

## **INQUIRY INTO MANDATORY DISEASE TESTING BILL 2020**

**Organisation:** New South Wales Bar Association

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*Our ref: 20/178*

21 December 2020

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

*By email: Law@parliament.nsw.gov.au*

Dear Chair

***Inquiry into the Mandatory Disease Testing Bill 2020 (NSW)***

1. I write in response to the Standing Committee on Law and Justice's (**the Standing Committee's**) invitation to the New South Wales Bar Association (**the Association**) to make a submission to the inquiry into the Government's Mandatory Disease Testing Bill 2020 (NSW) (**the Bill**).

*Introductory remarks*

2. The Bill would, if enacted, permit the mandatory blood testing of a person (defined in the Bill as the 'third party' or 'vulnerable third party') in circumstances where that person's bodily fluid, through the person's deliberate action, comes into contact with prescribed health, emergency or public sector workers (as defined in the clause 4 dictionary and accompanying table of 'workers').
3. The Association recognises the need for legislation that applies in limited circumstances where rapid diagnostic testing is needed to protect the wide range of workers covered by the Bill.
4. The Association supports the purposes and objects of the proposed scheme. We note that similar legislation exists in Western Australia, South Australia, Queensland and Victoria.
5. Recognising that the making of a 'mandatory testing order' compels a person to provide an intimate sample, this submission sets out the Association's support for safeguards contained in the Bill, as well as our suggestions as to how those safeguards could be strengthened.

*The safeguards currently within the Bill*

6. The Association supports the following safeguards contained in the Bill:
  - (i) that the Bill relates to a limited amount of 'relevant diseases' which are blood-borne diseases (set out in the clause 4 dictionary and being HIV, Hepatitis A and B and other such blood-borne disease as may be prescribed by regulations);
  - (ii) that the Bill only applies to 'deliberate' acts of 'third parties' (including 'vulnerable third parties'), and where accidental contact is made, a person's consent to testing would still be required;

- (iii) that mandatory testing of a child under the age of 14 is not permitted (see clause 7(2));
- (iv) that a ‘senior officer’, defined in the clause 4 dictionary (which in the case of members of NSW Police Force is a police officer of the rank of Inspector or above) is the person who must make or determine the application for a ‘mandatory testing order’ for non-vulnerable ‘third parties’ or, in the case of ‘vulnerable third parties’ determining whether to apply to the relevant court for an order;
- (v) that the ‘senior officer’ must take into account a range of matters in making or determining a mandatory testing application (set out in clause 10 of the Bill), including seeking the consent of, and considering any submissions of, the ‘third party’ or ‘vulnerable third party’;
- (vi) that the decision of a ‘senior officer’ to grant, make or refuse a ‘mandatory testing order’ must be in writing to the prescribed worker as well as to the ‘third party’ or ‘vulnerable third party’ (clause 13);
- (vii) that both ‘workers’ and ‘third parties’ may apply to the Chief Health Officer for review of senior officers’ decisions (see Part 7 of the Bill) and that the Chief Health Officer must be notified of, and may make submissions regarding, any application to the court for mandatory testing orders concerning ‘vulnerable third parties’;
- (viii) that in the case of ‘vulnerable third parties’,<sup>1</sup> only the Local Court or Children’s Court (as applicable) can order mandatory blood testing (see Part 4 of the Bill);
- (ix) that the Chief Officer must be notified of, and may make submissions on, any application to the court for a mandatory testing order (see clauses 13(3) and 14(3)(c) of the Bill);
- (x) that, save for in criminal proceedings against ‘third parties’ for offences under clause 26 or clause 27 of the Bill,<sup>2</sup> none of the following evidence may be admitted in proceedings against a ‘third party’:
  - a. information given or documents produced for the purposes of an application for a mandatory testing order or the determination of the application, or
  - b. the third party’s blood test results under a mandatory testing order;<sup>3</sup>
- (xi) that the relevant ‘senior officer’ must, at the end of each quarter, report to the Ombudsman about any determinations of an application for a mandatory testing order made by the senior officer during the quarter, including the reasons for the determination (see clause 12(3));
- (xii) that the Ombudsman will be required to report on the operation and administration of the mandatory testing scheme 12 months after its commencement and triennially thereafter (see clause 35) and may, in accordance with the amendment to the Bill agreed upon by the Legislative Assembly on 19 November 2020 (see clause 35(3A)),

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<sup>1</sup> Defined in the clause 4 dictionary as persons aged at least 14 but under 18 or those who suffer from ‘a mental illness or mental condition, or is cognitively impaired, within the meaning of the *Mental Health (Forensic Provisions) Act 1990* [NSW], which significantly affects the vulnerable third party’s capacity to consent to voluntarily provide blood to be tested for blood-borne diseases’.

<sup>2</sup> Being a failure to comply with a mandatory testing order or the provision of false or misleading information, respectively.

<sup>3</sup> See clause 30(1) of the Bill. The Bill’s provisions regarding the inadmissibility of evidence also apply to third parties in relation to whom an application for an order was made but refused (clause 35(3)).

require a senior officer of NSW Police Force to provide demographic information about those subject to orders and applications for testing orders; and

- (xiii) that the Bill, if enacted, is to be subject to a ministerial review as soon as possible after the Ombudsman's first report, with the Minister being required to table a report on the outcome of his/her review in each House (see clause 36).

#### *Proposed Additional safeguards*

7. To ensure that mandatory disease testing is only ordered as a measure of last resort and is used in a proportionate manner, the Association proposes the following additional safeguards and amendments to the Bill:

- (i) The Bill should expressly state that, if alternative measures are available that are equally effective in ensuring rapid diagnosis and clinical management for any 'prescribed worker', the measure which is least restrictive of the rights of the 'third party' or 'vulnerable third party' person should be chosen. This safeguard is contained in section 134(11) of the *Public Health and Wellbeing Act 2008* (Vic);
- (ii) The definition of 'vulnerable third party' (clause 4(1)) should be expanded, to reflect the potentially wide application of the Bill. There seems to be no clear policy justification for the definition of 'vulnerable third party' to remain as limited as it currently is. The current definition does not include, for instance, those who identify as Aboriginal people or as Torres Strait Islanders;
- (iii) The Bill does not contain any mechanism for an appeal by a 'third party' or 'vulnerable third party' against a 'mandatory testing order'. Appeal rights should exist to ensure the opportunity for review by a court.

A decision relating to a determination by a 'senior officer' concerning a 'third party' should be appealable as a *de novo* hearing in the Local Court.

A decision relating to a determination by the Children's Court or Local Court relating to a 'vulnerable third party' (or person falling within cl 16) should be appealable as a *de novo* hearing to the District Court.

To ensure that the process is determined as quickly as possible, such appeals should be filed within a short space of time (such as within 14 days, with a discretion to increase that period), and should be heard as soon as possible by the relevant court to which the appeal is made;

- (iv) While it is noted that the Bill does not apply to those under 14, the proposed mandatory testing regime should not, in the Association's view, apply to children of any age. Clause 7(2) ought to be amended to ensure that mandatory tests for blood-borne diseases cannot be conducted on any person under the age of 18;
- (v) The Bill does not deal with the destruction of samples taken pursuant to a 'mandatory testing order'. The Bill should require that all blood samples are compulsorily destroyed after completion of testing. There is no reason to retain the samples taken pursuant to the operation of the Bill;
- (vi) To avoid any potential widening of the use of blood samples, there should be an absolute prohibition on the use of samples in any other type of testing (including DNA testing).

### *Conclusion*

8. While the Association supports the Bill's intentions, the Association can only support the Bill's enactment if the additional safeguards identified above are incorporated into the Bill.
9. The Association urges the Standing Committee to recommend to the Parliament the inclusion of the above-mentioned proposed safeguards in the Bill to ensure that the mandatory testing scheme achieves its legitimate aim of protecting public servants without arbitrarily, unnecessarily or disproportionately encroaching upon the rights of individuals in NSW.
10. Thank you again for the opportunity for the Association to provide input on this important issue. If the Association can be of any further assistance to the Standing Committee, our contact at first instance is the Association's Director of Policy and Public Affairs

Yours sincerely

Michael McHugh SC  
President