

## INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020

**Organisation:** NSW Gay and Lesbian Rights Lobby

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**Submission to Mandatory Disease Testing  
Bill 2020**

**December 2020**



**Gay & Lesbian  
Rights Lobby**

# About the NSW Gay and Lesbian Rights Lobby

The New South Wales (NSW) Gay and Lesbian Rights Lobby has a proud history. We are the peak organisation representing the rights of gay and lesbian people. We advocate on behalf of the gay and lesbian community and their families, as well as joining advocacy efforts of our partners and allies across the LGBTIQ community.

We work closely with bisexual, transgender and intersex organisations, and all Members of Parliament to advance the rights of our communities in NSW. The GLRL has been in continuous existence since 1988, but the origins of our organisation date back to the 1970s and the efforts to decriminalise homosexual acts and to provide phone counselling support to community members impacted by bigotry.

The GLRL has established strong ties to the community, consulting with our members and hearing their stories, many of them describing incidents of violence, discrimination and hatred. In the past 31 years, our community-based organisation has been composed of volunteers with lived experience of this bigotry. We draw on our history of bearing witness to those stories in making this report.

A full list of our advocacy efforts is published on our website and in our annual reports.

Any questions are welcome and can be directed to [convenors@glrl.org.au](mailto:convenors@glrl.org.au)

**Stay proud,**

**Co-Convenors,**

**NSW Gay and Lesbian Rights Lobby,**

**Audrey Marsh**

**Jack Whitney**

# 1 Context of this review

A Bill has been introduced to NSW Parliament which would compel individuals to undertake a blood test if a police officer or other 'frontline worker' was subjected to an alleged assault and at risk of infection was identified. This legislation intended to ensure that frontline workers are safe from blood-transmittable diseases.

**While the aim of supporting frontline workers is a commendable goal, regrettably the bill does not do this.**

Instead, it provides a framework that does not reflect the existing scientific evidence base, does little to protect front line workers, undermines public health efforts, drives further stigmatisation of blood-borne viruses (BBVs), and violates human rights through the imposition of extra-curial punishment through a non-consensual medical procedure.

It is this last point that is most concerning. Indeed, the NSW government proposes that worker safety is promoted by facilitating orders that expose community members to the imposition of penalties comprising invasive medical procedures undertaken using force and the possibility of detainment. As a combination, this legislation:

1. Contradicts the science and evidence
2. Jeopardises existing law and systems
3. Creates distrust between citizens and authorities
4. Violates human rights and civil liberties
5. Stigmatises and marginalises people living with HIV and BBVs

Recommendations are made throughout this submission, developed in consultation with expert members of the Lobby. **However, it should be noted that fundamentally the Lobby does not support this Bill.**

## 2 Contradicts science and evidence

### 2.1 Current Rates of Blood Borne Viruses

This legislation has not considered the successful and significant reduction of HIV in Australia. There have been zero occupational transmissions of HIV in Australia for 17 years, and never an occupational transmission for a police officer (ACON, 2020).

Around 0.1% of the Australian population is living with HIV, and the prevalence of HIV for sex workers in Australia are estimated to be below 0.04%. Australia and New Zealand have the lowest prevalence globally of HIV in people who inject drugs, at

roughly 1.1% of that population (ACON, 2020). The current healthcare system provides effective treatment which means the chances of transmitting HIV are significantly eliminated; other BBVs are effectively prevented, managed, and cured. There is also an easy-to-access vaccine for Hepatitis B.

People living with Hepatitis C can reliably access effective treatment curing them of the condition through the Pharmaceutical Benefits Scheme. Australia has seen the lowest rate of Hepatitis C in ten years and the virtual elimination of Hepatitis C in 12 NSW custodial settings, thanks to the dedicated professionals in Justice Health and Forensic Mental Health Network.

## **2.2 Mandatory testing does nothing to reduce the risk of transmission**

In the unlikely event where an individual has exposed a worker to bodily fluids, this actually does nothing to prevent the risk of transmission and does little to provide comfort to those who have been exposed.

The time between potential exposure and a positive test result can be months long. Therefore, a negative test result obtained through the mandatory disease testing framework could provide false information that is relied upon in terms of risk mitigation, creating an unacceptable risk to frontline workers. It would also likely cause significant stress to the individual, with little resulting benefit.

### **Recommendations:**

- 1.** To uphold professional standards, workers who are defined as “frontline workers” must have received comprehensive training and education on BBVs, transmission routes and risk, and prevention methods from certified health professionals; and sustainable funding needs to be allocated to these training programs.
- 2.** To offer concrete protection for our frontline workers, it needs to be mandatory for them to receive vaccination for BBVs and where potential exposure has occurred that they are provided with Post-Exposure Prophylaxis (PrEP).

## **3 Jeopardise existing law**

This Mandatory Disease Testing Bill aims to impose legislation that is not based on public health evidence. The fundamental flaw in this approach lies in the incomparability between detection and testing of a disease in an individual.

In the current NSW health system, only the NSW Chief Health Officer has the power

to approve an order for mandatory disease testing, and the order needs to be administered by the Chief Health Officer. Citizens' liberty is protected by making sure that such orders are supported by the latest and most robust medical evidence and run by the senior medical experts. However, this new legislation creates a conflict of power and functions between our successful health care systems and other authorities in New South Wales.

This proposal also fails to recognise the interface between testing of individuals and results recording, the monitoring and surveillance bodies and requirements in the federal and jurisdictional Electronic Medical Records legislation. It does not offer to provide indemnity for practitioners who may be required to perform tests with coerced or no consent.

**Recommendations:**

1. Align any proposal with relevant legislation, especially the NSW Public Health Act relating to Category 5 illnesses such as HIV.

## 4 Lack of Accountability and Oversight

### 4.1 Absence of judicial oversight

The bill provides a mandatory testing order where the relevant officer is satisfied, that a mandatory testing order is justifiable in all circumstances. Whether a decision-maker would be satisfied in all circumstances, is a question of law made by reference to medical evidence and the surrounding circumstances. The legislature acknowledges this question is of a legal character by providing that applications in relation to children or those living with mental illnesses ('vulnerable parties') are to be determined by a Court. Despite this, there is no other provision for judicial consideration of an application, nor judicial review.

### 4.2 Concerns specifically relating to Police accountability

It is possible that the decision-makers may inadvertently or intentionally abuse power. This is potentially mitigated in a health context, where a health worker's senior officer is likely to have a medical background which will inform their assessment of whether a mandatory testing order is justified. However, this mitigating factor is not present in the Police or Correctional Centre.

There appears to be no accountability mechanism in this Bill for ensuring that police power is exercised appropriately. Firstly, the Police are responsible for investigating the complaints made against them, which would diminish public confidence in complaints made against actions taken under this Bill. Secondly, even where there are mechanisms for oversight, those oversight mechanisms are not adequately supported. There is a history of legitimate mistrust from the LGBTIQ community to the Police and all efforts should be made to ensure no new legislation is introduced which would serve to further undermine this relationship.

Similarly, Aboriginal and Torres Strait Islander communities have a particularly complex relationship with police and we hold concerns that this Bill would not serve the interests of this community.

**Recommendations:**

1. Any mandatory testing order application should be determined by the Chief Medical Officer, subject to guidelines made in partnership with representative groups for those most likely to be targeted by the orders.
2. All decisions ought to be subject to judicial review.
3. Police accountability mechanisms must be strengthened and have specific oversight with respect to any Mandatory Disease Testing regime.

## 5 Violation of human rights

Contextualising the proposed powers within the principles of a public health approach ensures that the health and wellbeing of all people involved in a suspected transmission of disease are respected and considered.

In the state of Victoria, professional counselling and its advice concerning medical and social consequences need to be present to proceed a testing order; and the test must not be admissible in evidence in proceedings before any court, tribunal or similar process. In Western Australia, the Health Department has clear regulations Western Australian Police cannot require a medical professional to perform the test; and no use of force is allowed in the process of taking the sample. Conversely, the Mandatory Testing Bill will grant the police the power to use force and detention for obtaining a test.

The lack of clarity in the Mandatory Testing Bill not only reduces its practicality but also creates space for the abuse of power and civil liberty violation. The bill does not consider the cases where facilities might be full, which can result in prolonged custody. There is no monitoring or review process proposed to make sure that the testing is not used as extrajudicial punishment for people who may not have committed an offence - transparency is abjectly absent in this legislation.

**Recommendations:**

1. To protect the privacy of our citizens, the distribution of the test results and related information needs to be anonymous.
2. To ensure the transparency of the legislation, the appeal process needs to be clarified and assigned to authorities with professional knowledge and no conflict of interest.

3. To uphold the NSW citizen's human rights, authorities need to inform them of the existence of the appeal process and their rights to use it.
4. To amend the lack of clarity in the description of detention conditions, the legislation needs to lay out the standards to ensure the detainees' dignity and human rights will not be violated.

## 6 Further Stigmatisation

The proposal of mandatory testing neglects the duty of care to the individuals since it does not factor in the stigma, discrimination and misinformation surrounded HIV and blood-borne viruses.

Community attitudes and understanding of HIV and blood-borne viruses are, unfortunately, often out of date, and can be discriminatory and stigmatising. These attitudes are present across society, including in the workforces outlined as being affected by mandatory testing legislation.

### **Recommendations:**

1. To eliminate the prevalence of misinformation, the assessments of risk must demonstrate strong ground on the latest scientific evidence concerning the transmission of blood-borne viruses.
2. Any policy of this nature must be supported by ongoing training and education to all frontline staff by health-related educators in the clinical area.

## 7 Costs of Medical Consultation

Also significant is that the cost of medical consultation and other reasonable costs associated with the same, are to be covered by the relevant funding body. The relevant funding body is described herein as the employer for convenience, given that the bill provides in most instances that the funding body is the relevant Commissioner or Secretary.

While this is commendable and those costs should rightfully be born by the employer where exposure occurs in the course of their work, these costs are only covered where an application for a mandatory testing order is made. This contradicts the stated objective to encourage workers to obtain medical advice in that medical advice is only endorsed through cost provision in limited circumstances. This will have the effect of increasing the number of applications made.

Furthermore, the bill imposes on the medical practitioner obligations to advise concerning risk and any mitigating action that may be taken by the worker. Notably, the bill also provides that the medical practitioner ought to advise with respect to the extent that blood testing will assist in assessing the risk to the worker. There is



no obligation that this advice is provided in writing. There is no specific requirement that the decision-maker has regard to medical advice.

### **Recommendations:**

1. In making an application, the applicant must include a range of information set out by the bill , including any medical advice received in writing, and a consent to consult with the relevant medical practitioner.

## **Recommendation and Conclusion**

**The Lobby believes that the Mandatory Testing Bill has no basis other than outdated bias and misinformation, and we strongly oppose its introduction to NSW.**

It contradicts both scientific evidence and international, national and state guidelines on BBV transmission in occupational settings; and it will violate the human rights and stigmatises people living with HIV and other BBV.

## **Summary of Recommendations**

1. The Bill should not proceed.
2. To uphold professional standards, workers who are defined as “frontline workers” must have received comprehensive training and education on BBVs, transmission routes and risk, and prevention methods from certified health professionals; and sustainable funding needs to be allocated to these training programs.
3. To offer concrete protection for our frontline workers, it needs to be mandatory for them to receive vaccination for BBVs and where potential exposure has occurred that they are provided with Post-Exposure Prophylaxis (PrEP).
4. Align any proposal with relevant legislation, especially the NSW Public Health Act relating to Category 5 illnesses such as HIV.
5. Any mandatory testing order application should be determined by the Chief Medical Officer, subject to guidelines made in partnership with representative groups for those most likely to be targeted by the orders.
6. All decisions ought to be subject to judicial review.

- 7.** Police accountability mechanisms must be strengthened and have specific oversight with respect to any Mandatory Disease Testing regime.
- 8.** To protect the privacy of our citizens, the distribution of the test results and related information needs to be anonymous.
- 9.** To ensure the transparency of the legislation, the appeal process needs to be clarified and assigned to authorities with professional knowledge and no conflict of interest.
- 10.** To uphold the NSW citizen's human rights, authorities need to inform them of the existence of the appeal process and their rights to use it.
- 11.** To amend the lack of clarity in the description of detention conditions, the legislation needs to lay out the standards to ensure the detainees' dignity and human rights will not be violated.
- 12.** To eliminate the prevalence of misinformation, the assessments of risk must demonstrate strong ground on the latest scientific evidence concerning the transmission of blood-borne viruses.
- 13.** Any policy of this nature must be supported by ongoing training and education to all frontline staff by health-related educators in the clinical area.
- 14.** In making an application, the applicant must include a range of information set out by the bill , including any medical advice received in writing, and a consent to consult with the relevant medical practitioner.