Submission No 20

INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020

Organisation: Police Association of NSW

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Police Association of NSW

Submission to the Standing Committee on Law and Justice Inquiry: Mandatory Disease Testing Bill 2020

This Bill is designed to address a considerable harm done to many emergency service workers each year.

It has the support of the men and women in emergency services, with the Public Service Association, NSW Nurses and Midwives Association, and Police Association of NSW calling for the legislation.

Unfortunately, thousands of emergency service workers suffer an incident of exposure to bodily fluids each year. Often these are the result of disgusting and intentional acts by a person seeking to cause harm to the emergency service workers, through physical violence, psychological distress, fear of contracting a disease, and degradation of the emergency service worker.

Offenders are using syringes as weapons, spitting mouthfuls of blood, or flinging/smearing bodily fluids to harm emergency service workers. This exposes emergency service workers to bodily fluid in circumstances of violence, physical injury, and disgusting and traumatising conduct.

NSW Justice provided yearly averages for number of incidents of bodily fluid exposure by Agency (Source: NSW Justice, Options Paper: Mandatory Disease Testing, September 2018, Table 1, Page 8).

Table 1

Agency	TOTAL incidents of exposure to bodily fluids (Per Year Average)	SUBSET – incidents involving human bite or needle stick injury (Per Year Average)
NSW Police Force[1]	450	60
Corrective Services NSW[2]	130	16
NSW Rural Fire Service[3]	1	0
Fire & Rescue NSW[4]	20	1
NSW State Emergency Service[5]	1	0
NSW Health[6]	2,218	1,627

[1] Per year average over a four-year period *(source: NSW Police Force)*
[2] Per year average over a two-year period *(source: Department of Justice)*
[3] Total of four members exposed in connection with one incident *(source: NSW Rural Fire Service)*
[4] 76 exposure incidents, plus one incident involving a bite/needle stick injury, over the period 2014 to date *(source: Fire & Rescue NSW)*
[5] Average over a three-year period (four incidents over the past three years) *(source: NSW State Emergency Service)*
[6] Per year average over the period July 2013 to June 2017 *(source: NSW Health)*

When these incidents occur, emergency service workers suffer physical injury, psychological harm, significant trauma, and are forced to undergo stressful procedures.

These incidents carry a risk of the emergency service worker contracting serious and permanent diseases. For example, incidents such as syringe injuries or a 3rd party's blood entering open wounds of an assaulted emergency service worker carries a risk of transmission of a blood borne disease, which the Bill defines as HIV infection, Hepatitis B, Hepatitis C.

Many emergency service workers who suffer these incidents are advised by their treating medical practitioner that the nature of the exposure they have suffered carries a sufficient risk of transmission of a disease to require the emergency service worker to:

- Complete long treatment plans to reduce the risk of contracting a disease. The side effects of this treatment often make emergency service workers very ill, causing them debilitating symptoms (eg nausea, vomiting, diarrhoea and fatigue, and potentially some more long term and serious side effects like renal failure[1]) and time off work.
- Undergo 3-6 months of their own testing plan to find out if they have contracted a disease. During this time they suffer considerable anxiety and fear while they await their test results.
- Alter their behaviour. Fearing they may have contracted a disease, during the testing period the emergency service worker may have to alter their behaviour to ensure they do not transmit any diseases they might have contracted, for example delaying trying to start a family, seeking medical advice regarding pregnancy or breastfeeding, or having to be vigilant about behaviours that carry a risk to those they live with (for example, the NSW Health Factsheet on Hepatitis C specifies that sharing of everyday items like used toothbrushes or razors may carry a risk of infection of Hepatitis C[2]).

The Bill would enable those processes to be informed by a risk assessment which had access to the test results of the source of the exposure. These test results will be highly useful information for the risk assessment and decisions regarding the treatment the emergency service worker will continue with.

Some stakeholders have disputed the utility of the results of the proposed test. This submission will deal with this in more detail below (from page 9), but it is important to state from the outset; post-exposure procedures established by NSW Health place significant value on the blood borne virus (BBV) status of the source person, and (if known) the viral load.[3]

The NSW Health procedures state: "Results of source testing will better inform the exposed HCW [health care worker] about the risk of transmission and where PEP has been initiated, inform the need for continuation."[4]

[1] Health Protection NSW, Policy Directive: *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 04 May 2017, page 8.
[2] NSW Health, Communicable Diseases Factsheet: Hepatitis C, 26 August 2019.
[3] Health Protection NSW, Policy Directive: *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 04 May 2017.
[4] Ibid, page 5.

The value of this information in NSW Health's post exposure procedures demonstrates the test results that will be obtained under this Bill would be important information in the risk assessment for affected emergency service workers.

Given the value of the test results, affected emergency service workers deserve access to that information, and this Bill should be passed into law in its current form.

Procedures for occupational exposures to bodily fluids involve risk assessments that factor in the blood borne virus (BBV) status of the source of the exposure. In most occupational settings, the source person is willing to voluntarily undergo testing and disclose the results because they want to ensure the safety of everyone involved. But as described above, in the context of emergency service work, these exposures often occur as a result of deliberate, violent or disgusting conduct by a person seeking to cause physical injury, psychological harm, degradation and fear to the emergency service worker. In this context, the source person is highly unlikely to voluntarily participate in testing

Therefore the order proposed in this Bill is necessary – without this Bill, emergency service workers will continue to be exposed without the important information of the source person's test results.

This Bill would make a huge difference to the emergency service workers who have to undergo this terrible experience.

This Bill would help affected emergency service workers by:

- providing valuable information to the risk assessment processes that emergency service workers must go through, that is currently not available in NSW due to the absence of this testing scheme, and
- if the test is negative, alleviating fear and anxiety as much as possible; while not conclusive due to detection windows, the test result, in conjunction with other information, affects the risk level assessed for transmission of a disease and would be a source of comfort to affected emergency service workers if a negative test result was returned.

We did not make the decision to advocate for a Bill of this nature lightly – we appreciate and respect the concerns put forward by stakeholders who do not support this Bill. We are well aware mandatorily taking a blood sample from a person for the purpose of disease testing is an intrusion on that person's bodily autonomy, and we regret this intrusion is necessitated by the circumstances described above. We also regret there are contentious issues that cannot be alleviated to the satisfaction of those stakeholders – in an ideal world we could meet the welfare and health needs of emergency service workers in a manner that also satisfied those stakeholders.

But we strongly believe that balancing the significant harm done to emergency service workers, in the context of the source person committing intentional acts of a disgusting or violent nature designed to harm emergency service workers, the Bill has achieved an appropriate outcome.

Many jurisdictions around Australia have adopted equivalent legislation designed for this objective (Western Australia, Northern Territory, South Australia, Queensland and Victoria).

Despite implementation of equivalent legislation in 5 jurisdictions, which have been in force for multiple years, we are yet to see any demonstration of the concerns raised by opponents of this Bill actually eventuating.

We therefore strongly support the Bill in its current form, and urge the Committee to recommend the Bill be passed without amendment.

Key components for emergency service workers

The main benefits of the Bill is:

- to provide the risk assessment with as much information as possible, as early as possible, and
- to alleviate the fear and anxiety of the emergency service worker.

Therefore the main criteria which will determine the practical success of the Bill in meeting the needs of the emergency service worker is:

- increasing the likelihood of compliance with the order,
- speed of the provision of the results, and
- all appropriate information relevant to risk is available and considered.

Likelihood of compliance

Ideally the source person would provide a sample voluntarily and consent to the disclosure of the results to the medical practitioner of the affected emergency service worker, negating the need for any order.

In the event an order is necessary to obtain the results, it is highly preferable that the subject of the order comply with the order, meaning the emergency service worker has access to all relevant information, and the penalty provisions of the Bill are not needed.

However, there will still be scenarios where the subject of an order seeks to avoid compliance; we are seeking to minimise that occurring as much as possible.

A key component of the Bill that seeks to achieve this is section 20.

Where a person is already in police custody or an inmate in a correctional facility, the opportunity to transport them to a facility at which a sample can be taken should be utilised to maximise the chance of compliance with an order.

In relation to police officers making an application under this Bill, we would anticipate that most persons subject to an application and an order will be in police custody in the aftermath of the incident, because frequently an exposure incident will occur in the context of an arrest.

We anticipate the steps in making and determining an application would in most circumstances in which police officers are the applicant and decision maker, occur very quickly, and enable the order to be complied with while the person is still in custody.

Police want to minimise, as much as possible, the need to re-locate and have a second interaction with an offender who has already shown a willingness to commit violent and disgusting acts against police. Section 20 means that the subject of the order can be taken to a facility in the immediate aftermath of the exposure incident, increasing the chance of compliance and reducing the number of unnecessary interactions police have to undertake with that individual.

We accept that even when subject to an order, in the face of possible penalties, and even when taken to a facility, the conduct of some source persons will make the taking of a sample impossible or unsafe. On these occasions, a sample might not be able to be obtain and penalty provisions may be applicable. But the Bill should establish processes that avoid that as much as possible.

The Bill in its current form is appropriate for that purpose.

Timeliness of results

If the process for applying for and making an order is slow and subject to interruptions and delays, the objectives of informing the risk assessment and alleviating fear is significantly undermined.

The provisions of the Bill seek to balance this essential criteria with the appropriate protections and procedures for the subject of a test order.

Key components of the Bill to ensuring a suitably timely process include:

- the application being determined by a senior officer of the relevant emergency services agency, meaning the procedures in place to process application can be as efficient as possible, and minimise issues of access to the requisite decision makers,
- Section 20 (see above), and
- Section 23(1), which ensures the review procedures do not frustrate the objective of the Bill (addressed in more detail on page 13 of this submission).

All appropriate information is available and considered

Not only is the BBV status of the 3rd party relevant to the risk assessment, but so too are other factors associated with the risk of transmission.

The NSW Health post-exposure policy directive states:

> Where possible, information concerning the source's stage of HIV infection, viral load, resistance testing and history of therapy and medication adherence should be ascertained so that the most appropriate therapy and counselling can be offered.[5]

[5] Health Protection NSW, Policy Directive: *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 04 May 2017, page 8.

We therefore seek clarification whether the testing carried out as a result of the order will include a viral load test, and if that has not been envisioned as part of the testing, ensure that is to be included in the testing processes.

Path to the MDT Bill

This Bill is the product of years of Parliamentary Inquiries, Departmental Reviews, stakeholder consultation and multi-Department working groups.

The Police Association has campaigned for this issue for many years, seeking to alleviate the harm caused to police officers and other emergency service workers.

In 2017 the Committee on Law and Safety inquiry: *Violence Against Emergency Services Personnel*, recommended the Government consider

> Recommendation 47
> That the NSW Government consider introducing legislation to allow mandatory disease testing of people whose bodily fluids come into contact with police and emergency services personnel, in consultation with all affected stakeholders.

The first step in that consideration was a Departmental Review, through the publication of an options paper and receipt of submissions from interested stakeholders.

In November 2019, the Minister for Police and Emergency Services David Elliott, Minister for Counter Terrorism and Corrections Anthony Roberts and Attorney General Mark Speakman announced the NSW Government would introduce the scheme, saying "the safety and protection of frontline workers was the NSW Government's primary consideration".[6]

This began months of multi-department working groups and stakeholder consultation to design a Bill that meets the needs of emergency service workers while also appropriately designing complex procedures and protections in the legislation, including the circumstances in which the scheme is potentially enlivened, the decision-making process, compliance mechanisms, and appeal avenues.

The Bill being considered by the Committee is the product of that extensive process.

The Bill in its current form is appropriate for its policy objectives.

Addressing sources of concern

During the many years of reviews and consultation, stakeholders have raised certain concerns regarding the proposal.

We provide our response to those issues below.

[6] NSW Government Media Release, 6 November 2019.

Inclusion of exposure types that carry no risk of transmission

The PANSW advocates for a testing process that is enlivened in circumstances that carries a risk of transmission of a prescribed disease. If there is no risk of transmission we acknowledge the best outcome is for medical advice to thoroughly inform and reassure the affected emergency service worker of this fact, so the worker is fully aware they are safe and there is no need for testing to occur.

Stakeholders who oppose this Bill argue our position is reliant on misunderstandings about how diseases can be transmitted. Most commonly it is argued the support for the Bill is based on fear of spitting, or bodily fluid coming into contact with unbroken skin.

We do not advocate for such a position; we continuously acknowledge the testing order should only be used in circumstances that give rise to the risk of transmission, and we use NSW Health documents as our reference points for what those circumstances are.

This Bill is necessary because emergency service workers suffer injuries in circumstances carrying sufficient risk of transmission such that their treating medical practitioner advises them to undergo months of treatment and testing, which often causes them to suffer fear, anxiety and illness.

Incidents like needle stick injuries, large amounts of blood being applied to emergency service workers who have suffered open wounds in the course of an assault, or other methods of exposure occur during the course of emergency services duties.

These circumstances carry a risk of transmission of blood borne diseases.

It is those circumstances we seek to address in this Bill.

It has never been our intention to reinforce false information or misunderstandings about the manner in which blood borne disease can be transmitted. If that has occurred we apologise and are eager to correct the record on that issue.

A misunderstanding often arises when we make reference to “spitting” – we are describing incidents where offenders have a mouth full of blood, and “spit” that blood onto emergency service workers. We are not referring to incidents involving saliva only, as we are aware saliva only does not carry a risk of transmission of diseases prescribed in this Bill (except for a very low risk for Hepatitis B). Again, if any of our comments have given an impression to the contrary, we apologise and are eager to correct the record on that issue.

The Bill adequately addresses factors affecting risk of exposure – before a testing order can be made, there are steps in the process at which point the risk is considered:

1. the affected emergency service worker is required to consult with a medical practitioner who will advise them of the risk of contracting a disease, the appropriate action to be taken, and the extent to which testing the source person’s blood will assist in assessing the risk of contracting a disease,

2. a senior officer determining an application must consider guidelines issued by the Chief Health Officer, which the PANSW envisions would advise on relevant risk levels, before determining whether the test is justified in the circumstances.

The assertion this testing power does not correspond to actual risk is false.

The utility of the testing results

Some people have questioned the utility of the test results that would be obtained under this Bill.

For diseases included in the testing power, there is a detection window which means a person could potentially have contracted a prescribed disease but still not test positive.

Some stakeholders therefore assert that as the test results are not conclusive they would be of no value to the emergency service worker.

We acknowledge the test results are not conclusive, but that does not mean they are of no value. Far from it, the test results will be highly valuable information relevant to the risk assessment and medical advice provided to the emergency service worker, even if not conclusive. Information need not be 100% conclusive in order to be valuable and relevant to the risk assessments and decisions being made by the emergency service worker's treating medical practitioner.

Post exposure procedures designed by relevant health experts involve risk assessment of the source person, and advise obtaining and consideration of the BBV status of the source person, including testing the source person.

For example, the NSW Health Policy Directive: *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*[7] (the Policy Directive) is designed "to assist Health Services to appropriately assess and manage a health care worker following an occupational exposure in order to prevent disease transmission."[8]

The Policy Directive outlines a process after an exposure where the exposure is risk assessed according to injury type. If the injury type is one with a potential for BBV transmission, the risk assessment process also includes a risk assessment of the source of the exposure, stating:

> Following occupational exposures that carry a risk of BBV transmission, officer/s conducting the risk assessment should seek information on the BBV status of the source patient as soon as is practicable.
>
> If the blood borne virus status of the source patient at the time of the incident is unknown, the staff conducting the risk assessment should arrange for the source

[7] Health Protection NSW, Policy Directive: *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 04 May 2017.
[8] Ibid, page 1.

> patient to be tested as soon as practicable for HIV, HBV and HCV infection (refer to Table 3). Results of source testing will better inform the exposed HCW about the risk of transmission and where PEP has been initiated, inform the need for continuation.[9]

We acknowledge the Policy Directive goes on to say: "Informed consent for testing must be obtained from the source patient." [10] But the Policy Directive is written for circumstances far different from those covered by the Bill. The circumstances envisioned by the Policy Directive are exposures caused accidentally when health staff are treating patients, so mandatory testing is not necessary because a source patient is likely to voluntarily undergo testing.

Unfortunately, this option will be rarely available in many of the circumstances envision by this Bill; the necessity of the Bill has arisen due to intentional acts of violence against emergency service workers in which the source person seeks to cause the emergency service worker physical harm through assaults, psychological harm through fear of contraction of a disease, and degradation through the application of a bodily fluid to the emergency service worker against their will.

In those circumstances, the source person is far less likely to volunteer a sample for testing and disclosure of results.[11] If they are willing to consent to providing a sample and the results being disclosed, the Bill ensures that voluntary process is considered before an order is made.

The NSW Health Policy Directive negates the assertion by opponents to the Bill that the test results have no value to the affected emergency service worker – in fact it is highly valuable and the NSW Health Policy Directive seeks to ensure that testing occurs as soon as possible after exposure.

Low risk of transmission

Opponents to the Bill point to a low risk of transmission, and the low numbers of actual numbers of transmissions in an occupational setting.

We acknowledge this to be the case.

However emergency service workers repeatedly suffer incidents which gives rise to sufficient risk of transmission to necessitate months of treatment and testing, which often causes them to suffer fear, anxiety and illness.

This treatment and testing is carried out on the advice of treating medical practitioners based on the risk of transmission arising out of the circumstances of the exposure.

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[9] Health Protection NSW, Policy Directive: *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 04 May 2017, page 5.
[10] Ibid, page 5.
[11] NSW Justice, Options Paper: *Mandatory Disease Testing*, September 2018, page 27.

If there is sufficient risk to necessitate emergency service workers suffering this process, there is sufficient risk to justify having access to all relevant information in the risk assessment and provision of medical advice. Relevant information that can be obtained through a single blood test.

Our members consider it to be completely unfair and insulting when opponents to this Bill state there is insufficient risk to justify a violent offender to undergo a single blood test, but sufficient risk (caused by their deliberate actions) to make an emergency service worker undergo months of testing and treatment with debilitating side effects, and months of anxiety, fear and potentially alteration of their behaviour while awaiting their results.

As stated above, the process in the Bill includes consideration of risk at the stage of consultation with a medical practitioner, and the senior officer's consideration of the guidelines issued by the Chief Health Officer.

Intrusion on the subject of the order

We appreciate that an order requiring a person provide a blood sample and have the test results disclosed against their will is a significant step for Parliament to take (although one that NSW Parliament has made in other contexts, such as forensic procedures or traffic accidents).

The PANSW originally advocated for a testing scheme enlivened solely on the grounds of exposure giving rise to a risk of transmission, without the requirement the exposure be caused by a deliberate act. This was to address the root of the harm caused to our members and be based on risk, rather than determined by the intent of the source person.

However, the lengthy consultation process that produced this Bill selected a more limited application, to circumstances where the exposure was caused by the deliberate act of the subject of the order.

While not in line with our original position, we accept that outcome as the result of the public consultation process. The requirement confines the operation of the Bill to circumstances where the transferor is unlikely to voluntarily provide a sample, circumstances in which it is more appropriate to compel a person to provide a sample, and which community expectations would align to that outcome.

As outlined above these deliberate acts are frequently violent and intentionally disturbing or degrading acts designed to harm the emergency service worker and cause fear in retaliation for performing their duties. The acts which cause these exposures are completely unacceptable behaviour.

As much as the intrusion on bodily autonomy as envisioned in the Bill is regrettable, it is necessary and appropriate in these circumstances to obtain valuable information to assist the affected emergency service worker.

Where someone has spat blood into the open wounds of a police officer, stabbed a Correction Officers with a syringe, or smeared semen on a nurse treating a patient – the

emergency service worker has suffered a far greater intrusion on bodily autonomy than the subject of the test order, and that intrusion has been caused by the criminal and violent acts of that same person.

Again, our members are incredibly insulted when opponents to this Bill argue a single blood test of a violent offender is too great an intrusion on their bodily autonomy, when the victim they have assaulted and applied bodily fluid to has to undergo months of testing and treatment with debilitating side effects, and months of anxiety, fear and potentially alteration of their behaviour while awaiting their results.

That intrusion of a single blood test is not pursuing a punitive objective; its purpose is to provide valuable information to the risk assessment and medical advice of the affected emergency service worker.

For these reasons we believe the provisions of the Bill are justified.

Stigma and discrimination

The intent of the Bill is to address a significant harm being caused to emergency service workers, using a testing scheme that is enlivened only when a narrow set of factual circumstances arise.

The testing scheme is not discriminatory and does not create stigma for people with blood borne viruses because;

- it applies only to circumstances where the subject person's deliberate actions give rise to a risk of transmission of disease, no other factors or characteristics are relevant to the testing order,
- a testing order is only available when certain factual scenarios arise, relating to those deliberate actions and the associated risk factors, and
- the BBV status of the person cannot be a basis of stigma or discrimination, as the BBV status is unknown at the time of the order.

Equivalent legislation has been implemented in 5 other Australian jurisdictions and we are yet to see any material which demonstrates those Acts have resulted in stigmatisation of people with blood borne viruses in those jurisdictions or around Australia.

The Ombudsman will be monitoring the operation and administration of the Bill, including the ability to require demographic information about third parties subject to orders and applications for orders.

Detained third parties

A mandatory testing order requires the subject to attend a facility and provide a blood sample for the purpose of testing.

Under section 20 of the Bill, where the subject of the order is in police custody or an inmate, a police officer or correctional officer may transport that person to the facility at which the sample will be taken.

This is to increase the prospects of compliance with a testing order. If the person is already in custody when an order creates a requirement to attend a facility and provide a sample, it is logical that law enforcement officers transport the person to a facility to comply with the order.

These provisions were drafted in this manner to ensure as much as possible, the following objectives:

- increase the prospects of compliance with an order,
- avoid the application of penalty provisions, and
- avoid an enforcement mechanism that required law enforcement officers to have an additional interaction with the subject of the order after the initial incident, especially considering they have already displayed a willingness to act violently towards emergency service workers.

The provisions are appropriate for those purposes.

Effect of application for review

Under section 23(1), the appeal mechanism delays the provision of results, but not the obligation to provide a sample.

We acknowledge this situation is not ideal for an appeal process, as it only delays part of the order under review and does not delay the intrusion of a blood test, however this arrangement is necessary to ensure that the test results are obtained as quickly as possible.

The testing scheme is at its most effective when test results can be obtained as early in the process as possible – it means this valuable information:

- can be considered in risk assessments as close to the beginning of the process as possible, when decisions about risk, treatment plans and testing of the affected emergency service worker are being made,
- it may (depending on the circumstances and other known information) affect treatment options that cause serious side effects, and
- depending on the results, will alleviate considerable fear and anxiety for the emergency service worker and their families by altering the risk level, even if not conclusive.

Delaying the taking of the sample would mean that if an order is upheld, the taking of the sample and the provision of the results would occur much later in the process the emergency service worker is undergoing, when this information should be obtained as soon as practicable (as articulated in the NSW Health Policy Directive[12]).

The delay would also render section 20 unworkable.

[12] Health Protection NSW, Policy Directive: *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed*, 04 May 2017, page 5.

While we understand the concerns regarding this arrangement, we strongly submit it is a necessary balancing of the needs of the emergency service worker with the interests of the third party applying for a review.

Conclusion

An extensive process over many years has produced the Bill in its current form.

The Bill covers a range of complex issues that attracts many differing positions from stakeholders.

We acknowledge all stakeholders have participated in this debate with a genuine concern for the people they represent and the community as a whole.

From the perspective of the PANSW, we are trying to protect emergency service workers from a significant harm that regularly affects them, and do so with a legislated process that is fair and balanced.

We strongly believe the Bill in its current form achieves this objective, and urge the Committee to recommend the Bill be passed without amendment.