Mandatory disease testing in NSW: monitoring the operation and administration of the *Mandatory Disease Testing Act 2021*

A report under s36 of the *Mandatory Disease Testing Act 2021*

Pursuing fairness for the people of NSW.

Ombudsman New South Wales

Acknowledgement of Country

We acknowledge the traditional and current custodians of the land of New South Wales on which our people live and work. We pay our respects to all Elders past and present, and to the children of today who are the Elders of the future.

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The Hon. Ben Franklin, MLC
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The Hon. Greg Piper, MP
Speaker
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Dear Mr President and Mr Speaker

I am pleased to present the first report on my office's monitoring of the operation and administration of the *Mandatory Disease Testing Act 2021*. The report covers the period from 29 July 2022 to 31 December 2023.

This report is presented in accordance with section 36(5) of the *Mandatory Disease Testing Act 2021.* The report addresses the reporting requirements outlined in section 36(2) of the Act and is titled *Mandatory disease testing in NSW: monitoring the operation and administration of the Mandatory Disease Testing Act 2021*.

I draw your attention to section 31AA of the *Ombudsman Act 1974* in relation to the tabling of this report, and request that you make the report public forthwith.

Yours sincerely

Paul Miller
NSW Ombudsman

5 February 2025

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NEW SOUTH WALES

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Executive summary

The *Mandatory Disease Testing Act 2021* (the **MDT Act**, or the **Act**) came into effect in July 2022. It provides for the mandatory blood testing of a person whose bodily fluids have come into contact with a worker from certain government agencies in NSW, including law enforcement, corrective services, and health and emergency services workers.

The NSW Ombudsman has a statutory role to monitor the administration of the Act. We are required to prepare a report to NSW Parliament after 12 months of commencement of the Act and every 3 years after the first report, including information about our monitoring of the scheme and the exercise of functions under the Act.

This is our first report following commencement of the Act, covering the first 18 months of the Act's operation, from 29 July 2022 to 31 December 2023 (the **reporting period**). The report comprises 3 parts:

- **Part A** is an overview of the Act and its operation during the reporting period.
- **Part B** provides our overarching comments and key recommendations.
- **Part C** provides our detailed comments on specific legal and operational issues.

Operation of the MDT scheme during the reporting period (Part A)

A mandatory testing order (**MTO**) can be made only where contact with a person's bodily fluids has occurred 'as a result of a deliberate action' by the person and where the making of an MTO for the testing of their blood is 'justified in all the circumstances'. A worker can apply for an MTO only after consulting a 'relevant medical practitioner'.

An MTO can be made by a 'senior officer' from the worker's agency. The senior officer must first seek the consent of the third party to voluntarily provide blood for testing, unless it appears to the senior officer that the third party is a vulnerable third party (defined as a person with a mental health impairment or cognitive impairment affecting their capacity, or a child aged 14 to 17 years) in which case the senior officer may apply to the court for an MTO. The senior officer's determination (to make an MTO or refuse the application) is reviewable by the Chief Health Officer (**CHO**).

Failing to comply with an MTO is a criminal offence.

Use of the Act

During the reporting period, staff from 3 agencies made MDT applications:

(a) NSW Police Force (the **NSWPF**): 106 applications

(b) Corrective Services NSW (**CSNSW**): 32 applications[1]

(c) NSW Ambulance Service: 1 application.

Of the 139 MDT applications[2] made during the reporting period:

- 33% (46) proceeded by way of testing by consent
- 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 a vulnerable third party

[1] All CSNSW applications related to a worker based in a publicly operated correctional centre.
[2] Three of these applications had not been finalised by the end of the reporting period.

- 18% (25) were approved by a senior officer
- 17% (24) were withdrawn or cancelled
- 7% (10) were the subject of court applications. Of those, 7 MTOs were made by the court and 3 were refused.

Key statistics

- Most incidents that led to an MDT application being made involved either spitting or biting. Eighty-four per cent (117 of 139) of all agency applications recorded exposure to saliva. Of those, 26% (30 of 117) indicated a concern about potential exposure to blood in or with the saliva.
- Relative to the general population, MDT applications disproportionately related to young people – people aged 14 to 17 comprise 4.8% of the general population but comprise 7.2% of third parties (10) subject to MDT applications. People aged 18 to 24 comprise 8.4% of the general population but comprised 33% of third parties (46) subject to MDT applications.
- Males are overrepresented in total applications made by all agencies – over two-thirds (68% or 95 of 139) of third parties were male.
- Females are significantly overrepresented in CSNSW MDT applications – 25% of third parties in CSNSW MDT applications were female, but females make up around 6.7% of the inmate population. This suggests that female inmates are just under 4 times more likely to be subject to an MDT application than male inmates.
- In 24% (33 of 139) of MDT applications, senior officers recorded that the person to be tested appeared to them to be a vulnerable third party. Of those 33 applications, 10 proceeded to court. Seven of these resulted in the court making an MTO.
- MDT applications have disproportionately related to Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people comprise 3.4% of the general population but were the subject of 28% of MDT applications. Third parties who are Aboriginal and Torres Strait Islander people had a higher rate of MDT applications dealt with by consent (41% compared with 29.7%) and were less likely to be assessed as vulnerable.
- No worker whose MDT application was refused applied for a review of that decision by the CHO during the reporting period. One review application was made by a third party who was subject to an MTO – the CHO upheld the decision to make the MTO.
- No judicial review proceedings were commenced in respect of a decision made under the MDT Act during the reporting period.
- The NSWPF and CSNSW have not reported any use of force in connection with administering an MTO during the reporting period.
- It is a criminal offence to fail to comply with an MTO without reasonable excuse. During the reporting period, one person was charged with ‘fail to comply’.

Overarching comments and core recommendations (Part B)

The Act is mostly being used in cases where there is no real risk of a worker contracting a blood-borne disease

Most MDT applications (at least 87 of 139, or 62.6%) involved the exposure of a worker to saliva only. Of these, 52 (60%) resulted in a senior officer making an MTO, applying to the court for an MTO or testing by consent of the third party.

Guidance from the CHO is that this type of exposure carries no real risk of transmission of any relevant blood-borne disease. Given that one of the objects of the Act is to encourage workers to seek medical advice and information about the risks of contracting blood-borne disease, as well as to protect and promote their health and wellbeing, the high proportion of applications being made with no risk of contracting a blood-borne disease suggests that the Act is not working as intended.

We saw no evidence that the Act is improving the health and wellbeing of workers

A survey of workers we conducted indicated that, of those who responded:

- no worker had their treatment changed following the third party being tested
- no worker felt that the scheme promoted their wellbeing
- some workers felt that the process of applying for an MTO added to their stress and anxiety.

We share the concerns of some stakeholders that the Act itself – for example, by including saliva as a relevant bodily fluid – may be contributing to misinformation and misunderstanding among workers of the risk of transmission of blood-borne diseases, and therefore contributing to their stress and fear.

Protections for third parties are ineffective

While the Act contains a range of provisions which aim to protect the rights of third parties and afford them procedural fairness, they are largely ineffective.

- The test for vulnerability (ie whether the third party is under 18 or has a mental or cognitive impairment) is subjectively applied and conceptually confusing, providing no guidance as to indicators of vulnerability.
- Blood test results of third parties are given to workers and there appears to be no legal restriction on the worker's ability to disclose those results.
- The third party's right to make submissions before an MDT application is determined is ineffectual in practice due to the short timeframe involved and the fact that the third parties are generally not given a copy of the worker's MDT application.
- There are significant practical barriers to a third party seeking external review of decisions by the CHO (the only review mechanism in the Act).
- Protections against the use of information in other proceedings against the third party are ambiguous, inadequate and poorly drafted.

The Act is disproportionately impacting Aboriginal and Torres Strait Islander people

The disproportionate impact of the scheme on Aboriginal and Torres Strait Islander people is even greater than can be explained by their disproportionate involvement in the justice system. For example, while Aboriginal and Torres Strait Islander people make up 3.4% of the general population and 31% of

the inmate population, half of all CSNSW's MDT applications concerned an Aboriginal or Torres Strait Islander person.

There are legal complications with testing by consent

Before determining an MDT application in respect of a non-vulnerable third party, the Act requires the senior officer to seek the consent of the person to voluntarily provide blood. Almost half of all MDT applications in respect of non-vulnerable people proceeded to testing by consent.

If consent is obtained, the MDT application must be refused. If consent is obtained, testing proceeds entirely outside the framework of the MDT Act. This leaves gaps because:

- there is no mechanism to deal with what happens if the person, having given consent, then fails or refuses to provide a blood sample
- provisions within the Act which require testing to occur 'subject to an MTO' are not enlivened, including:
  - the authorisation (and restriction) on the pathology laboratory to send the results to relevant medical practitioners and the CHO (and to no one else)
  - the entitlement of the third party to cost reimbursement
  - the non-disclosure of information gathered under the Act
  - the requirement for the agency to notify the NSW Ombudsman when a determination is made on an MDT application.
- the Act requires consent to be sought by the senior officer, and so this is occurring in a non-clinical context, and without the person having the opportunity to obtain medical, legal or other advice before making the decision to consent
- in some cases involving the NSWPF, we observed pressure being applied when consent was sought
- even when overt pressure is not applied, there is an inherent power imbalance between senior officers and third parties that may lead to doubts as to whether consent is being provided on a free and fully informed basis.

Senior officers of agencies are ill-equipped to be making determinations about MTOs, and decision-making processes within the NSWPF seem particularly poor

The Act confers decision-making power on senior officers, who are generally non-experts – either as administrative lawyers or as medical clinicians. This includes the decision as to whether a third party 'appears' to have a mental health or cognitive impairment which would qualify them as a vulnerable third party.

The Act provides extremely broad discretion to these decision makers, who can make an MTO if they consider it to be 'justified in all the circumstances'. Although reasons are required to be given, in practice documented reasons are perfunctory and, in the case of the NSWPF, are entered using a structured decision-making tool that functions largely as a check-a-box.

Core recommendations

In light of the observations above, we recommend that consideration be given to whether the Act should be continued at all (**recommendation 1**) and whether the administrative resources currently applied to the scheme would be better directed toward providing better avenues of advice and support directly to frontline workers exposed to bodily fluids in the workplace.

There were, at most, only 47 MDT applications during the 18-month reporting period where there existed even a low risk of blood-borne disease transmission to a worker.[3] In any case, the existence of a testing window (that is, a gap in time between when a person contracts a disease and when they develop the antibodies that show up in testing) applies to the third party as well as the worker. As such, when there may be a transmission risk, a negative result returned from the third party is no assurance against transmission.

Given the lack of clear and measurable benefits to workers, 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.

The Act attempts to balance important competing policy priorities, including:

- a scheme that will operate on a fast enough timeframe to make third party testing at least potentially relevant to a worker's medical treatment
- protections and procedural fairness rights for third parties.

It may be that these competing policy concerns are irreconcilable. Workers who responded to our survey generally told us that the scheme did not support their wellbeing, and they found that the process added to their stress. On the other hand, as noted above, the legislative safeguards for third parties are also ineffective and often inadequate.

If **recommendation 1** is not accepted and the Act is continued, we suggest that the different pathways that currently exist based on whether a third party appears to the senior officer to be vulnerable or non-vulnerable be removed.

Given the inadequacies in identifying vulnerability, the problems with decision making by senior officers alone and ineffective procedural fairness mechanisms, it is our view that all applications, if supported by the worker's employer, should be determined by the court (**recommendation 2**).

Detailed comments on legal and operational issues (Part C)

Part C contains our observations and analysis on the legal and operational issues we identified during our monitoring of the operation and administration of the Act. In this part of the report we have made recommendations on how the Act should be amended, it if it is to remain in effect. Part C also contains recommendations to make changes to the CHO guidelines and to agency policies and procedures, and for the increased publication of MDT-related data.

MDT applications

Under the Act, a worker can only apply for an MTO where bodily fluid contact has been caused as 'a result of a deliberate action' – however, this phrase is undefined and ambiguous (see **recommendation 3**). Although the MDT Act requires 'a detailed description of the contact, including the date, time, place and surrounding circumstances, and the nature of the worker's contact with the third party's bodily fluid', applications often only included only brief or minor details.

Consultation with a relevant medical practitioner

The Act requires workers to consult a 'relevant medical practitioner' with specialist qualifications or experience in blood-borne diseases before an MDT application can be made. There is no mechanism that allows us to determine the extent to which workers have attempted to do this. From what we can ascertain, it does not appear that workers are obtaining advice from medical practitioners with specialist expertise in blood-borne diseases (see **recommendation 4**). It is also apparent that the medical advice

[3] Number of MDT applications where blood was identified as a bodily fluid 40 NSWPF and 7 CSNSW.

that workers are obtaining is not comprehensively addressing the requirements prescribed in the Act (**recommendations 5** and **6**).

Worker experience and wellbeing

It has not been possible to assess the extent to which (if at all) the medical treatment of workers following an exposure incident has been affected by the testing of third party. The majority of workers who responded to a survey we conducted about their experience of the MDT process said they would have sought medical advice following exposure even if the MDT Act had not been in place. Survey results did not suggest that a worker's decision to receive treatment (that is, post-exposure prophylaxis (**PEP**)) was affected by third party testing under the Act. Worker survey results also indicated that workers generally did not feel that the MDT scheme had promoted their health and wellbeing.

Chief Health Officer reviews and court submissions

Reviews of MTO decisions are undertaken by the Chief Health Officer (the **CHO**). The CHO advises that, as it lacks legal expertise, it considers that it cannot be expected to conduct an administrative 'merits' review. If senior officers are to remain the decision maker under the Act, a proper merits review mechanism should be integrated into the scheme (see **recommendation 7**). There is also a lack of clarity around what happens if the CHO's review decision is to set aside the making of an MTO (see **recommendation 8**).

We identified operational flaws in the Act's review mechanism, including the following:

- The Act requires workers and the third parties to make any application for review within 1 business day of 'being notified' of the senior officer's decision – but it can be unclear when 'notice' of a senior officer's determination decision has been given (see **recommendation 9**) – and notice to a third party about their review rights is typically given after the review application period has already expired (see **recommendation 10**).
- The Mandatory Disease Testing Regulation 2022 (the **Regulation**) requires a third party's application for review to include a copy of the MTO, but they typically do not have it at that time (see **recommendation 11**).
- There is no clear power for the CHO to accept a late review application (see **recommendation 12**).
- It is difficult and impractical for people to obtain advice (including legal or medical advice) within the 1 business day timeframe in which they may apply for review (see **recommendation 13**).
- Third parties do not have a fair opportunity to make submissions to reviews of MTO decisions (see **recommendation 14).**
- There is no reasonable justification for requiring testing to proceed pending the outcome of a review, as currently occurs under the Act. Stakeholders raised significant opposition to this aspect of the Act, one noting that it 'wholly negates the purported safeguard against arbitrary bodily interference'. The Act's prohibition on disseminating test results during review is also ineffectual (see **recommendation 15)**.

No worker applied for a review during the reporting period. Potential reasons for this include the limited timeframe for applying for a review (1 business day following notification of the senior officer's determination), lack of awareness of review rights, and a perception that the review may be futile.

The CHO may make submissions to the court in relation to an application for an MTO, and the court must take these submissions into account. However, it notes that it has historically faced barriers to doing so (see **recommendation 16**). Even when it is notified of a court application, the CHO is not given all the information needed to make an informed submission (see **recommendation 17**).

Vulnerable third parties

Assessment of the vulnerability of a third party is subjective, and it appears that the senior officer is not required to make any inquiries to assess vulnerability. Unless the Act is amended to provide that all MTOs should be made by the court (**recommendation 2**), the test for vulnerability should be amended so that the presumption is that a person is vulnerable unless an assessment is made otherwise (see **recommendations 18** and **19**).

Aboriginal and Torres Strait Islander third parties have been assessed as vulnerable at a lower rate than non-Indigenous third parties. The number of third parties recognised as vulnerable by the NSWPF generally appears surprisingly low. Twenty-three per cent (33 of 139) of all third parties were identified by a senior officer as appearing to be vulnerable.

Senior officers also do not typically include a record of the enquiries made or reasons for their assessment of vulnerability (and such records are not currently required by the Act) (see **recommendation 20**).

The current test of vulnerability is based on the incapacity of the third party to consent, which is a narrow concept. We suggest that the threshold of 'significant impact on capacity to consent' should be removed from the Act's test of vulnerability, and instead the test should be extended to include an inability to understand the nature of the decision or to make proper submissions.

Several submissions recommended widening the definition of vulnerable third party to include Aboriginal and Torres Strait Islander people. We agree that this would be appropriate. The timing of the application of the test of vulnerability is also ambiguous. In our view, if a person has a relevant impairment at any relevant time, that should result in the person being considered vulnerable.

We recommend Government amend the Act's definition of vulnerable third party to address these issues (**recommendation 21**).

Chief Health Officer guidelines

The Act requires the CHO to issue guidelines to assist senior officers, relevant medical practitioners and persons taking blood from third parties under an MTO. The MDT Act does not specify any mandatory content requirements for the CHO guidelines. Some of the information they contain could be made clearer for senior officers (see **recommendation 22**). The CHO guidelines will also need to be updated if other legislative amendments recommended in this report are implemented (see **recommendation 23**).

Police-developed training materials do not reference the CHO guidance on transmissibility risk, nor do they include training on how to consider and apply the CHO guidelines more generally (see **recommendations 24** and **25**).

Decision making and determinations by senior officers

The MDT Act confers a wide discretion on senior officers to make an order if subjectively satisfied that it is 'justified in all the circumstances'. The NSW Crown Solicitor's Office (the **Crown Solicitor**) has advised that a senior officer must take into consideration the worker's MDT application (as well as the CHO guidelines and any submissions). Senior officers should be required to form a view that the worker is eligible to make an MDT application before it is determined (see **recommendation 26**).

The Act is ambiguous as to whether it is necessary for there to be at least some transmission risk for an MTO to be made, even though a key object of the Act is to provide for blood testing where 'the worker is at risk of contracting a blood-borne disease' (see **recommendation 27**). Given there is no real risk of transmission, saliva should be omitted from the MDT Act (**recommendation 28**).

The MDT Act defines bodily fluids to include those prescribed by regulation. Additional bodily fluids should not be able to be included unless they carry a real risk of transmission of a relevant blood-borne disease (**recommendation 29**).

Senior officers appear to be making inconsistent decisions about similar incidents or risks. Unclear advice about the possibility of blood in saliva increases inconsistencies in decision making and heightens the likelihood that MTOs are being made where there is no real risk of transmission.

Records of decisions by CSNSW senior officers do not suggest that the CHO guidelines are being routinely considered.

It also appears that senior officers are not consulting workers' medical practitioners before making determinations, even in cases where no written medical advice was provided (see **recommendation 30**). Senior officers may need to consult with medical practitioners and access records beyond what is contained in the written medical advice. Currently their ability to do so applies only in the case where no written medical advice has been obtained, and it is unclear why this is the case (see **recommendations 31**, **32** and **33**). Although the NSWPF guidelines advise NSWPF workers to seek written medical advice and attach it to their application, written medical advice is not always obtained for the senior officer to consider. Thirty-nine per cent of NSWPF MDT applications (41 of 106) did not contain written medical advice. A high proportion of these applications resulted in blood testing, either by way of an MTO or by consent.

Third parties are often not given sufficient opportunity to make a submission (see **recommendation 34**), and it appears that NSWPF senior officers use their consent form as the third party's opportunity to provide a submission, effectively conflating the Act's requirement to provide an opportunity to make a submission with the requirement to seek consent (see **recommendation 35**).

Enforcement

There is ambiguity in the Act around whether force can be used against a person who is arrested and detained for failing to comply with an MTO (see **recommendation 36**).

Testing with consent

As noted in **part B**, a high proportion of blood tests (47%) are being conducted by consent – and it is likely that these reported numbers are understated. There are inconsistent practices between and within agencies about how applications are to be finalised if consent is obtained – the Act does not specify what senior officers may or must do in relation to the MDT application when consent has been obtained, and senior officers from the NSWPF and CSNSW have demonstrated differing approaches.

The Crown Solicitor has confirmed that, if consent is obtained, the senior officer must refuse the application (see **recommendation 37**). It may be necessary to amend the MDT Act to explicitly set out what is to occur if a third party consents, given the risk that they might later withdraw consent (**recommendation 38**).

Some provisions of the MDT Act are predicated on testing being undertaken subject to an MTO – meaning they will not be enlivened if the testing occurs by consent (see **recommendation 39**).

While there is no express prohibition in the Act, it is clearly not intended that senior officers would seek consent in respect of vulnerable third parties. However, in a small number of cases this has occurred, and in (at least) 2 cases with some pressure applied.

We also have concerns that in some cases senior officers have already decided that they will make the MTO when they approach a third party to seek consent – meaning their decision would be contrary to

law.[4] Even where overt pressure is not applied, there is an inherent power imbalance between senior officers and third parties that may impact the validity of consent gained – for example, when consent is gained from a third party who is being held in custody.

In most cases, there is little or no documentation recording the contact made by senior officers with the third party during which consent was obtained. This has made it challenging for us to consider the extent to which consent is being obtained in accordance with the Act, and whether it has been provided on a free and informed basis. Although the CHO guidelines recommend that they do so, agencies rarely record any reasons as to why a third party has not consented. This information is important for purposes of transparency (see **recommendation 40**). It is also apparent that the obtaining of consent by the NSWPF is not routinely captured on body-worn video (**BWV**) (see **recommendation 41**).

If consent is obtained before an MDT application is made, the MDT Act does not apply.

Blood samples and test results

Although the Act requires it, pathology laboratories are not always providing blood test results to the CHO when the third party has not nominated a medical practitioner. This may be due (at least in part) to a lack of knowledge on the part of pathology laboratories about this obligation (see **recommendations 42** and **43**). When undertaking a test under an MTO, pathology staff are made aware that testing is subject to an MTO but are not provided a copy of the MTO itself. This is in contravention of the Act. It also appears that the applicant worker can legally nominate more than one medical practitioner for dissemination of blood test results. The disclosure of a person's health information to anyone without consent violates the person's health privacy and should be permitted under the Act only where absolutely necessary (see **recommendation 44**).

Neither the Act, the Regulation nor the CHO guidelines set out what information must be included with the test results when sent to medical practitioners (see **recommendations 45** and **46**). Further, it appears that workers may be under no legal obligation to maintain the confidentiality of the third party's test results. The Act provides that the recipient medical practitioner may disclose the blood tests to the applicant worker, but it does not provide any guidance as to what the worker may (or may not) do with those results (see **recommendation 47**).

The MDT Act appropriately does not authorise the senior officer to seek out, request or obtain the third party's test results. The pathology laboratory should be required to notify the senior officer in writing as soon as practicable after blood has been taken from the third party, without notifying them of the actual results (see **recommendations 48** and **49**). One of the exceptions to non-disclosure of third party health information is 'in other circumstances prescribed by the regulations'. Allowing additional exceptions to the disclosure of third party health information to be prescribed by regulation is justified (see **recommendation 50**).

We have not identified any impermissible attempts to use blood test samples for other law enforcement purposes – however the statutory protections in this regard appear inadequate (see **recommendations 51** and **52**). The Act only authorises (but does not require) blood test samples to be destroyed when no longer required for MDT purposes (see **recommendation 53**).

Ombudsman monitoring and reporting

Limitations on the Ombudsman's information gathering powers under the Act are problematic (see **recommendation 54**). Additionally, the Act does not expressly prevent agencies withholding information required by the Ombudsman on the grounds of public interest or other privilege (see **recommendation 55**).

[4] There may also be a question as to whether, at that time, they had also considered the CHO guidelines (which are also mandatory considerations).

The powers of the Ombudsman to compel agencies (and others if necessary) to produce information remain limited. We are currently unable to assess the number of third parties who, following a mandatory test, actually returned a positive result for blood-borne diseases. This information would be valuable in assessing whether the MDT Act may provide some benefit to workers (see **recommendation 56**).

Agencies are required to notify the Ombudsman when senior officers make determinations of MDT applications. This does not encompass all MDT applications that are made to agencies, such as those that are withdrawn. To address this, mandatory notification requirements should be expanded (see **recommendation 57**).

The NSWPF's use of a structured decision-making tool through BluePortal to both make and record decisions by senior officers has led to the recording of inadequate 'reasons' for decision, that impede any such assessment. Senior officers should make and provide full and proper reasons for their determinations, including what was considered and relied upon in making the decision and a clear statement of the reasoning process (see **recommendations 58** and **59**).

Detailed demographic data also cannot currently be reported as agencies do not routinely collect and retain it. Agencies need to be directed to make and keep a record of the demographic information that Parliament intends to be reported (see **recommendation 60**).

The Act provides for the Ombudsman to report every 3 years on its monitoring of the MDT scheme. Going forward, we intend to publish (at least annually) a report on our monitoring, including non-identified, non-health, statistical data on the operation of the MDT scheme (**recommendation 61**). BOCSAR could also report MDT activity of the NSWPF on their public platform, including information about the number of applications and orders made (**recommendation 62**).

Recommendations

Recommendation 1

That consideration be given to whether the Act should be continued at all, and whether 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. That could include establishing and funding a panel of specialist blood-borne disease clinicians to be available for immediate consultations with workers (and their general practitioners) if required following a workplace incident of exposure to bodily fluids.

Recommendation 2

If the Act is to be continued, the Act be amended to provide that, in all cases, MTOs may only be made by the court, on application by the worker's senior officer.

If this recommendation is implemented:

- **a.** Consideration should also be given to all of the recommendations set out in the next part of this report (other than those expressly stating that they do not apply if this recommendation is implemented). This includes that:
  - **i.** A panel of relevant medical experts should be made available to workers (**recommendation 4**) and their written medical advice should be put before the decision maker.
  - **ii.** The criteria for making an MTO should include that there must be a real risk of transmission of a blood-borne disease and that testing of the third party may affect the treatment of the worker (**recommendation 27**).
- **b.** In addition (and although the concept of 'vulnerable third party' can otherwise be omitted from the Act), consideration should be given to amending the Act to explicitly deal with how, prior to an MDT application being determined by the court, consent may (or may not) be obtained in the case of a minor or other person who lacks capacity to consent.

Recommendation 3

If the Act is to continue, that the Act be amended to clarify whether the requirement that contact with bodily fluid be a 'result of a deliberate action' by the third party means that:

- **a.** as indicated in the second reading speech for the Bill, the third party engaged in the action with the intention of causing contact between their bodily fluid and the worker (the *narrower view*), or
- **b.** as per the Crown Solicitor's preferred construction of the MDT Act currently, the third party need only have intended to engage in the action which caused the bodily fluid contact, without necessarily also intending to cause contact between their bodily fluid and the worker (the *broader view*).

Recommendation 4

That agencies work with the CHO to put in place arrangements with a list of relevant expert medical practitioners for workers, including those in regional areas, to have rapid telehealth consultations (including outside normal business hours) following an exposure event.

Recommendation 5

If the Act is to continue, that the Act be amended to provide that a worker's medical practitioner must, both during the consultation and in written advice, inform the worker about all of the following:

- **a.** the medical practitioner's assessment as to:
  - **i.** whether there is any risk of the worker contracting each blood-borne disease
  - **ii.** if so, the level of such risk.
- **b.** the appropriate action (if any) to be taken by the worker to mitigate that risk to the extent (if any) to which testing the third party's blood:
  - **iii.** will assist in assessing the risk to the worker of contracting each blood-borne disease
  - **iv.** may affect the appropriate action (if any) to be taken by the worker to mitigate that risk
  - **v.** may affect the worker's mental health or wellbeing
- **c.** the risk that the third party test may return a false result.

Recommendation 6

If the Act is to continue, that the CHO develop a form for workers to provide to their medical practitioner, addressing each of the matters referred to in **recommendation 5**, and which upon completion would constitute written medical advice for the purposes of the MDT Act. This proforma could be contained in the Regulation, or in the CHO guidelines and each agency's MDT policy.

Recommendation 7

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to provide that decisions of senior officers to make or refuse to make an MTO, are subject to a review:

- **a.** by NCAT, the Local Court, or other relevant court or tribunal with expertise in reviewing administrative decisions
- **b.** which permits the reviewing body to consider whether the senior officer's determination was the correct and preferable decision
- **c.** which, if the senior officer's decision is overturned, permits the reviewing body to make the correct and preferable decision.

Recommendation 8

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to clarify that if, on review, the CHO [or other review body] sets aside a decision to make an MTO, they may then:

- **a.** decide to refuse the MDT application
- **b.** in the case of a person who is not a vulnerable person, make an MTO (in different terms to that made by the senior officer)
- **c.** in the case of a person who is a vulnerable person, apply to the court to make an MTO

Recommendation 9

If the Act is to continue, that the Act be amended to make clear that 'notice' in s 23 means the written notice of determination required to be given under s 13.

Recommendation 10

If the Act is to continue and **recommendation 2** is not adopted, that the NSWPF, CSNSW and other relevant agencies include information in any notice of determination about workers' and third parties' review rights, and that the Act be amended to make this a requirement.

Recommendation 11

If the Act is to continue and **recommendation 2** is not adopted, that Government amend the Regulation to provide that an application for review from a third party must include either the MTO or a copy of the senior officer's notice of determination and reasons for determination.

Recommendation 12

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to provide that the CHO [or other review body] may accept an application for review out of time in exceptional circumstances.

Recommendation 13

If the Act is to continue, that the Act be amended to provide that the period within which an application for review must be made is 3 business days from notification of the decision.

Recommendation 14

If the Act is to continue, that the Act be amended to provide that both the third party and the worker are to be given an opportunity to make submissions on any review, and the CHO [or other review body] is to consider any submissions received.

Recommendation 15

If the Act is to continue, that the Act be amended to provide that testing in respect of an MTO is not to take place until whichever is later of the following:

- **a.** the expiry of the time within which an application for review may be made
- **b.** the finalisation of any review.

Recommendation 16

If the Act is to continue, that the CHO adopt the practice of always making submissions to assist the court in determining MDT applications.

Recommendation 17

If the Act is to continue, that the Act be amended to require that a senior officer must provide the CHO with a complete copy of the court application, including all filed documents, at the same time as the application is made.

Recommendation 18

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to provide that a third party is to be taken to be a vulnerable person unless the senior officer is satisfied, on reasonable grounds, that the person is not a vulnerable person.

Recommendation 19

If the Act is to continue and **recommendation 2** is not adopted, that the CHO revise the CHO guidelines to include advice to senior officers about assessing whether a third party is or is not a vulnerable person, and to provide that, if senior officers assess that a person is not a vulnerable person, they should record what enquiries were made and what factors were taken into consideration.

Recommendation 20

If the Act is to continue and **recommendation 2** is not adopted, that the NSWPF amend its guidelines to require that senior officers record what, if any, enquiries were made concerning vulnerability, and what factors were taken into consideration when assessing vulnerability – see **recommendations 18** and **19**.

Recommendation 21

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to change the definition of vulnerable third party to include, in addition to children aged 14 to 17 years, any person:

- **a.** who has, or at the time of the contact incident had, a cognitive impairment or mental health impairment, or
- **b.** whose English language proficiency prohibits them from, or who is otherwise unable to, understand the nature of the decision to be made or to properly make submissions or otherwise represent themself in respect of that decision, or
- **c.** who is an Aboriginal or Torres Strait Islander person.

Recommendation 22

If the Act is to continue**,** that the CHO review the CHO guidelines in consultation with agencies to consider whether advice on the transmission risk (or lack of risk) associated with contact types can be made clearer to non-expert readers.

Recommendation 23

If the Act is to continue**,** that the CHO promptly review and update the CHO guidelines accordingly following the passage of any legislative amendments as recommended by this report.

Recommendation 24

If the Act is to continue, that the Act be amended to provide that:

- **a.** a senior officer must complete a course of training, delivered or approved by the CHO, and
- **b.** determinations of MDT applications (including, if **recommendation 2** is adopted, applications to the court) may only be made by a senior officer who has completed that training.

Recommendation 25

If the Act is to continue, that all agencies ensure that the CHO guidelines are the primary reference source for any MDT-related policies and training material developed or used by agencies under the Act, including for the purpose of training senior officers on the risks (if any) of transmission.

Recommendation 26

If the Act is to continue**,** that the Act be amended to make it clear that a senior officer may only make an MTO (or apply to the court for an MTO, including if **recommendation 2** is adopted) if satisfied that the worker making the application was eligible to do so under s 8. This would mean that the senior officer must form a view on the following before making a decision on an MTO determination:

- **a.** the worker came into contact with bodily fluid of the third party
- **b.** the contact occurred in the execution of the worker's duty
- **c.** the contact was the result of a deliberate action by the third party
- **d.** the contact was without the consent of the third party
- **e.** the third party is over the age of 14
- **f.** the worker has consulted a relevant medical practitioner
- **g.** the application is made within 5 days of the contact.

Recommendation 27

If the Act is to continue, that the Act be amended to provide that, to make an MTO the decision maker (including the court if **recommendation 2** is adopted) must be satisfied, having regard to the CHO guidelines and medical advice, that there is a real risk that the worker has contracted a blood-borne disease from the contact incident.

Recommendation 28

If the Act is to continue, that the Act be amended to omit saliva as a 'bodily fluid' (noting that, if contact is made with *both* saliva and blood, the Act could still apply in respect of that contact as blood is a bodily fluid).

Recommendation 29

If the Act is to continue, that the Act be amended to omit from the definition of 'bodily fluid' the regulation-making power to prescribe any 'other bodily fluid or substance' as a bodily fluid, or alternatively to put in place a safeguard that a bodily fluid is only prescribed following certification by the CHO.

Recommendation 30

If the Act is to continue, that the Act be amended to require that all MDT applications *must* include written advice from the worker's medical practitioner. (See also **recommendation 5** as to the required content of that advice).

Recommendation 31

If the Act is to continue, that the Act be amended to provide that a worker's statement(s) consenting to the senior officer consulting their medical practitioner and accessing their medical records extends to the case of an MDT application that is determined by the senior officer deciding to apply to the court, to the extent necessary for the purpose of pursuing court proceedings.

Recommendation 32

If the Act is to continue, that the Act be amended to provide that, in all cases, a worker's MDT application must include statement(s) of consent to the senior officer accessing their relevant medical records as necessary.

Recommendation 33

If the Act is to continue, that the CHO review and revise the CHO guidelines to provide guidance to senior officers as to how and when they should be consulting with a worker's medical practitioner.

Recommendation 34

If the Act is to continue, that the Act be amended to require that, for the purpose of affording third parties an opportunity to make a submission:

- **a.** the senior officer must provide them with a redacted copy of the MDT application immediately, and in any case no later than 1 business day after the MDT application is made, and
- **b.** should they indicate that they wish to do so, third parties be given the opportunity to obtain medical and/or legal advice to assist with the decision to make (or not make) a submission, and to assist in the making of that submission.
- **c.** Pending any change to the legislation, this practice should be adopted by agencies as a matter of policy.

Recommendation 35

If the Act is to continue, that the NSWPF review its policy and practices to ensure that third parties are genuinely provided an opportunity to make a submission on any matters relevant to the determination of an MDT application, and not merely on their reasons for not consenting to provide a blood sample for testing.

Recommendation 36

If the Act is to continue, that the Act be amended to provide that the powers of law enforcement officers in respect of a detained third party provided by s 21 do not apply if the person has been detained only in connection with an offence under the Act.

Recommendation 37

If the Act is to continue, that the NSWPF, CSNSW and other relevant agencies amend their policies to include a direction that, if a non-vulnerable third party consents to providing a blood sample for testing after an MDT application has been made, the senior officer must proceed to determine the application by refusing it, and giving notice of that determination in accordance with s 13 of the Act.

Recommendation 38

If the Act is to continue, that the Act be amended to provide that, in respect of an MDT application about a non-vulnerable third party who has consented to voluntarily provide a blood sample for testing:

- **a.** the application is to remain on foot (and not be determined) until the blood sample for testing is provided - even if this is outside the 3-business-day timeframe within which a determination must ordinarily be made
- **b.** once the blood sample has been provided, the senior officer is to determine the application by refusing it
- **c.** but if the blood sample is not provided voluntarily (ie consent is withdrawn), the senior officer (or the court, if **recommendation 2** is adopted) may proceed to determine the application by either making an MTO or refusing the application.

Recommendation 39

If the Act is to continue, that the Act be amended to provide that the following provisions also apply where, following the making of an application for an MTO, testing is conducted with consent:

- **a.** s 22 (Results of blood test)
- **b.** s 29 (Disclosure of information)
- **c.** s 34 (Costs).

Recommendation 40

If the Act is to continue, that the NSWPF, CSNSW and other covered agencies review and if necessary, revise their policies and procedures to provide that:

- **a.** a form is provided for completion by any non-vulnerable third party to allow them to indicate whether they will or will not consent
- **b.** the form includes a specific field inviting the third party to provide reasons for not consenting, if they do not consent
- **c.** returned forms (where consent has not been provided) are considered by the senior officer before determining an MDT application (or provided to the court if **recommendation 2** is adopted), and otherwise kept on the relevant file
- **d.** if a third party does not complete a form, this is noted on the relevant file.

Recommendation 41

If the Act is to continue, that the NSWPF, CSNSW and other covered agencies review and revise their MDT policies and procedures to include directions to senior officers that they:

- **a.** are to seek consent by asking whether or not the person will consent
- **b.** are to give the third party a reasonable opportunity to consider (including after seeking legal or other advice, if necessary) whether they will consent

c. are not to apply pressure in seeking consent - including that they must not imply that, if consent is not provided, an MTO will necessarily be made

d. are to make a record of the manner in which consent was sought and, if relevant, obtained on the MDT application file

e. (in the case of the NSWPF and CSNSW) are to record on BWV any conversation in which consent is sought.

Recommendation 42

If the Act is to continue, that the CHO take steps to ensure that pathology laboratories are aware of their obligation to provide a copy of blood test results to the CHO if no medical practitioner has been nominated by the relevant third party.

Recommendation 43

If the Act is to continue, that the CHO be funded to develop and deliver training for NSW pathology staff in relation to the operation of the MDT Act, including their obligations concerning the dissemination of blood test results and treatment of blood test samples, and risk mitigation for staff who administer tests under an MTO.

Recommendation 44

If the Act is to continue, that the Act be amended to provide that a worker may nominate only one medical practitioner to receive the third party's blood test results on the worker's behalf.

Recommendation 45

If the Act is to continue, that the Act (or the Regulation) be amended to provide that, when blood test results are to be disseminated to a medical practitioner:

a. The pathology laboratory is to contact the medical practitioner to confirm that they are authorised and willing to receive the results on behalf of the relevant person

b. The results are to be marked as confidential for the personal attention of the medical practitioner, and

c. The results are to be accompanied by the following information:

i. The fact that the test was undertaken under an MTO

ii. The names of the relevant worker and third party

iii. A list of all persons who are receiving the results and why

iv. A copy of, or a reference to a public website that includes, the CHO guidelines.

Recommendation 46

If the Act is to continue and subject to **recommendation 45** being adopted, the CHO should issue advice to pathology laboratories with instructions to the above effect.

Recommendation 47

If the Act is to continue, that the Act be amended to:

a. provide that any person who receives the health information of a third party, including a worker and any person to whom the worker then discloses the information, is also subject to the prohibition on disclosing the information unless one of the exceptions in s 29(1) apply, and

b. add exceptions for the disclosure of information where reasonably necessary for the purpose of:

i. the worker informing a spouse, intimate partner or other person in respect of whom the third party's health information may be relevant to that person's own health or safety, or

ii. the worker or a person referred to in paragraph (i) above for the purpose of seeking medical, counselling, legal or other professional advice.

Recommendation 48

If the Act is to continue, that the CHO guidelines and the NSWPF, CSNSW and other agencies' policies be amended to state clearly that the third party's blood test results should not be disclosed to the senior officer, and the senior officer must not request those results.

Recommendation 49

If the Act is to continue, that the Act be amended to provide that, at the time of disseminating the blood test results under s 22, the pathology laboratory is to notify the senior officer that the test was successfully completed in accordance with MTO.

Recommendation 50

If the Act is to continue, that s 29(1)(e) of the Act be repealed.

Recommendation 51

If the Act is to continue, that the Act (s 7) be amended to provide there is an absolute prohibition on the use of blood samples for any purpose not authorised by the Act, and that this applies to any law enforcement agency and any other person.

Recommendation 52

If the Act is to continue, that the Act (s 31) be amended to provide that the prohibition on the use of samples and information as evidence applies to all proceedings and administrative decisions or assessments (other than if adduced by the third party themselves).

Recommendation 53

If the Act is to continue, that (subject to consultation with the CHO to confirm that there is no impediment under national pathology standards to doing so) the Act be amended to provide that the sample must be destroyed by the pathology laboratory as soon as it is no longer required for the purposes of the Act.

Recommendation 54

If the Act is to continue, that the Act (s 36) be amended to provide that the Ombudsman's power to require information can:

- **a.** be exercised for the purpose of any Ombudsman function under the Act (and not just for its function of preparing a report)
- **b.** relate to any information relevant to the Act (and not limited to information relating to an MDT application)
- **c.** be made to any person (and not just to senior officers or the Commissioner of Police).

Recommendation 55

If the Act is to continue, that the Act (s 36) be amended to provide that no Act (including any other provision of the MDT Act) or law prevents a person complying or affects a person's duty to comply with a requirement of the Ombudsman to provide information, except that the Ombudsman must set aside a requirement to produce information if:

- **a.** the person is not a public authority,
- **b.** the person has a ground of privilege that would entitle them to resist such a requirement in court proceedings, and
- **c.** the person has not waived that privilege.

Recommendation 56

If the Act is to continue, that the Act be amended (subject to consultation with the CHO to confirm that there is no impediment under the relevant health privacy laws and standards) to provide for the CHO to receive and collate:

- **a.** the result of pathology tests administered on third parties under the Act
- **b.** the PEP treatment of workers, including whether this changed following receipt of the third party test results
- **c.** data to the Ombudsman in deidentified and aggregated form for the purposes of our monitoring and reporting functions. (This should include in respect of all MDT applications, including where testing was done pursuant to an MTO and where testing was done by consent).

Recommendation 57

If the Act is to continue, that the Act be amended to include (in addition to the requirement to give notice to the Ombudsman of any determination under s 13) that agencies must report annually to the Ombudsman on the number of MDT applications received and the outcome of those applications, including those that proceeded to determination, those that were withdrawn, and those that were dealt with by consent.

Recommendation 58

If the Act is to continue (and to the extent necessary if **recommendation 2** is adopted), agencies should ensure, and the Act should be amended to require, that the notices of reasons provided under s 13 are adequate, including by ensuring that they describe with appropriate specificity:

- **a.** the decision
- **b.** the findings on material facts
- **c.** the evidence or other material on which those findings are based
- **d.** the reasons for the decision.

Recommendation 59

If the Act is to continue (and to the extent necessary if **recommendation 2** is adopted), agencies should ensure – and the Act should be amended to require, that notices given to the Ombudsman under s 13(1)(d) of the Act are accompanied by:

- **a.** references to any information considered in making a decision, including a copy of all relevant (non-public) documents
- **b.** where the decision is to apply to the court for an MTO, a copy of the court application documents (and subsequently, once the court proceedings are finalised, notice of its outcome).

Recommendation 60

If the Act is to continue, that the Act be amended to prescribe demographic information about third parties that agencies are required to seek and, if provided, to keep. This may include information about:

- **a.** age
- **b.** gender (including trans, intersex and non-binary)
- **c.** local government area of residence
- **d.** Aboriginal and/or Torres Strait Islander status
- **e.** cultural and linguistic diversity
- **f.** sexual orientation
- **g.** disability.

Recommendation 61

If the Act is to continue, that the Act be amended to provide that:

a. in addition to the full 3-yearly report required under the Act, the Ombudsman is to include in its Annual Report under the Ombudsman Act a report on its monitoring activities during the year, and

b. this report may include de-identified, aggregated data, including demographic data, in relation to MDT applications and orders.

Recommendation 62

If the Act is to continue, NSWPF enter into an arrangement to provide BOCSAR with data on key MDT Act activities of the NSWPF that it can include in its NSW Policing activity dashboard, including information about the number of applications and orders made.

PART A:
Operation of the MDT scheme during the reporting period

1. Introduction

1.1 The MDT Act

The MDT Act came into effect in July 2022. It provides for the mandatory blood testing of persons, where that person's bodily fluids have come into contact with a worker from certain government agencies in NSW, including law enforcement, corrective services, health and emergency services workers.[5]

An MTO can be made only where contact with a person's bodily fluids has occurred 'as a result of a deliberate action' by the person and where the making of an MTO for the testing of their blood is 'justified in all the circumstances'.[6] A worker can apply for an MTO only after consulting a 'relevant medical practitioner'.[7]

An MTO can be made by a 'senior officer' from the worker's agency,[8] unless the person appears to that senior officer to be a 'vulnerable third party', in which case the senior officer may apply to the court for an MTO.[9] The Act defines 'vulnerable third party' as a person with a mental health impairment or cognitive impairment affecting their capacity, or a child aged between 14 to 17 years inclusive.[10]

The senior officer's determination is reviewable by the Chief Health Officer (**CHO**) if a review is sought by either the worker or the person to be tested (**the third party**).[11]

An MTO requires a third party to provide blood to be tested for blood-borne diseases specified in the order.[12] Test results are provided to the medical practitioners nominated by the worker and the person tested.[13] Failing to comply with an MTO is a criminal offence.[14]

1.2 Objects of the Act

The objects of the MDT Act are to provide for the mandatory blood testing of a person in circumstances where:

- a health, emergency or public sector worker to whom the Act applies comes into contact with the person's bodily fluid as a result of the person's deliberate action, and
- the worker is at risk of contracting a blood-borne disease as a result of the person's deliberate action, and
- to encourage health, emergency and public sector workers to whom the Act applies to seek medical advice and information about the risks of contracting a blood-borne disease while at work
- to protect and promote the health and wellbeing of health, emergency and public sector workers to whom the Act applies.[15]

[5] See (additional information chapter) for a full list of relevant agencies.
[6] *Mandatory Disease Testing Act 2021* ss 8 and 11.
[7] Ibid s 9.
[8] Ibid s 11.
[9] Ibid s 11(1)(a).
[10] Ibid Dictionary (definition of 'vulnerable third party'). An MTO cannot be sought in respect of a child under the age of 14: s 8(1).
[11] *Mandatory Disease Testing Act 2021* s 23.
[12] Ibid s 18(1)(c).
[13] Ibid s 22(1)(a)-(b).
[14] Ibid s 27.
[15] Ibid s 3.

1.3 Background and purpose of the MDT Act

Parliamentary and public debate preceding the passage of the MDT Act

Mandatory disease testing was proposed by the Police Association of NSW (**PANSW**) to the NSW Legislative Assembly Law and Safety Committee's 2017 *Inquiry into Violence Against Emergency Services Personnel*.

The PANSW's proposal was premised on mandatory disease testing alleviating the stress that emergency services workers experience while waiting for their own test results after an exposure event, because the immediate testing of the third party would provide officers with greater certainty about the possibility of infection.[16]

Concerns with this proposal were raised by a group of 6 organisations to the Committee.[17] These concerns included, but were not limited to, the following:

> aspects of PANSW's proposal did not accord with up-to-date medical evidence about the way in which blood-borne viruses are transmitted. They stated 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.[18]

The Committee recommended that:

> Recommendation 47: That the NSW Government consider introducing legislation to allow mandatory disease testing of people whose bodily fluids come into contact with police and emergency services personnel, in consultation with all affected stakeholders.[19]

This recommendation was accompanied by the following finding:

> Finding 13: Under any legislative scheme, the power to conduct mandatory testing should only be able to be enlivened in circumstances where there is a risk of transmission of listed diseases. The legislation should clearly define the factual circumstances in which there is a risk of transmission of listed disease [sic] and this definition should be based on up-to-date medical evidence.[20]

In November 2020, the *Mandatory Disease Testing Bill* (**MDT Bill**) was introduced into the Legislative Assembly by the Hon David Elliott MP, Minister for Police and Emergency Services. Following passage by the lower house,[21] the Legislative Council referred the MDT Bill to the Standing Committee on Law and Justice for inquiry.

The Committee received submissions and heard evidence from agencies and stakeholders. It did not seek to resolve their various claims and concerns, recommending only:

> That the Legislative Council proceed to debate the Mandatory Disease Testing Bill 2020, and that the concerns identified by stakeholders as set out in this report be addressed during debate in the House.[22]

[16] Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Inquiry into Violence Against Emergency Services Personnel* (Report No 1/56, August 2017) 81.

[17] The 6 organisations comprised ACON, the Australasian Society for HIV, ASHM, Hepatitis NSW, NSW Users and AIDS Association, Positive Life NSW, and the Sex Workers Outreach Project.

[18] Legislative Assembly Committee on Law and Safety (n 16) 82.

[19] Ibid 81.

[20] Ibid.

[21] Inserted by an amendment moved by Alex Greenwich MP to expressly allow the Ombudsman, in the exercise of its oversight functions, to require a senior officer to provide demographic information about third parties subject to MTOs: see *Mandatory Disease Testing Act 2021* s 36(4).

[22] Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020* (Report No 76, April 2021) 40.

The Bill was supported in the Legislative Council by the Government and the opposition and passed, with amendments, on 13 May 2021. Most of the amendments related to additional protections against the potential use of blood samples and blood test results for other purposes.[23]

The Bill passed both houses on 13 May 2021. The Mandatory disease testing scheme commenced on 29 July 2022.

Claims and concerns raised during debate

Key claims made in support of the proposed scheme, by the Minister for Police and Emergency Services when introducing the Bill, by unions representing police officers and correctional service workers, the NSWPF and some other stakeholders in their submissions to the Standing Committee on Law and Justice included:

- the scheme would provide some comfort to frontline workers and reduce the stress and anxiety that they and their families may experience while waiting for test results following an interaction which places them at risk of transmission (noting that there may be a 3-to-6-month window before the worker themselves may reliably test to a transmitted blood-borne disease)[24]
- if a police officer is exposed to potential infection through contact with a bodily fluid, early information about any diseases will inform medical decisions made by their treating doctor and support the officer's physical and mental recovery[25]
- there is a higher prevalence of infectious diseases in the inmate population, which makes the use of bodily fluids in an assault in the correctional environment more dangerous[26]
- a scheme that applies to exposures as a result of 'deliberate action' is warranted because, unlike other circumstances such as accidental exposure to a patient's blood, the person concerned may unreasonably refuse to consent to testing or to disclose their disease status.[27]

Other stakeholders (including medical and legal professionals) raised concerns about the proposed scheme. These included the following:

- the proposed scheme is unnecessary given the risk of transmission of a blood-borne disease is low or non-existent in most situations faced by police and emergency workers, and existing medical protocols following an incident would not be altered by knowledge of the third party's blood test result[28]
- the intention of the Bill can be achieved through improved education about blood-borne diseases and early access to best-practice medical treatment and counselling for workers[29]
- the scheme will disproportionately impact already marginalised groups, as well as Aboriginal people who are overrepresented in interactions with police and corrective services[30]

[23] Other amendments were defeated, including amendments to introduce a requirement for an MTO to be made only if the senior officer is satisfied on the basis of medical evidence that the order is 'necessary'; make the CHO the senior officer for all workers; remove third parties under the age of 18 from the scope of the scheme; and insert a requirement that where an MTO is made in relation to an Aboriginal or Torres Strait Islander third party, the senior officer must inform the Aboriginal Legal Service.

[24] NSW Police Force, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*.

[25] Ibid.

[26] Public Service Association of NSW, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*.

[27] Police Association of NSW, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*.

[28] Australian Medical Association, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*.

[29] Ibid.

[30] Public Interest Advocacy Centre, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*.

- the scheme will exacerbate misunderstandings about the prevalence and transmission of blood-borne diseases, potentially increasing rather than alleviating workers' fear and stress, and stigmatising those who live with these diseases.[31]
- the scheme undermines successful public health approaches to combatting blood-borne disease in the community, which have been built on autonomy,[32] patient trust,[33] privacy,[34] and protection from stigma and discrimination[35]
- more generally, national standards and international guidelines for medical testing require voluntary consent, in line with the patient's dignity and human rights, ensuring that testing only occurs when patients want a test to be undertaken[36]
- health workers (required to administer tests on unwilling third parties under MTOs) would be exposed to greater risk of occupational violence [37]
- it is particularly inappropriate that any children be covered by the scheme, noting their vulnerability and the very low prevalence of transmissible blood-borne diseases in children[38]
- the legislation has been drafted using undefined terms (such as 'deliberate act' and 'justified in all the circumstances') that are vague and uncertain.[39]

MDT laws in other Australian jurisdictions

The Northern Territory,[40] South Australia[41] and Western Australia[42] have mandatory disease testing schemes broadly comparable to the scheme in NSW. Queensland has a mandatory testing scheme that allows testing of people reasonably suspected of committing particular sexual and serious assault offences to facilitate victims of crime receiving appropriate treatment.[43] Victoria allows for mandatory testing where an order is made by its Chief Health Officer.[44] These schemes were in place at the time mandatory disease testing was introduced in NSW.

1.4 The role of the Ombudsman under the MDT Act

It is the Ombudsman's role to independently monitor and report on the operation and administration of the MDT Act. We are required to prepare a report as soon as practicable after 12 months of the commencement of the Act, and every 3 years after the first report.[45] This is our first report, which covers the 18-month period from 29 July 2022 to 31 December 2023 (**the reporting period**).[46]

[31] Australian Medical Association (n 28).

[32] Ibid.

[33] Seear et al, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*.

[34] UNSW Centre for Social Research in Health, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*.

[35] Seear et al (n 33).

[36] Centre for Social Research in Health (n 34).

[37] Australian Medical Association (n 28).

[38] Ibid.

[39] Positive Life NSW, Submission to Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*; Bobby Goldsmith Foundation; Hepatitis NSW; Sex Workers Outreach Project.

[40] *Police Administration Act 1978* (NT).

[41] *Criminal Law (Forensic Procedures) Act 2007* (SA).

[42] *Mandatory Testing (Infectious Diseases) Act 2014* (WA).

[43] *Police Powers and Responsibilities Act 2000* (Qld).

[44] *Public Health and Wellbeing Act 2008* (Vic).

[45] *Mandatory Disease Testing Act 2021* s 36.

[46] We extended the reporting period beyond 12 months because we considered there may be an increased uptake of the scheme when it became more familiar to workers. As indicated in **figure 1** below, there was no acceleration in numbers of applications made after 12 months.

Following the tabling of this report, the Minister is required to review the MDT Act to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing the objectives.[47]

We have prepared this report conscious that it will be a key input into that statutory review and have made our recommendations accordingly.

Monitoring powers

Under the MDT Act, a senior officer must notify us in writing as soon as practicable after a determination is made on an application for an MTO. The Act requires that reasons for the determination also be provided.[48]

The Act provides that we may, for the purposes of preparing a report, also 'require' information about an application for an MTO, from the relevant senior officer (except in the case of applications concerning police officers, in which case we can require such information only from the Commissioner of Police rather than directly from a senior officer).[49] We may also require demographic information about third parties who are subject to MTOs and applications for MTOs.[50]

There are otherwise no compulsory information gathering powers available to us under the MDT Act or other legislation. Any other information required from agencies, for the purpose of monitoring the operation and administration of the MDT Act, can only be sought on a voluntary basis (see **appendix C – methodology and limitations**).

[47] *Mandatory Disease Testing Act 2021* s 37.
[48] Ibid s 13.
[49] Ibid s 36(3).
[50] Ibid s 36(4).

2. Use of the MDT Act during the reporting period

The data in this chapter relates to the period from 29 July 2022 to 31 December 2023 (**the reporting period**).

2.1 Applications made for MTOs

Number of applications for MTOs

There were 139 MDT applications made during the reporting period. These applications were made by workers from only 3 agencies:

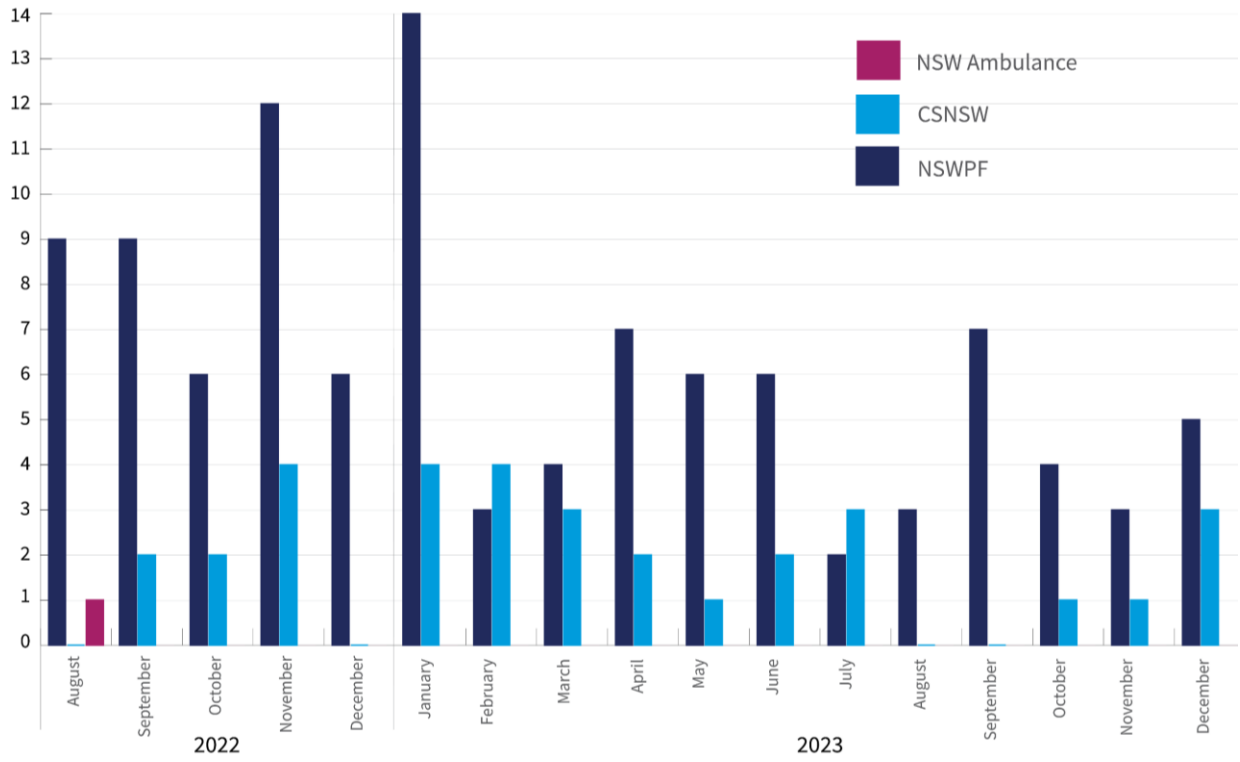
(a) NSWPF – 106 applications (76%)
(b) Corrective Services NSW (CSNSW) – 32 applications (23%)[51]
(c) NSW Ambulance – 1 application (0.1%).

Frequency of applications for MTOs per agency

Figure 1 below shows the number of MDT applications made during the reporting period by workers from the NSWPF and CSNSW, and when they were made.

The 1 application made by a worker of NSW Ambulance was made in August 2022.

Figure 1. Applications for MTOs by month made by workers across all agencies[52]



Location of MDT applications

NSW Ambulance

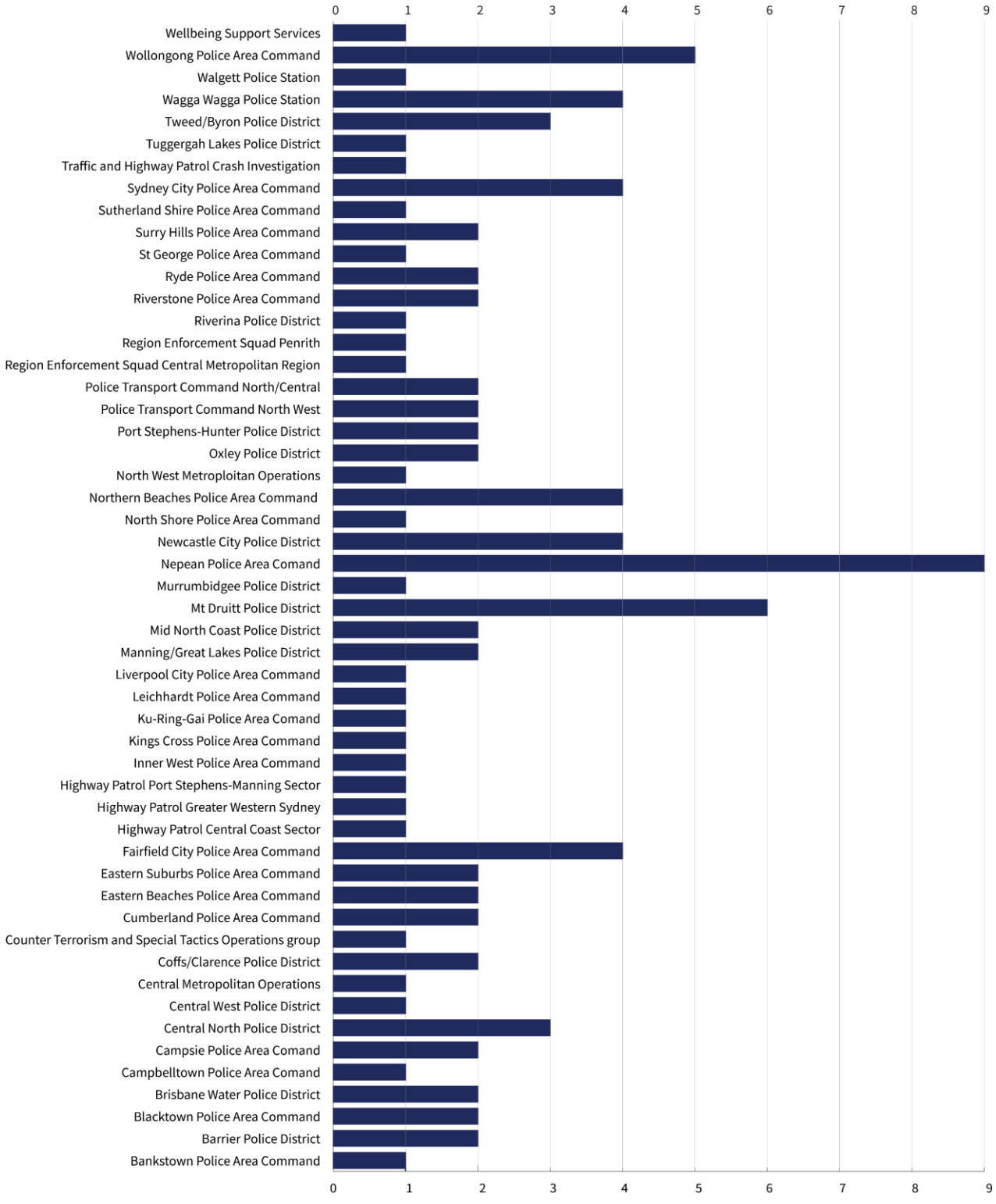
The 1 application received from NSW Ambulance (noted above) related to an incident that occurred in Newcastle.

[51] All CSNSW applications related to a worker based in a publicly-operated correctional centre.
[52] Although the Act commenced on 29 July 2022, no applications were made in July.

The NSWPF

Figure 2 shows the location (police area commands or districts) of the NSWPF senior officer who received an MDT application during the reporting period, and the number of applications received in each location.[53]

Figure 2. NSWPF MDT applications by location

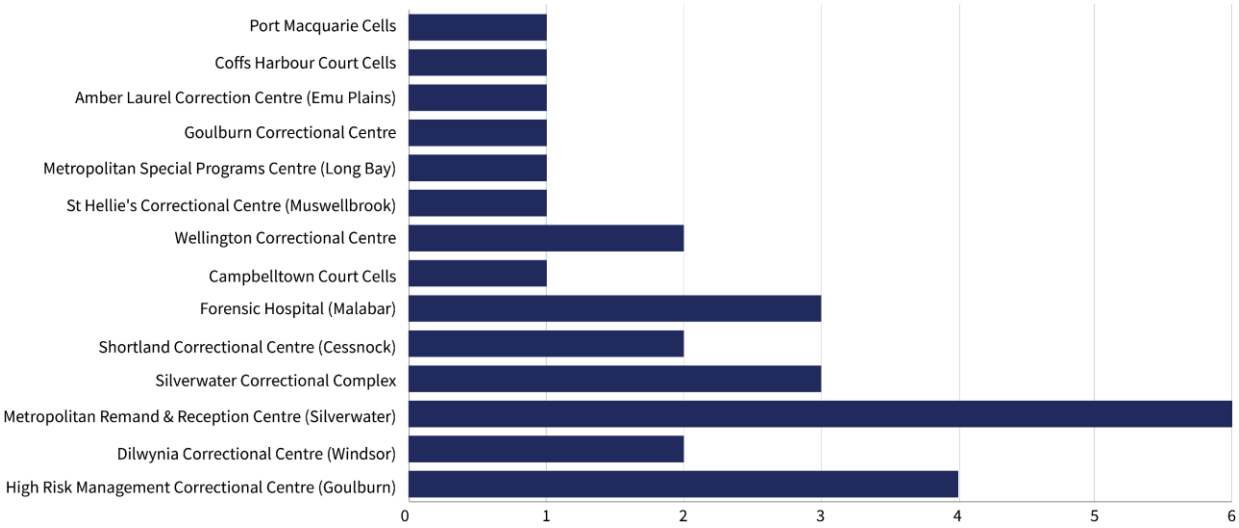


[53] Only 103 NSWPF MDT applications' locations were provided to us through the notification process.

CSNSW

Figure 3 shows the location from which an MDT application was made during the reporting period.

Figure 3. CSNSW MDT applications by location[54]



2.2 Determinations of applications

Outcome of MDT applications

The MDT Act provides that senior officers can determine an MDT application by:

i. making an MTO
ii. refusing to make an MTO
iii. applying to the court for an MTO (where a third party appears to be a vulnerable third party).[55]

However, as seen in **table 1** below, in practice senior officers have also treated MDT applications as being finalised by:

- the third party (or their parent or guardian) consenting to the testing without an MTO being made,[56] or
- the worker withdrawing or cancelling the application.[57]

Of the 139 MDT applications made during the reporting period:

- 33% (46) proceeded by way of consensual testing
- 22% (31) were refused by a senior officer. Of those, in half (16) the senior officer recorded that they considered the person to be a vulnerable third party
- 18% (25) were made by a senior officer
- 17% (24) were withdrawn or cancelled

[54] Refers to the CSNSW correctional centre at which an MDT application was made. Only 29 CSNSW MDT applications' locations were provided to us through the notification process.
[55] *Mandatory Disease Testing Act 2021* s 11.
[56] See **chapter 14**.
[57] However, there is no express provision in the Act for the withdrawal or cancellation of an application – see **section 2.2**.

- 7% (10) were the subject of court applications. Of those, 7 applications resulted in MTOs being made and 3 being refused.

Three applications (2%) had not been finalised at the end of the reporting period.

Table 1. Outcomes of MDT applications[58]

Outcome	NSWPF	CSNSW	NSW Ambulance	Total
Consent	32	14	0	**46**
MTO order refused	24	6	1	**31**
MTO approved	14	11	0	**25**
Withdrawn/cancelled	23	1	0	**24**
Application to the court[59]	10	0	0	**10**
Still active	3	0	0	**3**
Total	**106**	**32**	**1**	**139**

Bodily fluid contact

The MDT Act defines bodily fluid to mean saliva, blood, faeces, semen 'or other bodily fluid or substance prescribed by the regulations'.[60] No other bodily fluid or substance is currently prescribed.

The majority of applications – 84% (117 of 139) – recorded exposure to saliva. This refers to bodily fluid types ticked in application. Of those cases, 26% indicated a concern about potential exposure to blood in or with the saliva.

The 1 MDT application from a NSW Ambulance worker concerned exposure to saliva only.

Table 2 below shows the bodily fluid type for each MDT application received by the NSWPF and CSNSW, as recorded in workers' MDT applications.

Table 2. bodily fluids in NSWPF and CSNSW MDT applications (as per the agency's records)

Bodily fluid type[61]	NSWPF	CSNSW[62]
Saliva (only)	66 (62.3%)	21 (65.6%)
Blood (only)	15 (14.1%)	2 (6.2%)
Saliva and blood[63]	25 (23.5%)	5 (15.6%)
Semen	0	0
Faeces	0	0
Total	**106 (100%)**	**28 (87.5%)**

[58] These numbers represent our assessment of outcomes based on analysis of all information about applications. Agencies record outcomes differently. In the case of the NSWPF, there are no 'closure codes' in their online application system for consensual testing outcomes. There are other factors which require us to make an assessment of each outcome, for example cases where MTOs are made but not served in favour of consensual testing.

[59] Of the 10 MDT applications made to the court, 7 resulted in MTOs being made and 3 being refused.

[60] *Mandatory Disease Testing Act 2021* Dictionary (definition of 'bodily fluid').

[61] Refers to bodily fluid type boxes ticked by workers in their applications.

[62] Four of the 32 CSNSW applications did not identify bodily fluid types, so the figures in this column do not equal 100%.

[63] Both fluid types ticked.

Table 3. Matters where testing occurred following MDT application by bodily fluid type

Agency	Saliva-only		Blood identified	
	Applications	MTO made or proceeded by consent	Applications	MTO made or proceeded by consent
NSWPF	66	36 (54.5%)[64]	40	20 (50%)
CSNSW[65]	21	16 (76.2%)[66]	7	7 (100%)

Rank of senior officers

The MDT Act prescribes who the 'senior officer' is in relation to the specific worker and their agency. The role of senior officer can be delegated, but only to a person prescribed by the Regulation.[67]

NSW Ambulance

The senior officer for NSW Ambulance is the Health Secretary. The 1 application determined by Ambulance was determined by the Chief Executive, NSW Ambulance under delegation from the Health Secretary.

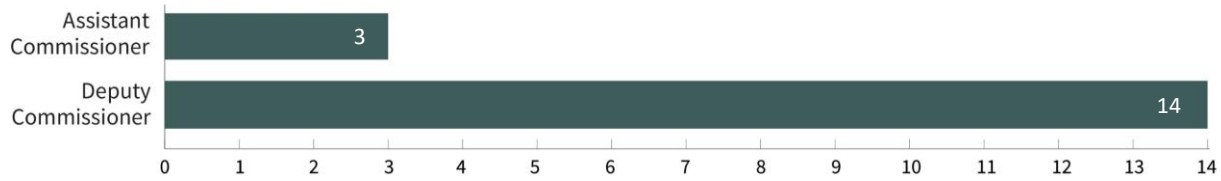
CSNSW

The senior officer for CSNSW is the Commissioner of Corrective Services. The Commissioner has delegated the senior officer functions to Assistant Commissioners and Deputy Commissioners, but the Deputy Commissioner, Security and Custody performs this function in practice.

All CSNSW applications that were determined during the reporting period were determined by the Deputy Commissioner, Security and Custody or an Acting Deputy Commissioner, except for 3 applications received at the commencement of the Act, which were determined by an Assistant Commissioner.[68]

Figure 4 shows the number of CSNSW MDT applications determined by Assistant and Deputy Commissioners.

Figure 4. CSNSW-determined MDT applications by senior officer rank



NSWPF

Uniquely, in the case of the NSWPF, the Act does not provide for the head of agency to be the senior officer, but instead provides that any police officer of the rank of Inspector or above is a senior officer. **Figure 5** shows the rank or role of the NSWPF senior officers who determined an MDT application during the reporting period.[69]

[64] Thirteen MTO approved or applied to Court, 23 consensual testing.

[65] Two CSNSW applications do not identify any bodily fluid type.

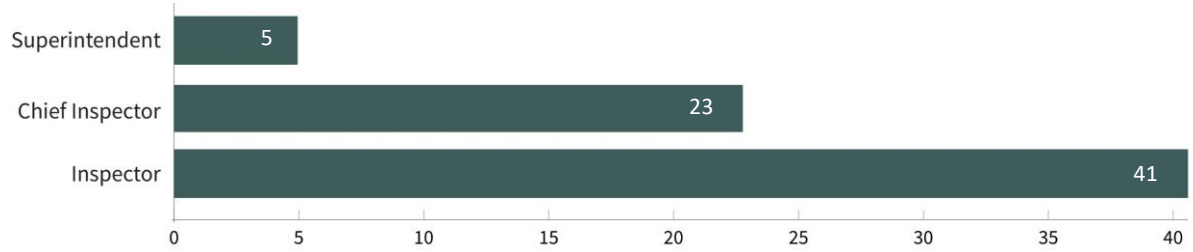
[66] Six MTO approved, 10 consensual testing.

[67] *Mandatory Disease Testing Act 2021* s 35(1).

[68] All 3 CSNSW applications determined by an Assistant Commissioner were before an executive restructure at CSNSW that established the role of Deputy Commissioner, Security and Custody. Prior to this restructure, the Deputy Commissioner, Security and Custody role was titled Assistant Commissioner, Custodial Corrections.

[69] Sixty nine of 106 applications.

Figure 5. NSWPF determined MDT applications by senior officer rank



2.3 MDT applications by incident type

Incidents resulting in exposure to bodily fluid

Our review of incident narratives in MDT applications shows that the majority of incidents involved spitting and biting. In addition, there were smaller numbers of incidents involving:

- bleeding contact during a wrestle
- scratching
- punching
- needlestick injuries.

The 1 MDT application from a NSW Ambulance worker involved spitting.

Due to differences in the MDT application forms used by agencies, the MDT applications from the NSWPF and CSNSW have different identification of:

- the type of contact (for example, biting)
- the bodily fluid(s) to which the worker was exposed.

In each MDT application a list of options is given for each type of contact and bodily fluid, with a checkbox marked to indicate which is applicable.[70]

Tables 4 and **5** set out the 'contact type' in relation to each MDT application made (and each matter where testing occurred either as a result of an MTO or by consent) during the reporting period, as recorded in the MDT applications made by workers of the relevant agencies.

Table 4. Contact types as recorded in NSWPF MDT applications and in matters where testing occurred

Contact type	# NSWPF applications	# matters where MTO made or testing proceeded by consent[71]
Bodily fluid contact (possibly containing blood) with broken skin, mouth and eyes	49	27
Bodily fluid contact did not contain blood with broken skin	36	17
Needlestick injury	4	3
Bodily fluid to intact skin, clothing and skin to skin contact	22	9
Bites that break the skin	22	13

[70] For discussion about how contact and bodily fluids are recorded by applicants in MDT applications, see **section 12.2**.

[71] We include court applications in this figure, given the same threshold applies for a senior officer to make a court application (in relation to vulnerable third parties) as to make an MTO (for non-vulnerable third parties).

Table 5. Contact types as recorded in CSNSW MDT applications and in matters where testing occurred

Contact type[72]	# CSNSW applications	# matters where MTOs made or testing proceeded by consent
Type(s) of contact		
Bodily fluid contact with worker's broken skin, mouth and eyes, which included:	23	19
1. Punch from bleeding person	2	2
2. Spitting with saliva which contained blood/semen	5	4
3. Large blood splash e.g. bleeding artery	2	2
4. A bite with visible blood in the mouth	2	2
5. Blood contact from giving mouth-to-mouth resuscitation with no protective equipment	0	0
6. Fluid contact with broken skin, mouth or eyes	13	13
Needlestick injury	0	0
Cut/laceration from bloodied sharp object	0	0
Sexual exposure	0	0
Other contact		
7. Biting that did not contain blood and/or did not break the skin	1	1
8. A punch from a fist not bloodied and/or did not break the skin	0	0
9. Cut from a sterile, unused sharp object.	0	0
10. Faeces thrown onto the face of a worker with no visible blood/semen	0	0
11. Contact to intact skin or clothing	3	3
12. Spittle contact that did not contain visible blood and/or did not contact broken skin/mouth/nose	6	3

2.4 Demographic information

Age profile of third parties

Relative to the general population, MDT applications disproportionately related to young people:

- People aged 14 to 17 comprise 4.8% of the general population,[73] but comprised 7.2% of third parties (10) subject to MDT applications.
- People aged 18 to 24 comprise 8.4% of the general population,[74] but comprised 33% of third parties (46) subject to MDT applications.
- For CSNSW, 22% of third parties (7) were aged under 24. Individuals aged under 24 make up roughly 9.5% of the inmate population.[75] This suggests that young inmates are almost 2.5 times more likely to be subject to an MDT application than inmates over 24.[76]

[72] These contact types refer to categories of contact recorded in CSNSW MDT applications. Contact categories are further discussed at **section 12.2**.
[73] Calculated from ABS data published on 19 September 2024.
[74] Ibid.
[75] Crichton Smith and Helen Tang, Corrective Services NSW, *NSW Inmate Census 2023 Summary of Characteristics* (No 52, February 2024).
[76] CSNSW workers include those working in community corrections. However, all of the applications made by CSNSW workers during the reporting period related to third parties who were in custody at the time of the incident.

Figure 6. Age of third parties subject of MDT applications, by agency[77]

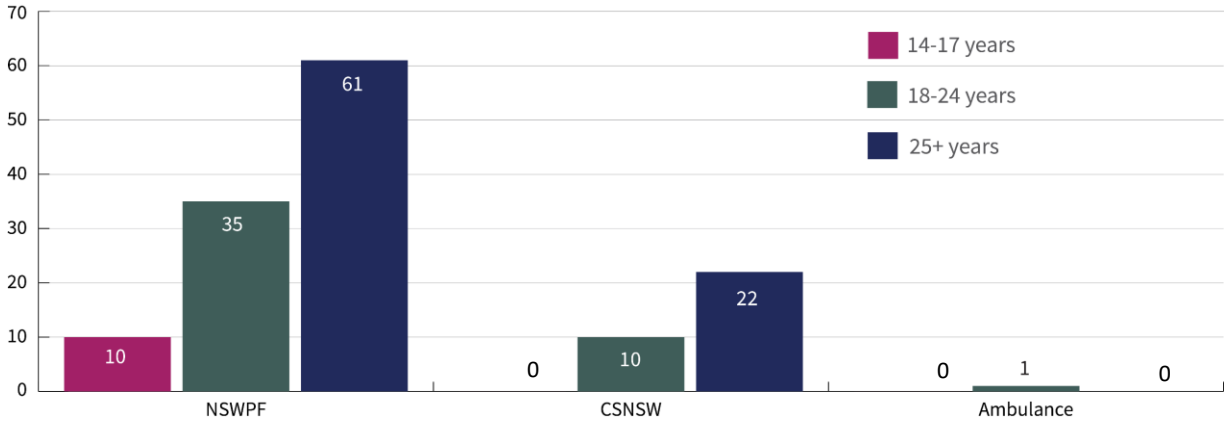


Table 6. Age of third parties and outcomes of MDT applications, by agency

Agency	Age bracket	MTO made	MTO refused	Consent given	Court[78]	Discontinued	Still active at end of reporting period	Total
NSWPF	14-17	0	3	0	6	1	0	**10**
	18-24	5	9	12	0	8	1	**35**
	25+	9	12	20	4	14	2	**61**
CSNSW	14-17 (N/A)	0	0	0	0	0	0	**0**
	18-24	2	2	6	0	0	0	**10**
	25+	9	4	8	0	1	0	**22**
NSW Ambulance	14-17	0	0	0	0	0	0	**0**
	18-24	0	1	0	0	0	0	**1**
	25+	0	0	0	0	0	0	**0**
TOTAL		**25**	**31**	**46**	**10**	**24**	**3**	**139**

Gender of third parties

Over two-thirds (68% or 95 of 139) of all third parties were recorded as male in MDT applications. Given that males comprise approximately 49.7% of the general population,[79] this cohort is disproportionately the subject of MDT applications.

However, 25% of third parties to CSNSW MDT applications were female. Women make up around 6.7% of the inmate population.[80] This suggests that female inmates just under 4 times more likely to be subject to an MDT application than male inmates.[81]

[77] These ages were calculated from the date of birth of third parties identified in agency documents against the date of the MDT application. Agencies do not always record the age or date of birth of third parties in relation to MDT applications. For example, NSWPF applications record that a third party is vulnerable because they are aged 14-17 years, but there is no date of birth in the application documents. We calculated the age of third parties for NSWPF applications from the third party DOB on the COPS events relevant to the contact incidents.

[78] Court outcomes by age: 14 to 17: 3 made, 3 refused; 25 and over: 4 made, 0 refused.

[79] ABS data as at March 2024.

[80] Smith and Tang (n 75).

[81] Note that CSNSW applications may include workers in community corrections where the third party was not in custody at the time of the exposure incident.

Figure 7. Gender of third parties (as identified in applications) by agency[82]

Table 7. Gender of third parties (as identified in MDT applications) by agency and outcome

Agency	Gender	MTO approved	MTO refused	Consent	Court[83]	Discontinued	Still active	Total
NSWPF	Male	9	13	20	6	19	3	**70**
	Female	5	11	12	4	4	0	**36**
	Non binary/ unspecified	0	0	0	0	0	0	**0**
CSNSW	Male	8	5	11	0	0	0	**24**
	Female	3	1	3	0	1	0	**8**
	Non binary/ unspecified	0	0	0	0	0	0	**0**
Ambulance	Male	0	1	0	0	0	0	**1**
	Female	0	0	0	0	0	0	**0**
	Non binary/ unspecified	0	0	0	0	0	0	**0**
TOTAL		**25**	**31**	**46**	**10**	**24**	**3**	**139**

Vulnerable persons

Under the MDT Act, a vulnerable person is defined as:

- a young person aged 14-17, or
- a person who 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.

[82] Gender is as specified on agency documents. Notwithstanding there are only male/female options in NSWPF records, we could see no other information suggesting third parties did not identify as either male or female.

[83] Court outcomes by gender: male: 4 made, 2 refused; female: 3 made, 1 refused.

Senior officers recorded that the third party appeared to them to be a vulnerable third party in 33 MDT applications (24% of all MDT applications). Of those 33 applications, 10 (30%) proceeded to court.[84] **Table 8** shows the number of vulnerable third parties identified in MDT applications across all agencies.

Table 8. Vulnerable third parties identified by senior officers

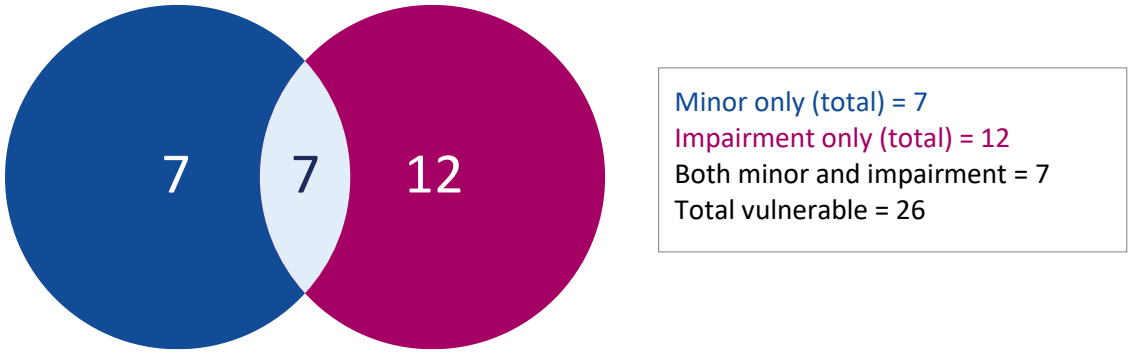
Agency	Vulnerable	Non-vulnerable	Not recorded*	Total
NSWPF	26	75	5	**106**
CSNSW	6	23	3	**32**
NSW Ambulance	1	0	0	**1**
Total	**33**	**98**	**8**	**139**

*In the case of some MDT applications that were refused or where no determination was made (for example because the application was considered to be withdrawn) no information is recorded as to whether the person appeared to the senior officer to be vulnerable or non-vulnerable. All 6 vulnerable third parties in CSNSW applications, and in the 1 NSW Ambulance application, were considered to be vulnerable on the basis of mental health or cognitive impairment.

Of the 26 NSWPF MDT applications in which the third parties were identified as being vulnerable:

- 14 were vulnerable because they were minors,
- Half of those who were minors were also identified as having a mental health or cognitive impairment (see **figure 8**)
- 12 were vulnerable because they either had a mental health or cognitive impairment.

Figure 8. Vulnerable third parties by type of vulnerability

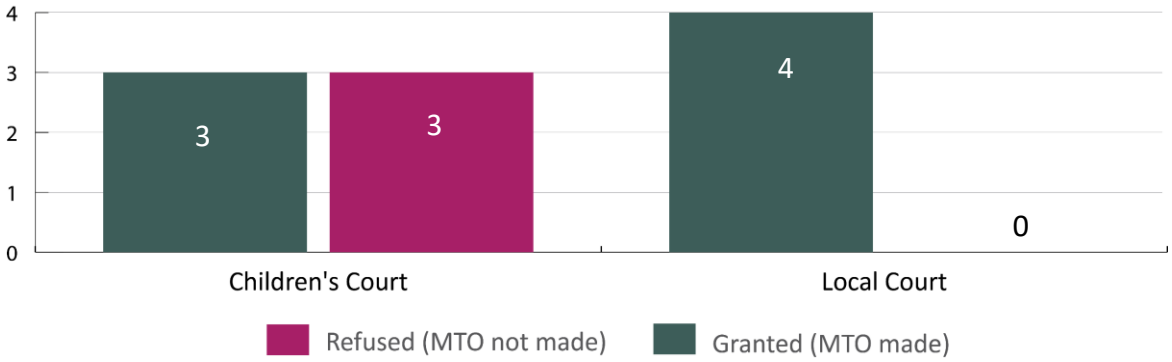


Of the 33 vulnerable third parties identified by senior officers during the reporting period, only 10 MDT applications proceeded to the court. Those applications were all NSWPF applications. Of those 10 applications, 7 MTOs were made.

The 3 applications where the court refused to make an MTO were heard in the Children's Court – see figure 9 below. Of the 23 MDT applications that did not proceed to the court, 16 were refused, 3 withdrawn and 4 third parties consented.

[84] A high number of NSWPF MDT applications in which the third party was considered vulnerable were refused by the senior officer or withdrawn or cancelled (14 of 26) while 10 went to Court. We have discussed 2 matters in **chapter 3** in which consent was obtained notwithstanding the third parties' vulnerability status. None of the 6 CSNSW MDT applications in which the third party was deemed vulnerable proceeded to court.

Figure 9. Court outcomes for vulnerable third parties subject of MDT application[85]



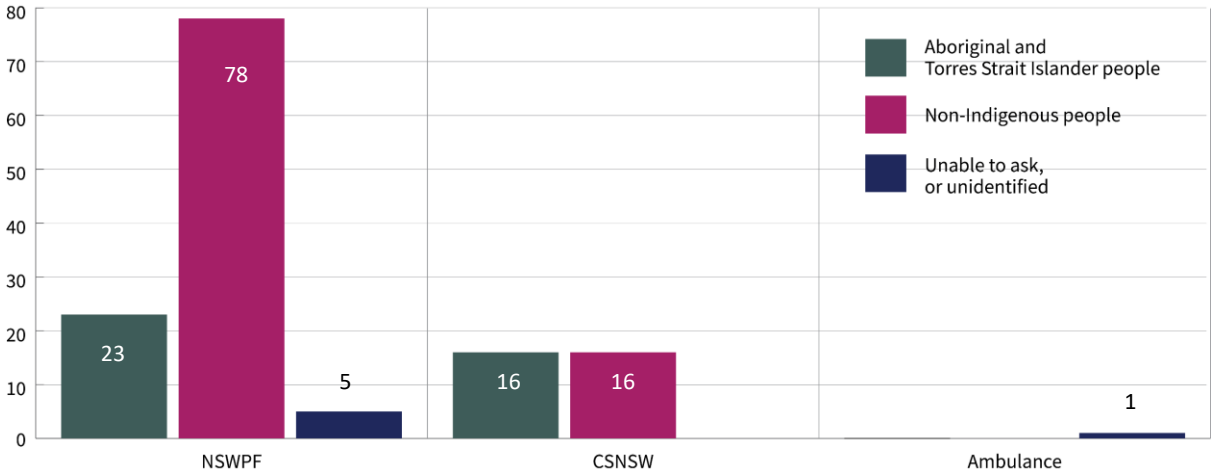
Third parties who are Aboriginal and Torres Strait Islander people

Relative to the general population, MDT applications have disproportionately related to Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people comprise 3.4% of the general population,[86] but were the subject of 28% of MDT applications.

In respect of applications by workers in the NSWPF, Aboriginal and Torres Strait Islander people comprised 21.7% of those subject to MDT applications. In CSNSW MDT applications, Aboriginal and Torres Strait Islander people were the subject of 50% of the MDT applications made by workers.[87]

This cannot be explained fully by the overrepresentation of Aboriginal and Torres Strait Islander people in custody, as Aboriginal and Torres Strait Islander people comprise around 31% of the inmate population.[88] This suggests that inmates who are Aboriginal and Torres Strait Islander people are almost 1.75 times more likely to be subject to an MDT application than other inmates.[89]

Figure 10. Number of MDT applications where the third party was identified as being an Aboriginal or Torres Strait Islander person, by agency[90]



[85] Of the 6 applications which went to the Children's Court, NSWPF senior officers assessed the third party was both a minor and had a mental health or cognitive impairment in 4 applications. 2 of these were granted, 2 were refused.

[86] Bureau of Crime Statistics and Research, 'Aboriginal Over-representation', *Aboriginal over-representation in the NSW Criminal Justice System* (Web Page, 25 November 2024) <https://bocsar.nsw.gov.au/topic-areas/aboriginal-over-representation.html>.

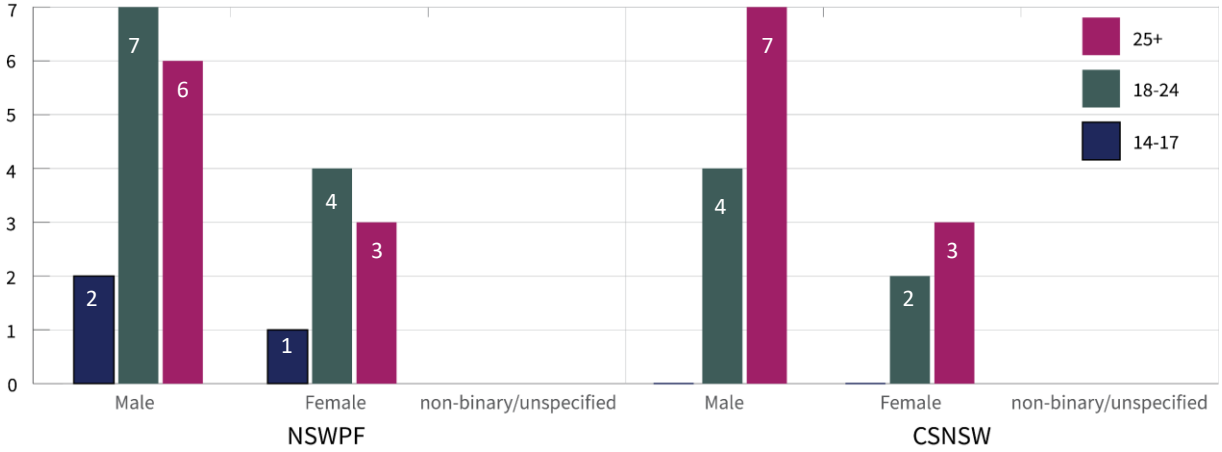
[87] Smith and Tang (n 75).

[88] Bureau of Crime Statistics and Research (n 86).

[89] Note that CSNSW applications may include workers in community corrections where the third party was not in custody at the time of the exposure incident.

[90] Agencies record the Aboriginal and Torres Strait Islander status of persons differently. The NSWPF records whether a person responds 'yes' or 'no' to a question about whether they identify as either Aboriginal or Torres Strait Islander. This information is not available in NSWPF MDT applications. We obtained this information by requesting the COPS event relevant to the contact incident subject of applications. 23 third parties stated that they identify as Aboriginal in these records, and none identified as Torres Strait Islander. In 5 cases police recorded they were unable to ask the person.

Figure 11. Age and gender of third parties identified as being Aboriginal or Torres Strait Islander people in MDT applications



The outcomes of determinations of MTD applications involving third parties who are Aboriginal and Torres Strait Islander people were largely consistent with outcomes for non-Indigenous third parties. However, third parties who were Aboriginal and Torres Strait Islander people had a higher rate of MTD applications being dealt with by consent (41% compared with 29.7%).

Table 9. Outcomes of MDT applications where third parties are Aboriginal or Torres Strait Islander people

Outcome	Aboriginal and Torres Strait Islander third party MDT applications (NSWPF and CSNSW)	Non-Aboriginal and Torres Strait Islander MDT applications (NSWPF and CSNSW)
Testing by consent	16 (41%)	28 (29.7%)
MTO made	7 (17.9%)	16 (17%)
MTO refused	8 (20.5%)	21 (22.3%)
Withdrawn/cancelled	6 (15.3%)	18 (19.1%)
Referred to court	2 (5%)	8 (8.5%)
TOTAL	**39**	**94***

* 3 applications were still active at the end of the reporting period

We found that third parties who are Aboriginal or Torres Strait Islander people were less likely to be assessed as vulnerable - 12.8% were considered to be vulnerable third parties, while 27.7% of non-Indigenous third parties were assessed as vulnerable. This is further discussed at **section 10.1**.

2.5 Reviews

Applications for review by the Chief Health Officer

During the reporting period, no workers who had their MDT application refused applied for a review of that decision.

One review application was made by a third party who was subject to an MTO made by the Deputy Commissioner of CSNSW. The Chief Health Officer upheld the Deputy Commissioner's decision to make the MTO. (See **case study 1** at **section 9.2**).

Applications for judicial review

No judicial review proceedings were commenced in respect of a decision made under the MDT Act during the reporting period.[91]

2.6 Enforcement of MTOs

Use of force

If an MTO is made in relation to a person who is detained, law enforcement officers may transport them to and from the place where the blood will be taken and assist a person to take blood from them.[92] The law enforcement officer may use reasonable force when carrying out these functions.[93]

The NSWPF and CSNSW have not reported any use of force in connection with administering an MTO during the reporting period. CSNSW advised us that no correctional officers had engaged in any use of force, and while the NSWPF did not directly respond to this question, we found no records attached to any of the NSWPF MDT applications which indicated any use of force powers were exercised.

Offences by persons subject to MTOs

It is a criminal offence to fail to comply with an MTO without reasonable excuse.[94] During our reporting period, one person was subject to a charge of fail to comply. The person was in CSNSW custody at the time of the alleged conduct. They were convicted by the court in absentia of proceedings.[95]

2.7 Complaints

We requested information from the NSWPF and CSNSW as to whether any complaints had been received. We are advised that no complaints were made about the conduct of officers exercising functions under the MDT Act during our reporting period.

The NSWPF advised us that 2 categories of misconduct matters relating to the MDT Act have been created in their online complaints management system (**iApro**). These allegation types are classified in iApro as:

- Information/Telecommunication – Mandatory Diseases Testing Act – Disclosure of information[96]
- Information/Telecommunication – Mandatory Diseases Testing Act – False or misleading information.

The NSWPF stated that no misconduct matters had been recorded for either of these allegation types during our reporting period.[97]

CSNSW provided the following response to our request for information:

> There are no records of complaints about CSNSW staff exercising functions under the Act. Inmates may raise issues at the local level, however there has [sic] been no complaints lodged.[98]

[91] There is no right to appeal a Local Court or Children's Court decision in respect of an MDT application about a vulnerable person: *Mandatory Disease Testing Act 2021* s 16(2).

[92] *Mandatory Disease Testing Act 2021* s 21(1).

[93] Ibid s 21(2)-(3).

[94] Ibid s 27.

[95] The relevant Local Court advised us on 29 October 2024 that sentencing had still not occurred in this matter. There was an arrest warrant current for the offender.

[96] We raised concerns with the NSWPF after the reporting period about the apparent disclosure of information by NSWPF officers posting the test results of third parties on BluePortal. As discussed at **section 15.2** the NSWPF did not respond to our request for advice about what action would be taken to address this, and we have referred the matter to the Law Enforcement Conduct Commission.

[97] Letter to the Ombudsman from the Commissioner of Police dated 15 April 2024.

[98] Letter to the Deputy Ombudsman from Director, Parliamentary and Executive Services, CSNSW dated 22 March 2024.

NSW Ambulance has advised us it did not receive any complaint about the 1 MDT application made during the reporting period.

2.8 Testing and transmission outcomes

Third party test results

The MDT Act does not provide any mechanism for monitoring and reporting on whether the people tested under a MTO (or by consent following an MDT application) have tested positive for any blood-borne disease (See **section 16.1**).

Worker infections

The MDT Act does not provide any mechanism for monitoring and reporting on whether a worker contracted a blood-borne disease as a result of an incident to which the MDT Act applies. However, it appears that no worker who made an MDT application during the reporting period acquired a blood-borne disease, given that, in response to our inquiries:

- CSNSW and NSW Ambulance confirmed that they had not received any report or claim from *any* staff in relation to having contracted a blood-borne disease in an occupational context during the reporting period
- the NSWPF did not respond to our request for advice as to whether any NSWPF staff had contracted a blood-borne disease from an occupational exposure[99] during the reporting period
- the Kirby Institute, which collects and publishes annual surveillance data of HIV and viral hepatitis infections in Australia,[100] informed us that there had been no reported cases of HIV infection due to occupational exposure during the reporting period.[101]

[99] Email requests were made with NSWPF dated 25 October and 20 November 2024.

[100] See Kirby Institute, Annual Surveillance Reports.

[101] The Kirby Institute advised us they do not report on exposure rates of viral hepatitis due to difficulties establishing which cases meet the case definition of newly acquired hepatitis.

3. Implementation of the MDT Act by agencies

3.1 Chief Health Officer guidelines

Section 33 of the MDT Act requires the CHO to issue guidelines (the CHO guidelines) to assist senior officers exercising functions under the Act, relevant medical practitioners who may consult workers, and persons taking blood from third parties under an MTO. Senior officers are to consider the guidelines[102] when determining an application for an MTO. While there is no requirement for the courts to consider the CHO guidelines when determining applications, the CHO can make submissions to the court, which must be considered.[103]

The CHO guidelines were issued on 29 July 2022, at which time the scheme commenced.[104] They are publicly available online.[105] The guidelines contain information about:

- blood-borne diseases including prevalence, levels of transmission risk and types of exposure which may pose a risk to workers
- guidance on processes and requirements under the MDT Act
- applying for a review to the CHO
- taking blood from third parties and the notification of results.

3.2 Agency training, policies and procedures

The Department of Communities and Justice

The Department of Communities and Justice (DCJ) employs some workers covered by the MDT Act (including those in Youth Justice NSW).[106] It is also the responsible policy department for both the Minister for Police and Counter-terrorism and the Attorney General, whose portfolios include joint responsibility for the MDT Act.[107]

DCJ has created a webpage containing detailed information about the MDT scheme, including links to resources such as fact sheets for workers, third parties, senior officers and relevant medical practitioners.[108] The site also contains links to legal supports and NSW Health information, including the CHO guidelines and a list of blood testing centres accessed via the NSW Health Pathology site.

The NSW Police Force

As noted in the **executive summary**, the NSWPF has implemented an online automated system for making and determining MDT applications called BluePortal. BluePortal has a number of functions for the NSWPF including its corporate services and IT processes and is also used by frontline police to request assistance from policing assets such as the Dog Unit and Marine Area Command.[109]

The MDT application and determination sections of BluePortal allow the applicant and senior officer to populate specific fields and upload documents as attachments, such as written medical advice or

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102 *Mandatory Disease Testing Act 2021* s 11(5)(a).

103 Ibid s 15(3)(c).

104 Ibid s 33(5).

105 NSW Health, *Chief Health Officer's guidelines for the Mandatory Disease Testing Act 2021*, <https://www.health.nsw.gov.au/Infectious/Documents/mdt-cho-guidelines.pdf>.

106 Although CSNSW was, during the reporting period, also a division of DCJ, it is effectively treated as a separate agency under the MDT Act.

107 NSW Department of Communities and Justice, 'Policy Reform and Legislation', *Our Role* (Web Page, 27 September 2024) <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/policy-reform-and-legislation.html>.

108 Department of Communities and Justice, *Mandatory Disease Testing Scheme* (Web Page, 17 May 2024) <https://dcj.nsw.gov.au/legal-and-justice/mandatory-disease-testing-scheme.html>.

109 Nico Arboleda, 'CRN', *RXP Services scores $3m ServiceNow deployment with NSW Police* (Web Page, 29 August 2019) <https://www.crn.com.au/news/rxp-services-scores-3m-servicenow-deployment-with-nsw-police-530314>.

consent forms signed by third parties. In addition, the system generates automated notifications by email to parties involved in the application process and external agencies with functions under the MDT Act, such as notifications to the CHO and our office.

A NSWPF worker's MDT application, once completed in BluePortal, is automatically notified to the superintendent of that officer's Command. The superintendent then assigns the application to a senior officer for determination. Senior officer delegations include NSWPF officers at a rank of inspector or above.[110] This means that there are many senior officers across the NSWPF making determinations of MDT applications. This contrasts with other agencies, such as NSW Ambulance (where the role of senior officer has been delegated only to the Chief Executive) and CSNSW (where the role has been delegated to only one Deputy Commissioner).

NSWPF structured decision making through BluePortal

BluePortal provides to NSWPF senior officers a structured decision-making framework that directs them through the determination of an MDT application, and allows for the recording of that decision, and the reasons for that decision.

Senior officers are first asked to confirm the following 'mandatory' fields:

- The bodily fluid type meets the definition in the MDT Act
- The contact occurred during the execution of the worker's duty
- The contact was as a result of the deliberate action by the third party
- The worker did not consent to the contact.

They can then select the following 'additional reasons' 'if relevant':

- The medical practitioner has provided advice that testing will assist to assess the risk to the worker of contracting a blood-borne disease
- There is a risk to the worker on review of the CHO guidelines.

Senior officers are then directed to 'confirm the following mandatory checkboxes':

- The testing is justified in all the circumstances
- The senior officer is satisfied the third part is not a vulnerable third party.

Automation of notices

BluePortal has also been designed to provide for the automated generation of notices required under s 13 of the Act, including notice to the Ombudsman with the determination and the reasons for the determination.

Written notices we receive from the NSWPF are therefore automatically generated emails from BluePortal. An example of a notice to our office is as follows:

> Dear NSW Ombudsman,
>
> In compliance with the legislation and on consideration of the circumstances relevant to the application for the Mandatory Testing Order and the guidelines issued by the Chief Health Officer under section 33 of the Mandatory Disease Testing Act 2021, it has been determined to make the Mandatory Testing Order.
>
> The application will proceed as per the following reasons:
> - The bodily fluid type meets the definition as defined in the Mandatory Disease Testing Act 2021.
> - The bodily fluid contact occurred in the execution of the Worker's duty.

[110] *Mandatory Disease Testing Act 2021* Dictionary (definition of 'senior officer').

- The contact with bodily fluid was as a result of a deliberate action by the Third Party.
- The Worker did not consent to the contact with the bodily fluid of the Third Party.
- The testing of the third party's blood for blood-borne diseases is justified in all circumstances.
- The senior officer is satisfied that the third party is not a vulnerable third party.

A copy of the order will be served on the third party no later than 5 business days after the mandatory testing order is made.

NSWPF training

The NSWPF provides guidance on how to submit and process requests for MTOs through BluePortal, including PETE Training and support information. PETE Training includes modules for all staff on the MDT Act as well as targeted training for senior officers on the MDT Act.[111]

The NSWPF has adopted an additional policy which provides guidance to workers and senior officers about their roles and responsibilities under the MDT Act.[112] This policy includes information about legal requirements when applying for an MTO, determining applications for MTOs, seeking consent or submissions from third parties, making and serving MTOs on third parties, applying to the court for MTOs involving vulnerable third parties, applying for reviews to the CHO, offences under the MDT Act and costs process.

Implementation costs

The NSWPF provided the following a breakdown of its implementation costs of the MDT scheme during the reporting period:

- Technical implementation: $77,822
- Change manager: $2,116
- Training cost: $612,000
- Total: $691,938

Corrective Services NSW

CSNSW has implemented a policy specific to MDT in their *Custodial Operations Policy and Procedures*. CSNSW and Justice Health, which administers health care to persons in corrective custody, work in cooperation on procedures for processing MDT applications.

Applications for an MTO by CSNSW workers are administered by the office of the Deputy Commissioner Security and Custody. The Deputy Commissioner performs the function of the senior officer in determining applications,[113] while the governor or manager of the correctional facility housing the inmate provides the supporting documentation. Before making a determination, CSNSW staff in the Deputy Commissioner's office provide a detailed written briefing to the Deputy Commissioner setting out the relevant considerations, and include supporting documents such as written medical advice, a vulnerability assessment by Justice Health, and consent forms.

The CSNSW policy includes a link to an educational video for their workers which outlines the risks of contracting a blood-borne disease as a result of exposure to bodily fluids in a correctional setting. CSNSW collaborated with Justice Health and the Australasian Society of HIV Viral Hepatitis and Sexual Health Medicine to produce this material.

111 NSW Police Force, *Guidelines for Workers and Senior Officers Mandatory Disease Testing Act-Senior Officers 2022-2023*; *Mandatory Disease Testing Act (All Staff) CTD 2022-2023*.

112 NSW Police Force, *Guidelines for Workers & Senior Officers*.

113 CSNSW prescribed delegates are 'Public Service senior executives employed in Corrective Services NSW': Mandatory Disease Testing Regulation 2022 reg 8(1)(b). This includes any Director, Assistant Commissioner or Deputy Commissioner.

CSNSW advised that its implementation of the MDT framework was absorbed into business-as-usual operations and has not been separately costed.

It is noted that CSNSW and Justice Health also have a parallel procedure for seeking blood test results from inmates by consent, where a worker is exposed to the bodily fluids of inmates – see **section 14.6**.

Health services

NSW Health advised us that there are 21 NSW Health agencies whose chief executives have been delegated by the Health Secretary to perform the functions of a senior officer under the MDT Act.

In terms of training or information provided to workers, NSW Health advised us that health workers have access to the CHO guidelines on the NSW Health webpage and other resources such as the factsheets developed by NSW Health and DCJ, which are available on the DCJ website. In addition, NSW Health had input by a specialist clinical advisor into the video produced with CSNSW and Justice Health about blood-borne disease risks (referenced above).

The Health Secretary wrote to the chief executives in July 2022 and advised that they were responsible for the implementation of the MDT Act within their own health organisation, and it was appropriate for procedures to be developed at a local level for their staff.

In November 2023 NSW Health indicated there was a review being undertaken of the relevant policy *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed.* This policy covers the immediate care of the exposed health worker, a risk assessment of the exposure and management of potential risk for blood-borne disease transmission. The revised document is yet to contain information and links regarding the MDT Act. A review of the publicly available version of that policy indicates there is no reference to the MDT Act in the policy to date.[114]

NSW Ambulance

NSW Ambulance is part of the NSW Health service. The Chief Executive of NSW Ambulance has been delegated the role of senior officer for NSW Ambulance by the Health Secretary.[7] The 1 MDT application made to NSW Ambulance during our reporting period was refused by the Chief Executive.

NSW Ambulance has provided information for staff on the MDT scheme as part of their occupational violence training. This informs workers of the provisions under the MDT Act for making an MDT application. NSW Ambulance advised us it otherwise relies on documents created by NSW Health, such as the CHO guidelines and fact sheets for parties to applications which are posted on the DCJ website (discussed below).

Ambulance advised us that while the MDT application it received was refused, the incident was managed subject to the relevant NSW Health policy *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed.* As noted above, we were advised in November 2023 that NSW Health were undertaking a review of this policy, but the policy to date does not contain a reference to the MDT scheme.

Other agencies

Other agencies whose workers can make an application under the MDT Act include:

- Youth Justice NSW
- Fire and Rescue NSW
- NSW State Emergency Service (**NSWSES**)
- NSW Rural Fire Service

[114] *HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed* did not contain any reference to MDT as at 20 December 2024.

- Inspector of Custodial Services
- NSW Sheriff's Office
- St John Ambulance NSW
- Office of the NSW Ombudsman
- The LECC

Agencies reported varying degrees of implementation of the MDT Act in response to our request for this information. Some agencies, such as the Office of the NSW Ombudsman, Youth Justice NSW, and the LECC have developed policies specific to the MDT Act, while others have undertaken to review their existing policies and guidelines with a view to including reference to the MDT Act in updated policy.[115]

These agencies advised us that a minimal amount of training had been undertaken by their staff in relation to the MDT Act. Some agencies indicated no training would be undertaken for staff who may be decision makers in MDT applications, given the head of the agency would be the senior officer determining any potential applications.[116] NSWSES indicated their work health and safety officers had been trained on the MDT Act, and flowcharts had been created to outline processes to be followed should an MDT application be received.

As at the date of finalising this report,[117] no MDT applications had been received in respect of any agency other than the 3 (NSWPF, CSNSW and NSW Ambulance) referred to in this report.

[115] For example, Fire and Rescue NSW and the NSW State Emergency Service.
[116] The Inspector of Custodial Services and Youth Justice.
[117] As at 19 December 2024.

PART B:

Our overarching comments and core recommendations

4. Our overarching comments on the operation of the MDT Act during the reporting period

4.1 The Act is mostly being used in cases where there is no real risk of a worker contracting a blood-borne disease

Most applications by workers for an order under the MDT Act have been made following incidents of spitting or biting in circumstances where there is no evidence to suggest any exposure to bodily fluids other than saliva. At least 87 out of the 139 applications during the reporting period (62.6%) were in this category. The CHO guidelines indicate that this carries no real risk of transmission of any relevant blood-borne diseases.

A further 30 applications made during the reporting period related to incidents where the worker indicated they had been exposed to saliva in which there was blood visible.[118]

The CHO guidelines provide that there is no risk of transmission unless the bodily fluid (for example, that which is being spat) is blood or contains 'visible blood' and it comes into contact with the broken skin, mouth or eyes of the worker.

This means that 87 applications made during the reporting period involved contact incidents in which there was no real risk of transmission of a blood-borne disease to the worker.

Given that one of the objects of the Act is to encourage workers to seek medical advice and information about the risks of contracting blood-borne disease, as well as to protect and promote their health and wellbeing,[119] the high proportion of applications being made with no risk of contracting a blood-borne disease suggests the Act is not working as intended.

Moreover, a significant proportion of these applications are being approved by senior officers.

Of the 87 applications concerning incidents with saliva-only exposure, 52 (60%) resulted in a senior officer making an MTO, applying to the court for an MTO, or obtaining the consent of the third party to testing.

Of the 30 applications concerning incidents with saliva and blood exposure, 17 (56%) were proceeded with by a senior officer making an MTO, applying to the court for an MTO, or testing by consent of the third party.

4.2 We saw no evidence that the scheme is improving the health and wellbeing of workers

While it has not been possible for us to directly test whether the treatment of any worker was affected in any way by the testing of a third party under the MDT Act, we saw no evidence to suggest that this had happened. It appears unlikely given:

- in our survey of workers who had made MDT applications (n = 30), responses indicated that none had had their recommended medical treatment change before and after the third party was tested. That is, those who initially received treatment did not discontinue treatment after third party

[118] In these 30 applications the worker (applicant) has selected both the 'saliva' and 'blood' boxes as **bodily fluid types**. There were 49 NSWPF applications where an applicant had ticked 'possibly contained blood' as a **contact type**. Of those 49, 18 applicants ticked saliva as the only bodily fluid, 31 applicants ticked blood as the bodily fluid. CSNSW do not have an equivalent field for capturing 'possibly contained blood'. For further discussion about how NSWPF applications record bodily fluids such as saliva which 'possibly contains blood' see discussion at **section 12.2**.

[119] New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 2020 (The Hon David Elliott).

testing and those who did not initially receive treatment did not begin treatment after third party testing.[120]

- if post-exposure prophylaxis (**PEP**) is the recommended treatment for a worker, on the basis of the risks of contracting a blood-borne disease in that particular kind of exposure, it is unlikely that the treatment will change (ceasing PEP), even if the third party tests negative to a blood-borne disease. This is because the exposure window means that the third party themselves could be falsely testing negative as a result of having contracted the disease within that window.[121]
- Workers did not otherwise report to us that the MDT scheme was promoting their wellbeing and, to the contrary, the process of applying for an MTO appears to be itself an additionally stressful experience for workers. In our survey of workers, several respondents made free-text comments such as 'the application of applying for mandatory testing is very, very stressful. It impacts emotional, mental and physically all aspects of your life'.

In their submission to our review, the PANSW stated it 'consulted a small number of police officers' who had experienced exposure as a result of deliberate and violent acts, some whose exposure had occurred before the MDT Act had commenced, and some whose exposure has occurred after commencement. The PANSW stated these officers rated the MDT scheme as 'useful' or 'very useful' when it came to medical risk assessment (67.9%) and 'useful' or 'very useful' to officer mental health and peace of mind (75.6%). We asked PANSW for further details about these responses, such as the number of officers they consulted and what questions were put to them. The PANSW did not respond to our request.

We share the concerns of some stakeholders that the Act itself, for example, by including saliva as a relevant bodily fluid, may be contributing to misinformation and misunderstanding about the risks of transmission in these incidents. This may be reinforcing, rather than alleviating, stress and fear among workers about the potential transmission of blood-borne diseases in cases where those concerns are medically unfounded.[122]

4.3 Protections for third parties, including for vulnerable third parties, are ineffective

The Act contains complex procedural machinery that appears to be aimed at minimising the infringement upon the health rights and privacy of third parties. We observed, however, that these protections are largely ineffective in practice, and agree with the observations of some stakeholders that some of them are merely 'illusory'.[123] These include:

- The provisions concerning **vulnerable third parties**, which provide a separate pathway for MDT applications in respect of such persons to be determined by the court instead of by a senior officer (see **chapter 10):**

  The test for vulnerability in the Act is conceptually confused, being based on incapacity to consent rather than whether the ordinary pathway would be procedurally fair to the person, having regard to the third party's ability to understand and fully participate and exercise their rights in the process.

  The identification of whether a third party meets the vulnerability test in the Act is subjective, based only on what 'appears' to the senior officer to be the case on the information available. Senior officers have no necessary skill in assessing vulnerability and are given no guidance by the Act as to indicators of vulnerability. There is seemingly no obligation on the senior officer to make inquiries as

[120] The survey asked, "Did you receive any medical treatment (such as post-exposure prophylaxis - PEP) **before** the blood testing of the third party?" and "Did you receive any medical treatment (such as post-exposure prophylaxis - PEP) **following** receipt of the test results?".

[121] Australian Medical Association, Submission to the NSW Ombudsman; NSW Health (n 105).

[122] NUAA, Submission to the NSW Ombudsman; Australian Medical Association (n 121); NSW Health (n 105).

[123] NSW Bar Association, Submission to the NSW Ombudsman.

to whether the person is or may be vulnerable. Outside of CSNSW (where, in the case of inmates, information and advice is sought from Justice Health), senior officers do not go beyond the information immediately before them when assessing vulnerability.

There is also little practical likelihood that a wrong assessment of a person as non-vulnerable will ever be rectified.

In respect of the NSWPF, it appears likely that MTOs are being made by senior officers in respect of vulnerable people, particularly noting the significant number of orders that are made following an incident that occurred in the context of a mental health intervention.[124]

- The provisions concerning the **privacy of the health information** of third parties (see **chapter 15):**

  Although there are prescribed limitations on the dissemination of a third party's test results, and offence provisions relating to unauthorised disclosure, the test results of third parties are given to workers and there appears to be no restriction on the worker's freedom to disclose those results.

  We have also seen examples where test results have been sought out by senior officers from the worker or their medical practitioner, and in the case of the NSWPF, uploaded to agency record systems without the authority to do so under the Act (see **section 16.3).**

- The **'procedural fairness'** provisions allowing third parties to make submissions before an MDT application is determined (see **section 12.5**):

  These are ineffectual in practice given that the timeframes make it infeasible for the third party to seek relevant health, legal or other advice for the purpose of preparing a submission. In the case of NSWPF applications, third parties are not explicitly invited to make submissions (other than being given an opportunity to explain why they do not consent to testing).

  Third parties are also not generally given a copy of the worker's MDT application and so are not informed of what information the applications contain about them and the incident that was said to have resulted in bodily fluid exposure, and therefore are unable to respond.

- The availability of **independent external review** by the CHO (see **chapter 9)**

  The CHO considers itself not in a position to conduct an administrative review of senior officers' decisions and has told us that any review would be limited to a consideration of technical health issues as their role is the assessment of health risk.

  There are, in any case, significant practical barriers to a third party seeking review, including an impractical timeframe of 1 business day within which a third party must make their review application. It also appears that, in the case of the NSWPF, third parties are being formally notified of their review rights after the timeframe for review has expired.[125] Concerningly, we found that the number of third parties deemed to be vulnerable was quite low (26 of 106 for the NSWPF and 6 of 32 for CSNSW), which would go unchecked if a review is not undertaken.

[124] Thirty of 106 NSWPF applications (28.3%) were made in context of a mental health intervention. Further discussion of this issue is at **section 10.1**.

[125] Rights of review are provided in the MTO served on third parties (not the notice of determination), which is likely to be served more than 1 day after the third party was notified of the determination to make the order. For further discussion of this issue see **section 9.2**.

4.4 The Act is disproportionately impacting Aboriginal and Torres Strait Islander people

Prior to the introduction of the MDT legislation stakeholders anticipated that the scheme may disproportionately impact Aboriginal and Torres Strait Islander people, particularly given that Aboriginal and Torres Strait Islander people already interact with police and the correctional system at disproportionate rates.[126]

Largely for this reason, an explicit provision was included in the legislation to give the Ombudsman power to obtain demographic data from agencies as part of our function of monitoring and reporting on the Act.[127] However, the legislation imposes no obligation on the agencies to meaningfully collect any such data (see **section 16.3** below). That has severely limited the extent to which we have been able to report on the demographic impact of the scheme.

Whether a third party is an Aboriginal or Torres Strait Islander person is, however, one demographic feature that is generally captured by agencies, but not necessarily included in MDT application documentation.[128]

The data we obtained from the applications made during the reporting period indicate that the concerns of stakeholders were well founded. Indeed, the disproportionate impact of the scheme on Aboriginal and Torres Strait Islander people is even greater than can be explained by their disproportionate representation in the justice system. For example, while Aboriginal and Torres Strait Islander people make up 3.4% of the general population and 31% of the inmate population, half of all CSNSW's MDT applications concerned an Aboriginal or Torres Strait Islander person (see **figure 10** above).

We have also noted that Aboriginal and Torres Strait Islander people have been assessed as vulnerable by senior officers at a lower rate than non-Indigenous people (see **section 10.1**).

4.5 Testing by consent under the Act is problematic

The obtaining of consent to test third parties ('consensual' testing) who are subject to an MDT application presents a loophole in the legislation. Before determining an MDT application in respect of a non-vulnerable third party, the MDT Act requires the senior officer to seek the consent of the person to voluntarily provide blood. However, the Act includes no provisions to deal with the process to be undertaken if consent is given in those circumstances.

Forty-seven per cent (46 of 98) of all MDT applications in respect of non-vulnerable people proceeded to consensual testing of the third party. We received advice from the Crown Solicitor (see **appendix E - advice from the Crown Solicitor's Office**) that, if consent is obtained, the MDT application must be refused, in line with s 11(7) of the Act. If consent is obtained, testing would then proceed entirely outside the framework of the MDT Act. This leaves gaps because:

- there is no mechanism to deal with what happens if the third party, having given consent, then fails to appear for testing or refuses to provide the blood sample.
- relevant provisions of the Act concerning testing do not apply, including: the authorisation (and restriction) on the pathology laboratory to send the results to relevant medical practitioners and the CHO (and to no one else), the entitlement of the third party to cost reimbursement, and – most importantly – the confidentiality provisions in the Act.

[126] NSW Bar Association, Submission to the Legislative Council Law and Justice Committee, Parliament of NSW, Inquiry into the Mandatory Disease Testing Bill 2020; Public Interest Advocacy Centre (n 30).

[127] *Mandatory Disease Testing Act 2021* s 36(4).

[128] We have had to make separate enquiries with the NSWPF and CSNSW to obtain information about whether third parties are Aboriginal and/or Torres Strait Islander people. For further discussion of this issue see **section 16.3**.

The process by which consent is being sought can also be problematic. The Act requires consent to be sought by the senior officer. This mean consent is being sought in a non-clinical context, and without the third party having the opportunity to obtain medical, legal or other advice before agreeing to consent.

In some NSWPF cases, we noted pressure being applied when seeking consent - see **case study 4** at **section 14.3**. Even when overt pressure is not applied, we consider there is an inherent power imbalance between senior officers and third parties that may indicate that consent was not provided on a free and fully informed basis.

The Act *requires* senior officers to seek consent from non-vulnerable third parties but is silent on whether consent can also be obtained in respect of vulnerable third parties. The Act does not seem to contemplate that consent will be sought in respect of vulnerable third parties, but rather that these matters would proceed to be determined by the court.

However, the Act also does not prohibit consent from being obtained, provided this can be lawfully obtained (for example, from the third party's parent or guardian, if the third party themselves lacks capacity to consent). In practice we observed several cases where consensual testing of a vulnerable third party did occur. In some cases, this consent was actively pursued by the agency (see **case study 4**). This is occurring without oversight by the court, which has sole jurisdiction to determine MDT applications in respect of vulnerable third parties.

4.6 Senior officers of agencies are ill-equipped to be making determinations about MTOs, and decision-making processes within the NSWPF seem particularly poor

The MDT Act generally confers decision-making power on senior officers of agencies who are typically non-experts, either as administrative lawyers or as medical clinicians, particularly blood-borne disease specialists. This includes the decision as to whether a third party 'appears' to have a mental health or cognitive impairment which would mean they are a vulnerable third party and require the MDT application to be determined by the court.

The Act provides extremely broad discretion to these decision makers, who can make an MTO if they consider it to be 'justified in all the circumstances'. Although reasons are required to be given, in practice documented reasons are perfunctory and, in the case of the NSWPF, are entered using a structured decision-making tool that functions largely as a check-a-box.

5. Core recommendations

5.1 Whether the Act should be continued

In light of the observations above, our core recommendation is that consideration be given to whether the MDT Act should be continued at all.

Excluding the saliva exposure cases referred to above, there were, at most, only 47 MDT applications[129] during the 18-month reporting period that may have presented even a low risk of transmission to workers. 27 of these (57%) proceeded to either an MTO being made, an application to the court, or resulted in consensual testing.

Given the limitations on our monitoring powers under the Act, we have no way of examining whether any of these workers obtained a different treatment or were otherwise better off because the third party had been tested.

It appears that no worker (in the relevant agencies, or indeed in any other agency) contracted a relevant blood-borne disease as a result of occupational exposure risk during the reporting period.[130]

It is possible that the testing of a third party that returned negative results for blood-borne diseases has helped to alleviate some of the psychological stress and fear workers may have otherwise had, following the incident, and before their own testing could reliably rule out any disease transmission. However, as a number of stakeholders pointed out, the existence of a testing window (that is, a gap in time between when a person contracts a disease and when they develop the antibodies that show up in testing) applies to the third party as well as the worker. As such, a negative result returned from the third party is no assurance against transmission and, in cases of serious transmission risk, it would be dangerous to rely on such a result, for example in deciding to discontinue PEP treatment.

Given the unclear benefits to workers, it is questionable whether the significant and complex legislative and administrative machinery of the MDT scheme is warranted for such a small number of cases.

We appreciate that the legislators have attempted to balance important competing policy priorities, including:

- a scheme that will operate on a fast enough timeframe to make third party testing at least potentially relevant to a worker's medical treatment, and whose processes will not generate additional stress for the worker
- protections and procedural fairness rights for third parties, including protection for particularly vulnerable third parties, in circumstances where the very notion of a mandatory testing scheme is that it inherently infringes upon health rights and health privacy.

It may be that these competing policy concerns are irreconcilable. Workers who responded to our survey generally told us that the scheme did not support their wellbeing, and they found the process added to their stress. On the other hand, as noted above, the legislative safeguards for third parties are also ineffective.

We are of the view that there is much force in the position put to us by the Australian Medical Association that:

> 'Given that testing and results do not dramatically change the initial protocol that should be followed in cases of significant exposure, and that testing of the source person should not be considered definitive, AMA (NSW) does not support mandatory testing as an effective, reliable, or necessary form of legislative reform…

[129] Number of MDT applications where blood was identified as a bodily fluid – 40 NSWPF and 7 CSNSW.

[130] This was confirmed with CSNSW and Ambulance. However, the NSWPF have not responded to our request for this information. The Kirby Institute has advised there were no reported cases of HIV infection due to occupational exposure during our reporting period, but they could not confirm this for Hepatitis B and C. For further discussion of worker infection see **section 2.8**.

> It is vital that individuals are given prompt assessment, counselling, and management by a medical professional. The effort and expense in enforcing mandatory testing would be better placed in ensuring those exposed workers are well informed and properly engaged with the health care system in incidents where they are exposed to hazardous bodily fluids'.[131]

Recommendation 1

That consideration be given to whether the Act should be continued at all, and whether 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. That could include establishing and funding a panel of specialist blood-borne disease clinicians to be available for immediate consultations with workers (and their general practitioners) if required following a workplace incident of exposure to bodily fluids.

5.2 Whether all MDT applications should be determined by the court, and only on the basis of expert clinical evidence

If the MDT Act is to be continued, we suggest that consideration be given to removing the different pathways that currently exist based on whether a third party appears to the senior officer to be vulnerable or non-vulnerable.

Given the inadequacies in identifying vulnerability (**chapter 10**), the problems with decision making by senior officers alone (**chapter 12**), and the ineffective procedural fairness mechanisms (**chapters 9 and 12**), it is our view that all applications, if supported by the worker's employer, should be determined by the court.

Judicial officers are well-equipped to make such decisions, including by virtue of being professionally trained and routinely expected to understand and apply legislative criteria, to make decisions independently and impartially, to take into account and weigh all relevant considerations (including expert medical evidence), and to supervise processes to ensure procedural fairness.

That some applications are already being determined by the court, and that the numbers of applications made overall is so low, suggests that there is no practical or timing impediment to the court process applying to all applications, or that the court would be overwhelmed by the case load if this approach was to be adopted.

Recommendation 2

If the Act is to be continued, the Act be amended to provide that, in all cases, MTOs may only be made by the court, on application by the worker's senior officer.

If this recommendation is implemented:

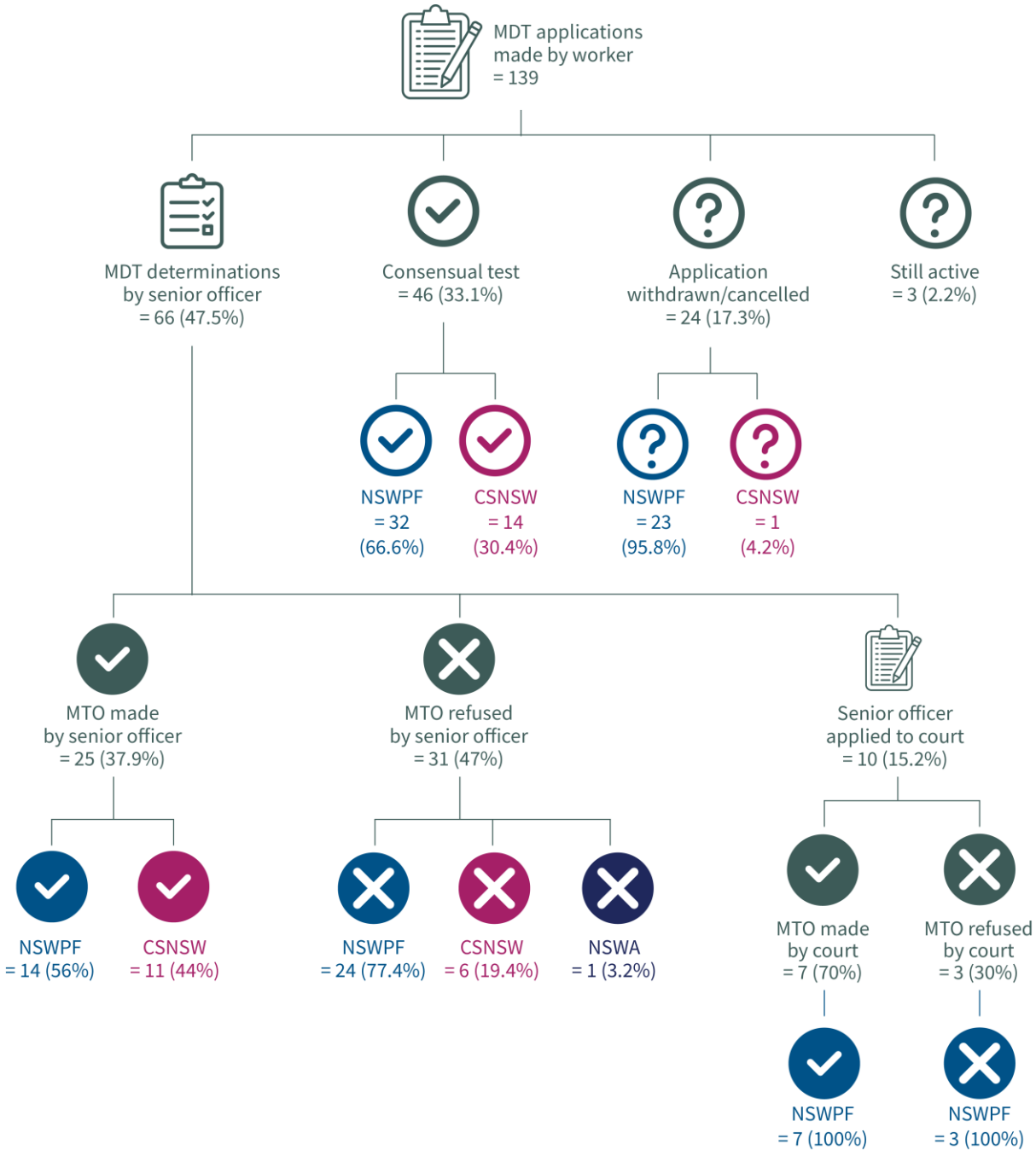
- **a.** Consideration should also be given to all of the recommendations set out in the next part of this report (other than those expressly stating that they do not apply if this recommendation is implemented). This includes that:
  - **i.** A panel of relevant medical experts should be made available to workers (**recommendation 4**) and their written medical advice should be put before the decision maker.

[131] Australian Medical Association (n 121).

ii. The criteria for making an MTO should include that there must be a real risk of transmission of a blood-borne disease and that testing of the third party may affect the treatment of the worker (**recommendation 27**).

b. In addition (and although the concept of 'vulnerable third party' can otherwise be omitted from the Act), consideration should be given to amending the Act to explicitly deal with how, prior to an MDT application being determined by the court, consent may (or may not) be obtained in the case of a minor or other person who lacks capacity to consent.

MDT applications by outcome and agency*



*As per **Table 1**, these are the number and type of outcomes based on our assessment of the information in the MDT applications made during the reporting period.

PART C:

Detailed comments on legal and operational issues

6. MDT applications

6.1 Eligibility to make an application

A worker can only apply where bodily fluid contact has occurred 'as a result of a deliberate action' – but this term is undefined and ambiguous

An MDT application can be made only where the worker's contact with bodily fluid occurred 'as a result of a deliberate action' by the third party.[132] However, this term is undefined and unclear.

This uncertainty was raised by the Parliamentary Inquiry,[133] but not resolved by the MDT Act.

As noted above, for the purposes of our monitoring and this report, we sought advice from the Crown Solicitor on the meaning of the term (see **appendix E**). In brief, the Crown Solicitor identifies two possible interpretations:

a. a broad view, under which all that is required is that the third party intended to engage in the conduct itself, but need not have intended that conduct to have a particular consequence (ie to cause contact between their bodily fluid and the worker), or
b. a narrow view, under which the third party must have intended to engage in the conduct for the purpose of causing contact between their bodily fluid and the worker.

Notwithstanding that the second reading speech for the legislation appears to support the narrow view,[134] and accepting that 'the matter is not free from doubt', the Crown Solicitor prefers the broad view as the proper construction of the provision.[135]

Even having reached that view, when asked to advise on particular scenarios, the Crown Solicitor was able to indicate only whether it was 'probable' or 'possible' that the scenario would fall within that broad view, noting that whether or not it did so would require consideration of complete information and that 'other surrounding facts may change the position'. The scenarios put were:

1. an individual is bleeding, there is a physical struggle with police and a police officer comes into contact with the individual's blood (the advice was that it is probable that it falls within the broad view)
2. individuals are involved in a fight, police intervene to break it up and in the process a police officer comes into contact with the individual's blood (the advice was that it is possible that it falls within the broad view)
3. police officer suffers needlestick injury while arresting a person with a concealed syringe (the advice was that it is possible that it falls within the broad view 'if the individual engaged in some intentional act which caused the police officer to arrest them')[136].

In respect of the second scenario above, the Crown Solicitor noted that '[t]he chain of causation here may be more difficult to establish than in the first scenario, in light of the officer's decision to intervene and the role that that independent act played in causing the contact'.

This highlights the point that the Act requires not just a deliberate action on the part of the relevant person, but that contact with bodily fluid be 'a result of' that action. This means that complex questions of causation (including how remote an action can be in the chain of causation to still be

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132 *Mandatory Disease Testing Act 2021* s 8(1).

133 Legislative Council Committee on Law and Justice (n 22), 22-24.

134 Hansard, Legislative Assembly, 11 November 2020, 4251 (MTO described as requiring "a third party who has **deliberately caused their bodily fluids to come into contact with a prescribed worker** to provide a blood same for testing" [emphasis added]).

135 Crown Solicitor Advice [54].

136 The Crown Solicitor considered it 'is not clear whether the individual must also have intended to conceal the syringe': [57] (Crown Solicitor's advice is at **appendix E**).

considered causally operative, and when another intervening cause might be considered to have broken the chain of causation) may also come into play, even if it is accepted that there was a 'deliberate action'. That the legislation refers to deliberate 'action' and not to 'inaction' (or 'conduct' that may include either)[137] may also be relevant.

During the reporting period, the question of whether contact was a result of deliberate action by the third party was generally clear cut; however, there were some grey cases

Most of the MDT applications made during the reporting period followed an act of spitting or biting. However, we also saw a number of MDT applications where it was less clear that the requirement for contact to be a result of deliberate action was met, particularly if (despite the Crown Solicitor's preferred view) the requirement is read according to the narrow view. These include the following scenarios:

- A man sustained bleeding injuries as he was forcibly removed from a vehicle via a broken window, after he failed to comply with a police direction to unlock the doors and police smashed the vehicle window. His blood came into contact with an officer during the arrest. There is no record of the man striking at police or taking any other action to cause his blood to come into contact with police.[138]
- A man was subject to a bag search while being taken into police custody. Police asked him whether he had anything in the bag that could harm police and he said no. During the search an officer located a needlestick and was pricked by the needle.[139]
- A woman was arrested when police identified the vehicle she was in was stolen. When police asked for her details, she attempted to flee by starting the vehicle and attempting to drive away. She was removed from the vehicle and handcuffed. During the incident, 'the female's blood transferred onto the left hand of [the officer] near to an existing and unrelated cut'. There is no other information about how the woman came to be bleeding or how the transfer of blood occurred.[140]

Given the doubts expressed by the Crown Solicitor, and the conflicting evidence given to the Parliamentary Inquiry, it is recommended that the legislation be amended to clarify which of the broad and narrow view is intended. It is noted that even providing that clarity will not remove all ambiguity associated with the test.

Recommendation 3

If the Act is to continue, that the Act be amended to clarify whether the requirement that contact with bodily fluid be a 'result of a deliberate action' by the third party means that:

a. as indicated in the second reading speech for the Bill, the third party engaged in the action with the intention of causing contact between their bodily fluid and the worker (the *narrower view*), or

b. as per the Crown Solicitor's preferred construction of the MDT Act currently, the third party need only have intended to engage in the action which caused the bodily fluid contact, without necessarily also intending to cause contact between their bodily fluid and the worker (the *broader view*).

[137] See *Ombudsman Act 1974* s 5 (definition of 'conduct').
[138] NSWPFMDT0001025 resulted in an MTO being made.
[139] NSWPFMDT0001042 resulted in consensual testing.
[140] NSWPFMDT0001076 resulted in consensual testing

6.2 The content of MDT applications

An application made by a worker must be made in writing and include the content prescribed by s 10 of the MDT Act. Our review of MDT applications during the reporting period showed substantial compliance with these mandatory content requirements, with one exception.

Applications generally provide little detail about the contact incident

Although the MDT Act requires 'a detailed description of the contact, including the date, time, place and surrounding circumstance, and the nature of the worker's contact with the third party's bodily fluid',[141] in some cases the descriptions included in applications contained only brief details.

Examples are set out in the box below. This was particularly the case in respect of applications by NSWPF workers who make their applications using an online form in BluePortal. NSWPF applications contain 2 free-text fields which provide for an applicant to enter information about the incident contact with the third party. These fields are titled: 'Please provide a detailed description of the incident' and 'Please provide a detailed description of the contact and surrounding circumstances'. Notwithstanding the repeated opportunities, we found applications in which little information was provided.[142]

Examples of 'detailed descriptions' of contact in MDT applications

1. MDT application contained the following information in the first field: 'Bitten on right arm by offender/mental health patient. Minor break / teeth marks in skin'. It contained the following information in the second field: 'Arrest of the offender mental health patient after RBT'.[143] The senior officer in this case did not assess the third party to be a vulnerable third party and made an MTO.

2. MDT application contained only the following information: 'I went to speak to a POI in relation to a job. The situation escalated and the POI spat on my face', and in the second field: 'spitting on police face'. This application was refused by the senior officer.[144]

4. MDT application contained the following information: 'Police attempted to arrest POI when he spat in the direction of an officer but it missed. He turn [sic] to another officer who was holding a handcuff on his wrist and spat in his face showering him with saliva in his eyes, mouth and nose. Arrest was then effected the arrest [sic] and conveyed to [police station]', and 'Police were spat in the face and it made contact with eyes, mouth and nose'. The senior officer made an MTO.[145]

[141] *Mandatory Disease Testing Act 2021* s 10(1)(a).

[142] While there may be additional information about the circumstances of contact available to a senior officer in the form of a COPS event, that document is not uploaded on to BluePortal and requires access to the COPS database. No additional information about the circumstances would be available to an external agency, for example the Chief Health Officer, for the purposes of application for a CHO review, as provided for in s 25(6)(a) of the MDT Act.

[143] NSWPFMDT0001118.

[144] NSWPFMDT0001057.

[145] NSWPFMDT0001050.

7. Consultation with a relevant medical practitioner

7.1 The requirement to consult

Encouraging workers to consult a relevantly qualified medical practitioner after a contact incident is a key feature of the MDT scheme, but we cannot tell how many workers have done so

A worker may apply for an MTO only if they have consulted a 'relevant medical practitioner' in accordance with s 9 of the Act.[146] This requirement is directed toward one of the key objects of the MDT Act, which is 'to encourage… workers… to seek medical advice and information about the risks of contracting a blood-borne disease while at work'.[147]

Presumably, the expectation of the scheme is that, where there is no or low risk of contracting a blood-borne disease, the obtaining of this medical advice and information will help to allay the worker's concerns, without them proceeding to make an application for an MTO.

In our monitoring of the MDT Act, there is no mechanism that would allow us to determine how many workers (if any):

- sought medical advice and information with a view to making an MDT application, but would not have done so had the MDT Act not been in place, or
- having done that, subsequently decided not to make an MDT application because they had been assured by that advice and information.

What we can say is that, in all applications made during the reporting period, the worker reported they had consulted a medical practitioner prior to making the application.

It does not appear that workers are obtaining advice from medical practitioners with specialist expertise in blood-borne diseases

Section 9 of the MDT Act also provides that a worker must consult the relevant medical practitioner 'as soon as reasonably practicable but no later than 24 hours after the contact occurred'.[148]

The Act defines a relevant medical practitioner as:

- a medical practitioner with qualifications or experience in blood-borne diseases, or
- if a medical practitioner with qualifications or experience in blood-borne diseases *is not available* at the time the worker requires a consultation under s 9 of the Act — another medical practitioner [emphasis added].

This means that a worker is required to consult a medical practitioner with the relevant qualifications and experience, if one is available within the short timeframe prescribed within the Act.

The CHO guidelines recommend that:

> a relevant medical practitioner, who is consulted for the purposes of the Act, is a medical practitioner with expertise in assessing and managing BBV [blood-borne virus] risk exposures, such as a medical practitioner who is an s 100 qualified prescriber, a sexual health medical practitioner or infectious diseases medical practitioner. If the relevant medical practitioner does not have qualifications or experience in the diagnosis,

[146] *Mandatory Disease Testing Act 2021* s 8(3).
[147] Ibid s 3(b).
[148] However, s 9(2) provides that the consultation may occur up to 72 hours after the contact occurred if reasonable in the circumstances.

> management and treatment of BBVs, the relevant medical practitioner should seek advice from an appropriately qualified practitioner.[149]

Medical practitioners known as s 100 prescribers require specialist training and accreditation to prescribe medications for the management and treatment of hepatitis B and HIV. The Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (**ASHM**) advises the following about s 100 prescribers:

> HIV and hepatitis B medications are subject to a restricted prescribing regime, which means that only approved medical practitioners (known as s100 prescribers) can prescribe these medications. These prescribers have undergone specific training and education to become qualified to prescribe these medications, and they are subject to ongoing monitoring and auditing to ensure they are prescribing safely and appropriately.[150]

We have been unable to ascertain the extent to which workers have attempted to, and have in practice been able to, consult with a medical practitioner with specialist qualifications or experience in blood-borne diseases.

NSWPF records on BluePortal indicate medical consultations of NSWPF workers have occurred in the emergency department in hospitals in 54% of cases (57 out of 106) and in medical centres in 45% of cases (48 out of 106).[151] While medical practitioners in these settings may have relevant qualifications or experience in blood-borne diseases, this was not apparent from our review of the medical advice provided.

We reviewed 64 records of written medical advice provided in MDT applications made to the NSWPF and CSNSW.[152] Of those 64 written medical advices:

- 61 contained no information as to whether the medical practitioner had specific qualifications or experience in blood-borne diseases
- 2 contained information indicating the medical practitioner did have qualifications or experience in blood-borne diseases
- 1 indicated the medical practitioner did not have specific qualifications or experience in blood-borne diseases.

In 4 of the 64 cases, the medical practitioner recorded that they had contacted another practitioner with qualifications or experience in blood-borne diseases.

Timeframes, and the lack of any register or panel of practitioners, may make it challenging for workers to access a relevantly expert medical practitioner

In its submission to our review, the Public Service Association (**PSA**) expressed concern that a worker will more likely consult with a medical practitioner without qualifications or experience due to the short timeframe in which to consult.[153] It indicated this may be exacerbated for workers in regional areas, particularly police officers and correctional staff working in remote locations or correctional facilities.

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149 NSW Health (n 105) 4.

150 ASHM, 'Prescriber Programs', *Become a Prescriber* (Web Page) <https://ashm.org.au/prescriber-programs/become-a-prescriber>.

151 1 of 106 did not attend.

152 These are the applications within the reporting period in which written medical advice was provided to us. Some applications had written medical advice uploaded onto BluePortal, for example, but the document was not among the attachments provided to us. This is further discussed at **section 7.2**.

153 Public Service Association, Submission to the NSW Ombudsman, particularly [37-8].

The timeframes set out in s 9 of the MDT Act are necessarily tight and correspond with the timeframes in which treatment by PEP is effective. NSW Health advise that 'it is crucial to start PEP as soon as possible, preferably within 24 hours but no later than 72 hours after exposure'.[154]

As noted above, and as also indicated by some responses to our worker survey, when workers seek advice from their general practitioner (**GP**), their GP may be willing and able to contact an infectious diseases expert for them. We noted that in the MDT applications made during the reporting period, workers were not provided by their agency with the name or names of expert medical practitioners who would be available at short notice for them to consult.[155] Respondents to our survey of workers generally indicated that having such a list would have been helpful to them.[156]

There is a need for workers to have better and timely access to suitably qualified and experienced medical practitioners. NSW Health has provided a link to a directory of qualified s100 prescribers maintained online by ASHM, in its *Information for medical practitioners* factsheet available on the DCJ website.[157]

In May 2024, CSNSW added a link to that directory in its updated policy, making it directly available to CSNSW workers.[158] It would be beneficial for the NSWPF to also provide workers with direct access to this link in the NSWPF guidelines.

During our consultations with the CHO, we explored whether it would also be possible for agencies to provide access to suitably qualified and experienced medical practitioners, and whether they could provide an appropriate medical consultation via telehealth.

Following these consultations, the CHO confirmed that, in its view, further action should be taken by agencies to ensure access by workers to the appropriate medical practitioners:

> The CHO recommends relevant agencies should make arrangements where medical practitioners with relevant expertise provide a service for their workers. This includes providing expert advice to the worker on the risk of BBV transmission and management of that risk. Such advice would need to be available outside usual business hours. This could be in the format of a central telehealth conferencing service and could be provided either by the private or the public sector.[159]

The CHO reiterated this position when providing feedback on a consultation draft of this report, noting that implementation would be subject to funding being made available for this initiative. We support the CHO's recommendations to better facilitate all workers' access to expert medical advice about the risks of transmission.

Recommendation 4

That agencies work with the CHO to put in place arrangements with a list of relevant expert medical practitioners for workers, including those in regional areas, to have rapid telehealth consultations (including outside normal business hours) following an exposure event.

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154 NSW Health, 'Sexual Health', *Post Exposure Prophylaxis (PEP)* (Web Page, 19 January 2024) <https://www.health.nsw.gov.au/sexualhealth/Pages/post-exposure-prophylaxis.aspx>.

155 All CSNSW workers who responded to our survey told us that they did not receive a list of medical practitioners with qualifications or experience in blood-borne diseases from their agency (n = 7).

156 NSW Ombudsman worker survey.

157 NSW Health, *Mandatory Disease Testing Act 2021 Information for relevant medical practitioners* (Fact Sheet, August 2022) <https://www.health.nsw.gov.au/Infectious/Documents/mdt-factsheet-clinicians.pdf>.

158 The CSNSW policy includes this information: 'Medical practitioners with expertise in BBD, known as S-100 prescribers, for Hepatitis A, Hepatitis B and HIV can be found at this website: https://www.ashm.org.au/prescriber-maps/'.

159 Email from CDB Specialist Programs Manager, Communicable Diseases Branch, Health Protection NSW (CHO representative), 21 June 2024.

7.2 Information provided by medical practitioners

Medical advice is not comprehensively addressing the prescribed requirements

Section 9(3) of the Act sets out the requirements for the medical consultation, being that the worker be informed about:

(a) the risk to them of contracting a blood-borne disease from the third party as a result of the contact, and

(b) the appropriate action to be taken by the worker to mitigate the risks of—

1. contracting a blood-borne disease from the third party as a result of the contact, and
2. transmitting a contracted blood-borne disease to another person, and

(c) the extent to which testing the third party's blood for blood-borne diseases will assist in assessing the risk to the worker of contracting a blood-borne disease.

In 61% of NSWPF MDT applications (65) and all 32 CSNSW applications a copy of written medical advice was included in the application. (See **section 7.2** in relation to issues where applications do not include written advice). Of these, medical advices relating to 45 NSWPF applications and 19 CSNSW applications (64 total) were provided to us.

In our review of those 64 advices, we made the observations outlined below.

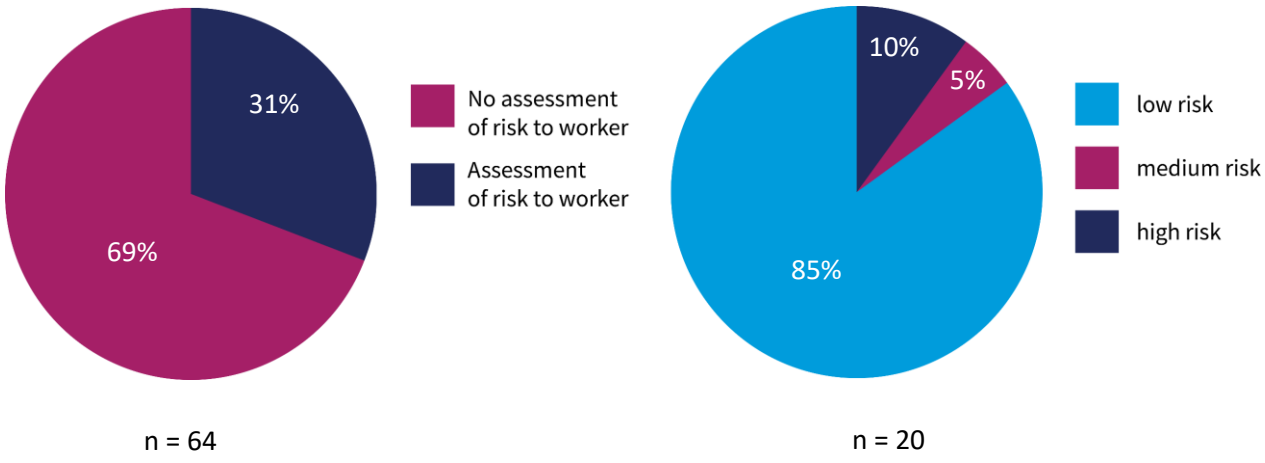
Information about risk to the worker of contracting a blood-borne disease

Forty-four of the 64 written medical advices (68.8%) did not include a statement as to the level of risk posed to the worker. Seven advices contained no assessment of risk at all, while 37 only included advice that used phrases such as 'worker **at risk** of infection' or '**potential risk** of exposure' [emphasis added].[160]

The medical advice in the other 20 records did identify a particular level of risk posed to the worker, such as:

- a 'low', 'less than low' or 'very low risk' (17 of 20)
- 'medium' risk (1 of 20)
- 'high risk' (2 of 20).

Figure 12. Risk of contracting a BBV identified in written medical advice provided in NSWPF and CSNSW MDT applications



[160] NSWPFMDT000101 and NSWPFMDT0001036 respectively.

Information about action to mitigate risks

21 of 64 written medical advices (32.8%) did not contain any information about action which should to be taken to mitigate the risk of either contracting a blood-borne disease from the third party as a result of the contact, or transmitting a contracted blood-borne disease to another person.

Information about effect of third party testing on risk assessment

26 of the 64 records (40.6%) did not contain information about the extent to which testing the third party would assist in assessing the risk to them of contracting a blood-borne disease from the third party as a result of the contact.

Table 10. Information in written medical advices about risk mitigation and effect of testing on workers risk assessment in NSWPF and CSNSW MDT applications

Type of information relating to risk	# written medical advice	percentage
No information on extent testing third party would assist in assessing risks	26	40%
No information on actions to mitigate risks	21	32%
Contained information on how testing third party would assist in assessing risk or how to mitigate risk	17	28%

It is noted that, while s 9(3) of the Act sets out matters which the medical practitioner must inform the worker about, there is no express requirement that any written medical advice necessarily also cover all of those matters.[161]

We therefore cannot rule out the possibility that workers were informed about all the prescribed matters during consultation, but that information was not included in the written medical advice (see **section 4.6** in relation to a senior officer's consideration of medical advice when determining MDT applications).

Agencies provide some guidance to medical practitioners on what they should inform a worker during a consultation

Agencies have provided guidance to medical practitioners about what medical advice is required for the purposes of considering whether to make an MDT application. The DCJ MDT website includes a fact sheet titled *Information for relevant medical practitioners*, which includes information about what they must inform a worker under the Act.[162]

The NSWPF provides an 'explanatory letter' for their workers to take to the medical practitioner, which contains information about the requirements of s 9(3) of the MDT Act.

CSNSW has recently revised its 'medical practitioner advice and information form', which prompts the medical practitioner to tick boxes indicating whether they have given advice on the risk to the worker of contracting a BBV as a result of the contact (s 9(3)(a) of the Act), the appropriate actions to be taken to mitigate this risk and the risk of transmission (s9(3)(b) of the Act) and to provide written reasons as to why testing would be beneficial or not in assessing the risk to the worker of contracting a blood-borne disease (in line with s 9(3)(c)).[163] The CSNSW form is a positive step in addressing the gaps we identified (outlined above) in the medical advice provided to workers about the risks of transmission.

[161] *Mandatory Disease Testing Act 2021* s 10(1)(h).
[162] NSW Health (n 157).
[163] *Medical practitioner advice and information form version 1.0* (attachment to COPP 13.14 Mandatory disease training v1.1).

We consulted with the CHO about our recommendation (see **recommendation 4**) that the CHO develop a proforma that workers are to provide to their medical practitioners when attending a consultation, the completion of which would constitute written medical advice. The CHO advised us that receiving a copy of a completed pro forma of this nature would be beneficial in both making meaningful submissions to the court in relation to MDT applications where the third party is vulnerable MDT applications and when reviewing senior officer determinations under s 23 of the Act.[164]

More information should be provided to workers about how testing of third parties will affect them

Currently, in respect of the proposed third party blood testing, the MDT Act requires the medical practitioner to inform the worker about the extent to which doing that testing will assist in assessing the risk to the worker of contracting a blood-borne disease.[165]

However, given the objects of the scheme (as well as the matters that will be relevant to be considered by the senior officer when determining an MDT application) the medical practitioner should provide information and advice about the extent (if any) to which testing the third party's blood:

(a) may affect the appropriate action (if any) to be taken by the worker to mitigate the risk, and

(b) may affect the worker's mental health or wellbeing.

In providing this advice, the medical practitioner should also be required to have regard to, and specifically inform the worker about, the risk that a negative third party test result may not be able to be fully relied on. This may be because of the window of time between when a person becomes infected (and infectious) with a blood-borne disease and when they begin to test positive to that disease.

Recommendation 5

If the Act is to continue, that the Act be amended to provide that a worker's medical practitioner must, both during the consultation and in written advice, inform the worker about all of the following:

- **a.** the medical practitioner's assessment as to:
  - **i.** whether there is any risk of the worker contracting each blood-borne disease
  - **ii.** if so, the level of such risk.
- **b.** the appropriate action (if any) to be taken by the worker to mitigate that risk to the extent (if any) to which testing the third party's blood:
  - **i.** will assist in assessing the risk to the worker of contracting each blood-borne disease
  - **ii.** may affect the appropriate action (if any) to be taken by the worker to mitigate that risk
  - **iii.** may affect the worker's mental health or wellbeing
- **c.** the risk that the third party test may return a false result.

Recommendation 6

If the Act is to continue, that the CHO develop a form for workers to provide to their medical practitioner, addressing each of the matters referred to in **recommendation 5**, and which upon completion would constitute written medical advice for the purposes of the MDT Act. This proforma could be contained in the Regulation, or in the CHO guidelines and each agency's MDT policy.

[164] NSW Health, Response to Consultation Draft, 31 December 2024.

[165] *Mandatory Disease Testing Act 2021* s 9(3)(c).

8. Worker experience and wellbeing

8.1 Impact of MTOs on medical treatment of workers

It has not been possible to assess the extent to which (if at all) the medical treatment of workers has been affected by the testing of a third party

As discussed in **section 16.1**, no NSW agency currently collates data on third party test results obtained pursuant to an MTO (or by consent). Data on the test results of workers following their window period is also not collated and retained. Nor is there data available on the treatment of workers and whether this was, or was not, affected by the availability of the third party's test results.

We note, however, that the Australian Medical Association's submission to our review advises that the third party's infection status does not affect the clinical management of the worker. One reason for this, as noted in the CHO guidelines, is the possibility of a 'false negative result' because the third party is still in the window period of the test(s) and may in fact have a blood-borne disease unknown to them.[166]

As part of our review, we undertook a survey of workers who had made an MDT application to ascertain the impact that the scheme had on worker concerns, their likelihood of seeking medical assistance, stress, and mental health.[167] The survey had 30 respondents, 23 from the NSWPF and 7 from CSNSW.

The majority of respondents (25 of 30 - 83.3%) stated that they would have sought medical advice even if the MDT Act had not been in place, with only a small proportion (5 of 30 - 16.7%) responding 'maybe'. No respondents responded that they would not have sought medical advice in the absence of the MDT Act requirement.

In relation to medical treatment, the survey results do not suggest any of the worker's treatment (either receiving PEP or not) was subsequently affected by third party testing. This was the case regardless of whether the worker's MDT application resulted in the third party being tested.[168]

Survey Question (Responses: Yes/No/Maybe)	NSWPF	CSNSW	Combined
Would you have sought medical advice and information about the risks of contracting a blood-borne disease if the mandatory testing scheme wasn't in place?	Yes 18 Maybe 5	Yes 7	Yes 25 Maybe 5
Did you receive any medical treatment (such as post-exposure prophylaxis) before the blood testing of the third party?	Yes 12 No 11	Yes 1 No 6	Yes 13 No 17
Did you receive any medical treatment (such as post-exposure prophylaxis - PEP) following receipt of the test results?[169]	No 11	No 6	No 17

[166] NSW Health (n 105) 10.

[167] See **appendix C** in relation to limitations of our survey.

[168] Of the 17 respondents who did not receive treatment before their MDT application was determined, 12 resulted in testing, 4 did not result in testing, and the outcome of 1 application is unknown.

[169] All respondents to the survey were asked this question. For the purpose of this report, we only considered the responses to this question from respondents who indicated in the previous question that they had received medical treatment before the blood testing of the third party.

8.2 Impact of the MDT scheme on worker stress and wellbeing

Workers' self-reported levels of stress and wellbeing have not been improved by the MDT scheme

In our survey of workers, we sought views relating to workers' level of concern about contracting a blood-borne disease, and whether their experience of the MDT scheme had promoted their health and wellbeing.

Survey Question[170]	NSWPF	CSNSW	Combined
How would you rate your level of concern about contracting a blood-borne disease at the time of the incident?*	7.22/10 (mean)	8/10 (mean)	7.4/10 (mean)
Do you feel your experience of the mandatory disease testing scheme has been effective in promoting your health and wellbeing?*	3.78/10 (mean)	1.71/10 (mean)	3.3/10 (mean)

These survey responses indicated a high level of concern by workers at the time of their exposure incident. This was the case even where the exposure related to spitting incidents which carry no risk of blood-borne disease transmission. This may support the following observations made by Justice Health in their submissions to us:

> Many CSNSW staff do not have education around the actual risks of contracting a BBV therefore requests for MTOs may be based on fear not actual risk. This could possibly result in [patients] being subjected to an MTO even if the risk is low or nil. The consequences for the patient if they refuse could lead to them being charged and having additional time added to their sentence.

The need for greater education around blood-borne disease transmission is supported by comments made by workers who responded to our survey. Several respondents highlighted the frustration of receiving little information throughout the process, notwithstanding the availability of the worker factsheets on the DCJ website and the CHO guidelines. Some relevant comments from respondents include:

- The was next to NO information.
- The process was put in place to better protect the mental health of those that are the victim of a crime/exposure and not have to be reliant on waiting 6 months for blood tests each time they are exposed.
- No feedback was supplied to me following the application, I do not know if the offender was tested or not.
- I have sent multiple emails to follow up with no response it has been a waste of time.

While the survey received a limited number of responses, workers who did respond indicated strongly that they did not consider that the MDT scheme had promoted their health and wellbeing.

Respondents gave an overall average score of 3.3/10 when asked whether the scheme promoted their health and wellbeing, and CSNSW workers gave an average score of 1.71/10. Responses to the survey suggest that reasons for this vary. Some workers cited poor communication of reasons for refusal, lack of information about the scheme itself, and general feelings of stress during the application process.

[170] Scale ranged from 1 to 10. As noted in the **Limitations** of this report, 1 out of 10 was pre-selected upon the survey webpage loading. This means that a respondent who ignored the question would submit a 1 out of 10.

In its submission to our review, PANSW advised of the results of a survey it undertook with its members who had been impacted by bodily fluid exposure before and after the MDT Act came into effect. PANSW told us that the survey found 75.6% of respondents rated the results of the person who deliberately exposed them to bodily fluid was 'very useful' or 'useful' for the officer's mental health and peace of mind. PANSW did not provide further information about the scope of the survey.[171]

The responses to our survey, however, largely yielded feedback that the MDT process was difficult, stressful, and was not effective in promoting the health and wellbeing of workers. Some comments to our survey include:

- No feedback was supplied to me following the application, I do not know if the offender was tested or not. This scheme is a great idea but is being implemented poorly by senior staff who don't have the confidence to apply it properly and it is the officers on the ground that could ultimately pay the price. [NSWPF]
- The [matter] was dropped by the NSWPF without consulting myself. This caused the accused to get off and sued the [NSWPF].
- I found it incredibly difficult to get an answer from any health authority about the results of the other party blood sample. In fact, to date, I have not received any official notification that their sample was negative. [NSWPF]
- There was never any consideration given to my health status, Only the inmates health was anyone's concern… I have never felt so let down by the system in the almost 39 years in [CSNSW].
- The process should be no more than 10 days from start to finish - however in its current format for CSNSW it is pathetic as it doesn't work to assist or support injured persons nor alleviate with any psychological issues or minimise psych stressors to persons exposed. [CSNSW]
- The application of applying for mandatory testing is very, very stressful. It impacts emotional, mental and physically all aspects of your life. [CSNSW]
- It was a waste of time and an unnecessary added stress as it feels no one cares enough to follow up. [CSNSW]

[171] We sought further information and clarification from PANSW (email to Manager Engagement, PANSW, cc'd to President, PANSW, 14 May 2023). We did not receive a response.

9. Chief Health Officer reviews and court submissions

9.1 Scope and effect of CHO reviews

Decisions of senior officers to make an MTO or to refuse an application for an MTO are reviewable on application by either the worker or the third party.[172] Reviews are undertaken by the CHO or a prescribed delegate.[173]

A decision by the senior officer to apply to the court for an MTO is not reviewable.[174] However, the CHO may make submissions to the court in relation to an application for an MTO,[175] and the court must take those submissions into account.[176]

Although the Act does not limit the scope of reviews, the CHO advises their reviews are likely to be limited to health-related issues

A review by the CHO is not limited in scope under the MDT Act, which appears to contemplate the CHO considering the decision 'on the merits' – that is, looking at the relevant facts, law and policy and arriving at their own decision. However, noting that the CHO lacks legal expertise, they consider that they are not well placed to, and cannot be expected to, conduct an administrative 'merits' review of decisions.

Accordingly, advice from the CHO suggests that any review is likely be limited to considerations of the health risks (including transmission risk and psychological risks) to the worker in the situation described in the MDT application, rather than a broader examination of whether the senior officer's decision was legally correct, administratively reasonable, or, in the CHO's view, the preferable decision.

A representative of the CHO told us:

> The CHO considers that their role in the Act in determining applications for review is primarily from a health risk assessment position. It is not considered the CHO's role, who is not a legal practitioner, to review applications based on the legislative requirements of the Act.[177]

It appears, therefore, that the CHO is unlikely to entertain other grounds for review, including:

- that the MDT application itself did not meet the eligibility requirements, such as by disputing that the bodily fluid contact had been the result of deliberation action by the third party.
- that the MTO was wrongly made by the senior officer because the third party was actually a vulnerable person (see **section 10.1**).
- that the senior officer's decision otherwise did not meet the legal requirements of the MDT Act, for example because it failed to invite submissions from the third party or failed to give any consideration to the submissions. In relation to this specific example, we asked the CHO's office whether a review would consider if a third party had been provided adequate opportunity to make a submission to the senior officer. The CHO's representative advised that:

[172] *Mandatory Disease Testing Act 2021* s 23.

[173] The CHO may only delegate functions to a person in class prescribed by the Regulations: *Mandatory Disease Testing Act 2021* s 35(1). No class has been prescribed meaning that, at present, all functions conferred on the CHO must be performed personally.

[174] *Mandatory Disease Testing Act 2021* 23(7).

[175] Ibid s 14(4).

[176] Ibid s 15(3).

[177] Communicable Diseases Branch Specialist Programs Manager (n 156).

> While [the CHO's office] will endeavour to check with the senior officer if the third party was given the opportunity to make a submission to the senior officer, this may not always be possible as the CHO will be working under tight timeframes to determine an application and potential lack of a reply from the senior officer could delay our processes.[178]

- that the conclusion that the MTO was 'justified in all the circumstances' was unreasonable, not just having regard to any health issues for the worker, but also when weighing those considerations against others, such as how (if at all) the mandatory test results might change the health treatment or health outcomes for the worker, and the rights of and impact on the third party.

This position was reiterated by the CHO in response to a consultation draft of this report:

> It is noted that the CHO considers their role in the application review process to be primarily from a health risk assessment position.

It appears that the review mechanism in the Act was intended to establish an avenue for comprehensive merits review of decisions, and not merely a technical 'check' that the decision correctly assessed the health situation for the worker. However, we accept the CHO's advice that they are not well placed to conduct such a review.

If senior officers are to remain the decision maker under the Act, then a proper merits review mechanism should be integrated into the scheme.

While NCAT appears to be the most appropriate existing body to conduct such reviews, we have not consulted with NCAT in the preparation of this report. We also note that there is an essential requirement for timeliness in the conduct of reviews.[179] That said, NCAT has capacity and experience in hearing matters on an urgent basis where required (eg guardianship matters).

Otherwise, consideration could be given to having reviews conducted by the Local Court, which already has a role in determining MDT applications in respect of vulnerable persons.

Recommendation 7

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to provide that decisions of senior officers to make or refuse to make an MTO, are subject to a review:

a. by NCAT, the Local Court, or other relevant court or tribunal with expertise in reviewing administrative decisions
b. which permits the reviewing body to consider whether the senior officer's determination was the correct and preferable decision

which, if the senior officer's decision is overturned, permits the reviewing body to make the correct and preferable decision.

There is a lack of clarity about the consequences if the CHO's review decision is to set aside the making of an MTO

The MDT Act provides that, following review, the CHO may either affirm the senior officer's decision or set aside the decision.[180]

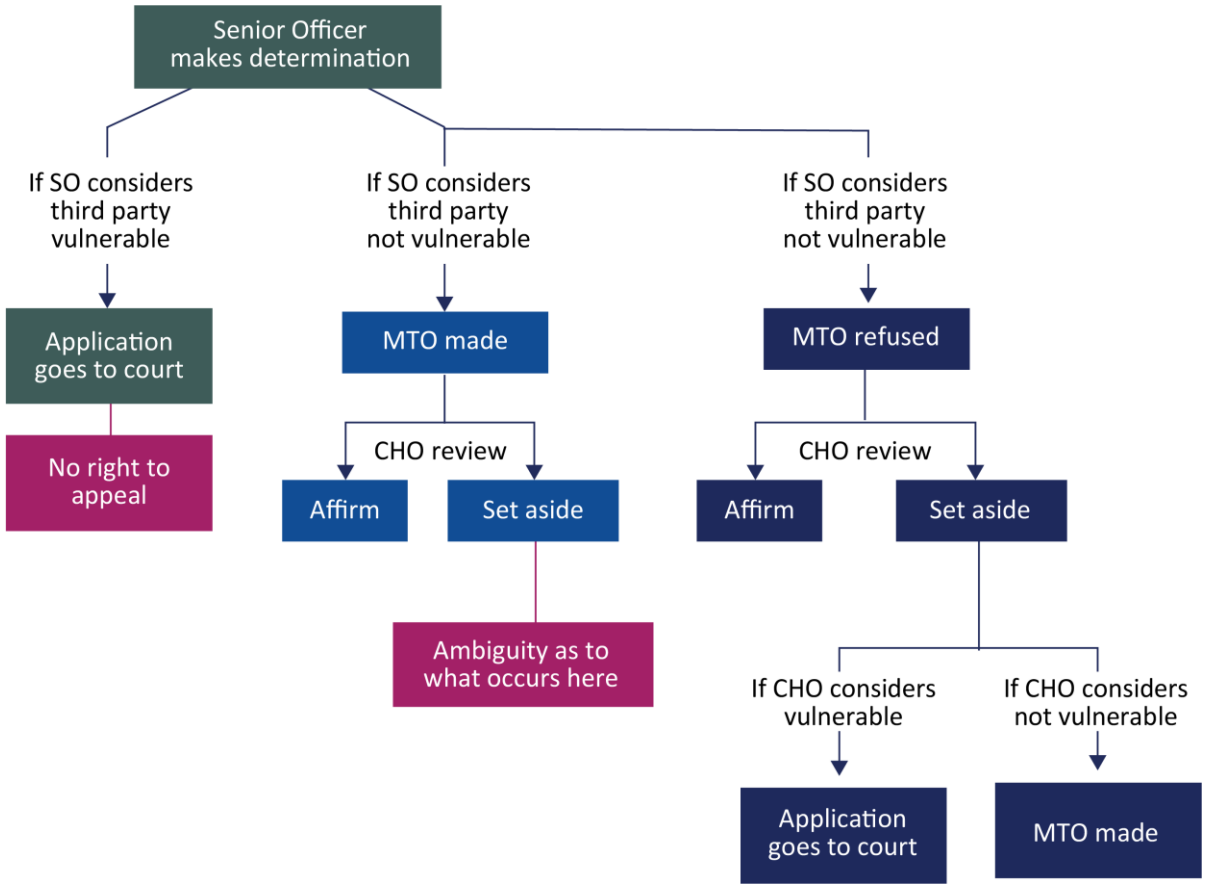
[178] Email from Communicable Diseases Branch Specialist Programs Manager, Health Protection NSW, 18 January 2024.
[179] For example, the CHO is currently required to determine review applications within 3 days: s 25.
[180] *Mandatory Disease Testing Act 2021* s 25.

Where a decision was made by the senior officer to refuse the MTO, and on review the CHO sets that decision aside, the Act provides for the CHO to make an MTO.[181] However, the Act is silent about what happens in the situation where the CHO sets aside a decision of the senior officer to make an MTO. This means that it is not clear whether the setting aside of a decision to make an MTO results in:

- the MDT application being taken to be refused, or
- the MDT application remaining on foot (and undetermined) – in which case the senior officer may (and perhaps must) make a further decision about it.[182]

This lack of clarity is particularly problematic if the CHO decides to set aside a decision to make an MTO on the basis that, although the CHO agrees that an MTO is warranted, the CHO considers the third party is a vulnerable third party. In those circumstances, there is no power for the CHO, after setting aside the senior officer's determination, to apply to the court for an MTO, and it is unclear if the senior officer has power to do so. This effectively means that a CHO review has no ability to rectify an error by the senior officer as to vulnerability.

Figure 13. MDT review process



A similar issue arises if the CHO decides that an MTO is warranted, but that the particular terms of the MTO made by the senior officer are not appropriate and that the particular MTO should be set aside – for example, because the MTO provides for testing a number of diseases, some of which are necessary

[181] Ibid s 25(2).

[182] It is likely that the 3-business-day time period within which a senior officer may make a determination will have expired, but s 11(2) of the Act allows for the senior officer to make a determination after a longer time period if 'necessary in the circumstances'.

and others which are not. There is no power for the CHO to vary the existing MTO or to make a different MTO. This should be clarified.

Recommendation 8

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to clarify that if, on review, the CHO [or other review body] sets aside a decision to make an MTO, they may then:

a. decide to refuse the MDT application
b. in the case of a person who is not a vulnerable person, make an MTO (in different terms to that made by the senior officer)
c. in the case of a person who is a vulnerable person, apply to the court to make an MTO.

9.2 Operational flaws in the review mechanism

It can be unclear when 'notice' has been given and the 1 business day review application period has commenced

Under s 23 of the MDT Act, both the worker and the third party must make the application for review within only 1 business day of 'being notified of the senior officer's decision'.

The MDT Act separately provides that the worker and third party (and others) are to be given written notice of the senior officer's determination, together with reasons.[183]

It is, however, ambiguous whether notice for the purpose of s 23 of the Act necessarily refers only to the written notice given under s 13. For example, if the worker (or third party) is first informed orally of the senior officer's determination (as appears from our observations to be a common occurrence), a question may arise as to whether that is sufficient to constitute notice for the purpose of s 23 of the Act so as to start the clock running on the 1 business day to apply for a review.

Recommendation 9

That is the Act is to continue, that the Act be amended to make clear that 'notice' in s 23 means the written notice of determination required to be given under s 13.

Notice to a third party about their review rights is typically given after the review application period (of only 1 business day) has already expired

Even if notice is received (for the purpose of s 23 of the MDT Act) only when the written notice required by s 13 of the Act is given, there is no requirement for that written notice to inform third parties of their review rights.

Instead, the Regulation requires information about review rights to be included in the MTO.[184] However, the written notice of determination under s 13 can be (and in practice usually is) given *before* the MTO itself is served. The Act separately provides that the senior officer is to personally provide a copy of the MTO to the third party as soon as reasonably practicable, but no later than 5 business days after the MTO is made.[185]

[183] *Mandatory Disease Testing Act 2021* s 13.
[184] Mandatory Disease Testing Regulation 2022 reg 4(1)(c).
[185] *Mandatory Disease Testing Act 2021* s 19(1).

This means that notice to the third party of their review rights is not required to be given until the MTO itself is served, which may be after the 1 business day period in which a review application can be made.

In practice, the NSWPF's BluePortal sends the third party an automated email notifying them of the senior officer's determination as soon as the determination is entered into the system. The NSWPF advises that the MTO itself is only later (but within 5 business days) served on the third party in person.

CSNSW's policy appears to suggest that the MTO is provided with the notice of determination:

> If an MTO is made, an authorised officer must present the third party with a copy of the order, and a Notice of determination of application mandatory testing order ... The officer must fully explain the content of the order and the notice, using interpreter services if required.[186]

The policy further states, 'If an inmate intends to apply for a review, they be provided the form, *Application for review by Chief Health Officer - third party from a correctional officer*.' However, this seems to suggest that the third party is expected to raise their intention to apply for a review, and does not impose a proactive obligation to provide notice of the right to a review.

Recommendation 10

If the Act is to continue and **recommendation 2** is not adopted, that the NSWPF, CSNSW and other relevant agencies include information in any notice of determination about workers' and third parties' review rights, and that the Act be amended to make this a requirement.

The Regulation requires a third party's application for review to include a copy of the MTO, but they typically do not have it at that time

The Regulation requires applications for review from third parties to include a copy of the MTO.[187] As noted above, third parties will often not receive a copy of the MTO until after the review application period has expired.

Recommendation 11

If the Act is to continue and **recommendation 2** is not adopted, that Government amend the Regulation to provide that an application for review from a third party must include either the MTO or a copy of the senior officer's notice of determination and reasons for determination.

No review application form was available until May 2024

The MDT Act provides for a form to be prescribed by regulation for applications for reviews by the CHO. The CHO guidelines, issued on commencement of the Act in July 2022, state that the worker or third party:

> should complete and sign the "Application for review by Chief Health Officer – [worker/third party]" form as part of the application. The application for review and any additional information should be sent to NSWH-MDT@health.nsw.gov.au.

[186] In records we have reviewed, CSNSW staff advise the third party of the determination at the time of serving the MTO. However CSNSW records of the notice of determination and/or service of the order have not always been provided to us.

[187] Mandatory Disease Testing Regulation 2022 reg 7(2). This contrasts with applications from workers, which are required to include the senior officer's notice of determination; Reg 7(1).

However, forms were only made available on 5 May 2024.[188] The prior lack of availability of an application form may have discouraged potential review applications.

Inmates are reliant on CSNSW to lodge their application for review within the relevant period

Under CSNSW policy, inmates wishing to seek a review by the CHO are to obtain an internal CSNSW form, *Application for review by Chief Health Officer - third party* from a correctional officer.

Once this form is completed, the inmate third party is reliant on a staff member to submit the application form on their behalf, correctly and within 1 business day of being notified of the decision to make the MTO.

In relation to the only CHO review which has been completed (see below), the third party furnished the application within 1 business day of being notified of the senior officer's decision, but it was not received by the CHO until [11 days] later due to the application being initially sent by CSNSW to the wrong email address. While the CHO proceeded to undertake the review, by the time they did so the mandatory blood test had already been administered.

Case Study 1. The only review the CHO has conducted on an MDT decision to date

In January 2024, the CHO notified us of a review application made by a third party who was an inmate of a correctional facility. To date, this has been the only review application under the MDT scheme.

The CHO affirmed the decision and the MTO remained in effect, with the third party required to comply with the order.

The MDT application stated that the person had spat at a worker, striking the worker's open eye. It was reported that the third party said, 'I got Hep C and am bleeding from the mouth'.

The CHO considered the transmission risks on these facts. The CHO noted that the window for PEP recommendations (for Hepatitis B and HIV) had already passed. However, the CHO also noted that there was a 2-month period in which the worker's own test results would not be definitive, and there may be significant anxiety to the worker during that period which may be relieved by knowing the results (if negative) of the third party.

The third party's application for review was received by the CHO more than a week outside the 1-day limitation in which the MDT Act requires applications for review to be made.

The CHO noted that this delay was not caused by the person themselves, who had given the form to CSNSW and was reliant on CSNSW to lodge it.

The CHO therefore resolved to determine the review regardless.

The application was received by the CHO on the same day that the third party's blood was taken under the MTO being reviewed.

The CHO notified NSW Health Pathology that the application had been received and accepted the next day and requested the third party's test results not be released. By this time, the third party's blood test results had already been released to Justice Health (as the third party's nominated medical practitioner), but not to the medical practitioner who had been nominated within Justice Health by the third party. The results had not yet been released to the worker's nominated medical practitioner. NSW Health Pathology subsequently held the test results until the CHO determined the review application

[188] We were advised by a CHO representative in November 2023 the forms were being prepared and had to go to the multi-agency MDT working group for consultation before being made available on the DCJ MDT website. The forms were posted on the DCJ MDT website on 5 May 2024.

There is no clear power for the CHO to accept a review application out of time

Although in the one review that has been conducted to date the CHO decided to proceed with the review even though they had received the application well out of time, it is not clear that they had power to do this.

The Act provides that a person 'must' make the application within 1 business day of notice of the senior officer's determination,[189] and there is no express provision for the CHO to otherwise accept late applications.

Recommendation 12

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to provide that the CHO [or other review body] may accept an application for review out of time in exceptional circumstances.

Accessing support in one day is impractical

Submissions made to us by Legal Aid NSW, the NSW Bar Association and ACON[190] highlighted the difficulties for persons who receive notice of an MTO to obtain any advice – including basic advice about their rights and the process for exercising them, as well as legal or medical advice, and social support – within the 1 business day timeframe they have to apply for review.

This was considered especially problematic for those in custody, who have limited access to external resources and advice. The NSW Bar Association described the review rights under the Act as 'largely illusory' as a one-day limitation period is 'patently insufficient and unfairly limits an impacted person's ability to obtain legal advice and/or an independent medical opinion to support their review application'.[191]

A similar concern had been raised during the Parliamentary Inquiry, particularly in relation to third parties with limited literacy, fluency in English or who were otherwise vulnerable or disadvantaged (but who are not necessarily 'vulnerable third parties' under the Act, in respect of whom a determination would be made by the court rather than a senior officer).

In its submissions to this report, Hepatitis NSW noted that the 1 business-day time limit applied to the third party can be contrasted with:

- the worker, who has 5 business days after the contact incident to make an MDT application,[192]
- the senior officer who has 3 business days to make a determination[193]

Hepatitis NSW suggested that this disparity should be addressed to improve 'equity and fairness in time allowed'. It also submitted that a mechanism to facilitate expeditious lodgement of a review application be implemented, such as a pro-forma review application, with additional assistance provided for people with disabilities.

189 *Mandatory Disease Testing Act 2021* ss 23(2) and (4).

190 Formerly known as the AIDS Council of NSW, now known as ACON Health Limited.

191 NSW Bar Association (n 123).

192 *Mandatory Disease Testing Act 2021* s 8(4). We note that the worker also has only 1 business day from receiving notice of the determination to apply for a review. However, they will have had the opportunity (and indeed requirement, in the case of a medical consultation) to obtain advice prior to making their original application, and the application for review requires no additional substantive information. Nevertheless, the limited time period for making a review application may also be a barrier for workers – see **section 9.3** below.

193 *Mandatory Disease Testing Act 2021* s 11(2). The CHO also has 3 days to make the review decision: s 25(1).

Recommendation 13

If the Act is to continue, that the Act be amended to provide that the period within which an application for review must be made is 3 business days from notification of the decision.

Third parties do not have a fair opportunity to make submissions to review

If a senior officer refuses an MDT application and the worker applies for a review of that decision, the CHO must, before setting aside the senor officer's decision, provide the third party with an opportunity to make submissions and consider those submissions.[194]

However, if it is the third party who makes the application for review (after the senior officer decided to make an MTO), there is no similar mechanism for seeking a submission from the third party.

Instead, the review application will only include a copy of the third party's original submission to the senior officer, if any.[195]

As discussed in **section 12.5**, at the time of making their submission to the senior officer, the third party will not have been informed of the worker's version of the exposure event because the third party does not receive a copy of the MDT application. This means that, if a third party is not given an opportunity to make a fresh submission to the CHO as part of the review, the CHO's review will be based solely on the worker's version of events concerning the exposure incident, which may be of significance to the assessment of the health risks.

While there appears to be no legal impediment to the third party proactively deciding to put in a submission when they submit their review application, this is unlikely to be practical, given the 1 business day application deadline discussed above. Moreover, neither the MDT Act nor the CHO guidelines or agency policies refer to the possibility of any such submission being made, and third parties are unlikely to be aware of their right to make one. There is no express requirement in the Act for the CHO to consider such a submission, if it were made.[196]

Recommendation 14

If the Act is to continue, that the Act be amended to provide that both the third party and the worker are to be given an opportunity to make submissions on any review, and the CHO [or other review body] is to consider any submissions received.

The continuing effect of MTOs pending a review outcome

There is no reasonable justification for requiring testing to proceed pending the outcome of a review

If an application for review is made by a third party, the MTO continues to have effect, and the third party must still comply with the order.[197] This means that the third party must submit to a mandatory blood test within 2 business days of the order being made,[198] although the pathology laboratory is directed not to provide the test results to the nominated medical practitioners unless and until the review affirms the MTO.[199]

194 *Mandatory Disease Testing Act 2021* s 25(4).

195 It is also relevant here that advice from the CHO's office is that a review is unlikely to scrutinise whether the third party was given an appropriate opportunity to make a submission – see **section 9.1** above.

196 *Mandatory Disease Testing Act* s 25(4)(b).

197 Ibid s 24(1).

198 Ibid s 5(1)(a)(i).

199 Ibid s 24(2).

Given that applications for review may be made 1 business day after MTO was made, and the CHO then has 3 business days within which to complete a review, in most cases testing will proceed before the outcome of the review is known.

Significant opposition to this provision was raised during the Parliamentary Inquiry,[200] and these concerns were reiterated in submissions made to us for the purpose of this report. The NSW Bar Association stated in its submission to our review that s 24(1) 'wholly negates the purported safeguard against arbitrary bodily interference'. This appears especially to be the case in the context of persons in custody, who may be subject to the use of reasonable force by law enforcement officers to undergo testing.

There also appears to be no reasonable justification for the testing to proceed while the outcome of a review is pending. Although there is a need for timeliness in testing to benefit the worker, as numerous stakeholders have pointed out, the maximum 3 days difference while waiting for a review decision is unlikely to have any effect on the test results (the window for testing is much longer).[201] Nor can testing during the review period provide any benefit in terms of either the treatment of the worker or their psychological state, given that the results are in any case withheld until the review is complete.

Recommendation 15

If the Act is to continue, that the Act be amended to provide that testing in respect of an MTO is not to take place until whichever is later of the following:

- **a.** the expiry of the time within which an application for review may be made
- **b.** the finalisation of any review.

The prohibition on disseminating test results while a review is underway is ineffectual

Section 22 of the MDT Act provides that the pathology laboratory at which the testing of a third party's blood under an MTO was carried out must, as soon as reasonably practicable, provide the results to the medical practitioners authorised by the worker and third party to receive the blood test results, and to the CHO if the third party does not authorise a medical practitioner.[202]

As indicated above, making an application for review does not impose a stay on the MTO. Instead, s 22 of the Act does not apply until the CHO determines the application for review.[203] This means that the test results are not to be disseminated until, and if, the MTO is affirmed by the CHO.[204]

If the CHO sets aside the MTO, the test results are not to be provided to the worker's authorised medical practitioner but will still be provided to the third party's medical practitioner.[205]

Concerns have been raised that test results could be disseminated by pathology staff prior to a review being finalised, further undermining the review mechanism. In its submissions on the draft CHO guidelines, Legal Aid NSW raised the following concerns:

> Section 26 of the Act also does not require the Chief Health Officer to give notice of their determination of a review to the pathology laboratory. We note that, in the absence of these notice requirements, it is likely that the pathology laboratory will release the results as soon as they are available, regardless of s 24(2) of

200 Legislative Council Law and Justice Committee (n 22) 31. Particularly, see Public Interest Advocacy Centre; NUAA; Positive Life NSW; ACON; Australasian Society of HIV; ASHM.
201 Australian Medical Association (n 28).
202 *Mandatory Disease Testing Act 2021* s 22(1).
203 Ibid s 24(2).
204 Ibid.
205 Ibid ss 24(4) and 22.

> the Act, because they will be unaware of the review process taking place. Once released, the third party's ability to stop those results from being communicated to the worker is virtually non-existent.

When we consulted with the CHO's office, a representative agreed with this proposition. The CHO's office also noted that, even if pathology laboratories were notified that a review was underway, that notice would likely come too late to stop dissemination of the test results. Section 22(1) of the Act requires them to provide results 'as soon as practicable', which will often be before an application for review has even been lodged (even though the time limit for that is currently only 1 business day). The CHO's office advised that test results may be available to pathology laboratories several hours after receipt of specimens, depending on the site of collection and processing:

> The third party has one working day to put in an application for CHO review; however, if NSW Health Pathology is to provide results as soon as reasonably practicable, this may occur before the window for application for CHO review has elapsed. Therefore, results may be disclosed to the worker and the third party's medical practitioner before an application for CHO review has been made'.

The CHO noted in response to our consultation that the halting of test results being disseminated must be done manually and would require 'timely notification' to NSW Health Pathology of the application for review and its outcome. The CHO therefore supported the recommendation to delay dissemination until the determination of the review, stating that it would help ensure test results did not get released while the review is on foot.[206]

Notwithstanding our recommendation in this report, the CHO has indicated they are in discussions with NSW Health Pathology regarding processes around release and holding of blood test results. This problem will, however, be avoided by the implementation of our recommendation above, that testing should not occur pending the outcome of a review.

9.3 Barriers to workers seeking reviews

No workers have applied for a CHO review during the reporting period, and there are barriers to them applying for review

During the reporting period, there have been 32 MDT applications (not related to a vulnerable third party) that were refused by a senior officer.

We have considered what potential reasons there may be for no applications for review being made by workers (other than an acceptance of the determination and the reasons for the determination):

- ***Limited time frame*** **-** The worker must make a review application within only 1 business day of being notified of the senior officer's determination.[207] This provides limited opportunity for the worker to seek legal, medical or other advice (including to consult again with their medical practitioner) before deciding whether to apply for review, or to prepare any submissions they might wish to put forward with their review application.
- ***Lack of awareness of review rights*** **-** In our survey of workers who had made MDT applications, 2 CSNSW workers whose applications had been refused reported they did not seek a review because they were unaware of their rights to review. This suggests that the worker factsheet on the DCJ website and the CSNSW's MDT policy needs to be better communicated.
- ***Futility of review*** **-** In cases where an MDT application was refused on the basis that it did not meet eligibility requirements, a review may not have been pursued because of a recognition that

[206] NSW Health (n 164).

[207] *Mandatory Disease Testing Act* s 23(2).

the senior officer was obliged to refuse the application, and that this outcome would not change on review. A similar factor may have been relevant in other cases, for example where the third party could not be located.

- ***Provision of wrong email address to workers*** **-** The NSWPF MDT guidelines outline the requirements for an application for review and provides a direct email address to which applications are to be sent. That email address contained a typographical error, which was replicated in the NSWPF's BluePortal system. We raised this error with the NSWPF, and it has now been corrected.[208] We were advised that there is no way of knowing whether any workers may have unsuccessfully attempted to apply for review through this email address.[209]
- The CSNSW policy also included an incorrect email address for the submission of review applications to the CHO. We note that in the updated CSNSW policy provided to us on 17 May 2024, 3 of those 4 references to the CHO email address had been corrected.
- ***Incorrect information about application requirements*** **-** The CSNSW MDT policy lists the requirements which it says need to be met for an application to be made for the review of an application to the CHO. However, the list combines the content requirements for applications for review by workers and by third parties, which are different. An application for review by a worker needs only to include a copy of the MDT application and the senior officer's determination. The other things listed are required only in respect of third party review applications.

Submissions by the CHO to the court

The CHO rarely makes submissions to the court

The CHO may make submissions to the court in relation to an application for an MTO,[210] and the court must take such submissions into account.[211]

Presumably, although s 15(3) of the MDT Act says that the court 'must' take the CHO's submissions into account, this is only if the CHO has in fact made a submission, noting that the CHO *may* do so.

However, another consideration that is listed in the same section as being required to be taken into account by the court (the wishes of the third party or their parent or guardian) has added to it the words 'if any',[212] suggesting a recognition by the legislative drafters that there may not always be such consideration before the court. That similar words do not appear after the reference to consideration of submissions from the CHO would appear to suggest that the CHO was generally expected to have made submissions to the court.

In response to the above, the CHO noted during consultation that while it supports this concept in principle, it has historically faced barriers to making submissions to the court.[213]

Recommendation 16

If the Act is to continue, that the CHO adopt the practice of always making submissions to assist the court in determining MDT applications.

[208] NSWPF advised us this had been remedied in May 2023, although notifications continued not to be made to the CHO. It appears to have been successfully remedied now, based on the fact automated notifications are being made from BluePortal to the CHO where an application to the court is made.

[209] This would not have affected third parties, who are notified of the right of review in the MTO itself.

[210] *Mandatory Disease Testing Act 2021* s 14(4).

[211] Ibid s 15(3).

[212] Ibid s 15(3)(b).

[213] NSW Health (n 164).

The NSWPF was not routinely notifying the CHO of court applications, as required by the Act

To make submissions, the CHO needs to be aware that court proceedings are on foot. For that purpose, there is a statutory duty on the senior officer to notify the CHO of an application to the court for an MTO in relation to a vulnerable third party.[214]

During the reporting period CSNSW did not make any MDT applications to the court. Of the 12 NSWPF applications made to the court during the reporting period,[215] the CHO was given notice of only 5 applications (42%). Of the 5 notified applications, 1 notification was made to the CHO 1 month after the application to the court had been made, and 9 days after the court granted the MTO.[216] One notification was made at 3:07 PM on the day before a court hearing scheduled for 9:30 AM. The notice contained no information about the alleged contact incident, and further information had to be sought by the CHO's office.[217] A third notification contained no application to the court or other documentation and this was not provided on request.[218] In one case, the required notification was made after our office made direct enquiries with senior officers as to whether the notification to the CHO had been made.[219]

The NSWPF could not provide us with any clear reasons why it was failing meet the notification requirements under the Act. It appears that an 'automated' mechanism was intended to be included in BluePortal, that would make, or at least prompt the senior officer to make, the required notification.

As previously noted, we identified that the relevant NSWPF policy contained an incorrect email address for the CHO, which was presumably the same email as contained in BluePortal. This might have had an impact on notifications not being made. We alerted the CHO to this situation and were advised by the NSWPF in July 2023 that any problems had been rectified. However, subsequent applications made by the NSWPF to the court were still not notified to the CHO.

In August 2023, we asked the NSWPF what the underlying causes were for the failure to notify the CHO of court applications. It responded by referring to a failure to notify 1 application, which it said had been due to the senior officer not entering sufficient information into BluePortal to automatically trigger a notification.

We also asked whether the NSWPF needed to take any action to ensure the CHO was notified of all applications to the court in the future. In August 2023 the NSWPF advised us:

> Workforce Safety are working with Technology Command to determine whether any fail safe and tracking modifications can be made to the current process. As an interim measure, the situation will be manually monitored by Workforce Safety.[220]

In September 2023, the CHO's office received a notification well after the MTO had been served.221 At the time representatives of the CHO advised us:

> We have reached out to the NSW Police Force representatives on the MDT multiagency working group to advise them of the timeline for this application, and ask whether there could be consideration of mechanisms that the order and any additional documents could be provided.

It appears that the process now in place is that when the senior officers populate a certain field in BluePortal (relating to a court application) the system sends an internal email to that senior officer reminding them to send a copy of the court application, once signed by the court registry, to the CHO.

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214 Ibid s 14(3).

215 This includes 2 applications which did not go to the Court but should have been notified to the CHO at the time of the senior officer determination to apply.

216 NSWPFMDT0001105.

217 NSWPFMDT0001113.

218 NSWPFMDT0001070.

219 NSWPFMDT0001085.

220 Email from an A/Inspector, Staff Officer, Office of the Deputy Commissioner – Corporate Services, 28 August 2023.

221 NSWPFMDT0001105.

We understand that since December 2023, the NSWPF has been notifying the CHO of applications made to the court.

The CHO is not given all the information needed to make meaningful submissions to the court

Even when the NSWPF does notify the CHO of a court application, these notifications do not include the information the CHO needs to make an informed submission.

In 2 recent notifications to the CHO (following those discussed above) made by the NSWPF after the reporting period, the CHO requested the full court application documents,[222] but these were not provided.[223] One senior officer responded to the CHO request by providing the CHO with the court details, but no application documents. The other senior officer responded to the CHO by declining to provide the requested documents at all, and then later advised the CHO that the court application was to be withdrawn.

Timely access to all the relevant documents before the court is necessary for the CHO to make an informed decision as to whether to make a submission.

To date, the CHO has made only 1 submission to the court on an application for an MTO involving a vulnerable third party. The CHO advised that the senior officer on that occasion had provided a copy of the MDT application on request. However, the CHO also requested a copy of the written advice from the worker's medical practitioner (which would have been included with the MDT application), but this was not provided.

The CHO advised us during consultation that a requirement for the senior officer to provide application documents to the CHO at the same time as the application to the court is made, would be beneficial in allowing them to properly consider making a submission.[224] They further advised in other correspondence that it would be particularly helpful, for the purpose of assessing health risk, to be provided with any written medical advice that was included with the worker's MDT application. The CHO's office advised us:

> the information regarding the incidents in these applications are fairly vague so it is hard to make an informed risk assessment about the risk of blood-borne virus transmission. It would be helpful if the medical practitioner's reports were provided to the CHO but I don't believe it is stated in the Act that the senior officer is required to provide this… We normally receive the MDT applications to court (like the one attached) when we have requested further information from the senior officer. I note that in s 10(1)(h) states [sic] that "a copy of written advice received from the relevant medical practitioner, if any" is to be included in an application for an MTO. It would be helpful if this were to be included as part of the information provided to the CHO for them to make an assessment of the risk of BBV transmission with regard to applications to court for vulnerable third parties.[225]

Recommendation 17

If the Act is to continue, that the Act be amended to require that a senior officer must provide the CHO with a complete copy of the court application, including all filed documents, at the same time as the application is made.

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222 The court application documents would include a copy of the worker's original MDT application, which would include a copy of any medical advice obtained by the worker: ss 14(2)(a) and 10.

223 NSWPFMDT0001161 and NSWPFMDT0001162.

224 NSW Health (n 164).

225 Email from CDB Specialist Programs, Communicable Diseases Branch, Health Protection NSW (CHO representative), 13 September 2024.

10. Vulnerable third parties

10.1 Recognising a third party as vulnerable

Assessment of vulnerability is subjective, and it appears that the senior officer is not required to make any inquiries to assess vulnerability

Vulnerability is assessed under the MDT Act based only on what 'appears' to the senior officer to be the case. This means that the test is inherently subjective. Presumably, under ordinary principles of administrative law, the senior officer would need to act reasonably in forming their view.

There is no guidance in the Act, or in the CHO guidelines, about indicators of vulnerability or what circumstances might be expected to lead a senior officer to form the view that a person appears vulnerable or not vulnerable.

The MDT Act invites the senior officer to consider whether the person appears to them to be vulnerable or not vulnerable 'based on the information available'. The term 'available' is ambiguous. It clearly includes the information that is immediately in front of the senior officer at the time. However, it is unclear whether it also includes other information that the senior officer is able to access and, if so, how accessible that other information needs to be for it to be considered 'available'. For example, must it be information that the officer has an immediate ability to access without needing to make any inquiry or seek assistance from any other person, or does it also include information that the officer could readily access by inquiry?

The NSWPF guidelines advise that information as to whether a third party appears to be a vulnerable third party may be obtained from the worker's MDT application, police records, or engaging with the third party directly. Our review of NSWPF records show that senior officers in the NSWPF are interpreting the phrase 'on the information available' as not requiring them to undertake inquiry beyond the information immediately in front of them. That information typically comprises the worker's MDT application, and any information that may be contained in Computerised Operational Policing System event (**COPS event**) records about the third party.

The situation is different in the case of CSNSW when dealing with third parties who are inmates. Senior officers have typically obtained advice from Justice Health, who provide healthcare to inmates in NSW correctional centres and have clinical expertise in identifying mental health or cognitive impairment. In the CSNSW MTO process, the senior officer's consideration of vulnerability is informed by the provision of a 'vulnerability package'. The package contains:

- a list of CSNSW alerts related to the third party
- the case notes made by CSNSW in relation to the third party
- a Health Problem Notification Form provided by Justice Health, which includes a clinical assessment of the vulnerability of the third party by a Justice Health and Forensic Mental Health Network staff member.

In its submission to our review, the PSA raised concerns about a lack of transparency (to workers who had made MDT applications) of vulnerability assessments by CSNSW. The PSA concluded that it 'may be of assistance for employers to be provided with more prescriptive guidelines about what information should be taken into account and more broadly what factors should be weighed up by the senior officer making the determination'.[226]

[226] Public Service Association (n 153).

The CHO advised us during consultation that given the clinical nature of this decision (whether someone is a vulnerable third party or not), it may not be appropriate for the guidelines to include general guidance to assess vulnerability. They suggested an alternative approach of having senior officers consult with a clinician when they are unsure whether the third party is vulnerable for the purposes of the MDT Act.[227]

The MDT Act is structured in a way that makes it more likely that a vulnerable person will be assessed as non-vulnerable, than that a non-vulnerable person will be assessed as vulnerable

Although s 11(1) of the Act is ostensibly symmetrical – that is, it does not express any starting assumption as to whether a person is vulnerable or non-vulnerable – in practice it is apparent that third parties are generally taken by senior officers to be non-vulnerable unless there is something that causes the senior officer to form the view that they appear vulnerable.

This makes the risk of false negatives (a person being miscategorised as non-vulnerable when they are, in fact, vulnerable) higher than the risk of false positives (that a non-vulnerable person might be incorrectly assessed as vulnerable).

Further, if a vulnerable person is wrongly assumed to be non-vulnerable by the senior officer (a false negative), then it is highly unlikely that this will ever be challenged or corrected. If the person is indeed vulnerable within the meaning of the Act, then the likelihood that they will be capable of exercising their right to seek a CHO review seems particularly remote (see **section 9.3** above for a discussion of the barriers to CHO review for third parties). The Ombudsman also does not have a practical role in reviewing individual vulnerability assessments as part of our monitoring function (see **section 16.1** below for limitations on our monitoring functions).

In respect of a false positive, on the other hand, we reviewed the transcripts of all court proceedings under the MDT Act during the reporting period and identified no case where the court found, or even raised a doubt, that the third party in each case was a vulnerable person. [228]

For these reasons, unless the Act is amended to provide that *all* MTOs should be made by the court (see **recommendation 2**), we suggest that, at the very least, the test for vulnerability should be amended so that the presumption is that a person is vulnerable (and therefore the matter requires court oversight) unless an assessment, on reasonable grounds, is made otherwise.

Recommendation 18

If the Act is to continue and **recommendation 2** is not adopted, that the Act be amended to provide that a third party is to be taken to be a vulnerable person unless the senior officer is satisfied, on reasonable grounds, that the person is not a vulnerable person.

Recommendation 19

If the Act is to continue and **recommendation 2** is not adopted, that the CHO revise the CHO guidelines to include advice to senior officers about assessing whether a third party is or is not a vulnerable person, and to provide that, if senior officers assess that a person is not a vulnerable person, they should record what enquiries were made and what factors were taken into consideration.

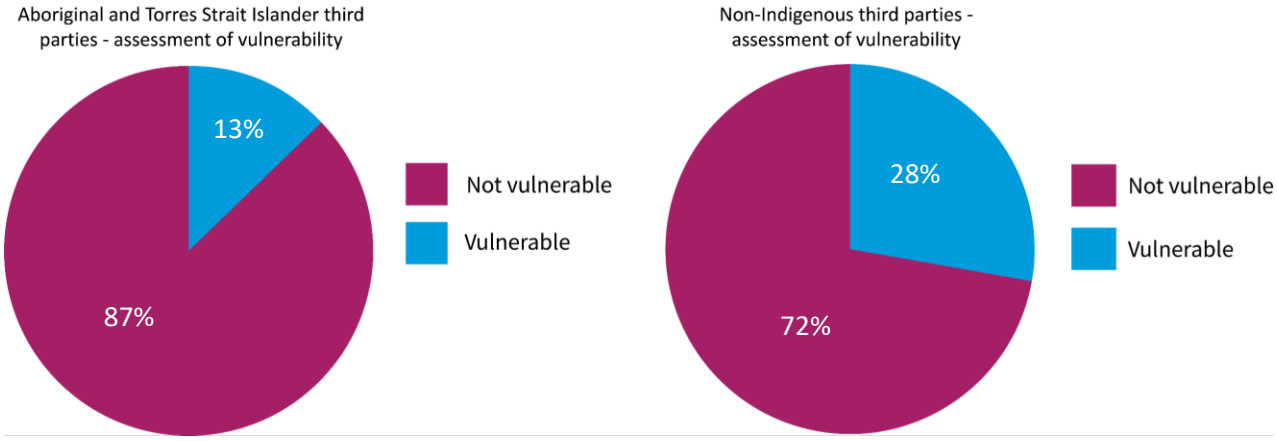
[227] NSW Health (n 164).

[228] While the courts have not questioned the vulnerable status of third parties, s 17 of the Act provides: "If, during proceedings relating to an application to the Court for a mandatory testing order, it appears to the Court that the third party is not a vulnerable third party, the Court may continue to deal with the application as if the third party was a vulnerable third party."

Aboriginal and Torres Strait Islander people are less likely to be assessed as vulnerable

Third parties who are Aboriginal and Torres Strait Islander people have been assessed as vulnerable at a lower rate than third parties who are non-Indigenous.

Figure 14. Assessment of vulnerability – comparison between third parties who are Aboriginal and Torres Strait Islander people and third parties who are non-Indigenous



n = 39

n = 94

* Of these 5 vulnerable third parties, 3 were minors. 2 of those 3 minors were also assessed to be vulnerable due to mental health or cognitive impairment.

**Of these 26 vulnerable third parties, 9 were minors. 5 of those 9 minors were also assessed to be vulnerable due to mental health or cognitive impairment.

In its submission to our review, the Aboriginal Legal Service highlighted the higher rates of mental health issues and cognitive impairment in the Aboriginal community, while also noting that:

> …police are frequently unable to identify mental health challenges and cognitive impairment in Aboriginal people in custody. These barriers are complex and cannot be easily overcome through a simple legislative amendment. In short, police officers are simply not in a position to determine whether an Aboriginal person is 'vulnerable' in a culturally safe and accurate way.[229]

This assertion is in line with findings from the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* that 95% of First Nations people charged with criminal offences who appear in court have an intellectual disability, a cognitive impairment or a mental illness.[230]

The number of third parties being recognised as vulnerable by the NSWPF appears surprisingly low

Of all the MDT applications made across the 3 agencies that exercised powers under the MDT Act during the reporting period, 23% (33 of 139) of third parties were identified by a senior officer as being vulnerable.

[229] Aboriginal Legal Service (NSW/ACT), Submission to the NSW Ombudsman, 4.

[230] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *People with disability over represented at all stages of the criminal justice system* (Media Release, 23 December 2020) <https://disability.royalcommission.gov.au/news-and-media/media-releases/people-disability-over-represented-all-stages-criminal-justice-system>.

CSNSW

In 19% of CSNSW MDT applications made during the reporting period (6 of 32 applications), third parties were assessed as vulnerable. Unsurprisingly, in all of the CSNSW matters, the third party's vulnerability was assessed on the basis of mental health impairment or cognitive impairment (that is, none of the applications related to persons identified as minors).

As discussed above, CSNSW senior officers base their assessment on clinical advice about an inmate's vulnerability status from the information provided by Justice Health. Generally speaking, therefore, there can be greater confidence that CSNSW senior officers are identifying third parties who are vulnerable.

NSW Ambulance

NSW Ambulance received 1 MDT application. In that application, the third party was assessed to be vulnerable on the basis of mental health or cognitive impairment.

NSWPF

In 24% of NSWPF MDT applications made during the reporting period (26 of 106 applications), third parties were assessed as vulnerable. Of these 26, 14 were minors – and indisputably fell within the definition of a vulnerable third party.[231] This means that, of the 92 MDT applications that were not about minors, only 12 (13%) were assessed as vulnerable by reason of mental health impairment and cognitive impairment.[232]

Our review of NSWPF records about MDT applications indicates that senior officers do not keep adequate records of how they came to form a view about whether a person appears to be vulnerable or not vulnerable.

This includes cases where there were references otherwise in the record to indicate that the third party had had a mental health episode (including in relation to the incident that led to the making of the MDT application) or that the third party had been detained for the purpose of a mental health assessment.

A police officer may detain a person under s 22 of the *Mental Health Act 2007* (**MH Act**), in the following circumstance:

> A police officer who, in any place, finds a person who appears to be mentally ill or mentally disturbed may apprehend the person and take the person to a declared mental health facility if the officer believes on reasonable grounds that—
>
> (a) the person is committing or has recently committed an offence or that the person has recently attempted to kill himself or herself or that it is probable that the person will attempt to kill himself or herself or any other person or attempt to cause serious physical harm to himself or herself or any other person, and
>
> (b) it would be beneficial to the person's welfare to be dealt with in accordance with this Act, rather than otherwise in accordance with law.

Where this occurs, the detained person can be held in custody and transported to a mental health facility without their consent and without a warrant. The officer may use reasonable force and restraints in doing so.[233] An authorised person may also sedate the person during transport if necessary.[234] A medical assessment of the person must be undertaken within 12 hours of

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231 *Mandatory Disease Testing Act 2021*, Dictionary (definition of 'vulnerable third party').

232 This does not necessarily mean that in all the other cases the third party was assessed as being non-vulnerable. In some cases it appears no assessment was made.

233 *Mental Health Act 2007* s 81(1)-(2).

234 Ibid s 81(3).

admission.[235] A certificate must be completed by an authorised medical officer indicating whether that person is mentally ill or mentally disordered.[236]

We identified 30 cases where the third party had been detained under s 22 of the MH Act for the purpose of mental health assessment, prior to the making of the MDT application. NSWPF records relating to these MDT applications do not indicate the outcomes of the mental health assessments (ie whether the person was ultimately assessed by a medical practitioner to be mentally ill or disordered).

However, in 17 (57%) of these cases, although they had been detained on mental health grounds, the third party was assessed by a senior officer as not vulnerable for the purposes of determining the MDT application.

It is conceivable, although it appears unlikely, that a person could 'appear to be mentally ill or mentally disturbed' to the extent required for them to be taken in by Police under the MH Act and also not 'appear to the senior officer, on the information available' to be a vulnerable third party for the purposes of s 11 of the MDT Act. However, there is at least an apparent contradiction here that requires explanation. Senior officers, however, do not typically include a record of reasons for their assessment of vulnerability, and the MDT Act does not require them to do so.[237]

Case Study 2. Limited record on how the vulnerability of a third party was considered before consent sought[238]

The incident which resulted in this MDT application was a needlestick injury sustained by a NSWPF officer when a search of the third party was being undertaken. The third party identified as Aboriginal, and the MDT application included information that the third party 'suffers schizophrenia'. The relevant Computerised Operational Policing System event (**COPS event**) indicates the third party appeared to have a medical episode after being taken into custody, and an ambulance was called. She was reportedly aggressive and was restrained to a stretcher. The event states 'she was later sedated by NSW Ambulance officers and transported to [hospital]' for treatment.

The officer making the MDT application reported to the hospital medical practitioner that the third party 'was arrested by police initially for aggression but found unconscious in police car with bottle of unknown substance and uncapped needle, known IVDU [intravenous drug user]'. This suggests the sedation later given by ambulance officers that afternoon was in addition to any substances the third party may have taken earlier.

The third party signed a consent form, and a blood sample was obtained on the same day as the incident at the hospital to which she had been conveyed. There is no information contained in police records about the circumstances under which consent was obtained, or the condition the third party was in at the time of giving consent.

Although the person had been sedated and had a recorded history of mental health impairment, there are no records showing what factors were taken into consideration by the NSWPF senior officer in assessing the third party as not vulnerable, such that they then proceeded to obtain consent to testing.

The COPS event states the third party was discharged medically fit from custody, but it is not clear what time this occurred.

235 Ibid s 27(1)(a).

236 Ibid.

237 *Mandatory Disease Testing Act 2021* s 11(1)(a) only requires vulnerability of the third party to 'appear to the senior officer, on the information available'.

238 NSWPFMDT0001108.

Recommendation 20

If the Act is to continue and **recommendation 2** is not adopted, that the NSWPF amend its guidelines to require that senior officers record what, if any, enquiries were made concerning vulnerability, and what factors were taken into consideration when assessing vulnerability – see **recommendations 18** and **19**.

10.2 The definition of 'vulnerable third party'

The current test is based on the incapacity of the third party to consent, which is a narrow concept of vulnerability

The test of vulnerability (for an adult) under the Act requires that both:

- the person has a mental health impairment or cognitive impairment, and
- the person's capacity to consent to voluntarily provide blood for testing is significantly affected by that impairment.

The NSWPF guidelines emphasise this point:

> The mere fact that a third party suffers from a mental illness, mental condition or cognitive impairment does not automatically establish that they are a 'vulnerable third party' for the purposes of the Act. The test for the purposes of the Act is that the third party is suffering from mental illness or mental condition, or is cognitively impaired, within the meaning of the Mental Health and Cognitive Impairment (Forensic Provisions) Act 2020, which significantly affects the vulnerable third party's capacity to consent to voluntarily provide blood to be tested for blood-borne diseases.

Requiring an impairment to significantly impact capacity to consent increases the threshold to be assessed as vulnerable.

It also means that the test is more reliant on the subjective views of the senior officer, despite them generally not being well placed to assess a person's capacity to consent. In one court application from the NSWPF, the senior officer noted a difficulty in forming any view about the impact of a known mental health condition on a person's capacity:

> [The third party] indicated that she had just been released from a mental health facility and was being readmitted next week. When asked to provide information about this admission, she declined to provide any further information… **It is not known what effect if any her being released and further pending admission had upon [the third party] in providing consent in relation to the MDT request**.[239]

It is, in any event, unclear why capacity to consent to *voluntary* blood testing should be relevant to assessing a person's vulnerability in respect of *mandatory* blood testing. While assessing a person as vulnerable does affect whether the person should be asked if they will consent to testing,[240] the question of vulnerability is most importantly relevant to whether the MDT application will proceed along the senior officer only process, or whether it must be determined through a court process.

Of most relevance, then, is whether the person can fairly understand, make proper submissions, and exercise their rights (including a right to seek CHO review) if the decision were to be made by the agency's senior officer alone.

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[239] NSWPFMDT0001069.

[240] The requirement to seek consent from the third party under *Mandatory Disease Testing Act 2021* s 11(4) only applies to third parties who do not appear to be a vulnerable third party.

That being the case, we recommend that the threshold of 'significant impact on capacity to consent' should be removed from the test of vulnerability, and instead the test should be extended to include an inability to understand the nature of the decision or to make proper submissions.

Stakeholders have suggested that Aboriginal and Torres Strait Islander people be included as vulnerable third parties

Submissions to our review from Legal Aid NSW, the ALS and the NSW Bar Association recommended widening the definition of vulnerable third party to include Aboriginal and Torres Strait Islander people.[241]

Particularly given the disproportionate use of the MDT scheme on Aboriginal and Torres Strait Islander people, we agree that this would be appropriate. This is further supported by the fact that third parties who are Aboriginal and Torres Strait Islander people in the MDT applications made during the reporting period were less likely to be assessed as vulnerable third parties (see **chapter 2.4** above) than non-indigenous third parties.[242]

The timing of the application of the test of vulnerability is ambiguous

The test of vulnerability includes that a person has a 'mental health impairment' substantially affecting their capacity to consent to voluntary blood testing.

Under the *Mental Health and Cognitive Forensic Provisions Act 2020*, mental health impairment is defined to include both ongoing and *temporary* disturbances.

This raises the possibility that a person may have a mental health impairment at one point in time (such as during the contact incident) but not at another time (such as when the senior officer is deciding whether to make an MTO).

Although the Act does not explicitly state the point in time at which the person must have the mental health impairment to be considered vulnerable, it appears that it refers only to the state of the person at the time the senior officer is assessing the person's vulnerability.[243]

This would mean, for example, that a 17-year-old who caused their bodily fluid to come into contact with a worker may be assessed as non-vulnerable if their 18th birthday falls between that incident and the senior officer's decision. It also means that, although an MDT application cannot be made in respect of third party who is under the age of 14 years,[244] an application can be made in respect of a 13-year-old who turns 14 between the exposure event and the determination of the MTO application.

It also leaves open the possibility that a person who was experiencing a mental health impairment (such as a psychotic episode) at the time their bodily fluid came into contact with a worker will be processed through the non-vulnerable/non-court pathway if it appears to the senior officer that the episode has ended. Whether or not this is how the provision is intended to apply should be made clear.

In our view, if a person has a relevant impairment at any relevant time, that should result in the person being considered vulnerable. This will allow the matter to be appropriately dealt with by the court – including so that the court can, when deciding whether an MTO is justified in all the circumstances, take into account the role (if any) of the person's impairment in relation to the contact incident.

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241 Legal Aid NSW, Submission to the NSW Ombudsman, 6; Aboriginal Legal Service (n 229) 5; NSW Bar Association (n 121) 2-3.

242 Aboriginal and Torres Strait Islander third parties were assessed as vulnerable third parties in 12.8% of applications involving Aboriginal and Torres Strait Islander third parties, as opposed to 27.7% of non-Aboriginal and Torres Strait Islander third parties who were assessed as vulnerable among the non-Aboriginal and Torres Strait Islander cohort.

243 The wording of *Mandatory Disease Testing Act 2021* s 11(1) suggests that it must appear to the senior officer that the third party is a vulnerable third party at the time that the MDT determination is made.

244 *Mandatory Disease Testing Act 2021* Dictionary (definition of 'vulnerable third party').

Recommendation 21

If the Act is to continue and if **recommendation 2** is not adopted, that the Act be amended to change the definition of vulnerable third party to include, in addition to children aged 14 to 17 years, any person:

a. who has, or at the time of the contact incident had, a cognitive impairment or mental health impairment, or

b. whose English language proficiency prohibits them from, or who is otherwise unable to, understand the nature of the decision to be made or to properly make submissions or otherwise represent themself in respect of that decision, or

c. who is an Aboriginal or Torres Strait Islander person.

11. Chief Health Officer guidelines

11.1 Publication of the guidelines

The delay in the commencement of the Act was primarily due to the time required to prepare the CHO guidelines

Under s 33 of the MDT Act, the CHO is required to issue guidelines. These are to assist:

- senior officers exercising functions under this Act
- relevant medical practitioners who may consult with workers
- persons taking blood from third parties under an MTO.[245]

In accordance with s 26(1) of the *Interpretation Act 1987*, the CHO guidelines were prepared prior to the commencement of the MDT Act, and we understand that it was the delay in preparing these guidelines which resulted in the Act, which was assented to in June 2021, not commencing until 29 July 2022. No criticism is intended of the CHO in this regard, particularly noting that, at the time of the passage of the MDT Act, the state was still dealing with what would be (at least) 5 waves of the COVID-19 pandemic throughout 2020 and 2021.[246]

11.2 Content of the CHO guidelines

The MDT Act does not specify any mandatory content requirements for the CHO guidelines

There are no mandatory content requirements prescribed for the guidelines. The Act provides only that, without limiting what else they might contain, they 'may' contain the following:

(a) information about how blood-borne diseases are transmitted and the minimisation of risks of infection and onward transmission,

(b) information about the prevention, diagnosis and treatment of blood-borne diseases, and

(c) advice and information to be given to a third party providing blood under an MTO.

The CHO guidelines do, in fact, provide information about all of the above, and we did not identify any significant omissions.

The CHO guidelines appear to cover what they should, but could be made clearer for senior officers

The CHO guidelines appear to us to accurately describe the legislative requirements of the MDT Act.[247]

We are not qualified to, and have not sought to, validate the advice contained in the guidelines concerning, for example, the transmission risks of certain bodily fluid exposure or the appropriate

[245] Ibid s 33(1).

[246] See NSW Ombudsman, *2020 hindsight - the first 12 months of the COVID-19 pandemic - a special report under section 31 of the Ombudsman Act 1974* (22 March 2021) and NSW Ombudsman, *The COVID-19 pandemic: second report - a special report under section 31 of the Ombudsman Act 1974* (7 September 2022) 10.

[247] However, there are references in the CHO guidelines to things a senior officers 'should' (as distinct from 'must' or 'is to') do, which the Crown Solicitor's advice indicates are mandatory, because, even though not explicitly stated, they are an implied requirement of the Act (eg to consider the information contained in the MDT application itself, which would include any report or advice of the medical practitioner who performed the consultation with the worker, before deciding whether to make an MTO): *Mandatory Disease Testing Act 2021* s 11(5).

occasion for and mode of post-exposure treatment. We note that none of the submissions made to us in this review raised any concerns with the accuracy of the CHO guidelines in this respect.

However, some of the information contained in the CHO guidelines could be made clearer for non-expert senior officers.

For example, in respect of whether there is any transmission risk associated with spitting or biting, the CHO guidelines provide as follows:

- In table 1 of page 9, the guidelines state clearly that in respect of both 'spitting' and 'biting', the estimated transmission risk for each of the blood-borne diseases (including HIV) is 'none'. These scenarios are not further qualified, for example by whether or not there may be the presence of blood in the saliva (or how much), or by whether a bite or the saliva from spitting makes contact with broken skin or a mucous membrane such as an open mouth or eyes. The note accompanying the table states: 'Note – For very low risk, the risk is too low to estimate. For exposures with no risk, there has never been a recorded human transmission via that exposure.'
- In the text prior to that table, on the previous page, the guidelines state the following:

  - There is no risk of HIV transmission via contact with the saliva of a person living with HIV (PLHIV), including through kissing, biting, or spitting.
  - There is no risk of HIV transmission from biting or spitting where the saliva of a PLHIV contains no, or a small quantity of, blood.
  - There is no to very low risk of HIV transmission from biting where the saliva of a PLHIV contains a significant quantity of blood, and the blood comes into contact with a mucous membrane or broken skin, and the viral load is not low or undetectable.

  These statements appear to be generally consistent with the estimates given in the subsequent table (albeit the third bullet point states the consensus risk to be 'no to very low' rather than 'none' as stated in the table).

  However, as the above list is not comprehensive (for example, it is silent about spitting or biting where there is a significant quantity of blood other than in the particular circumstances described in the third bullet point) a lay reader might infer that the consensus view on risk in such cases must be something more than 'none', or perhaps that there is no consensus view.

- More confusingly, the text following the table states that:

  injuries to the worker that break their skin or where the eyes or mouth have come into contact with blood or visibly bloody bodily fluid would be classified as moderate (0.1%-1% chance of transmission) to very high risk (10%-30% chance of transmission) of BBV transmission, when assuming the third party is infectious' and would 'generally warrant consideration for PEP.

The guidelines then list scenarios by way of example that include 'bloody saliva spit into the eye of a worker' or 'a bite from a third party that breaks the workers [sic] skin, where there is visible blood in the mouth of the third party'.

Given the potential for non-expert senior officers to read these pieces of information in isolation, or to interpret them as conflicting, we recommend that the CHO review this aspect of the guidelines, in consultation with agencies (as required by the Act).[248]

In doing so, we suggest that the guidelines should provide both a comprehensive list of the various scenarios associated with contact types – especially spitting and biting which are the predominant

[248] *Mandatory Disease Testing Act 2021* s 33(3).

types of contact that have resulted in MDT applications – together with advice on transmissibility risk in respect of each scenario that is clear and easy for a lay reader to understand.

Recommendation 22

If the Act is to continue, that the CHO review the CHO guidelines in consultation with agencies to consider whether advice on the transmission risk (or lack of risk) associated with contact types can be made clearer to non-expert readers.

The CHO guidelines will need to be updated if our other recommendations are adopted

For completeness, we note that the CHO guidelines would need to be updated if other legislative amendments recommended in this report are implemented.

Recommendation 23

If the Act is to continue, that the CHO promptly review and update the CHO guidelines accordingly following the passage of any legislative amendments as recommended by this report.

11.3 Training of senior officers on the CHO guidelines

NSWPF-developed training materials do not reference the CHO guidelines in respect of transmissibility risk

The NSWPF's MDT training module for senior officers provides information on determining the risk of transmission. However, the training materials do not refer to the CHO guidelines when identifying risks – nor do they include training on how to consider and apply the CHO guidelines more generally.

The materials used in training have been prepared by ASHM.[249] ASHM is an authoritative source of advice, and the information contained in the training materials appears to be consistent with the CHO guidelines. However, given the CHO guidelines are the document NSWPF senior officers must, by law, consider, it would seem more appropriate for training material to reference the CHO guidelines directly.

Recommendation 24

If the Act is to continue, that the Act be amended to provide that:

a. a senior officer must complete a course of training, delivered or approved by the CHO, and
b. determinations of MDT applications (including, if recommendation 2 is adopted, applications to the court) may only be made by a senior officer who has completed that training.

Recommendation 25

If the Act is to continue, that all agencies ensure that the CHO guidelines are the primary reference source for any MDT-related policies and training material developed or used by agencies under the Act, including for the purpose of training senior officers on the risks (if any) of transmission.

[249] ASHM, *Police And Blood-Borne Viruses* (September 2023).

12. Decision making and determinations by senior officers

12.1 The criteria for making an MTO

The MDT Act confers a wide discretion on senior officers to make an order, if subjectively satisfied that it is 'justified in all the circumstances'

A senior officer may make an MTO (or apply to the court for an MTO in the case of a person who appears to be a vulnerable person) only if they are 'satisfied' that testing the third party's blood for blood-borne diseases 'is justified in all the circumstances'.[250]

The Act expressly prescribes only 2 mandatory considerations, which senior officers must take into account:

- the CHO guidelines[251]
- any submissions received from the third party.[252]

The Crown Solicitor has advised that, even though not expressly listed as a mandatory consideration, it is necessarily implied by the Act that a senior officer must also take into consideration the worker's MDT application, including any written medical advice it contains.[253]

The senior officer 'is to' consider 'other matters the senior officers consider relevant (including a report made in relation to the incident during which the contact occurred).'[254] The Act does not contain any expressly prohibited considerations.

The Crown Solicitor noted the wide discretion that is provided to senior officers:

> Section 11(5)(b) confers a degree of latitude on a senior officer to consider matters that they consider relevant. Beyond identifying the above mandatory considerations, I am unable to advise exhaustively on the circumstances that will be relevant to a senior officer's consideration of whether "testing the third party's blood for blood-borne diseases" is "justified in all the circumstances". The relevant circumstances are necessarily application-specific. It is also a matter for the senior officer to consider what weight they give to various circumstances in a particular case.
>
> There are, however, legal limits on the exercise of the senior officer's power, in accordance with standard administrative law principles. Most relevantly for the purposes of this question, in addition to taking into account all mandatory considerations, the senior officer must not take into account any prohibited considerations and the senior officer's decision under s 11(7)(b) must not be legally unreasonable.[255]

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250 *Mandatory Disease Testing Act 2021* ss 11(6) and (7)(b). In the case of a non-vulnerable person, the senior officer must also be satisfied that the third party will not voluntarily provide blood to be tested for blood-borne diseases: s 11(7)(a). That second criterion is discussed in **section 14.1** below.

251 *Mandatory Disease Testing Act 2021* s 11(5). The NSWPF policy pointedly notes that being a mandatory consideration does not mean that senior officers are bound to follow the CHO's advice: NSWPF MDT Guidelines, 13-14 ('The Chief Health Officer Guidelines must be considered, and should be viewed as persuasive, however they are not binding upon the decision of the senior officer.')

252 *Mandatory Disease Testing Act 2021* ss 11(3)-(4).

253 The Crown Solicitor notes that the MDT Act is drafted without expressly prescribing any mandatory considerations in respect of the decision as to whether an MTO is 'justified in all the circumstances'.

254 *Mandatory Disease Testing Act 2021* s 11(5)(b). The drafting here is ambiguous, as it is unclear whether 'a report made in relation to the incident during which the contact occurred' is (assuming such a thing exists) a mandatory consideration – that is, something the Act requires or effectively deems that the 'senior officer considers relevant', or whether it is included merely as an example of something a senior officer may (but is not required or deemed to) consider relevant.

255 Crown Solicitor's Advice [25]-[26].

Senior officers should be required to form a view that the worker is eligible to make an MDT application before it is determined

As noted in the previous chapter, s 8 of the MDT Act specifies eligibility requirements which a worker must meet before being permitted to make an MDT application. These are that:

- the worker came into contact with bodily fluid of the third party
- the contact occurred in the execution of the worker's duty
- the contact was the result of a deliberate action by the third party
- the contact was without the consent of the third party
- the third party is over the age of 14
- the worker has consulted a relevant medical practitioner.[256]

The Act also provides that an application may only be made within 5 business days after the contact incident.[257]

However, the Act is silent about what happens if the worker submits an MDT application despite one or more of these eligibility requirements not in fact being met.

One of the eligibility requirements is that the contact with bodily fluid be the result of a deliberate action by the third party. The Crown Solicitor's advice concerning the meaning of 'a result of a deliberate action' (see **section 6.1** above) expressly noted but left open a question as to whether the senior officer must, in determining the application, themselves form a view as to whether the contact was, in fact, a result of a deliberate action of the third party. The Crown Solicitor also left open the question of whether a senior officer could legally determine an MDT application even if *not* satisfied that the contact was a result of a deliberate action (or otherwise not satisfied of any of the other eligibility requirements in s 8), and what the consequences of doing so would be.[258]

This ambiguity should be resolved. It puts both senior officers and those administering tests at risk of acting without jurisdiction and thus unlawfully. A court may determine, for example, that an MTO application has been made by a senior officer in circumstances where there was no jurisdiction to do so.

Recommendation 26

If the Act is to continue, that the Act be amended to make it clear that a senior officer may only make an MTO (or apply to the court for an MTO, including if **recommendation 2** is adopted) if satisfied that the worker making the application was eligible to do so under s 8. This would mean that the senior officer must form a view on the following before making a decision on an MTO determination:

a. the worker came into contact with bodily fluid of the third party
b. the contact occurred in the execution of the worker's duty
c. the contact was the result of a deliberate action by the third party
d. the contact was without the consent of the third party
e. the third party is over the age of 14
f. the worker has consulted a relevant medical practitioner
g. the application is made within 5 days of the contact.

[256] *Mandatory Disease Testing Act 2021* s 8.
[257] Ibid s 8(4).
[258] Crown Solicitor's Advice [58].

12.2 Consideration of transmission risk

The Act is legally ambiguous as to whether it is necessary for there to be at least some transmission risk for an MTO to be made

A key object of the MDT Act is 'to provide for mandatory blood testing of a person in circumstances where…the worker is at risk of contracting a blood-borne disease'.[259] This reflects the parliamentary debate which proceeded the passage of the legislation, including the NSW Legislative Assembly Law and Safety Committee's 2017 report on its *Inquiry into Violence Against Emergency Services Personnel*, which stated that any power to conduct testing should:

> only be able to be enlivened in circumstances where there is a risk of transmission of listed diseases. The legislation should clearly define the factual circumstances in which there is a risk of transmission of listed disease and this definition should be based on up-to-date medical evidence.[260]

However, there is ambiguity in the MDT Act as to whether some degree of actual transmission risk is necessary before an MTO can be made.

In deciding whether to make an MTO in respect of a non-vulnerable person, the MDT Act requires the senior officer to take into consideration, among other things, the CHO guidelines, which includes advice on the transmissibility risks of different exposure types, with reference to types of contact and bodily fluid.[261]

The MDT Act also requires senior officers to consider any written medical advice provided by the worker with their MDT application.[262] However, it does not provide what weight (if any) is to be given to that advice, and nor does it provide that an MTO should only be made in cases where the medical evidence demonstrates a level of risk of transmission to the worker.

When we sought legal advice from the Crown Solicitor, we asked whether it would be legally open to a senior officer to decide that an MTO is justified solely on the basis, for example, of alleviating the subjective concerns of the worker even if those concerns are unfounded, and where there is before the senior officer either no medical evidence of transmission risk or the medical evidence indicates that there is no or low risk of transmission.

After noting that the question would need to be assessed on a case-by-case basis, the Crown Solicitor's advice was that:

> [I]t could be argued that a decision to make a MTO based purely on alleviating worker concerns, in circumstances where the medical evidence indicates that there is no risk of transmission and there are no other factors supporting the making of a MTO, would be legally unreasonable. In this respect, I note that one of the objects of the Act is to provide for mandatory blood testing of a person in circumstances where, relevantly, "the worker is at risk of contracting a blood-borne disease as a result of the person's deliberate action" (s 3(a)(ii)).

However, the advice went on further to say:

> I do not think it could safely be stated that a MTO could not ever be justified "in all the circumstances" of a particular case despite the absence of any transmission risk.

[259] *Mandatory Disease Testing Act 2021* s 3(a).
[260] Legislative Assembly Committee on Law and Safety (n 16) 13.
[261] *Mandatory Disease Testing Act 2021* s 5(a).
[262] Crown Solicitor advice [30].

Agencies' policies and practices differ in respect of whether the presence of transmission risk to the worker is essential before an MTO can be made:

- In the case of CSNSW, its MDT policy states, among other things, that it is necessary that 'the worker's medical practitioner has provided advice that testing the third party's blood for blood-borne diseases will assist in assessing the risk to the worker of contracting a blood-borne disease', and 'there is a risk to the Worker on review of the Chief Health Officer Guidelines'.[263]
- There is no similar statement in the NSWPF MDT Policy, and its BluePortal guided decision-making fields. BluePortal lists transmission risks as 'additional reasons' (non-mandatory) for proceeding to make an order, only 'if relevant'.[264]

Given the object of the Act is to protect workers who are actually at risk of contracting a blood-borne disease – and that this is said to justify the infringement on the ordinary rights of third parties – the Act should be amended to make it clear that an MTO is not to be made in circumstances where there is a medically unfounded fear on the part of the worker about contracting a blood-borne disease. In those circumstances, the appropriate response is to address and alleviate that fear directly, including by providing accurate and authoritative information and support.

Recommendation 27

If the Act is to continue, that the Act be amended to provide that, to make an MTO the decision maker (including the court if **recommendation 2** is adopted) must be satisfied, having regard to the CHO guidelines and medical advice, that there is a real risk that the worker has contracted a blood-borne disease from the contact incident.

Some senior officers are deciding to make MTOs where the application concerns mere saliva exposure; given there is no real risk of transmission, saliva should be omitted as a bodily fluid from the MDT Act

The CHO guidelines state that contact through spitting and biting presents no risk of transmission.[265] It also states that spitting or biting may present a risk if the contact fluid is blood, or visibly bloody fluid, and it comes into contact with the broken skin, mouth or eyes of the worker, in which it presents a low to moderate risk of transmission.[266]

Despite this, 62% (66 of 106) of the NSWPF applications received during the reporting period recorded saliva alone, *without* other contact fluids such as blood.[267] In 54% (36 of 66) of these cases the senior officer decided to make an MTO, to proceed to testing by consent, or to make an application to the court for an MTO.

In CSNSW, 66% of the applications (21 of 32) it received during the reporting period identified saliva only contact, with no blood. Of those, 76% (16 of 21) resulted in a determination to proceed with an MTO or proceeded by consent.

Concerns about the inclusion of saliva as a prescribed bodily fluid in the MDT Act, given the absence of transmission risk, had been raised during the Parliament of NSW *Inquiry into the Mandatory Disease*

[263] Corrective Services NSW, *Custodial Operations Policy and Procedures 13.14 Mandatory Disease* Testing, 14.

[264] The two optional reasons are: 1) The worker's medical practitioner has provided advice testing the third party will assist in assessing the risk to the worker of contracting a blood-borne disease, and 2) There is a risk to the worker on review of the CHO guidelines: *NSW Police Force - How to submit a Mandatory Testing Order (MTO)* 24.

[265] NSW Health (n 105) section 3.3.2 Table 1: Estimated risk of BBV transmission from a known infectious third party.

[266] Ibid 10.

[267] For discussion about how NSWPF applications record bodily fluids such as saliva which 'possibly contains blood' see section titled **Unclear advice about the possibility of blood in saliva increases inconsistencies in decision making, and also the likelihood that MTOs are being made where there is no real risk of transmission** at section 12.2.

Testing Bill 2020 (the **Parliamentary Inquiry**).[268] The same concerns have been raised again in multiple submissions to our review.[269]

Similar concerns have been raised in other jurisdictions where proposals for mandatory testing in respect of saliva exposure have been considered. In the United Kingdom, a 2018 proposal to require blood testing to address the risk of contracting HIV or Hepatitis B and C through spitting was withdrawn because of medical evidence that there is no real risk of such transmission.[270]

Recommendation 28

If the Act is to continue, that the Act be amended to omit saliva as a 'bodily fluid' (noting that, if contact is made with *both* saliva and blood, the Act could still apply in respect of that contact as blood is a bodily fluid).

The category of bodily fluids should not be able to be further expanded by regulation beyond what the medical evidence shows are the real risks of transmission

The MDT Act defines bodily fluids to include those prescribed by regulation. There are currently no additional bodily fluids prescribed by regulation. Given the concern about the unnecessary inclusion of fluids (such as saliva), additional bodily fluids (including saliva, if it is otherwise removed from the Act itself in line with our **recommendation 28**) should also not be able to be included, unless they carry a real risk of transmission of relevant blood-borne diseases.

Accordingly, it is recommended that consideration be given to removing the power to extend the categories of bodily fluid by regulation, or alternatively to provide that such a regulation may only be made following the CHO certifying that such bodily fluid carries a real transmission risk for one or more of the blood-borne diseases.

Recommendation 29

If the Act is to continue, that the Act be amended to omit from the definition of 'bodily fluid' the regulation-making power to prescribe any 'other bodily fluid or substance' as a bodily fluid, or alternatively to put in place a safeguard that a bodily fluid is only prescribed following certification by the CHO.

Different senior officers appear to be making inconsistent decisions about similar incidents or risks

It appears that different NSWPF senior officers are determining applications inconsistently, particularly where similar contact incidents have occurred with low, very low, or no risk under the CHO guidelines.

For example, of the 44 (of 69) NSWPF applications that resulted in a determination by a senior officer where saliva alone was recorded as the contact fluid type (see **table 2** in **section 2.2**),[271] 26 resulted in

[268] See, for example, the dissenting statement by Mr David Shoebridge MLC in Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020* (Report No 76, April 2021).

[269] NAPWHA, Submission to the NSW Ombudsman; Positive Life NSW; NSWCCL; ACON; NUAA (NSW Users and AIDS Association).

[270] United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 2018.

[271] During our reporting period, there were 69 NSWPF MDT applications which were notified to the Ombudsman under s 13 of the MDT Act as they were subject of a senior officer's determination.

MTOs being made (or being the subject of a court application) and 18 being refused. An example of a refusal is **case study 3** below.

Case Study 3. Submission on the risk of transmission taken into account in decision making[272]

An email chain provided to us with the MDT application (which was made following an alleged spitting incident) shows the NSWPF seeking to contact a vulnerable third party's solicitor to '…offer [the third party] and [their] parents/guardians the opportunity to put forward any submissions in relation to any application for an order'.

The solicitor responded, providing a submission via email stating that 'the defence are strongly opposing this Mandatory Disease Testing Order for numerous reasons'. In the submission, the solicitor noted that the CHO guidelines state that spitting carries 'no risk for HBV, HCV, HIV'. They also argued that any MDT application applied for in the court would constitute a 'significant intrusion on the [vulnerable third party's] privacy and bodily integrity', going on to state that 'testing a third party has very limited to no utility and does not necessarily indicate the workers risk of contracting a disease or confirm whether the worker has in fact contracted a disease'.

In a subsequent internal email, the relevant senior officer states that they have decided to refuse the application, noting that they considered (among other factors) the written submission. In their email, the senior officer cited the above arguments made in the submission and stated that they 'tended to agree' with them, and that they believed an order would not be justified in the circumstances.

Given that each senior officer must consider whether the MTO is 'justified in all the circumstances' it is possible that the applications approved can be distinguished from those refused because of other circumstances that the senior officer considered relevant to the determination (such as the degree to which the worker in question was subjectively concerned or anxious about the incident and their perceived risk of transmission).

However, particularly given the paucity of information available to the senior officer contained in BluePortal about any such circumstances, it appears more likely that the different outcomes of these applications suggests differing views among NSWPF senior officers either:

- about whether (despite the CHO's guidance) there is actually a transmission risk, or
- whether an MDT application should be made in circumstances where there is no transmission risk.

Table 11. Determinations made on NSWPF MDT applications involving saliva contact only

Outcome of MDT application	Number of applications	Percentage
Approved (to make an MTO or apply to the Court for an MTO)	26	59%
Application refused	18	41%
Total	**44***	**100%**

*44 is the total number of saliva contact only NSWPF applications which were determined by a senior officer and notified to our office.

[272] NSWPFMDT0001102.sssssssssssssss

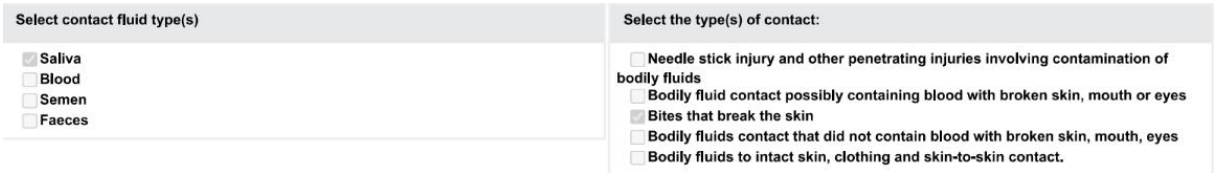
Unclear advice about the possibility of blood in saliva increases both inconsistencies in decision making, and the likelihood that MTOs are being made where there is no real risk of transmission

Particularly in the NSWPF context (where MDT applications are submitted using an online form in BluePortal that includes fields with pre-populated options), similar incidents may be recorded (and potentially decided) differently if the worker raises that the saliva 'possibly' contains blood.

Figure 15 below shows the BluePortal fields that are completed by a worker when making an MDT application. An incident (for example of 'spitting') may be recorded in different ways.

For example, a worker can mark the contact fluid as 'saliva' (only), but then (inconsistently) mark the box that says 'Bodily fluid possibly containing blood with broken skin, mouth, eyes'. Given that a worker is unlikely to know for certain that there was no possibility of any blood whatsoever in the saliva, workers may choose to check this box even if they have no reason to believe that there was any blood in the saliva, on the basis that it may have been 'possible'.

Figure 15. fluid types and types of contact in BluePortal



This is problematic on two counts. First, it may lead to different assessments by senior officers of what are substantively equivalent contact incidents and risks. Second, the presence of this option seems to suggest (to both the worker and the senior officer) that a mere possibility of the presence of any blood in saliva could be sufficient to raise a risk of transmission.

However, the CHO guidelines indicate that there is transmission risk only if the bodily fluid is 'visibly bloody'.[273] Other authoritative sources, such as ASHM, are also clear that there is only a risk of transmission where there is 'exposure to a visible amount of the third party's blood'.[274] See full discussion of this issue in **section 4.1**.

Concerns were raised by the NSWPF in Parliamentary debate about the potential presence of blood in saliva. In his second reading speech, the Hon Scott Farlow stated:

> I am aware that the Inquiry heard evidence that these diseases are not transmissible via saliva or faeces alone but, as reported by the Police during the Standing Committee's Hearings, many frontline workers will be exposed to mixed fluids. Where blood is mixed with these other fluids the worker may not be able to see if there is blood present in the fluid. And it may not be possible or hygienic for them to perform a close inspection.

We accept there may be difficulties for the worker to say whether the saliva may have contained blood. This makes it even more important that the worker personally consult a medical practitioner with relevant expertise, to describe the incident and what they do know, so that the medical practitioner can make the assessment and provide clear and written medical advice.

[273] NSW Health (n 105) 9.
[274] ASHM (n 249) 5.

12.3 Consideration of the CHO guidelines

The MDT policies of both CSNSW and the NSWPF note that consideration of the CHO Guidelines by senior officers is mandatory.[275]

Records of decisions by CSNSW senior officers suggest that the CHO guidelines are not being routinely considered[276]

We found only 1 recorded decision by a CSNSW senior officer that contained any reference to consideration having been given to the CHO guidelines. The other 13 recorded decisions made no reference to the CHO guidelines at all.[277]

Records of decisions by NSWPF senior officers also suggest that the CHO guidelines are not being routinely considered, and the BluePortal structured decision-making process may misleadingly suggest that consideration of the guidelines is not mandatory

As noted in **section 3.2** above, NSWPF senior officers are guided through the decision-making process (and the recording of that decision) by a structured framework in BluePortal. There, the only reference to the CHO guidelines is the field labelled 'There is a risk to the worker on review of the CHO guidelines' which is presented as an 'additional reason' that, unlike other fields which are presented as 'mandatory', is presented as needing to be considered 'if relevant'.[278]

This may mislead senior officers to believe that the CHO guidelines only contain guidance and advice about risk, and that the guidelines in any case only need to be considered 'if relevant' (rather than being a mandatory consideration).

We found that 54% (37 of 69) of recorded MTO determinations by NSWPF senior officers did not select this field in BluePortal.[279] Of those 37 MDT applications, 17 were determined by making an MTO, and 4 by applying to the court for an MTO. The remainder were refused.

12.4 Consideration of the worker's medical advice

In the case of the NSWPF, written medical advice is not always obtained for the senior officer to consider

The MDT Act does not require medical advice to be provided in writing to workers, but if it is provided it is to be included in the MDT application. The Crown Solicitor's advice confirms that, if written medical advice is included with the MDT application, then it is a mandatory consideration which senior officers must take into account.[280]

The CHO guidelines recommend that medical practitioners provide their advice in writing.[281]

The CSNSW MDT policy advises workers that if written medical advice is not supplied, the application may not be able to be progressed.[282] All the CSNSW MDT applications we reviewed during our

[275] Corrective Services NSW (n 261) 14; NSW Police Force, *Mandatory Disease Testing 2021 Guidelines for Workers and Senior Officers*, 13.

[276] Determinations by the CSNSW Deputy Commissioner contain a list of considerations taken into account, which is what we refer to here. In all determinations, that list is prefaced that the determination is made in accordance with the MDT Act and the CHO guidelines. We did not take this to signify that the CHO guidelines had been explicitly considered unless it was included among the considerations.

[277] A total of 17 were subject of determination. Only the 14 which were determined by an order being made or refused. We have not included 3 CSNSW applications which the Deputy Commissioner referred to the Crown Solicitor for advice.

[278] The equivalent field for a senior officer refusing an application, which confirms the CHO guidelines were considered, is a field labelled, 'There is no risk to the Worker on review of the Chief Health Officer Guidelines'.

[279] Either in the affirmative or the negative.

[280] Crown Solicitor's Advice, 6.

[281] NSW Health (n 105) 5.

[282] Corrective Services NSW (n 263) 7.

monitoring contained written medical advice, or evidence that written medical advice was subsequently provided and considered. All CSNSW MDT applications considered by the Deputy or Assistant Commissioner (for senior officer determination) included a submission about the application, which contained a reference to the written medical advice and its contents. In some applications, CSNSW staff had asked workers to obtain written advice after initially making their application without providing it.

However, in the case of the NSWPF applications, although the NSWPF guidelines advise NSWPF workers to seek written medical advice and attach it to their application,[283] this is not always happening. NSWPF workers made 106 MDT applications through BluePortal in the relevant reporting period. Of these, 39% (41 of 106 applications) did not contain written medical advice.

A high proportion (61%, 25 of 41) of these applications proceeded either by way of an order being made, or by consensual testing. Sixteen of the 41 applications (39%) resulted in either a determination by a senior officer to approve an application or apply to the court (4 of the 16 were court applications).[284] Nine of the 41 (22%) resulted in consensual testing. Sixteen of the 41 did not proceed (39%).

Senior officers made determinations on 22 of the 41 (37%) applications without medical advice provided.[285] In 16 of these 22 determinations (73%), senior officers made MDT orders or made application to the court for an order. Six of the 22 determined applications were refused.

Table 12. Outcomes of NSWPF MDT applications with no written medical advice provided

Outcome	Number	Percentage
Senior officer determined to make an order or apply to court	16	39%
Senior officer determined to refuse an application	6	15%
Consent provided (no determination)	9	22%
Withdrawn or cancelled (no determination)	10	24%
Total	**41**	**100%**

Senior officers are not otherwise consulting workers' medical practitioners

An MDT application is required to include statements from the worker consenting to:

- the senior officer discussing the consultation with the medical practitioner (to the extent required for the MDT application determination)[286]
- the senior officer obtaining their medical records, but only if the MDT application does not contain written medical advice (to the extent required for the MDT application determination).[287]

It appears that senior officers are generally not consulting with medical practitioners before making determinations, even in cases where no written medical advice was provided. The NSWPF's BluePortal system does not provide a specific field to record action taken by senior officers to contact a worker's medical practitioner. There is no indication otherwise that medical practitioners were consulted or that their advice was considered in any determination.

Neither the CHO guidelines, nor the NSWPF MDT guidelines or the CSNSW MDT policy, explain how and when a senior officer should contact a worker's medical practitioner.

283 NSW Police Force, *Mandatory Disease Testing 2021 Guidelines for Workers and Senior Officers*, 10.

284 Three court applications resulted in MTOs being granted, 1 resulted in consensual testing before hearing.

285 This is the number of applications without any written medical advice uploaded to BluePortal, which were determined and notified to our office under s 13 of the Act.

286 *Mandatory Disease Testing Act 2021* s 10(2)(a).

287 Ibid s 10(2)(b).

The small number of matters where consultation with medical practitioners has been recorded as having taken place have all occurred in the context of the senior officer preparing an application to the court for an MTO involving a vulnerable third party.

In one case, a NSWPF senior officer advised us he had attended a second medical appointment with the worker to explain to the medical practitioner what information was required for court application purposes. This was after the worker's first consultation with the medical practitioner, during which no written medical advice had been provided. Despite not having medical advice, the senior officer determined that an application should be made to the court, after which they decided they needed to obtain written medical advice for that purpose.[288]

We have also seen cases of CSNSW staff contacting the worker's nominated medical practitioner seeking greater evidence of transmission risk in an attempt to bolster MDT applications before going to court. This occurred even though the medical practitioner had already provided written medical advice on transmission risk. Given the timeframes under the MDT Act, consultation and the obtaining of medical records may not always be practically feasible before the senior officer is required to make a determination. That being the case, it is even more important that the senior officer have the benefit of comprehensive written advice included in the worker's MDT application.

Recommendation 30

If the Act is to continue, that the Act be amended to require that all MDT applications *must* include written advice from the worker's medical practitioner. (See also **recommendation 5** as to the required content of that advice).

Senior officers may need to consult and access records even if written medical advice is provided

The MDT Act requires the worker to provide their consent for the senior officer to consult with their medical practitioner in all cases, including where written medical advice has been provided. This is appropriate, as senior officers may need to consult the medical practitioner *about* the written advice – for example if it is unclear, inadequate or if the senior officer simply does not understand it or seeks elaboration.

In that regard, the senior officer may also need to access medical records beyond what is contained in the written medical advice. It is unclear why their ability to do so applies only in the case where no written medical advice has been obtained.[289]

Also, as noted above, senior officers may need to consult with medical practitioners in the course of preparing an application to the court. However, their ability to do so may be in doubt given an apparent anomaly in the drafting of the Act. While 11(1)(b) provides that an MDT application can be determined in the case of a non-vulnerable third party by 'making' an MTO, s 11(1)(a) provides, in the case of a vulnerable third party, that an MDT application can be determined by '*deciding* to apply' to the court for an MTO (rather than 'applying to the court').

As noted above, the worker's consent to allow the senior officer to consult with their medical practitioner is limited 'to the extent necessary for *determining* the application' [emphasis added]. If the senior officer makes the decision to apply to the court, then under s 11(1)(a) the application has been determined. This means that there may be a question as to whether the worker's consent continues in respect of the senior officer's subsequent conduct in pursuing the court application and proceedings.

[288] In this matter (NSWPFMDT0001070), the senior officer took this application to the court without written medical advice ultimately, as the medical practitioner declined to provide it. The court refused the application, but we cannot say whether this was because of a lack of written medical advice.

[289] *Mandatory Disease Testing Act 2021* s 10(2)(b).

While it is important that the senior officer should not be given access to unrelated medical records of the worker, they may require access to relevant records for the purpose, not only of determining the MDT application, but also applying to the court for an MTO (if that is what they determined to do).[290]

Recommendation 31

If the Act is to continue, that the Act be amended to provide that a worker's statement(s) consenting to the senior officer consulting their medical practitioner and accessing their medical records extends to the case of an MDT application that is determined by the senior officer deciding to apply to the court, to the extent necessary for the purpose of pursuing court proceedings.

Recommendation 32

If the Act is to continue, that the Act be amended to provide that, in all cases, a worker's MDT application must include statement(s) of consent to the senior officer accessing their relevant medical records as necessary.

Recommendation 33

If the Act is to continue, that the CHO review and revise the CHO guidelines to provide guidance to senior officers as to how and when they should be consulting with a worker's medical practitioner.

12.5 Consideration of third parties' submissions

The MDT Act requires that senior officers provide third parties (whether or not they are assessed to be vulnerable) with an opportunity to make submissions and must consider the submissions received.[291]

Submissions are an important element of procedural fairness. They provide the third party an opportunity to respond to any allegations contained in an MDT application and provide a senior officer with information that could impact the outcome of the application. For example, a submission may provide information refuting that the contact incident was the result of a deliberate action by the person. It may also provide information relevant to recognising that the person is a vulnerable third party.

The submission would also be an opportunity for the third party to note any particular religious, cultural or other reasons as to why they refuse to consent to providing their blood for testing.

Third parties are often not given sufficient opportunity to make a submission

In accordance with the MDT Act and agencies' policies, third parties will generally first become aware of an MDT application having been made when the senior officer contacts them to seek their consent to testing and to give them the opportunity to make a submission. The senior officer has 3 [business] days to determine the MDT application, and longer if necessary.[292]

There is no timeframe specified in the Act as to how long a third party must be given to be considered to have had an 'opportunity' to make a submission. However, given the timeframe within which senior officers are directed to make their determination, in practice the timeframe is very short.

[290] NSW Health (n 164). During our consultations, the CHO noted that it may be inappropriate for a senior officer to have access to the worker's unrelated medical records and that the senior officer may lack the medical training necessary to properly consider medical records.

[291] *Mandatory Disease Testing Act 2021* s 11(4).

[292] Ibid s 11(2).

In its submission to our review, Legal Aid NSW raised procedural fairness concerns with the lack of notice given to third parties when the MDT application itself is made.[293] If third parties were notified immediately upon an MDT application being made, they would have more time to consider whether to make a submission, including if necessary to seek legal, medical or other advice.

As well as notifying third parties earlier, the opportunity to make meaningful submissions would be enhanced if third parties were given a copy of the MDT application (redacted as appropriate – for example in respect of any medical advice relating to the worker). Having access to the MDT application is particularly important for the third party to consider whether they wish to make submissions, for example disputing the worker's version of the events that led to the contact with their bodily fluid. CSNSW policy expressly provides for a third party to access a redacted copy of an MDT application. There is no provision for this in the NSWPF policy.

Neither policy facilitates third party access to medical or legal advice when considering making a submission, with the exception that the CSNSW policy instructs that a vulnerable third party is to be provided access to a support person and legal representation.[294] In its submission to our office, Legal Aid NSW expressed concern about '…how effectively third parties can [make submissions], without legal advice about the range of factors decision makers are permitted to consider when determining an MDT application.' It recommended 'due to the MDT scheme's complex nature and far-reaching powers, 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'.

To give effect to the procedural fairness obligation under the Act, agencies should ensure that:

- third parties are notified of an MDT application immediately, to give them the most opportunity possible to consider making a (noting that timeframes will still necessarily be short, given that the determination must be decided within 3 days),
- third parties are given a copy of the MDT application (redacted as necessary to omit any personal or health details of workers), and
- should they indicate that they wish to do so, third parties are given the opportunity to obtain medical and/or legal advice prior to the application being determined.

Recommendation 34

If the Act is to continue, that the Act be amended to require that, for the purpose of affording third parties an opportunity to make a submission:

a. the senior officer must provide them with a redacted copy of the MDT application immediately, and in any case no later than 1 business day after the MDT application is made, and

b. should they indicate that they wish to do so, third parties be given the opportunity to obtain medical and/or legal advice to assist with the decision to make (or not make) a submission, and to assist in the making of that submission.

Pending any change to the legislation, this practice should be adopted by agencies as a matter of policy.

[293] Legal Aid NSW (n 241) 10.

[294] The onus is on a non-vulnerable third party to seek their own legal representation or use the Offender Telephone System to obtain advice: Corrective Services (n 263) 12-13.

The NSWPF's consent form does not provide adequate opportunity for third parties to make submissions

Procedurally, it appears that NSWPF senior officers use their consent form as the third party's opportunity to provide a submission. BWV footage shows officers reading the form out to the third party at the time consent is sought.

The form states, in the 'information about this form' section at the top:

> before determining the application the Senior Officer must… provide you with an opportunity to make submissions and consider the submissions received. This form is designed to assist you to provide or decline to provide your consent.

The 'non-consent' section at the end of the form states '(Optional) The reason I do not consent is:' and provides 5 lines of space for the third party to explain why they do not consent.

In effect, it appears that this is the only opportunity third parties are given to make a submission. It is misleading in at least 2 respects:

- Although it notes that the senior officer must provide the person with an opportunity to make submissions, there is no indication that *this* form is that opportunity.
- To the extent that there is an opportunity on the form to make submission, the person is guided to make submissions only about their reasons for not consenting.

This practice effectively conflates the requirement in the Act to provide an opportunity to make a submission with the requirement to seek consent.

The low number of submissions made to the NSWPF (our analysis of NSWPF data shows that the 'submission received' checkbox in BluePortal was ticked for only 12 of 106 NSWPF applications)[295] may indicate that third parties are not properly aware of their right to make submissions.

In contrast, CSNSW policy provides for a fact sheet to be given to third parties that outlines their right to provide a submission about the application made about them. CSNSW also provides a separate form to the third party specifically to collect any submission they wish to provide. This is provided to the third party together with a copy of the MDT application in a redacted form.

Recommendation 35

If the Act is to continue, that the NSWPF review its policy and practices to ensure that third parties are genuinely provided an opportunity to make a submission on any matters relevant to the determination of an MDT application, and not merely on their reasons for not consenting to provide a blood sample for testing.

[295] Twenty-five NSWPF applications included some information in a BluePortal field titled 'Submission and contact attempt comments'. However, while comments in that field may contain information relevant to third party submissions, the field more often contains information that the third party signed a consent form or refused to sign.

13. Enforcement

13.1 Use of force

Use of force has the potential to increase the risk to those workers seeking to take blood from the third party

Use of force to administer an MTO is authorised only in respect of a detained third party, and for the purposes prescribed by s 21 of the Act, namely:

- to transport them to and from a place at which their blood will be taken
- to assist a person to take blood from them, and
- to prevent loss, destruction or contamination of their blood sample.

During the Parliamentary Inquiry, concerns were raised that use of force to assist a person to take blood from a detained third party had the potential to increase the risk of harm to that person, including the risk of coming into contact with the bodily fluids of the detained third party.[296] This position was reiterated to us by CSNSW during this review, who advised us that they advise correctional staff not to use force as it may place them in harm's way.[297]

The NSWPF and CSNSW have not reported any use of force in connection with administering an MTO during the reporting period.[298]

Although it is apparent that taking a blood sample by force raises risks for workers involved, as there has been no use of force during the reporting period, we cannot comment on how that risk may play out in practice.

There is a lack of clarity as to whether use of force can be used against a person who is arrested and detained for failing to comply with an MTO

Given that a failure to comply with an MTO is a criminal offence,[299] there is a question as to whether a person (not currently detained) can, if they fail to comply with an MTO, be arrested for that offence and thereby (now being detained) have force used against them to administer the mandatory test.

If that is permitted (as a literal reading of s 21 seems to suggest) it appears to be an unintended outcome given that it would effectively mean that use of force can be used against *any* third party whether or not they were already in detention.

This question does not appear to have been raised in the Parliamentary Inquiry or Parliamentary debate proceeding the passage of the Bill.

We recommend that the Act be clarified before the question arises in practice.

Recommendation 36

If the Act is to continue, that the Act be amended to provide that the powers of law enforcement officers in respect of a detained third party provided by s 21 do not apply if the person has been detained only in connection with an offence under the Act.

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296 Australian Medical Association (n 28).

297 CSNSW MDT policy outlines when force can be used under s 21 of the Act but advises against the use of force. The policy states that non-compliance by inmates with an MTO should be dealt with by reminding the inmate of the penalty for failing to comply, and any continuation be reported to the Deputy Commissioner's office for referral to police. Staff should also follow CSNSW procedures for inmate discipline.

298 We requested advice from both the NSWPF and CSNSW as to whether any use of force had been used in obtaining a blood sample from a third party during our reporting period. CSNSW advised us that no correctional officers had engaged in any use of force. The NSWPF did not directly respond to this question. However there are no records attached to any of the NSWPF applications we could find indicating any use of force powers were exercised under s 21 of the Act.

299 *Mandatory Disease Testing Act 2021* s 27.

14. Testing with consent

The MDT Act requires that, when an MDT application is made, the senior officer must first seek the consent of the third party to voluntarily provide blood for testing, unless it appears to the senior officer that the third party is a vulnerable third party.[300]

While there is no similar duty to seek consent in respect of a vulnerable third party, the opportunity to make submissions may also provide an opportunity to consent to the testing,[301] and in at least some cases there have been explicit requests for consent made in respect of vulnerable third parties (see **section 14.3** below).

Many blood tests are being conducted 'by consent'

As noted in **chapter 10**, of the 98 MDT applications made in respect of persons assessed not to be vulnerable, 46 (47%) were recorded as having proceeded to testing with consent.[302]

For the NSWPF, 43% of MDT applications for non-vulnerable third parties were recorded as proceeding to testing with consent, and for CSNSW, 61% of MDT applications were recorded as proceeding to testing with consent.

It is likely these numbers understate the number of incidents covered by the MDT Act that resulted in tests being administered with consent, for the following reasons:

a. In some cases, third party consent may have been sought and obtained before an MDT application was lodged. If that happens, the agency's MDT records will contain no record of that, as it will be considered to have been done entirely outside of the MDT scheme, which is triggered only on the making of an MDT application (See **section 16.2** below).[303]
b. If a third party will voluntarily provide blood for testing after an MDT application has been made, the senior officer is not permitted to make an MTO.[304] Given poor practices around the recording of reasons for determinations, in cases where an MDT application has been recorded as simply 'refused' or 'withdrawn',[305] the third party may in fact have consented to the testing.

14.1 The finalisation of MDT applications after consent has been obtained

There are inconsistent practices between and within agencies about how applications are to be finalised if consent is obtained

Section 11(7) of the MDT Act provides that a senior officer may make an MTO only if satisfied that the third party will not *voluntarily* provide blood to be tested for blood-borne diseases. It is clear then that, if consent is obtained, the senior officer cannot determine the MDT application by making an MTO.

However, the Act does not say what senior officers may or must do in relation to the MDT application when consent has been obtained.

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300 Ibid s 11(4).
301 Ibid s 11(3).
302 Note, 2 applications where consent was obtained related to vulnerable third parties by the senior officer's assessment. See case studies at **section 14.3**.
303 That is so even if, when seeking consent from the third party, they are informed that, if they do not consent, an application can or will be made under the MDT Act.
304 *Mandatory Disease Testing Act 2021* s 11(7).
305 In relation to whether it is legally open to treat an MDT application as 'withdrawn' see **section 14.1**.

During the reporting period of this report, senior officers from the NSWPF and CSNSW demonstrated differing approaches. CSNSW recorded all MDT applications that proceeded to consensual testing as 'Not Applicable' to determinations. In effect, they proceeded on the basis that the MDT application simply lapsed or fell away.

NSWPF records indicate that consent was obtained in relation to 32 applications, but recorded the outcomes differently:

- 17 were recorded as 'approved' (although no MTO was made)
- 5 were recorded as 'refused'
- 4 were recorded as 'withdrawn'
- 6 were recorded as 'undetermined'.

NSW Ambulance, which had 1 MDT application during the reporting period (relating to a vulnerable third party), told us it was not sure how it would have dealt with an MDT application which proceeded to testing by consent.

The Crown Solicitor has confirmed that, if consent is obtained, the senior officer must proceed to make a determination to refuse the application

Section 11(1) of the MDT Act expressly requires a senior officer who receives an MDT application in respect of a non-vulnerable person to either make an MTO or refuse the application. There is no provision for an application to be withdrawn, to lapse or to otherwise be left undetermined.

In our view, read together with s 11(7) (which provides that a senior officer may only make an MTO if satisfied that the third party will not voluntarily provide blood to be tested), the only action open to the senior officer to take, if the person consents to provide the blood sample, is to refuse the application.

This is consistent with the instructions in the CHO guidelines which state that a senior officer can make an MTO if satisfied the third party will not voluntarily provide blood to be tested and testing the third party's blood is justified in all circumstances, *'otherwise, the senior officer must refuse the application'* [emphasis added].[306]

Legal advice we have obtained from the Crown Solicitor confirms this interpretation. The Crown Solicitor noted that one reason why this is more likely to be the intended interpretation of the Act is that requiring senior officers to proceed to determine the MDT application (by refusing it) means that the matter can remain subject to oversight by the Ombudsman – given that s 13 of the Act requires the Ombudsman only to be notified if and when an MDT application has been determined:

> I note that a determination triggers a requirement to notify the worker, the third party and the Ombudsman (s 13(1)(a)–(b), (d)). The requirement to notify the Ombudsman of all determinations facilitates the effective exercise of the Ombudsman's oversight functions (see s 36). In circumstances where a senior officer refuses an application based on consent, the Ombudsman might wish to consider (for example) whether there was any indication that the third party was a vulnerable third party. Relieving the senior officer of their obligation to determine the application might thus impair the Ombudsman's statutory oversight role. Absent clear language to the contrary, Parliament should not be taken to have intended that result.

There is, however, a practical problem if consent is obtained but the third party later refuses to provide blood

If consent to voluntarily provide a blood sample is obtained, then the senior officer must determine the MDT application by refusing it. However, this may leave a legal gap if the third party subsequently refuses to provide the blood sample, in effect withdrawing their consent.

[306] NSW Health (n 105) 7.

This issue arose in a case relating to a contact incident that occurred in November 2022 in a correctional centre. The third party provided consent to testing.[307] However, when taken to the clinic, the third party refused to undergo testing. For reasons that are not clear, this refusal was not communicated to CSNSW until January 2023, at which point no action could be taken due to delay. As no MTO was made in response to the application, the third party was also unable to be charged with failure to comply with MTO.[308]

To overcome this problem, it may be necessary to amend the MDT Act to explicitly set out what is to occur if a third party consents, given the risk that they might later withdraw consent. The following approach is suggested:

- The senior officer may not make an MTO, but the application is to remain on foot and undetermined until the blood sample for testing is provided. This may be outside the 3-business day timeframe within which a determination must ordinarily be made.[309]
- Once the blood sample has been provided voluntarily, the senior officer is to determine the application by refusing it. However, if the blood sample is not provided voluntarily (ie consent is effectively withdrawn), the senior officer may then proceed to determine the application in the ordinary way – ie by either making an MTO or refusing the application).

Recommendation 37

If the Act is to continue, that the NSWPF, CSNSW and other relevant agencies amend their policies to include a direction that, if a non-vulnerable third party consents to providing a blood sample for testing after an MDT application has been made, the senior officer must proceed to determine the application by refusing it, and giving notice of that determination in accordance with s 13 of the Act.

Recommendation 38

If the Act is to continue, that the Act be amended to provide that, in respect of an MDT application about a non-vulnerable third party who has consented to voluntarily provide a blood sample for testing:

a. the application is to remain on foot (and not be determined) until the blood sample for testing is provided - even if this is outside the 3-business-day timeframe within which a determination must ordinarily be made
b. once the blood sample has been provided, the senior officer is to determine the application by refusing it
c. but if the blood sample is not provided voluntarily (ie consent is withdrawn), the senior officer (or the court, if **recommendation 2** is adopted) may proceed to determine the application by either making an MTO or refusing the application.

There is also a practical problem if a third party consents to provide a blood sample for testing, but does not agree to the test results being disclosed

As noted above, the Act provides that a senior officer cannot make an MTO unless satisfied that the third party 'will not voluntarily provide blood to be tested for blood-borne disease'.

[307] In this case the senior officer did not 'refuse' the MDT application, but recorded the outcome as 'Not Applicable'.

[308] We have not referenced the CSNSW MDT application as the applications are identified by the name of the inmate subject of the application. There are no other identifiers for CSNSW applications.

[309] Notably s 11(2) of the Act provides that: The senior officer must determine an application within 3 business days after receiving the application, **unless a longer period is necessary in the circumstances** [emphasis added].

However, given that s 22 (results of blood test) only applies where the test was conducted 'under a mandatory testing order', there is no express power under the Act to disseminate the blood test results to anyone other than the third party or the third party's medical practitioner in accordance with health privacy laws that ordinarily apply to pathology testing.

The NSWPF and CSNSW use similar consent forms to obtain and record the third party's consent, which seek to get around this problem by seeking consent from the third party to both:

- being tested for blood-borne diseases
- disclosure of the test results to the worker's medical practitioner.

Recommendation 39 should resolve this problem by ensuring that s 22 also applies where a test is conducted by consent.

14.2 Provisions not enlivened when testing is by consent

Testing with consent creates a grey area that is not subject to all relevant protections

Some provisions of the MDT Act are predicated on testing being undertaken subject to an MTO, such that they will not be enlivened if the testing occurs instead by consent.

There are, of course, some provisions that are appropriately only to be enlivened in the case of testing under an MTO, such as s 21 (use of force to assist in taking a blood sample) and s 27 (offence of failure to comply with an MTO).

However, other provisions should apply to testing whether consensual or under an MTO:

- **Section 22 – dissemination of blood test results by pathology laboratory:** that provision is particularly important both because it imposes a limit on the permissible dissemination of results, but also because it is the mechanism through which third parties can be informed of, and obtain medical advice about, their own results.
- If this provision does not apply, then test results may be sent only to the person whose details are stated on the relevant pathology request form, which may be just the worker's nominated medical practitioner.
- **Section 34 – cost reimbursement mechanism**: the right to cost reimbursement is also expressed to apply only in respect of 'the carrying out of a mandatory testing order'. It covers 'the cost to the third party of complying with the order' as well as reasonable travel costs and expenses they incur. There appears no reason why a right to cost reimbursement should not also apply where testing is by consent, and indeed if cost reimbursement is not available as of right in that situation that may be a disincentive to providing consent.
- **Section 29 – non-disclosure**: of most concern, there may be a doubt about the application of the non-disclosure offence in s 29 where testing has occurred voluntarily. That provision applies only to 'information obtained in connection with the administration or execution of this Act' and there may be a question as to whether this includes information obtained in relation to a blood test that is voluntarily undertaken.
- There may also be a practical issue with the application of s 29 (as well as s 22) in that, if testing occurs voluntarily by consent, relevant people to whom obligations under those provisions would apply (such as the pathology laboratory and relevant medical practitioners) may not even be made aware that the testing has been agreed to following an MDT application and therefore that these provisions of the Act apply.

We recommend that the Act be amended to ensure these provisions apply to consensual testing (after an MDT application is made), as well as testing where an MTO has been made.[310]

Recommendation 39

If the Act is to continue, that the Act be amended to provide that the following provisions also apply where, following the making of an application for an MTO, testing is conducted with consent:

a. s 22 (Results of blood test)
b. s 29 (Disclosure of information)
c. s 34 (Costs).

14.3 Consent in respect of vulnerable third parties

There is a question about the appropriateness of seeking consent in respect of vulnerable third parties

Unlike the case of non-vulnerable third parties (where the MDT Act *requires* senior officers to seek consent before determining an MDT application) the MDT Act does not contemplate consent being sought or obtained in respect of a vulnerable third party.

As outlined above, if a third party is considered a vulnerable third party, a senior officer is to either refuse the application or apply to the court for an MTO.[311] However, there is no express prohibition in the Act on asking vulnerable third parties and their parent or guardian if they wish to consent to provide the blood sample voluntarily. Nor, if consent is appropriately and validly given,[312] is there any prohibition in the Act on proceeding with the testing on a voluntary basis.[313]

However, given that the Act deals explicitly with consent in the case of non-vulnerable third parties, and that the current test for vulnerability is built around impairment that significantly affects a person's capacity to consent, it is clearly not intended that senior officers would actively request or encourage consent in respect of vulnerable third parties.

That is particularly so in circumstances where there is doubt as to the vulnerable third party's capacity to provide consent, and where the senior officer may not have certainty as to the legal capacity of another person (such as their parent or carer) to provide consent on their behalf.

The NSWPF has actively sought consent in cases involving vulnerable third parties

A small number of NSWPF MDT applications (during the relevant reporting period) explicitly refer to consent being requested from vulnerable third parties. We have included 2 of these matters as case studies below, both of which resulted in the testing of vulnerable third parties by consent. Consent may have been sought in other cases without a record having been made of that attempt.

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310 It is noted that, rather than amending the above provisions so that they are expressed to apply to consensual testing, an alternative approach would be to amend the Act to provide that, where consent is given, the senior officer is to determine the MDT application by making the MTO (to provide for an order to be made 'by consent'). This would mean that all the provisions of the Act would clearly apply to the testing and test results.
However, we do not suggest that approach because: 1) the concept of a 'mandatory testing order for testing by consent' may be contradictory and confusing, and 2) this approach would also result in the potential application of provisions that would appear to be inconsistent with *voluntary* testing – such as s 21 (use of force to assist in taking a blood sample) and s 27 (offence of failure to comply).

311 *Mandatory Disease Testing Act* 2021 s 11(1)(a)(i).

312 Whether by the vulnerable person (if they have legal capacity to consent) or by their guardian or another person with legal capacity to provide consent on their behalf.

313 In which case, presumably like in the case of a non-vulnerable applicant, the MDT application should be determined by being refused.

Case Study 4. Obtaining consent from a vulnerable third party[314]

This MDT application was made following an incident of alleged spitting at a police officer. The senior officer assessed the third party as appearing to be vulnerable. BluePortal records indicate police telephoned the third party and their mother (who is also the third party's carer) and visited their home on at least 5 occasions in one day in an attempt to gain consent for testing.

BWV footage also shows the senior officer and another officer stopping to speak to the third party and their mother, after observing them on the street while passing by in their car. The officers speak for several minutes, attempting to obtain consent. The senior officer refers to the alleged spitting incident, and states 'as the senior officer, I'm actually trying to take out a mandatory testing order through the court, because [the third party] is a vulnerable person, and you're his carer'. He goes on to state that 'one of the ways to prevent [the matter going to court] is that I ask you… to do it voluntarily, to provide a blood sample.' The senior officer tells them that he 'can take [the order] out through the court… I don't want to do it forcibly, that's crazy… that's not in anyone's interest'.

The other officer says, 'I think the best outcome would be if [the third party] takes this piece of paper… [to the GP or pathology clinic]'. The senior officer notes that testing will let them know if they have any diseases, saying 'if you're picking up things and touching them off the street, there's a good chance you might pick something up out of a cigarette butt'.

The third party's mother then tells the officers that she doesn't drive and asks them if they could drop her and the third party off at the pathology clinic 'because you're the ones putting the pressure on…'. The senior officer replies 'it's not pressure, you shouldn't feel pressure because I'm not pressuring you. I'm just outlining what the options are'.

The senior officer then reads the consent form out to the third party and their mother. Around the time the senior officer mentions the notice in the consent form that refers to the ability of the third party to make a submission about the application,[315] the third party says, 'sometimes when I'm talking, I spray', in an apparent reference to the alleged 'spitting' incident that forms the basis of the MDT application.

Records indicate the third party's mother signed the consent form in the third party's name, and the third party's blood was taken.

BluePortal records show that the application was refused 'as per the following reasons:

1. The third party [name redacted] agreed to provide a voluntary blood sample. [They] attended [a pathologist] on [date] with [their] mother.
2. The testing of the third party's blood for blood-borne diseases is not jusified [sic] in all the circumstances.'

Case Study 5. A vulnerable third party is tested by consent prior to the court hearing an MDT application

The third party subject to the MDT application had allegedly bitten a NSWPF officer during a traffic stop. The senior officer identified the third party as a vulnerable third party due to mental health impairment. The senior officer noted on the application, '[the third party] indicated that [they] had just been released from a mental health facility and was being readmitted next week… it is not known what affect [sic] if any [their] being released and further pending admission had upon [them] in providing consent/non consent in relation to the MDT request.'

[314] NSWPFMDT0001072.

[315] NSWPF consent forms include a checkbox stating the third party understands they will be given an opportunity to make submissions, and that those submissions will be taken into consideration by the senior officer. The third party can indicate whether they wish to make a submission or not.

On 11 April, the senior officer determined the application by applying for an MTO from the court, and our office was notified of this outcome.

On 19 April, we requested further information from the NSWPF about the court matter. A NSWPF officer advised us that '[t]he Court proceedings were not required as [the third party's] legal rep made suitable arrangements and [they were] tested on Monday prior to the Court date. I ensured that the prosecutors did not present the matter before the Court as a sample was supplied for testing.'

Application records indicate a blood test was obtained from the third party on 17 April. Court transcripts of the hearing for the MDT application dated 18 April indicate the court was told by the third party's legal representative that 'my client complied with that yesterday'. Court records indicate the application was refused at a Local Court on 18 April.

14.4 The conduct of officers when seeking consent

There have been instances of the NSWPF applying pressure to obtain consent

In **case study 4** above (**section 14.3**) and **case study 6** below, NSWPF senior officers have gone well beyond asking whether the person will consent and have applied some pressure on them to do so (although in **case study 4** the officer explicitly denies this).

In doing so, officers may also have provided misleading information. In **case study 4**, for example, the officer informed the third party and their mother that, if consent was not given, he could 'take the order out through the court'. Whether he intended to or not, this misleadingly suggests that an order would necessarily be issued by the court.

As noted above, a high proportion of MDT applications are being dealt with by consent (30.2% NSWPF and 43.75% CSNSW applications). Given the general absence of any records detailing the circumstances in which consent was obtained, we cannot draw conclusions about how widespread the practice is of pressing for consent, rather than merely providing an opportunity for it to be provided.

In some cases, it is apparent that senior officers have effectively already decided to issue an MTO before giving the third party the opportunity to consent, or to make any submissions

Under s 11(4) of the MDT Act, before determining an MDT application in respect of a non-vulnerable person, the senior officer must both:

I seek the third party's consent to voluntarily provide blood for testing

ii provide the third party with an opportunity to make submissions and consider the submissions received.

It is apparent, however, that in some cases senior officers have already decided that they will make the MTO when they approach the third party to seek consent – or, at the very least, they inform or strongly imply to the third party that this is the case, resulting in the third party being under the impression that the testing is a *fait accompli*, the only question being whether it will be with their consent or mandatory.

If senior officers have, in fact, already pre-determined the application before seeking consent and therefore also before providing an opportunity for the third party to make submissions, their decision

would be contrary to law as they will have failed to comply with the statutory procedural fairness requirement to allow and to *consider* submissions.[316]

Case study 6 below is illustrative. In that case the MTO was issued after the third party did not provide immediate and clear consent. However, it is difficult from the record of the interaction with the third party to understand how the senior officer could have been satisfied that the third party '*will not* voluntarily provide blood to be tested'.[317]

Case Study 6. A third party is given a choice between consenting and an order being made

The contact incident which resulted in this MDT application involved the third party struggling with police after sustaining injuries during a police pursuit. The third party was in custody when the NSWPF senior officer sought their consent to testing.

A senior officer recorded the interaction between the officer and a third party as follows:

> '[The third party] declined to provide a blood sample on the grounds he was not sure if he should or not. [The third party] was informed a senior officer order **would be made** to which he stated he would comply with any other order. When asked if he had any other objections to providing his blood sample [the third party] said, "No. Just what I said. Not sure if I should do it. I might speak to a lawyer".' [emphasis added]

When served with the MTO the senior officer recorded:

> '[The third party] stated that if he was bailed at court, he would attend the location immediately for the purpose of the blood test'.

Even where overt pressure is not applied, there is an inherent power imbalance between senior officers and third parties that may affect the validity of consent

In some cases, consent has been sought and obtained from a third party who, though not assessed as vulnerable (as defined in the Act), was clearly in a position of vulnerability in respect of the inherent power imbalance associated with their circumstances, such as being held in police custody.

A number of stakeholders in submissions to our review argued that the power imbalance between senior officers and third parties may impact the validity of consent gained.

In its submission, the Aboriginal Legal Service cited the experience of one of its clients in an interaction with the MDT scheme. The client was experiencing a mental health episode and was taken to a mental health ward, at which point a contact incident allegedly occurred, leading to an MDT application being made. The client was arrested. They instructed their solicitor that they were willing to submit to the requested disease testing in order to be processed faster.

In this case, the third party provided consent on the understanding that it would mean they could leave custody sooner. We cannot determine to what extent this was based on anything they were told by police. However, police have extensive discretionary powers, and a detained party might reasonably consider that these might be used more or less favourably depending on whether they provide consent to be tested. Under such circumstances, it is questionable whether the consent can be considered to have been given freely.

[316] There may also be a question as to whether, at that time, they had also considered the CHO guidelines (which are also mandatory considerations).

[317] *Mandatory Disease Testing Act* 2021 Act s 11(7)(a) [emphasis added].

14.5 Records regarding consent

Use of consent forms is appropriate, but these are not always being recorded

Both the NSWPF and CSNSW obtain and record consent using consent forms.

Of the 32 MDT applications finalised by the NSWPF by consent, 6 had no consent form on record. In most cases where consent was not obtained, no consent form is included on the NSWPF file. Of the 74 NSWPF MDT applications not proceeded by consent, 67 had no consent form attached to the file. It appears that this is because third parties are generally only given the consent form by the NSWPF if they have indicated a willingness to consent.

All 14 MDT applications finalised by CSNSW by consent have consent forms.[318] In many CSNSW cases where consent has not been provided, there was a consent form attached to the application file (9 of 17).

The circumstances in which consent was sought and obtained are generally not documented

In most cases, there is little or no documentation recording the contact made by senior officers with the third party during which consent was obtained. This has made it challenging for us to consider the extent to which consent is being obtained in accordance with the Act, and whether it has been provided on a free and informed basis.

In respect of the NSWPF, BluePortal provides for senior officers to mark a box indicating if consent was obtained, and to provide comments. In 9 of the 32 NSWPF applications finalised by consent, the 'consent' box was not ticked in BluePortal.[319]

Only 26 of 106 total NSWPF applications had any information populated in the field 'Consent comments' – 20 where the third party had consented, and 6 where they had not. This means that, in 12 of the 32 applications which were dealt with by consent, no information at all was recorded about the circumstances under which consent was sought or obtained.

There is, however, an additional field in BluePortal in which comments can be made about 'submissions and contact attempts' with third parties. In some case, senior officers have referred in this field to contact with third parties in which attempts were made to obtain consent. However, again only a small proportion of matters (25 of 106) included any comments at all in this field. In some cases, a time and date of contact with a third party has been entered but no other information is provided.

[318] CSNSW provided us with two consent forms (signed by third parties at the time of the application) after we reported in our consultation draft material to CSNSW that those applications resulted in consensual testing but did not have consent forms on record.

[319] Note that of the 9 applications where the consent box was not ticked 4 had no consent form attached and 5 did. Of the 6 with no consent form attached, 4 did not have the box ticked and 2 did. All resulted in consensual testing.

Agencies rarely record any reasons why a third party has not consented

The CHO guidelines recommend that, where third parties have refused to provide consent for testing, agencies should record the reasons for not consenting in writing and should consider these reasons when making their determination.[320]

This is important to provide transparency as to what was done in seeking consent, and on what grounds the senior officer has formed their satisfaction that the person will not voluntarily provide a blood sample.

In the case of CSNSW, and as noted above, third parties are invited to complete a consent form even where they have indicated they will not consent. That consent form contains a box to indicate that the third party does not consent, and a separate box to indicate whether the third party wishes to make a submission.[321]

In the 11 CSNSW applications where the third party did not consent and a consent form was attached to the application file, 4 third parties indicated they did not wish to make a submission and 7 left the box blank.[322] None of the consent forms included any statement as to why consent had been refused.

CSNSW senior officers[323] also note that the person did not consent, and typically include the following statement: 'The third party did not cite any religious, cultural or personal beliefs that impacted their decision to not give consent for a BBV test'.[324] It is not clear if this suggests that the third party may have been asked about any such beliefs, or simply did not proactively raise them.

Little or no information is recorded by the NSWPF about the circumstances under which consent was sought from, or the reasons for refusal by, non-consenting third parties. NSWPF senior officers recorded reasons for a third party having refused consent in only 2 cases (using the 'consent comments' field in BluePortal). As noted above, consent forms are not routinely obtained by the NSWPF for third parties who do not consent.

While the information available indicates that neither CSNSW and the NSWPF are making clear and detailed records documenting consent, it is important to note that the Act does not include any specific guidance as to the form in which consent should be obtained and recorded.

320 NSW Health (n 105).

321 The CSNSW consent form poses the question, 'Do you wish to make a submission to the Assistant Commissioner?'. The form advises that if the Yes box is ticked the third party can be provided a submission template form.

322 One consent form which was left blank related to two applications, by two separate workers involved in the one contact incident. This form is counted twice.

323 The senior officer in CSNSW process is either a Deputy Commissioner or an Assistant Commissioner. They receive a package of MDT documents on which to base their determination of an application.

324 10 CSNSW applications contain information the third party did not consent and all 10 submissions to the Deputy Commissioner contain this statement.

Recommendation 40

If the Act is to continue, that the NSWPF, CSNSW and other covered agencies review and if necessary, revise their policies and procedures to provide that:

a. a form is provided for completion by any non-vulnerable third party to allow them to indicate whether they will or will not consent

b. the form includes a specific field inviting the third party to provide reasons for not consenting, if they do not consent

c. returned forms (where consent has not been provided) are considered by the senior officer before determining an MDT application (or provided to the court if **recommendation 2** is adopted), and otherwise kept on the relevant file

d. if a third party does not complete a form, this is noted on the relevant file.

Obtaining consent is not routinely captured on body-worn video, and it should be

From the information available to us, it appears that the interaction between police and the third party where consent was sought was captured on BWV in only 4 cases.

That said, there is no field in BluePortal that requires a record to be made if an interaction was captured by BWV, and no ability to upload such footage to the relevant MDT application file. In the 4 cases we identified where BWV was used, we had found reference to a relevant BWV recording in free-text comment fields in BluePortal, in a related COPS event, or in a duty book entry that had incidentally been attached to the MDT file. We requested copies of such BWV from the NSWPF where we saw it was referred to.[325]

In one recording we obtained, a NSWPF officer appears to be reading the contents of the consent form to the third party and asking if they have any questions. In another recording, outlined in **case study 4** above (**section 14.3**), BWV footage depicts police attempting to obtain the consent of a vulnerable third party and their mother.

Neither CSNSW nor the NSWPF MDT policies provide any instruction about recording interactions with the third party by BWV (or in any other way).

Video recordings of the interaction with the third party where consent is sought provide the best and most valuable documentation of the circumstances and manner in which consent was obtained. It may provide evidence that consent was given freely and without pressure, including if concerns about this are raised subsequently.

NSWPF officers use BWV operationally 'when they would normally use their official notebook to record information, to capture evidence or record something of relevance, and when exercising a police power'.[326] Capturing the circumstances under which consent is sought for MDT purposes is therefore consistent with operational use and should be subject of instruction in the NSWPF MDT guidelines.

While we accept that the NSWPF BWV operational policy allows for the discretion of police in activating BWV,[327] there should be a presumption that the interaction is recorded unless there are exceptional circumstances for not doing so.[328] The BWV recording of consent should also be noted in BluePortal in a standardised form.

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[325] We only requested 2 of the 4 BWV consent recordings identified in NSWPF records, as we were not aware of 2 at the time we requested footage.

[326] NSW Police Force, *Body Worn Video* (Brochure) <https://www.police.nsw.gov.au/__data/assets/pdf_file/0008/586484/Updated_Brochure_BWV.pdf>.

[327] NSW Police Force, *Body-Worn Video Standard Operating Procedures*, Version 2.6.

[328] NSWPF BWV SOPs state that a police officer will exercise their own judgment in making the decision to activate their BWV camera, taking into consideration a number of factors including the need to capture evidence, accountability, involvement of vulnerable people and other relevant factors that exist: NSW Police Force (n 327) 6.

CSNSW officers have had access to BWV equipment since 2020,[329] in addition to hand-held cameras. CSNSW video evidence policy instructs correctional officers that they must use a video recording device in such circumstances as the use of force, exercising certain powers or searching an inmate's cell.[330] The policy includes mandatory recording when questioning an inmate about an incident or speaking to them about their behaviour. Recording any attempt by CSNSW staff to obtain consent from third parties is consistent with the stated purposes in CSNSW policy of providing "a more comprehensive presentation of evidence to all parties to assist in decision making and enhance transparency and accountability".[331]

Notwithstanding the policy may already cover conversations in which consent is sought, we recommend this is made explicit in the CSNSW MDT policy and those recordings included among CSNSW MDT application documents.

Recommendation 41

If the Act is to continue, that the NSWPF, CSNSW and other covered agencies review and revise their MDT policies and procedures to include directions to senior officers that they:

a. are to seek consent by asking whether or not the person will consent
b. are to give the third party a reasonable opportunity to consider (including after seeking legal or other advice, if necessary) whether they will consent
c. are not to apply pressure in seeking consent - including that they must not imply that, if consent is not provided, an MTO will necessarily be made
d. are to make a record of the manner in which consent was sought and, if relevant, obtained on the MDT application file
e. (in the case of the NSWPF and CSNSW) are to record on BWV any conversation in which consent is sought.

14.6 Seeking consent *before* an MDT application is made

If consent is obtained before an MDT application is made, the MDT Act does not apply

The provisions of the MDT Act (including all of the obligations, powers, protections and oversight mechanisms) are enlivened only if an MDT application is made by a worker.

This means that if, following an incident to which the Act could apply, the third party was asked to and did consent to being tested for blood, this will take place entirely outside the scope of the MDT scheme.

CSNSW offers this alternative option for workers who seek to have a third party tested

CSNSW's mandatory disease testing policy and procedure document advises workers who have been exposed to contact with bodily fluids that they have 2 options: they can use the Justice Health and Forensic Mental Health Network's (**Justice Health**'s) 'Early Detection Program' or make an application

[329] Department of Communities and Justice, *Prison officers to wear body-worn cameras* (Media Release, 18 February 2020) <https://dcj.nsw.gov.au/news-and-media/news/2020/prison-officers-to-wear-body-worn-cameras.html>.
[330] Corrective Services NSW, *Custodial Operations Policy and Procedures 13.9 Video Evidence*.
[331] Ibid 5.

for an MTO (where the circumstances of the MDT Act are applicable).[332] The policy does not preclude workers from pursuing both options simultaneously.

Under Justice Health's Early Detection Program, '…an affected [CSNSW] staff member may request that Justice Health seek consent from an inmate to have bloods taken and for blood test results to be shared with the staff member's nominated medical practitioner'.[333] The program was introduced in May 2024 and is a parallel process to the MDT scheme. It can be used whether or not the worker's exposure meets the criteria under the MDT Act (for example, where the exposure was not the result of a deliberate action).

The program has the potential to reduce the number of MDT applications by CSNSW staff where consent can otherwise be obtained for testing.

One difference between utilising the program and proceeding under the MDT Act is that it is Justice Health staff who approach the third party for consent, rather than a senior officer from CSNSW – meaning that consent is being sought in the context of a clinical relationship between patient and medical practitioner. This may be a more effective means of obtaining a third party's consent and viewed as less pressured for the third party, than being approached by a correctional officer.

In June 2024, Justice Health advised us that 4 requests had been made under the program:

- Consent was obtained in 2 of these cases. Justice Health told us that both these cases related to circumstances where an MDT application could have been made.
- Consent was not given by the inmate in 1 case. That case did not relate to an incident that could have been the subject to an MDT application.
- In the fourth case, Justice Health declined to seek consent, apparently based on doubt about the capacity of the person to consent. That case related to an incident that could have been the subject of a (vulnerable third party) MDT application.[334]

[332] As per the updated and endorsed CSNSW MDT Policy (May 2024).

[333] Justice Health and Forensic Mental Health Network, *Early Diversion Program Fact Sheet*.

[334] We understand this case did not result in any MDT application. We were advised about these requests by Justice Health on 5 June 2024. We were advised by CSNSW on 16 June 2024 there had been no further MDT applications made to CSNSW since February 2024.

15. Blood samples and test results

15.1 Dissemination of blood test results

Pathology staff are administering blood tests without being given a copy of the MTO

We were advised by NSW Health Pathology that, when undertaking a test under an MTO, pathology staff are made aware that testing is subject to an MTO. We understand that this is because the pathology request form for an MTO is not the standard form and therefore should be recognisable. Pathology staff are however, not provided a copy of the MTO itself.[335]

This is in contravention of s 20(2) of the MDT Act which expressly states:

> (2) A person taking blood from a third party under a mandatory testing order must—
> (a) be presented with a copy of the mandatory testing order relating to the third party before taking the third party's blood…[336]

Pathology laboratories are not always providing results to the CHO when the third party has not nominated a medical practitioner

Once blood test results are obtained by a pathology laboratory, they are to be disseminated as soon as reasonably practicable to (and only to) the medical practitioners who have been authorised by the third party and the worker. If the third party does not nominate a medical practitioner to receive their results, they are also to be provided to the CHO.[337]

To date, however, the CHO has received only 1 set of test results on behalf of a third party, despite a significant number of MTOs (32) not listing a third party's nominated medical practitioner.[338] This suggests a compliance failure by the pathology laboratories.

More importantly, it is unclear how or if third parties, whose test results have been provided neither to their nominated medical practitioner nor to the CHO, are being informed of their results.

Advice we received from the CHO suggests that provision of the third party's test results is vitally important in the absence of a nominated medical practitioner:

> The provision of test results to a medical practitioner aligns with usual care practices and allows the medical practitioner to analyse and explain the results and advise on, and provide, any recommended treatment. If the third party does not nominate a medical practitioner to receive the test results, it is important that attempts are made to explain the results to the patient. Therefore, the results are provided to the Chief Health Officer, who can seek to ensure that the blood test results can be communicated by an appropriate practitioner to the individual, link the third party to a care provider, and help ensure that the person receives any appropriate medical advice and care. Linkage to care with treatment as appropriate is important not only for the third party's health, but also for public health.

For the same reasons, it is essential that the provision of blood test results to the CHO (in the absence of a nominated medical practitioner) apply regardless of whether a test is undertaken under an MTO or by consent – see **recommendation 39**.

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335 Ibid.

336 *Mandatory Disease Testing Act 2021* s 20(2).

337 Ibid s 22.

338 All 32 cases related to applications from the NSWPF. CSNSW applications would generally result in Justice Health being treated as the authorised medical practitioner where the third party is an inmate of a correctional facility.

One reason why pathology laboratories may not be sending blood test results to the CHO when required to do so is simple administrative oversight, and a failure to appreciate that there is an obligation to do so. Over 10 million pathology requests are made in NSW annually,[339] while less than 100 tests are performed annually under an MTO.

NSW Health Pathology also noted that there are 170 collection points across NSW, but that no training has been offered to pathologists about the MDT scheme, beyond basic information that is listed on the testing request form.[340]

Recommendation 42

If the Act is to continue, that the CHO take steps to ensure that pathology laboratories are aware of their obligation to provide a copy of blood test results to the CHO if no medical practitioner has been nominated by the relevant third party.

Recommendation 43

If the Act is to continue, that the CHO be funded to develop and deliver training for NSW pathology staff in relation to the operation of the MDT Act, including their obligations concerning the dissemination of blood test results and treatment of blood test samples, and risk mitigation for staff who administer tests under an MTO.

Workers sometimes nominate multiple medical practitioners to receive results, which is an unnecessary further intrusion on health privacy

Although s 22 of the Act refers to the dissemination of blood test results to 'the medical practitioner' authorised by the worker, it appears that the worker can legally nominate more than one medical practitioner for this purpose.[341] This is explicitly contemplated in the model MTO set out in Schedule 1 of the Regulation, which contains the following note:

> Note 1—
> More than one medical practitioner at a medical practice can be listed.[342]

Noting that the disclosure of a person's health information to anyone without consent violates the person's health privacy, it should be permitted under the Act only where absolutely necessary.

In this case, while it is possible that there may be exceptional cases where a worker will need to engage with multiple medical practitioners in connection with the incident (for example, a GP and a specialist), the dissemination of results to each of these practitioners is unnecessary. Advice from the CHO's office concurs with this view:

> ...if a worker is being managed by a specialist after their exposure incident, that practitioner must be the one who receives the results on the worker's behalf. I say must because it makes the most sense from a practical and clinical management perspective. In my view, there is no need or reason for having multiple practitioners receive the results on the worker's behalf, as this can lead to privacy and other management issues... In my view, if the medical practitioner nominated by the worker is not managing their post-

[339] NSW Health Pathology, *Clinical Services Plan 2019 – 2025* (version 2, 2021) <https://pathology.health.nsw.gov.au/wp-content/uploads/2022/10/Clinical-Services-Plan.pdf>.

[340] Meeting between NSW Ombudsman staff and NSW Health Pathology, 28 June 2023.

[341] Under *Interpretation Act 1987* s 8(b), a reference to a word or expression in the singular form includes a reference to the word or expression in plural form.

[342] It is not clear why the note suggests that multiple medical practitioners can be listed only provided they are at the same medical practice.

exposure care, then there would not be a clinical reason for them to receive these results as they would not impact any additional risk assessments.[343]

Recommendation 44

If the Act is to continue, that the Act be amended to provide that a worker may nominate only one medical practitioner to receive the third party's blood test results on the worker's behalf.

Medical practitioners are receiving blood test results without any prior notice of what they are or why they are being sent to them

Provided the worker or the third party nominates a medical practitioner as authorised to receive the test results, the pathology laboratory is required to send those results to that medical practitioner. In some cases, medical practitioners are being listed without the worker or third party advising them and with no prior awareness that they will be sent the results or why.

When the results are received, they have been sent with little or no explanatory material or context. Neither the Act, Regulation, nor the CHO guidelines set out any information that must be included with the test results when sent to medical practitioners.

Case study 7 below provides an example of the confusion that can result, including the time and stress for medical practitioners in seeking to understand and discharge their professional and legal responsibilities, when they receive test results in these circumstances.

Case Study 7. Medical practitioner concerned when they were not informed that they were nominated to receive results

In May 2023, a NSW GP contacted the NSW Ombudsman by email raising significant concern with an MDT-related interaction. The scenario concerned a police officer who had been exposed to bodily fluids from a third party, and who had been informed by the third party that they were HIV positive. On the day of the exposure incident, the worker presented to an emergency department for appropriate treatment. Seven days later, the worker presented themselves to a sexual health clinic for review and further treatment. Two days after this, the third party complied with the MTO.

For reasons which were not able to be ascertained, the worker had nominated the GP in question as their authorised medical practitioner despite the practice having no record of the worker as ever being a patient in their database.

The results of the test were therefore received by the practice, causing confusion and concern by practice staff. The GP advised us that at this stage they were under the impression that their details had been used fraudulently, as they had no record of the patient to whom the results related.

Ascertaining that the matter was MDT-related, the GP contacted the CHO's office and the CHO advised that they could not discuss the test result verbally. Six days later (16 days after the exposure incident), the GP was contacted by the senior officer who requested to discuss the blood test results. The GP declined the call but asked for the worker's name, hoping to discuss the results with them directly. The GP then contacted their medical indemnity provider which, after escalating the issue for further advice, advised that the GP could 'probably' talk to the worker and disclose the third party's test results but that they were not 100% sure. Around this period, the worker's other medical practitioner (from a sexual health clinic the worker presented to after initially presenting to the emergency department) contacted the GP to discuss ongoing clinical management of the worker.

[343] Email from Manager, Communicable Diseases Branch, Health Protection NSW, (CHO representative), 26 May 2023.

After contacting the worker and ascertaining the worker's post-exposure activities, the GP opted not to discuss the third party's results on the basis that 'it was no longer of urgent clinical importance'.

Recommendation 45

If the Act is to continue, that the Act (or the Regulation) be amended to provide that, when blood test results are to be disseminated to a medical practitioner:

a. The pathology laboratory is to contact the medical practitioner to confirm that they are authorised and willing to receive the results on behalf of the relevant person
b. The results are to be marked as confidential for the personal attention of the medical practitioner, and
c. The results are to be accompanied by the following information:
    i. The fact that the test was undertaken under an MTO
    ii. The names of the relevant worker and third party
    iii. A list of all persons who are receiving the results and why
    iv. A copy of, or a reference to a public website that includes, the CHO guidelines

Recommendation 46

If the Act is to continue and subject to **recommendation 45** being adopted, the CHO should issue advice to pathology laboratories with instructions to the above effect.

15.2 The further disclosure of blood test results

Workers may be under no legal obligation to maintain the confidentiality of the third party's health information

Although the MDT Act provides for test results to be provided only to medical practitioners authorised by the worker and the third party, it would be necessary for the worker's medical practitioner to disclose the third party's test results to the worker themselves.

Clause 6 of the Regulation, made on 29 July 2022, states:

> 6 Disclosure of blood test results—the Act, s 38(1)
> To avoid doubt, a medical practitioner authorised by a worker to receive the third party's blood test results on the worker's behalf under the Act, section 22(1)(a) may disclose the blood test results to the worker.

The Act does not, however, provide any guidance as to what the worker may, or may not, then do with those results.

Section 29 of the Act creates an offence for any person to disclose health information of the third party. However, that offence applies only to information 'obtained in connection with the administration or execution' of the Act.[344] A worker receiving blood test results (as a patient) is not themselves at that time administering or executing the Act. It is doubtful, therefore, whether they have obtained that information 'in connection with the administration or execution of the Act'.

If s 29 of the Act did apply to workers in respect of the third party's test results, that would mean that workers would be prohibited even from disclosing those results to their spouse or other intimate

[344] *Mandatory Disease Testing Act 2021* s 29.

partner, which would appear to be unreasonable and unrealistic. Whether or not disclosure to others is permitted (for example, for the purpose of seeking other medical, counselling or legal advice) would depend on whether doing so is considered a 'lawful excuse' under s 29(1)(f) of the Act. However, the lawful excuse exception does not apply in the case of health information about Category 5 conditions (ie the HIV status of the third party)[345] and could not be relied upon by the worker to disclose that information.

If, however, the prohibition on disclosure does *not* apply to the worker (and the way the Act has been drafted, it appears it may not) then all of the provisions of the Act concerning the health privacy of the third party offer no more than the façade of protection, as their test results, after disclosure to the worker, can in effect be disclosed to anyone.

The lack of clarity is therefore undesirable from both the worker and third party's perspective.

Recommendation 47

If the Act is to continue, that the Act be amended to:

- **a.** provide that any person who receives the health information of a third party, including a worker and any person to whom the worker then discloses the information, is also subject to the prohibition on disclosing the information unless one of the exceptions in s 29(1) apply, and
- **b.** add exceptions for the disclosure of information where reasonably necessary for the purpose of:
  - **i.** the worker informing a spouse, intimate partner or other person in respect of whom the third party's health information may be relevant to that person's own health or safety, or
  - **ii.** the worker or a person referred to in paragraph (i) above for the purpose of seeking medical, counselling, legal or other professional advice.

Blood test results have been disclosed to senior officers

It is apparent that the MDT Act does not intend for the senior officer to receive the third party's test results. It lists the persons to whom results are to be disseminated - the authorised medical practitioners or the CHO – and the senior officer is an obvious and deliberate omission from that list.[346]

Senior officers should therefore not be seeking out, or asking to receive a copy of, the test results from the worker.

If a senior officer were to do this, and were to obtain that information, then s 29 of the MDT Act likely applies to the senior officer in respect of that information. Even though it is inappropriate and not contemplated by the Act, the senior officer will still have obtained the information in their capacity as a senior officer under the Act and purportedly 'in connection with the administration or execution of the Act'.

This means that the senior officer would commit a criminal offence by further disclosing the test results.

Neither the NSWPF nor CSNSW were able to confirm whether any senior officers had sought out the blood test results of third parties. However, that some blood test results have been uploaded to BluePortal indicates that there have been at least some occasions (in relation to NSWPF) where results were obtained by the senior officer.

[345] Ibid s 29(2); *Public Health Act 2010* Schedule 1.

[346] *Mandatory Disease Testing Act 2021* s 22.

We appreciate that a senior officer may be required by their agency to take action to confirm that an MTO process has been finalised for internal recordkeeping or reporting purposes. The NSWPF's policy, for example, directs senior officers to contact the pathology laboratory 2 days after the MTO was made to confirm whether the third party complied.

To this end, we recommend that, in addition to disseminating the blood test results as required by s 22 of the Act, the pathology laboratory be required to notify the senior officer in writing as soon as practicable after blood has been taken from the third party (without notifying them of the actual results). This would allow the senior officer to document compliance with the MTO and finalise their agency's records. This would also enable the senior officer to notify the worker, so that the worker can contact their medical practitioner to make an appointment to consult on the results.

Uploading of blood test results to BluePortal

In the course of our monitoring, we identified that on at least 4 separate occasions the NSWPF had obtained and uploaded third party test results in BluePortal. This occurred in cases where testing had occurred under an MTO (3 cases) as well as when it occurred by consent (1 case).

In a separate case, a worker's own blood test results had been uploaded to BluePortal with no explanation as to why this had occurred.

Given the likely contravention of s 29 of the MDT Act, we requested advice from the NSWPF about how the documents containing test results were obtained and uploaded, who has access to the test result documents and what action if any the NSWPF intended to take about the obtaining and uploading of the documents.

The NSWPF responded by:[347]

- advising they were 'unable to determine how original access to the document was provided' in 2 of the 4 applications, which did not address how the documents were uploaded on to BluePortal,[348]
- providing no information about 1 application, and
- advising, in respect of 1 application, that the test result information had been provided to them by consent of the third party. However, in that matter, the third party had signed a standard NSWPF consent form, which provides consent to the disclosure of test results to the nominated worker's medical practitioner and their own medical practitioner. The form states:

> Any disclosure outside of my consent is subject to section 56 of the *Public Health Act 2010* (NSW) which limits disclosure of certain information. Any disclosure is limited by section 29 of the *Mandatory Disease Testing Act 2021* (NSW).

We have no information to suggest the third party otherwise consented to their test results being uploaded to BluePortal.

The NSWPF advised us that on 24 September 2024 that there were 169 members with access to the BluePortal MTO dashboard,[349] but 'membership of itself does not mean that individuals will randomly peruse the MTO dashboard – access would be on a need-to-know basis'.

[347] Undated letter from Commissioner Karen Webb APM, 29 September 2024.
[348] Our question to the NSWPF was how the documents containing test results were obtained and uploaded for each of the applications.
[349] We understand access to the MTO dashboard means access to information about all NSWPF MDT applications and attachments.

Given the possibility that uploading the documents was contrary to s 29 of the MDT Act, we asked the NSWPF what action it now intended to take. The NSWPF responded by telling us that this question was outside the purview of the Ombudsman's role in monitoring the operation and administration of the MDT Act. The NSWPF stated:

> It is not the role of the of the Ombudsman to determine whether there has been a breach of s 29 of the MDT Act (noting there is a distinction between use and disclosure in the context of personal/health information) – in circumstances of breach this is to be dealt with summarily before the Local Court, and individuals have corresponding rights of protection regarding representation, presumption of innocence and limits on self-incrimination … The NSWPF's response to this question does not admit any wrongdoing by any individual.

The NSWPF did not advise us whether these third party test results have been removed from BluePortal, or whether any other action has been taken by the NSWPF to address this issue. As noted in **chapter 16**, we have referred this matter to the LECC for its consideration.

Recommendation 48

If the Act is to continue, that the CHO guidelines and the NSWPF, CSNSW and other agencies' policies be amended to state clearly that the third party's blood test results should not be disclosed to the senior officer, and the senior officer must not request those results.

Recommendation 49

If the Act is to continue, that the Act be amended to provide that, at the time of disseminating the blood test results under s 22, the pathology laboratory is to notify the senior officer that the test was successfully completed in accordance with an MTO.

Allowing additional exceptions to the disclosure of third party health information to be prescribed by regulation is not justified

One of the exceptions to non-disclosure of third party health information is 'in other circumstances prescribed by the regulations'.[350] Regulations for this purpose require the concurrence of the Minister for Health.[351] Exceptions made by regulation do not apply to information in relation to HIV status or testing.[352]

Stakeholders both during the Parliamentary Inquiry[353] and in submissions to this review[354] raised concerns about this regulation making power, arguing that there appears no good reason why access to a third party's personal health information should be able to be authorised by delegated legislation.

To date, s 29(1)(e) of the MDT Act has only been exercised - 'to avoid doubt' – to authorise the passing on of a third party's blood test results by the worker's nominated medical practitioner to the worker.[355] That in itself is problematic, given that an exception made by regulation can apply only to information about Hepatitis testing and not to HIV testing. Accordingly, the fact a regulation was considered necessary at all (to authorise the disclosure to the worker of hepatitis test results) seems to heighten

[350] *Mandatory Disease Testing Act 2021* s 29(1)(e).
[351] Ibid s 6.
[352] Ibid s 29(2).
[353] Public Interest Advocacy Centre (n 30).
[354] NUAA (n 122).
[355] Mandatory Disease Testing Regulation 2022 reg 6.

the doubt as to whether the medical practitioner is authorised to disclose the worker HIV test results (which the Regulation cannot authorise).

Recommendation 50

If the Act is to continue, that s 29(1)(e) be repealed.

15.3 Use and destruction of blood samples

There have been no attempts to use blood test samples for other law enforcement purposes – however the statutory protections in this regard appear inadequate

The MDT Act aims to prevent the use of information gathered in the administration of the Act, for purposes other than those authorised under the Act.

Section 7 states that, '[t]o avoid doubt, blood taken from a third party under a mandatory testing order must not be used by a member of the NSW Police Force for a purpose that is not authorised under this Act.'

Section 31 additionally prevents the admission of evidence against a third party to the extent to which the exhibit contains:

- information given or documents produced for the purposes of an application of an MTO or the determination of the application
- a blood sample obtained from a third party under an MTO
- a third party's blood test results under an MTO
- information derived from a blood sample obtained under an MTO.[356]
- that evidence may also not be used as a ground for a search warrant.[357]

We have not identified any impermissible use of blood samples, or the attempted use of samples or associated information in extraneous proceedings. However, in monitoring compliance with these provisions, we have noted that they appear to be inadequate to address fully the concerns that were raised in the Parliamentary Inquiry and during Parliamentary debate on the Bill.

In particular, while concerns were raised about the need for 'an absolute prohibition on the use of samples in any other type of testing (including DNA testing)',[358] the current provisions:

- specifically prohibit only the NSWPF from using the blood sample for non-MDT Act purposes but are silent about other bodies such as the Australian Federal Police[359] or the NSW Crime Commission.
- prohibit the material being admissible as 'evidence' in 'proceedings against the third party', but do not expressly prevent the material being used for other purposes (such as NDIS, insurance, Centrelink) or perhaps in proceedings that are not '*against* the third party' (such as proceedings brought *by* the third party).

[356] The section does not apply to criminal proceedings against the third party under *the Mandatory Disease Testing Act 2021* itself: s 31(2).

[357] *Mandatory Disease Testing Act 2021* s 31(3).

[358] NSW Bar Association (n 123); Positive Life NSW (n 38).

[359] Appreciating that there may be constitutional limitations on the extent to which a prohibition in *the Mandatory Disease Testing Act 2021* could affect a directly inconsistent provision of a Commonwealth law: s 109 Constitution Act 1901 (Cth).

Recommendation 51

If the Act is to continue, that the Act (s 7) be amended to provide there is an absolute prohibition on the use of blood samples for any purpose not authorised by the Act, and that this applies to any law enforcement agency and any other person.

Recommendation 52

If the Act is to continue, that the Act (s 31) be amended to provide that the prohibition on the use of samples and information as evidence applies to all proceedings and administrative decisions or assessments (other than if adduced by the third party themselves).

The Act only authorises, but does not require, blood test samples to be destroyed when no longer required for MDT purposes

Under s 22(2) of the MDT Act, 'the pathology laboratory at which the testing of a third party's blood under a mandatory testing order was carried out may destroy the sample as soon as the sample is no longer required for the purposes of this Act'.

We are advised by the CHO that blood samples for testing are stored and subsequently destroyed to comply with the National Pathology Accreditation Advisory Council requirements.[360]

Section 22(2) of the MDT Act was introduced as an amendment to the Bill after the issue was raised in the Parliamentary Inquiry by the NSW Bar Association, which submitted that the legislation should require the destruction of the blood sample after testing.[361]

However, the amendment provides only that laboratories *may* do so, not that they must. Concerns were raised in Parliament about the discretionary nature of the provision, but a question was also raised as to whether a mandatory duty to destroy the sample would be inconsistent with national pathology guidelines.[362]

The Commonwealth *Requirements for the retention of laboratory records and diagnostic material* provide that:

> Laboratories **must** dispose of specimens and patient records in accordance with relevant state/territory legislative requirements.[363] (emphasis in original)

We see no reason why the destruction of blood samples, when no longer required for the purposes of the MDT Act, should not be a mandatory requirement of the Act.

Recommendation 53

If the Act is to continue, that (subject to consultation with the CHO to confirm that there is no impediment under national pathology standards to doing so) the Act be amended to provide that the sample must be destroyed by the pathology laboratory as soon as it is no longer required for the purposes of the Act.

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360 Australian Commission on Safety and Quality in Health Care, *Requirements for the retention of laboratory records and diagnostic material* (9th ed, 2022).

361 NSW Bar Association (n 126).

362 New South Wales, *Parliamentary Debates*, Legislative Council, 11 May 2021 (Abigail Boyd MLC).

363 Australian Commission on Safety and Quality in Health Care (n 360) 26.

16. Ombudsman monitoring and reporting

16.1 The Ombudsman's information-gathering powers

The Ombudsman's information-gathering powers under the MDT Act are limited

The MDT Act provides for the Ombudsman to monitor the operation and administration of the Act, including the exercise of functions conferred on persons or bodies under it,[364] and to report on that monitoring.[365] However, the only power given to the Ombudsman to require information under the Act to support this monitoring is limited in terms of:

- the purpose for which information may be required – information can only be required for the purpose of preparing a report
- the information that may be required – information required must relate to an MDT application
- from whom information may be required – information can only be required from the Police Commissioner or, for agencies other than the NSWPF, the relevant senior officer.

These limitations are problematic. For example, there is no clear power to require information from agencies about their actions in relation to the MDT Act generally, other than as relates to a particular application. We also appear to have no power to require information about incidents of bodily fluid exposure that do *not* result in a worker making an MDT application. That information would, however, be highly relevant to assessing the operation of the Act, as it could identify how many would-be applicants are satisfied after seeking the pre-requisite medical consultation that they do not need to proceed with an MDT application. Given that the express objects of the Act include encouraging workers to obtain medical advice, and protecting and promoting their wellbeing, this information would be useful in assessing how well the Act is achieving those objects.

Recommendation 54

If the Act is to continue, that the Act (s 36) be amended to provide that the Ombudsman's power to require information can:

a. be exercised for the purpose of any Ombudsman function under the Act (and not just for its function of preparing a report)
b. relate to any information relevant to the Act (and not limited to information relating to an MDT application)
c. be made to any person (and not just to senior officers or the Commissioner of Police).

There is no express abrogation of privilege when responding to a requirement to produce information to the Ombudsman

The Act does not expressly provide that information required by the Ombudsman cannot be withheld on the grounds of public interest or other privilege. Our concerns about this were raised in a report to the Parliament when the Bill for the MDT Act was being debated.[366]

However, since that time the Court of Appeal handed down the decision in *Commissioner of Police v Attorney General for New South Wales* [2024] NSWCA 150, which held that a power of the LECC to

[364] *Mandatory Disease Testing Act 2021* s 36(1).
[365] Ibid s 36(2).
[366] See NSW Ombudsman, *Comments on clause 35 of the Mandatory Disease Testing Bill 2020*, (Special Report to Parliament under section 31 of the *Ombudsman Act 1974*).

require information from Police impliedly abrogated any claim to public interest privilege in respect of the information sought. We expect that the reasoning of that case would likewise mean that information required by us under the MDT Act could not be withheld by agencies on public interest privilege grounds.

In practice, none of the agencies from which we have formally sought information relating to an MDT application under s 36(3) have responded by refusing to do so explicitly on grounds of privilege or public interest immunity.

Nevertheless, for the purpose of the forthcoming statutory review of the Act, we recommend that consideration be given to amending our information gathering powers to make this point clear. Doing so provides assurance to agency officials that they are authorised, as well as required, to provide us with information that may otherwise be privileged.

Recommendation 55

If the Act is to continue, that the Act (s 36) be amended to provide that no Act (including any other provision of the MDT Act) or law prevents a person complying or affects a person's duty to comply with a requirement of the Ombudsman to provide information, except that the Ombudsman must set aside a requirement to produce information if:

a. the person is not a public authority,
b. the person has a ground of privilege that would entitle them to resist such a requirement in court proceedings, and
c. the person has not waived that privilege.

A recent amendment to the Ombudsman Act may expressly authorise us to make other inquiries, but compliance is non-compulsory

The recently enacted *Ombudsman and Other Legislation Amendment Act 2024* has amended the Ombudsman Act to relevantly include:

- an express power to make 'preliminary inquiries' for the purpose of any other Act (including the MDT Act)[367] – the inquiries enable us to request, but not require information from agencies and others
- an express duty on agencies to cooperate with the Ombudsman in the exercise of the Ombudsman's functions.[368]

Although these express powers were not available in respect of the preparation of this report, we did make informal inquiries and sought the cooperation of agencies for the purposes of our monitoring and reporting **(**see **appendix C - methodology and limitations).**

Despite these amendments, the powers of the Ombudsman to *compel* agencies (and others if necessary) to produce information remain limited, as explained above.

The Ombudsman is currently unable to evaluate trends in blood test results and treatment

The Ombudsman has no power to require information from pathology laboratories relating to the results of blood tests conducted under the MDT Act, nor are they authorised to provide those results

[367] *Ombudsman Act 1974* s 13AA(1)(c).
[368] Ibid s 36A.

to us.[369] We are also unable to obtain information about the PEP treatment of workers, including whether that changed in any way as a result of the third party's testing (aside from the insights drawn for the worker survey – see **section 8.2**). No agency currently collects this data.

Consequently, we are currently unable to assess the number of third parties who, following a mandatory test, actually returned a positive result for blood-borne diseases. We also cannot assess the number of workers for whom either a positive or negative third party test resulted in a change to their medical treatment (for example, whether they started or ceased PEP).

This information would clearly be valuable in assessing if and how the MDT Act may, in practice, have provided some benefit to workers.

We do not, however, propose that the Ombudsman should have access to identified health information, including blood test results obtained from pathology laboratories. Instead, noting that there is already provision for the CHO to receive the results of pathology tests in some circumstances,[370] and given the CHO's role in overseeing public health aspects of the scheme, we believe their office is the appropriate agency to collect and collate relevant data, and to provide it to us (in aggregated, de-identified form) for the purpose of our monitoring.

Recommendation 56

If the Act is to continue, that the Act be amended (subject to consultation with the CHO to confirm that there is no impediment under the relevant health privacy laws and standards) to provide for the CHO to receive and collate:

a. the result of pathology tests administered on third parties under the Act
b. the PEP treatment of workers, including whether this changed following receipt of the third party test results
c. data to the Ombudsman in deidentified and aggregated form for the purposes of our monitoring and reporting functions. (This should include in respect of all MDT applications, including where testing was done pursuant to an MTO and where testing was done by consent).

16.2 Mandatory notifications

Mandatory notification requirements should be expanded

While agencies are required to notify the Ombudsman when determinations of MDT applications are made by senior officers under s 13 of the MDT Act, this does not encompass all MDT applications that are made to agencies. For example, it does not include MDT applications that are made but then withdrawn, or MDT applications that are dealt with by consent – see **section 14.2** above.

This has meant that we have needed to issue specific information requirements to agencies under s 36 to seek this information.

Recommendation 57

If the Act is to continue, that the Act be amended to include (in addition to the requirement to give notice to the Ombudsman of any determination under s 13) that agencies must report annually to the Ombudsman on the number of MDT applications received and the outcome of those applications, including those that proceeded to determination, those that were withdrawn, and those that were dealt with by consent.

[369] *Mandatory Disease Testing Act 2021* ss 22 and 29.

[370] Where the third party has not authorised a medical practitioner: s 20.

16.3 Agency impediments to effective oversight

The recording of determinations by NSWPF senior officers using a structured decision-making tool is inadequate to allow appropriate oversight

Written reasons for the determination of an MDT application must be provided to the worker, the third party (and, if relevant, their parent or guardian), and the Ombudsman under s 13 of the MDT Act.

Reviewing these reasons against the Act, including assessing whether the decision has taken into account all mandatory considerations, has not impermissibly taken into account irrelevant considerations, and is otherwise reasonable, is evidently a core activity for the Ombudsman in 'monitor[ing] the operation and administration of …[the MDT Act], including the exercise of functions conferred on persons or bodies under… the Act]'.[371]

However, the NSWPF's use of a structured decision-making tool through BluePortal to both make and record decisions by senior officers provides inadequate 'reasons' that impede any such assessment. These records of decisions do not detail the specific situation or circumstances of each application, nor do they refer to, or provide copies of, the evidence or supporting documents that were considered and relied on. The description of key findings and the process of reasoning is presented in a way that is generic, superficial and skeletal.

This has caused us to doubt whether decisions made by senior officers within the NSWPF are always compliant with the requirements of the MDT Act. It has also meant that we have, in the case of NSWPF applications, needed to issue notices requesting further specific information about each determination.

Senior officers should make and provide full and proper reasons for their determinations, including what was considered and relied upon in making the decision and a clear statement of the reasoning process. There are publicly available guidelines that agencies can refer to on how to prepare such a statement of reasons.[372]

Among other things, such a statement of reasons is essential to enable the Ombudsman to effectively perform our monitoring function.

Recommendation 58

If the Act is to continue (and to the extent necessary if **recommendation 2** is adopted), agencies should ensure, and the Act be amended to require, that the notices of reasons provided under s 13 are adequate, including by ensuring that they describe with appropriate specificity:

- **a.** the decision
- **b.** the findings on material facts
- **c.** the evidence or other material on which those findings are based
- **d.** the reasons for the decision.

[371] *Mandatory Disease Testing Act 2021* s 36(1).

[372] See for example, Administrative Review Council, *Decision Making: REASONS* (Best Practice Guide 4, August 2007) <https://www.ag.gov.au/sites/default/files/2020-03/best-practice-guide-4-reasons.pdf>.

Recommendation 59

If the Act is to continue (and to the extent necessary if **recommendation 2** is adopted), agencies should ensure – and the Act be amended to require, that notices given to the Ombudsman under s 13(1)(d) of the Act are accompanied by:

a. references to any information considered in making a decision, including a copy of all relevant (non-public) documents
b. where the decision is to apply to the court for an MTO, a copy of the court application documents (and subsequently, once the court proceedings are finalised, notice of its outcome).

Detailed demographic data cannot be reported as agencies do not routinely collect and retain it

As a result of an amendment to the Bill for the MDT Act passed in the Legislative Assembly, s 36(4) of the MDT Act specifically allows for the Ombudsman to require a senior officer to provide demographic information about third parties subject to applications for orders and orders.

However, there is nothing in the Act that requires senior officers to collect and keep records of this information and, in practice, they generally do not. Available demographic data contained in application and determination documents is generally limited to age and gender. We have had to request agencies provide us additional demographic data about third parties and been advised that this data is not kept by them.

In some cases, demographic data may be available to agencies but is not included in the information attached to MDT applications and determinations. For example, NSWPF officers hold information about the Aboriginal and Torres Strait Islander status of people they deal with, but this does not form part of their MDT documentation, and we have had to request it separately.[373]

The intent of the legislative amendment was to empower the Ombudsman to reach conclusions and report on whether marginalised groups are being targeted through the MDT scheme,[374] in response to concerns raised by stakeholders to the Parliamentary Inquiry.[375]

To do so, agencies need to be directed to make and keep a record of the demographic information that Parliament intends to be reported. We do not suggest that third parties should be under any obligation to provide this information to agencies.

Recommendation 60

If the Act is to continue, that the Act be amended to prescribe demographic information about third parties that agencies are required to seek and, if provided, to keep. This may include information about:

a. age
b. gender (including trans, intersex and non-binary)
c. local government area of residence
d. Aboriginal and/or Torres Strait Islander status
e. cultural and linguistic diversity
f. sexual orientation
g. disability.

[373] NSWPF practice is to ask persons of interest whether they identify as Aboriginal or Torres Strait Islander. However, access to this information requires 'drilling into' the COPS records for that person. It was not information contained in the COPS records provided to us with MDT applications and attachments.

[374] New South Wales, *Parliamentary Debates* Legislative Assembly, 18 November 2020 (Alex Greenwich MP).

[375] NUAA, Submission to the Legislative Council Law and Justice Committee, Parliament of NSW, *Inquiry into the Mandatory Disease Testing Bill 2020*; Public Interest Advocacy Centre; Hepatitis NSW; Positive Life NSW: NSW Gay and Lesbian Rights Lobby.

Agencies have been resistant to some aspects of the Ombudsman's monitoring

The NSWPF and CSNSW were resistant to the Ombudsman conducting a survey of affected workers

Noting the primary purpose of the MDT Act concerns the physical and psychological health and wellbeing of workers, and the challenges of assessing the extent to which that objective is being achieved in any other way, we proposed to conduct a short, voluntary survey of workers who had made an MDT application. Our intention was to provide an opportunity to hear their voices about their experiences with the scheme, and to consider whether the scheme had achieved its objectives in their case.

Noting that s 36 of the MDT Act does not expressly authorise us to seek information directly from anyone other than the Police Commissioner (in the case of NSWPF) and the Commissioner of Corrective Services or their delegated senior officer (in the case of CSNSW), and in any event because we considered it more appropriate to do so, we asked the Commissioners to disseminate the survey of their relevant workers, with an invitation (but no requirement) to complete the survey.

The purpose of the survey was to assist us in determining how well the scheme is achieving the objects of the MDT Act, by ascertaining:

- applicants' subjective experience of the application process and outcomes
- applicants' reasons for applying
- whether the scheme had influenced applicants to obtain medical advice when they otherwise would not, or whether it affected the treatment they received
- whether applicants felt that the MDT scheme had protected or promoted their physical and psychological health and wellbeing.

We initially obtained in-principle support from both agencies to conduct the survey. Both also agreed with our view that it was preferable that we do not seek to contact workers directly, and that it was more appropriate for the survey to be disseminated by the agencies themselves. We provided the survey and a request that it be disseminated on 23 October 2023.

However, both agencies subsequently resisted doing this.

On 17 January 2024, the Acting Deputy Commissioner of Police wrote to us informing us that the NSWPF had not and would not disseminate the survey:

> After review, it has been determined that the NSW Police Force decline to conduct the survey…
>
> There is no express power in either the Mandatory Disease Testing Act or the Ombudsman Act, when monitoring the operation of the Act, to go directly to workers, or require the Commissioner of Police to survey her own workers under section 36 of the Act.
>
> I also respectfully ask that you do not directly approach any NSW Police Officers with respect to the *Mandatory Disease Testing Act*…

Eventually, following correspondence directly between the Ombudsman and the Commissioner of Police, the NSWPF said that it would disseminate the survey provided that certain questions were removed and others reframed. Most of the questions the Commissioner required to be taken out of the survey were said to be because 'this information is provided to you in materials requested by the Ombudsman to date and provided by the NSWPF'. However, as was noted in the Ombudsman's response:

> [Y]ou have omitted a number of questions on the basis that the information is already available to my Office. As you are aware, that information has been provided to my Office as it forms part of the record of a Mandatory Testing Order (MTO).

> Given that this is an anonymous survey, it will not be possible for my Office to link the survey responses to a particular case. It is therefore not relevant that the information has previously been provided to us in an MDT application file. I note that the removal of these questions from the survey will limit the extent to which I can report on the experience of NSWPF workers.

Nevertheless, noting that by this time over 6 months had elapsed since we first asked for the survey to be distributed, we ultimately decided to accept the Police Commissioner's conditions to the distribution of the survey so that we could proceed.

The amended survey was considerably less informative than originally proposed. The Commissioner of Police would also not agree to any survey question that would give workers an opportunity to include a 'free-text' response. (One respondent worker subsequently contacted us to state that this should have been made available to them).

When the same (originally proposed) survey was provided to CSNSW in October 2023, it indicated support for distributing the survey by email, and we received further correspondence shortly after anticipating that the survey would be distributed.

However, on 24 March 2024 we were advised that the survey would not be distributed and that we would have to apply for approval from CSNSW's Ethics Committee before the survey could be undertaken.

Following further correspondence from the Ombudsman to the Acting Commissioner of Corrective Services, approval was eventually given on 19 April 2024 to distribute the survey with some amendments (these amendments were different to those in the NSWPF-limited survey).

There has been push back on other requests for information from the Ombudsman

There was another occasion when we sought information from agencies which was refused to us on the asserted ground that the information requested was outside the scope of s 36 of the MDT Act. This concerned our request for information arising from our observation that BluePortal contained blood test results.

We issued a requirement for the NSWPF to provide us with information about how those blood test result documents had been obtained and uploaded on the system and who had access to them, and we asked, 'If the documents were uploaded contrary to s 29 of the MDT Act, what action if any the NSWPF intends to take'.

In response, the NSWPF said:

> It is the position of the NSWPF that this question is outside the purview of the Ombudsman's role in monitoring the operation and administration of the MDT Act. It is not the role of the Ombudsman to determine whether there has been a breach of s 29 MDT Act (noting that there is a distinction between use and disclosure in the context of personal/health information) – in circumstances of breach this is to be dealt with summarily before the Local Court, and individuals have corresponding rights of protection regarding representation, presumption of innocence and limits on self-incrimination.
>
> Regardless, the NSWPF is also subject to its own independent overseeing body, being the Law Enforcement Conduct Commission.[376]

This response was received on 29 September 2024, 3 months after our requirement to produce the information was sent on 28 June 2024. As suggested by the NSWPF, we have referred this matter to the LECC.

[376] Letter from Commissioner Karen Webb APM, 29 September 2024.

16.4 Increasing transparency about the operation of the MDT scheme

Going forward, the Act provides for the Ombudsman to report only every 3 years on its monitoring of the MDT scheme

Following this report, the MDT Act provides for us to prepare a report of our monitoring of the operation and administration of the Act only every 3 years, meaning that our next report will not be until the beginning of 2028.

We note that several submissions we received criticised the current lack of such public-facing MDT data, which impedes the visibility of the scheme to stakeholders and their ability to make meaningful comment.[377]

We consider that it would be useful and in the public interest for us, going forward, to publish, at least annually, a report on our monitoring including non-identified, non-health, statistical data on the operation of the MDT scheme. This would include the kind of data set out in the tables and charts in **chapter 2** of this report.

Although we do not consider that it is legally necessary to provide for this specifically in the Act, given the ostensibly strict non-disclosure provisions of the Act (s 29), for the avoidance of doubt we recommend that the MDT Act be amended to specifically provide for this annual reporting.

Recommendation 61

If the Act is to continue, that the Act be amended to provide that:

a. in addition to the full 3-yearly report required under the MDT Act, the Ombudsman is to include in its Annual Report under the Ombudsman Act a report on its monitoring activities during the year, and

b. this report may include deidentified, aggregated data, including demographic data, in relation to MDT applications and orders.

BOCSAR could also report MDT activity of the NSWPF on their public platform

From 14 October 2024 the NSW Bureau of Crime Statistics and Research (**BOCSAR**) began posting statistical information about the policing activities of the NSWPF, such as the number of searches conducted, move-on directions issued, bail and apprehended violence order compliance checks conducted and non-criminal domestic episodes.[378] To increase transparency about the use of the MDT scheme, consideration could be given to including basic data about the NSWPF's activity on this dashboard going forward.

Although the NSWPF is only one agency covered by the Act, given it is – and is expected to continue to be – the most prolific user of the MDT scheme, there would seem to be a public interest in transparency of its activity in this regard.

Recommendation 62

If the Act is to continue, NSWPF enter into an arrangement to provide BOCSAR with data on key MDT Act activities of the NSWPF that it can include in its NSW Policing activity dashboard, including information about the number of applications and orders made.

[377] NSW Bar Association (n 123); Legal Aid NSW (n 241); ACON, Submission to the NSW Ombudsman.

[378] Bureau of Crime Statistics and Research, *NSW Policing Activity* (Web Page) <https://policingactivitytool.bocsar.nsw.gov.au>.

Appendices

Appendix A – key terms and acronyms

Term	Definition
AMA	Australian Medical Association (NSW) Ltd
ASHM	Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine
Blood-borne disease	HIV infection, Hepatitis B, Hepatitis C or other blood-borne disease prescribed by the Regulation.
Blood-borne virus	Virus transmitted by blood or other specific bodily fluids that may contain the virus when they enter the body of a susceptible person
BWV	Body worn video
CHO	Chief Health Officer
CHO guidelines	Chief Health Officer Guidelines
Cognitive impairment	As defined under s 5 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, as follows: (1) a person has a cognitive impairment if— (a) the person has an ongoing impairment in adaptive functioning, and (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (2) or for other reasons. (2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons— (a) intellectual disability, (b) borderline intellectual functioning, (c) dementia, (d) an acquired brain injury, (e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder, (f) autism spectrum disorder.
CSNSW	Corrective Services NSW
MDT	Mandatory Disease Testing
MDT Act, the Act	*Mandatory Disease Testing Act 2021* (NSW)
MDT Regulation, the Regulation	Mandatory Disease Testing Regulation 2022 (NSW)
MDT application	Mandatory Disease Testing application
Mental health impairment as defined under s 4 *Mental Health and Cognitive Impairment*	Section 4 **Mental health impairment** (1) For the purposes of this Act, a ***person has a mental health impairment*** if— (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and

Term	Definition
Forensic Provisions Act 2020	(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person. (2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons— (a) an anxiety disorder, (b) an affective disorder, including clinical depression and bipolar disorder, (c) a psychotic disorder, (d) a substance induced mental disorder that is not temporary. (3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by— (a) the temporary effect of ingesting a substance, or (b) a substance use disorder.
MTO	Mandatory Testing Order
Non-vulnerable third party or non-vulnerable person	A third party other than a vulnerable third party.
Parliamentary Inquiry	'Parliamentary Inquiry' refers to the Inquiry conducted by the Legislative Council's Standing Committee on Law and Justice on the Mandatory Disease Testing Bill 2020. The report of which (Report 76, April 2021) is linked here.
PEP	Post-exposure prophylaxis. The word 'prophylaxis' means to prevent or control the spread of an infection or disease. PEP means taking HIV medicines within 72 hours (3 days) after a possible exposure to HIV to prevent HIV.
Relevant medical practitioner	A medical practitioner with qualifications or experience in blood-borne diseases, or if a medical practitioner with qualifications or experience in blood-borne diseases is not available at the time the worker requires a consultation under s 9 of the Act—another medical practitioner.
Senior officer	The senior officer for the worker who has applied for an MTO. They are set out in the table at the end of the Dictionary in the Act.
The NSWPF	The NSW Police Force
Third party	Individual in relation to whom an MDT application is made, for the purpose of seeking an order to have their blood tested.
Vulnerable third party or vulnerable person	A third party who is between 14 and 17 years, or an adult who appears to have a mental illness, a mental health condition or cognitive impairment that significantly affects their capacity to consent to voluntarily provide blood for testing.
Worker	Individual entitled to apply for an MTO. They are set out in a table in the Dictionary to the MDT Act.

Appendix B – detailed overview of the MDT Act

Who can apply for an MTO, and when?

The MDT Act allows 'workers' to apply for an MTO if they come into contact with the bodily fluid of a third party and that contact:

(a) occurred in the execution of the worker's duty,

(b) as a result of a deliberate action of the third party, and

(c) without the consent of the worker.[379]

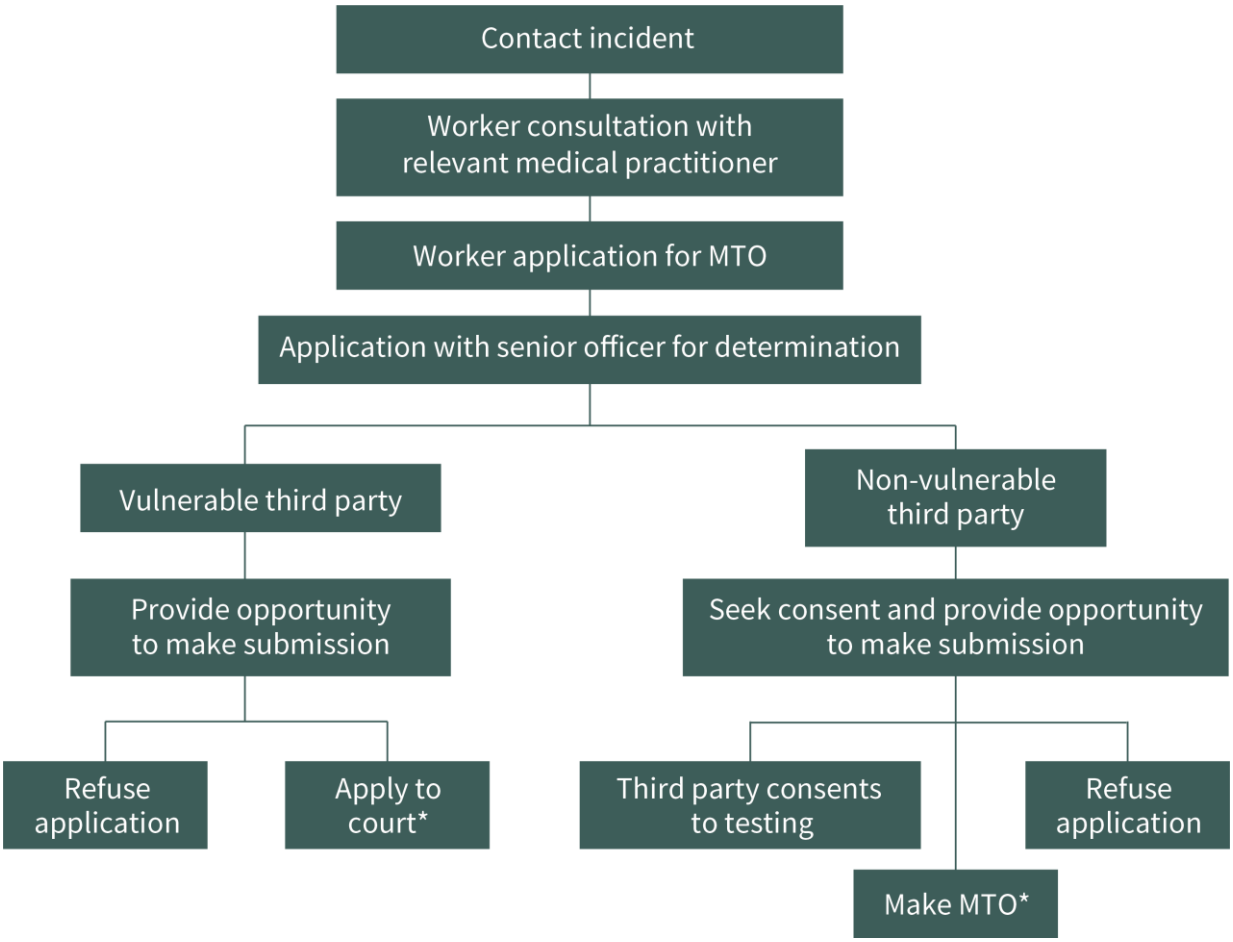
Under the Act, a 'worker' includes:

- members of the NSWPF
- correctional officers
- emergency services workers.[380]

'Deliberate act' is not defined in the Act.

The MTO process

Figure 16. MDT application process



[379] *Mandatory Disease Testing Act 2021* s 8(1).
[380] Ibid Dictionary (definition of 'worker').

As outlined in **figure 16** above, before the senior officer can determine an MDT application, they must consider whether the third party appears to be a vulnerable third party.[381]

Non-vulnerable third parties

If the third party is not a vulnerable third party, the senior officer must first seek their consent to voluntarily provide blood to be tested for blood-borne diseases.[382] They must also give the third party an opportunity to make submissions and consider any submissions received.[383] Submissions may be written or oral and given by audio or audio-visual means.[384]

If the third party does not consent to voluntarily provide blood, the senior officer can then determine the application by either making an MTO or refusing the application.[385] The senior officer cannot make an MTO if the third party has consented to voluntarily provide blood.[386] The senior officer may only make an MTO if satisfied that testing for blood-borne diseases is justified in all the circumstances.[387]

Vulnerable third parties

Under the MDT Act, a third party is a vulnerable third party if the third party has a mental health impairment or cognitive impairment that significantly affects their capacity to consent or is between the ages of 14 and 17 inclusive.[388]

If it appears to the senior officer that the third party is a vulnerable third party, the senior officer must provide them (and their parent or guardian, if relevant) with an opportunity to make submissions, and consider any submissions received.[389] The senior officer can then determine the application by deciding to apply to the court for an MTO or refusing the application.[390]

The court can only make an MTO if satisfied, on the balance of probabilities, that testing the third party's blood for blood-borne diseases is justified in all the circumstances.[391] When making a determination, the court must take into account the best interests of the vulnerable third party, the vulnerable third party's (and their parent or guardian's) wishes, submissions made by the CHO, and any other matters the court considers relevant.[392]

If during court proceedings it appears to the court that the third party is not a vulnerable third party, the court can continue to deal with the application as if the third party was a vulnerable third party.[393]

What happens once an MTO is made

Service of the order

MTOs made by a senior officer must be personally served on the third party as soon as reasonably practicable, and no later than 5 business days after the order is made.[394] MTOs made by the court must either be personally served on a third party by a registrar if the third party is present in court when the

[381] Ibid s 11(1).
[382] Ibid s 11(4).
[383] Ibid.
[384] Mandatory Disease Testing Regulation 2022 reg 5.
[385] *Mandatory Disease Testing Act 2021* s 11(1)(b).
[386] Ibid s 11(7)(a).
[387] Ibid s 11(7)(b).
[388] Ibid Dictionary (definition of 'vulnerable third party').
[389] Ibid s 11(3).
[390] Ibid s 11(1)(a).
[391] Ibid s 15(2).
[392] Ibid s 15(3).
[393] Ibid s 17.
[394] Ibid s 19(1).

order is made, or be given to the senior officer to personally serve on the third party within 5 business days, as well as posted to the third party.[395] Workers must not be involved in the service of MTOs.[396]

Testing of blood

Once an MTO is made and served, a person approved by the Health Secretary[397] may take blood from the third party, even if they do not consent.[398] Medical practitioners authorised by the worker and the third party receive results of the blood test on their behalf.[399] These results must be communicated to the medical practitioners as soon as reasonably practicable.[400] If the third party does not authorise a medical practitioner, the results of the blood test are given to the CHO.[401]

If an MTO is made in relation to a detained third party, law enforcement officers may transport the third party to and from the place where the blood will be taken and assist a person to take blood from the third party under the order.[402] The law enforcement officer may use reasonable force when carrying out these functions.[403]

The Act requires a pathology laboratory to test for the blood-borne diseases specified in the MTO.[404] A blood-borne disease is defined in the Act as a HIV infection, Hepatitis B, Hepatitis C, or other blood-borne disease prescribed by the Regulation.[405] There are currently no additional diseases prescribed.

The review process

Workers and third parties have rights of review in relation to applications and determinations of MTOs. A worker may apply to the CHO for a review if a senior officer refuses an application for an MTO.[406] A third party may apply to the CHO for a review if a senior officer makes an MTO.[407] Applications for review must be made in writing within 1 business day of the worker or third party being notified of the senior officer's decision.[408] An application for review may not be made of a senior officer's decision to apply to the court for an MTO for a vulnerable third party.[409]

Applications for review by a worker must include a copy of the original application by the worker, the blood-borne diseases to be tested, and a copy of the senior officer's determination and reasons.[410] An application by a third party must include a copy of the mandatory testing order, a copy of the third party's written submissions, and the blood-borne diseases to be tested.[411]

Once the CHO has determined the application for review, they must as soon as practicable give written notice to the worker, the third party (and the third party's parent or guardian if they are a vulnerable third party), the senior officer and the Ombudsman.[412]

[395] Ibid ss 19(2)-(3).
[396] Ibid s 19(4).
[397] This includes nurses, medical practitioners, and persons who take blood in the ordinary course of their employment, including phlebotomists: Chief Health Officer's Guidelines for the *Mandatory Disease Testing Act 2021*, p 12.
[398] *Mandatory Disease Testing Act 2021* ss 20(1) and 27(1).
[399] Ibid s 22.
[400] Ibid.
[401] Ibid s 22(1)(c).
[402] Ibid s 21(1).
[403] Ibid s 21(2)-(3).
[404] Ibid s 20(3).
[405] Ibid Dictionary (definition of 'blood-borne disease').
[406] Ibid s 23(1).
[407] Ibid s 23(3).
[408] Ibid ss 23(2) and (4)-(5).
[409] Ibid s 23(7).
[410] Ibid s 23(5); Mandatory Disease Testing Regulation 2022 reg 7(1); NSW Health (n 105).
[411] *Mandatory Disease Testing Act 2021* s 23(5); Mandatory Disease Testing Regulation 2022 reg 7(2); NSW Health (n 105).
[412] *Mandatory Disease Testing Act 2021* s 26.

If an application for review is made by a third party, the MTO continues to have effect, and the third party must continue to comply with the order.[413] This means that the third party must present themselves to a pathology laboratory and have their blood taken while the review is pending. However, the results of the blood tests are not to be communicated to the medical practitioners authorised by the worker and third party (or the CHO) until the CHO determines the review.[414]

Applications for review must be determined within 3 business days of receipt of the review application, by either affirming or setting aside the original decision.[415]

In determining a review of a decision to refuse the application by the senior officer, the CHO must provide the third party (and their parent or guardian, in the case of a vulnerable third party) with an opportunity to make submissions and take those submissions into account.[416] The CHO may also require the senior officer to provide any relevant material, including the material the senior officer relied on to make the decision.[417]

If a request for a review by a third party is successful, the results of the blood test are not communicated to the medical practitioner authorised by the worker to receive the results but are still communicated to either the medical practitioner authorised by the third party, or the CHO where no practitioner is authorised.[418]

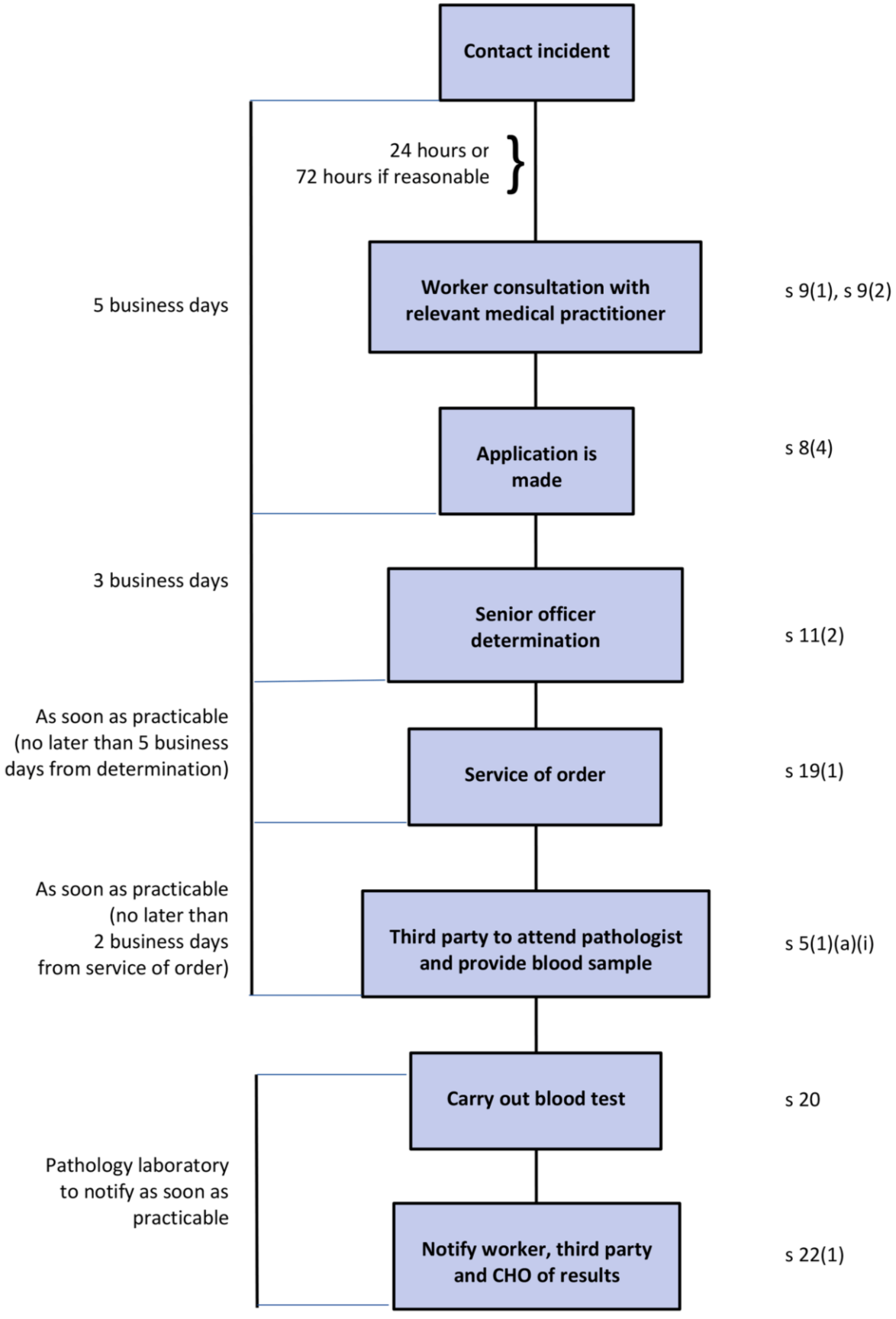
Penalties

The MDT Act creates 3 offences:

- **Failure to comply with MTO:** A third party who does not comply with an MTO, without reasonable excuse, is guilty of an offence and subject to a maximum penalty of 100 penalty units or imprisonment for 12 months, or both.[419]
- **Providing false or misleading information**: If a worker or third party provides a senior officer, or any other person exercising functions under the MDT Act,[420] information they know to be false or misleading they are guilty of an offence and subject to a maximum penalty of 100 penalty units or imprisonment for 12 months, or both.[421]
- **Unlawful disclosure of information**: It is an offence to disclose information obtained in connection with the administration or execution of the MDT Act, unless that disclosure is permissible under s 29. That section provides that information may be disclosed in certain circumstances – see **section 15.2** for more detail. Unlawful disclosure is subject to a maximum penalty of 100 penalty units or imprisonment for 12 months, or both.[422]

[413] Ibid s 24(1).
[414] Ibid s 24(2).
[415] Ibid s 25(1).
[416] Ibid s 25(4).
[417] Ibid s 25(3).
[418] Ibid s 24(2)-(3).
[419] Ibid s 27.
[420] This includes, for example, the CHO when exercising its review function and the Ombudsman when exercising its monitoring and reporting functions.
[421] *Mandatory Disease Testing Act 2021* s 28.
[422] Ibid s 29.

Timeframes set out by the Act



Appendix C – methodology and limitations

Scope

The operation and administration of the MDT Act, including the exercise of functions conferred on persons or bodies under the Act.

Information sources

Notifications

Notifications are required to be made by a senior officer when a determination is made under the MDT Act. The CHO must also notify us when a review of an MDT determination is completed.[423]

Notifications were received from CSNSW and NSW Ambulance by correspondence or email, with advice about the determination made and a package of supporting documents. Notifications were provided by NSWPF by way of automated email notifications via BluePortal. NSWPF notifications include information about what determination was made on an MDT application and listing the relevant requirements of the Act that were determined to apply. We did not receive a notification from any other agency.

To date, the CHO has only determined 1 application for review. This notification was received by email, with supporting documents.

Inquiries of agencies

We met with a number of agencies over the course of furnishing this report, including with relevant agencies to which the Act applies to explain our role and obtain information from them about their implementation of the Act.

We made further information requests to agencies about their systems, policies and training for exercising functions under the Act, in line with the powers conferred to the Ombudsman under the Act for the purposes of monitoring the operation of the Act.[424] Documents and information sought from agencies related to MDT applications and outcomes during the first 18 months of the Act's commencement, including:

- MDT applications made during the reporting period
- police reports of exposure incidents which resulted in MDT applications
- written medical advice provided in support of each application
- consent forms signed by third parties
- submissions made by third parties to a senior officer
- a sample of BWV taken by the NSWPF in exercising functions under the Act
- demographic information about third parties subject to an MTO.

Submissions

Relevant agencies both internal and external to the NSW Government were afforded the opportunity to make a submission to our monitoring (currently advertised on our website),[425] including for the purpose of this report. This included direct invitation to targeted stakeholder organisations and social

[423] Ibid ss 13 and 26.

[424] Ibid s 36.

[425] NSW Ombudsman, *Inviting Submissions on the operation of the Mandatory Disease Testing Act* (Web Page, 24 August 2023) <https://www.ombo.nsw.gov.au/about-us/news-events/news/inviting-submissions-on-the-operation-of-the-mandatory-disease-testing-act>.

media campaigns and distribution of leaflets to targeted stakeholder organisations seeking submissions from persons who may have been subject to MTOs.

Worker survey

We also conducted a survey of workers who had made an MDT application during the 18-month reporting period. We received 23 responses from NSWPF officers and 7 from CSNSW staff.

Submissions from agencies on draft report

We provided agencies with an opportunity to respond to draft material in this report about our observations of the operation of the MDT Act. We provided consultation draft material to the NSWPF, CSNSW, the CHO, and NSW Health Pathology and invited any comment or feedback.

The feedback from the NSWPF and CSNSW are attached at **appendix F** and **appendix G**. Feedback from the CHO and NSW Health is referenced in this report.

Limitations

No NSW agency currently collates blood test results obtained subject to MTOs. This means that we are unable to identify how many blood-borne diseases have been contracted or avoided during the reporting period of this report.

The Ombudsman is empowered under the Act to require only information relating to an application for an MTO. This means that we could not require information about matters which did not result in an application being made.

The Ombudsman is empowered under the Act to require information only from the Commissioner of Police and the senior officer from other MDT agencies. This significantly reduced our ability to gather information (for example, to undertake a worker survey, as discussed below).

Most MDT agencies did not keep records on matters we considered relevant to the monitoring and review of the MDT Act.

We received significant opposition to our interest in undertaking a survey of workers who had made an MDT application. The opposition resulted in a rough delay of 6 months in disseminating the survey.

We received no responses to our invitation for submissions from persons subject of MDT applications or MTOs. However, some of the submissions we referred to (see **appendix D**) referenced the experiences of persons directly affected by mandatory disease testing.

Appendix D – submissions

The following submissions were received and considered in the preparation of this report.

	Date received	Organisation
1.	9/11/2023	ACON Health Limited (previously known as the AIDS Council of NSW)
2.	14/11/2023	Aboriginal Legal Service (NSW/ACT) Limited
3.	3/11/2023	Australian Medical Association (NSW)
4.	12/09/2023	Dr Bruce Baer Arnold Associate Professor, CELTS Fellow, Canberra Law School; Faculty of Business, Government & Law, University of Canberra
5.	14/11/2023	Hepatitis New South Wales
6.	30/10/2023	Law Society of New South Wales
7.	17/11/2023	Legal Aid NSW
8.	19/12/2023	National Association of People with HIV Australia (NAPWHA)
9.	31/10/2023	New South Wales Bar Association
10.	9/11/2023	New South Wales Council for Civil Liberties
11.	30/10/2023	New South Wales Users and AIDS Association (NUAA)
12.	19/12/2023	Police Association of New South Wales (PANSW)
13.	14/11/2023	Positive Life New South Wales
14.	25/10/2023	Pride in Protest
15.	31/10/2023	Public Service Association of New South Wales (PSA)

Appendix E – advice from the Crown Solicitor's Office

Sensitive: Legal

Crown Solicitor's Office

ADVICE

OPERATION AND EFFECT OF MANDATORY DISEASE TESTING ACT 2021

Executive summary

1. I am asked to advise the NSW Ombudsman (the Ombudsman) on questions about the operation and effect of the *Mandatory Disease Testing Act 2021* (the Act).

Question 1: Circumstances relevant to determining whether a MTO is "justified in all the circumstances" (s 11(7)(b))

2. The Act makes provision generally for what a senior officer must consider. Beyond that, the circumstances relevant to determining whether a mandatory testing order (MTO) is "justified in all the circumstances" are necessarily application-specific, as informed by the provisions and objects of the Act. There are, however, legal limits on the exercise of the senior officer's power, in accordance with established administrative law principles. I illustrate these by applying them to a senior officer's consideration of the concerns of the worker.

Question 2: Information a senior officer must have before them to be satisfied under s 11(7)(b)

3. The Act does not prescribe any information which must be considered by a senior officer for the purpose of forming a view under s 11(7)(b). However, in determining an application generally, a senior officer must consider: the application itself (which is required to contain certain information); any consent of the third party to provide blood; any submissions of the third party; the guidelines issued by the Chief Health Officer under s 33; and any other matters the senior officer considers relevant (including an incident report).

Question 3: Is it unlawful for the senior officer to make a MTO without sufficient information, as specified in question 2?

4. Where a senior officer makes a MTO and fails to take into account a mandatory consideration, the decision will be invalid if the matter in question was not "so insignificant that the failure to take it into account could not have materially affected the decision". Where a senior officer makes a MTO, taking into account each mandatory consideration, but there is some doubt as to whether the information before the senior officer was sufficient, the decision might be impugned on the basis that it was legally unreasonable, resulting in invalidity. Both assessments turn on the facts of a specific case.

Prepared for: OMB454 Office of the Ombudsman
Client ref: Isla Miller ADM/2022/299
Author: Alexander Kiefer/Elizabeth Daley/Jeremy Southwood Date: 25 July 2024

Sensitive: Legal

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Question 4: Consequences of a third party consenting after application is made

5. A senior officer would not have power to make a MTO if satisfied that the third party will voluntarily provide blood to be tested. I prefer the view that the senior officer, even if so satisfied, would still need to determine the application by refusing it.

6. It is not clear from the Act whether the senior officer would still need to comply with s 11(4)(b) and (5). A safer approach would be for the senior officer to (a) seek consent and invite submissions at the same time and to consider any submissions if provided, and (b) be familiar with the guidelines and any incident report (and to note this in their decision). The senior officer would not need to separately consider whether they are satisfied of s 11(7)(b), in circumstances where the third party has consented to provide blood.

7. On the above view, the requirement to notify the Ombudsman would still be triggered (s 13(d)), and a blood sample obtained by consent would not be obtained under a MTO (since no MTO would have been made).

Question 5: Construction of "deliberate action" in s 8(1)(b)(ii) and relevant factors

8. I think "deliberate action" essentially means an intentional act. Although the matter is not free from doubt, I prefer a broader view of the provision, that there only need be some causal connection between a "deliberate action" of the third party and the contact.

Analysis

The Act

9. The long title to the Act explains that it is:

> An Act to provide for 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.

10. Section 5 defines the concept of a MTO. Such an order (s 5(1)):

    (a) requires the third party in relation to whom the order is made to—

        (i) attend the place specified in the order as soon as practicable but no later than 2 business days after being served with the order, and

        (ii) provide the third party's blood to be tested for blood-borne diseases, and

    (b) authorises the third party's blood to be tested for the blood-borne diseases specified in the order.

11. Subsection (2) provides that a MTO may be made by:

    (a) a senior officer for the worker concerned under Part 3, or

    (b) the Court under Part 4, or

    (c) the Chief Health Officer under Part 7.

12. This advice concerns only the making of a MTO by a senior officer under pt 3.[1] I note, by way of context, that a MTO can only be made by the Court on an application by a senior officer or the Chief Health Officer (where the subject of the order appears to be a "vulnerable third party"[2]: see ss 14(1) and 15(1)). A MTO can only be made by the Chief Health Officer on an application for review of a senior officer's decision under pt 3 (see s 23(1)–(4)).

13. Part 2 regulates applications for MTOs. Section 8 sets out the circumstances in which a "worker"[3] may make an application. Section 8(1) provides:

> (1) A worker may apply for a mandatory testing order in relation to a person (the *third party*) if—
>
> (a) the worker has come into contact with the bodily fluid[4] of the third party, and
>
> (b) the contact occurred—
>
> (i) in the execution of the worker's duty, and
>
> (ii) as a result of a deliberate action of the third party, and
>
> (iii) without the consent of the worker.

14. Section 8(2)-(4) prescribe further parameters for the making of an application for a MTO. Relevantly, s 8(3) provides that, in order to make an application, the worker must have consulted a "relevant medical practitioner"[5] in accordance with s 9 of the Act.

15. Section 9 is titled "Consultation with a medical practitioner". It provides that consultation for the purposes of s 8(3) must occur "as soon as reasonably practicable but no later than 24 hours after the contact occurred" (s 9(1)). It may, however, occur up to 72 hours after the contact occurred "if reasonable in the circumstances" (s 9(2)). The practitioner must inform the worker of certain matters during the consultation, including "the risk to the worker of contracting a blood-borne disease from the third party as a result of the contact" and "the extent to which testing the third party's blood for blood-borne diseases will assist in assessing the risk to the worker of contracting a blood-borne disease" (s 9(3)).

16. Section 10 regulates the form of and content of an application for a MTO. An application:

[1] The "senior officer" for a worker is specified in a Table at the end of the Dictionary (see s 4) in the Act. The Table is arranged by Worker types and then lists corresponding senior officers and funding providers.

[2] Defined in the Dictionary (see s 4) as "a third party 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." Note s 17 provides that even if it appears to the Court, during proceedings relating to an application to it for an MTO, that the third party is not a vulnerable third party, "the Court may continue to deal with the application as if the third party was a vulnerable third party".

[3] Defined in the Dictionary (see s 4) as "a worker specified in the Table at the end of this Dictionary".

[4] Defined in the Dictionary (see s 4) as "blood, faeces, saliva, semen or other bodily fluid or substance prescribed by the regulations".

[5] Defined in the Dictionary (see s 4) as "(a) a medical practitioner with qualifications or experience in blood-borne diseases, or (b) if a medical practitioner with qualifications or experience in blood-borne diseases is not available at the time the worker requires a consultation under section 9—another medical practitioner."

(a) must be in writing (s 10(1));

(b) must contain the matters listed in s 10(1)(a)–(i), including the name and contact details of the medical practitioner consulted under s 9 and a copy of any written advice from the medical practitioner;

(c) must contain a statement of consent, as described in s 10(2); and

(d) may (but it appears need not) also contain information about whether or not it appears to the worker that the third party is a vulnerable third party (s 10(3)).

17. Part 3 is headed "Determination of applications for mandatory testing orders". Section 11, which is central to this advice, provides:

> (1) A senior officer is to determine an application for a mandatory testing order by—
>
> (a) if it appears to the senior officer, on the information available, that the third party is a vulnerable third party—
>
> (i) deciding to apply to the Court for a mandatory testing order, or
>
> (ii) refusing the application, or
>
> (b) if it does not appear to the senior officer, on the information available, that the third party is a vulnerable third party—
>
> (i) making a mandatory testing order, or
>
> (ii) refusing the application.
>
> (2) The senior officer must determine an application within 3 business days after receiving the application, unless a longer period is necessary in the circumstances.
>
> (3) Before determining an application under subsection (1)(a), the senior officer must—
>
> (a) provide the third party and the third party's parent or guardian, if any, with an opportunity to make submissions, and
>
> (b) consider the submissions received.
>
> (4) Before determining an application under subsection (1)(b), the senior officer must—
>
> (a) seek the third party's consent to voluntarily provide blood to be tested for blood-borne diseases, and
>
> (b) provide the third party with an opportunity to make submissions and consider the submissions received.
>
> (5) In determining an application, the senior officer is to consider—
>
> (a) the guidelines issued by the Chief Health Officer under section 33, and
>
> (b) other matters the senior officer considers relevant, including a report made in relation to the incident during which the contact occurred.
>
> (6) The senior officer may decide to apply to the Court for a mandatory testing order for a vulnerable third party only if satisfied that testing the third party's blood for blood-borne diseases is justified in all the circumstances.
>
> (7) The senior officer may make a mandatory testing order for a third party only if satisfied that—

(a) the third party will not voluntarily provide blood to be tested for blood-borne diseases, and

(b) testing the third party's blood for blood-borne diseases is justified in all the circumstances.

18. A senior officer may refuse an application if they cannot locate the relevant third party "after making reasonable inquiries" (s 12(1)), or "on other grounds the senior officer considers appropriate in the circumstances" (s 12(2)). "As soon as practicable after determining an application", the senior officer is required to give written notice of their determination and reasons to the worker, the third party (unless they cannot locate them), the Ombudsman and – if the third party appears to be a vulnerable party – the third party's parent or guardian (if any) (s 13).

Relevant administrative law principles

19. Two forms of legal error recognised at common law are relevant to this advice. First, what are known as "relevancy grounds". [6] Second, what is known as "legal unreasonableness".

20. Aronson, Groves and Weeks, in their leading text on judicial review, observe that, although the "relevancy grounds" "are often described as 'taking an irrelevant consideration into account' and 'failing to take a relevant consideration into account'", those grounds "should not be read literally".[7] Rather, the grounds should be read in terms of considerations that an Act prohibits (prohibited or forbidden considerations) and considerations that an Act requires (mandatory considerations).[8] In this way, the initial question is one of statutory construction, to identify what considerations are required or prohibited by the Act.[9] Only then can an assessment be made as to whether a decision-maker has taken into account a consideration prohibited by the Act, or whether they have failed to consider something that the Act required them to consider.

21. A decision that is legally unreasonable is often described as one which goes beyond the boundaries of legal reasonableness, in the sense that it "lacks an evident and intelligible justification"[10] or does not "fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law".[11] Those boundaries are informed by reference to the terms, scope and objects of the statute, and reflect the limits of the statutory authority conferred on the decision-maker.[12] The High Court has also held that

[6] A grouping label used in Aronson M, Groves M, Weeks G, *Judicial Review of Administrative Action and Government Liability*, 7th ed, 2022, Lawbook Co, at [6.80] p 281 (Aronson).

[7] Aronson, at [6.80]-[6.90] p 281-282.

[8] Aronson, at [6.80]-[6.90] p 281-282. See eg *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39 (Mason J).

[9] See Aronson, at [6.100]; *Peko-Wallsend*, at 39-40 (Mason J).

[10] See eg *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*) at [66] and [76] (Hayne, Kiefel and Bell JJ).

[11] *Li* at [105] (Gageler J).

[12] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 (*SZVFW*) at [12] (Kiefel CJ), [54], [59] (Gageler J), [79] (Nettle and Gordon JJ), [131], [134] (Edelman J). See also Aronson, at 274.

the principle operates not only at the level of overall discretionary powers but also at the level of processes informing the exercise of those powers.[13]

22. It does not automatically follow from establishing any form of legal error that the affected decision would be invalid.[14] In the context of the relevancy grounds, invalidity will not follow where the consideration in question is "so insignificant that the failure to take it into account could not have materially affected the decision".[15] This is known as the threshold of materiality. A breach is only material to a decision "if compliance could realistically have resulted in a different decision".[16] In the context of legal unreasonableness, a requirement of that kind has been regarded as built in.[17]

Question 1: Circumstances relevant to determining whether a MTO is "justified in all the circumstances" (s 11(7)(b))

23. The Act does not prescribe any information which must be considered by a senior officer specifically for the purpose of forming a view under s 11(7)(b). However, as the purpose of s 11(7) is to identify the circumstances in which a senior officer is authorised to make a MTO, I think it follows that the matters that must be considered for the purposes of forming that view are the same as matters that must be considered by the senior officer in determining an application under s 11 more generally.

24. The Act does prescribe, either explicitly or implicitly, information that must be taken into account by a senior officer in determining an application under s 11, as follows:

    (a) I think it is implicit that a senior officer must consider information contained in the application for an MTO. As noted above, this includes any written advice provided by the medical practitioner consulted under s 9.

    (b) Section 11(3) and (4) provide that a senior officer must consider any submissions provided by the third party in relation to the application.

    (c) I think it is implicit in s 11(4) (read with s 11(7)(a)) that, in relation to a third party who is not a vulnerable third party, a senior officer must consider whether the third party consents to provide blood.

    (d) Section 11(5) provides that a senior officer must consider, in determining an application, the guidelines issued by the Chief Health Officer under s 33 (the guidelines) and "other matters the senior officer considers relevant, including" (that

[13] See Aronson, at 275, citing *Li* and *SZVFW*. See eg Gageler J's reference in *SZVFW* at [55] to "a decision which has been made in fact" being "beyond statutory authority because of unreasonableness … in the purported exercise of some other power in the statutory procedure which led to the making of the decision".

[14] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at [91]-[93] (McHugh, Gummow, Kirby and Hayne JJ).

[15] *Peko-Wallsend*, at 40 (Mason J). See also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, at [30] (Kiefel CJ, Gageler and Keane JJ).

[16] *Minister for Immigration and Border Protection v SZMTA (*2019) 264 CLR 421 at [45] (Bell, Gageler and Keane JJ).

[17] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 (*MZAPC*) at [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

is, by way of non-exhaustive example) "a report made in relation to the incident during which the contact occurred".

25. Section 11(5)(b) confers a degree of latitude on a senior officer to consider matters that they consider relevant. Beyond identifying the above mandatory considerations, I am unable to advise exhaustively on the circumstances that will be relevant to a senior officer's consideration of whether "testing the third party's blood for blood-borne diseases" is "justified in all the circumstances". The relevant circumstances are necessarily application-specific. It is also a matter for the senior officer to consider what weight they give to various circumstances in a particular case.

26. There are, however, legal limits on the exercise of the senior officer's power, in accordance with standard administrative law principles. Most relevantly for the purposes of this question, in addition to taking into account all mandatory considerations, the senior officer must not take into account any prohibited considerations and the senior officer's decision under s 11(7)(b) must not be legally unreasonable. I turn now to consider the application of these principles to a senior officer's consideration of the concerns of the worker.

Alleviating concerns of a worker

27. I am instructed that there have been occasions where a senior officer has made a MTO despite medical evidence indicating that the risk of transmission of blood borne diseases is low. I am also instructed there have been occasions where a senior officer has made a MTO in the absence of medical evidence, based solely on non-medical considerations such as alleviating the concerns of the worker. My instructions query whether the fact that a MTO would alleviate the concerns of the worker is, of itself, a sufficient basis for a senior officer to be satisfied that making a MTO is justified in all the circumstances. I make the following observations in relation to this issue.

28. First, I do not consider the concerns of the worker to be an irrelevant (or prohibited) consideration. I have not identified anything in the Act which would indicate that the broad authority to consider any "other matters the senior officer considers relevant" could not extend to the concerns of the worker. To the contrary, the objects of the Act expressly include protecting and promoting the health and wellbeing of workers (s 3(c)). Further, the guidelines, which the senior officer is required to consider (s 33(5)(a)), recognise worker concerns as a relevant factor – by listing the psychological impact on the worker as a factor that senior officers should consider.[18]

29. Second, in light of the above, I think it is clear that a senior officer would not exceed the limits of the statutory authority conferred by s 11 merely by taking into account the concerns of the worker. However, whether a particular decision which takes into account such concerns would nonetheless be legally unreasonable must be assessed on a case-by-case basis. Whether or not the decision lacks justification can only be assessed by

[18] NSW Health, *Chief Health Officer's Guidelines for the Mandatory Disease Testing Act 2021,* issued July 2022, at [3.3.4] 10.

reference to the specific circumstances of that case, which might include, for example, the level of risk of transmission, the particular nature of the worker's concerns, and the effect of those concerns on the health and wellbeing of the worker. This may not be a straightforward evaluative exercise. As the guidelines state at [3.3.4], "senior officers should also be aware that a third party's test result indicating the presence of one or more [blood borne viruses] may create stress and anxiety to the worker even where there is no, very low or low risk of … transmission".

30. Third, while I can only consider this matter in general terms for present purposes, it could be argued that a decision to make a MTO based purely on alleviating worker concerns, in circumstances where the medical evidence indicates that there is no risk of transmission and there are no other factors supporting the making of a MTO, would be legally unreasonable. In this respect, I note that one of the objects of the Act is to provide for mandatory blood testing of a person in circumstances where, relevantly, "the worker is at risk of contracting a blood-borne disease as a result of the person's deliberate action" (s 3(a)(ii)).

31. While s 11 does not itself require a senior officer to be satisfied that there is some risk of transmission, a worker is required under s 9 to consult a medical practitioner about the risk of transmission and to include the contact details of the medical practitioner and a copy of any written advice as part of an application under s 10. In addition, the senior officer is required to consider any report in relation to the incident during which the contact occurred (s 11(5)(b)). The guidelines also contain information about the estimated risk of transmission by reference to particular types of contact and bodily fluid. They state, at [3.3.2], that the "[blood borne virus] status (either positive or negative) of the third party will generally have no effect on the clinical management of the worker in scenarios with no, very low or low … transmission risk". Taken together, this raises a question as to whether a MTO would be "justified in all the circumstances" if there is no risk of transmission.

32. However, given it is not possible in the abstract to advise conclusively in relation to the validity of a decision to make a MTO, the above comments are necessarily general. I do not think it could safely be stated that a MTO could not ever be justified "in all the circumstances" of a particular case despite the absence of any transmission risk.

Question 2: Information a senior officer must have before them to be satisfied under s 11(7)(b)

33. As outlined above, s 11(7)(b) does not prescribe particular information as needing to be before a senior officer, in order for them to be satisfied that testing is justified in all the circumstances. There are, however, particular documents that a senior officer is required to consider in determining the application: the application itself (which is required to contain certain information); any consent of the third party to provide blood; any submissions of the third party (s 11(3)(b) and (4)(b)); the guidelines and any incident report (s 11(5)). Beyond these documents, a senior officer has broad authority to consider any other matter the senior officer considers relevant (s 11(5)(b)).

Question 3: whether it is unlawful for the senior officer to make a MTO without sufficient information, as specified in question 2

34. I note at the outset that a MTO cannot be made unless the senior officer is satisfied that testing the third party's blood is justified in all the circumstances. If the senior officer is not so satisfied on the basis of the material before them, they are required by the Act to refuse the application. I turn now to consider the two contexts in which the "sufficiency" of the material before the senior officer may be called into question.

35. As outlined in answer to questions 1 and 2, the Act requires a senior officer to take certain matters into account in deciding whether to make a MTO under s 11.

36. In circumstances where a senior officer makes a MTO and fails to take into account one of those matters, the senior officer would breach a condition of the statutory power conferred by s 11. As noted above at [22], the High Court has recognised that not every error of law will invalidate an exercise of statutory power. Whether (and, if so, when) non-compliance with a statutory condition will result in a decision which exceeds the limits of the decision-making authority is a question of statutory construction. However, a statute is ordinarily to be interpretated as incorporating a threshold of materiality in the event of non-compliance.[19] Accordingly, whether or not the decision to make a MTO would be invalid would depend on whether the matter in question was "so insignificant that the failure to take it into account could not have materially affected the decision". This would have to be assessed by reference to the facts of the particular case.

37. In circumstances where a senior officer makes a MTO and takes into account each of those matters, but there is some doubt as to whether the information before the senior officer was sufficient to support the making of a MTO, the decision could be challenged on the basis that it was legally unreasonable.[20] If error of that kind were made out, then the decision to make a MTO would be invalid (see above at [22]). Again, however, this would have to be assessed by reference to the facts of the particular case. It is unlikely to be safe to proceed on the basis that such a MTO is invalid, absent a declaration to that effect by a court.

Question 4: Consequences of a third party consenting after application is made

38. I am asked a number of questions concerning a scenario where a third-party consents to voluntarily providing blood for testing, after a MTO application has been made. In advising on this question, I assume that the third party does not appear to the senior officer to be a vulnerable third party (see s 11(1)(a)).

[19] See *MZAPC*, at [30]-[32] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

[20] I note that insufficiency of evidence is not a standalone legal error of the kind that may ground an application for judicial review, but it may demonstrate other forms of legal error: see, generally, *Judicial Review of Administrative Action and Government Liability*, [5.280] p 257.

(a) & (b) Must the application be determined, and can it be withdrawn by the worker or senior officer? If a determination must be made, what is the appropriate determination?

39. A senior officer would not have power to make a MTO if satisfied that the third party will voluntarily provide blood to be tested, because they would necessarily not be able to reach the state of satisfaction required by s 11(7). For the following reasons, however, I prefer the view that the senior officer would still need to determine the application. The appropriate determination would be to refuse the application.

40. First, I think it is clear that s 11(1) and (2) impose an obligation on a senior officer to determine an application. That obligation arises once an application has been submitted in compliance with ss 8-10. The senior officer must carry out the obligation within three business days after receipt, unless a longer period is necessary in the circumstances.

41. Second, s 11(1) exhaustively prescribes the determinations which can be made by a senior officer in relation to an application. A senior officer has a binary choice. If the third party appears to be a vulnerable third party, the senior officer "is to determine" the application by deciding to apply to the Court for a MTO or by refusing the application (s 11(1)(a)). If the third party does not appear to be a vulnerable third party, the senior officer "is to determine" the application by making a MTO or by refusing the application (s 11(1)(b)).

42. Third, as noted above, a senior officer is only authorised to make a MTO if satisfied of the matters in s 11(7), including that the third party "will not voluntarily provide blood to be tested for blood-borne diseases". Section 12(2) then provides that a senior officer may refuse an application "on other grounds the senior officer considers appropriate in the circumstances". This would clearly encompass, in my view, a decision to refuse an application on the basis that the third party will voluntarily provide blood.

43. Finally, the Act does not expressly provide for the withdrawal of an application or the consequences of withdrawal for the decision-making process. While I think it would be open to a worker to notify the senior officer that the worker no longer seeks a MTO, I doubt that the senior officer would, in those circumstances, be impliedly relieved of the duty to make a determination under s 11(1). In particular, I note that a determination triggers a requirement to notify the worker, the third party and the Ombudsman (s 13(1)(a)–(b), (d)).[21] The requirement to notify the Ombudsman of all determinations facilitates the effective exercise of the Ombudsman's oversight functions (see s 36). In circumstances where a senior officer refuses an application based on consent, the Ombudsman might wish to consider (for example) whether there was any indication that the third party was a vulnerable third party. Relieving the senior officer of their obligation to determine the application might thus impair the Ombudsman's statutory oversight role. Absent clear language to the contrary, Parliament should not be taken to have intended that result.

[21] Paragraph (c) requires notification of the third party's parent or guardian, if any, if the third party appears to the senior officer to be a vulnerable third party.

(c) Where consent has been given, must the senior officer still comply with ss 11(4)(b), (5) and (7)(b)?

44. A vulnerable third party cannot consent to the making of a MTO by a senior officer (see s 11(1)(b), (3) and (6)). Accordingly, in answering this question, I will proceed on the basis that the relevant third party is not a vulnerable third party.

45. It is not clear from the Act whether, in circumstances where a third party has consented to provide blood, the senior officer must nonetheless comply with ss 11(4)(b) and (5). I note that these provisions do not expressly relieve a senior officer of the obligation to invite and consider submissions (if provided) and to consider the guidelines and any other relevant material (including an incident report). However, a senior officer *cannot* make a MTO if the third party consents to provide blood. This means that there could not be anything else in the material before the senior officer capable of leading them to make a MTO. In practical terms, therefore, I doubt that the senior officer could commit a material error (thereby invalidating the decision) by failing to consider the matters in s 11(4)(b) and (5), where consent has been given. Nonetheless, a safer approach would be for the senior officer to (a) seek consent and invite submissions at the same time and to consider any submissions if provided, and (b) be familiar with the guidelines and any incident report (and to note this in their decision).

46. Turning to s 11(7)(b), if a senior officer is satisfied that the third party will voluntarily provide blood to be tested, they need not separately consider whether they are satisfied of s 11(7)(b). The third party's consent alone prevents the senior officer from making a MTO.[22]

(d) Impacts on the Ombudsman's notification obligation arising?

47. On the above view, there would be no adverse effect on the Ombudsman's ability to exercise its oversight functions, because a determination would still need to be made by the senior officer. This would trigger the notification requirement in s 13(d) of the Act.

(e) Is a blood sample obtained by consent "obtained under a mandatory testing order"?

48. On the above view, where the third party consents, the senior officer could not be satisfied that the third party does not so consent, and so could not make a MTO. Accordingly, a blood sample obtained by such consent would not be obtained under a MTO, because no MTO would have been made.

Question 5: Construction of "deliberate action" in s 8(1)(b)(ii) and relevant factors

49. I am asked what is meant by "deliberate action" in s 8(1)(b)(ii) of the Act, and if there are factors that a senior officer should consider to be satisfied that there was a deliberate

[22] There may be circumstances where a senior officer may be able to delay making a determination until the third party voluntarily provides blood in accordance with the consent that has been given.

action. I am unable to advise exhaustively on the outer limits of the expression, although I can provide the following general guidance. Consistently with the present approach of the High Court to statutory construction, I will consider the text of s 8, in view of the context and purpose of the provision and the Act more broadly.[23]

50. Starting with the text and immediate context, I note that s 8 sets out the circumstances in which a worker may make an application for a MTO in relation to a third party. Relevantly, a worker may make an application if the worker has come into contact with the bodily fluid of the third party and the contact occurred "as a result of a deliberate action of the third party" and "without the consent of the worker" (s 8(1)).

51. I turn then to the natural and ordinary meaning of the expression "deliberate action",[24] noting it is not defined in the Act. The Macquarie Dictionary relevantly defines "deliberate" as "carefully weighed or considered; studied; intentional", and "action" as "something done; an act; deed".[25] There is nothing in the terms of the Act which causes me to think that the expression should take something other than its ordinary meaning. Accordingly, applying the ordinary meaning of the individual terms, I think the expression "deliberate action" means, in effect, an intentional act.

52. However, there is some ambiguity as to *what* needs to have been intended by the third party's conduct for it to constitute "deliberate action". I think there are two possible constructions:

    (a) the third party intended to engage in the conduct itself, but need not have intended that conduct to have a particular consequence (namely, to cause contact between the third party's bodily fluid and the worker) (the broad view); or

    (b) the third party intended to engage in the conduct for the purpose of causing contact between their bodily fluid and the worker (the narrow view).

53. The narrow view is supported by comments made in the Second Reading Speech for the bill (which I think can be considered in light of the statutory ambiguity).[26] There, MTOs were described as requiring "a third party who has **deliberately caused their bodily fluids to come into contact with a prescribed worker** to provide a blood sample for testing for blood-borne diseases".[27] This suggests that the third party must have engaged in conduct intended to cause contact between their bodily fluid and the worker.

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[23] See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, at [14], quoted in Pearce DC, *Statutory Interpretation in Australia*, 2024, 10th ed, LexisNexis, at [2.1] p 40.

[24] See *SZTAL*, at [14] (Kiefel CJ, Nettle and Gordon JJ).

[25] Accessed online, 16 July 2024. Regarding the use of dictionary definitions see generally, *Statutory Interpretation in Australia*, [3.36] p 122 and following.

[26] See *Interpretation Act 1987*, s 34(2)(f).

[27] Hansard, Legislative Assembly, 11 November 2020, p 4251 (emphasis added).

54. However, the comments in the Second Reading Speech cannot displace the statutory text.[28] Although the matter is not free from doubt, I prefer the view that the broad view reflects the proper construction of s 8(1)(b)(ii). In particular, I note that (read with the chapeau to that subparagraph), s 8(1)(b)(ii) requires that "the contact occurred as a result of a deliberate action of the third party".[29] In my view, this calls for an assessment of whether an act that was in fact causative of the contact ("as a result of"), was undertaken deliberately, but not of whether that deliberate act was done with the intention of causing the contact. The word "deliberate" is given work to do by excluding unintended or accidental acts, which nonetheless resulted in contact with bodily fluids.

55. I am also conscious that the provision in question serves an important role in gatekeeping the ability to make an application for a MTO. In this respect, I note that the objects of the Act include "to protect and promote the health and wellbeing of health, emergency and public sector workers to whom [the] Act applies" (s 3(c)). The narrow view would significantly diminish the fulfilment of that object.

56. I emphasise that the boundaries of the above construction would also need to be considered on a case-by-case basis. By way of illustration though, I note the following examples referred to in my instructions:

    - where an individual is bleeding, there is a physical struggle with police and a police officer comes into contact with the individual's blood;
    - individuals are involved in a fight, police intervene to break up the fight and in the process of doing so a police officer comes into contact with the individual's blood;
    - a police officer suffers a needlestick injury while arresting a person with a concealed syringe.

57. Without the benefit of complete information, and noting that the addition of other surrounding facts may change the position, my preliminary observations are:

    (a) It is probable that the first example would fall within the broad view, on the basis that the individual intended to engage in a physical struggle with police which caused the police officer to come into contact with the individual's blood.

    (b) It is possible that the second example would fall within the broad view, on the basis that the individual intended to engage in the fight, presumably despite demands from police to disengage, which caused the police officer to intervene and to come into contact with the individual's blood. The chain of causation here may be more difficult to establish than example one, however, in light of the officer's decision to intervene and the role that that independent act played in causing the contact.

    (c) It is possible that the third example would fall within the broad view, if the individual engaged in some intentional act which caused the police officer to arrest them and, in the process, come into contact with the individual's bodily fluid on the syringe.

[28] See *R v Bolton; ex parte Beane* (1987) 162 CLR 514; *Statutory Interpretation in Australia*, at [3.28] p 117.

[29] Similarly, s 10(1)(e) provides than an application must contain a statement that, in the worker's opinion, "the contact with the third party's bodily fluid was as a result of a deliberate action of the third party".

However, it is not clear whether the individual must also have intended to conceal the syringe.

58. For completeness, I note that my instructions in relation to question 5 appear to assume that a senior officer must independently consider whether the worker's contact with the third party's bodily fluid occurred as a result of a deliberate action of the third party. I do not understand my instructions to be asking me to consider the correctness of this assumption. Accordingly, I have not considered whether, in determining an application for a MTO, a senior officer is required to form a view on whether the contact was, in fact, a result of a deliberate action of the third party (or whether the other requirements in s 8 have been satisfied). Nor have I considered the consequences for the senior officer's jurisdiction to determine an application for a MTO where the officer is not satisfied that the contact was a result of deliberate action (or where the officer is not satisfied of another requirement in s 8).

[redacted]

Karen Smith
Crown Solicitor

Appendix F – NSWPF feedback on report consultation draft

NSW Police Force

OFFICE OF THE COMMISSIONER

Louise Lazzarino
Deputy Ombudsman, Systems Oversight
NSW Ombudsman
Level 24, 580 George St
Sydney NSW 2000

9 January 2025

Dear Deputy Ombudsman

NSW Ombudsman Consultation Draft Report on the monitoring of the *Mandatory Disease Testing Act 2021*

The NSW Police Force (NSWPF) thanks the NSW Ombudsman for sharing material from the Consultation Draft Report on the monitoring of the *Mandatory Disease Testing Act 2021* (the Act) which relates to the NSWPF. The NSWPF appreciates the opportunity to provide feedback on the Consultation Draft Report before it is tabled in Parliament.

Administrative processes relating to MDT applications

The NSWPF notes that much of the commentary in the Consultation Draft Report that relates to the NSWPF discusses the need for improved record keeping practices.

The NSWPF is committed to reviewing and improving administrative processes to ensure compliance and transparency in the operation of Mandatory Disease Testing and will seek to work with the Ombudsman's office to ensure the relevant aspects are satisfied.

As part of this commitment, the NSWPF will make improvements to the NSWPF Consent Form and will liaise with Corrective Services NSW to improve this form.

The NSWPF will also seek to rectify administrative procedures for giving notice to third parties about an MDT application to allow them sufficient time to make a submission to the Senior Officer.

Consultation with a relevant medical practitioner

The NSWPF agrees with the NSW Ombudsman's view that it would be beneficial to provide NSWPF workers with a link to a directory of accredited Australian HIV s 100 and pre-exposure prophylaxis (PrEP) prescribers maintained online by ASHM Health. This could be done by way of a fact sheet that, as part of work health and safety procedures, is provided to NSWPF workers in the event of bodily fluid exposure.

This fact sheet could also include information from the Police Medical Officer regarding strategies to alleviate some of the psychosocial risks arising from the uncertainty for officers, for example, whilst waiting for testing results or PrEP. The Police Medical Officer is undertaking the requisite courses to become an accredited s 100 prescriber

which will enable the Police Medical Officer to provide the necessary information around bodily fluid exposure in the fact sheet.

Chief Health Officer Court Submissions
The NSWPF supports giving the Chief Health Officer appropriate information, at the earliest opportunity, in relation to Court Mandatory Testing Order applications.

"Deliberate action" test
As was noted in the legal advice from the Crown Solicitor's Office, the NSWPF agrees that the requirement in relation to "deliberate action" should be interpreted according to the broad view. The narrow view would render the Act and processes essentially redundant.

Finalisation of MDT applications after consent has been obtained
The NSWPF agrees that the Act may need amendment to deal with the situation where a Mandatory Testing Order is refused because a third-party consents to testing, but then prior to testing later withdraws the consent.

Vulnerable Third Parties
Regarding determination of vulnerability, the NSWPF remains silent on whether or not the test for vulnerability should be changed. The NSWPF notes that its Senior Officers (for the purpose of the Act) are not medical practitioners and can only do their best in the circumstances with the information available to them at the time.

Consideration of transmission risk
The NSWPF remains silent on the matter of what bodily fluids are included under the Act.

These comments are based on the NSWPF's review of the sections from the Consultation Draft Report only. The NSWPF looks forward to reviewing the full version of the NSW Ombudsman's Report when it is available.

The NSWPF will use this opportunity to review NSWPF processes by re-engaging with the other agencies that are also subject of the Act. It will also seek any legislative changes during the Statutory Review process, which is scheduled to commence following the tabling of the NSW Ombudsman's Report in Parliament.

If you have any questions, please contact Deputy Commissioner [redacted]

Yours sincerely

[redacted]

Karen Webb APM
Commissioner of Police

Appendix G – CSNSW feedback on report consultation draft

Corrective Services NSW
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Parramatta NSW 2124
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CSNSW Ref: D24/1523961
Your Ref: ADM/2023/749

14 January 2025

Louise Lazzarino
Deputy Ombudsman
Systems Oversight
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Sydney NSW 2000

Dear Ms Lazzarino

Thank you for your letter and extracts from the Consultation draft: Report on the Ombudsman monitoring of the *Mandatory Disease Testing Act 2021* (***MDT Act***). Comments from Corrective Services NSW (CSNSW) are as follows:

1. **Consultation with a relevant medical practitioner**

CSNSW has updated the hyperlink to the Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM) in the Custodial Operations Policy and Procedure (COPP) 13.14 Mandatory Disease Testing to improve staff access to community medical practitioners with expertise in blood borne diseases. I note the reference in the draft report to the challenges of the timing provisions in the MDT Act as well as access to relevant qualified medical practitioners in remote and regional locations where CSNSW has a number of facilities.

CSNSW will liaise with the Justice Health and Forensic Mental Health Network as to what might constitute an appropriate referral service for CSNSW staff to obtain expert medical advice about the risks of transmission.

2. **Decision-making and determinations by senior officers**

a. **Consideration of transmission risk**

CSNSW supports saliva remaining as a bodily fluid defined in the MDT Act. While the Chief Health Officer's guidelines (CHO guidelines) state that contact through spitting and biting presents no risk of transmission, they also refer to a low to moderate risk of transmission where spitting or biting results in the contact fluid containing an amount of blood, and the blood comes into contact with the broken skin, mouth or eyes of the worker.

The CHO guidelines describe circumstances where this could present a risk including:

> *"…injuries to the worker that break their skin or where the eyes or mouth have come into contact with blood or visibly bloody bodily fluid would be classified as moderate (0.1%-1% chance of transmission) to very high risk (10%-30% chance of transmission) of BBV transmission, when assuming the third party is infectious (Table 1). These exposures would generally warrant consideration for PEP for hepatitis B and/or HIV by a medical practitioner. Some scenarios are listed below:*
> - *a needlestick or sharps (stabbing) injury where the workers skin is punctured or broken*
> - *any sexual exposure with contact to bodily fluids*
> - *bloody saliva spit into the eye of a worker*
> - *a punch from the bloodied fist of a third party that breaks the workers skin, or lands on the eye or mouth*

- *a bite from a third party that breaks the workers skin, where there is visible blood in the mouth of the third party* "[1]

Given the difficulty in determining whether a small quantity of saliva contains any blood particularly in the circumstances where the immediate response of the victims would be to wipe it off means that transmission through saliva cannot be ruled out. Despite the CHO guidelines, there is some evidence of horizontal transmission of Hepatitis B Virus (which is one of the blood borne viruses of interest to the MDT regime (see for example Horizontal Modes of Transmission of Hepatitis B Virus (HBV): A Systematic Review and Meta-Analysis by Sabeena and Ravishankar in 2022).

CSNSW also note the primary intention of the legislation was to "reduce some of the stress and anxiety [individuals] may suffer if exposed to the risk of blood-borne diseases" as outlined in the Second Reading Speech. In that context adopting a strict public health lens on modes of transmission may not address anxiety in circumstances where there is even a remote risk of infection as in the case of exposure of saliva.

Consideration of the CHO (Chief Health Officer) guidelines
CHO guidelines are routinely considered by CSNSW senior officers, however CSNSW will ensure the decision explicitly outlines where CHO guidelines are considered.

b. Consideration of third parties' submissions
CSNSW opposes a notification of a Mandatory Disease Testing (**MDT**) application to third parties prior to a vulnerability assessment being undertaken. CSNSW is of the view that third parties are already notified at the earliest possible time but acknowledge the timeframes for Senior Officer decisions can impact on the ability of third parties to prepare submissions.

3. Testing with consent
b. Records regarding consent
CSNSW submits that two, not three MDT applications were missing consent forms. These forms were provided to the Ombudsman on 17 December 2024. Where CSNSW consent forms were not signed by the third party, inmates had refused to engage with the process or they had been assessed as a risk to themselves or others.

CSNSW will update the MDT application consent form to include a record of whether an inmate has granted consent on a free and informed basis, or, where applicable, the reasons for their refusal to provide consent. CSNSW is also evaluating the most effective operational approach to include information in an inmate's preferred language. This may involve documenting instances where an interpreter was used and/or providing an MDT factsheet in that language.

CSNSW's preference is to document the circumstances surrounding consent directly onto the consent form. It is important to note that obtaining consent on body worn video may require policy changes and further discussion with key stakeholders.

4. Ombudsman monitoring and reporting
a. Agency impediments to effective oversight
On 26 September 2023 CSNSW provided the requested demographic data on third parties where retained, to the Ombudsman. Other information related to Human Resources was directed to the Department of Communities and Justice who were responsible for CSNSW Human Resources at the time.

CSNSW has previously acknowledged and apologised for the initial delay in providing the survey to CSNSW staff. The survey was distributed following consultation with the Ombudsman's Office and we continue to work collaboratively with your team. There has been no opposition or purposeful impediments placed in the way of the Ombudsman by CSNSW.

[1] CHO Guidelines for the *Mandatory Disease Testing Act 2021*, pp9-10

If you require any further information, please contact [redacted]

Yours sincerely

[redacted]

Bernhard Ripperger
A/COMMISSIONER

Pursuing fairness for the people of NSW.

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