

INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020

Organisation: NSW Police Force
Date Received: 23 December 2020

NSW POLICE FORCE

Submission

Legislative Council Standing Committee on Law and Justice

Mandatory Disease Testing Bill 2020

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Submission closing date: 21 December 2020



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1 Introduction and context

1.1 The Inquiry terms of reference

Inquiry into Mandatory Disease Testing Bill 2020

TERMS OF REFERENCE

That:

- (a) the provisions of the Mandatory Disease Testing Bill 2020 be referred to Standing Committee on Law and Justice for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message from the Legislative Assembly,
- (c) the committee report by Wednesday 17 February 2021.

1.2 Purpose of Submission

This Submission responds to an invitation from the Legislative Council's Standing Committee on Law and Justice to provide input into the inquiry into the Mandatory Disease Testing Bill 2020.

1.3 Purpose of Bill

This Bill implements the NSW Government's commitment to establish a mandatory disease testing scheme for frontline workers exposed to a risk of transmission of a blood-borne virus in the course of duties, as a result of the deliberate action of a third party.

The Bill will enable the worker to apply for a mandatory testing order requiring the third party's blood to be tested for certain blood-borne diseases: HIV, hepatitis B and hepatitis C.

Potential exposure to these diseases can be traumatic and stressful for frontline police, health, emergency and corrective services workers. This scheme will reduce the stress and anxiety police, corrections, health and emergency workers experience waiting for test results following an interaction which has placed them at risk of transmission of a blood-borne disease. Testing of the third party may assist clinicians to determine the most appropriate medical support for the worker.

1.4 Background

The Mandatory Disease Testing Bill 2020 implements recommendation 47 of the NSW Legislative Assembly Committee on Law and Safety report of the inquiry into Violence Against Emergency Services Personnel, released in August 2017¹. The NSW Government publicly announced the key components of the scheme on 6 November 2019.

2 Proposed Reforms

2.1 Coverage of the scheme

The scheme applies to prescribed workers of the NSW Police Force, Corrective Services NSW, Youth Justice NSW, Fire and Rescue NSW, the Rural Fire Service, the State Emergency Service, NSW Ministry of Health, the Office of the Sheriff, the NSW Ombudsman, the Office of the Inspector of Custodial Services, Official Visitors and St John Ambulance Australia (NSW) ².

¹ Legislative Assembly Committee on Law and Safety [Violence against Emergency Services Personnel](#), August 2017

² Mandatory Disease Testing Bill 2020 Second Print Dictionary

2.2 Consultation with a medical practitioner

Before applying for a mandatory testing order, the prescribed worker must consult with a medical practitioner as soon as reasonably practicable; ideally within 24 hours after the incident³.

2.3 Making an order

Specified senior officers in each agency can make a mandatory testing order in respect of third parties within 3 business days of receiving an application if certain conditions are met.

The senior officer must first seek the third party's consent to voluntarily provide blood for testing, and must provide the third party with an opportunity to make submissions. The senior officer must consider matters including the Chief Health Officer Guidelines. The senior officer may only make the order if satisfied that the third party will not voluntarily provide blood to be tested for blood-borne diseases, and testing the third party's blood for blood-borne diseases is justified in all the circumstances⁴.

2.4 Vulnerable third parties

If the third party is vulnerable, defined as an adult with a mental illness or cognitive impairment which significantly affects their capacity to consent to provide blood for testing, or a child aged 14-17, applications for a mandatory testing order are determined by the Local Court or Children's Court⁵.

The Local Court or Children's Court can only make the order if satisfied that, on the balance of probabilities, testing the third party's blood for blood-borne diseases is justified in all the circumstances. The Court must take into account the best interests of the third party, the wishes of the third party and the third party's parent or guardian, submissions made by the Chief Health Officer and other matters the Court considers relevant⁶.

2.5 Failure to comply

Failure to comply with a mandatory testing order without reasonable excuse, is an offence with a maximum penalty of 100 penalty units, or imprisonment for 12 months (or both)⁷. If the third party is detained or in custody, a police officer or correctional officer may use reasonable force to ensure a blood test is carried out⁸.

2.6 Review

Either party can apply to the Chief Health Officer for a review of the senior officer's decision⁹.

3 Consultation

The Bill was developed by a Working Group consisting of the Department of Communities and Justice, NSW Police Force, Corrective Services NSW, Youth Justice NSW, Resilience NSW, Department of Premier and Cabinet and the NSW Ministry of Health. The Ombudsman, Local Court, Children's Court, Legal Aid NSW and Victims Services were consulted along a wide variety of non-government stakeholders representing the justice, health, police and emergency services sectors.

³ Mandatory Disease Testing Bill 2020 Second Print, clause 8

⁴ Mandatory Disease Testing Bill 2020 Second Print, clause 10

⁵ Mandatory Disease Testing Bill 2020 Second Print, clause 13 and 14

⁶ Mandatory Disease Testing Bill 2020 Second Print, clause 13 and 14

⁷ Mandatory Disease Testing Bill 2020 Second Print, clause 26

⁸ Mandatory Disease Testing Bill 2020 Second Print, clause 20

⁹ Mandatory Disease Testing Bill 2020 Second Print, clause 22

4 Key considerations in developing the Bill

4.1 The importance of a mandatory disease testing scheme in NSW

Emergency services and other frontline personnel can be exposed to the bodily fluids of others as part of their daily duties. This can present a risk of transmission of a serious life-long disease.

There are many circumstances in which such exposure can occur, such as during an altercation, while attempting to effect an arrest, or through an assault.

These exposures occur as a result of the emergency services worker's duties, which may require involvement in difficult and dangerous situations.

Where the exposure to bodily fluids gives rise to the risk of transmission of a blood-borne disease such as HIV, Hepatitis B or Hepatitis C, this can be the cause of significant stress and anxiety for the worker and their families.

While the emergency services worker may get tested for infectious diseases, HIV, Hepatitis B and Hepatitis C may not immediately show in the test results due to 'window periods' (up to three months for HIV, up to six months for Hepatitis B and C). A positive result may sometimes be detected earlier; but confirming a negative result can take up the full window period. An exposure incident can therefore result in a long period of uncertainty for the worker before it can be confirmed whether or not disease transmission occurred.

This scheme will reduce the stress and anxiety police, corrections, health and emergency workers experience waiting for test results following an interaction which has placed them at risk of transmission of a blood-borne disease.

The 2016-17 NSW Legislative Assembly Committee on Law and Safety's inquiry into violence against emergency services personnel noted the stress that emergency services personnel experience waiting for test results following an interaction that could lead to infection with a serious disease like HIV or hepatitis ¹⁰.

The Law and Safety Committee recommended that the NSW Government consider introducing legislation to allow mandatory disease testing of those people whose bodily fluids come into contact with police and emergency workers.

In response to this recommendation, the Government released an options paper in 2018. The options paper noted that NSW Police record around 450 incidents of staff being exposed to bodily fluids per year. For Corrective Services NSW, the figure is around 130 per year and for Health workers, the figure is around 2,218 exposure incidents per year¹¹.

Similar schemes already exist in other states such as Western Australia, Queensland and South Australia.

4.2 Significance of the mandatory disease testing scheme to the NSW Police Force

Unfortunately, there is still a high incidence of assaults on police officers performing their duties, and a high number of exposures to bodily fluids.

¹⁰ Legislative Assembly Committee on Law and Safety [Violence against Emergency Services Personnel](#) August 2017 p1

¹¹ *Mandatory Disease Testing Options Paper*, Department of Justice, September 2018, p8 available at: <https://www.justice.nsw.gov.au/justicepolicy/Documents/mandatory-disease-testing-options-paper.pdf>

In the 2019-20 financial year, the NSW Bureau of Crime Statistics and Research recorded 2,537 incidents of assaults on police¹². According to NSW Police Force internal data for the 2019-20 financial year, there were 490 incidents through which a NSW Police Force employee was exposed to bodily fluids, including 69 bites and 29 needlestick injuries¹³. This is higher than the average annual figure of 450 incidents that was reported in the Government's 2018 Mandatory Disease Testing options paper¹⁴.

During its Inquiry into assaults on members of the NSW Police Force, the Legislative Assembly's Committee on Law and Safety recently reported 1,600 assaults of police officers in the nine months from January to September 2020, and 2,500 assaults for the 2019 calendar year, noting this equates to six or seven assaults per day¹⁵. The Committee also noted the actual numbers of assaults may be underreported. The Committee found that these assaults can impact on the physical and mental health of officers, sometimes in the long term, and can also impact on their families¹⁶.

The Committee recognised that the risk of being exposed to an infectious disease when bitten or otherwise exposed to bodily fluids during an assault is a concern for police officers, and can cause a time of mental strain for both officers and their families¹⁷.

If a police officer is exposed to potential infection through contact with a bodily fluid of the third party, information is key to supporting their physical and mental recovery – and early information about any diseases will inform medical decisions made by their treating doctor.

4.3 Application of the Bill to deliberate actions of third parties

The objects of the Bill at clause 3 provide for mandatory blood testing of a person in circumstances where a worker comes into contact with a person's bodily fluid as a result of the person's deliberate action¹⁸.

Clause 7 further clarifies that a worker may apply for an order if the contact occurred in the execution of the worker's duties, was the result of the third party's deliberate action and without the consent of the worker.

The scheme is not intended to apply to accidental exposures such as might occur if the third party is convulsing. It is important to note, however, that a deliberate action does not necessarily require the third party to have intended to expose the worker to a blood-borne disease or have intended to expose the worker to bodily fluids.

Nor is the scheme limited to deliberate actions that would meet the *threshold of being a criminal assault*. Examples of 'deliberate action' that might result in contact with bodily fluid could include:

- a corrections officer being bitten by an inmate
- an ambulance officer punched by a patient who is covered in blood
- a police officer cut or sliced by a bloodied weapon whilst trying to disarm an offender.

¹² Source: NSW Bureau of Crime Statistics and Research, September 2020

¹³ Source: NSW Police Force, 4 November 2020

¹⁴ *Mandatory Disease Testing Options Paper*, Department of Justice, September 2018, p8

¹⁵ Legislative Assembly Committee on Law and Safety, [Assaults on members of the NSW Police Force](#), November 2020, p1

¹⁶ Legislative Assembly Committee on Law and Safety, [Assaults on members of the NSW Police Force](#), November 2020, p3

¹⁷ Legislative Assembly Committee on Law and Safety, [Assaults on members of the NSW Police Force](#), November 2020, p3

¹⁸ Mandatory Disease Testing Bill 2020 Second Print, clause 3

4.4 Consultation with a medical practitioner

One of the important features of the Bill is to require the worker to consult with a relevant medical practitioner before making an application for a mandatory testing order.

The Bill provides a definition of ‘relevant medical practitioner’ that preferences (but does not mandate) a practitioner with experience in blood-borne diseases over any other practitioner¹⁹.

The Bill requires this consultation to occur within 24 hours, ideally, or 72 hours where this is not possible, such as where the worker may first need to be treated for significant injuries or where the worker is in a remote or regional location²⁰.

The Bill specifically requires the medical practitioner to inform the worker about –

- the risk to the worker of contracting a blood-borne disease from the third party as a result of the contact; and
- the appropriate action to be taken by the worker to mitigate this risk, as well as any risk of transmitting the disease to someone else; and
- the extent to which testing a third party’s blood will assist in assessing the risk to the worker²¹.

The Chief Health Officer will issue Guidelines under the scheme that will assist medical practitioners to understand their obligations in relation to the consultation.

The Guidelines may include information about:

- how blood-borne diseases are transmitted and the minimisation of risks; and
- the prevention, diagnosis and treatment of blood-borne diseases²².

The Bill provides that, if written advice has been received from the medical professional, this must be included in an application for a mandatory testing order²³.

The Bill does not make it mandatory to include written advice from the relevant medical practitioner as this has the potential to further delay the application process.

However, as part of the application, the worker must consent to the senior officer discussing the consultation with the relevant medical practitioner concerned, and obtaining the worker’s medical records that relate to the contact, if the application does not include a copy of written advice received from the relevant medical practitioner²⁴.

4.5 Timeframes in the Bill

The Bill has been developed with clear timeframes designed to ensure that the worker receives the best possible health advice as soon as practicable after the incident.

All timeframes specified in the Bill have been drafted with this principle in mind.

Where a step in the process involves discretionary decision-making, such as the decisions made by the senior officer, there is scope for these timeframes to be extended where a longer period is necessary in the circumstances.

¹⁹ Mandatory Disease Testing Bill 2020 Second Print, Definitions

²⁰ Mandatory Disease Testing Bill 2020 Second Print, clause 8

²¹ Mandatory Disease Testing Bill 2020 Second Print, clause 8

²² Mandatory Disease Testing Bill 2020 Second Print, clause 32

²³ Mandatory Disease Testing Bill 2020 Second Print, clause 9(1)

²⁴ Mandatory Disease Testing Bill 2020 Second Print, clause 9(2)

The set timeframes in the Bill will reduce waiting times and minimise anxiety for exposed workers. This supports the objects of the Bill to protect and promote the health and wellbeing of health, emergency and public sector.

4.6 Extra safeguards for juveniles and vulnerable third parties

The Bill does not apply to children under the age of 14.

The Bill provides for extra safeguards for children between the ages of 14 and 17, and adults suffering from a mental illness, mental condition or cognitive impairment which significantly impacts their capacity to consent to voluntary testing.

For these people, mandatory testing orders can only be made by the Children's Court for children, or the Local Court for other vulnerable persons.

If it appears to the senior officer on the information available that the third party is vulnerable, the senior officer may apply to the relevant court for a mandatory testing order if satisfied that testing the third parties blood is justified in all the circumstances²⁵.

Before making this determination, the senior officer must provide the third party and their parent/guardian an opportunity to make a submission and must consider this submission²⁶.

In considering the application, the Children's Court or the Local Court must take into account the best interests of the third party, the wishes of the third party and their parents or guardian, and any submissions by the Chief Health Officer who has a right to appear as well as other matters the Court thinks relevant²⁷.

Workers can be exposed to blood-borne viruses by the deliberate actions of children aged over 14 and vulnerable adults.

In these cases, the Children's Court and Local Court are best placed to balance the needs of the child or the vulnerable adult and the exposed worker in the context of the exposure incident and any other relevant factors.

Referring applications involving this cohort to the courts for a determination is somewhat consistent with the *Crimes (Forensic Procedures) Act 2000* which, in certain circumstances, provides for the Court to decide whether the carrying out of a forensic procedure on a vulnerable person is justified in all the circumstances²⁸.

4.7 Appeal mechanisms

The Bill provides that workers and third parties can apply to the Chief Health Officer for a review of the decision by a senior officer to refuse or to grant a mandatory testing order²⁹.

It is also open for a worker or a third party to seek judicial review in the Supreme Court.

Decisions under the mandatory disease testing scheme need to be made quickly so the best possible advice is provided to the worker about risks and actions to be taken to mitigate risks. Allowing for additional lengthy court-based appeal processes would undermine the need for the testing to take place quickly.

²⁵ Mandatory Disease Testing Bill 2020 Second Print, clause 10

²⁶ Mandatory Disease Testing Bill 2020 Second Print, clause 10(3)

²⁷ Mandatory Disease Testing Bill 2020 Second Print, clause 14

²⁸ Crimes (Forensic Procedures) Act 2000, section 80

²⁹ Mandatory Disease Testing Bill 2020 Second Print, clause 22

The Bill specifically provides for that the regulations may make provisions in relation to reviews by the Chief Health Officer³⁰. This could include requirements around notifying third parties and workers of their right to apply for a review.

4.8 Effect of the order if a third party applies to the Chief Health Officer for a review

The Bill allows a third party to apply for a review of the Chief Health Officer³¹.

In this case, the mandatory testing order continues to have effect³². This means that the third party must still comply with the order within 2 business days after being served the order³³.

This is important to ensure that the worker receives the best possible health advice within the shortest timeframe after the incident, without delays being contributed to by review processes.

The Chief Health Officer must make their decision within three business days³⁴.

The requirement in clause 21 that the pathology lab must provide the results as soon as reasonably practicable to the medical practitioners authorised by the worker and the third party or the Chief Health officer **does not apply** until the Chief Health Officer has determined the review³⁵

Practical details and guidance will be developed ahead of implementation.

4.9 Reasonable excuse for non-compliance

There may be occasions where a third party is not able to reasonably comply with the order within the timeframes.

For these instances, the Bill provides it is a defence to a prosecution for the offence of non-compliance with an order if the third party had a reasonable excuse³⁶.

4.10 Use of reasonable force

The Bill provides that reasonable force may be used in very limited circumstances. Specifically, where the third party is detained, either in police custody or as an inmate, a police officer or corrections officer may use reasonable force to transport a detained third party to and from a place at which the detained third party's blood will be taken under a mandatory testing order, to assist a person to take blood from a detained third party under a mandatory testing order, and to prevent loss, destruction or contamination of a blood sample taken from the detained third party³⁷.

This recognises that the penalty for non-compliance with a mandatory testing order may include imprisonment for up to 12 months. A detained third party may already be serving, or facing the prospect of, a sentence for other offences. In this case, a prison term of up to 12 months may not be sufficient to encourage compliance with the order.

Any use of force will be guided by existing legislation and policies with respect to use of force in custodial settings, plus any extra safety considerations that might be needed in the context of a blood test.

³⁰ Mandatory Disease Testing Bill 2020 Second Print, clause 37(2)

³¹ Mandatory Disease Testing Bill 2020 Second Print, clause 22

³² Mandatory Disease Testing Bill 2020 Second Print, clause 23(1)

³³ Mandatory Disease Testing Bill 2020 Second Print, clause 5(1)

³⁴ Mandatory Disease Testing Bill 2020 Second Print, clause 24(1)

³⁵ Mandatory Disease Testing Bill 2020 Second Print, clause 23(2)

³⁶ Mandatory Disease Testing Bill 2020 Second Print, clause 26(2)

³⁷ Mandatory Disease Testing Bill 2020 Second Print, clause 20

This is similar to the approach in the *Crimes (Forensic Procedures) Act 2000* which authorises the use of force to carry out forensics procedures³⁸.

4.11 Chief Health Officer Guidelines

Another important feature of the Bill is for the Chief Health Officer to issue guidelines to assist senior officers, relevant medical practitioners and persons taking blood from third parties³⁹.

These guidelines may contain information such as:

- information about how blood-borne diseases are transmitted and the minimisation of risks of infection and onward transmission,
- information about the prevention, diagnosis and treatment of blood-borne diseases
- advice and information to be given to a third party providing blood under a mandatory testing order.

These Guidelines will be publicly available⁴⁰.

4.12 The Bill does not cover COVID-19

The Bill applies to blood-borne diseases only. As such it does not apply to COVID-19.

If an emergency worker has been exposed to COVID-19 they can be tested and their results will be known relatively quickly because the disease has a much shorter incubation period than HIV, Hepatitis B or Hepatitis C.

It is therefore not necessary to test the third party in order to assess the exposure risk for the worker. Third party testing is not necessary to manage or treat the exposed worker.

The blood-borne viruses covered by the mandatory disease testing scheme have window periods during which a positive exposure might not be known from testing the worker alone. Third party testing for these diseases may, therefore, help determine the exposure risk and treatment of the worker.

A comprehensive testing system is already available for COVID-19, managed by NSW Health in response to the crisis. For these reasons, the two schemes should remain separate.

4.13 Role of the Ombudsman

The Bill includes important additional oversight features. The Ombudsman will be responsible for monitoring the operation and administration of the Act, and will prepare a report 12 months after the commencement of the Act, and then every three years⁴¹.

To support this function, the Ombudsman has power to require the Commissioner of Police or senior officers from other agencies to provide information about mandatory testing orders⁴².

This includes demographic information about third parties subject to mandatory testing orders⁴³.

³⁸ Crimes (Forensic Procedures) Act 2000, section 47

³⁹ Mandatory Disease Testing Bill 2020 Second Print, clause 32

⁴⁰ Mandatory Disease Testing Bill 2020 Second Print, clause 32(4)

⁴¹ Mandatory Disease Testing Bill 2020 Second Print, clause 35

⁴² Mandatory Disease Testing Bill 2020 Second Print, clause 35 (3)

⁴³ Mandatory Disease Testing Bill 2020 Second Print, clause 35 (4)

Existing oversight arrangements also apply. For example, the Law Enforcement Conduct Commission has oversight of the NSW Police Force, and has a specific statutory role to investigate misconduct in the NSW Police Force⁴⁴. The powers of the Ombudsman in this Bill are not intended to duplicate this function.

In addition, the Bill requires the Minister to review the Act as soon as possible after the first report is tabled by the Ombudsman⁴⁵.

⁴⁴ *Law Enforcement Conduct Commission Act 2016* Section 26

⁴⁵ *Mandatory Disease Testing Bill 2020* Second Print, clause 36