



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:CBms301023

30 October 2023

Mr Paul Miller
NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

By email: MDT@ombo.nsw.gov.au

Dear Mr Miller,

Operation of the Mandatory Disease Testing Act 2021

Thank you for the invitation to provide a submission as part of your consultation on the operation of the *Mandatory Disease Testing Act 2021* (**Act**). The Law Society's Criminal Law Committee contributed to this submission.

The Law Society did not support the mandatory testing scheme under the Bill, for the reasons set out in our submission to the Standing Committee on Law and Justice Inquiry for the Mandatory Disease Testing Bill 2020 (**enclosed** for convenience). In particular, we queried the effectiveness of the requirement to test the third party for blood-borne disease rather than the worker at risk of infection. We continue to hold this position and concerns in relation to the Act.

We understand that while Legal Aid NSW has data on how many matters have been prosecuted in Court under the Act, there is no information available about the number of applications and mandatory testing orders made. We understand from Legal Aid that the prosecution rate is low, and query whether the low numbers also extend to other uses of the Act.

We note that, under s 37(2) of the Act, the Minister is required to review the Act as soon as practicable after the Ombudsman publishes his first report in order to "to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing the objectives."¹ We suggest that it would assist the Minister's review if the Ombudsman's report included data on the total number of applications and mandatory testing orders made under the Act. In addition, we suggest that it would assist the review if the Ombudsman's report included information on whether there have been any prosecutions for failure to comply with mandatory testing orders under the Act, and if so the outcomes of these prosecutions.

¹ Section 37(1) of the *Mandatory Disease Testing Act 2021*.

The Law Society contact for this matter is Mahrukh Sarwar, Policy Lawyer, who can be reached on (02) 9926 0129 or at mahrukh.sarwar@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The letters are cursive and fluid.

Cassandra Banks
President

Encl.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC: RHrg2001177

8 December 2020

The Hon. Wes Fang MLC
Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

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

Dear Mr Fang,

Inquiry into the Mandatory Disease Testing Bill 2020

We refer to the Mandatory Disease Testing Bill 2020 introduced into Parliament on 11 November 2020, and referred to the Standing Committee on Law and Justice for inquiry and report on 19 November 2020.

The Bill provides for mandatory blood testing of a person in circumstances where the person's bodily fluid, through the person's deliberate action, comes into contact with an emergency, health or other defined public sector worker and the worker is at risk of contracting a blood-borne disease.

The Law Society does not support the legislation. A mandatory testing scheme removes the autonomy of a person to consent to medical procedures and for their health information to remain private.

We query the policy justification for testing the third party rather than the worker. Such a test cannot provide a conclusive answer about whether the third party has contracted an illness since the contact, due to considerations such as lag time for test detection. The only way for the worker to have legitimate peace of mind is to be tested themselves as soon as possible, and then again at an appropriate period when certain diseases become detectable. The information sought is whether the worker has a blood-borne disease. The appropriate avenue to obtain this information is to test the worker.

Legislating to force a person to undergo testing, with a penalty of a fine and/or imprisonment if they do not acquiesce, when that avenue is a less reliable way of obtaining the information sought, is, in our view, unacceptable.

We note that the workers to whom the Bill would apply include workers who regularly deal with people with complex emotional and other needs, and other vulnerable people. We consider that improvements to current agency policy and practice, including improvements to early management of an incident, the medical information provided to the affected worker and

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provision of appropriate early counselling, may deliver significant benefits without the need to introduce mandatory disease testing.

If the Bill is to proceed, we submit that children should be excluded from the mandatory testing scheme.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'R Harvey', with a stylized flourish at the end.

Richard Harvey
President