



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: CLC/IIC:JBjf101125

10 November 2025

Sallie McLean  
Director, Law Enforcement and Crime  
Policy, Reform and Legislation  
Department of Communities and Justice

By email: [policy@dcj.nsw.gov.au](mailto:policy@dcj.nsw.gov.au)

Dear Ms McLean,

### **REVIEW OF THE *MANDATORY DISEASE TESTING ACT 2021* (NSW)**

The Law Society is grateful for the opportunity provide feedback on the *Mandatory Disease Testing Act 2021* (NSW) as part of the statutory review conducted by the Department of Communities and Justice and the NSW Police Force, on behalf of the Attorney General and the Minister for Police and Counter-terrorism. This submission is informed by the Law Society's Criminal Law and Indigenous Issues Committees.

In its submission to the Standing Committee on Law and Justice in 2020, the Law Society opposed the introduction of the mandatory disease testing scheme under the Mandatory Disease Testing Bill 2020. In 2023, the Law Society reiterated its opposition to the scheme in its submission to the NSW Ombudsman on the operation of the *Mandatory Disease Testing Act 2021* (NSW) (**Act**) (attached). We continue to hold the concerns previously expressed.

For the reasons set out in our previous submissions and below, the Law Society endorses Recommendation 1 made by the NSW Ombudsman in its Report on the Operation and Administration of the *Mandatory Disease Testing Act 2021* (**Report**):

That consideration be given to whether the Act should be continued at all, and whether the administrative resources currently applied to the scheme would be better directed toward providing improved avenues of advice and support directly to front-line workers who become exposed to bodily fluids in the workplace. That could include establishing and funding a panel of specialist blood-borne disease clinicians to be available for immediate consultations with workers (and their general practitioners) if required following a workplace incident of exposure to bodily fluids.<sup>1</sup>

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<sup>1</sup> NSW Ombudsman, 'Mandatory disease testing in NSW – monitoring the operation and administration of the Mandatory Disease Testing Act 2021' (February 2025), available at <<https://cmsassets.ombo.nsw.gov.au/assets/Reports/Mandatory-disease-testing-in-NSW-monitoring-the-operation-and-administration-of-the-Mandatory-Disease-Testing-Act-2021-February-2025.pdf>> p xi (**Report**).

## Policy objectives and appropriateness of the Act

The Law Society recognises the significant stress and anxiety experienced by health, emergency and public sector workers who may, in the execution of their duties, be deliberately exposed to a third party's bodily fluids. We reiterate our view that the mandatory disease testing scheme is ineffective in responding to the legitimate health concerns of frontline workers. Testing a third party cannot conclusively determine whether a worker has contracted a blood-borne illness after exposure to the third party's bodily fluid. In our view, forcing persons to undergo testing at risk of a fine or imprisonment if they do not comply,<sup>2</sup> when these test results cannot confirm whether the worker has contracted any illness, is an unnecessary and disproportionate response, and therefore unreasonable intrusion on a person's bodily autonomy.

Recent findings of the NSW Ombudsman indicate that the mandatory testing scheme established under the Act has not achieved its policy objectives. In a survey of thirty workers who had applied for a mandatory disease testing order, the NSW Ombudsman found no worker had their treatment changed following the third party being tested, no worker felt that the scheme promoted their wellbeing, and some workers felt that the process of applying for a mandatory disease testing order had, in fact, added to their anxiety and stress.<sup>3</sup>

In addition to establishing the mandatory disease testing scheme, the Act's objectives include encouraging frontline workers to seek medical advice and information about blood-borne disease transmission risk, and to promote the health and wellbeing of frontline workers.<sup>4</sup> The Law Society suggests these important and valid objectives would be better achieved by ensuring the availability of specialist medical services, information and support for all frontline workers exposed to bodily fluids, whether such exposure is deliberate or otherwise.

## If the mandatory disease testing scheme is continued

As noted above, the Law Society endorses the NSW Ombudsman's recommendation to discontinue the Act. However, if the mandatory disease testing scheme is continued, we strongly support consideration of the Report's other recommendations and emphasise our key concerns below.

### Saliva as a 'bodily fluid'

The Law Society endorses Recommendation 28 of the Report, to omit saliva as a 'bodily fluid' under the Act.<sup>5</sup> The Chief Health Officers' guidelines indicate that there is no risk of blood-borne virus transmission from exposure to saliva only, such that occurs with spitting and biting.<sup>6</sup> Despite there being no risk of transmission, from 29 July 2022 to 31 December 2023, 63% of applications for mandatory disease testing orders were made for incidents involving exposure to saliva only.<sup>7</sup> Of those, 59% resulted in a senior officer making a mandatory disease testing order, applying to court for an order, or testing the third party with their consent.<sup>8</sup>

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<sup>2</sup> *Mandatory Disease Testing Act 2021* (NSW), s 27.

<sup>3</sup> Report, p iii, 26-27, 45.

<sup>4</sup> *Mandatory Disease Testing Act 2021* (NSW), s 3(b) and (c).

<sup>5</sup> Report, p 74-75.

<sup>6</sup> NSW Health, 'Chief Health Officer's guidelines for the *Mandatory Disease Testing Act 2021*' (Jul 2022), p 8-9.

<sup>7</sup> NSW Department of Communities and Justice, '*Mandatory Disease Testing Act 2021 – Statutory Review Consultation Paper*' (October 2025), p 6 (**Consultation Paper**).

<sup>8</sup> Ibid.

Proceeding with mandatory testing despite there being no risk of transmission is, in our view, contrary to the intention of the scheme, unnecessarily adds to the workload of the courts, and inappropriately exposes third parties to unnecessary medical interference.

The Law Society also queries whether the inclusion of saliva as a relevant bodily fluid under the Act may be contributing to misinformation and misunderstanding among workers about the risk of transmission of blood-borne diseases, and may be reinforcing, rather than alleviating, stress and fear among workers about the potential transmission of blood-borne diseases in cases where those concerns are medically unsubstantiated.<sup>9</sup>

In circumstances where the exposure to saliva presents no risk of blood-borne disease transmission and its inclusion as a relevant bodily fluid may contribute to misinformation about transmission risk, we strongly support omitting saliva as a relevant bodily fluid under the Act.

### Review processes

The Law Society endorses consideration of Recommendations 7 to 15 of the Report, which aim to improve review processes under the Act.<sup>10</sup> Currently, a decision by a senior officer to make or refuse a mandatory disease testing order is reviewable by the Chief Health Officer on application by either the worker or the third party within one business day of being notified of the senior officer's decision.<sup>11</sup> Our key concerns with this review process include:

1. Notice to a third party about their review rights is often given after the review application period, being one business day, has already expired.<sup>12</sup>
2. A third party's application for review must include a copy of the mandatory disease testing order.<sup>13</sup> However, third parties often do not receive a copy of the order until after the review application period has expired.<sup>14</sup>
3. A time limit of one business day to apply for the review of a mandatory disease testing order is unreasonable and unfair, especially if the third party is in custody or otherwise vulnerable, for example due to mental health or cognitive impairment.<sup>15</sup>
4. While the Act does not limit the scope of the Chief Health Officer's review of the senior officer's decision, the Chief Health Officer has advised the NSW Ombudsman that they only consider the review from a health perspective.<sup>16</sup> It does not appear that the legality of the application, or any legal issues raised, are considered in the review.

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<sup>9</sup> Report, p 27.

<sup>10</sup> Report, p xii-xiii.

<sup>11</sup> *Mandatory Disease Testing Act 2021* (NSW), s 23.

<sup>12</sup> Report, p 50.

<sup>13</sup> *Mandatory Disease Testing Regulation 2022* (NSW), reg 7(2).

<sup>14</sup> Report, p 51.

<sup>15</sup> Report, p 53.

<sup>16</sup> Report, p 47.

5. Under the Act, even if an application for review is made by the third party, the third party must still comply with the mandatory testing order.<sup>17</sup> The NSW Ombudsman reported that, in most cases, testing will proceed before the outcome of the review is known.<sup>18</sup>

We strongly support consideration of the Report's recommendations to ensure that the review process is accessible, fair and considers the legality of the mandatory disease testing application.

#### Testing with consent

Of the 139 mandatory disease testing applications made from 29 July 2022 to 31 December 2023, the third party consented to testing in 33% of cases.<sup>19</sup> Noting the substantial number of applications which resolve with testing by consent, the Law Society is especially concerned by the procedure followed in these circumstances. The Crown Solicitor advised the NSW Ombudsman that if the consent of the third party to testing is obtained, the senior officer must then formally "refuse" the application.<sup>20</sup> The testing of the third party then proceeds entirely outside the framework of the Act, causing a number of procedural safeguards otherwise afforded to third parties to fall away.<sup>21</sup> In our view, and consistent with Recommendation 39 of the Report, testing by consent should be conducted within the framework of the Act and be subject to the same safeguards as if testing was ordered and conducted without the third party's consent.<sup>22</sup>

#### Vulnerable third parties

Under the Act, a vulnerable third party is defined as a child aged 14 to 17 years, or a person with a mental health or cognitive impairment that significantly affects their capacity to consent to testing for blood-borne diseases.<sup>23</sup> An application for a mandatory disease testing order for a vulnerable third party must be made to the court.<sup>24</sup>

We are concerned by the Report's finding that despite a disproportionate number of mandatory disease testing order applications being made against Aboriginal and Torres Strait Islander people,<sup>25</sup> third parties who are Aboriginal and Torres Strait Islander have been identified as "vulnerable" at a lower rate than third parties who are non-Indigenous.<sup>26</sup> This appears at odds with the well-documented high rates of mental health issues and cognitive impairment amongst Aboriginal and Torres Strait Islander people in contact with the criminal justice system,<sup>27</sup> and may indicate that police are failing to properly identify vulnerable third parties. We support the Report's recommendation to expand the definition of vulnerable third parties to include, by default, Aboriginal and Torres Strait Islander people.<sup>28</sup> We further suggest the legislation be amended to require that in

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<sup>17</sup> *Mandatory Disease Testing Act 2021* (NSW), s 24(1).

<sup>18</sup> Report, p 54-55.

<sup>19</sup> Consultation Paper, p 6.

<sup>20</sup> Report, p 86.

<sup>21</sup> Report, p 88-89.

<sup>22</sup> Report.

<sup>23</sup> *Mandatory Disease Testing Act 2021* (NSW), Dictionary.

<sup>24</sup> *Ibid*, section 11.

<sup>25</sup> Report, p 29.

<sup>26</sup> Report, p 29, 62.

<sup>27</sup> Report, p 62-63.

<sup>28</sup> *Ibid*, p 67.

all applications where the third party is Aboriginal or Torres Strait Islander, the senior officer must refer the third party to the Aboriginal Legal Service (ACT/NSW) or Legal Aid NSW for legal advice.

### Children and young people

The Law Society is also concerned by the Report's findings that a disproportionate number of mandatory disease testing applications have been made against young people aged 14 to 17.<sup>29</sup> In our view, children should be excluded from the mandatory testing scheme, noting the very low prevalence of transmissible blood-borne diseases in children. We emphasise the submission of the Australian Medical Association:

The prevalence of BBV [blood-borne viruses] within under 19-year-olds in NSW in 2023 stands at only 9 cases. Similarly, there is a very low prevalence of Hepatitis B and C within this age group. To forcibly engage a child in venepuncture, without any health benefit for the child, when the utility of such a result is negligible, is contrary to the basics of medical ethics, such as beneficence and non-maleficence.<sup>30</sup>

### Ombudsman monitoring and reporting

The Law Society endorses the Ombudsman's recommendations in relation to monitoring and reporting.<sup>31</sup> In particular, we support adoption of Recommendation 60, which would require agencies to seek and, if provided, keep data relating to the age, gender, local government area of residence, cultural and linguistic diversity, sexual orientation and disability status of third parties. In our view, the collection of accurate data is essential to proper oversight of the mandatory disease testing scheme and the identification of affected cohorts who may be disproportionately impacted, such as Aboriginal and Torres Strait Islander people.

The Law Society is grateful to provide our feedback on the Act. Inquiries at first instance may be directed to Jade Fodera, Policy Lawyer, at [jade.fodera@lawsociety.com.au](mailto:jade.fodera@lawsociety.com.au) or (02) 9926 0218.

Yours sincerely,



**Jennifer Ball**  
President

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<sup>29</sup> Ibid, p 12.

<sup>30</sup> Australian Medical Association, 'Submission on the Mandatory Disease Testing Act 2021' (3 November 2023), available at <<https://www.amansw.com.au/wp-content/uploads/2023/12/AMA-NSW-Submission-to-the-NSW-Ombudsman-Review-of-Mandatory-Testing-Legislation-.pdf>> p 2.

<sup>31</sup> See: Report, recommendations 54 – 62.



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](mailto: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."<sup>1</sup> 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.

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<sup>1</sup> 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](mailto:mahrukh.sarwar@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'CBanks'.

Cassandra Banks  
**President**

**Encl.**



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](mailto: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

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney  
ACN 000 000 699 ABN 98 696 304 966

[lawsociety.com.au](http://lawsociety.com.au)

T +61 2 9926 0333 F +61 2 9231 5809  
E [lawsociety@lawsociety.com.au](mailto:lawsociety@lawsociety.com.au)



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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](mailto: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**