

Mandatory Disease Testing Act 2021

Tip sheet for lawyers

When an application may be made

An application may be made by a health, emergency or a public sector *worker** if the worker has come into contact with the bodily fluid of the third party and the contact with the bodily fluid occurred;

- i. in the **execution of the worker's duty**,
- ii. as a result of a **deliberate action** of the third party, and
- iii. without the consent of the worker.

An application **cannot** be made if the third party is **under 14 years of age**.

An application must be made within **5 days** of the contact incident, and only after the worker has consulted with a relevant medical practitioner.

*A table in the Dictionary to the Act sets out the categories of *worker* who may make an application under the Act.

Who determines the application?

The worker's *senior officer* must determine the application but can only make a *mandatory testing order* if satisfied the making of the order is **justified in all the circumstances** and that the third party is **not a vulnerable third party**. Before making an order, the senior officer must seek the third party's consent to voluntarily provide a sample to be tested.

In cases concerning a *vulnerable third party*, the officer cannot ask for their consent, and if of the view an order is **justified in all the circumstances**, the senior officer can make an application to the court for an order.

In all cases, the *senior officer* can decide to **refuse an application**.

A *vulnerable third party* is defined as a third party who is;

- a) at least 14 years of age but under 18 years of age, or
- b) has a mental health impairment, within the meaning of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, that significantly affects the person's capacity to consent to voluntarily provide blood to be tested for blood-borne diseases.

Applications determined by a Court

Only a court can make a *mandatory testing order* in relation to a *vulnerable third party*, and it is only these applications that can be brought before a court to be determined. Depending on the age of the *vulnerable third party*, the application is heard in either the Local Court or Children's Court.

In determining an application, the Court must consider the factors in section 15(3) of the Act, which includes, **the best interests of the third party**, **the wishes of the third party** and their parent or guardian (if any) and any submissions made by the Chief Health Officer.

Appeal and review rights

- The **only** decisions that are reviewable under the Act are certain decisions of the *senior officer*.
- Reviewable decisions of the senior officer may be reviewed by the **Chief Health Officer**.

- The *worker* may apply for a review of a decision not to make an order.
- The *third party* may apply for a review of a decision to make an order.
- Neither can apply for a review of a decision of the *senior officer* to make an application to the court for an order (*vulnerable third party*)
- The Chief Health Officer's determination upon reviewing a decision of a senior officer is **not** reviewable.
- The decisions of the Local and Children's Court are not appealable.

A request for review by a third party may be lodged by email to NSWH-MDT@health.nsw.gov.au and must include a copy of the order and submissions (if any) that were made to the *senior officer*. **A review must be lodged within 1 business day** of being notified of the decision to make an order.

Lodging a review **does not** stay the operation of the order – the third party must still comply with the order but testing results will not be released until the review is determined.

Timeframes

Event	Time requirement*
Lodging of application by <i>worker</i>	Within 5 days of contact incident – section 8(4)
Senior officer to determine the application	Within 3 days of receiving the application, unless longer period is necessary – section 11(2)
Apply to Chief Health officer for a review	Within 1 day of being notified of the decision – section 23(2) and (4)
Chief Health Officer to determine review	Within 3 days of receiving application for review – section 25(1)
Service of an order on the <i>third party</i>	As soon as practicable but no later than 5 days after the order is made – section 19

*All references to 'days' are to be read as *business days*.

Reimbursement of costs

A third party can claim for the reimbursement of costs associated with an application for a mandatory testing order and the carrying out of an order, which includes reasonable travel costs and expenses incurred by the third party in complying with an order.

Costs are payable by the designated *funding provider* for the *worker* who made the application, which is set out in the table in the Dictionary to the Act. The Act or regulations have not set any specific procedures or standard forms for the claiming of costs.

Further information

[Mandatory Disease Testing Act 2021 – A short guide for lawyers](#), Legal Aid NSW

[Chief Health Officer's guidelines for the Mandatory Disease Testing Act 2021](#)

[Mandatory Disease Testing Scheme](#) – NSW Communities and Justice webpage