



New South Wales

Mandatory Disease Testing Bill 2020

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to establish a scheme under which a person (a *third party*) can be ordered to provide a blood sample for testing for blood-borne diseases if—

- (a) the third party's bodily fluid has come into contact with a health, emergency or public sector worker as a result of the third party's deliberate action, and
- (b) the worker is at risk of contracting a blood-borne disease as a result.

The scheme applies only to third parties who are at least 14 years of age. For third parties who are at least 14 years of age but under 18 years of age an order is made by the Children's Court. For third parties who have a mental health or cognitive impairment, an order is made by the Local Court. For all other third parties, an order is made by the worker's senior officer, who is usually the head of the agency that employs the worker.

An order is a *mandatory testing order* and a third party must not fail, without reasonable excuse, to comply with a mandatory testing order. The maximum penalty is 100 penalty units, currently \$11,000, or imprisonment for 12 months, or both.

The Bill provides for the following matters—

- (a) the health, emergency and public sector workers to whom the proposed Act will apply,
- (b) the making of an application for a mandatory testing order,
- (c) the determination of an application for a mandatory testing order by a senior officer,
- (d) the making of a mandatory testing order by a Court,
- (e) the carrying out of the blood testing,

- (f) reviews of decisions about mandatory testing orders by the Chief Health Officer,
- (g) offences and proceedings,
- (h) the administration of the scheme and other miscellaneous matters,
- (i) consequential amendments to other Acts.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 sets out the objects of the proposed Act, which are—

- (a) to provide for mandatory blood testing of a third party in circumstances where—
 - (i) a health, emergency or public sector worker to whom the proposed Act applies comes into contact with the third party's bodily fluid as a result of the third party's deliberate action, and
 - (ii) the worker is at risk of contracting a blood-borne disease as a result of the third party's deliberate action, and
- (b) to encourage health, emergency and public sector workers to whom the proposed Act applies to seek medical advice and information about the risks of contracting a blood-borne disease while at work, and
- (c) to protect and promote the health and wellbeing of health, emergency and public sector workers to whom the proposed Act applies.

Clause 4 provides that words used in the proposed Act are defined in the Dictionary.

Clause 5 defines a *mandatory testing order* as an order that—

- (a) requires the third party in relation to whom the order is made to provide blood for testing for certain diseases at a specific place within a specific period, and
- (b) authorises the third party's blood to be tested for the blood-borne diseases specified in the order.

A mandatory testing order may be made by a senior officer under proposed Part 3, a Court under proposed Part 4 or the Chief Health Officer under proposed Part 7.

Clause 6 requires the concurrence of the Minister administering the *Public Health Act 2010* for certain regulations to be made under the proposed Act.

Part 2 Applications for mandatory testing orders

Clause 7 provides for a worker to apply for a mandatory testing order in relation to a third party following an incident during which the worker comes into contact with the third party's bodily fluid while at work. A worker must apply for a mandatory testing order within 5 business days after the incident.

Clause 8 requires a worker to consult with a medical practitioner, who, where possible, has qualifications or experience in blood-borne diseases, before making an application for a mandatory testing order.

Clause 9 sets out the information that a worker applying for a mandatory testing order must include in the application.

Part 3 Determination of applications for mandatory testing orders

Clause 10 requires an application for a mandatory testing order by a worker to be determined by the worker's senior officer as follows—

- (a) if it appears to the senior officer, on the information available, that the third party is a vulnerable third party—
 - (i) by deciding to apply to a Court for a mandatory testing order, or
 - (ii) by refusing the application,
- (b) if it does not appear to the senior officer, on the information available, that the third party is a vulnerable third party—
 - (i) by making a mandatory testing order, or
 - (ii) by refusing the application.

A senior officer must determine an application within 3 business days and must be satisfied that testing the third party's blood for blood-borne diseases is justified in all the circumstances.

A **vulnerable third party** means a third party who—

- (a) is at least 14 years of age but under 18 years of age, or
- (b) is suffering from a mental illness or mental condition or is cognitively impaired, which significantly affects the vulnerable third party's capacity to consent to voluntarily provide blood to be tested for blood-borne diseases.

Clause 11 provides that a senior officer may refuse an application for a mandatory testing order if the third party cannot be located. A senior officer may also refuse an application on other grounds the senior officer considers appropriate.

Clause 12 requires the senior officer to notify the parties of the decision and reasons for the decision.

Part 4 Mandatory testing orders for vulnerable third parties

Clause 13 provides for a senior officer to apply to the Children's Court or the Local Court, as appropriate, for a mandatory testing order for a vulnerable third party.

Clause 14 provides for the Court to make a mandatory testing order only if satisfied that, on the balance of probabilities, testing the vulnerable third party's blood for blood-borne diseases is justified in all the circumstances.

Clause 15 makes further provision regarding the jurisdiction of the Local Court and the Children's Court.

Clause 16 enables a Court to continue dealing with an application for a mandatory testing order for a vulnerable third party even if it no longer appears to the Court that the third party is a vulnerable third party.

Part 5 Content and service of mandatory testing orders

Clause 17 sets out the information that must be contained in a mandatory testing order.

Clause 18 deals with the service of mandatory testing orders and requires a mandatory testing order to be personally served on the third party in relation to whom the order is made, no later than 5 business days after the order is made.

Part 6 Carrying out of mandatory testing

Clause 19 authorises a person of a class approved by the Secretary of the Ministry of Health to take blood from a third party under a mandatory testing order, even if the third party does not

consent to provide blood. The third party's blood is required to be tested in a pathology laboratory accredited by the National Association of Testing Authorities.

Clause 20 gives functions to police officers and correctional officers in relation to the taking of blood from a third party who is in police custody or in a correctional centre, including the use of reasonable force.

Clause 21 requires a pathology laboratory carrying out testing of a third party's blood under a mandatory testing order to provide the blood test results to the medical practitioners authorised by the worker and the third party concerned.

Part 7 Review by Chief Health Officer

Clause 22 enables a worker and a third party to apply to the Chief Health Officer for a review of a decision by a senior officer in certain circumstances.

Clause 23 provides that a mandatory testing order made by a senior officer continues to have effect until the review is determined by the Chief Health Officer.

Clause 24 requires the Chief Health Officer to determine a review within 3 business days and to consider submissions from the third party in certain circumstances.

Clause 25 requires the Chief Health Officer to notify the parties of the results of a review.

Part 8 Offences and proceedings

Clause 26 makes it an offence for a third party in relation to whom a mandatory testing order is made to fail, without reasonable excuse, to comply with the order. The maximum penalty is 100 penalty units, currently \$11,000, or imprisonment for 12 months, or both. The proposed section also requires a third party who is sentenced to imprisonment for failing to comply with a mandatory testing order to serve the sentence consecutively with any other sentences of imprisonment the third party is currently serving.

Clause 27 makes it an offence for a worker or third party to provide false or misleading information. The maximum penalty is 100 penalty units, currently \$11,000, or imprisonment for 12 months, or both.

Clause 28 makes it an offence to disclose information obtained in connection with the administration or execution of the proposed Act, except in certain circumstances. The maximum penalty is 100 penalty units, currently \$11,000, or imprisonment for 12 months, or both.

Clause 29 provides for offences under the proposed Act to be dealt with summarily before the Local Court.

Clause 30 provides for the inadmissibility of certain evidence in proceedings against a third party.

Clause 31 protects persons exercising functions under the proposed Act from civil and criminal liability, and from breaches of professional standards, in certain circumstances.

Part 9 Administration

Clause 32 requires the Chief Health Officer to issue guidelines to assist senior officers, medical practitioners who consult with workers who make an application for a mandatory testing order and persons taking blood from third parties under mandatory testing orders.

Clause 33 requires costs associated with a mandatory testing order to be paid by the funding provider for the worker concerned, which is usually the head of the worker's agency.

Clause 34 enables certain functions under the proposed Act to be delegated.

Part 10 Miscellaneous

Clause 35 requires the Ombudsman to monitor and report on the operation and administration of the proposed Act as soon as practicable after 12 months after the commencement of the proposed section and every 3 years after that.

Clause 36 requires the Minister administering the proposed Act to review the proposed Act as soon as practicable after the Ombudsman's first report.

Clause 37 enables the Governor to make regulations for the purposes of the proposed Act.

Schedule 1 Savings, transitional and other provisions

Schedule 1 enables savings and transitional regulations to be made.

Schedule 2 Amendment of other legislation

Schedule 2.1 makes a consequential amendment to the *Crimes (Sentencing Procedure) Act 1999* that relates to proposed section 26.

Schedule 2.2 amends the proposed Act to update the definition of *vulnerable third party* when the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* commences.

Schedule 2.3 amends the *Public Health Act 2010* to enable the disclosure of information about a person who has HIV for the purposes of the proposed Act.

Dictionary

The Dictionary defines words used in the proposed Act. In particular, the Dictionary lists the *workers* to whom the proposed Act applies and the *senior officer* for each worker.