

Media Release

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Ombudsman’s first report on its monitoring of the *Mandatory Disease Testing Act 2021*, tabled in Parliament today

The NSW Ombudsman’s report – *Mandatory disease testing in NSW: monitoring the operation and administration of the Mandatory Disease Testing Act 2021* was tabled in Parliament today.

The NSW Ombudsman has a statutory role to monitor the operation and administration of the *Mandatory Disease Testing Act 2021* (MDT Act), and to report on that monitoring.

The MDT Act commenced in July 2022 – it provides for mandatory blood testing of a person whose bodily fluids have come into contact, as a result of that person’s deliberate action, with a worker from certain government agencies in NSW, including law enforcement, corrective services, health and emergency services.

The report sets out the Ombudsman’s observations from monitoring the first 18 months of the scheme. It also contains 62 recommendations about the MDT Act and how it is being used. The report shows that between 29 July 2022 and 31 December 2023, 139 mandatory disease testing (MDT) applications were made – all but 1 were made by workers in the NSW Police Force and Corrective Services NSW.

Of the 139 MDT applications made:

- More than half (78) proceeded to blood testing:
 - 18% (25) after the senior officer made a mandatory testing order,
 - 5% (7) after a court made an order
 - 33% (46) by consent (meaning that the person agreed to testing without an order being made).
- 22% (31) were refused by a senior officer. In approximately half (16) of these refusals, the senior officer recorded that they considered the person to be vulnerable (defined in the MDT Act as a person with a mental health impairment or cognitive impairment affecting their capacity, or a child aged 14 to 17 years).
- 17% (24) were withdrawn or cancelled.
- 7% (10) were the subject of court applications. Of those, 7 Mandatory Testing Orders were made by the court, and 3 were refused.

Most incidents that led to an MDT application involved either spitting or biting. 84% (117 of 139) of all agency applications recorded exposure to saliva. Of those 117 applications, 63% (87) were made when the exposure was to saliva only. A further 26% (30) indicated a concern about potential exposure to blood in or with the saliva. None of the workers who made an MDT application during the monitoring period contracted a relevant blood-borne disease.

The NSW Ombudsman has observed issues with how agencies are using the MDT Act, including:

- The applications under the MDT Act are being made where there is no real risk of a worker contracting a blood-borne disease. Most MDT applications involved the exposure of a worker to saliva only. The Chief Health Officer Guidelines on MDT state that this type of exposure carries no real risk of transmission. Despite this, a significant number of these applications proceeded to testing.
- That a high proportion of applications involve saliva only, suggests workers are not obtaining relevant, accurate medical advice as intended by the Act, and, by prescribing saliva as a relevant bodily fluid, the regime itself may be contributing to misinformation and misunderstanding about the transmissibility of blood-borne diseases.
- Protections for people to be tested under the MDT scheme are largely ineffective. The test for vulnerability is subjective and applied without rigour, the privacy of health information is not adequately restricted, procedural fairness is lacking and there are significant practical barriers to external review of application decisions.
- The MDT Act is disproportionately impacting Aboriginal and Torres Strait Islander people. 28% of MDT applications related to Aboriginal and Torres Strait Islander people (and more than half of the people subject of MDT applications in Corrective Services custody). Aboriginal and Torres Strait Islander people were less likely to be assessed as vulnerable and more likely to be tested 'by consent' after an MDT application was made.
- There are legal complications with testing by consent under the MDT Act. If consent is obtained, testing proceeds entirely outside of the framework of the MDT Act.
- Senior officers of agencies are ill-equipped to be making determinations about Mandatory Testing Orders.

Recommendations

The NSW Ombudsman made 62 recommendations about the MDT scheme.

NSW Ombudsman Paul Miller stated, "Our aim with the report is that it provides the platform for a clear-minded and evidence-based evaluation of the effectiveness of the scheme".

"The MDT Act tries to balance important competing policy considerations," said Mr Miller. "The scheme aims to enable testing to be undertaken very quickly, so that the test results might allay the stress and anxiety the worker may be facing, or so that those results can be taken into account in a worker's medical treatment. At the same time, the Act aims, as it must, to provide protections and procedural fairness to those being tested. It may be that these competing policy concerns are irreconcilable."

"We did not observe clear and measurable benefits of the MDT scheme for workers. Given that lack of clarity, it is questionable whether the significant and complex legislative and administrative burden of the MDT scheme is warranted for such a small number of exposures," said Mr Miller.

The NSW Ombudsman has recommended consideration be given to whether the MDT Act should be continued. “The administrative resources currently applied to the scheme would be better directed toward providing improved avenues of advice and support directly to front-line workers who become exposed to bodily fluids in the workplace,” Mr Miller said.

“That could include establishing and funding a panel of specialist blood-borne disease clinicians to be available for immediate consultation with workers (and their doctors) if required following a workplace incident of exposure to bodily fluids.”

If that recommendation is not adopted and the MDT Act is continued, the NSW Ombudsman has recommended that all MDT applications, if supported by the worker’s employer, should be determined by the Court.

The NSW Ombudsman has also made a series of 60 recommendations, including for amendments to the MDT Act to address problems with decision-making and ineffective procedural fairness mechanisms identified when monitoring the scheme. The NSW Ombudsman acknowledges and thanks those workers, other individuals, and organisations who contributed to the report by sharing their experience and expertise.

The *Mandatory Disease Testing Act 2021 (MDT Act)* report is available on our website at www.ombo.nsw.gov.au.

[Watch the NSW Ombudsman discuss the report](#)

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