

Monitoring the *Mandatory Disease Testing Act 2021* (NSW)

Legal Aid NSW submission to
NSW Ombudsman
November 2023



Legal Aid
NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries

and circuit locations through the Family Advocacy and Support Service, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

Name Ruth Carty, Senior Law Reform Officer, Strategic Law Reform Unit

2. Executive summary

Legal Aid NSW welcomes the opportunity to make a submission to the NSW Ombudsman on the *Mandatory Disease Testing Act 2021 (NSW)* (**the Act**).

This submission outlines Legal Aid NSW's practical experience with the Mandatory Disease Testing (**MTD**) scheme and makes recommendations for reform.

Legal Aid NSW acknowledges the essential work of police,¹ corrective services,² and emergency services personnel³ and the need to ensure that such individuals have a safe working environment. We also recognise the stress that potential exposure to diseases brings to these individuals and their families. Responses to identified health-related risks arising from exposure incidents should, however, be balanced against fundamental individual rights to privacy and bodily integrity.

Legal Aid NSW is concerned by the MDT scheme's far-reaching powers, short timeframes, and limited options for review. When consulted on a proposed Mandatory Disease Testing Act in 2018 and 2020, Legal Aid NSW did not support the draft Bill due to policy concerns about MDT and any coercive-based model. Instead, we advocated for a consent-based approach which would:

1. have proper regard to an individual's right to privacy and bodily integrity, and
2. place health care professionals at the centre of the process.

Legal Aid NSW submitted that if a MDT scheme were to be legislated, compulsory orders for the taking of blood samples should only occur where ordered by a court or tribunal in exceptional circumstances and be subject to prescribed minimum safeguards. We reiterate that position here. Accordingly, Legal Aid NSW recommends:

1. The introduction of the following requirements into the legislation
 - a) all third parties be provided with a copy of the application before an order is made, along with an information sheet on the MTD scheme
 - b) all third parties be given the opportunity to seek legal advice and representation before an application is determined
 - c) consent to testing provided under section 11(4)(b) be informed consent, and that consent be documented in a signed consent form information about whether a third party is vulnerable is provided within the application
2. Senior officers take active steps to consider whether a third party is vulnerable before determining an application
3. The definition of vulnerable third party be extended to include Aboriginal and Torres Strait Islander people and people from non-English speaking backgrounds who lack English proficiency
4. That the time allowed for a third party to apply for a review to the Chief Health Officer be extended from one business day to five business days
5. The introduction of provision to allow appeals of court decisions.

¹ Data obtained from the NSW Ombudsman indicates NSW Police have made 62 applications for MDT orders since the commencement of the Act.

² Data obtained from the NSW Ombudsman indicates Corrective Services have made 13 applications for MDT orders since the commencement of the Act.

³ Data obtained from the NSW Ombudsman indicates Ambulance NSW have made 1 application for an MDT order since the commencement of the Act.

Recommendations

Recommendation 1:

- a) All applications for mandatory disease testing orders should be required to be made to, and determined by a court.
- b) The legislation should be amended to include provisions for appeals of court decisions.

Recommendation 2: The definition of ‘vulnerable third party’, contained in the Dictionary section of Schedule 2 of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to include Aboriginal and Torres Strait Islander people and people from non-English speaking backgrounds who lack English proficiency.

Recommendation 3: Data on all applications made under the *Mandatory Disease Testing Act 2021* (NSW) should be publicly available.

Recommendation 4: Section 10 of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to require an applicant to include information about whether a third party is a vulnerable third party within the application.

Recommendation 5: Section 11 of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to require a senior officer to take active steps to determine whether a third party is vulnerable before determining an application.

Recommendation 6: The *Mandatory Disease Testing Act 2021* (NSW) should be amended to introduce a requirement to provide third parties with a copy of the application for a mandatory disease testing order within a specified period. The application should be accompanied by a written notice with minimum information.

Recommendation 7: All third parties should be provided with a copy of the *Mandatory Disease Testing Act 2021: Information for third parties* when first contact is made regarding the application.

Recommendation 8: The *Mandatory Disease Testing Act 2021* (NSW) should be amended to introduce a requirement that a senior officer explain to a third party why the mandatory disease testing application has been made, the purpose of testing, and the limits on the use and disclosure of results, at the time they seek a third party’s consent to voluntarily submit to testing. Any consent should then be documented in a signed consent form.

Recommendation 9: All third parties should be given an opportunity to obtain legal advice and representation before the application is determined.

Recommendation 10: Section 23(4) of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to extend the time allowed for a third party to apply for a review to the Chief Health Officer from one business day to five business days.

3. Legal Aid NSW's experience with the practical operation of the mandatory disease testing scheme

Despite the scheme commencing in July 2022 Legal Aid NSW has only been involved in a small number of MDT matters, including:

1. Two applications for MDT orders against children listed in the Children's Court of NSW, where Legal Aid NSW represented two separate children who were the subject of MDT applications. Both applications ran alongside criminal charges.
2. One prosecution of an adult person listed in the Local Court of NSW, for an offence of failing to comply with a mandatory testing order under section 27(1) of the Act.

MDT applications to the Childrens Court of NSW

In both matters before the Children's Court of NSW, Legal Aid NSW solicitors were approached on the day of the court listing by children who had been served with an application for a MDT order. Both applications consisted of an eight-to-ten-page bundle of documents which included:

- a brief description of how contact occurred
- a brief statement about whether the exposure was considered 'low or high risk'
- a pathology referral for a blood test.

After receiving legal advice, neither child formally opposed the making of the order.

One of the MDT applications contained information that was inconsistent with the Police Facts document for the related criminal charge. As a result, Legal Aid NSW was able to use the information contained in the MTD application to successfully seek withdrawal of charges against that child.

MDT applications to the Local Court of NSW

Legal Aid NSW data indicates we have had no involvement in MDT applications to the Local Court of NSW with respect to vulnerable third parties over the age of 18.

Criminal prosecutions for 'failure to comply with mandatory testing order'

Legal Aid NSW is currently instructed in proceedings against a defendant who has been charged with an offence of failure to comply with mandatory testing order under section 27(1) of the Act before the Local Court of NSW. The defendant has entered a plea of not guilty and the matter will be set down for a defended hearing.

4. Improving the mandatory disease testing scheme

4.1 Determination by a court

Legal Aid NSW notes that the MDT Act overrides a person's right to bodily integrity, autonomy, and self-determination. As such, powers under the Act should be exercised with caution, in exceptional circumstances only. The ability of senior officers to grant applications for mandatory testing orders against all, except vulnerable third parties, affords this extraordinary power to a large number of individuals, who are able to exercise this power in circumstances that lack transparency and public scrutiny. For these reasons, Legal Aid NSW submits that all applications for MDT orders should be made to, and determined by a court. Consistent with other similar legislation,⁴ decisions under the MDT Act should be appealable to the District Court or Supreme Court of NSW, within a prescribed timeframe.

Recommendation 1

- a) All applications for mandatory disease testing orders should be required to be made to, and determined by a court.
- b) The legislation should be amended to include provisions for appeals of court decisions.

4.2 Extending the definition of vulnerable third party

Schedule 2 of the Act currently defines a "vulnerable third party" as someone who:

- (a) is at least 14 years of age but under 18 years of age, or
- (b) has a mental health impairment or cognitive impairment, within the meaning of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, that significantly affects the vulnerable third party's capacity to consent to voluntarily provide blood to be tested for blood-borne diseases.⁵

Legal Aid NSW is concerned about the unfair and disproportionate impact the MDT scheme may have on Aboriginal and Torres Strait Islander people, who have disproportionately higher rates of contact with police. We are also concerned about the MDT scheme's impact on people from non-English speaking backgrounds, particularly in relation to the difficulty they may have understanding the complexities of the scheme and the options available to them. Legal Aid NSW therefore recommends that the definition of a "vulnerable third party" be extended to include:

1. Aboriginal and Torres Strait Islander people, and
2. people from non-English speaking backgrounds who lack English proficiency.

The proposed definition would be consistent with the definition of a "vulnerable person" under the *Law Enforcement (Powers and Responsibilities) Regulation 2016* which

⁴ For example, the *Crime (Forensic Procedures) Act 2000* (NSW) s 115A.

⁵ *Mandatory Disease Testing Act 2021* (NSW), Sch 2, Dictionary.

dictates additional safeguards that must be applied when police are dealing with such persons.

Recommendation 2

- The definition of ‘vulnerable third party’, contained in the Dictionary section of Sch 2 of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to include Aboriginal and Torres Strait Islander people and people from non-English speaking backgrounds who lack English proficiency.

4.3 Determining whether a third party is vulnerable

There have been 76 applications in NSW between July 2022 and September 2023 but only ten applications have been made to NSW courts.⁶ The data indicates only 13% of applications were made to NSW courts. We were unable to obtain data indicating whether these ten applications related to children or adult vulnerable third parties.

Data on the MDT scheme is collected by the NSW Ombudsman and is not publicly available. As part of the preparation for this submission Legal Aid NSW sought data on the MDT scheme from the NSW Ombudsman.⁷ We experienced significant delays in our requests for data which impacted the preparation of our submission. To assist with the transparency of the scheme, Legal Aid NSW suggests that this data be publicly available.

Recommendation 3

- Data on all applications made under the *Mandatory Disease Testing Act 2021* (NSW) should be publicly available.

People with mental health and cognitive impairments are vastly overrepresented in the NSW criminal justice system.⁸ Data from BOCSAR suggests offenders who commit offences ‘against the person’ (this includes assaults against emergency workers) have even greater rates of mental health and cognitive impairments than other offenders.⁹ Against this background, Legal Aid NSW is surprised at the limited number of applications to NSW courts regarding vulnerable third parties since the scheme’s commencement.

Legal Aid NSW is concerned that under the current scheme, there is a possibility for vulnerable third parties not to be properly identified, allowing orders to be made against them by senior officers. We note that section 10(1)(a)-(i) of the Act lists various information that must be contained within the application. Information on whether a third party is vulnerable is not included in this list. Therefore, there is presently no obligation on the applicant to provide information about a third party’s vulnerability within the application. Instead, section 10(3) of the Act states “An application may also contain

⁶ Data provided on 14/11/2023 by the NSW Ombudsman.

⁷ Legal Aid NSW made email requests to the NSW Ombudsman for data on 18/9/2023, 9/10/2023, 11/10/2023, 27/10/2023 and 1/11/2023.

⁸ Karen Freeman, *Mental health and the criminal justice system*, BOCSAR, Crime and Justice Bulletin No. 38. See also L Forsythe & A Gaffney, Mental disorder prevalence at the gateway to the criminal justice system (2012). *Trends & issues in crime and criminal justice*, no 438. Canberra: Australian Institute of Criminology.

⁹ Karen Freeman, *Mental health and the criminal justice system*, BOCSAR, Crime and Justice Bulletin No. 38.

information about whether or not it appears to the worker that the third party is a vulnerable third party” (emphasis added).

Section 11 of the Act allows a senior officer to make a MDT order *if it does not appear, on the information available*, that the third party is a vulnerable third party.

This means:

1. there is no obligation on the applicant to take steps to determine whether a third party is vulnerable and to include this information in the application, and
2. the senior officer is only required to determine the application ‘on the information available’ (i.e. the application) and is not required to take any additional steps consider whether the third party is vulnerable.

Legal Aid NSW does not consider these requirements as appropriate. Instead, we recommend that the Act be amended to require the applicant to provide information regarding whether a third party is vulnerable within the application form. We further recommend senior officers be required to take steps to determine whether the third party is vulnerable before determining an application. This could include speaking with the third party and reviewing any available agency records.

Recommendation 4

- Section 10 of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to require an applicant to include information about whether a third party is a vulnerable third party within the application.

Recommendation 5

- Section 11 of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to require a senior officer to take active steps to determine whether a third party is vulnerable before determining an application.

4.4 Service of the application and information on third parties

There is currently no requirement in the Act for an application made to a senior officer to be served on a third party. This means third parties who are not treated as vulnerable¹⁰ are generally unaware of the application until they are contacted by a senior officer seeking their consent to undergo testing.¹¹

To ensure procedural fairness we recommend all third parties be provided with a copy of the application within a specified period of time.

The application should be accompanied by a written notice of the application. The written notice should contain the same minimum information, regardless of whom the application is made to. This should include:

- an explanation of the nature of the application

¹⁰ Under s 14(3)(b) of the Act a notice of an application to the court must be given to the vulnerable third party and their responsible person “as soon as practicable” after the application is made.

¹¹ Pursuant to the *Mandatory Disease Testing Act 2021* (NSW), s 11(4)(a).

- the reasons for the application being made
- details of the alleged incident
- a written report by the worker's medical practitioner
- any material from the Chief Health Officer
- the relevant diseases proposed to be tested
- the rights of the third party, including to make submissions, and to receive legal advice and representation
- information concerning appeal and review rights
- information on the third party's privacy and disclosure of their personal information, and
- a note that costs are to be borne by the worker's employer.

Recommendation 6

- The *Mandatory Disease Testing Act 2021* (NSW) should be amended to introduce a requirement to provide third parties with a copy of the application for a mandatory disease testing order within a specified period. The application should be accompanied by a written notice with minimum information.

We further recommend all third parties be provided with the information sheet developed by the Department of Communities and Justice titled *Mandatory Disease Testing Act 2021: Information for third parties*.¹² This is necessary given the short timeframes within which applications are usually made, and the limited period of time afforded to third parties to seek a review.

The information sheet should be provided at the time third parties are served with the application (as recommended above). Alternatively, this could occur when a third party is contacted by a senior office seeking their consent to testing,¹³ or when they are provided with notice of the determination of a MDT order.¹⁴

Recommendation 7

- All third parties should be provided with a copy of the *Mandatory Disease Testing Act 2021: Information for third parties* when first contact is made regarding the application.

4.5 Requirement for documented and informed consent

Section 11(4)(b) of the Act provides that, before determining an application for a MDT order, a senior officer must seek the third party's consent to voluntarily provide a blood sample for the purposes of testing for relevant diseases. However, there are no provisions in the Act concerning what constitutes informed consent. The recommendations above regarding service of the application and information sheets on third parties will go some way to ensuring that the third party is giving informed consent. To strengthen the third parties' ability to provide informed consent we also suggest that senior officers be required to explain to the third party why the request has been made,

¹² Available here: [Mandatory Disease Testing Act - third party factsheet \(nsw.gov.au\)](https://www.nsw.gov.au/mandatory-disease-testing-act-2021-third-party-factsheet).

¹³ Pursuant the *Mandatory Disease Testing Act 2021* (NSW), ss 11(3) and (4).

¹⁴ Pursuant to the *Mandatory Disease Testing Act 2021* (NSW), s 13.

the purpose of testing, and the limits on the use and disclosure of results. The third party's consent should then be properly documented in a signed consent form.

Recommendation 8

- The *Mandatory Disease Testing Act 2021* (NSW) should be amended to introduce a requirement that a senior officer explain to a third party why the mandatory disease testing application has been made, the purpose of testing, and the limits on the use and disclosure of results, at the time they seek a third parties' consent to voluntarily submit to testing. Any consent should then be documented in a signed consent form.

4.6 Requirement for legal advice and representation

Under s 11(1)(b) a third party must be given an opportunity to make submissions regarding the order. However, we query how effectively third parties can do this, without legal advice about the range of factors decision makers are permitted to consider when determining a MDT application.

Due to the MDT scheme's complex nature and far-reaching powers, we recommend the introduction of a requirement that all third parties be given the opportunity to obtain legal advice and representation prior to an application being determined.

Recommendation 9

- All third parties should be given an opportunity to obtain legal advice and representation before the application is determined.

4.7 Extending the timeframe for review of decisions by senior officers

Under section 23(3) of the Act, a third party (other than a vulnerable third party) may apply to the Chief Health Officer for review of a decision by a senior officer to grant an application for a MDT order. An application for review must be made within one business day of the third party being notified of the decision.¹⁵

Legal Aid NSW submits that one business day is not sufficient to allow a third party to seek advice or assistance with making an application for review. Accordingly, we recommend that the timeframe be extended to five business days.

Recommendation 10

- Section 23(4) of the *Mandatory Disease Testing Act 2021* (NSW) should be amended to extend the time allowed for a third party to apply for a review to the Chief Health Officer from one business day to five business days.

¹⁵ *Mandatory Disease Testing Act 2021* (NSW), s 23(5).



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