

Mandatory Testing (Infectious Diseases) Bill 2014

EXPLANATORY MEMORANDUM

Overview of the Bill

Currently, in circumstances where a police officer is exposed to bodily fluids capable of transmitting blood borne viruses, such as from the spitting of blood or phlegm, there is no means to compel the source individual to provide a bodily sample. The inability to test the source individual to determine if they have a virus means that the exposed police officer must submit to testing.

The purpose for taking this bodily sample from the source individual is to assist with the diagnosis, clinical management and treatment of the exposed police officer. Because blood-borne viruses, such as Human Immunodeficiency Virus (HIV) and Hepatitis B Virus (HBV), can have lengthy window or incubation periods, sometimes up to a year, where the disease is present in the body but the antibodies to the disease cannot be detected with confidence, the police officer may be left to wait 3-6 months to confirm whether they have contracted the disease.

In cases where there has been a significant exposure, the police officer will also be advised to undergo post-exposure prophylaxis treatment (“PEP”), which usually requires the taking of two or more anti-retroviral drugs. Whilst PEP is effective in preventing the transmission of the virus, it can be accompanied by debilitating side effects and other risks for the police officer. These side effects combined with the fears of secondary transmission can place enormous physical and emotional stress on the officer concerned and may significantly diminish their ability to carry out the functions and roles expected of a police officer.

Where an offender assaults a public officer, or in the course of an arrest otherwise exposes an officer to the risk of infectious disease, this legislation will permit police to, upon authorisation of an officer of the rank of inspector or above (a senior police officer), arrange for a suitably qualified medical practitioner, nurse or phlebotomist to take a sample from the suspected transferor who has bitten, spat on, or otherwise attacked the officer acting in the course of their duty. The term *public officer* used in the legislation includes a police officer, a police related officer and a police service employee.

In 2013, there were 147 incidents recorded where officers were exposed to bodily fluids during the course of policing. However, only a small number of these cases will result in a requirement to take a blood sample under a disease test authorisation. This is because the legislation will require a senior police officer to be satisfied that there has been a transfer of bodily fluid through penetration of a mucous membrane or through the broken skin of another person.

The identified benefits of the legislation are to:

- provide an efficient means for testing a source individual;
- reduce the stress and anxiety for exposed officers; and
- assist in making decisions on treatment.

Part 1 - Preliminary

Clause 1. Short title

Cites the short title of the Act as the *Mandatory Testing (Infectious Diseases) Act 2014*.

Clause 2. Commencement

Clauses 1 and 2 come into operation on Assent. The remaining provisions in the Bill come into operation on a day fixed by proclamation.

Clause 3. Purpose of Act

The Act will provide for the mandatory testing for certain infectious diseases of persons reasonably suspected of having transferred bodily fluids to police and other related public officers acting in the course of duty.

Clause 4. Terms used

This clause will define the various terms that are used throughout this Bill. Some of the terms most relevant to the practical operation of the legislation are:

bodily fluid includes semen, blood and saliva.

incapable person means a person who is not a child and –

- (a) who for any reason is unable to give consent to being tested for an infectious disease; or
- (b) who is unconscious or otherwise unable –
 - (i) to understand a request made to give consent to being tested for an infectious disease; or
 - (ii) to communicate whether or not he or she consents to being tested for an infectious disease.

infectious disease means any of the following –

- (a) Human Immunodeficiency Virus (HIV) infection;
- (b) Hepatitis B;
- (c) Hepatitis C;
- (d) any other prescribed disease capable of being transmitted by the transferor of bodily fluid.

public officer means any of the following –

- (a) a police officer;
- (b) a police related officer;
- (c) a police service employee.

reasonable grounds for disease testing means reasonable grounds for suspecting that there has been a transfer of bodily fluid from a suspected transferor to a public officer as a result of –

- (a) an assault by the suspected transferor against the public officer;
 - (b) the lawful apprehension or detention of the suspected transferor by the public officer;
- or

- (c) any other prescribed circumstance involving the suspected transferor and the public officer.

suspected transferor, where there are reasonable grounds for disease testing, means the person from whom it is suspected the bodily fluid was transferred.

transfer of bodily fluid means the transfer of bodily fluid from one person into the anus, vagina, mucous membrane or broken skin of another person.

Clause 5. Freedom of Information Act 1992 does not apply to this Act

In order to protect the identity of a suspected transferor or an affected public officer the *Freedom of Information Act 1992* (the “Act”) will not apply to activities or records under the Act. This will address the situation where the Act may be used to identify the affected public officer or suspected transferor for purposes other than those provided for in the legislation. This clause is consistent with the provisions of clause 29 that places restrictions on the disclosure of the results of an analysis.

Part 2 – Disease test approvals

Division 1 – Preliminary

Clause 6. Purpose of Part

This clause applies to a person who is a *suspected transferor* but is not a child or an incapable person (i.e. a *protected person*). The term *protected person* means a child or an incapable person, including a deceased person. Therefore, this clause does not apply to a protected person, rather they are dealt with in Part 3 – Disease test orders, and testing must proceed by way of an application to the Courts.

Clause 7. Terms used

This clause will define the various terms that are used in this Part. Some of the terms most relevant to the practical operation of the legislation are:

remote communication means any way of communicating at a distance including by telephone, fax, email or radio.

senior police officer, in relation to an application, means a police officer who is an inspector or an officer of a rank more senior than an inspector.

Division 2 - Applications

Clause 8. Application for a disease test approval

An application for a disease test approval must be made by application to a senior police officer. A senior police officer is defined as a police officer who is at, or above, the rank of an inspector. This clause provides that an application can be made by a public officer if there are reasonable grounds for disease testing and application is made to a senior police officer who is not involved in the investigation of any associated offence.

The term *reasonable grounds* is defined in the Act as meaning that there are reasonable grounds for suspecting that there has been a transfer of bodily fluid from the suspected transferor to a public officer as a result of -

- (a) an assault by the suspected transferor against the public officer; or
- (b) the lawful apprehension or detention of the suspected transferor by the public officer; or
- (c) any other prescribed circumstance involving the suspected transferor and the public officer.

Application to a senior police officer provides for external oversight by an experienced officer of a suitably senior rank. An officer involved in any investigation is precluded for being involved in this decision making process to avoid any real or perceived bias.

Clause 9. Detention of suspected transferor pending application

If a suspected transferor is being detained in relation to an alleged offence it may arise that they are eligible or able to be released from police custody. If police haven't completed an application for a disease test approval by that time, this provision enables police to detain a suspected transferor if necessary. It will also enable police to apprehend and detain a suspected transferor after they have been released and need to be returned to police custody to enable an application to be determined.

Division 3 – Disease test approval

Clause 10. Giving of disease test approval

Before giving an approval for disease testing, the senior police officer must be satisfied that there are reasonable grounds for testing. The term *reasonable grounds* is defined in clause 4 and means reasonable grounds for suspecting that there has been a transfer of bodily fluid from a suspected transferor to a public officer as a result of –

- (a) an assault by the suspected transferor against the public officer; or
- (b) the lawful apprehension or detention of a suspected transferor by the public officer; or
- (c) any other prescribed circumstance involving the suspected transferor and the public officer.

A disease test approval must be in writing and contain information in a statement that includes that a police officer can:

- apprehend and detain a suspected transferor;
- enter a place where he or she suspects the suspected transferor is; and
- take a suspected transferor to a place that has facilities for the taking of a sample.

There may be circumstances where a senior police officer is not available or is involved in the investigation; therefore, provision has been made for an application to be made by remote communication. If approval is granted orally, a written record must be made as soon as practicable.

Clause 11. Copy of disease test approval to be served

Once approval is given, provision has been made for a disease test approval to be served personally on the suspected transferor. This will explain the effect of a disease test approval and inform the suspected transferor of the purpose and effect of the approval; that force may be used to enforce the approval; and that it is an offence not to comply with a requirement of the approval.

This will ensure that a suspected transferor is properly informed and aware of the obligations placed on them as a consequence of the approval.

Division 4 – Consequences of issuing disease test approval

Clause 12. Effect of disease test approval

A disease test approval will confer certain powers including the powers for police to:

- apprehend and detain a suspected transferor;
- enter a place where it is reasonably suspected that a suspected transferor may be located; and
- take a suspected transferor to a place that has appropriate facilities for taking the blood sample.

If a suspected transferor is being detained by police, this provision will then give police the power to take a person to a place to have a blood sample taken. In some cases, this may be done at a police facility if a doctor, nurse or qualified person attends at the police facility. If this is not the case then police will need to take the person to a place where a sample can be taken.

In some cases a suspected transferor may have been released by police prior to a disease test approval being given. In these situations the necessary powers have been given to police that will enable them to apprehend and detain a person and take them to a place where a sample of blood can be obtained. It may also occur that a suspected transferor is under the influence of alcohol and / or drugs at the time they commit the offence or when released from police custody. In such cases police will be able to execute the disease test approval at a later time.

Clause 13. Offences of failing to comply with requirement under disease test approval

The proposed offences and penalties are intended to provide a deterrent to persons who may consider refusing to comply with the request of a senior police officer to submit to taking a sample. The intent and purpose of the legislation will not be achieved if compliance is not achieved.

Part 3 – Disease test orders

Division 1 - Preliminary

Clause 14. Purpose of part

This part deals with mandatory testing of a suspected transferor who is a protected person. The term *protected person* means –

- (a) a child; or
- (b) an incapable person, including a deceased person.

Clause 15. Terms used

This clause will define the various terms that are used in this Part. Some of the terms most relevant to the practical operation of the legislation are:

court means –

- (a) in relation to a suspected transferor who is a child – the Children’s Court;
- (b) in relation to a suspected transferor who is not a child – the Magistrate's Court.

Division 2 - Applications

Clause 16. Application for order for blood testing of suspected transferor

This clause makes provision for a public officer to make application to a court where the suspected transferor is a protected person. Similar to the requirements for a disease test approval, there must be reasonable grounds for testing.

Clause 17. Copy of application to be served

This clause makes provision for a copy of the application to be served on a responsible person. A responsible person is defined in clause 4.

responsible person –

- (a) in relation to a suspected transferor who is a child, means any of the following persons –
 - (i) a parent of the child;
 - (ii) a guardian of the child;
 - (iii) another adult person who has responsibility for the day-to-day care of the child;
 - (iv) if no person mentioned in another subparagraph of this paragraph is available, a prescribed person, or a person in a prescribed class of persons;
- (b) in relation to a suspected transferor who is an incapable person other than a deceased person, means the following persons-
 - (i) an adult relative of the incapable person;
 - (ii) a person who is a guardian of the incapable person under the *Guardianship and Administration Act 1990*;
 - (iii) a person who is an enduring guardian of the incapable person under the *Guardianship and Administration Act 1990* and is authorised to perform functions in relation to the incapable person in the circumstances in which this Act applies;
 - (iv) a person recognised as the incapable person's advocate under the *Disability Services Act 1993* section 32(2);
 - (v) a person who is a carer (as defined in the *Carers Recognition Act 2004* section 4) in relation to the incapable person;
 - (vi) if no person is mentioned in another subparagraph of this paragraph is available, a prescribed person, or a person in a prescribed class of persons.

In relation to a suspected transferor who is a deceased person, the person who has lawful custody of the suspected transferor's body. A person who has lawful custody may be the Coroner or a family member.

Clause 18. Hearing an application

An application that is made to the courts must proceed with as little delay as possible. Once an application is before the courts it may be adjourned, however this must not be for any more than 24 hours.

When hearing an application, the suspected transferor and a third party must be afforded the right to be represented by a lawyer and the suspected transferor, third party or a lawyer can make submissions to the court.

Division 3 – Disease test orders

Clause 19. Making of disease test order

Before making an order, the Court must be satisfied that there are reasonable grounds for testing and in the circumstances, a blood sample should be taken. This provision is similar to the provision that applies to a senior police officer when considering whether to make a disease test approval. The term *reasonable grounds for disease testing*, is a defined term.

It is expected that the Courts will need to consider any evidence provided by the affected officer, any witness evidence and any evidence provided by the suspected transferor to establish if there has been a transfer of bodily fluid before making a disease test order.

Clause 20. Explanation of disease test order

In making a disease test order, the Court must advise the suspected transferor of a number of matters including their right to appeal to the District Court, the effect of an order and their obligations to comply with an order. The provisions for appeal are set out in clause 24.

A failure by the Court to comply with this clause will not invalidate the disease test order. This is a safeguard to ensure that minor breaches do not invalidate the order.

Clause 21. Copy of disease test order to be served

The third party to an application is a *responsible person* as defined in clause 4. A responsible person in respect to a child, incapable person or deceased person must be served personally with a copy of the disease test order.

A *responsible person* has certain obligations (refer cl. 23) in respect to compliance with a disease test order and this provision is necessary to give effect to this clause.

Division 4 – Consequences of issuing disease test orders

Clause 22. Effect of disease test order

A disease test order confers certain powers that enable a police officer to apprehend and detain a suspected transferor, enter any place where they may be, take them to a place where a blood sample can be taken and authorises testing of a blood sample for infectious diseases.

Clause 23. Offence of failing to comply with disease test order

Unless they have a reasonable excuse, a responsible person who is a third party must take all reasonable steps to enable a blood sample to be taken in accordance with a disease test order, otherwise they commit an offence.

Division 5 - Appeals

Clause 24. Appeal against disease test order

This clause will enable a third party on behalf of a suspected transferor to appeal a disease test order to the District Court. An appeal to the District Court must be filed without delay and the appeal must be heard and decided within 48 hours of the disease test order being made.

The purpose of mandatory disease testing is to ensure that public officers receive early advice of the status of the suspected transferor; therefore any appeals should be progressed expeditiously which is the reason why there are timeframes for the applicant and Courts to deal with these matters.

Clause 25. Appeal by public officer

This clause will enable a public officer to appeal a decision by the District Court not to grant a disease test order and is similar to the provision that enables an appeal to be made by a third party on behalf of a suspected transferor. An appeal to the District Court must be filed without delay and the appeal must be heard and decided within 48 hours of the decision not to make a disease test order being made.

The purpose of mandatory disease testing is to ensure that public officers receive early advice of the status of the suspected transferor; therefore any appeals should be progress expeditiously which is the reason why there are timeframes for the applicant and Courts to deal with these matters.

Part 4 – General

Clause 26. Taking blood samples under disease test authorisation

This clause provides what actions can be taken by a police officer when executing a disease test authorisation. A doctor, nurse or qualified person can take a blood sample when provided with a disease test authorisation.

When taking a blood sample, the doctor, nurse or qualified person may ask another person to give any help that is reasonably necessary. This could include using any reasonably necessary force that may be needed to be used for the taking of a blood sample.

As a matter of policy, the Commissioner of Police has advised that police officers will only use force if they are asked to assist the medical staff with the taking of blood. In cases where the offender is behaving in a way that may cause harm to medical staff, the suspected transferor, police or bystanders, it is likely that the testing will stop. At this point, the option will be available for police to charge the suspected transferor with failing to submit to the taking of a blood sample. It should be noted that clause 26 does not give use of force powers directly to police officers. Subclause 26(5) simply enables the medical staff, and anyone helping them, to be able to use force if it is reasonably necessary.

The decision making process for the use of force by police generally, is dealt with by training, policy and guidelines. The use of force by police must be reasonably necessary in the circumstances and police officers are individually accountable for the use of such force. This is consistent with the provisions of this legislation which requires that the use of force must be reasonably necessary for the taking of a blood sample.

Guidance as to what is considered reasonable when force is being lawfully used is provided in section 260 of the *Criminal Code Act Compilation Act 1913* (WA):

260. Excessive force is unlawful

In any case in which the use of force by one person to another is lawful, the use of more force than is justified by law under the circumstances is unlawful.

Once a blood sample is taken, the doctor, nurse or qualified person must send it immediately to a pathology laboratory that has facilities to test the sample for infectious diseases.

Clause 27. Analysis of blood samples

This clause provides for the analysis of a blood sample by a pathology laboratory and allows a sample to be destroyed if it is no longer required for analysis or for further analysis. Once an analysis has been done it is not necessary to retain blood samples.

A sample taken under this legislation cannot be used for other purposes. The reason for taking a sample is to test it for an infectious disease. Once this is done, the results are forwarded to a person who is authorised to have the results of an analysis.

Clause 28. No payment may be required in relation to taking or testing under disease test authorisation

The Commissioner of Police is responsible for the health and welfare of officers. Therefore, this clause provides that the costs of testing are not recoverable from the suspected transferor, a responsible person if the suspected transferor is a protected person or the person who has lawful custody of the suspected transferor if they are deceased.

The estimated number of instances where testing falls within the requirements of this legislation is expected to be low and indicative figures for the cost to conducting an analysis is also low.

Clause 29. Restriction on disclosure of results of analysis

A person conducting the analysis of a blood sample for an infectious disease is restricted in whom they can provide the results of those tests to. Primarily, the results can be supplied to the affected public officer, the suspected transferor or a person providing treatment, care or counselling.

In addition, the Commissioner of Police can be provided with the results of a test. This information may be used by the Commissioner to provide warnings to other officers. The availability of this information will be of assistance to officers in any future dealings with a suspected transferor.

A person authorised to have the results of a disease test can only provide that information to any other person who is also authorised to receive those results.

Clause 30. Prohibition on use of blood samples for other purposes

Blood samples are not being taken for evidentiary purposes and therefore use of the results is confined to the purposes for which they are taken.

Clause 31. Certain evidence inadmissible

Blood samples are being taken for health and welfare purposes and not for any other purposes. If the results were to be available for other purposes there may be reluctance by a suspected transferor to supply a blood sample for analysis. The test results will be of questionable evidentiary value as they are not being taken for this purpose.

Where it is necessary for the purposes of other legislation to take samples for evidentiary purposes provision is made to this in that legislation.

Clause 32. Protection from liability

The legislation provides that a person acting in good faith is protected from liability for any function being performed in accordance with the legislation.

Clause 33. Regulations

This clause enables regulation to be made to give effect to the purposes of the Act.

Clause 34. Review of this Act after 5 years

Provision has been made for the Act to be reviewed after 5 years. It is considered good practice to undertake an examination to consider whether the legislation is achieving its objectives.