

Comments on clause 35 of the Mandatory Disease Testing Bill 2020

A Special Report to Parliament under section 31
of the *Ombudsman Act 1974*.

20 November 2020



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Introduction

The purpose of this report is to provide information to Parliament relevant to its consideration of the Mandatory Disease Testing Bill 2020 (NSW), which was introduced into the Legislative Assembly by the Hon. David Elliott MP on 11 November 2020.

These comments are presented by way of a special report to Parliament by the Ombudsman under section 31 of the *Ombudsman Act 1974*.

Mandatory Disease Testing Bill 2020

The Bill proposes a scheme for the mandatory blood testing of a person in circumstances where the person's bodily fluid comes into contact with a health, emergency or public sector worker as a result of the person's deliberate action, and the worker may be at risk of contracting a blood-borne disease.

The policy merits or otherwise of a mandatory disease testing scheme and its proposed parameters have been the subject of considerable public discussion. The issue was considered in a public inquiry conducted by the Legislative Assembly Law and Safety Committee, which reported in August 2017.¹ It was subsequently the subject of a public consultation process undertaken by the then Department of Justice.²

No doubt there will be further discussion as this Bill is debated in Parliament.

The NSW Ombudsman's office has not itself undertaken a detailed policy review or other assessment of the Bill or the scheme it proposes to establish, and accordingly in this report we make no comment on those matters.

The focus of this report is solely on clause 35 of the Bill, and the proposed functions of the Ombudsman to monitor and report on the operation of the legislation.

Key issues

In this report, the Ombudsman makes the following key comments:

1. The Ombudsman supports the proposal that the operation and administration of the Act be subject to independent monitoring and report, and agrees that the Ombudsman is an appropriate office to perform those functions (section 1).
2. However, the functions should only be conferred on the Ombudsman if they will be accompanied by the necessary powers and additional resources that will enable them to be performed in a manner consistent with Parliamentary and community expectations of 'Ombudsman oversight'.
3. The Bill as currently drafted does not confer the necessary powers the Ombudsman will need to obtain information to undertake its proposed monitoring function (section 2).

1 Legislative Assembly Committee on Law and Safety, *Violence against Emergency Services Personnel* (August 2017, Report 1/56), available at <https://www.parliament.nsw.gov.au/ladocs/inquiries/2395/Violence%20Against%20Emergency%20Services%20Personnel%20Report.pdf>

2 NSW Government, Department of Justice, *Mandatory Disease Testing: Options Paper* (September 2018), available at: <https://www.justice.nsw.gov.au/justicepolicy/Documents/mandatory-disease-testing-options-paper.pdf>

4. The Ombudsman does not have the capacity to undertake the proposed functions without adequate additional resources, and seeks assurances that these resources will be provided in the upcoming budget process (section 3).

Suggestions to Parliament

It is suggested that Parliament:

1. Note that, if the Ombudsman is conferred these new functions, additional funding will need to be provisioned to the Ombudsman's office from the next annual budget cycle.
2. Consider amending the Bill to ensure that the Ombudsman has the necessary ability to obtain the information required to discharge the proposed monitoring and reporting functions, and in particular we suggest:
 - (a) amending clause 28 to provide that a disclosure to the Ombudsman for the purpose of the Ombudsman's functions under clause 35 is a permitted disclosure, and
 - (a) amending clause 35 to provide that the Ombudsman may require any person to provide relevant information, and that such a requirement applies despite any other Act or law (except that such a requirement is to be set aside if a legally recognised ground of privilege exists in respect of a person who is not a public authority.)

(See section 2.4 for further detail of suggested amendments.)

1. Proposed oversight role

1.1 Clause 35 (Oversight of Act by Ombudsman)

Clause 35 of the Bill, titled ‘Oversight of Act by Ombudsman’, provides that the Ombudsman is to monitor the operation and administration of the Act, and is to provide a report for tabling in Parliament on the Act after 12 months from commencement and then every three years.

Clause 35 is in the following terms:

35 Oversight of Act by Ombudsman

- (1) The Ombudsman is to monitor the operation and administration of this Act, including the exercise of functions conferred on persons or bodies under this Act.
- (2) The Ombudsman is to prepare a report about the monitoring—
 - (a) as soon as practicable after 12 months after the commencement of this section, and
 - (b) every 3 years after the first report.
- (3) The Ombudsman may require the following persons to provide information to the Ombudsman for the purposes of preparing the report—
 - (a) for information relating to an application for a mandatory testing order made by a worker who is a police officer or special constable—the Commissioner of Police,
 - (b) for information relating to an application for a mandatory testing order made by any other worker—the senior officer for the worker.
- (4) A report is to be tabled in each House of Parliament as soon as practicable after the report is prepared.

Under clause 36 of the Bill, a statutory review of the Act is required to be undertaken by the Minister. The timing of that review is tied to the completion of the Ombudsman’s first report under clause 35, presumably on the basis that the Ombudsman’s report will be a critical input into that statutory review.

1.2 Appropriateness of the Ombudsman to oversight the Act

We support the proposal that the operation and administration of the Act be subject to monitoring and public report by an independent integrity office.

We confirm that the Ombudsman is an appropriate office to undertake that function, and (subject to our comments in sections 2 and 3 below) that we are willing and able to do so.

Monitoring functions of the kind proposed here are similar in nature to functions the Ombudsman already has in various parts of its jurisdiction. These include its ongoing monitoring roles in respect of Aboriginal programs (Part 3B *Ombudsman Act*), the *Public Interest Disclosures Act 1994*, and the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

There are also numerous past examples where Parliament has conferred on the Ombudsman specific monitoring and reporting functions when novel legislative schemes were introduced. Examples include the *Crimes (Criminal Organisations Control) Act 2012*, the *Terrorism (Police Powers) Act 2002*, and the *Child Protection (Offenders Registration) Act 2000*.

2. Ombudsman powers

2.1 Concerns with currently proposed information gathering powers

To be able to properly fulfil the proposed new functions, the Ombudsman should be able to obtain any and all information that is reasonably considered to be relevant, and to do so in a manner that is efficient and expeditious, without unnecessary uncertainty or protracted argument.

Currently, clause 35 of the Bill states that the Ombudsman may require certain information. However, that power is limited both in terms of the information that may be sought and the persons from whom it may be sought.

The Ombudsman can only require information:

- (1) for the purposes of preparing a report,
- (2) relating to an application for a mandatory testing order, and
- (3) from the Commissioner of Police (in respect of applications made by a police officer or special constable) or from a 'senior officer' (in respect of application made by other 'workers').

Further, although the provision states that the Ombudsman may require information, it is silent as to what happens when such a requirement comes into conflict with other laws that otherwise restrict the disclosure of information, such as privacy legislation, defamation laws, legal privilege, and statutory confidentiality provisions.

The limitation on the purpose for which information may be required

Clause 35 provides that the Ombudsman is to monitor the operation and administration of the Act (clause 35(1)) and to prepare a report on the monitoring (clause 35(2)).

The provision enabling the Ombudsman to require information refers to activity of reporting, but not to the activity of monitoring (clause 35(3)). It may be that no distinction is intended by this drafting (that is, any monitoring activity is necessarily taken to be for the purpose of reporting). However, it would be clearer to refer to both monitoring and reporting in sub-section (3), given that those activities are separately identified in sub-sections (1) and (2).

The limitation on the subject matter of the information

The Bill provides that information can only be required if it relates to an application for a mandatory disease testing order.

This would appear to preclude the Ombudsman, for example, from seeking information about other incidents of bodily fluid exposure (whether identified as deliberate or not) that did not result in an application under the scheme. Such information may be of considerable

relevance to monitoring the operation and administration of the scheme – for example, if it shows that most would-be applicants decide not to apply for a mandatory disease test once they have obtained the pre-requisite medical consultation as provided for in clause 8.

The limitation on the persons from whom information may be required

Currently, the Bill would enable the Ombudsman to obtain information only from the Commissioner of Police or the relevant ‘senior officer’.

It would not, for example, permit us to seek information from the applicant or from agencies and officials involved in the incident or the undertaking of the test (eg., Justice Health officials, in the case of a test administered in respect of a decision made by Corrective Services). We could not, for example, require information from the Chief Health Officer even in respect of a decision made by that officer to overturn the decision of a senior officer.

Restrictions on information disclosure

Unlike our information gathering provisions in the *Ombudsman Act*, the power in this Bill for the Ombudsman to require information is silent in terms of how such a requirement would interact with other existing duties (such as confidentiality and privacy) and immunities (such as legal professional privilege).

This means that we will likely be precluded from obtaining relevant information. It also places those who may be subject to a requirement from us in a potentially invidious position, if complying with that requirement might risk breaching some other obligation, such as to protect privacy.

In the *Ombudsman Act*, provisions for Royal-commission type powers to compel the production of information not only ensure that we can access the information we need; it also ensures that those providing us with information have the clear authority to do so, are not at personal risk (for example, of any alleged breach of confidentiality or privacy) and do not need to seek complex legal advice any time we request information from them.

2.2 Impact of clause 28

The above concerns about the narrowness of clause 35(3) are heightened by the impact of clause 28 (Disclosure of information).

That clause creates a criminal offence, punishable by up to 12 months’ imprisonment, for the unauthorised disclosure of information obtained in connection with the administration or execution of the Act.

28 Disclosure of information

- (1) A person must not disclose information obtained in connection with the administration or execution of this Act unless that disclosure is made—
- (a) for health information—with the consent of the third party to whom the information relates, or
 - (b) for information that is not health information—with the consent of the person from whom the information was obtained, or
 - (c) in connection with the administration or execution of this Act or the *Public Health Act 2010*, or
 - (d) for the purposes of legal proceedings arising out of this Act or of a report of the proceedings, or
 - (e) in other circumstances prescribed by the regulations, or
 - (f) with other lawful excuse.

Maximum penalty—100 penalty units or imprisonment for 12 months, or both.

- (2) Subsection (1)(e) and (f) do not authorise the disclosure of information that a third party—
- (a) has been, is to be or is required to be tested for a relevant Category 5 condition, or
 - (b) has, or has had, a relevant Category 5 condition.
- (3) In this section—health information means information that a third party—
- (a) has been, is to be or is required to be tested for a blood-borne disease, or
 - (b) has, or has had, a blood-borne disease. relevant Category 5 condition means a Category 5 condition, within the meaning of Part 4 of the *Public Health Act 2010*, that is also a blood-borne disease.

Note. On the commencement of this Act, HIV infection is the only Category 5 condition.

The interaction between clause 28 and clause 35(3) is problematic in two respects.

First, although compliance with a formal requirement of the Ombudsman to provide information under clause 35(3) would presumably constitute a ‘lawful excuse’ under clause 28(1)(f), the lawful excuse defence does not apply to any cases involving Category 5 conditions: clause 28(2). Accordingly, it appears that a person could (indeed must) refuse to comply with a requirement to provide information to the Ombudsman if it relates to a Category 5 condition.

Second, it appears unlikely that anything other than a formal requirement made strictly within the terms of clause 35(3) would constitute a 'lawful excuse' for disclosing information to the Ombudsman. This makes the very narrow terms of clause 35(3) even more problematic, and more likely in practice to generate the need for legal advice to be obtained whenever the Ombudsman requests information. It also raises the likelihood of legal dispute. Any person who provides information to the Ombudsman runs the risk of finding themselves having committed a criminal offence unless they can be absolutely certain that the narrow and strict criteria in clause 35(3) apply. In circumstances of doubt, we appreciate that it would not be unreasonable for the person or agency to decline to provide the information requested.

2.3 Expectations of 'oversight of Act by Ombudsman'

The issue of conferring new functions on the Ombudsman (or on other Parliamentary statutory officers) without also importing the ordinary procedural powers of the office raises a broader point of principle.

Generally, if functions are to be conferred on the Ombudsman we submit that those functions should be conferred with the usual Ombudsman powers that would enable us to discharge those functions in a manner consistent with Parliamentary and community expectations of what an Ombudsman is and does. This would be consistent with the Ombudsman's status as a 'Royal commission-type' investigatory body, fully independent of the Executive Government, reporting directly to the Parliament and the public.

In this case, the Bill proposes to confer on the Ombudsman functions (of monitoring and reporting) but does not confer the usual powers and protections. We have outlined the limitations and the problems we foresee with this approach in the sections above.

In summary, the Bill does not provide for the Ombudsman to monitor and report on the operation of the proposed mandatory disease testing scheme in a manner that is consistent with what Parliament and the community are likely to expect when our office has been given 'oversight of the Act'. As the information-gathering powers in clause 35(3) are currently drafted, it appears that we would be largely limited to collating and undertaking a desktop review of statistical information and presenting that in a simple report, for example, by way of a table showing the number of applications made, whether they were successful, and so on. If that is all that is expected in respect of the exercise of these functions, then it may be more appropriate for them to be conferred instead on a relevant Department or to include them as part of the Minister's statutory review function.

2.4 Suggested amendments

We suggest that consideration be given to amending the Bill as follows:

Amendment to clause 28

Insert after paragraph (d) of sub-clause (1):

(e) to the Ombudsman for the purpose of the Ombudsman's functions under section 35,

Re-number paragraphs (e) and (f) of sub-clause (1) accordingly.

In sub-clause (2), replace "(1)(e) and (f)" with "(1)(f) and (g)".

Amendment to clause 35

Option 1

Delete existing sub-clause (3) and insert provisions to the following effect:

(3) For those purposes, the Ombudsman may require any person to provide information about the operation and administration of this Act, including the exercise of functions conferred under this Act.

(4) No provision of this or any other Act or law prevents the person from complying, or affects the person's duty to comply, with a requirement of the Ombudsman under this section.

(5) However, the Ombudsman must set aside a requirement if:

(a) it appears to the Ombudsman that a person has a ground of privilege that would entitle that person to resist a like requirement in court proceedings,

(b) it does not appear to the Ombudsman that that person has waived that privilege, and

(c) that person is not a public authority (within the meaning of the Ombudsman Act 1974).³

Existing sub-clause (4) becomes sub-clause (6).

Option 2

Replace existing sub-clause (3) with a provision to the following effect:

(3) Sections 18, 19, 20, 21, 21A and 21C of the Ombudsman Act 1974 apply in respect of the exercise of the Ombudsman's functions under this clause in the same way as they apply to an investigation under that Act.

³ This provision is required to ensure that important rights of members of the public (such as the privilege against self-incrimination) are not taken to be abrogated. It is also noted that the category of 'workers' covered by the Bill may be expanded by regulation, and that it is possible that, in future, these workers may not be, or be employed by, public authorities.

3. Resourcing

3.1 The need for funding

The Ombudsman's office will also require additional funding if it is to undertake these proposed new statutory functions.

The conferral of any new statutory function on this office should only occur if sufficient additional resources are also conferred to enable us to fulfil the statutory mandate in a way that will meet Parliamentary and community expectations, and that will not require us to divert resources away from the performance of other important statutory functions.

The requirement for additional funding is particularly pertinent if, as we have assumed, the intent is for this office to exercise the new functions substantively and in accordance with the usual oversight practices of an Ombudsman's office.

3.2 The avenue for seeking necessary funding

Under the current funding processes that the Government applies to the Ombudsman and other independent statutory officers, there are two potential avenues for us to seek additional funding associated with the conferral of a new function:

- (1) (*Request for supplementation*) A request could be made to the Secretary of the Department of Premier and Cabinet (DPC) for 'supplementary funding', which is essentially discretionary funding provided by the Secretary of DPC within the current financial year by way of the re-allocation of resources from within the 'DPC cluster'.
- (2) (*Annual Budget funding bid*) A funding proposal submitted to Treasury for the purposes of the Government (Expenditure Review Committee of Cabinet) consideration for the purposes of inclusion in the amount appropriated to the services of the Ombudsman under the Annual Appropriation Bill.

Serious doubts have been raised about the legality and propriety of the supplementation process being applied to independent statutory bodies such as the Ombudsman.⁴

Accordingly, the Ombudsman will be submitting a request for additional funding in its 2021/22 budget bid.

⁴ See for example, Audit Office of NSW, *The effectiveness of the financial arrangements and management practices in four integrity agencies* (20 October 2020), available at: www.audit.nsw.gov.au/sites/default/files/documents/The%20effectiveness%20of%20the%20financial%20arrangements%20and%20management%20practices%20in%20four%20integrity%20agencies.pdf

4. Other matters

4.1 Relationship with existing Ombudsman functions

Under the *Ombudsman Act*, any person may complain to the Ombudsman about, and we may investigate, conduct of a public authority if it appears that it may include conduct of a kind referred to in section 26. This includes conduct that is contrary to law, unreasonable, improperly discriminatory, motivated by improper purposes, or otherwise wrong.

Some conduct is excluded from this jurisdiction under Schedule 1 of the *Ombudsman Act*. Of most relevance, conduct of members of the NSW Police Force is excluded from our general jurisdiction, as it is now subject to the oversight of the Law Enforcement Conduct Commission (LECC) (see below).

Our general complaints and investigation jurisdiction would allow us (even in the absence of clause 35 of the Bill) to receive complaints about alleged wrong conduct of other public authorities under the proposed mandatory disease testing legislation. This would include the conduct of other agencies (such as Corrective Service NSW, Youth Justice and NSW Health), as well as of officials such as the Chief Health Officer. However, we would only be able to investigate conduct under the scheme if the conduct met the threshold under section 13 of the *Ombudsman Act* – that is, if it appears to the Ombudsman that it may be conduct of a kind referred to in section 26.

4.2 Relationship with the Law Enforcement Conduct Commission

Most of the agencies and officials that are covered by the proposed scheme under the Bill are already agencies and officials that fall within the general (complaints and investigations) jurisdiction of the Ombudsman.

However, as noted above, conduct of a member of the NSW Police Force is excluded from our general jurisdiction. Complaints and investigations of alleged misconduct and maladministration by the NSW Police Force or its members are now matters within the jurisdiction of the LECC.

That does not affect the appropriateness of conferring this specific oversight function on the Ombudsman, and nor (subject to our comments in section 2 above) does it affect our capacity to undertake that function.

We also do not expect that our performing these functions would interfere in any way or materially overlap with other oversight functions of the LECC concerning the NSW Police Force. If the Ombudsman were to become aware of specific instances of misconduct or maladministration by the NSW Police Force (whether in relation to the operation of the mandatory disease testing scheme or otherwise) we have all necessary powers to refer the matter to the LECC for its consideration and, if necessary, investigation. In particular, section 33 of the *Law Enforcement Conduct Commission Act 2016* requires the Ombudsman to notify the LECC of possible officer misconduct and maladministration.

4.3 Designation of Ombudsman's staff as 'workers' under the Act

The table to the Bill's Dictionary provides that staff of the Ombudsman's office are included as 'workers' for the purposes of the scheme to be established by the Bill.

This means that front-line staff of this office are within the category of people who can apply for a third party to be required to undertake a mandatory blood test, if that third party's bodily fluid has come into contact with them by a deliberate act, and if they may be at risk of contracting a blood borne disease.

Staff of the Ombudsman's office routinely visit correctional and youth justice facilities and meet with detainees there. It appears appropriate that, if all other public sector workers who work in or visit such facilities are to be covered by this scheme, it should also apply to the Ombudsman's staff.

The Ombudsman is the 'senior officer' and the 'funding provider' in respect of those staff. The former of those roles means that, if a staff member of the Ombudsman's office were to make an application for a mandatory disease testing order against a third party, the Ombudsman will have the role of determining, in the first instance, whether the application should be granted: Part 3. That decision is subject to review by the Chief Health Officer: Part 7.

Unlike the Commissioner of Corrective Services and the Inspector of Custodial Services, the Ombudsman is not designated to be a 'worker' (and so could not make an application for a mandatory disease test in respect of their own exposure).

While we do not consider that inclusion of Ombudsman's staff as workers under the Bill creates any actual or potential conflict of interest, or otherwise imposes any necessary impediment to the Ombudsman performing the proposed monitoring and reporting function under clause 35, we consider it appropriate to draw this aspect of the Bill to the specific attention of the Parliament. In particular, if a view is formed that the specific inclusion of Ombudsman staff in the Bill may impact our perceived independence to undertake the function of monitoring the operation and administration of the Act, we would support an amendment to omit our staff from the category of 'workers' covered by the Bill.

