public interest
ADVOCACY CENTRE

Submission re Mandatory Disease Testing Bill 2020

18 December 2020

Level 5, 175 Liverpool Street, Sydney NSW 2000
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

Contact

Alastair Lawrie
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: 02 8898 6515
E: alawrie@piac.asn.au

Website: www.piac.asn.au

Public Interest Advocacy Centre

@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Recommendations

Recommendation 1 – The Bill should be rejected

The Mandatory Disease Testing Bill 2020 should be rejected.

Recommendation 2 – Children should not be subjected to mandatory BBV testing orders

Section 7(2) of the Bill should be amended such that 'An application may not be made if the third party is under the age of 18 years.'

Recommendation 3 – Force should not be authorised to conduct tests

Section 20, which authorises police and correctional officers to use force on detained people for the purposes of undertaking mandatory BBV tests, should be removed.

Recommendation 4 – Provide equal time periods for applications and submissions

Section 10 should be amended so that third parties have the same period of time in which to prepare their submission as people seeking mandatory testing orders have to make their application (5 business days).

Recommendation 5 – Increase the time period during which to seek review

Section 22 should be amended to increase the time period during which people may seek a review to a minimum of 3 business days, especially for people against whom a mandatory testing order has been granted.

Recommendation 6 – No mandatory BBV tests while awaiting review

Section 23, which provides that mandatory BBV tests may still be conducted during the period in which the Chief Health Officer is considering an application for review, should be removed.

Recommendation 7 – Disclosure of viral hepatitis status should not be authorised by regulation

Section 28 should be amended to ensure that the disclosure of viral hepatitis status cannot be authorised by regulations.

Recommendation 8 – Limit delegation of authority to grant mandatory testing orders

Section 34(1) should be amended to limit the ability of senior officers to delegate the authority to grant mandatory testing orders. At a minimum, the class of persons to whom delegation is allowed should be set out in the Bill itself.

Recommendation 9 – Further consultation with experts about medical knowledge and processes

The Committee should consult with experts, including ACON, about further amendments to the Bill to ensure it better reflects contemporary medical knowledge and processes, including in relation to the definition of bodily fluids and the need to offer pre- and post-test counselling.

Mandatory Disease Testing Bill 2020

1. Introduction

PIAC welcomes the opportunity to provide this submission about the Mandatory Disease Testing Bill 2020.

We have consistently expressed serious concerns about proposed mandatory blood borne virus (BBV) testing regimes, writing in late 2019 to both the NSW Premier and Opposition Leader and participating in a consultation with the Department of Justice in the first half of 2020.

We have worked in collaboration with ACON on this issue and our submission draws on their expertise in the area of BBV transmission.

For the reasons we set out below, we oppose this Bill and urge that it be rejected. While we recognise that the Bill responds to a legitimate concern for the safety and wellbeing of health, emergency and public sector workers, the Bill is misconceived. It does not provide protection from harm, diverts resources from things that work and offers only false comfort for those it seeks to support.

If the Bill is to proceed, it should be significantly amended to ensure it operates consistently with its stated purpose, is fair and proportionate.

2. A Misguided Approach

PIAC recognises the demands that are placed on people working in essential roles, as well as the need for appropriate protection against assault and abuse, and the right to a safe workplace. In no way do we condone unlawful behaviour or seek to minimise its potential impact on victims.

However, the Mandatory Disease Testing Bill 2020 is deeply flawed, for a number of reasons.

Most fundamentally, it is misguided because mandatory BBV testing cannot deliver 'peace of mind' to workers who may have been exposed given the lag time between infection and detection. As outlined by ACON:[1]

> [The scheme] has no basis in medical evidence… BBVs have a varied and at times extended window period for the detection of a transmission and as such, testing the source of exposure is not an effective method for gaining 'peace of mind' of one's own test results.

While this reality may be unfortunate, it cannot be ignored.

Mandatory testing diverts attention from the most appropriate health-based approaches to *preventing the transmission* of BBVs. This includes ensuring all front-line workers are vaccinated against hepatitis A and B, and continuing to provide curative hepatitis C treatments to everyone who may need them.

[1] ACON, Media Release: 'ACON Condemns Move to Introduce Mandatory HIV Testing', 30 October 2019.

In the fortunately rare event that a front-line worker is exposed to bodily fluids which could, based on medical advice, transmit HIV, workers should be provided with urgent medical support and, where appropriate, provided with Post Exposure Prophylaxis (PEP) within at most 72 hours (and ideally within 24 hours). This is where energy and resources should be directed to best protect workers.

Taking a mandatory testing approach also undermines Australia's long-standing commitment to voluntary testing which has underpinned our world-leading, health-based response to the HIV epidemic. As noted in the current *National HIV Strategy*:[2]

> Testing for all people at risk of HIV must be based on the principles of voluntary testing, informed consent and confidentiality which have underpinned the improvements in testing coverage achieved in Australia to date.

Mandatory testing takes a punitive approach to what is essentially a health issue. As noted above, PIAC does not condone acts of assault or abuse. Such acts should, however, be dealt with under the criminal law. In the absence of a sound medical basis for mandatory testing, it cannot be justified.

The approach is also disproportionate. As noted by ACON and others,[3] 'there have been zero occupational transmissions of HIV in Australia for 17 years, and never an occupational transmission for a police officer'.

We therefore submit that the Mandatory Disease Testing Bill 2020 should be rejected, with Parliament encouraging the Government to focus on a health-first response to possible BBV exposure in the workplace.

Recommendation 1 – The Bill should be rejected

The Mandatory Disease Testing Bill 2020 should be rejected.

Should the Committee reject this recommendation, the following specific comments and recommendations are provided to lessen some of the Bill's negative impacts.

3. Specific Comments

3.1 'Deliberate action'

The mandatory BBV testing framework established by the Bill purports only to apply 'where the person's bodily fluid comes into contact with a health, emergency or public sector worker as a result of the person's *deliberate action*' (Long Title) [emphasis added].

However, the only evidence required to establish that any such action is deliberate is 'a statement that, in the opinion of the worker, the contact with the third party's bodily fluid was as a result of a deliberate action of the third party' (section 9(1)(e)). There is no obligation on any decision-maker, including senior officers (section 10), the courts (section 14), and the Chief Health Officer (section 24), to be satisfied that the action was, in fact, deliberate.

[2] *Eighth National HIV Strategy 2018-2022*, page 26.
[3] ACON et al, 'Let's Not Weaken the NSW Response to Managing Blood Borne Viruses', December 2019, page 3.

This is an inappropriately low bar to enable mandatory BBV testing, which involves a significant invasion of privacy and interference with bodily integrity. This is especially so when a failure to comply is an offence punishable by up to 12 months' imprisonment.

If the Bill is to proceed it should be amended to ensure it applies only in the circumstances in which it is intended. This could be achieved in the following way:

- Section 9(1) should be amended to add after (e):

  > the factual basis for the worker's opinion that contact with the third party's bodily fluid was as a result of a deliberate action of the third party, and any evidence (such as statements from eyewitnesses) that would support that opinion.

- Section 10 should be amended to require the senior officer to be satisfied as to deliberateness, by adding a paragraph between s 10(7)(a) and (b) that reads: 'the contact by the worker with the bodily fluid of the third party was a result of a deliberate action of the third party.'

- And/or an amendment should be made to s 11 to make a lack of evidence of deliberateness a basis for refusal, for example adding a new s 11(2) that reads:

  > A senior officer must refuse an application if not satisfied on the basis of the evidence provided in the application that the contact by the worker with the bodily fluid of the third party was a result of a deliberate action of the third party.

- Similarly, s 14 should be amended in relation to Court decisions, for example by amending s 14(2) so it reads:

  > (2) The Court may make a mandatory testing order only if satisfied that, on the balance of probabilities:
  >
  > a. the contact by the worker with the bodily fluid of the third party was a result of a deliberate action of the third party; and
  > b. testing the third party's blood for blood-borne diseases is justified in all the circumstances.

- Changes should also be made to s 24 relating to reviews, to make it clear that the CHO will only make a mandatory testing order if satisfied that the contact by the worker with the bodily fluid of the third party was a result of a deliberate action of the third party. This could be achieved by including a subsection that reads:

  > (2) The Chief Health Officer may only make a mandatory testing order if satisfied that:
  >
  > a. the contact by the worker with the bodily fluid of the third party was a result of a deliberate action of the third party; and
  > b. testing the third party's blood for blood-borne diseases is justified in all the circumstances.

- A further way to reinforce these safeguards would be to have an independent office-holder assess all applications (rather than senior officers within each of the agencies), making it more likely they would properly scrutinise whether the exposure was deliberate. This would, however, require more comprehensive changes to the Bill.

3.2 Application to children

We are seriously concerned that the Bill authorises mandatory BBV tests on children aged between 14 and 17 years old (with section 7(2) only exempting children where they are under 14 years of age).

We are unaware of evidence of sufficient risk of BBV transmission from children to front-line works that would justify this measure. The privacy and bodily integrity of children should only be interfered with in exceptional circumstances and their crimnalisation in the event of refusing a test should be avoided.

This is particularly the case given the disproportionate levels of engagement between police and young Aboriginal and Torres Strait Islander people, especially in public spaces. This scheme is likely to lead to the disproportionate imposition of mandatory BBV testing orders on First Nations children.

Recommendation 2 – Children should not be subjected to mandatory BBV testing orders

Section 7(2) of the Bill should be amended such that 'An application may not be made if the third party is under the age of 18 years.'

3.3 Authorised use of force

We are opposed to the use of force by law enforcement officers to 'assist a person to take blood from a detained third party under a mandatory testing order' (as authorised by section 20(1)-(2) of the Bill). This force both allows transportation of detained people to a place of testing, as well as 'assisting a person to take blood from a detained third party under a mandatory testing order'.

This is an unjustified contravention of the civil liberties of people who are in the custody of police or corrections, and is exacerbated by other problems of the Bill. For example, where an application for a mandatory testing order is made by a corrections officer, the decision made by the Commissioner of Corrective Services based primarily on the 'opinion' of the corrections officer that the exposure was deliberate. This does not ensure a fair and impartial decision will be made.

Once again, given the disproportionate rates of incarceration of Aboriginal and Torres Strait Islander people, we also note that this provision will be disproportionately used against First Nations people in custody.

Recommendation 3 – Force should not be authorised to conduct tests

Section 20, which authorises police and correctional officers to use force on detained people for the purposes of undertaking mandatory BBV tests, should be removed.

3.4 Lack of procedural fairness

The Bill fails to provide procedural fairness to people who may be subject to mandatory testing orders in a number of ways.

The first is the lack of appropriate timelines for third parties against whom orders are sought to respond to applications and/or seek reviews of decision to grant mandatory testing orders.

For example, while section 7 allows people seeking to apply for an order up to 5 business days after possible exposure in which to make that application, section 10(2) provides that the decision-maker must determine the application within 3 business of receiving it – and only that, before making that determination, they 'must provide the third party and the third party's parent or guardian, if any, with the opportunity to make submissions' (section 10(3)).

The Bill does not specify a minimum time period during which a person should be allowed to make a submission. This may result in decisions being made without a person having had their views taken into account. For example, a decision-maker may provide an opportunity to make submissions on the third and final day during the decision-making period and simply proceed to make a decision if the person is unable to make a submission in time.

Given the serious consequences for failure to comply with an order once issued (up to 12 months' imprisonment), we submit that third parties should have the same time in which to prepare a submission to the decision-maker as the person making the application.

Recommendation 4 – Provide equal time periods for applications and submissions

Section 10 should be amended so that third parties have the same period of time in which to prepare their submission as people seeking mandatory testing orders have to make their application (5 business days).

Similar concerns exist around the time period in which to seek a review of a decision to grant a mandatory testing order. Section 22 currently provides that the relevant time period is just 1 business day (applying to both people seeking mandatory testing orders under section 22(2), and people against whom a mandatory testing order has been granted in s 22(4)).

This is an inappropriately short time period to seek a review, especially for people against whom a mandatory testing order has been granted, where their basic rights, including right to privacy and bodily integrity, are at risk where they face the threat of 12 months' imprisonment for failure to comply.

This is also particularly concerning for people who are in custody and who may not physically be able to comply with section 22(5) ('An application for review must be made in writing and in the form prescribed by the regulations, if any'), as well as for people who are vulnerable or experiencing disadvantage and lack access to legal support. This time period must be extended.

Recommendation 5 – Increase the time period during which to seek review

Section 22 should be amended to increase the time period during which people may seek a review to a minimum of 3 business days, especially for people against whom a mandatory testing order has been granted.

We are further concerned by proposed section 23(1), which provides that 'If an application for review is made by a third party after a senior officer has made a mandatory testing order, the mandatory testing order continues to have effect and the third party must comply with the order'.

Compelling people who have sought review of a mandatory testing order by the Chief Health Officer to submit to a mandatory BBV test while their review is being considered (with the threat

of punishment by 12 months' imprisonment if they fail to comply) completely undermines the process of review. Third parties must not be compelled to comply with a mandatory testing order while awaiting the outcome of their review.

Recommendation 6 – No mandatory BBV tests while awaiting review

Section 23, which provides that mandatory BBV tests may still be conducted during the period in which the Chief Health Officer is considering an application for review, should be removed.

3.5 Disclosure of hepatitis B and/or hepatitis C status authorised by regulations

We are also concerned at the breadth of information disclosure allowed by proposed section 28. In particular, section 28(1)(e) ('in other circumstances prescribed by the regulations') would allow regulations to be made authorising the disclosure of the hepatitis B and/or hepatitis C status of third parties obtained through mandatory testing orders (although not their HIV status, because of the operation of section 28(2)(b)). PIAC can see no good reason why access to this personal health information should be able to be authorised by delegated legislation.

Recommendation 7 – Disclosure of viral hepatitis status should not be authorised by regulation

Section 28 should be amended to ensure that the disclosure of viral hepatitis status cannot be authorised by regulations.

3.6 Inappropriate delegation

Section 34(1) of the Bill provides that '[a] senior officer may, in accordance with the regulations, delegate a function of the senior officer under this Act, other than this power of delegation, to a person of a class prescribed by the regulations'.

This may include delegating the responsibility for making decision about whether or not to grant a mandatory testing order itself, and could result in delegation to a person with insufficient skills and experience to perform this serious function (and with potential serious consequences for the third party). It could also see delegation to officers who may work with, or even *for*, the person making an application for a mandatory testing order.

Ideally, this function – the ability to grant mandatory testing orders – should be used sparingly, in which case it may not need to be delegated at all. Even if delegation is allowed, the class of persons to whom this function is delegated should be narrow, and set out in primary legislation.

Recommendation 8 – Limit delegation of authority to grant mandatory testing orders

Section 34(1) should be amended to limit the ability of senior officers to delegate the authority to grant mandatory testing orders. At a minimum, the class of persons to whom delegation is allowed should be set out in the Bill itself.

3.7 Other health concerns

Finally, we are aware that groups such as ACON hold a range of additional concerns around the failure of the Bill to reflect contemporary medical knowledge and processes.

This includes concerns about the definition of bodily fluid in the Dictionary ('means blood, faeces, saliva, semen or other bodily fluid or substance prescribed by the regulations') and that this definition does not align with, and specifically is broader than, a definition of bodily fluid that reflects the actual risks of BBV transmission.

It also includes concerns that the Bill does not adequately provide access to appropriate pre- and post-test counselling which is usually associated with testing for BBVs like HIV. We urge the Committee to consult with experts in this area, including ACON, about making further improvements to the Bill on these issues.

Recommendation 9 – Further consultation with experts about medical knowledge and processes

The Committee should consult with experts, including ACON, about further amendments to the Bill to ensure it better reflects contemporary medical knowledge and processes, including in relation to the definition of bodily fluids and the need to offer pre- and post-test counselling.