



Mandatory testing for BBVs for alleged offenders in South Australia & Western Australia

The South Australian and Western Australian governments recently introduced legislation that allows for forced testing for blood borne viruses (BBVs) of individuals accused of certain offences. The scope of these laws differs and passage of these laws is at different stages in each jurisdiction; the laws have been passed in Western Australia, while in South Australia they are still in Parliament (as at 3 November 2014). In both states, the laws have been introduced as a result of the local Police Association's advocacy. AFAO, WAAC and Gay Men's Health South Australia have been actively engaged in advocacy against these laws.

These forced testing laws are of great concern. They perpetuate the common misconception that HIV can be transmitted through contact with saliva, such as through spitting. They also confuse issues about HIV risk and third party transmission. It could be argued that we are seeing the introduction of laws based in dated, 30-year old notions of HIV and other BBV transmission risk.

This paper provides:

- an explanation of what those supporting these laws seek to achieve
- where the legislation sits in relation to expert HIV medical guidance on HIV transmission risk and policing, the Australia HIV Testing Policy and the HIV legal framework more broadly
- policy solutions
- the advocacy AFAO, its members and partners have undertaken in response to the introduction of these laws.

Several annexures are included: a letter sent by AFAO to the South Australian Deputy/Premier (Annexure A), the letter received in response (Annexure B), the letter received by Gay Men's South Australia, Relationships Australia South Australia (Annexure C), the letter sent by WAAC to the Western Australia Attorney General (Annexure D) and the letter received in response (Annexure E).

South Australia

In 2012 the South Australian Police Association passed a resolution at its annual conference calling for laws that require a person or persons who assault a police officer to undergo blood tests to check for communicable diseases. In the lead up to the South Australian state election in early 2014, the Labor party announced its intention to pass such a law if re-elected. The re-elected Labor

Government introduced the Bill into Parliament – the *Criminal Law (Forensic Procedures) (Blood Testing for Diseases) Amendment Bill 2014*¹.

The Bill would allow Police to test someone who has spat at or bitten police. The circumstances in which Police would be able to require a BBV test are defined as where “the person is suspected of a prescribed serious offence” (this covers assault, causing harm and serious harm), and “it is likely that a police officer came into contact with, or was otherwise exposed to, biological material² of the person as a result of the suspected offence”. A senior police officer would determine whether exposure occurred and can order forced testing for BBVs.

The SA Opposition supports the measure but wants to broaden the scope of the law to cover firefighters, paramedics, emergency service workers, surf lifesavers, nurses, midwives, doctors and hospital emergency department staff.

The SA Government, Opposition and the Police Association argue that passing of the Bill would provide ‘peace of mind’ to police who might be exposed to a BBV. The Police Association’s President, Mark Carroll, has advocated for the law by arguing that the “incubation periods for diseases such as hepatitis and HIV cause the police and their families to endure stress while waiting months before knowing whether the officers involved are infected or healthy.”³ He has also recounted instances when police have been exposed to blood or other bodily fluids - many of which do not include risk of HIV transmission. South Australia’s Premier, Jay Weatherill, has supported forced testing, arguing that,

"While officers are already blood tested in these situations, some diseases are not detectable for months. This means officers can be left waiting for a considerable amount of time, which can be stressful for them and their families."⁴

Western Australia

In October 2014, the WA Government passed the *Mandatory Testing (Infectious Diseases) Bill 2014*. This law allows for mandatory testing for certain infectious diseases of persons reasonably suspected

¹www.legislation.sa.gov.au/LZ/B/CURRENT/CRIMINAL%20LAW%20%28FORENSIC%20PROCEDURES%29%20%28BLOOD%20TESTING%20FOR%20DISEASES%29%20AMENDMENT%20BILL%202014.aspx

²s20A definition of biological material “means the person's blood or bodily fluids or any other biological material of the person that is *capable of communicating or transmitting a disease* (emphasis added)”

³<http://www.thebody.com/content/69495/australia-push-for-police-assailants-to-undergo-ma.html>

⁴New blood test law to protect those who protect us, South Australian Premier Jay Weatherill and Deputy Premier John Rau Attorney-General joint News Release, Tuesday, October 15, 2013, available at: <http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/Oct%202013%20-%20Media%20Releases/New%20blood%20test%20law%20to%20protect%20those%20who%20protect%20us%20%28PDF%20304.8KB%29.pdf>

of having transferred bodily fluids to police and other related public officers (related to policing) acting in the course of duty.

The Police Union WA has stated that before the new "spitters and biters" legislation was passed, officers faced "an anxious three to six months" for blood tests results to see if they had caught an infectious disease (ignoring the reality that most BBVs can be diagnosed in less than six months). According to police union boss, George Tilbury, "under the new [law], police officers will now only have to wait a few days ... one officer was reluctant to kiss his soon-to-be wife after their wedding, because he feared he could transfer an infectious disease after he was spat in the mouth by a woman." Mr Tilbury said the union has been lobbying the state government for years to have mandatory testing for offenders who bite and spat at officers:

"This issue has been on our agenda since it was first raised at the 2008 Annual Conference...and was resurrected again in 2012 after an executive motion".⁵

Police Minister, Liza Harvey, has stated that the legislation, which was an election commitment, meant that a person who exposed a police officer to the risk of infectious disease would be required to undergo blood testing:⁶

"Currently, the police officer has to wait an anxious three to six months for test results to confirm whether they have contracted a disease. This legislation will allow for the taking of bodily samples from the offender which will help with early diagnosis, clinical management and treatment of the exposed police officer. We need to protect officers who are on the frontline protecting us." (Underlining ours)

Problems with the laws

This briefing paper is based on the understanding that HIV infection is a very serious matter with serious, life-long implications. It also acknowledges that it is extremely regrettable that police and others serving the community should ever be put at risk of HIV infection while in the line of duty.

Unfortunately, the mechanisms proposed in the Bill will do little to address stress for Police or their families who believe they've been put at risk of HIV infection, much of which is based on misunderstanding of the ways in which HIV is transmitted. The new laws will, however, mark a fundamental shift in the rights of individuals to privacy and to the integrity of their own bodies and a fundamental change to Australian policy which generally requires consent for HIV testing.

These laws are deeply problematic because they:

⁵ 'Biting and spitting bill' will bring police officers relief: union, WA Today, Article 24 October 2014, available at: <http://www.watoday.com.au/wa-news/biting-and-spitting-bill-will-bring-police-officers-relief-union-20141024-11b92l.html#ixzz3HK3Pbd4q>

⁶ New blood test laws protect police, Hon Liza Harvey MLA, Police Minister, Media Statement 15 May 2014, also available at: <http://www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=8325>

- **Perpetuate HIV transmission myths:** The new laws perpetuate the common misunderstanding that HIV can be transmitted through contact with saliva, such as through spitting and potentially consolidate police officers' misapprehensions regarding risk of contracting a BBV, rather than allay general anxiety and specific concerns. As clearly stated in the Australian Society of HIV Medicine's guiding document entitled *Police and Blood-Borne Viruses*⁷, there are only certain body fluids that contain HIV in sufficient concentration to be implicated in HIV transmission (i.e. blood, semen, pre-ejaculate, vaginal fluids and breast milk), and spit is not one of them. This position was clearly stated in the July 2014 the US Center for Disease Control (CDC) statement on HIV transmission risk⁸: risk of HIV transmission risk from biting and spitting is negligible. Likewise, the US Center for HIV Law & Policy's⁹ *Spit Does Not Transmit Fact Sheet for Law Enforcement Professionals on the Risk of HIV Transmission in the Line of Duty* clearly states that "Contact with saliva, tears, or sweat has never been shown to result in HIV transmission".

Unfortunately, Australia lacks such expert scientific and legal statements by comparable authorities. In the absence of such statements by Australian authorities the new laws will only compound current misunderstandings and myths regarding transmission risks associated with spitting and biting.

- **Conflate third party status with likelihood of transmission:** The rationale for forcibly testing a third party for BBVs is misconceived. Even if a positive BBV result is returned, it cannot establish whether a police officer has contracted the BBV. Conversely, as there is a window period for HIV tests, a negative test result from a third party is not conclusive. Execution of the new laws will likely fuel unnecessary anxiety for some, while creating a false sense of security for others.
- **Completely ignore the thresholds set by the National HIV Testing Policy:** The National HIV Testing Policy¹⁰ states:

Informed consent for testing means that the person being tested agrees to be tested on the basis of understanding the testing procedures, the reasons for testing and is able to assess the personal implications. Informed consent is required for HIV testing, except for rare occasions when a legal order is made for compulsory testing or in emergency settings (see Section 3.0 Indications for HIV Testing).

In both South Australia and Western Australia, a 'senior police officer' will decide whether exposure to a BBV has occurred and will be able to order forced testing of a person. The senior police officer is not required to seek permission from a court or to obtain external

⁷Australasian Society for HIV Medicine (ASHM), *Police and Blood-Borne Viruses*, June 2011, accessible at: http://www.ashm.org.au/images/pdfs/publications/1976963382_POLICE_Booklet_V2.0.pdf

⁸<http://www.cdc.gov/hiv/policies/law/risk.html>

⁹As well as the Organisation of Black Law Enforcement Executives and Association of Prosecuting Attorneys

¹⁰<http://testingportal.ashm.org.au/hiv/informed-consent-for-testing>

scientific or medical expert opinion on HIV transmission risk. This broad brush approach ignores HIV transmission science and fails the National HIV Testing Policy's threshold which requires that testing without a person's informed consent can only occur if a legal order is obtained or the actions are carried out in an emergency setting.

- **Undermines the National HIV Strategy:** The National BBV Strategies are premised on a partnership between Government, the community, clinicians and researchers. The Seventh National HIV Strategy identifies the negative impact of criminalisation on priority populations through perpetuating isolation and marginalisation and limiting their ability to seek information, support and health care. New laws that potentially further criminalise people with HIV and other affected communities run contrary both to the letter and spirit of these Strategies.
- **Undermine basic legal principles of assault:** The new laws represent a significant challenge to Australian legal principles. Generally, taking blood from a person without their consent involves the criminal offence of assault and civil trespass. HIV testing exceeds the legal boundaries of 'examining' a person, as it requires the subcutaneous drawing of blood: skin penetration constituting bodily harm. It is a marked infringement on an individual's human rights and civil liberties.
- **Provide no threshold at which the intervention of a court should be sought:** Of particular concern is the provision (at section 9) in the Western Australian Act that states that "A police officer may apprehend and detain the suspected transferor for as long as is reasonably necessary to enable to determination of the application'. This suggests that a person may be held indefinitely while they continue to resist forced testing. There is no time limit at which the matter may be referred to a court for adjudication. There is no opportunity for a court to intervene to consider whether there is a genuine risk that HIV transmission could possibly have occurred and there is no appeal mechanism for a person who does not wish to be tested.
- **May be frequently applied:** The WA Police have released a statement to the media that in 2013, 147 WA Police were exposed to bodily fluids, implying such cases should come under the scrutiny of the new law. Despite the large numbers of people alleged to have exposed police to bodily fluids, we have not been able to identify a single recorded case of HIV transmission by biting or spitting in Australia. Introduction of forced testing laws is clearly legislative over-reach, responding to instances of spitting and biting rather than to evidence of exposure to transmission risk.
- **Fail to differentiate risk associated with different BBVs:** The new laws group BBVs together. It is unclear whether in each instance an assessment will be made about the likelihood of transmission associated with each different BBV, or whether a full 'set' of tests will be run regardless of risk.
- **Risk of criminalisation of those who test positive for HIV:** There is a chance that individuals who test positive under the new laws may potentially be charged under general criminal laws for exposure and transmission of HIV. Criminalisation of HIV is very problematic, and extending the scope of its application is of great concern.

- **May be replicated in other states:** Following the prompt promulgation of these laws in South Australian and Western Australia, we are concerned that laws such as these may be adopted in other states and territories. Once in place, the repeal of such laws is notoriously difficult. Consequently, it is crucial to act immediately to prevent the further adoption of such laws.

Policy remedies to ameliorate the impact of the new laws

Given that laws have now been introduced in both South Australia and Western Australia, it is essential to ensure the reasonable and consistent application of these laws. This should be done in the framework of an operating procedures protocol that outlines the appropriate application of these laws. Such a procedure document should, among other things, limit the application of new laws requiring/permitting non-consensual testing for communicable (SA) or infectious (WA) diseases *only* to circumstances where there is a real/reasonable possibility of transmission.

The SA and WA Bills were introduced in a context of fear of BBV transmission risk. The new laws neither address real transmission risk nor provide mechanisms to address the fears articulated by the police in both states. Ironically, these laws may serve to undermine the wellbeing of those officers first seeking to utilise them by giving effect to formerly vague fears. Where the legislation is applied and a forced test is undertaken, the officer involved may well draw conclusions/inferences from the results of alleged offenders that are not relevant to understanding their own BBV status.

A concerted, coordinated approach is required to respond to the serious deficit in understanding of HIV transmission risk, as evidenced by the rationales provided in SA and WA for these laws. This should be based on scientific, evidence-based processes, as laid out in ASHM's guiding document entitled *Police and Blood-Borne Viruses*. All police officers who have been put at actual risk of HIV infection should be offered access to Post-Exposure Prophylaxis (as per appropriate jurisdictional and national guidelines). They should also be offered referral to professional and expert post-exposure counselling. These evidence-based responses must occur in a context of increased education/awareness of first responders to actual BBV transmission risk.