

From: Scottish Prison Service
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Bill Barron
Police Bill Team
Police Division 1
St Andrew's House

SCOTTISH PRISON SERVICE (SPS) AND TUS PARTNERS RESPONSE

BLOOD TESTING FOLLOWING CRIMINAL INCIDENTS WHERE THERE IS A RISK OF INFECTION: PROPOSALS FOR LEGISLATION

General

This proposal is as a result of a petition by the Scottish Police Federation, which calls for mandatory blood testing of anyone who has caused a police officer to be exposed to the risk of infection via a blood-borne virus ie HIV or Hepatitis C or D. The Scottish Executive Justice Department advocates this proposed piece of legislation should be expanded to include other emergency workers or members of the public, allowing them to seek information on whether their assailant was carrying any of these infections.

The SPS and the recognised trade unions comprising the Trade Union Side have consulted together on the proposals and submit jointly their response to each of the questions as they are written adding the unique perspective of this Executive Agency to this debate.

Issues of Principle

Question 1. Do you agree that 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? Or should the protection be restricted to particular groups of people? If the latter, what groups should it be restricted to and what would be the justification for this?

Response 1: The SPS/TUS Partners agree that if the legislative proposals are to be enacted regarding mandatory blood testing, they should apply universally. This is assuming the proposed safeguards are also enacted robustly.

Question 2. Do you agree that mandatory blood testing should only be ordered by a sheriff?

Response 2: The SPS/TUS Partners agree that mandatory blood testing should only be ordered by a sheriff and be subject to the rigid qualifications outlined in part 3.12 of the paper.

The proposals by the Scottish Executive concerning trigger events only addresses cases where a risk of infection arises as a result of the suspect allegedly committing a crime. It specifically proposes that accidental infections be omitted. This precludes accidental infection by a third party as a result of a criminal incident.

The SPS/TUS Partners would like to highlight this risk of exposure where intervention is required to prevent or cease an assault being committed on a third party. In these cases the victim of the deliberate assault, as well as the assailant, may be the infector. Likewise SPS staff are often exposed to the risk of infection when intervening to deal with attempted or successful suicide attempts. Both of these scenarios can result in accidental contamination by bodily fluids. We note that the proposals would not currently address this form of exposure.

The SPS/TUS Partners are aware that a delicate balance must be struck between the human rights of the third party victim of any circumstance which may expose SPS staff to the risk of infection. However we have concerns that this aspect of accidental infection has not been considered fully. The vast majority of high risk interventions by SPS staff are to break up prisoner on prisoner assaults, not to address direct assaults on staff by prisoners. In the 3 years from 2002, 297 serious prisoner on prisoner assaults occurred throughout the SPS estate. In the same time period 44 prisoner on staff serious assaults occurred. These statistics evidence that the risk of infection through accidental contamination is a very real hazard for staff and may benefit from special consideration.

The proposals also state, "that mandatory blood testing should only be considered if an applicant has come into contact with a bodily substance of another individual as a result of that individual allegedly committing a crime". It could be argued that every prisoner held in the SPS estate has allegedly committed a crime therefore the human rights of this particular population could be compromised if the legislation regarding alleged criminal activity is not made more specific. This caveat should not be applied to individuals held in custody within the SPS estate unless they have allegedly committed a crime whilst held in custody, the alleged crime committed prior to this should not be a consideration. Equally a SPS staff exposure to risk under circumstances of suicide attempts would not be addressed through this criteria.

Question 3. Do you agree that mandatory blood testing should not be applied to anyone who has committed no crime but may accidentally have exposed another person to a prescribed blood-borne viral infection, so that such people should be free to decline to give a blood sample?

Response 3: See the answer to question 2. The SPS/TUS Partners would submit that the uniqueness of the prison environment lends itself to the circumstance where exposure to the risk of infection is more likely to follow from 'accidental' circumstances in so far that a Prison Officer was not the intended victim of assault but is the victim of another victim of assault. It is clear that the corresponding mental health issues whether resulting from deliberate assault viewed as a criminal incident, will be the same as those when a prison officer is accidentally exposed to a blood-borne viral infection through other circumstances. The SPS/TUS Partners propose the Scottish Executive take this unique position into consideration when drafting legislation.

Proposals for Legislation

Question 4. Do you agree with the principle of mandatory blood testing for those who commit serious physical or sexual assaults and thereby put the victim of the crime at risk of infection with a prescribed blood-borne virus?

Response 4: Regarding circumstances where mandatory blood testing should be applied, the SPS/TUS Partners agree with the proposals outlined in part 4.3 of the paper. Also we are in agreement with the proposal to universally apply mandatory blood testing to all individuals who commit serious physical or sexual assaults, but not excluding cases where the risk arose accidentally but out of circumstances where the individual had committed a crime. The SPS/TUS Partners takes cognisance of the example outlined in part 4.4 of the paper, but also submits this could be extended to include the unique circumstances of the prison environment.

Question 5. Do you agree that the provisions for mandatory testing should extend to any type of case where the applicant may have been exposed to a prescribed blood-borne viral infection as a result of a crime being committed by the other party?

Response 5: The SPS/TUS Partners agree that the provisions for mandatory blood testing should extend to any type of case where the applicant may have been exposed to a prescribed blood-borne virus as a result of the crime being committed by the other party. However, we again wish to emphasise that exposure to a prescribed blood borne virus in a prison environment is not dependent upon a crime having been committed and may be as a result of third party exposure.

Question 6. Do you think there should be any variation in these provisions for cases where the suspect is under age?

Response 6: The SPS/TUS Partners agree that no variation for age purposes should be included in the legislation, although special consideration should be given to the way in which consent for testing is obtained from minors and how test results are imparted to this suspect group.

Question 7. Do you agree that persons at risk of infection from a criminal incident should be entitled to seek information from the Procurator Fiscal about the prescribed blood-borne viral infection risks they may face?

Response7: The SPS/TUS Partners agree that where health risk information may be provided as a by-product of a criminal investigation into an assault, applicants should be entitled to seek information from the Procurator Fiscal.

Question 8. Do you agree with the proposed criteria for mandatory testing orders?

Response 8: The SPS/TUS Partners agree that in cases where the transfer of blood-borne viral infection is not being pursued by the Procurator Fiscal, legislation should entitle the applicant to apply to a Sheriff for an order authorising access to the suspects health records, and where these are unavailable or inconclusive, requiring the individual to provide blood for analysis. Uniquely to the SPS, all individuals admitted to prison or hospital are allocated a specific health care record. This could make potential access to pertinent confidential information easier. However it does have implications for the human rights of the suspect and for the requirements contained in the Data Protection Act 1995. We also consider that for those in custody, the penalty for non-compliance with a Sheriff's order may be less persuasive than to an individual in the community.

Separately the process for applying for a mandatory testing order, as currently outlined, is vague suggesting a number of routes which could be utilised. The SPS/TUS Partners submit that for public sector emergency workers consideration is given to outlining a distinct, consistent process, either via the employer or via a union solicitor, utilising a strict set of criteria. Allowing options in this process may be seen as creating disparity for non trade union members.

The legitimate necessity for the suspect and applicant to appear in court, in order to progress the application process, may place an added demand on the current outsourced escorting arrangements, managed by the SPS. Timelines for the application process could also be adversely affected should the prisoner suspect already have additional court appearances scheduled.

Question 9. Do you have any comments on the proposed civil application process?

Response 9: See above. In addition the SPS/TUS Partners recognise that the confidentiality surrounding the staff/ prisoner patient relationship may be adversely affected under the proposals to make the results of a blood test available. The fact that under proposed legislation the applicant and the suspect would be at liberty to pass this information on to others, potentially compromises the medical confidentiality of both the suspect and the applicant. The consequent risk of breaching patient confidentiality may be greater in the closed confines of a prison environment.

Question 10. Do you agree that information provided from mandatory testing orders should be for the sole purpose of benefiting the applicant, and should not be retained by the police?

Response 10: This is a matter for the Police to decide what is important to them and meets their needs. However it is not immediately apparent to us what the benefits of such an action would be if the outcome is 'negative'. Even in circumstances where the outcome is 'positive' this could also transpire to be 'false positive' or indeed 'false negative'. Retaining the information may therefore be counter-productive in promoting a false sense of security.. In the Prison environment the information would be inserted in the prisoner suspect's health records held by the SPS.

Question 11. Do you agree that the costs of the testing process should fall to the applicant?

Response 11: The SPS/TUS Partners propose that the costs of the testing process and the application are borne by the tax payer ie the Scottish Executive. This would ensure parity of access in the application process.

Question 12. Should some support organisations be empowered to act on an applicant's behalf and to provide support and advice as appropriate?

Response 12: If applicants are not supported through the process by an employer's occupational health processes they should be offered alternative appropriate support.

Conclusion

The SPS/TUS Partners welcome the opportunity to respond to this consultation and recognise the concerns raised by the Scottish Police Federation regarding potential infection by

contaminated bodily fluids. However as the Scottish Executives proposals suggest they are concerns that are shared with other front line workers including SPS staff. We submit that the proposed legislation, if extended to all emergency workers and victims of crime, fails to address significant areas where the actual or perceived risk of infection is high and the suspect's status is unknown. There further remains in our mind a question concerning clarity of purpose of the proposals. We would submit the fundamental question is around the management of the *exposure to the risk* of infection. If this is the underpinning principle then the proposals do not go far enough to address the concerns and circumstances that arise in the prison environment. The proposals appear to curtail the considerations to specific circumstances surrounding the exposure to risk, eg results from an assault or a criminal act. This approach then fails to address the concept of exposure to the risk of infection through a third party who may be a victim of a criminal act. Although these additional scenarios are not exclusive to the prison environment, we submit they occur more frequently in closed conditions.

Regarding health records, if prisoners perceived that information contained within their health records would not remain confidential this could reduce numbers coming forward for voluntary testing for HIV and Hepatitis. It should be noted that the Royal College of Physicians of Edinburgh has stated that Hepatitis C is likely to become an epidemic, that the disease is mostly transmitted by intravenous drug (IV) users and that most IV drug users are more likely to contract the disease in prison. Viewed in this context therefore any measures which could affect a reduction in prisoner co-operation would have a negative effect on proactive prevention and support measures for employee groups and infected individuals to reduce the chances of spreading infection. HIV and Hepatitis C are known major public health issues, a proactive not reactive response to this issue may be more beneficial for the community.

Post Exposure Prophylactics (PEP) is recommended for workers who have had significant occupational exposure to blood or another high risk bodily fluid from a person either known or considered to be HIV or infected, but where the result of an HIV test has not or cannot be obtained. It is recommended for HIV that, if indicated, PEP should be commenced within an hour of the incident and be augmented with follow up counselling, post exposure testing and medical evaluation. For Hepatitis B management includes initiation of the hepatitis B vaccine series to any susceptible, unvaccinated person who sustains an occupational blood or body fluid exposure. The right of the applicant to obtain blood samples would not negate this process, and in the case of many prisoner suspects who are non-conformist of law by definition the order for mandatory blood testing is likely to be refused, deeming PEP treatment essential.

Currently the prevalence of Hepatitis C in the prison population is estimated at 20% i.e. approximately 1300 people. Hepatitis B statistics are not known. HIV positive numbers are reported as 12. It is illuminating to note that over 80% of people coming into prison have a drug problem and over 20% of the population are injecting drug users. Given the high concentration of IV drug users and their propensity to share injecting equipment, it could be argued that the likelihood of a prison officer/nurse being infected with a prescribed blood-borne virus would be higher than that of other emergency workers. However, statistics from 2002 to date evidence that out of 125 assault at work applications only 5 have been related to potential blood-borne viruses and in the same time period we know of 62 needle stick and sharps injuries being reported. The SPS/TUS Partners are not aware of any employee contracting HIV or Hepatitis B or C as part of their contractual duties. However we do

recognise the employer's duty of care under the Health and Safety at Work etc. Act 1974 and we are currently reviewing our occupational health strategy to improve support, information and treatment provision for staff who may have been potentially infected by a blood-borne virus.

The SPS/TUS Partners would welcome the opportunity to participate in further discussions about the issues raised .



BARBARA ALLISON
Director of Human Resources



ANDY HOGG
SPS-TUS Secretary