

Western Australia

**Mandatory Testing (Infectious Diseases)
Act 2014**

As at 03 Nov 2014

No. 26 of 2014

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Mandatory Testing (Infectious Diseases) Act 2014

(No. 26 of 2014)

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Western Australia

Mandatory Testing (Infectious Diseases) Act 2014

No. 26 of 2014

An Act to 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.

[Assented to 3 November 2014]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Mandatory Testing (Infectious Diseases) Act 2014*.

2. Commencement

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

3. Purpose of Act

The purpose of this Act is 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 by authorising —

- (a) the taking of a blood sample from a person who, if carrying an infectious disease, might have transmitted it to the officer; and
- (b) the analysis of the blood sample to find out whether the person is carrying the infectious disease.

4. Terms used

In this Act, unless the contrary intention appears —

adult means a person who has reached 18 years of age;

affected public officer means a public officer in relation to whom there are reasonable grounds for disease testing;

bodily fluid includes semen, blood and saliva;

child means a person who is under 18 years of age;

Commissioner means the Commissioner of Police;

disease test authorisation means —

- (a) a disease test approval as defined in section 7(1); or
- (b) a disease test order as defined in section 15;

doctor means a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the medical profession;

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, deceased 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 transfer of bodily fluid;

nurse means a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the nursing and midwifery profession whose name is entered on the Register of Nurses kept under that Law;

police officer means a police officer acting in the course of duty;

police-related officer means any of the following acting in the course of duty —

- (a) a person appointed under the *Police Act 1892* Part III to be a special constable;
- (b) a person appointed under the *Police Act 1892* Part IIIA to be an Aboriginal police liaison officer;

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- (c) a person appointed under the *Police Act 1892* Part IIIB to be a police auxiliary officer;
- (d) a police cadet within the meaning of the *Police Act 1892*;

police service employee means a person employed or engaged in the department of the Public Service principally assisting the Minister in the administration of the *Police Act 1892* and acting in the course of duty;

prescribed means prescribed in regulations under this Act;

protected person means —

- (a) a child; or
- (b) an incapable person;

public officer means any of the following —

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

qualified person means a person who has been trained to take samples of blood from persons by a registered training organisation within the meaning of the Australian Quality Training Framework as approved from time to time under the *Skilling Australia's Workforce Act 2005* (Commonwealth);

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; 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;

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 any of 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 mentioned in another subparagraph of this paragraph is available, a prescribed person, or a person in a prescribed class of persons;

- (c) in relation to a suspected transferor who is a deceased person, the person who has lawful custody of the suspected transferor's body;

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.

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

The *Freedom of Information Act 1992 (FOI Act)* does not apply to activities or records under this Act to the extent that the FOI Act would otherwise enable or require the disclosure of the identity of —

- (a) a suspected transferor; or
- (b) an affected public officer.

Part 2 — Disease test approvals

Division 1 — Preliminary

6. Purpose of Part

The purpose of this Part is to provide for the mandatory testing of a suspected transferor who is not a protected person.

7. Terms used

(1) In this Part —

application means an application under section 8;

approved form means a written form approved by the Commissioner;

disease test approval means an approval under this Part for the taking and testing of a blood sample from a suspected transferor;

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

(2) A reference in this Part to making an application includes a reference to giving information in support of the application.

Division 2 — Applications

8. Application for a disease test approval

(1) A public officer may apply to a senior police officer for a disease test approval if —

- (a) there are reasonable grounds for disease testing; and
- (b) the suspected transferor is not a protected person; and

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Part 2 Disease test approvals

Division 2 Applications

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- (c) the senior police officer is not involved in the investigation of any suspected offence to which the proposed disease test approval relates.
- (2) The application may be made by remote communication.
- (3) The application must —
 - (a) if practicable be in writing; and
 - (b) state the full name and official details of the applicant; and
 - (c) state the full name and official details of the affected public officer; and
 - (d) state the full name and address of the suspected transferor; and
 - (e) state the grounds for suspecting that there has been a transfer of bodily fluid from the suspected transferor to the affected public officer; and
 - (f) include any other information that is prescribed for the purposes of this subsection.
- (4) If it is not practicable to make the application in writing, the public officer making the application must, as soon as practicable after the application is made, make a written record of it, including all the information required under subsection (3).
- (5) If the suspected transferor is being detained under section 9, the application must be made —
 - (a) as soon as practicable; and
 - (b) in a manner that ensures the determination of the application as soon as practicable,after the apprehension of the suspected transferor.

9. Detention of suspected transferor pending application

A police officer may apprehend and detain the suspected transferor for as long as is reasonably necessary to enable the determination of the application.

Division 3 — Disease test approval

10. Giving of disease test approval

- (1) On an application, a senior police officer may give a disease test approval if satisfied —
 - (a) there are reasonable grounds for disease testing; and
 - (b) the suspected transferor is not a protected person.
- (2) The disease test approval must be in an approved form and must include a statement of all of the following —
 - (a) the full name and address of the suspected transferor;
 - (b) that a police officer may apprehend the suspected transferor and detain him or her for as long as is reasonably necessary to enable the taking of a sample of the suspected transferor's blood;
 - (c) that, for the purposes of paragraph (b), a police officer may enter any place where the police officer suspects on reasonable grounds the suspected transferor might be located;
 - (d) that a police officer may take the suspected transferor to a place the police officer considers has appropriate facilities for taking the blood sample;
 - (e) that a doctor, nurse or qualified person may take a blood sample from the suspected transferor.
- (3) The disease test approval may be given subject to any reasonable conditions that the senior police officer considers appropriate and specifies in the approval.
- (4) The disease test approval may be given by remote communication.
- (5) The senior police officer must, as soon as practicable after granting an approval orally by remote communication, make a

record in writing of the particulars referred to in subsection (2) relating to the approval.

11. Copy of disease test approval to be served

- (1) A copy of the disease test approval must be served personally on the suspected transferor.
- (2) The copy of the disease test approval must contain an explanation, in an approved form —
 - (a) of the purpose and effect of the approval; and
 - (b) that force may be used to enforce the approval; and
 - (c) that failure to comply with a requirement made under the approval is an offence.
- (3) A disease test approval does not take effect until a copy of it is served in accordance with this section.

Division 4 — Consequences of issuing disease test approvals

12. Effect of disease test approval

- (1) A disease test approval confers the powers referred to in section 10(2)(b), (c) and (d).
- (2) A disease test approval relating to a suspected transferor —
 - (a) authorises a blood sample to be taken from the suspected transferor in accordance with the approval; and
 - (b) authorises a police officer to require the suspected transferor to submit to the taking of the blood sample in accordance with the approval.
- (3) A disease test approval also authorises the blood sample to be tested for an infectious disease.

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

A suspected transferor commits an offence if the suspected transferor, without reasonable excuse, fails to comply with a requirement made under section 12(2)(b).

Penalty: a fine of \$12 000 and imprisonment for 12 months.

Part 3 — Disease test orders

Division 1 — Preliminary

14. Purpose of Part

The purpose of this Part is to provide for the mandatory testing of a suspected transferor who is a protected person.

15. Terms used

In this Part —

application means an application under section 16;

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 Magistrates Court;

disease test order means an order of a court under this Part authorising the taking and testing of a blood sample from a suspected transferor, and includes a variation of the order under section 19(4);

lawyer means an Australian lawyer as defined in the *Legal Profession Act 2008* section 3;

third party, in relation to an application, has the meaning given in section 17(2).

Division 2 — Applications

16. Application for order for blood testing of suspected transferor

A public officer may apply to a court for a disease test order if —

- (a) there are reasonable grounds for disease testing; and
- (b) the suspected transferor is a protected person.

17. Copy of application to be served

- (1) The applicant must serve a copy of the application personally on a responsible person.
- (2) A person served under subsection (1) is a *third party* to the application.

18. Hearing an application

- (1) The court —
 - (a) must hear and decide an application with as little delay as possible and in the absence of the public; and
 - (b) may, in extraordinary circumstances, adjourn the application for no more than 24 hours to allow further evidence to be put before the court; and
 - (c) must ensure that all of the following persons are afforded the right to be represented by a lawyer at the hearing —
 - (i) the suspected transferor; and
 - (ii) a third party.
- (2) An affected public officer cannot be compelled to give evidence at the hearing.

Division 3 — Disease test orders

19. Making of disease test order

- (1) The court may make a disease test order in relation to the suspected transferor if the court is satisfied that —
 - (a) there are reasonable grounds for disease testing; and
 - (b) in the circumstances, a blood sample should be taken from the suspected transferor.
- (2) The disease test order must include a statement of all of the following —
 - (a) the full name and address of the suspected transferor;

- (b) that a police officer may apprehend the suspected transferor and detain him or her for as long as is reasonably necessary to enable the taking of a sample of the suspected transferor's blood;
 - (c) that, for the purposes of paragraph (b), a police officer may enter any place where the police officer suspects on reasonable grounds the suspected transferor might be located;
 - (d) that a police officer may take the suspected transferor to a place the police officer considers has appropriate facilities for taking the blood sample;
 - (e) that a doctor, nurse or qualified person may take a blood sample from the suspected transferor.
- (3) The disease test order may be made subject to any reasonable conditions that the court considers appropriate and specifies in the order.
- (4) The court may, by further order, vary or revoke a disease test order.

20. Explanation of disease test order

- (1) A court making a disease test order must ensure that the suspected transferor and third party are informed —
- (a) of the suspected transferor's right under section 24 to appeal to the District Court against the disease test order; and
 - (b) that the suspected transferor has a right to obtain legal advice and to communicate with a lawyer; and
 - (c) about the purpose and effect of the order; and
 - (d) that force may be used to enforce the order; and
 - (e) that failure to comply with the order is an offence.
- (2) The court must take all reasonable steps to ensure that the explanation provided to the suspected transferor is expressed in

a language and manner that the suspected transferor is likely to understand.

- (3) A failure by the court to comply with this section does not invalidate the disease test order.

21. Copy of disease test order to be served

- (1) A copy of a disease test order must be served personally on a third party.
- (2) A disease test order does not take effect until a copy of it is served in accordance with this section.

Division 4 — Consequences of issuing disease test orders

22. Effect of disease test order

- (1) A disease test order confers the powers referred to in section 19(2)(b), (c) and (d).
- (2) A disease test order —
- (a) authorises a blood sample to be taken from the suspected transferor in accordance with the order; and
 - (b) requires a responsible person who is a third party to take all reasonable steps to enable that blood sample to be taken in accordance with the order.
- (3) A disease test order also authorises the blood sample to be tested for an infectious disease.

23. Offence of failing to comply with disease test order

A responsible person who is a third party commits an offence if the responsible person, without reasonable excuse, fails to comply with a requirement referred to in section 22(2)(b).

Penalty: a fine of \$12 000 and imprisonment for 12 months.

Division 5 — Appeals

24. Appeal against disease test order

- (1) A third party may, on behalf of the suspected transferor, appeal against a disease test order to the District Court.
- (2) Unless the District Court otherwise orders, the appeal —
 - (a) must be filed without delay; and
 - (b) does not stay the operation of the disease test order.
- (3) The District Court cannot order a stay of a disease test order of more than 48 hours from the time the disease test order is made.
- (4) The District Court must hear and decide the appeal —
 - (a) within 48 hours after the disease test order is made; and
 - (b) in the absence of the public; and
 - (c) without adjourning the appeal.
- (5) The District Court may allow or refuse to allow the appeal.

25. Appeal by public officer

- (1) If a court decides not to make a disease test order under section 19, the public officer who applied for the order may appeal to the District Court against the decision.
- (2) Unless the District Court otherwise orders, the appeal must be filed without delay.
- (3) The District Court must hear and decide the appeal —
 - (a) within 48 hours after the decision not to make a disease test order; and
 - (b) in the absence of the public; and
 - (c) without adjourning the appeal.
- (4) The District Court may allow or refuse to allow the appeal.

Part 4 — General

26. Taking blood samples under disease test authorisation

- (1) A police officer executing a disease test authorisation in relation to a suspected transferor may ask a doctor, nurse or qualified person to take a blood sample from the suspected transferor.
- (2) When asking the doctor, nurse or qualified person to take the blood sample, the police officer must produce for the doctor's, nurse's or qualified person's inspection a copy of the disease test authorisation.
- (3) The doctor, nurse or qualified person may take a blood sample from the suspected transferor in accordance with the disease test authorisation.
- (4) If help is needed for taking a blood sample, the doctor, nurse or qualified person may ask another person to give any reasonably necessary help.
- (5) The doctor, nurse or qualified person, and a person helping the doctor, nurse or qualified person, may use any reasonably necessary force for taking the blood sample.
- (6) The doctor, nurse or qualified person must immediately send the sample to a pathology laboratory with appropriate facilities for testing the sample for infectious diseases.

27. Analysis of blood samples

- (1) An officer of a pathology laboratory may analyse, or arrange for someone else to analyse, a blood sample sent to the pathology laboratory under section 26.
- (2) An officer of the pathology laboratory may destroy a blood sample, or any part of the sample —
 - (a) before it has been used for the analysis or a further analysis — if it is not required for any analysis or further analysis;

- (b) after it has been used for the analysis or a further analysis — if it is not required for any further analysis.

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

A person who takes a sample under a disease test authorisation cannot require any of the following persons to make any payment (whether in money or money's worth) for or in relation to the taking or testing of a blood sample under a disease test authorisation —

- (a) the suspected transferor;
- (b) if the suspected transferor is a protected person — a responsible person, whether or not the responsible person is a third party to the application, as those terms are defined in section 15;
- (c) if the suspected transferor is a deceased person, the person who has lawful possession of the suspected transferor's estate.

29. Restriction on disclosure of results of analysis

- (1) In this section —

health professional has the meaning given in the *Civil Liability Act 2002* section 5PA;

senior next of kin, in relation to a deceased person, has the meaning given in the *Coroners Act 1996* section 37(5).

- (2) A person who conducts an analysis of a blood sample under this Act must not disclose the results of the analysis to any person other than one or more of the following —
 - (a) an affected public officer;
 - (b) the Commissioner or any other public officer acting in the course of duty;
 - (c) the suspected transferor;

- (d) if the suspected transferor is a protected person — a responsible person;
- (e) if the suspected transferor is a deceased person, the senior next of kin of the suspected transferor;
- (f) a doctor, nurse or other health professional involved in treating or providing care for an affected public officer or the suspected transferor;
- (g) a psychiatrist, psychologist or social worker providing counselling for an affected public officer or the suspected transferor;
- (h) a person to whom the disclosure is authorised or required to be made under a written law;
- (i) a prescribed person, or a person in a prescribed class of persons.

Penalty: a fine of \$9 000 and imprisonment for 9 months.

- (3) A person referred to in subsection (2) to whom information is disclosed under this section must not disclose the information except to another person referred to in subsection (2).

Penalty: a fine of \$9 000 and imprisonment for 9 months.

- (4) Subsection (3) does not apply to an affected public officer unless the disclosure is done —

- (a) by way of a public disclosure through the mass media by the affected public officer of the results of the analysis; and
- (b) in such a way as to reveal the identity of the suspected transferor.

- (5) Subsection (3) does not apply to the suspected transferor unless the disclosure is done —

- (a) by way of a public disclosure through the mass media by the suspected transferor of the results of the analysis; and

- (b) in such a way as to reveal the identity of the affected public officer.

30. Prohibition on use of blood samples for other purposes

A person must not use a blood sample taken under this Act for any purpose other than analysis under this Act.

Penalty: a fine of \$9 000 and imprisonment for 9 months.

31. Certain evidence inadmissible

- (1) In this section —

proceeding means a legal or other action or proceeding, other than an action or proceeding under this Act.

- (2) In a proceeding all of the following are not admissible in evidence —

- (a) the making of an application for a disease test authorisation;
- (b) the giving of a disease test authorisation;
- (c) the results of an analysis of a blood sample under this Act.

32. Protection from liability

- (1) No civil or criminal liability attaches to a person for the performance, or purported performance, in good faith, of a function under this Act.

- (2) If a person conducting an analysis of a blood sample under this Act discloses the results of the analysis to a person referred to in section 29(2), the disclosure is not to be regarded as —

- (a) a breach of any duty of confidentiality or secrecy imposed by law; or
- (b) a breach of professional ethics or standards or any principles of conduct applicable to the person's employment; or

- (c) unprofessional conduct.

33. Regulations

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

34. Review of this Act after 5 years

- (1) The Minister must review the operation and effectiveness of this Act as soon as practicable after the expiry of 5 years from the commencement of section 3.
- (2) The Minister must, as soon as practicable —
 - (a) prepare a report about the outcome of the review; and
 - (b) cause a copy of the report to be laid before each House of Parliament.

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Defined terms

*[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]*

Defined term	Provision(s)
adult	4
affected public officer	4
application.....	7(1), 15
approved form.....	7(1)
bodily fluid.....	4
child	4
Commissioner	4
court	15
disease test approval	7(1)
disease test authorisation.....	4
disease test order.....	15
doctor	4
FOI Act	5
health professional	29(1)
incapable person	4
infectious disease	4
lawyer	15
nurse.....	4
police officer	4
police service employee.....	4
police-related officer	4
prescribed.....	4
proceeding.....	31(1)
protected person	4
public officer.....	4
qualified person.....	4
reasonable grounds for disease testing	4
remote communication	7(1)
responsible person.....	4
senior next of kin	29(1)
senior police officer	7(1)
suspected transferor	4
third party.....	15, 17(2)
transfer of bodily fluid	4