Communities and Justice

Mandatory Disease Testing Act 2021
Information for senior officers

Under the *Mandatory Disease Testing Act 2021*, frontline workers who have come into contact with another person's bodily fluid (blood, faeces, saliva, semen) can apply for a Mandatory Testing Order (MTO) if there's a risk they can contract a bloodborne virus.

A MTO requires the other person involved in the contact (the third party) to get a blood test for HIV, Hepatitis B and Hepatitis C.

Applicant eligibility

The *Mandatory Disease Testing Act 2021* outlines which workers from your organisation are eligible to apply for a MTO.

A worker can only apply for a MTO if:

1. they have come into contact with the bodily fluid (blood, faeces, saliva, semen) of a third party who is at least 14 years old
2. the incident happened:
    - while they were on duty
    - due to a deliberate action of the third party
    - without their consent
3. the worker consulted a doctor within 24 hours of the incident (or 72 hours if reasonable in the circumstances).

An application must be made within 5 business days of the exposure incident. You must deny the application if any of these criteria are not met.

Vulnerable third parties

A vulnerable third party (VTP) is someone who:

- is between the ages of 14 to 18; or
- has a mental health condition or cognitive impairment that significantly affects their ability to consent to provide a blood sample.

You cannot make a MTO where the application relates to a VTP. The MTO decision process for applications involving a VTP is outlined below (see Step 3). If you become aware that the third party is a VTP after you have started considering the application, you will need to follow the requirements of the legislation which applies to VTPs.

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MTO decision process

Step 1: contact the third party

Before you can determine an application, you must contact the third party to:

1. seek their consent to voluntarily provide a blood sample (if they consent, you should get it in writing using the consent form)
2. provide them with an opportunity to make a submission.

If the third party appears to be a VTP, you cannot seek their consent to voluntarily provide a blood sample. However, you are required to provide the VTP and their parent or guardian, if any, with the opportunity to make a submission.

If, after making reasonable inquiries, you cannot locate the third party, you can refuse the application.

Step 2: determine the application

You must determine an application within three business days unless a longer period is necessary.

When determining whether a MTO is justified, you must consider:

- the Chief Health Officer's guidelines
- any report provided by the consulting doctor
- all material provided by the worker and the third party
- any other matters you consider relevant.

You are allowed to discuss the worker's consultation with the consulting doctor. If no written advice has been provided, you are allowed to obtain the worker's medical records relating to the incident.

It is an offence punishable by up to 12 months imprisonment for a third party or worker to knowingly providing you with false information.

Step 3: make a MTO

You can make a MTO if you are satisfied that:

- the eligibility criteria are met
- the third party is not a VTP

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- the third party will not voluntarily provide a blood sample
- testing the third party's blood is justified in all the circumstances.

To make a MTO, complete the mandatory testing order form and the pathology request form.

Please note that you cannot make a MTO where the application relates to a VTP. If you are satisfied that testing a VTP's blood is justified in all the circumstances, you must apply to the Local Court or Children's Court (depending on the age of the VTP) for a MTO. It is recommended that you contact your legal branch for further assistance.

Step 4: service of MTO

If you make a MTO, it must be personally served on the third party no later than five business days after it is made, and by someone who was not present during the exposure incident.

If a court makes an MTO and a registrar of the court is unable to personally serve the order on the third party, a copy of the order will be given to the senior officer. If you are given an MTO by a court, you must cause the MTO to be personally served on the third party no later than five business days after it is made by the court, and by someone who was not present during the exposure incident.

Step 5: notice of determination

As soon as possible after you have determined an application for a MTO, you must give written notice of the decision and the reasons for it to the:

- applicant/worker
- third party
- Ombudsman
- parent or guardian of a VTP.

You can send notices of determination to the Ombudsman by email to MDT@ombo.nsw.gov.au

Oversight by NSW Ombudsman

The NSW Ombudsman will monitor the operation and administration of the Mandatory Disease Testing Act. For more information, visit: https://www.ombo.nsw.gov.au/guidance-for-organisations/mandatory-disease-testing.