

# Mandatory Disease Testing Act 2021

A short guide for lawyers  
September 2022

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**Disclaimer**

This publication is a general guide to the law. You should not rely on it as legal advice, and we recommend that you talk to a lawyer about your situation. The information is correct at the time of printing. However it may change. For more information contact LawAccess NSW on 1300 888 529.

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# 1. Background and Purpose

The Mandatory Disease Testing Act 2021 (hereafter, the Act) commenced on 29 July 2022 and provides for the 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.

This document will cover:

1. The category of workers that can apply for a Mandatory Testing Order (MTO)
2. What events may give rise to an MTO
3. The application process
4. When can the senior officer determine an application for an MTO
5. When a court must determine an application for MTO
6. The processes for determining an application
7. Appeal and review rights
8. Processes and procedures for making, serving, and carrying out of an order
9. Offences contained within the Act
10. Chief Health Officer's guidelines for the *Mandatory Disease Testing Act 2021*
11. Oversight by the Ombudsman

## 2. Who can apply and when?

### 2.1 The categories of workers that can apply for an MTO

Only health, emergency and certain public sector workers can apply for an MTO.

The [Dictionary](#) to the Act contains a Table which sets out a closed list of **workers** for the purposes of the Act and is reproduced at the end of this document. The Table also specifies the relevant **senior officer** for each class of worker listed. Whilst the Table is a closed list, by regulation, further classes of *worker* may be prescribed. At commencement, the only class of *worker* added by regulation is the Commissioner of the Law Enforcement Conduct Commission (LECC) and members of the Commission's staff. <sup>1</sup>

### 2.2 What events may give rise to an application for an MTO

An application for an MTO may be made if:

- a) The worker has **come into contact with** the bodily fluid of the third party, and
- b) 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.
- c) An application **cannot** be made if the third party is **under 14 years of age**.

### 2.3 The application process

It is important to note that:

- **Only** the affected *worker* involved in the incident relied upon to ground the application can make the application<sup>2</sup>.
- **Before** making the application<sup>3</sup>, the worker **must** consult with a **relevant medical practitioner**<sup>4</sup> as soon as reasonably practicable, and within 24 hours of the contact incident, or up to 72 hours if reasonable in the circumstances.<sup>5</sup>

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<sup>1</sup> Clause 9, *Mandatory Disease Testing Regulation 2022*

<sup>2</sup> Section 8(1)

<sup>3</sup> Section 8(3)

<sup>4</sup> Defined in the Dictionary to the Act 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 section 9—another medical practitioner."

<sup>5</sup> Section 9

- An application **must** be lodged within **5 business days** of the contact event<sup>6</sup>

Section 9 of the Act sets out the matters on which the relevant medical practitioner must inform the worker about, and includes:

- The risk to the worker of contracting a blood-borne disease from the third party as a result of the contact,
- Appropriate actions the worker can take to mitigate the risk of contracting or transmitting a blood-borne disease, 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.

While the content of the advice provided by the relevant medical practitioner does not affect the worker's ability to make an application, in the application, the worker is required to:

- provide details of the medical practitioner who provided the advice,
- attach to the application any written advice that may have been provided, and
- agree to the *senior officer* discussing the consultation with the medical practitioner and obtaining the medical records relating to that contact.

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<sup>6</sup> Section 8(4)

## 3. Who determines the application?

### 3.1 When can the senior officer make an MTO?

The senior officer can only make an MTO if, on the information available, it appears to the senior officer that the third party is not a **vulnerable third party**.<sup>7</sup>

Where applications relate to a vulnerable third party, the senior officer must still determine the application, but can only determine the application in one of two ways, either:

1. refuse the application, or
2. decide to **apply to the Court** for an MTO but can only do so if satisfied that testing the third party's blood for blood-borne diseases is justified in all the circumstances.<sup>8</sup>

**Vulnerable third party** is defined in the Dictionary to the Act 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.

### 3.2 When must a court determine an application?

Only a court has the power to make an MTO with regard to a **vulnerable third party** and an application can only come before the court on an application of the *senior officer* or by the Chief Health Officer following their review of a decision of the senior officer.<sup>9</sup>

Applications concerning a **vulnerable third party** are the only matters a court can be called on to determine. With one exception, the court has no function, either at first instance, or any power of review, regarding applications that do not concern a vulnerable third party.<sup>10</sup>

### 3.3 The processes for the senior officer determining an application

Section 11 of the Act sets out the primary process and requirements that a *senior officer* must follow when determining an application, and whilst the process differs slightly, it also sets the process to be followed for applications concerning a **vulnerable third party**.

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<sup>7</sup> Section 11(1)(a)

<sup>8</sup> Section 11(6)

<sup>9</sup> Section 25(2)(a)

<sup>10</sup> If, when dealing with an application, it appears to the court that the third party is not a **vulnerable third party**, the court can nonetheless proceed and determine the application – section 17

The senior officer must determine an application **within 3 business days** after receiving the application, unless a longer period is necessary in the circumstances.

### 3.3.1 Applications that do **NOT** involve a *vulnerable third party*

Before determining an application, the senior officer must:

1. Seek the third party's consent to voluntarily provide blood to be tested,
2. Provide the third party with an opportunity to make submissions,<sup>11</sup> and
3. Consider;
  - a) any submissions received from the third party,
  - b) guidelines issued by the Chief Health Officer, and
  - c) other matters the senior officer considers relevant, including a report made in relation to the contact incident.

The senior officer may make an MTO only if satisfied that;

1. The third party will not voluntarily provide blood to be tested, and
2. Testing the third party's blood is ***justified in all the circumstances***.

In determining the application, the senior officer can do one of two things, either **make an MTO** or **refuse the application**.

### 3.3.2 Applications involving a *vulnerable third party*

Before determining an application, the senior officer must:

1. Provide the third party and the third party's parent or guardian, if any, with an opportunity to make submissions, and
2. Consider;
  - a) any submissions received from the third party, parent or guardian,
  - b) guidelines issued by the Chief Health Officer, and
  - c) other matters the senior officer considers relevant, including a report made in relation to the contact incident.

In determining the application, the *senior officer* must do one of two things, either:

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<sup>11</sup> Information given or documents produced by the third party for the determination of an application are not admissible in proceedings against the third party or be used as grounds for a search warrant – see section 31.



1. refuse the application, or
2. decide to **apply to the Court** for an MTO, but only if satisfied that testing the third party's blood for blood-borne diseases is justified in all the circumstances.

### 3.4 Submissions to the *senior officer*

The *senior officer* **must** give the *third party*<sup>12</sup> the opportunity to make submissions to the *senior officer*. There is nothing in the Act to suggest the *senior officer* is alleviated from this obligation or is taken to have discharged it by the making of all reasonable efforts to locate or contact the *third party* or similar.

Perhaps confirming the enduring nature of this obligation, section 12(1) of the Act provides that;

*“A senior officer may refuse an application for a mandatory testing order if, after making reasonable inquiries, the senior officer cannot locate the third party in relation to whom the application relates.”*

Having contacted the *third party*, to be truly 'providing the third party an opportunity to make submissions', it should entail making clear by when and how those submissions are to be made. Clause 5 of the *Mandatory Disease testing Regulations 2022* provide that those submissions may be;

- a) written or oral, and
- b) given by audio or audio visual means.

Given the very tight timeframes involved under the Act, a *third party* is perhaps unlikely to be given anything more than 1 to 2 days to make any submissions.

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<sup>12</sup> and in cases of a vulnerable third party, the third party's parent or guardian

## 4. The process for a court to determine an application

Part 4 of the Act sets out the process with regards to how an application is brought before the court and determined. Note that applications concerning a **vulnerable third party** are the only matters a court can be called on to determine.<sup>13</sup>

### 4.1 Application and jurisdiction

Only the relevant *senior officer*, or the Chief Health Officer can make an application to the court for an MTO. The capacity of the Chief Health Officer to make an application arises only as a consequence of exercising their function with regard to reviewing a decision of the *senior officer*, this is discussed in the *Appeal and review rights* section of this document.<sup>14</sup>

An application will be heard in either the **Local Court** or **Children's Court** depending on the age of the *vulnerable third party*.<sup>15</sup>

The *senior officer* may bring an application to the court only after properly considering an application by a *worker* and determining that;

1. the third party is a **vulnerable third party**, and
2. is satisfied that testing the third party's blood for blood-borne diseases is **justified in all the circumstances**.

The application must be in writing and include;

- a) a copy of the application for a mandatory testing order made by the *worker*,
- b) the blood-borne diseases for which the vulnerable third party's blood is to be tested, and
- c) other information the senior officer considers relevant.

At present, blood obtained under an MTO can only be tested for HIV infection, Hepatitis B and Hepatitis C.<sup>16</sup> Regarding the requirement to nominate in the application the disease/s for which the blood is to be tested, it is this writer's view that the medical advice of the practitioner that the *worker* consulted, or other medical advice received, to the extent that it addressed the risk of transmission for each of the particular diseases, should be somewhat instructive as to which diseases the blood is

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<sup>13</sup> With the exception that, when dealing with an application, it appears to the court that the third party is not a *vulnerable third party*, the court can nonetheless proceed and determine the application – section 17

<sup>14</sup> The process the court follows to determine an application is the same regardless of whether it was the *senior officer* or the Chief Health Officer that brought the application.

<sup>15</sup> *Court* is defined in the Dictionary to the Act as *Children's Court* when the third party is under 18 years, and the *Local Court* for other applications. See also section 16 of the Act.

<sup>16</sup> *Blood-borne disease* is defined in the Dictionary to the Act as HIV infection, Hepatitis B, Hepatitis C or other blood-borne disease prescribed by the regulations. At the time of writing, no other diseases have been prescribed.

tested for. If a blanket (test for all) approach was intended, the requirement to nominate would seem superfluous.

As soon as practicable after making the application to the court, the *senior officer must notify* the *worker*, the *third party* (including any parent or guardian) and the Chief Health Officer. The Chief Health Officer may make submissions to the Court in relation to the application.<sup>17</sup>

## 4.2 Determining the application

Section 16 of the Act confirms that, but for section 70<sup>18</sup>, Part 4 of the *Local Court Act 2007* (which concerns application proceedings) applies to applications under the *Mandatory Disease Testing Act 2021* – this paper does not address the general law and procedures regarding application proceedings in the Local Court.

Section 15 of the Act sets out the considerations and the test to be applied when the court determines whether to make an order, and is set out in full below:

### 15 Court may make mandatory testing order for vulnerable third party

1. The Court may, on application by a senior officer or the Chief Health Officer, make a mandatory testing order for a third party who appears to the Court to be a vulnerable third party.
2. The Court may make a mandatory testing order only if satisfied that, on the balance of probabilities, testing the third party's blood for blood-borne diseases is justified in all the circumstances.
3. In determining whether or not to make a mandatory testing order, the Court must take into account the following—
  - a) the best interests of the third party,
  - b) the wishes of the third party and the third party's parent or guardian, if any,
  - c) submissions made by the Chief Health Officer,
  - d) other matters the Court considers relevant.

As can be gleaned from the section, to make an order, the court must, on the balance of probabilities consider that testing the third party's blood is **justified in all the circumstances** and the **best interests**, and **wishes**, of the vulnerable third party and their parent or guardian are specific matters the Court must take into account.

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<sup>17</sup> Section 14(4)

<sup>18</sup> Section 70 of the *Local Court Act 2007* provides the avenue for an appeal following application proceedings – s70 is exempted as there is no right of appeal in *mandatory testing order* matters.

## 5. Appeal and review rights

### 5.1 Summary

- The only decisions that are reviewable under the Act are those of the **senior officer**.
- The decisions of the senior officer that are reviewable, if reviewed, are to be reviewed by the **Chief Health Officer**.
- 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.<sup>19</sup>
- The lodging of a review by the third-party **DOES NOT** stay the operation of the mandatory testing order and the third party must still comply with the order, but;
- testing results from any sample obtained will not be provided until the review is determined, and if the MTO is set aside, the results will not be provided

Review options and outcomes		
Decision of the senior officer	Worker	Third-party
To make an MTO	Not applicable	Chief Health Officer can either <b>affirm</b> or <b>set aside</b> the decision to make an MTO*
To apply to a court for an MTO (vulnerable third party)	Not reviewable	Not reviewable <sup>20</sup>
Not to make an MTO (to <b>refuse</b> the application)	Chief Health Officer can either <b>affirm</b> or <b>set aside</b> the decision to refuse the application.  If setting aside the decision, the Chief Health Officer may: <ol style="list-style-type: none"> <li>1. make an MTO, or</li> <li>2. in cases of a <b>vulnerable third party</b>, apply to the Court</li> </ol>	Not applicable

<sup>19</sup> Section 16 of the Act sets out matters regarding jurisdiction, and whilst Part 4 of the *Local Court Act 2007* applies, section 16(2) specifically excludes the operation of section 70 of the *Local Court Act 2007*, which contains the appeal options for application proceedings before the Local Court.

<sup>20</sup> Section 23(7)

\*See “A potential drafting anomaly” further below in this section of the document.

## 5.2 Time frames

- A review lodged by either the *worker* or *third party* must be lodged within **1 business day** of being notified of the *senior officer’s* decision<sup>21</sup>
- The Chief Health Officer must determine the review within **3 business days** after receiving the application for review.

## 5.3 Outline of review process

An application for review must be in writing and in the form prescribed by the regulations.

An application for review by a **worker** must be accompanied by a copy of:

1. the original application for a mandatory testing order,<sup>22</sup> and
2. the *senior officer’s* determination and the reasons for the determination<sup>23</sup>

An application for review by a **third party** must be accompanied by a copy of:

1. the mandatory testing order
2. the third party’s written submissions (if any) made to the *senior officer*

A review lodged by the **third party DOES NOT** stay the operation of the mandatory testing order and the third party must still comply with the order, but;

- testing results from any sample obtained will not be provided until the review is determined, and if the MTO is set aside, the results will not be provided to the medical practitioner the *worker* nominated to receive the results.<sup>24</sup>

Section 26 of the Act sets the requirements of the **Chief Health Officer** in conducting the review and the possible outcomes. In summary;

- The Chief Health Officer may require further information from the *senior officer*, and

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<sup>21</sup> Section 23(2) and (4)

<sup>22</sup> Section 23(6)

<sup>23</sup> Clause 7(1) of the *Mandatory Disease Testing Regulation 2022*

<sup>24</sup> Section 24 of the Act

- Before setting aside a decision of the *senior officer* **not** to make an order, the Chief Health Officer must provide the third party, and parent or guardian (in cases of a *vulnerable third party*) an opportunity to make submissions.

The application for review and any additional information should be sent to

[NSWH-MDT@health.nsw.gov.au](mailto:NSWH-MDT@health.nsw.gov.au)

## 5.4 Outcomes

When reviewing a decision of the *senior officer* to **make** an MTO, the Chief Health Officer can do one of the following:

1. affirm the decision, or
2. set aside the decision.<sup>25</sup>

When reviewing a decision of the senior officer to **refuse** an application for an MTO, the Chief Health Officer can do one of the following:

1. affirm the decision, or
3. make an MTO, or
4. in the case of a *vulnerable third party*, apply to the Court for an MTO<sup>26</sup>

## A potential drafting anomaly

It is the writer's view that, in some cases, there is a missing option or pathway for the Chief Health Officer when conducting a review of a decision of the *senior officer* to make an MTO.

The problem would seem to arise if the Chief Health Officer comes to the view that, whilst an MTO might be justified in all the circumstances, it appears to the Chief Health Officer that the third party is a *vulnerable third party*, and therefore the *senior officer* ought not to have made the order, but instead should have brought an application to the Court.

Under the Act, when reviewing a decision to make an order, the Chief Health Officer can only affirm or set aside the decision of the senior officer, there is no option for the Chief Health Officer to remit it back to the *senior officer* or set aside the decision and bring an application before the Court. The

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<sup>25</sup> Section 25(1)

<sup>26</sup> Section 25(2)

latter exists by virtue of section 25(2) of the Act, but this only applies when the Chief Health Officer is reviewing a decision of the *senior officer not to make an MTO*.

The Act says nothing of second or subsequent applications arising from the same contact incident, so it is not clear whether, in the circumstances above, the decision of the *senior officer* could be set aside and a fresh application lodged, but in any event, by the time the Chief Health Officer comes to determining the review, the *worker* is likely to be out of time to lodge a fresh application.

## 6. Processes and procedures for serving and carrying out of an order

### 6.1 Content of a mandatory testing order

Section 18 of the Act sets out that a *mandatory testing order* must be in writing, and what it must contain:

#### **18 Content of mandatory testing order**

1. A mandatory testing order must be in writing and contain the following information—
  - a) the name of the third party,
  - b) the place the third party is required to attend to provide blood,
  - c) that the blood is to be tested for all blood-borne diseases unless otherwise specified,
  - d) the name and contact details of a medical practitioner—
    - i. authorised by the worker to receive the blood test results on the worker's behalf, and
    - ii. authorised by the third party to receive the blood test results on the third party's behalf, if any,
  - e) that failure to comply with a mandatory testing order is an offence with a maximum penalty of 100 penalty units or imprisonment for 12 months, or both,
  - f) for a detained third party—that reasonable force may be used to ensure that a detained third party complies with the mandatory testing order,
  - g) other information prescribed by the regulations.
2. The regulations may prescribe a form for a mandatory testing order made by a senior officer or the Chief Health Officer.

Further requirements for the content and form of the mandatory testing order have been prescribed in clause 4 of the *Mandatory Disease Testing Regulations 2022*, requiring the notice to also include details regarding the medical practitioner, date of birth of the third party and a notice advising the third party of their right to seek a review by the Chief Health Officer and the time for requesting a review. A prescribed form for the order can be found in *Schedule 1* of the regulations.



## 6.2 Service of a mandatory testing order

Once the *senior officer* makes an MTO, it must be served on the third party **personally** and as soon as reasonably practicable, but **no later than 5 days** after an MTO is made.<sup>27</sup>

If a court makes an MTO, the Registrar is to personally serve the order on the third party if the third party was present when the order was made, if not present, or unable to be served, the Registrar will arrange a copy of the order to be;

1. sent to the *senior officer* for service, and
2. posted to the third party or another person the registrar thinks fit.

A *mandatory testing order* **must not** be served on the third party by the worker concerned, or another person who was present during the contact incident.<sup>28</sup>

Note: The Act does not appear to stipulate service provisions for occasions where the Chief Health Officer makes an MTO following a review, but it would be reasonable to presume in practice, it would be sent to the *senior officer* to arrange for service.

## 6.3 Carrying out an order

A person authorised to take a blood sample from a third party under an MTO must be presented with a copy of the order, and;

1. take blood in a manner consistent with the relevant medical and other professional standards, and
2. not use force against the third party, other than that ordinarily required to take blood from a person.<sup>29</sup>

In cases of a ***detained third party***,<sup>30</sup> a law enforcement officer may transport the third party to and from a place for the taking of blood, and assist the person taking blood under an MTO, including the officer **using reasonable force** as may be necessary for the taking of blood, and to prevent the loss, destruction or contamination of the blood sample taken.<sup>31</sup>

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<sup>27</sup> Section 19(1)

<sup>28</sup> Section 19(4)

<sup>29</sup> Section 20(2)

<sup>30</sup> A person in police custody or an inmate – see Dictionary to the Act

<sup>31</sup> Section 21

## 6.4 Costs associated with an order

For each category of *worker* listed in the Table in the Dictionary to the Act, a *funding provider* is also listed. The *funding provider* is responsible for the costs incurred in the application process and the carrying out of a mandatory testing order. A number of specific costs are listed in section 34 of the Act, and relevant to a *third party*, includes:

- the cost to the third party of complying with the order
- reasonable travel costs and expenses incurred by the third party in complying with the order.

The Act does not provide anything further with regard to how these costs are to be claimed, and at present, no regulations have been made pursuant to section 34(2).

The prescribed form for the **mandatory testing order** does not advise the third party that they may be able to claim the costs they incurred.

## 7. The results of the blood test and limitations on use

### 7.1 Results

The blood is to be tested for the blood-borne diseases specified in the order, and as soon as practicable, provide the results to:

- a) the medical practitioner authorised by the worker to receive the results,
- b) the medical practitioner (if any) authorised by the third party to receive the results, and
- c) the Chief Health Officer – if the third party did not authorise a medical practitioner to receive results on their behalf.

The pathology laboratory that tested the blood, may destroy the sample as soon as it is no longer required for the purposes of this Act.<sup>32</sup>

Note: As mentioned in the ‘appeal and review’ section of this document, if the third party has requested a review of the *senior officer’s* decision to make an order, the results of the blood sample cannot be released until that review has been determined by the Chief Health Officer and won’t be released if the *senior officer’s* decision is set aside by the Chief Health Officer.

### 7.2 Restrictions on use of the blood sample and information provided by the third party

Section 7 of the Act states:

*“To 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 of the Act sets out a number of restrictions:

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<sup>32</sup> Section 27 – it is unclear to the writer why ‘may’ is stipulated rather than ‘must’.

### **31 Evidence not admissible in proceedings against third party**

1. Evidence of the following is not admissible in proceedings against a third party—
  - a) information given or documents produced for the purposes of an application for a mandatory testing order or the determination of the application,
  - b) a third party's blood test results under a mandatory testing order,
  - c) a blood sample obtained from a third party under a mandatory testing order,
  - d) information derived from a blood sample obtained from a third party under a mandatory testing order.
2. This section does not apply to criminal proceedings against a third party for an offence under section 27 or 28.
3. Evidence referred to in subsection (1) may not be used as a ground on which a search warrant may be issued under an Act or law.
4. In this section—

third party includes a third party in relation to whom an application for a mandatory testing order was made and refused.

In summary, neither the results of the testing, the sample itself, or anything else gleaned from the sample should be admitted in proceedings against the third party (or form any part of grounds for a search warrant), except for specific offences under the Act relating to failing to comply or providing false or misleading information.

## 8. Offences contained within the Act

The Act creates three offences, which in short are:

### Section 27 – Failure to comply with mandatory testing order

*Reasonable excuse* defence is available, maximum penalty of 100 penalty units or imprisonment for 12 months or both and unless court orders otherwise, any sentence of imprisonment is to be served **consecutively** to any existing sentence.<sup>33</sup>

### Section 28 – False or misleading information

A *worker* or *third party* who knowingly provides information that is false and misleading in a material particular is subject to maximum penalty of 100 penalty units or imprisonment for 12 months or both.<sup>34</sup>

### Section 29 – Disclosure of information

Creates an offence for any person disclosing information obtained in connection with the administration or execution of this Act unless the disclosure falls into one of a number of exceptions specified in the section. The excepted disclosures include matters such as disclosures related to health information, or administration or execution under the Public Health Act, for purposes of legal proceedings arising under the Act or a report of the proceedings, or with consent.

Maximum penalty of 100 penalty units or imprisonment for 12 months or both.<sup>35</sup>

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<sup>33</sup> Section 58 of the *Crimes (Sentencing and Procedure) Act 1999* was amended to exempt offences under the *Mandatory Disease Testing Act 2021* from the operation of section 58

<sup>34</sup> Unlike the offence in section 27, any penalty of imprisonment is not required to be served consecutive to existing periods

<sup>35</sup> Unlike the offence in section 27, any penalty of imprisonment is not required to be served consecutive to existing periods

## 9. Chief Health Officer's guidelines

In accordance with section 33 of the Act, the Chief Health Officer has issued [guidelines](#) designed to assist *senior officers*, *relevant medical practitioners* and persons taking blood from third parties under an MTO. These guidelines give significant guidance with regards to the whole process, including further considerations for the *senior officer* determining an application and data on the prevalence in the community of the each of the three *blood-borne* diseases covered by the Act and the risk of transmission from specified events. This may be particularly useful to those who provide advice or representation to a third party facing an MTO application or seeking a review of an order.

Whilst the guidelines should be read in their entirety, below are some highlighted areas:

**3.3.2** *Senior officer* should consider the risk of blood-borne virus transmission to the worker in deciding whether or not to make an order. NB: The guidelines note that “**..no HIV transmission through biting or spitting has ever been reported in Australia.**”

**3.3.2** and **Chapter 6** of the guidelines provide useful tables and data designed to assist the *senior officer* in assessing risk when considering an application.

**3.3.3** *Senior officer* should consider why the third party declined to volunteer,<sup>36</sup> it may have been on personal or religious grounds and the granting of the order may cause distress.

**3.3.4** The *senior officer* should consider the effect on the well-being of the *worker*. The lack of knowledge or uncertainty as to the third party's BBV status may create anxiety for the worker and impact day-to-day life, even after events where risk of transmission is very low.

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<sup>36</sup> Only applies to a non-vulnerable third party

## 10. Oversight by the Ombudsman

Section 36 of the Act provides that the Ombudsman is to monitor and report on the operation and administration of the Act, the first report due as soon as practicable following 12 months from commencement, then every 3 years.

The Ombudsman may require further information from the Commissioner of Police (for applications where the *worker* concerned was a police officer or special constable) and in any other applications, the senior officer for the worker. The Act also requires notice to the Ombudsman of the following;

- *Senior officer* to provide written notice of the determination of an application and the reasons for the determination – section 13(1)(d)
- Chief Health officer to provide written notice of the determination of a review and the reasons for the determination – section 26(e)

The website of the Ombudsman New South Wales has a [page relating to the monitoring of the Mandatory Disease Testing Act](#) and people with a complaint about an MTO can contact them on:

[mdt@ombo.nsw.gov.au](mailto:mdt@ombo.nsw.gov.au)

**Note:** For Legal Aid NSW staff, please do not lodge a complaint with the Ombudsman on behalf of another person. If you do have concerns regarding a particular application or an approach or practice you have observed more generally, please advise the Crime Executive via our Manager Professional Development – [Stephen.Lasker@legalaid.nsw.gov.au](mailto:Stephen.Lasker@legalaid.nsw.gov.au)

## 11. Table — Workers, senior officers and funding providers

**Note:** This table has been taken from the Dictionary to the Act and the “*Funding provider*” column has not been reproduced below. For each category of *worker* listed, the nominated *funding provider* is responsible for the payment of costs associated with the application and carrying out of a mandatory testing order – section 34 of the Act.

<b>Worker</b>	<b>Senior officer</b>
Member of NSW Police Force	Police officer of the rank of inspector or above
Special constable employed under Part 6A of the <i>Police Act 1990</i>	Police officer of the rank of inspector or above
Commissioner of Corrective Services	Secretary
Correctional officer	Commissioner of Corrective Services
Community corrections officer within the meaning of the <i>Crimes (Administration of Sentences) Act 1999</i>	Commissioner of Corrective Services
Person employed in the Public Service or otherwise engaged to provide services directly to offenders within the meaning of the <i>Crimes (Administration of Sentences) Act 1999</i>	Commissioner of Corrective Services
Person employed at a managed correctional centre, within the meaning of the <i>Crimes (Administration of Sentences) Act 1999</i> , or otherwise engaged to provide services directly to offenders at a managed correctional centre	Governor of the managed correctional centre
Juvenile justice officer within the meaning of the <i>Children (Detention Centres) Act 1987</i>	Secretary
Inspector of Custodial Services	Secretary
Member of staff of the Inspector of Custodial Services	Inspector of Custodial Services
Official Visitor under the <i>Crimes (Administration of Sentences) Act 1999</i> or the <i>Children (Detention Centres) Act 1987</i>	Inspector of Custodial Services
Person employed in the Public Service as Sheriff or a sheriff’s officer	Secretary
Member of a fire brigade or community fire unit within the meaning of the <i>Fire and Rescue NSW Act 1989</i>	Commissioner of Fire and Rescue NSW
Member of staff of Fire and Rescue NSW	Commissioner of Fire and Rescue NSW
Member of the NSW State Emergency Service	Commissioner of the State Emergency Service
Member of the NSW Rural Fire Service	Commissioner of the NSW Rural Fire Service
Person employed in the NSW Health Service	Health Secretary
Person engaged by a statutory health organisation, within the meaning of the <i>Health Services Act 1997</i> , to enable the organisation to exercise its functions	Health Secretary
Person engaged by a public hospital controlled by the Crown to enable the hospital to exercise its functions	Health Secretary
Person providing first aid or ambulance services on behalf of St John Ambulance Australia (NSW)	Commissioner of St John Ambulance Australia (NSW)
Member of staff of the Ombudsman’s office	Ombudsman
Person belonging to a class prescribed by the regulations	Person prescribed by the regulations





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