



Our ref: 20/8

2 March 2021

The Hon Wes Fang MLC
Chair
Standing Committee on Law and Justice
Legislative Council
Parliament of New South Wales

By email: law@parliament.nsw.gov.au

Dear Chair

Answer to Question on Notice - Inquiry into the Mandatory Disease Testing Bill 2020 (NSW)

1. Thank you again for the opportunity for the New South Wales Bar Association (**the Association**) to appear before the Standing Committee on Law and Justice's (**the Standing Committee's**) inquiry into the Mandatory Disease Testing Bill 2020 (NSW) (**the Bill**).
2. The Association's Senior Vice-President, Ms Gabrielle Bashir SC, appeared on the Association's behalf and was asked during the hearing on 11 February 2021 by the Hon Trevor Khan MLC what the position was in Victoria with regard to the testing of children. The Association undertook to answer this question on notice.
3. It is the Association's understanding that children can be the subject of orders for testing made under Division 5 of Part 8 of the *Public Health and Wellbeing Act 2008* (Vic) (**the Victorian Act**).
4. Unlike the scheme proposed in the Bill, the *Victorian Act* does not provide an age limit on the persons against whom a disease testing order can be made. The *Victorian Act* clearly envisages that the person tested may be a "child"¹ by its stipulation in paragraph 138(3)(a) that counselling must be given by a registered medical practitioner to the parents of tested children. The Department of Health's guidelines on the disease testing regime in Victoria have also been drafted on the assumption that children are persons to whom mandatory testing and related orders may apply.²
5. It should be noted that authorised senior medical officers who under the *Victorian Act* may, in response to "incidents" at a relevant "health service", exercise the Chief Health Officer's powers cannot do so where a child is the potential source of infection.³ Such testing must always, in the case of children, be ordered by the Chief Health Officer.
6. In its written submission to the Standing Committee, the Australian Medical Association (NSW) Ltd noted the extremely low prevalence of blood-borne diseases amongst those under 18.⁴ The epidemiologically negligible number of children suffering from HIV or hepatitis B or C would, of course, militate against the making of a testing order against a person under the age of 18 and would appear to be a matter where it would be open to the Chief Health Officer to consider under paragraph 134(1)(d) of

¹ The term "child" is defined in s 3(1) of the *Victorian Act* as anyone under the age of 18.

² Department of Health, *Guidelines for post-incident testing orders and authorisations Part 8, Division 5 of the Public Health and Wellbeing Act 2008*, State of Victoria, (Revised November 2012), 2, 4, 9, 11 and 15 (**the Guidelines**).

³ See the gloss on ss 134(1)(c)(ii) and 137(3) of the *Victorian Act* given on page 4 of the Guidelines.

⁴ Submission N^o 19 (21 December 2020) 4.

the *Victorian Act* when determining whether sample screening is “*necessary*”. Moreover, when deciding whether the circumstances are “*so exceptional*” as to justify permitting a police officer to use reasonable force to obtain a sample under subsection 134(4) of the *Victorian Act*, the Magistrates’ Court would not be prevented from taking into account the age of the person whose blood is to be taken.

7. The issue of whether and how the Victorian scheme applies to children is somewhat academic when one notes that the testing powers have never been used by the Chief Health Officer against any individual (regardless of age) since Division 5 of Part 8 of the *Victorian Act* came into force on 1 January 2010.
8. Under section 143 of the *Victorian Act*, the Chief Health Officer must include in the Department of Health and Human Services’ annual reports the number of mandatory testing orders made by him/her. The period in which the Victorian disease testing scheme has been in force is covered by the last 11 annual reports from the Department of Health and Human Services (formerly the Department of Health), spanning the financial years 2009/10 to 2019/20. Those annual reports confirm that no tests have been ordered under section 134 of the *Victorian Act* since 1 January 2010, as is shown in the table below.

Annual report	Number of orders made under s 134
2019/20	nil ⁵
2018/19	nil ⁶
2017/18	nil ⁷
2016/17	nil ⁸
2015/16	nil ⁹
2014/15	nil ¹⁰
2013/14	nil ¹¹
2012/13	nil ¹²
2011/12	nil ¹³
2010/11	nil ¹⁴
2009/10	nil ¹⁵

9. The reluctance of the Chief Health Officer to exercise his/her powers to order disease testing indicates that section 134 of the *Victorian Act* has fallen into disuse.

⁵ Department of Health and Human Services, *Department of Health and Human Services annual report 2019–20* (October 2020) 169.

⁶ Department of Health and Human Services, *Department of Health and Human Services annual report 2018–19* (October 2019) 162.

⁷ Department of Health and Human Services, *Annual report 2017–18 Victorian Department of Health and Human Services* (September 2018) 156.

⁸ Department of Health and Human Services, *Annual report 2016–17 Victorian Department of Health and Human Services* (October 2017) 109.

⁹ Department of Health and Human Services, *Annual report 2015–16 Victorian Department of Health and Human Services* (October 2016) 99.

¹⁰ Department of Health and Human Services, *Annual report 2014–15 Victorian Department of Health and Human Services* (October 2015) 107.

¹¹ Department of Health and Human Services, *Annual report 2013–14 Department of Health* (October 2014) 165.

¹² Department of Health and Human Services, *Annual report 2012–13 Department of Health* (October 2013) 156.

¹³ Department of Health and Human Services, *Annual report 2011–12 Department of Health* (September 2012) 145.

¹⁴ Department of Health and Human Services, *Annual report 2010–11 Department of Health* (26 October 2011) 173.

¹⁵ Department of Health and Human Services, *Annual report 2009–10 Department of Health* (16 September 2010) 62.

10. It can reasonably be said, therefore, that while children are *de jure* covered by the disease-testing regime in Victoria, they appear to be *de facto* excluded from its operation. Consequently, the Victorian system does not, in the Association's view, provide a basis to conclude that the Bill should apply to children between the ages of 14 and 17.
11. The special status of children is enshrined in the *Convention on the Rights of the Child* (1989) (**the Convention**) and is recognised throughout the corpus of Australian law. Article 16 of the *Convention* expressly guarantees to children a right to privacy, which encompasses a right to bodily integrity. While not absolute, that right to privacy must not be subject to arbitrary or unlawful interference. Any encroachment on a child's privacy must be both a necessary and proportionate means to achieve a legitimate aim within, and by the standards of, a democratic society.
12. In the Association's view, the application of the Bill's mandatory disease testing regime to children would:
 - a. represent an arbitrary and unfettered interference with the privacy of those aged between 14 and 17 in that no account is taken of the extremely low prevalence of blood-borne diseases such as HIV amongst children;
 - b. fail to recognise adequately the special status of children and the weight needed to be accorded to their best interests and their age when determining whether to subject them to invasive blood sampling; and
 - c. amount to an unnecessary and/or wholly disproportionate means of protecting the health and wellbeing of key workers because the mandatory collection and testing of children's blood would provide little, if any, assistance with the rapid diagnosis, management or treatment of diseases.
13. The Association, therefore, repeats its opposition to the enactment of the Bill in its current form and to the application of any form of mandatory disease testing to children in NSW.
14. If the Association can be of any further assistance to the Standing Committee, please contact at first instance the Association's Director of Policy and Public Affairs, _____ on _____ or at _____.

Yours sincerely

Michael McHugh SC
President