

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

**Organisation:** Bobby Goldsmith Foundation

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# Bobby Goldsmith

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## Foundation

Bobby Goldsmith Foundation (BGF) Submission to:  
NSW Mandatory Disease Testing Bill (2020) Inquiry  
December 2020

## Acknowledgment of Traditional Land Owners

BGF acknowledges the traditional owners of the lands on which we work. We pay respect to Aboriginal elders past, present and emerging.

## About BGF

Bobby Goldsmith Foundation (BGF) is Australia's longest running HIV charity, established in 1984. BGF provides practical and emotional support to people living with HIV (PLHIV) of all ages, sexual orientation, gender identity and CALD backgrounds through a range of services including case management, casework, financial advocacy, health and wellbeing, community support and alcohol and other drugs programs.

BGF is focused on being agile and adapting to the changing needs of the people they support to ensure their services remain relevant and accessible to all areas of geographic need, and include the provision of services to clients who are supported by NDIS and My Aged Care packages.

BGF is here to provide a safe, open and inclusive environment for all members of the gender and sexually diverse, and ally, communities. We are here to ensure that all people living with HIV feel welcome and supported.

We are a registered not-for-profit organisation, an equal opportunity employer and we have no political or religious affiliations.

## Executive Summary

In agreement with our sector partners and on behalf of our stakeholders, notably our client community, BGF remains vehemently opposed to the proposed Mandatory Disease Testing legislation currently under review.

We find that the legislation is:

- unnecessary;
- counterproductive to the NSW globally recognised best practice approach to blood borne virus prevention;
- potentially incredibly damaging to people living with blood borne viruses;
- and ignores international best practice and recommendations from the World Health Organisation.

The specific Bill that the Committee seeks advice about is incredibly problematic. Our submission reflects many previous submissions from Blood Borne Virus sector organisations, related to such proposed legislation and documents provided to relevant Parliamentarians which outlines potential legislative considerations our communities and partners identified.

## Recommendations

In line with sector partners and our opposition to the Bill, BGF recommends the NSW Government reject the *Mandatory Disease Testing Bill (2020)*, noting that the Bill is not based on evidence, is in opposition to public health objectives and is potentially harmful for people living with blood borne viruses.

Should the Inquiry Committee recommend that the *Mandatory Disease Testing Bill (2020)* be passed into law then BGF supports the recommendation of the following:

- That the Inquiry Committee and the NSW Government explore solutions to the concerns of frontline workers that are grounded in best practice public health, including education, training and improved access to biomedical prevention methods.
- That s9, s10, s11 and s14 are amended to remove ambiguity in relation to deliberate actions resulting in transfer of bodily fluids.
- That determinations on mandatory disease test orders be made by an independent arbiter, under the guidance of the Chief Health Officer, who has the requisite skills and knowledge to assess potential risk without the potential for a conflict of interest.
- That the Bill be amended to ensure that Testing Orders can only be made when an actual risk of transmission occurs.
- That the Bill be amended to provide clarity on the definition of bodily fluids in relation to transmission of disease.
- Amending the Bill so that it only applies to people over the age of 18 years.
- Amending the Bill to require anyone who wishes to apply for an order to visit a medical practitioner within 24 hours of the incident.
- Amending the Bill to reflect that the determining senior officer must seek out and consider the advice of the medical practitioner in making their decision.
- Legislating the decision-making process for determining whether an order is made.
- That should the process for determining whether an order is made not be legislated, that an order cannot be made until the guidelines are published.
- Including in the development of guidelines the following organisations: the Anti-Discrimination Board of NSW, the Mental Health Commissioner of NSW, Aboriginal Affairs NSW, Multicultural NSW, the Corporate Sponsor for LGBTI Issues in NSW Police, the Corporate Sponsor for Aboriginal Engagement in NSW Police, Australasian Society for HIV Medicine, ACON and Positive Life NSW.
- Amending the Bill to remove the ability to use force to ensure compliance with an order by a detained person.
- Amending the Bill so that it includes clarification on how people in detention will be supported to appeal a decision in relation to a mandatory disease testing order.
- Alterations to the Bill that ensure a fair and transparent appeals process which means that until determination is made by the Chief Health Officer, no mandatory test is required.
- That the Bill be edited to ensure that senior officers named in the Bill must be trained in blood borne virus transmission.
- That the Bill be edited to ensure that senior officers can only delegate the determination of a mandatory disease testing order to another officer who has received the same level of training as a senior officer in blood borne virus transmission.
- The Bill be edited to ensure that senior officers must not delegate the determination of a mandatory testing order to any officer with a potential conflict of interest.

## Narrative

This submission expresses our continued opposition to the *Mandatory Disease Testing Bill (2020)* ('the Bill') introduced into the New South Wales Parliament by the NSW Government on 11 November 2020.

Whilst we acknowledge the fact that the Bill is being subject to the Upper House enquiry, Bobby Goldsmith Foundation, along with many other expert, qualified stakeholders continues to strongly oppose the introduction of any legislation which allows for mandatory disease testing of people whose bodily fluids come into contact with frontline workers in New South Wales (NSW).

We believe that those putting forward the Bill to mandatorily test people are doing so as a well-meaning but misguided gesture of care for frontline workers in NSW.

The concern for frontline workers is commendable and shared by all of us; however this Bill does not afford real protections for our frontline workers – current NSW state policies and procedures do; as evidenced by the fact that there has not been an incidence of occupational transmission of HIV for emergency service workers in more than 15 years.

Emergency service workers are fundamental to our society and the assault of such workers is beyond reproach. Those deeply regrettable events are however covered by existing laws, policies, and procedures – all of which are based on evidence and have been proven to be effective over decades.

This Bill is not in line with evidence, and is not consistent with multiple state, national and international policies and guidelines. It exacerbates unfounded fear in vulnerable communities and it does nothing to educate and inform our frontline workers about the real risks associated with bodily fluids (which would reduce, or address completely, their anxiety).

Our existing laws, policies and procedures work; there are other ways to reduce fear, risk and concern about this issue among these workers.

We believe that this Bill is based on fear and ignorance, and flies in the face of decades of evidence-based practice and policy in relation to HIV and other blood borne virus transmission. The Bill will increase stigma and discrimination experienced by people living with HIV and other blood borne viruses.

In addition to our overall strong opposition, we have several issues with the Bill.

We are concerned that the draft *Mandatory Disease Testing Bill (2020)* does not provide clarity on when the transfer of fluids from a third party is a "deliberate action" – a trigger for a range of the processes that follow. Medical procedures performed against the will of the person should not occur on the subjective opinion of a frontline worker and their senior officer, who is unlikely to understand the contemporary evidence around blood borne virus transmission. Extraordinarily, this Bill does not require medical advice of an infectious disease expert to be included in the application for a mandatory test.

We also have significant concerns in relation to the transportation, detention and the use of force against people in police custody who are the subject of such an order, including the ability of people in custody to make a written application for review. This would be particularly the case in rural and regional areas of the State.

Under the proposed legislation, a person who has appealed a decision made by a senior officer must *still* undergo venepuncture under threat of a fine or jail. A person who is detained can have force used against them to ensure this occurs. This is a denial of natural justice, a violation of civil liberties and is totally unacceptable.

Extremely worryingly to us is the fact that the proposed legislation allows for mandatory testing orders for children between 14 and 18 years of age, and that such orders be dealt with by the Children's Court.

NSW reported only 3 infections among children aged 14 to 18 years of age in 2019/2020. On any assessment of risk, that minors are included in the Bill is an overreach and unconscionable. Mandatory testing orders for young people will further increase pressures on the Children's Court and increase the distress of this vulnerable group of people. The handful of people likely to have any risk of HIV infections in this age group – and the likelihood these young people will be on treatment and thus untransmissible – represents perhaps the most egregious aspect of this Bill.

Fundamentally this Bill is an inappropriate criminalisation of a health issue, one which has been dealt with through world leading, evidence based, bipartisan policy. NSW has every reason to feel incredibly proud of our efforts to contain HIV and indeed, COVID-19 infections. We have a tradition in this State of responding to pandemics by following the evidence, trusting people with information, and supporting frontline workers while they do their job, not ignoring science, inciting fear and enacting policy that marginalises an already vulnerable population.

We draw attention to previously submitted briefing papers developed by organisations engaged in the sector which details our concerns with this Bill in more detail. We also draw your attention to the previously submitted Discussion Paper titled *Let's Not Weaken the NSW Response to Managing Blood Borne Viruses*.