



# NUAA Submission: Mandatory Disease Testing Act

## 30 October 2023

The NSW Users and AIDS Association (NUAA) is a peer-based harm reduction organisation that represents people with lived and living experience of drug use in NSW. Our mission is to advance that health, human rights, and dignity of people with lived and living experience of drug use. NUAA is primarily funded by the NSW Ministry of Health with additional project-specific funding from NSW Local Health Districts, research centres and donations.

We play a vital role in policy and research. NUAA also provides a diverse range of harm reduction services including a fixed and postal needle and syringe program, including a take home naloxone program; clinical service, vein care, hepatitis C point of care testing and linkage to treatment; peer education, publications, and resources; DanceWize NSW – a peer education and harm reduction initiative operating at NSW music festivals and PeerLine a telephone peer support line.

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# ABOUT NUAA

The NSW Users and AIDS Association (NUAA) is a peer-based harm reduction organisation that works to improve the health, human rights and dignity of people who use drugs in NSW. NUAA represents people who have living and lived experience of illicit drug use across NSW, as well as people who have lived or living experience of Hepatitis C. NUAA plays a crucial role in health policy by representing people with living and lived experience in drug use in policy and research and we provide advice across a range of policy areas including harm reduction, hepatitis C treatment and AOD treatment. We are also a service provider with a diverse range of programs including a fixed needle and syringe program with a suite of harm reduction services including a clinical service, vein care, hepatitis C point of care testing and linkage to treatment, postal NSP and take home naloxone, peer education, publications and resources, DanceWize NSW – a peer education and harm reduction initiative operating at music festivals in NSW and PeerLine a peer-based telephone support line for people who use drugs in NSW.

NUAA is primarily funded by the NSW Ministry of Health with additional project-specific funding from NSW Local Health Districts, research centres and donations. NUAA is an association registered under the Associations Incorporation Act 2009 (NSW) and accredited under the Australian Services Excellence Standards (ASES), a quality framework certified by Quality Innovation and Performance (QIP).

## PREPARATION OF THIS SUBMISSION

NUAA has developed the following submission for the NSW Ombudsman’s review of the Mandatory Disease Testing Act (NSW) 2021. The comments provided in this submission have been prepared by NUAA staff, on behalf of our members.

## TAKE AWAY MESSAGES FOR NUAA’S SUBMISSION

This submission makes the following requests:

- The MDT Act be repealed.
- That evidence-based improvements to agency policy and practice are prioritised to ensure emergency services personnel are promptly assessed, counselled and managed by a health care professionals with access to specialist advice immediately following an exposure to potentially infectious body fluids.
- In the instance that the MDT Act is not repealed NUAA requests that:
  - Third parties subject to an MDT order are linked into the relevant community organisation to ensure they have access to support, are informed of their rights under the Act and understand any risks associated with their particular circumstance;

- Section 21 (2) of the MDT Act which authorises police and correctional officers to use force on detained people for the purposes of undertaking mandatory BBV tests, should be removed;
- Section 24 of the MDT Act which provides that mandatory BBV tests may still be conducted during the period in which the Chief Health Officer (CHO) is considering an application for review be removed;
- Section 29 of the MDT Act be amended to ensure that disclosure of viral hepatitis status cannot be authorised by regulations.

## **NUAA contact for this submission**

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# SUBMISSION

The Mandatory Disease Testing Act 2021 (the MDT Act) came into effect in NSW in July 2022. This was despite significant opposition from community-led organisations, including NUAA who previously made a submission on the Options Paper in September 2018. In our 2018 submission NUAA opposed the introduction of Mandatory Disease Testing (MDT) in NSW on the grounds that it presents significant risk to the health and human rights of marginalised people, including people who inject drugs, that come into contact with police and emergency services. NUAA instead called for evidence-based improvements to agency policy and practice. An evidence-based approach would ensure emergency services personnel are promptly assessed, counselled and managed by a health care professional with access to specialist advice immediately following an exposure to bodily fluids.

The MDT Act has now been in effect in NSW for over 12 months. This submission raises NUAA's concerns that people subject to MDT orders are not being connected to appropriate community organisations to ensure they understand their health rights under the Act. Moreover, it also reaffirms NUAA's position that the MDT Act should be repealed, and that evidence-based policy and practice be prioritised to ensure first responders have access to specialist advice and treatment following any exposure to bodily fluids.

## **1. NUAA has no access to information regarding the impact the MDT Act has had on our community members since it came into effect in July 2022.**

NUAA has had no access to information regarding the impact the MDT Act has had on our community members. This includes any data or information about what agencies have been making applications, who in the community is being subject to MDT orders and in what circumstances these applications are being made and/or completed. The absence of this information raises concerns including:

- **Whether people subject to MDT orders are being adequately supported and connected into relevant community organisations, such as NUAA.** Community linkage has been identified as important to ensure people subject to MDT orders understand their rights under the Act and any risks associated with their particular circumstances. Since the introduction of MDT in NSW NUAA has raised concerns regarding the disproportionate impact MDT would have on already marginalised groups of people, in particular Aboriginal and Torres Strait Islander people, people who inject drugs and incarcerated people – especially given the way disease and illness has been historically racially and paternalistically weaponised. NUAA request that the Ombudsman review how people subject to MDT orders are being informed of their rights under the MDT Act, including what mechanisms are in place, if any, to ensure people subject to MDT are provided relevant support and advised of any risks associated with their particular circumstances.

- **Whether the MDT Act is being used appropriately by authorised agencies.** There is concern that the MDT Act could be used as a punitive and stigmatising measure for marginalised groups as it provides additional powers to police and correctional officers to engage in discriminatory behaviours. NUAA recognises the disproportionate rates of incarceration and over policing of Aboriginal and Torres Strait Islander people and the ongoing criminalisation of people who use drugs. There is significant concern that the MDT Act can and has disproportionately impacted Aboriginal and Torres Strait Islander people and/ or people who use and/or inject drugs, especially given the additional authorisation of the use of force against people who have been detained (see section 29). NUAA requests that the Ombudsman publicly evaluates MDT applications made to date including examining:
  - who is being subject to MDT orders (demographics such as age, gender, Aboriginal and/or Torres Strait Islander Status, sexuality, Correctional facilities both juvenile and adult);
  - by what authorised agencies and in;
  - what circumstances MDT orders are being made (institution, type of fluid transfer, percentage of requests).

An evaluation of the application of the MDT Act is critical to understand whether the Act is fulfilling its intended purpose and what, if any, any unintended harm to particular demographics has occurred in the application of this policy.

**2. NUAA is concerned that the scope of the MDT Act perpetuates harm to marginalised groups and is misaligned to the objects of the Act.**

NUAA is concerned that the MDT Act's current powers go beyond the appropriate scope required to protect and promote the health and wellbeing of emergency and public sector workers and instead increase harm for marginalised groups, such as people who inject drugs and Aboriginal and Torres Strait Islander people, who may be subject to these orders. Rather than facilitating ways for health, emergency, and public sector workers to seek medical advice and information about the risks of contracting a blood-borne disease while at work, the MDT Act currently provides, authorised agencies, power to subject people to mandatory testing in circumstances where no such risk of disease transmission exists. It is known that coming into contact with saliva does not present a risk for acquisition of HIV, hepatitis C (HCV) or hepatitis B (HBV), yet under the Act an application for mandatory testing, if this circumstance was to deliberately occur, could be made. In the case of needlestick injuries where there is a real risk of transmission, NUAA asserts that supporting access to evidence-based prevention and treatment options should be the priority. It remains unclear how MDT orders contribute to preventing the acquisition of BBV and/or improve emergency and public sector workers health and wellbeing.

We argue that MDT provides no additional protection to health, emergency and public sector workers or increased understanding about the risks of contracting a blood-borne virus (BBV). As it currently stands, the powers afforded by the MDT Act are excessive and misaligned to the object of the legislation. They perpetuate misinformation and misperception of risk in BBV transmission and uphold harmful, stigmatising narratives around people with lived or living experience of BBV. NUAA urges the Ombudsman to consider undertaking a review of the scope of the Act to assess whether legislated mandatory testing powers are the most appropriate and effective way to protect and promote the health and wellbeing of health, emergency and public sector workers, while also upholding the health and wellbeing of people who may be subject to those testing powers.

### **Concerns with specific provisions in the MDT Act:**

#### **3. NUAA does not support MDT tests being conducted while awaiting review**

Section 24 of the current MDT Act provides that mandatory BBV tests may still be conducted during the period in which the Chief Health Officer (CHO) is considering an application for review. This means that mandatory testing orders could occur in instances where the CHO is not satisfied that the contact by the worker with the bodily fluid of the third party was a result of a deliberate action of a third party and therefore testing the third party's blood for blood-borne viruses is not justified under the Act. NUAA's position is that there should be no mandatory BBV tests while applications are under review to make sure a third party is not subject to unwarranted testing.<sup>1</sup>

#### **4. NUAA does not support the authorisation by regulation of disclosure of viral hepatitis status**

NUAA are concerned with the breadth of information disclosure allowed by section 29. In particular, section 29 (1)(e) *'in other circumstances prescribed by the regulations'* –allows regulations to be made authorising the disclosure of Hepatitis B and/or Hepatitis C status of third parties obtained through mandatory testing orders (although not HIV status, because of the operation of section 29(2)(b)). NUAA cannot see why access to this personal health information should be able to be authorised by delegated legislation.<sup>2</sup>

#### **5. NUAA does not support the authorisation of the use of force to conduct tests**

Section 21 (2) of the MDT Act authorises police and correctional officers to use force on detained people for the purposes of undertaking mandatory BBV tests. NUAA asserts that this

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<sup>1</sup> Public Interest Advocacy Centre Submission re Mandatory Disease Testing Bill 2020 18 December 2020 <https://piac.asn.au/wp-content/uploads/2021/01/20.12.18-PIAC-Submission-re-Mandatory-Disease-Testing-Bill-2020-Final1.pdf>

<sup>2</sup> Public Interest Advocacy Centre Submission re Mandatory Disease Testing Bill 2020 18 December 2020 <https://piac.asn.au/wp-content/uploads/2021/01/20.12.18-PIAC-Submission-re-Mandatory-Disease-Testing-Bill-2020-Final1.pdf>

is an inappropriate extension of police and correctional officers' powers and is an unjustified contravention of the civil liberties of people who are in custody of police or corrections. NUAA recognise the disproportionate rates of incarceration of Aboriginal and Torres Strait Islander people and the ongoing criminalisation of people who use drugs. It is likely that this provision will be disproportionately used against Aboriginal and Torres Strait Islander people and/or people who have been identified as people who use drugs and/or people who inject drugs in custody.<sup>3</sup>

## Conclusion

This submission raises NUAA's concerns with the MDT Act in NSW since it came into effect in July 2022, as well as our overall broader concerns with MDT. NUAA is deeply concerned that community members who have been subject to an MDT order are not being adequately linked to relevant community organisations to ensure they are supported and have a clear understanding of their rights under the Act.

It is critical that the ombudsman publicly evaluate the MDT orders including examining:

- who is being subject to MDT orders (demographics such as age, gender, Aboriginal and/or Torres Strait Islander Status, Correctional facilities);
- by what authorised agencies and in;
- the circumstances of MDT orders (institution, type of fluid transfer, percentage of requests)

It is important to understand whether the Act is fulfilling its intended purpose and what, if any, human rights violations have occurred in the application of this policy. It is important to recognise and acknowledge that the weight of expert advice and opinion was firmly against the introduction of MDT and clarify what the benefits to frontline staff have been. This submission reaffirms NUAA's position that the MDT Act should be repealed, and that evidence-based policy and practice be prioritised to ensure first responders have access to specialist advice and treatment following any exposure to potentially infectious bodily fluids.

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<sup>3</sup> Public Interest Advocacy Centre Submission re Mandatory Disease Testing Bill 2020 18 December 2020  
<https://piac.asn.au/wp-content/uploads/2021/01/20.12.18-PIAC-Submission-re-Mandatory-Disease-Testing-Bill-2020-Final1.pdf>