

First report on the Mandatory Disease Testing Act

The NSW Ombudsman's role under the MDT Act

The *Mandatory Disease Testing Act 2021* (**MDT Act**) provides that the Ombudsman 'monitor the operation and administration' of the Act, and report on our monitoring as soon as practicable after 12 months of the MDT Act's commencement.

On 5 February 2025 our first report was published, covering an 18-month reporting period from 29 July 2022 to 31 December 2023.

What is the MDT Act?

The MDT Act provides for the mandatory blood testing of a person (**third party**) whose bodily fluids have come into contact with a worker from certain NSW Government agencies.

Mandatory testing must be subject of a Mandatory Testing Order (**MTO**) which can only be made where:

1. A third party's bodily fluid made contact with a worker, and
2. Contact was 'as a result of a deliberate action' by the third party, and
3. Making the MTO is 'justified in all circumstances'.

A worker must first consult a 'relevant medical practitioner' for medical advice regarding their risk of contracting a blood-borne disease (**BBD**), namely HIV, Hepatitis B and C, before applying for an MTO.

If it appears to a senior officer that a third party is a 'vulnerable third party'¹, an MTO can only be made by the Court.

The purpose of the MDT Act is to provide for mandatory testing of a third party where a worker is at risk of contracting a BBD aims to:

- encourage health, emergency and public sector workers to seek medical advice about the risks of contracting a BBD while at work, and
- promote the health and wellbeing of these frontline public sector workers.

Who made MTO applications?

Over the 18-month reporting period, 139 applications for an MTO were made across 3 agencies:

- NSW Police Force (**NSWPF**) – 106 (76%)
- Corrective Services NSW (**CSNSW**) – 32 (23%)
- NSW Ambulance – 1 (0.1%)

Although only 3 government agencies engaged with the scheme, MDT is available under the MDT Act for frontline workers across at least 10 other different government agencies.

Who was subject to an MTO application?

MTO applications disproportionately related to young people as 33% (46) of third parties were aged 18 to 24 (8.4% of the population).

MTO applications also disproportionately related to Aboriginal and Torres Strait Islander people as discussed below.

MTO applications mostly related to males as 68% of third parties were recorded as male (49.7% of general population).

But females were highly represented in prisons with 25% of third parties being recorded as female in CSNSW applications (6.7% of inmate population).

Senior officers recorded that 24% (33) of applications involved a third party who appeared to be a vulnerable person.

Outcomes of MTO applications

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

1. Making an MTO, or
2. Refusing to make an MTO, or
3. Applying to the Court for an MTO where the third party appears to be a vulnerable person.

However, many MTO applications were resolved by consensual testing.

¹ Vulnerable means a child aged between 14 and 17 or a person with a mental health or cognitive impairment. Children under 14 cannot be subject to mandatory testing.

Table 1. Outcomes of MDT applications

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

Key observations

Consensual testing has legal complications

Obtaining consent to conduct a blood test under the scheme presents loopholes in the MDT Act:

- Consent is being sought in a non-clinical context and often without an opportunity to obtain medical or legal advice.
- Once consent is obtained, the testing of a third party falls outside the legal framework of the MDT Act and the oversight of the Ombudsman.

No real risk of transmission

62.6% of MTO applications involved exposure to saliva only, which the Chief Health Officer advises has no risk of BBD transmission. Yet a significant proportion of these applications were approved by senior officers.

No evidence of improving workers' health and wellbeing

The BBD status of a third party will generally have no effect on the clinical management of a worker with no, very low or low BBD risk. In a survey of workers (n=30) who made an MTO application, none reported that their treatment changed after the third party was tested and none had reported that the scheme promoted their wellbeing.

Protections are ineffective

Protections for the health and privacy rights of third parties were largely ineffective. Provisions for procedural fairness, such as the requirement to provide third parties an opportunity to make submissions, were ineffectual.

Timeframes in the MDT Act made it unfeasible for third parties to seek health and legal advice, respond to an application or apply for a review.

Disproportionate impact on Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander people were more likely to be subject to an MTO application than a non-Indigenous person.

- 28% of MTO applications related to an Aboriginal and Torres Strait Islander person (3.4% of the general population).
- 50% of CSNSW applications involved an Aboriginal and Torres Strait Islander person (31% of the inmate population).

Senior officers are ill-equipped to determine applications

The MDT Act confers decision-making powers on senior officers in agencies who are generally non-experts as medical clinicians or administrative lawyers.

Senior officers are required under the MDT Act to provide reasons for their determinations. In practice, documented reasons were perfunctory and typically entered using a structured decision-making tool (check box).

Recommendations

The core recommendations in our report are:

Recommendation 1

Government to consider whether the MDT Act should be continued at all and whether resources would be better directed towards providing advice and support directly to workers.

Recommendation 2

If the Act were to continue, all MTO applications should be determined by a court based on expert medical evidence.

In the event these recommendations are not adopted, we have made an additional 60 recommendations aimed at clarifying problematic aspects of the MDT Act and its operation.



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