sup> McGowan, M. (16 June 2020). NSW police disproportionately target Indigenous people in strip searches. *The Guardian*. Retrieved from <https://www.theguardian.com/australia-news/2020/jun/16/nsw-police-disproportionately-target-indigenous-people-in-strip-searches> on 15/12/20.

<sup>5</sup> McGowan, M. (27 May 2020). Law firms look to launch landmark strip-search class action against NSW police. *The Guardian*. Retrieved from <https://www.theguardian.com/australia-news/2020/may/27/law-firms-look-to-launch-landmark-strip-search-class-action-against-nsw-police> on 15/12/20.



People who use drugs are diverse and our community sits at the intersection of multiple marginalised communities, such as Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities, young people, and people experiencing homelessness, mental health issues, drug dependence, and incarceration. As a consequence, many people who use drugs experience compounding marginalisation, criminalisation, stigma and discrimination and are disproportionately more likely to come into contact with frontline workers, including police. Despite people who use drugs achieving and retaining the virtual elimination of HIV amongst our communities<sup>6</sup>, NUAA is deeply concerned that the broad terms stipulated in *the Bill* will allow for mandatory testing orders being disproportionately placed against people who use drugs and other marginalised communities, placing us at further risk of being fined, charged, incarcerated, stigmatised and discriminated against.

*The mandatory testing regime proposed in the draft Bill is in conflict with Australia's comprehensive, best practice response to BBVs and is unnecessary.*

The draft *the Bill* legislates that frontline workers can apply for a mandatory blood testing order against a third parties if:

- the third party's bodily fluids came into contact with the frontline worker as a result of the third party's 'deliberate action'; and
- the frontline worker believes there is a risk of blood borne disease transmission.<sup>7</sup>

While *the Bill* indicates that frontline workers must seek the counsel of a medical practitioner, the frontline worker is not necessarily required to provide a written copy of the advice provided to them in their mandatory disease testing application. The applications are made to senior officers who are instated with approval process and once approved, the third party must provide a blood sample via venepuncture for blood borne disease testing or face 12 months imprisonment, \$11 000 fine, or both.<sup>8</sup>

The testing regime proposed in *the Bill* is in direct conflict with Australia's national BBV strategies that explicitly specifies voluntary, informed testing to be critical in implementing a best practice response to prevention and management of BBVs in Australia, including for HIV, hepatitis B and hepatitis C.<sup>9,10,11</sup> Australia's state based and national BBV response is recognised as one of the best in the world in retaining extremely low rates of HIV among the general population, virtual elimination among key priority populations (such as people who use drugs and sex workers), and upholding the human rights of communities affected by and living with HIV. Australia's best practice response to managing BBVs is predicated on a partnership approach with communities affected by and living with HIV which recognises the removal of legal, regulatory, and policy barriers to accessing human rights and scientifically

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<sup>6</sup> Department of Health. (2018). *Eighth National HIV Strategy 2018-2022*. Commonwealth of Australia. Pg14.

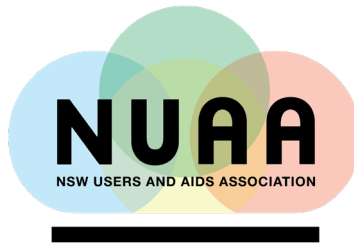
<sup>7</sup> Mandatory Disease Testing 2020 (NSW), *Section 3(a)*.

<sup>8</sup> Ibid. Section 17(1e).

<sup>9</sup> Department of Health. (2018). *Eighth National HIV Strategy 2018-2022*. Commonwealth of Australia. Pg26.

<sup>10</sup> Department of Health. (2018). *Third National Hepatitis B Strategy 2018-2022*. Commonwealth of Australia. Pg16.

<sup>11</sup> Department of Health. (2018). *Fifth National Hepatitis C Strategy*. Commonwealth of Australia. Pg24.



proven prevention strategies, such as peer education, treatment as prevention, and pre- and post-exposure prophylaxis, to be integrally connected and critical to the response.

Mandatory disease testing and punitive responses that place communities and people living with BBVs at risk of criminalisation is not recognised as an effective strategy to reduce BBV prevalence and transmission. In fact, Australia's Eighth National HIV Strategy explicitly identifies criminalisation and mandatory testing as key barriers to implementing best practice HIV responses.<sup>12</sup>

Additionally, it is worth noting that Australia and NSW are already heavily investing funds and resources into the delivery and maintenance of a comprehensive response to managing the risks associated with occupational exposure to BBVs. The effectiveness of the existing response is demonstrated in the fact that there have been **zero** occupational transmissions of HIV in Australia for 17 years and 'the combined efforts of many HIV service and research organisations have not been able to identify a case of HIV transmission to a police officer, ever'.<sup>13</sup> *The System is Broken: Audit of Australia's Mandatory Testing Laws*, a comprehensive research paper assessing the risks of occupational exposure to HIV, existing mandatory disease testing regimes in the states and territories, and the impact of these regimes on Australia's best practice HIV response, outlined that 'although violence against emergency services workers may be increasing, risk of HIV transmission is not'.<sup>14</sup>

*Mandatory disease testing fails to provide frontline workers who have experienced an occupational exposure to bodily fluids with any additional meaningful protection or 'peace-of-mind'.*

Due to window periods, blood testing cannot confirm the current BBV status of an individual. As a result, frontline workers who experience an occupational exposure to bodily fluids that carry a contemporary clinical risk of HIV transmission needs to follow scientifically proven, best practice responses to prevent the transmission of BBVs regardless of the blood test results of the third party. For BBVs such as HIV and hepatitis B delays to taking scientifically proven preventative treatments, such as post exposure prophylaxis (PEP) and the hepatitis B vaccination, can undermine the effectiveness of the treatment.

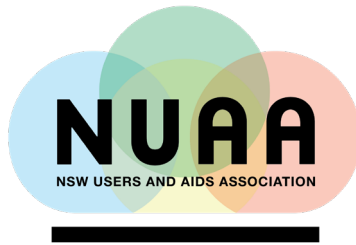
Additionally, due to some bodily fluids having zero to negligible risk of transmission and the effectiveness of biomedical interventions (such as people living with HIV retaining an undetectable and untransmissible viral load, PEP, and the hepatitis b vaccination), exposure to bodily fluids from a person who has a BBV does not necessarily mean transmission can or will occur. As a result, directing the focus of the BBV prevention response towards knowing the BBV status of the third party can exacerbate unfounded fears that transmission will occur when, in fact, the risk of transmission is scientifically negligible or impossible.

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<sup>12</sup> Department of Health. (2018). *Eighth National HIV Strategy 2018-2022*. Commonwealth of Australia.

<sup>13</sup> National Association of People with HIV Australia (NAPWHA) & HIV Justice Network. (2019). *The System is Broken: Audit of Australia's Mandatory Disease Testing Laws*. Retrieved from [https://napwha.org.au/wp-content/uploads/2019/09/2019\\_NAPWHA\\_TheSystemIsBroken.pdf](https://napwha.org.au/wp-content/uploads/2019/09/2019_NAPWHA_TheSystemIsBroken.pdf) on 15/12/20. Pg5.

<sup>14</sup> Ibid. Pg4.



In the best interest of the health and welfare of frontline workers, it is critical that frontline workers are provided with up-to-date, evidence-based information and strategies to minimise the risk of BBV transmission and alleviate concerns regarding the transmission of BBVs in an occupational setting. Investment should be directed to ensuring frontline workers are provided with educational training on actual, contemporary risks of BBV transmission from bodily fluids and scientifically proven responses that minimise the risk of infection from an occupational exposure. Investment should also be directed towards frontline workers being able to access scientifically proven prevention strategies free of charge or as a condition of employment, such as accessing the hepatitis B vaccinations, the most effective response against being exposed to hepatitis B.

***In recognition that this draft Bill may still be instated despite its ineffectiveness, human rights violations and the damage it will cause to Australia's best practice BBV response, NUAA strongly asserts that, at a minimum, amendments are made to the Bill to minimise its damaging impacts on our BBV response and the Australian community.***

*There is a serious need to provide guidance on what is considered 'deliberate action' to ensure transparency and accountability in the application of mandatory testing orders against third parties.*

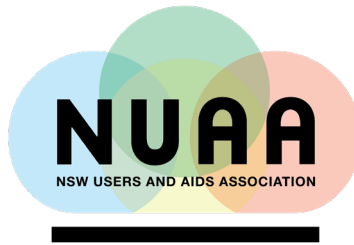
While *the Bill* allows for mandatory disease testing orders to be made against third parties if the transfer of bodily fluids from the third party is a 'deliberate action', *the Bill* does not define or provide any guidance on what constitutes as 'deliberate action'. Leaving 'deliberate action' undefined fails to provide guidance to frontline workers on what actions constitute as 'deliberate' and allow for the individual bias of frontline workers to direct their decision making. Failure to define 'deliberate action' leaves the mandatory disease testing orders vulnerable to being overused, used inappropriately or the orders being used as a form of additional punishment against the Australian community. Considering that mandatory disease testing orders will violate the third party's basic human right to bodily autonomy, there is a serious need to provide guidance to frontline workers on what constitutes a 'deliberate action' by providing a definition within the legislation. Ensuring that that frontline workers are provided with a clear definition will provide a layer of fairness, transparency, and accountability to the mandatory disease testing order regime.

*The definition of 'bodily fluids' need to be narrowed down to reflect the contemporary risks of transmission for specific BBVs. At a minimum, saliva should be removed from the definition of 'bodily fluids'.*

*The Bill* defines 'bodily fluids' to include 'blood, faeces, saliva, semen or other bodily fluids or substance prescribed by the regulations'.<sup>15</sup> The definition of 'bodily fluids' is very broad and includes fluids that do not carry a risk of BBV transmission, such as saliva. *The Expert Consensus Statement on the Science of HIV in the Context of Criminal Law* outlines twenty of the world's leading HIV scientists' evidence-based consensus on HIV and criminal law. This consensus statement indicates:

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<sup>15</sup> Mandatory Disease Testing Bill 2020 (NSW), *Dictionary*.



‘There is no possibility of HIV transmission via contact with the saliva of an HIV positive person, including through kissing, biting or spitting... there is no possibility of HIV transmission from biting or spitting where the HIV-positive person's saliva contains no, or a small quantity of, blood... The possibility of HIV transmission from biting where the HIV-positive person's saliva contains a significant quantity of blood, and their blood comes into contact with a mucous membrane or open wound, and their viral load is not low or undetectable varies from none to negligible.’<sup>16</sup>

Additionally, there is no risk of transmission of hepatitis C and zero to negligible risk of transmission of hepatitis B through saliva<sup>17</sup>, even where there is blood in the saliva, and the saliva makes contact with the mouth or eyes.

Broadly allowing the transfer of any ‘bodily fluids’ that is deliberate to trigger a mandatory testing order fails to take into account the different transmission risks associated with specific bodily fluids in particular circumstances and implies that all bodily fluids have the same risk of transmission in all circumstances, exacerbating unfounded fears and anxiety frontline workers may be experiencing.

At a minimum, NUAA asserts that saliva is removed from the definition of ‘bodily fluids’ as it carries no risk of BBV transmission. As saliva is most readily available ‘bodily fluid’ with the no risk of BBV transmission that frontline workers will come into contact with, the inclusion of saliva in the definition of ‘bodily fluids’ will result in the unnecessary overuse of mandatory disease testing orders. The broad definition of bodily fluids coupled with the failure to define ‘deliberate action’ and no requirement to include the advice of the healthcare professional the frontline worker sought counsel from allows for senior officers to approve mandatory testing orders against third parties in circumstances where there is no risk of transmission, unnecessarily placing the Australian community at risk of human rights violations and failing to provide any meaningful additional protection or ‘peace-of-mind’ to frontline workers. Due to criminalisation, stigma and discrimination, the risks of mandatory disease testing orders being used unnecessarily or inappropriately are exacerbated for people who use drugs and other marginalised communities.

*Mandatory disease testing orders must only be issued by the CHO.*

While *the Bill* proposes that the applicant of the mandatory disease testing order must seek the counsel of a healthcare professional, ultimately the senior officer can determine the outcome of a mandatory disease testing order. Senior officers are not healthcare professionals and allowing anyone other than those specifically trained in BBV management to authorise the mandatory disease testing of a third party allows for people who are untrained to make such an assessment to use misconceptions and stereotypes to direct their decision making.

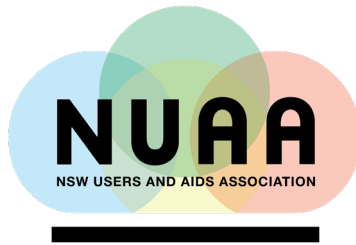
Where the third party’s drug use is known to the frontline worker or the senior officer, stigmatising and discriminatory attitudes and incorrect assumptions about people who use

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<sup>16</sup> Barré-Sinoussi, F, et al. (2018). Expert consensus statement on the science of HIV in the context of criminal law. *Journal of the International AIDS Society*, 21(7).

<sup>17</sup> SafeWork NSW. (n/a). *Hepatitis and HIV*. Retrieved from <https://www.safework.nsw.gov.au/resource-library/hepatitis-and-hiv2> on 15/12/20.





drugs and BBVs may direct the frontline worker and the senior officer's decision making around the application of a mandatory disease testing order. Stigmatising attitudes about drug use and risk of BBV transmission may be exacerbated through layered stigma, discrimination and marginalisation, such as where the third party is a person who uses drugs and also identifies as Aboriginal and Torres Strait Islander, culturally and linguistically diverse, young, and may also be experiencing homelessness, mental health issues, drug dependence, and/or incarceration.

NUAA strongly asserts that mandatory testing orders can only be made to and approved by the Chief Health Officer (CHO) to ensure the mandatory disease testing regime is not incorrectly applied. Seating this responsibility with the CHO will also streamline the appeals process which might otherwise result in people spending excessive time in custody. As the CHO is currently the authority instated with hearing appeals, the mandatory disease testing regime proposed in the draft bill has the potential to bring the CHO in conflict with frontline workers, a highly undesirable situation for two essential services where cooperation is crucial.

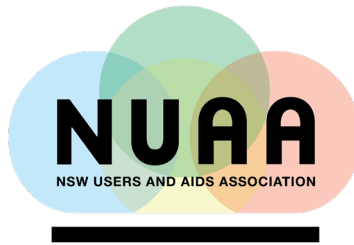
*People under the age of 18 should not be subjected to mandatory disease testing orders as it is unnecessary and a violation of young people's basic human rights.*

A further, major concern is that the draft bill allows for mandatory disease testing orders to be made against third parties as young as 14 years. The number of people under the age of 18 with HIV is negligible. In addition, as highlighted in the Hepatitis NSW submission into this inquiry, the prevalence of hepatitis B and C in people under the age 18 is also negligible or exceptionally low.

While *the Bill* indicates that mandatory disease testing applications against people aged between 14-18 years must go through a Court process, forcing young people to go through a court proceeding and have their bodily autonomy violated without a rational basis is a serious human rights violation and a situation that young people should not be placed at risk of in NSW, or anywhere else. In addition, court involvement and the process proposed in *the Bill* for people under the age of 18 is an unnecessary burden on the Children's Court system that is already under considerable pressure. For these reasons, NUAA strongly assert that the minimum age that a mandatory disease testing order can be made against a person is at least 18 years of age.

Similarly, laws that violate young people's basic human rights without a rational basis have seriously damaged relations between young people and the police and caused trauma. For example, one young person who was strip searched at a music festival without the police finding any drugs on them indicated:

"The way I've described it before that when you're out on the streets, on a night out or whatever, you see the police and you're meant to think 'oh there's the police, I



feel safe'. Now I see them and it's like, I've got to stay away, even if not doing anything wrong. It ignites a fear, rather than feeling safe around them.'<sup>18</sup>

*The appeals process for third parties outlined in the Bill is unclear, unfair, and inaccessible.*

NUAA is deeply concerned that the review process outlined in the draft bill does not provide third parties with a clear, fair and accessible avenue to challenge unnecessary and inappropriate mandatory disease testing orders made against them. While *Section 23 of the Bill* allows for third parties to make an 'application for review' and the review is conducted by the CHO, the third party is only provided with one business day to make an application, it is unclear *how* the third party will submit the application to the CHO particularly if they are under police custody, and an 'application for review' does not impact the forced blood testing of the third party. Only providing one business day to make an application for review is insufficient time for many people to understand, seek counsel on and apply to appeal. This timeframe is particularly concerning coupled with the fact that it is unclear how the third party can submit an application for review to the CHO, particular for those who are under police custody. The severely insufficient timeframe and the lack of clarity around the process creates serious concerns regarding the transparency, oversight, and fairness of the proposed mandatory disease testing regime.

Additionally, it is concerning that an 'application for review' does not delay the mandatory disease testing, particular if the review by the CHO finds that the approval of the mandatory disease testing order to be inappropriate. The failure for the 'application for review' to delay the mandatory disease testing orders until it has undergone review by the CHO creates a serious disincentive and barrier for people who rightly should apply for review as it does not impact the actual forced testing. At a minimum, the timeframe a third party can apply for an 'application for review' needs to be extended, testing orders need to include clear instructions and accessible avenues for the third party to lodge an 'application for review', and an 'application for review' needs to delay testing until the CHO has provided a response to the application.

*Robust evaluation of the outcomes of the law is essential.*

While external oversight of this proposed legislation is appreciated, *the Bill* does not outline what details of the application will be included. We suggest that some demographic information without identifiable data be reported on, to track communities or populations where this proposed law may be being implemented disproportionately.

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<sup>18</sup> McGowan, M. (27 May 2020). Law firms look to launch landmark strip-search class action against NSW police. *The Guardian*. Retrieved from <https://www.theguardian.com/australia-news/2020/may/27/law-firms-look-to-launch-landmark-strip-search-class-action-against-nsw-police> on 15/12/20.