

Mandatory Disease Testing

Legal Aid NSW submission to the
NSW Department of Justice

October 2018

323 CASTLEREAGH ST
HAYMARKET NSW 2000 / DX 5 SYDNEY

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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) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

A range of Legal Aid NSW specialist services provide legal assistance to people who may be affected by the introduction of a mandatory disease testing scheme in NSW.

The Civil Law practice provides legal advice, minor assistance, duty and casework services to people through the Central Sydney office and 13 regional offices. The Civil Law Human Rights Group specialises in the areas of human rights, discrimination, false imprisonment and judicial review.

The Mental Health Advocacy Service (MHAS) advises in all areas of mental health law, including discharge from a mental health facility and the legal implications of the *Mental Health Act 2007* (NSW). The MHAS also provides representation before the Mental Health Review Tribunal.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

The Children's Legal Service (**CLS**) advises and represents children and young people involved in criminal cases in the Children's Court. CLS lawyers also visit juvenile detention centres and give free advice and assistance to young people in custody.

The Prisoners Legal Service (**PLS**) provides representation in hearings at the State Parole Authority, prison discipline offences before a Visiting Magistrate, reviews of segregation directions, and applications in the Supreme Court to determine a term for pre 'truth-in-sentencing' life sentences. The PLS also provide general legal advice and minor assistance to prisoners by way of a visiting advice service to most gaols and responding to letters and telephone calls from or on behalf of prisoners.

Should you require any information regarding this submission, please contact:

Harriet Ketley
Manager
Strategic Law Reform Unit
Policy, Planning & Programs
(02) 9219 5069
harriet.ketley@legalaid.nsw.gov.au

Introduction

Legal Aid NSW welcomes the opportunity to provide a submission in response to the NSW Department of Justice's Options Paper *Mandatory Disease Testing* ("Options Paper"). Legal Aid NSW acknowledges the essential work of police and emergency services personnel 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 such 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. Responses should be evidence-based and implemented as a health-related concern that is not conflated with criminal justice concerns. Whether the "source person" has, or may have committed, an offence, is not directly relevant to the assessment of risk to the affected person's health. As such, we consider that health professionals, rather than police, should be tasked with assessing health related risk and/or seeking authorisation for any sampling procedures (compulsory or not).

In that context, Legal Aid NSW supports both Options 1 and 2 (which are consent-based processes) but does not support proposed Options 3 and 4 (which involve mandatory testing). The significant intrusion on the right to privacy and bodily integrity that would be enabled under Options 3 and 4 is not justified, taking into account the acknowledged limited utility of tests. We are particularly concerned about the unfair and disproportionate impact a compulsory testing scheme would have on already vulnerable and disadvantaged groups, namely:

- those who have disproportionate contact with police: young people, Aboriginal and Torres Strait Islander people, those with substance abuse disorders and people suffering from mental health conditions;¹ and
- those groups who are disproportionately affected by blood borne viruses (BBVs), including gay men, people who inject drugs, sex workers, people from culturally and linguistically diverse backgrounds and Aboriginal and Torres Strait Islander people.²

Should a mandatory testing scheme ultimately be supported, Legal Aid NSW recommends a number of minimum safeguards should be included. This would include oversight by a court, the right to a support person, a clearly prescribed set of criteria for mandatory orders and other safeguards detailed below. We also note the lack of any evidence that saliva can transmit HIV. We would strongly oppose any mandatory testing regime that encompassed testing resulting from incidents involving spitting.

¹ Noting data provided by NSW Ambulance to the NSW Upper House *Inquiry into Violence against Emergency Services Personnel* for the 2015/16 financial year indicating that approximately 51 per cent of incidents of violence were attributed to mental illness (Inquiry Report, p 9).

² ACON et al letter to the *Inquiry into Violence against Emergency Services Personnel* dated 16 February 2017, available at: <https://www.parliament.nsw.gov.au/ladocs/other/10591/ACON%20letter%20and%20attachments.pdf>

We respond to each of the proposed options as follows.

Option 1 – Improvements to current agency policy and practice

Legal Aid NSW strongly supports this option to improve current agency policy and practices around consent-based testing. We share the Department of Justice’s view that prompt assessment, counselling and management of an exposed worker by a health care professional is very likely to help reduce stress in the period between testing for infectious diseases and obtaining test results.³ We further support each suggested avenue for improving policies and procedures under Option 1.⁴

Legal Aid NSW considers that increased awareness among emergency services personnel about existing available resources and supports following an exposure incident may reduce stress and anxiety following an exposure incident. The case studies provided in Appendix D of the Options Paper provide good examples of how prompt medical assessment and recommendations can be accessed by emergency services personnel through the Blood and Body Fluid Line. Access to this service should be encouraged among emergency services personnel following an incident.

Increasing awareness of up-to-date evidence on the risk of transmission, including by reference to evidence that HIV cannot be transmitted through spitting⁵, may also help reduce fears and anxiety among workers. Legal Aid NSW also supports revising relevant preventative measures in agencies, as an important mechanism to minimise the risk of exposure to disease in the first instance.

Legal Aid NSW considers that NSW Health is well placed to guide policy and procedure development in this area. NSW Health has the vast majority of workers affected by such incidents, and are experts in evidence-based risk assessment and care. Current NSW Health policy and practice, including immediate relief from duty (where possible), first aid following an incident and requiring hepatitis B vaccination as a condition of employment, are all policies worthy of consideration by agencies who employ emergency services personnel, particularly where there are high numbers of reported exposure incidents.

Improvements to policy and practice should be prioritised by the NSW Government to appropriately support all emergency services personnel. As noted in the Options Paper, prompt assessment, counselling and management of an exposed worker by a health care professional is very likely to help reduce stress.⁶ We suggest that such improvements be implemented and evaluated before further consideration is given to any mandatory testing scheme.

³ Options Paper, p12.

⁴ Ibid, p14.

⁵ Ibid, p11. See also the Australian Federation of AIDS Organisations ‘Background Briefing. Spitting and Mandatory Testing for HIV and other Blood Borne Viruses’. October 2015, p1.

⁶ Options Paper, p12.

Option 2 – Testing by consent

Legal Aid NSW also supports extending to other emergency services personnel the current practice by NSW Health employees of testing the source person on the basis of both their informed consent and a comprehensive risk assessment (Option 2).⁷ We note the observation in the Options Paper that those situations where consent was not given would be rare.⁸

Legal Aid NSW supports a consent-based approach, for the reasons identified on page 17 of the Options Paper. A consent-based approach pays proper regard to the individual right to autonomy and bodily integrity, principles that have been recently emphasised by the NSW Law Reform Commission Report on *Guardianship*.⁹ It also places health care professionals at the centre of such a process. As identified by the Options Paper, health workers are best placed to assess the risk of transmission.¹⁰ Under this option, both the source person and the affected emergency services worker receive counselling and management by a health care professional. We strongly support this aspect of Option 2.

The consent process is not detailed at length in the Options Paper. We consider that consent should only be provided on an informed basis, including a requirement that the person has an understanding of why the request has been made, the purpose of testing and the limits on use and disclosure of results. We also suggest:

- children under 18 and cognitively impaired individuals should have access to an appropriately qualified support person to ensure that they are adequately supported, understand all of the information presented and do not feel pressured into consenting. Relevant definitions could be based on those found in the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (LEPR Regulation).¹¹
- Additional safeguards for obtaining the informed consent of Aboriginal people.¹²
- Consent should be documented by a signed consent form. For those lacking capacity to consent, written consent should be required from a parent, guardian or carer. In cases where such individual is not available, testing should not occur.
- Although 16 years is considered an appropriate age at which a child can consent to a medical procedure in other contexts, we consider that 18 years of age should be the minimum age at which a child should be able to consent to testing in the present context.¹³

⁷ As outlined in the Options Paper, pp 15-16.

⁸ Options Paper, p15.

⁹ Report 145, tabled 15 August 2018.

¹⁰ Ibid, p17.

¹¹ Clause 28 contains a definition of vulnerable person and Clause 30 defines support person.

¹² Reflecting similar safeguards in the *Crime (Forensic Procedures) Act 2000* and Cl 37 of the LEPR Regulation.

¹³ In Australia, children younger than 16 can consent to many procedures if they are considered to be sufficiently mature. This right was recognised by the majority judges of the High Court in *Marion's case*, when they approved the following statement of Lord Scarman, in a case heard by the House of Lords

We note the Options Paper observes that a positive result from the source person would increase stress for the worker, despite such result not necessarily establishing that the worker has contracted a disease. This appears to be a problem with any model which involves testing of the source person. Legal Aid NSW is of the view that improved agency policy and practice should be prioritised to assist in reducing the stress of workers in such a scenario.

Mandatory Testing - Options 3 & 4

Legal Aid NSW does not support Options 3 and 4 and holds significant concerns about any coercive-based model. These concerns are detailed in the following section.

Option 3 is not a consent-based model

Option 3 is described as a consent-based model with an option for a court order, should consent not be given: an explanation is given to the source person that refusing to provide consent may result in a court order being sought. It is important that a person be informed of their rights and possible mechanisms to obtain testing. However Legal Aid NSW suggests that, in reality, this option does not allow for free and informed consent, given the potential for court proceedings to compel the subcutaneous drawing of blood or other invasive medical process. Such prospect may pressure a person, particularly if they are vulnerable, into consenting.

Option 4: the role of police

Legal Aid NSW has particular concerns about Option 4, which would enable the NSW Police to order testing where an exposure incident arises from an offence, or a suspected offence. Whether or not **an offence** has been committed will only be established following charge and court proceedings, which may be many months away. Awaiting the outcome of criminal proceedings before an order for compulsory testing could be made would defeat the purpose of the scheme to reduce the stress and anxiety of the affected person in the immediate period following the exposure incident.

Tying the scheme to an incident that arises in the course of a **suspected offence** undermines the presumption of innocence and the proper role of a court in determining whether an offence has, in fact, been committed. More generally, it inappropriately conflates health and criminal justice policy considerations and objectives. The fact that an exposure incident arises during a police investigation, as opposed to a search and rescue operation, is not, in itself, determinative of the level of risk. The convenience and mere proximity of police to an exposure incident does not justify police taking on a role that sits more properly with a qualified health professional. We also suggest that any analogy with

in England: 'A minor is ... capable of giving informed consent when he or she "achieves- a sufficient understanding and intelligence to enable him or her to understand fully what is proposed" (*Gillick v. West Norfolk AHA* [1986] AC 112, 189, quoted in Marion's case, p.237). A person who has the requisite level of maturity is sometimes referred to as being 'Gillick Competent'.

existing police powers (to make public safety orders, forensic procedures and make provisional AVOs) is not useful, where:

- forensic procedures involving blood samples can only be authorised on court order,¹⁴ and
- public safety orders and provisional AVOs do not enable police to authorise or make assessment as to the need for invasive medical procedures.¹⁵

We share the concern articulated in the Options Paper that an offence-based model of testing may result in people being charged following an incident of exposure, where police previously may have used their discretion appropriately to not charge a person. We also consider that police involvement in a mandatory scheme could deter people from consenting to being tested.

Unjustified infringement on the right to bodily integrity

In respect of both Options 3 and 4, Legal Aid NSW is concerned about the significant intrusion on the right to bodily integrity, autonomy and self-determination created by a mandatory testing scheme. Such rights are recognised and protected both under common law and international human rights principles.¹⁶ In NSW, the Supreme Court's decision in *Hunter and New England Area Health Service* confirmed common law protection of a competent adult's right to autonomy or self-determination: the right to control their own body.¹⁷ The rights of suspects to physical integrity is also recognised in NSW legislation.¹⁸

Legal Aid NSW does not support arrest, detention, restraint or the use of force to undertake a non-therapeutic medical procedure. We also oppose detaining a person for the purpose of determining the need for or the making of a testing order, as occurs in Western Australia. Such actions would constitute a significant erosion of fundamental human rights to security of the person and freedom from arbitrary detention.¹⁹ Such measure is not necessary or justified in light of the limited utility of test results which are inconclusive during the window period.

Legal Aid NSW agrees with the Options Paper that subjecting victims of accidents to a mandatory testing scheme would be particularly harsh.

¹⁴ Under Part 5 of the *Crimes (Forensic Procedures) Act 2000* (NSW)

¹⁵ At p29. Contrary to the statement in the Options Paper, NSW Police do not have power to make interim AVOS

¹⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3 ('UDHR'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('ICCPR'); ICCPR art 1(1).

¹⁷ [2009] NSWSC 761.

¹⁸ Section 24, *Crimes (Forensic Procedures) Act 2000* (NSW)

¹⁹ As contained in article 9 of the International Covenant on Civil and Political Rights (ICCPR). See also article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 37 of the Convention on the Rights of the Child (CRC) and article 14 of the Convention on the Rights of Persons with Disabilities (CRPD).

Impact on vulnerable groups

Legal Aid NSW shares the concerns of other stakeholders that mandatory testing may contribute to stigma and discrimination for people living with HIV and viral hepatitis B and C. This was a concern raised by six organisations in a letter to the NSW Parliament's Law and Safety Committee.²⁰ The Australian Federation of AIDS Organisations notes that such laws perpetuate HIV transmission myths.²¹ Legal Aid NSW also notes the concern of medical experts that such a scheme dissuade this priority population from engaging with health care services.²²

Legal Aid NSW is also concerned about the impact such reform may have on other vulnerable groups who come into contact with police, including young people, people in custody and people suffering from mental illness and mental conditions. People in custody are more likely to be subject to mandatory testing due to both their proximity to emergency services personnel in a confined environment and the higher prevalence of hepatitis C among prison populations.²³ The United Nations Human Rights Committee has made it clear that prisoners enjoy all the rights in the International Covenant on Civil and Political Rights (ICCPR), subject to 'restrictions that are unavoidable in a closed environment'.²⁴ This includes the right to be treated with humanity, dignity and respect while in detention.²⁵ The risk of such rights being unfairly or unjustifiably eroded would be increased if the testing model did not allow for decision-making by an independent medical professional with consideration given to the actual risk of disease transmission.

Safeguards

Should the Government support a mandatory testing model, Legal Aid NSW would prefer Option 3: a scheme whereby compulsory orders for taking of blood samples only occur where ordered by a court or tribunal in exceptional circumstances and subject to prescribed minimum safeguards, as follows.

Application-maker

Any decision to apply for a compulsory blood sample order should only be made by an independent health care professional. Such professionals are best placed to ensure relevant decisions are based on up-to-date evidence concerning the risk of transmission and the utility of a test result on the diagnosis and treatment of the affected worker. In our experience, prisoners are at particular risk of mistreatment or abuse of requests for testing as a result of prison infrastructure blind spots and the inherent vulnerability of inmates in

²⁰ ACON letter, dated 16 February 2017,

<https://www.parliament.nsw.gov.au/ladocs/other/10591/ACON%20letter%20and%20attachments.pdf>

²¹ Australian Federation of AIDS Organisations 'Background Briefing. Spitting and Mandatory Testing for HIV and other Blood Borne Viruses'. October 2015, pp 12.

²² Ibid

²³ NSW Health. 'NSW Hepatitis C Strategy 2014 - 2020', pp 15

<https://www.health.nsw.gov.au/hepatitis/Publications/hepatitiscstrategy.pdf>

²⁴ General Comment No.21

²⁵ As set out in articles 7 and 10 of the ICCPR, article 37 of the Convention on the Rights of the Child (CRC) and in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

a controlled and confined environment. Limiting decisions concerning testing to health care professionals would mitigate that risk.

Decision-making threshold

There should be a threshold for making a decision that relates to the evidence-based risk of transmission *and* that the order is necessary in the interest of diagnosis and management and care of the affected person (as per the Victorian provision that an order can only be made where it is *necessary in the interests of rapid diagnosis and clinical management and, where appropriate, treatment for anyone involved in the incident*²⁶). The risk assessment should be based on the associated risk posed by each relevant BBV, rather than grouping all viruses together.

We note the expert medical evidence provided to the NSW Upper House *Inquiry into Violence against Emergency Services Personnel* that there have been no cases of HIV transmission through saliva in Australia, and there is no risk of transmission where bodily fluid comes into contact with unbroken skin, or where there is skin to-skin contact.²⁷

If health care professionals are empowered to perform testing, they should also have the right to object to a direction to test if to do so would have a deleterious effect on the source person's health. This would be consistent with existing law in relation to mandatory testing in the context of motor vehicle accidents in NSW.²⁸

We also suggest that consideration be given to the need for objections and exemptions from a compulsory scheme on the basis of other objections, such as on religious grounds. We note that the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) provides a defence for an offence of failure to provide a blood sample if the person charged establishes that their failure, refusal or behaviour was based on *religious or other conscientious grounds or on medical grounds*.²⁹

Less restrictive approach

If alternative measures are available for diagnosis and treatment of the affected worker, such as accessing existing health information about the source person, the legislation should require the less restrictive approach, as per the Victorian model.³⁰

Timeframe on testing orders

There should be a timeframe which applies to applications for mandatory testing orders. Legal Aid NSW considers that a maximum of seven days would protect the interests of both the affected worker and the possible source person.

²⁶ Part 8, Division 5, *Public Health and Wellbeing Act 2008*.

²⁷ ACON et al, Letter to the Committee dated 16 February 2017, p2.

²⁸ Section 114 and Schedule 3, *Road Transport Act 2013* (NSW).

²⁹ Section 23(4)

³⁰ Section 134 of the *Public Health and Wellbeing Act 2008* (Vic)

Appeals against decisions

The source person should have a right to independent merits review of a compulsory order (if made by a health professional) and/or an appeal (if made by a court or tribunal).

Vulnerable persons

As noted above, there should be sufficient safeguards to ensure that vulnerable people and those lacking capacity have access to a guardian, parent and/or support person during the initial process where their informed consent is sought prior to any compulsory process. Legislation should also provide that any person subject to a compulsory order have a right to free legal advice and representation.

Prisoners

Further safeguards should be considered for persons in custody, such as prohibitions on any punishments for failure to comply. Should a court-ordered scheme not be supported, consideration could be given to implementing a committee to decide whether to mandatorily test an inmate, consisting of two health care practitioners and a senior corrections officer. Under this model, a consensus would be required in order to perform a non-consensual test. Precedent for such a model is found in Corrective Services NSW's Risk Intervention Team Protocol.³¹

Prohibition on the use of results for legal proceedings and limitation on disclosure

There should be a legislative prohibition on the admissibility of test results in any legal proceedings. Without such a safeguard, individuals who test positive to a BBV as a result of mandatory testing may have their results used in criminal and/or civil proceedings for exposing or transmission of HIV. Other jurisdictions have a similar safeguard.³² Without this safeguard, the ability to utilise results in criminal proceedings would infringe the person's right to silence and privilege against self-incrimination.

Further, there should be legislative restrictions limiting the disclosure of results. Such a provision would need to be carefully worded to ensure appropriate exemptions for disclosure in health care and counselling settings and disclosure when there is anyone at risk of further transmission. We consider that the Victorian model contains a useful precedent.³³

³¹ See: <https://www.correctiveservices.justice.nsw.gov.au/Documents/custodial-op-proc-manual/Public-version-OPM-sec-13.3-rit-protocols-v2.pdf>

³² Victoria and Western Australia as per Appendix A of the Options Paper.

³³ Section 136 of the *Public Health and Wellbeing Act 2008*.

Penalties

Should a mandatory testing scheme be implemented, Legal Aid NSW considers that punishment for non-compliance with a testing order should be by way of fine only.³⁴ A refusal to submit to an invasive health procedure does not indicate moral culpability of such gravity sufficient to justify imprisonment.

Review of the scheme

Legal Aid NSW recommends that any mandatory testing based scheme should be subject to the regular and ongoing oversight of the NSW Ombudsman due to the significant concerns highlighted in the Options Paper and this submission. Further, or in the alternative, should a mandatory testing scheme be introduced, it should be subject to statutory review within a reasonable time following commencement.

³⁴ This is consistent with the approach in Victoria and in the State of Ontario, Canada under the *Mandatory Blood Testing Act 2006*.