



Back to the future? HIV, spitting and perceptions of risk

By Linda Forbes and Michael Frommer

Warning: this article may evoke a spooky, back to the 1980s feeling ... a past/future Australia where councils seriously proposed draining swimming pools frequented by gay men to protect swimmers from ‘catching AIDS ...’. But this is not a story of past ignorance; it’s about recent developments, policy challenges, and a very serious question: how do we preserve hard won legal protections against HIV-related discrimination and laws that stigmatised people with HIV?

Introduction

In 2014 the South Australian (SA) and Western Australian (WA) parliaments passed legislation providing for forced testing for blood borne viruses (BBVs) of people who are considered to have potentially exposed police, hospital staff or emergency workers to a BBV. In both states, the laws were introduced following concerted advocacy on the part of police unions. This article looks at what drove the introduction of these laws, discusses implementation issues, and proposes some policy solutions.

Before looking at the detail, let’s be clear: police officers face challenging and dangerous situations daily, and it is perfectly understandable that an officer who has been bitten, jabbed, bled on or spat at will want workplace policies in place to minimise the risk of contracting an infectious disease as a result of potential exposure.

The problem is that for HIV and other BBVs, these new forced-testing laws represent a knee-jerk response that:

- (a) undermines Australia’s best-practice policy framework for addressing BBV risks to public health in a way that responds to actual risk, and
- (b) does nothing to educate the public or police about BBV transmission and exposure risk, or allay unfounded fears and stigmatisation of people living with BBVs in the community.

It is the view of the Australian Federation of AIDS Organisations (AFAO) that these laws in fact serve to reinforce misinformation about how BBVs are transmitted; heighten police officers’ anxieties; and fuel community stigma

associated with HIV and other BBVs. The concerns raised in this article focus on HIV, but the basic issues apply for all BBVs.

South Australia

In the lead up to the 2014 South Australian election, the Police Association of SA successfully lobbied the SA Labor Government for laws to provide that a person who assaults a police officer can be required to undergo blood tests to check for ‘communicable diseases’ – including HIV and other BBVs. This resulted in Labor announcing its intention to pass such a law if re-elected. The SA Premier and Attorney-General’s media statement announcing the proposed legislation described it as ‘a new community safety measure’ designed to ‘protect those who protect us’.¹

The re-elected Labor Government subsequently fulfilled its promise, with the *Criminal Law (Forensic Procedures) (Blood Testing for Diseases) Amendment Bill 2014*.² The Opposition, the Police Association and the Law Society of SA were all at one with the government on the issue,

agreeing that the legislation would provide 'peace of mind' to police who might have been exposed to a BBV or communicable disease. The SA Opposition not only supported the measure but proposed to broaden its scope to include firefighters, paramedics, emergency service workers, surf lifesavers, nurses, midwives, doctors and hospital emergency department staff.³

Representations made to the SA Attorney-General, including from AFAO, argued strongly against the legislation, went unheeded and in 2015 the Bill was passed.

The SA legislation provides for forced testing for 'communicable diseases', including HIV and other BBVs where a person is 'suspected of a prescribed serious offence' (this covers assault, causing harm and serious harm), and 'it is likely that' a person engaged in 'prescribed employment' came into contact with, or was otherwise exposed to, 'biological material of the person as a result of the suspected offence'. People in 'prescribed employment' are:

- (a) police officers
- (b) emergency workers
- (c) medical practitioners in a hospital
- (d) nurses or midwives in a hospital, and
- (e) people providing assistance or services in a hospital.

Under the legislation, a senior police officer determines whether it is 'likely' that exposure occurred, and can order that an alleged offender provide a blood sample for BBV testing. The scope of this legislation is extremely broad, allowing for testing to be carried out 'whether or not the person is in lawful custody', and clarifying that these amendments apply 'whether the relevant offence was committed before, on or after the commencement of the law'.

Western Australia

And so to the west ... and another election commitment. In October 2014,

the WA Parliament passed the *Mandatory Testing (Infectious Diseases) Act 2014*⁴, its intended purpose being:

'to help ensure that a police officer or other public officer who, in the course of duty, is exposed to the risk of transmission of certain infectious diseases receives appropriate medical, physical and psychological treatment ...'

Under the legislation, persons reasonably suspected of having transferred bodily fluids to a police officer (or other public officer) may be required to test for BBVs/specified STIs. Other than for children/incapable persons, the decision to require a person to test is made by a 'senior police officer'.

It is particularly concerning that the guidelines supporting the implementation of this legislation enable the police to 'request to override' an attending doctor's recommendation as to the need for testing.⁵ This extraordinary process prioritises the expertise of police over attending doctors when making decisions about testing, and begs the question of what infection and disease expertise do WA Police have that is more relevant than that of a medical professional?

As in South Australia, the introduction of the legislation was the result of concerted police union advocacy, with similar hyperbole providing fodder for sensationalist media reports. A WA News report in March 2014 says it all when quoting WA Police Union Boss George Tilbury:

*'Members have told harrowing stories about withdrawing from family and friends because they feared they would infect them ... This legislation will allow for the taking of blood samples from the offender which helps in diagnosis, clinical management and treatment of the exposed police officer.'*⁶

Peppered with inaccuracies and factual errors, the report uses the same emotive language as we heard from SA, when Police Association of SA president Mark

Carroll stated: 'Incubation periods for serious diseases such as hepatitis C and HIV mean that police and their families must endure the horrible stress of waiting months before their health is cleared'.⁷

Misguided rationale

The rationale presented for introducing these laws has been variously stated as 'protecting' the police, and helping to address officers' anxieties while they wait for their own test results.

The legislation fulfils neither rationale. A fundamental flaw is the broad-brush approach of both the SA and the WA legislation, covering various BBVs and contagious diseases; and covering various types of exposure to bodily fluids, ranging from contact with saliva, to blood co-mingling, including during an assault. Rather than serving to address real exposure risks faced by police officers, this broad coverage reinforces misplaced anxieties and common misconceptions about modes of transmission of HIV – as is apparent in the media statements about the laws.^{8,9}

Government, opposition and trade union policy announcements and associated media have served to perpetuate the common misunderstanding that HIV can be transmitted through contact with saliva, such as through spitting. This will reinforce rather than allay general anxiety about the risk of contracting a BBV, both among police and the wider community.

What if there has been an actual exposure risk?

In cases of actual potential exposure risk, the rationale for forcibly testing the source of the potential exposure is misconceived. If a positive BBV result is returned for an offender, it cannot establish whether a police officer has contracted a BBV unless they are themselves tested, allowing for the relevant BBV window periods. While a positive result may unduly alarm the officer, a negative test result from the offender is not conclusive, given that they may have seroconverted but still be in the test window period.

The new laws also 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.

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The best-practice approach for any police officer who has had an actual potential exposure to a BBV – e.g. they’ve been jabbed with a blood-filled syringe – is to get immediate access to post-exposure prophylaxis (PEP) and ongoing support, including accurate information resources and referral to professional and expert counselling.

The logistics of forcibly obtaining a blood sample

The legislation does not meet the threshold criteria for compulsory testing set by the National HIV Testing Policy, which 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.’
(Section 3.0)¹⁰

In both SA and WA, a ‘senior police officer’ will be able to order forced testing of a person. The senior police officer is not required to obtain external scientific or medical expert opinion on HIV transmission risk.

The legislation fails to specify how testing will be enforced where a person refuses to be tested. The WA Act states that: ‘A police officer may apprehend and detain the suspected transferor for as long as is reasonably necessary to enable determination of the application’. This suggests that a person may be held indefinitely while they continue to resist forced testing.

Alternatives to forced testing

In AFAO’s view, the SA and WA legislation should be repealed, or at least substantially amended to require that exposure risks for particular BBVs and contagious conditions are taken into account when determining whether a test is to be required. Clear processes for supporting police who have been exposed to risk need to be developed, as laid out in ASHM’s guiding document, *Police and Blood-Borne Viruses*.¹¹ In the meantime, robust procedural protocols are needed, both to limit application of these laws and ensure that overriding protections and rights of appeal in other legislation are observed.

The need for federal leadership

There is a risk that these laws may be replicated around the country, with police

unions in other jurisdictions making calls for similar ‘protection’.¹²

The Commonwealth has an overarching responsibility to identify and respond to jurisdictional issues of national significance. The SA and WA laws clearly flout the Seventh National HIV Strategy¹³, and established national policy guidelines which state that BBV testing must be voluntary and with informed consent; however, the Commonwealth has to date taken a hands-off approach, arguing that these are jurisdictional issues.

This perspective ignores the real potential for further policy replication across the jurisdictions – particularly given the political expediency of responding to ongoing pressure from state police unions regarding what is painted as a law and order issue. The legislation has been presented by governments as workforce protection without regard to actual BBV transmission risks, and without proper consultation with jurisdictional health departments. In SA and WA it seems that political expediency overrode expert advice. The result is that we are now seeing the introduction of laws based on misguided understandings of HIV transmission risk that were rife in 80s, but are now well and truly discredited.

Once in place, the repeal of such laws is notoriously difficult. The National HIV Strategy notes the importance of entering into ‘a respectful dialogue with other sectors to discuss impacts of wider decisions on the health of priority groups’.¹⁴ It’s time for the Commonwealth to establish ‘a respectful dialogue’ with WA, SA and the police unions to reform the laws now in place, and prevent the replication of bad laws around the country.

References

- 1 Weatherill, J., Rau, J. (2013, 15 October). *New blood test law to protect those who protect us*. Media release. Government of South Australia, Adelaide. Retrieved from: <http://www.agd.sa.gov.au/new-blood-test-law-protect-those-who-protect-us>
- 2 Available at: http://www5.austlii.edu.au/au/legis/sa/num_act/clptfdaa201511o2015685/s6.html
This Bill is yet to come into operation, with the date of proclamation currently unknown. Under the *South Australian Acts Interpretation Act 1915*, it will come into operation on the second anniversary of the assent date, i.e. 9 July 2017, in the absence of any date of proclamation being announced.
- 3 Novak, L. (2014, 14 October). SA Liberals want mandatory blood tests for offenders who

bite or spit at emergency service workers. *The Advertiser*. Retrieved from: [http://www.adelaidenow.com.au/news/south-australia/sa-liberals-want-mandatory-blood-tests-for-offenders-who-bite-or-spit-at-emergency-service-workers/news-story/549971219f77c8c38fad38e49f5d1309?="](http://www.adelaidenow.com.au/news/south-australia/sa-liberals-want-mandatory-blood-tests-for-offenders-who-bite-or-spit-at-emergency-service-workers/news-story/549971219f77c8c38fad38e49f5d1309?=)

- 4 Available at: http://www5.austlii.edu.au/au/legis/wa/consol_act/mtda2014394/
- 5 See: ‘Transmission risk of an infectious disease’, Section 7.6, in: Government of Western Australia Department of Health. (2015). *Mandatory testing of a suspected transferor for an infectious disease*. Department of Health, Perth.
- 6 Foster, B. (2014, 14 October). *‘Biting and spitting bill’ will bring police officers relief: union*. WAtoday.com.au. Retrieved from: <http://www.watoday.com.au/wa-news/biting-and-spitting-bill-will-bring-police-officers-relief-union-20141024-11b92l.html>
- 7 News.com.au editorial feature. (2012, 21 October). *Push for police assailants to undergo mandatory blood tests*. Retrieved from: <http://www.news.com.au/national/south-australia/push-for-police-assailants-to-undergo-mandatory-blood-tests/story-fndo4dzn-1226500282813>
- 8 Foster, B. (2014, 14 October). op. cit.
- 9 News.com.au editorial feature. (2012, 21 October). op. cit.
- 10 See: section 3.0 ‘Indications for HIV testing’ in: National HIV Testing Policy Expert Reference Committee. (2011). *National HIV Testing Policy 2011 v1.1*. Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM), Sydney. Retrieved from: <http://testingportal.ashm.org.au/hiv/indications-for-hiv-testing>
- 11 ASHM, Australia New Zealand Policing Advisory Agency (ANZPAA). (2015). *Police and Blood-Borne Viruses*. ASHM, Sydney. Retrieved from: <http://www.ashm.org.au/resources/Pages/978-1-920773-39-7.aspx>
- 12 AAP editorial feature. (2015, 15 March). *Cops union calls for new spitting offence*. *The Advertiser*. Retrieved from: <http://www.adelaidenow.com.au/news/breaking-news/cops-union-calls-for-new-spitting-offence/news-story/ca54ebf487418bfd08cbf51c3aae89d2?sv=f1e1fd99175f8aa31e05da1d0574a2b7>
- 13 Department of Health (DoH). (2014). *Seventh National HIV Strategy 2014–2017*. Commonwealth of Australia, Canberra. Section 7.2 states that: ‘The principles of voluntary testing, informed consent and confidentiality underpin high rates of HIV testing in Australia, and these principles remain central to the management of HIV. The National HIV Testing Policy ... provides guidance to those involved in testing and is reviewed regularly to accommodate changing epidemiology and technology and to reflect the needs of the sector.’
- 14 *ibid.*

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