



# Spitting and Mandatory Testing for HIV and other Blood Borne Viruses

## Key Points

1. SA and WA legislation now provides for forced BBV testing of an individual who is considered to have potentially exposed a police officer to the risk of contracting a BBV. Although the specifics of the legislation differ, in both states the legislation includes provision for forced testing for BBVs of a person who has spat<sup>1</sup> at a police officer. In both states introduction of the legislation followed concerted Police Association advocacy.
2. Presented as protecting police, these laws will in fact serve to fuel officers' unfounded fears regarding HIV transmission risk, while doing nothing to address legitimate police health concerns.
3. These forced testing laws and media regarding introduction of the legislation serve to perpetuate the common misconception that HIV can be transmitted by contact with saliva, such as through spitting. They also confuse issues about HIV risk and third party transmission.

## Background and context

- In both WA and SA, the legislation was introduced as a result of advocacy on the part of local police associations.
- This briefing paper is premised on the understanding that HIV infection is a very serious matter with serious, life-long implications, and that there is a need for guidelines and procedures to minimise the risk of an officer contracting HIV following an exposure risk.
- AFAO, Western Australian AIDS Council and Gay Men's Health South Australia advocated against these laws because the provisions for forced testing do not in fact protect police from HIV infection. They instead serve to reinforce common misunderstandings of the ways in which HIV is transmitted, and will fuel rather than address unfounded anxieties experienced by police who have been spat at or bitten.
- The new laws flout Australia's National HIV Testing Policy which generally requires consent for HIV testing.
- **Key concerns about these laws are that they:**
  - **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 will no doubt fuel 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*<sup>2</sup>, 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.
  - **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. Application of the new laws will likely fuel unnecessary anxiety for some, while creating a false sense of security for others.

<sup>1</sup> Or other bodily/biological fluid has come in contact with a police officer.

<sup>2</sup> Australasian 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](http://www.ashm.org.au/images/pdfs/publications/1976963382_POLICE_Booklet_V2.0.pdf)



# Spitting and Mandatory HIV and other Blood Borne Virus Testing

- **Completely ignore thresholds set by the National HIV Testing Policy:** The National HIV Testing Policy<sup>3</sup> states:

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 SA and WA, a ‘senior police officer’ will decide whether exposure to a BBV has occurred and will be able to order forced testing of a person, without requiring permission from a court or to obtain external scientific or medical expert opinion on HIV transmission risk.
- **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. Laws that potentially 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.
- **Provide no threshold at which the intervention of a court should be sought:** Of particular concern is the provision in the Western Australian legislation which 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. The South Australian states that “For the avoidance of doubt, a forensic procedure may be carried out on a person under this Division whether or not the person is in lawful custody”.
- **May be frequently applied:** A WA Police media release noted that in 2013, 147 WA Police were exposed to bodily fluids - implying that mandatory testing may have been imposed in these cases had the legislation been in place at the time. Such statements fuel groundless anxieties: there are no recorded Australia cases of HIV transmission attributed to biting or spitting.
- **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 transmission and exposure is very problematic and further extending the scope of criminalisation 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.

<sup>3</sup> <http://testingportal.ashm.org.au/hiv/informed-consent-for-testing>