

## **FIFE COUNCIL RESPONSE TO CONSULTATION**

### **Blood Testing Following Criminal Incidents where there is a Risk of Infection: Proposals for Legislation**

#### **General**

The assumptions on which the consultation document is based are worthy of a degree of challenge. Rates of occupational exposure to BBVs are low. Even after a "high risk" incident such as needlestick the risk of contracting HIV or Hep C is low (risk of transmission of Hep B is higher but anybody in a risk occupation should have been immunized).

For example, worldwide there has only been one unequivocal case of HIV transmission via biting out of over 60,000,000 HIV cases. Similarly, there are only two probable cases where transmission has been due to fighting, and one case of household transmission between children. There has been one confirmed case worldwide of HIV being transmitted following a road accident and one of transmission via a sports accident.

Although considerably more infectious than HIV, incidents of occupational transmission of Hepatitis C are still rare and in most cases, as with HIV, preventable by the use of universal precautions.

It is important that proposed legislation is not based on inaccurate assessment of risk or misunderstanding of what level of reassurance can be given to an individual if a suspect appears to test negative. For example, if an individual with HIV has only recently (within 3 months) become infected, s/he could be highly infectious while still providing a negative HIV antibody test. Post exposure prophylaxis for the individual would still have to be considered, regardless of the result of the suspect's test. The situation for Hepatitis C is similar except that the "window period" is taken to be 6 months.

Post exposure prophylaxis, which exists for HIV but not for Hepatitis C, has to be administered within hours to be effective. The proposed legal process is likely to take days and therefore even in the case of HIV will probably be ineffectual.

One test is unlikely to give a definitive diagnosis and the process of compulsion will inevitably be lengthy. The measure may create a false sense of security that could lead to complacency and increased risk to the individuals concerned.

The justification in the document for applying the legislation only to people suspected of committing a crime is difficult to sustain. The fundamental principle on which our legal system is based is that of innocence until proven guilty. Two unsubstantiated judgements will require to be made. First, whether someone is believed to be guilty of an offence (believed by whom, based on what evidence?); and second, whether someone is believed to be infected (based on what evidence?).

It may be more easily defensible to argue that in the case of possible infection (intentional or accidental) an application could be made for a blood test. The only basis for this argument would be the balance of benefit to the "victim" against the rights of the person suspected of carrying the BBV (again, suspected by whom and based on what evidence?).

A more effective approach would be to ensure that universal precautions are applied wherever possible and that potentially "at risk" groups of workers have accurate knowledge of the real level of risk.

What of a suspect who is involved in an incident with a police officer who has or is suspected of having a blood borne virus? Should these measures not be implemented universally, potentially requiring police officers or others to undergo testing? Indeed any individual could potentially demand the testing of any other if there had been an incident involving body fluids.

### **Question 1**

Front line professionals from the emergency and public services face personal risk on occasion in the course of their duties, including exposure to viruses such as HIV, hepatitis B and hepatitis C. As noted in the Ministerial forward to the consultation, this is not a frequent occurrence. Consequently, the response to this issue should be considered and proportionate.

In all cases where a mandatory testing order is being considered, the suspect should first be invited to give information from their medical records, or submit to a blood test voluntarily.

Any legislation giving rights to individuals to apply for information about blood-borne viral infections, with which they may have been infected, should apply universally.

The psychological or physical harm suffered by police officers as a result of possible exposure to a blood-borne viral infection is a significant issue. It is no less significant for any other emergency service, public sector professional, or member of the public who has been exposed to this type of risk. All groups or individuals have an equal right to protection under the law.

### **Question 2**

Mandatory blood testing should only be ordered by a Sheriff as part of the due legal process. Requiring an individual to be tested for serious infections should not be undertaken lightly; there should be safeguards to ensure that suspects do not have this requirement imposed upon them unreasonably. One such safeguard should be that any compulsion should only be on the basis of decision by a sheriff.

### **Question 3**

If compulsory testing is to be justified on the basis of the accrued benefits to the "victim", it is difficult to argue for a differential approach to "suspects" based on whether they are *believed* to have committed a crime. The harm to the victim from an infected person is no less simply because the person is not believed to have committed an offence. Therefore, compulsory testing, if justified, should apply to everyone. If it is not possible to justify this for "innocent" people, it is difficult to see how it can be so for anyone, particularly as they will not, by the time of the test, have been convicted of an offence.

### **Question 4**

The reality that the level of intrusion experienced by the alleged perpetrator of a violent/sexual offence in submitting to a compulsory blood test is less than that suffered by the victim of such an offence. However, the question of proportionality needs to address the issue of how compulsory testing may assist the victim if the timescales for testing and its results do not provide any realistic prospect of post exposure prophylaxis.

### **Question 5**

If the purpose of the proposed legislation is to secure information on which to base decisions about the need for health care for the "victim", and the question of proportionality is based on the balance between intrusion for the "suspect" and degree of risk for the "victim", the question of whether the suspect may have committed a crime and of what type, or whether the act was committed accidentally seems to be irrelevant. Either a judgement is made that one individual's rights not to be compelled to undergo a test are less critical than another individual's rights to information, or not. To attempt to grade rights on the basis of the suspicion of a crime, the suspicion of a type of crime and the suspicion of infection seems impossibly flawed.

### **Question 6**

It will be essential that the rights of children or adults with incapacity to consent are protected in the event of the provisions of the legislation applying to all ages and groups.

### **Question 7**

Accessing information that would prevent alternative intrusive means of testing would be welcomed. However, the provisos in relation to timescales referred to above apply equally in these circumstances.

### **Question 8**

The concerns articulated above apply here. What will be the threshold for an assumption of guilt; and what will the basis be for the "reasonable suspicion" that the suspect may be the carrier of a prescribed blood-borne viral infection?

**Question 9**

The main concerns relate to the question of effectiveness of testing and timescales, which could render the proposals ineffectual.

**Question 10**

Agreed.

**Question 11**

Yes, with the proviso that no "victim" is discriminated against by the system that is established.

**Question 12**

Agreed.

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