

Police Association of NSW

Submission regarding the
Mandatory Disease Testing Act 2021

Thank you for the opportunity to contribute to the first report of the monitoring of the operation and administration of the Mandatory Disease Testing Act 2021 (“the Act”).

The Police Association of NSW has for many decades assisted police officers when they suffer incidents of violence that involve exposure to bodily fluids.

The Act is considered very important by our members, as police officers in NSW suffer significant harm when they are assaulted in circumstances that give rise to the risk of contracting a blood-borne disease.

These incidents involve immediate physical harm, has long-term impacts on officers’ mental health, and involves months of testing and potentially changed behaviour and impact on quality of life. The anxiety and trauma can carry on for many years.

While the testing and provision of results from the person who harmed the officer is not conclusive, it does provide information that may be highly relevant and valuable to the risk assessment, advice and mental health of affected police officers.

NSW Parliament recognised this when the Mandatory Disease Testing Bill was introduced into NSW Parliament on 11 Nov 2020, and passed on 13 May 2021.

The Bill was the product of years of Parliamentary Inquiries and Departmental reviews, and is supported by police officers, nurses and corrective services officers across the State.

The objects of the Act are:

- (a) to provide for mandatory blood testing of a person in circumstances where a person’s deliberate actions create a risk an emergency service worker contracts a blood-borne disease
- (b) to encourage emergency service workers to seek medical advice and information about the risks of contracting a blood-borne disease while at work, and
- (c) to protect and promote the health and wellbeing of emergency service workers.

These policy objectives of the Act remain valid. The terms of the Act are largely appropriate for securing those objectives, with some improvements recommended below.

Recommendations

Recommendation 1

The Act is operating as intended; it is being used in a small number of cases, and the final decisions are reached and influenced according to the medical utility of the information. The test results are valuable to an affected police officer and their treating medical practitioner. Only a small number of third parties have been affected by the Act, and few if any have made an appeal or complaint.

Recommendation 2:

Monitor ongoing efforts to ensure relevant medical practitioners are available after an exposure to provide advice and treatment to affected police officers.

Recommendation 3:

Allow other emergency service workers to make an application on behalf of an eligible applicant.

Recommendation 4:

Police should have the power to convey a third party to a health facility whenever doing so is reasonable to ensure compliance with an order under the Act.

Recommendation 5:

If consent is given, but no sample provided, an order is made.

Recommendation 6:

Young people and their guardians should be able to consent to voluntarily provide a sample for testing.

Recommendation 7:

The definition of vulnerable third party should remain unchanged.

Recommendation 8:

The impact of the definition of “deliberate” may need to be considered, for example whether reckless acts of a third party should also be included as an act for which an application and order can be made.

Experience of the Act in relation to NSWPF

Our members' experience of the Act in its first 18 months of operation indicate an Act working as intended, with some improvements available to increase its effectiveness.

We are only aware of a small number of applications being made (approx. 100), showing that the availability of the testing orders makes an important difference to police officers who need it, but impacts only a small number of third parties.

Approximately 30% of applications are subsequently withdrawn by the officer, largely due to information provided during the medical consultation provided for in Section 9 of the Act.

This is an important indicator of the ongoing validity and appropriateness of the Act; applications are progressing to a final decision only when the advice of a relevant treating medical practitioner indicates doing so would assist in protecting the health of the emergency service worker.

Approximately 40% of applications result in an order being made. In 18 months, this represents a small number of people impacted by the Act, but important information being provided to police officers who are receiving medical advice and treatment in relation to the risk of contracting a blood-borne disease.

The PANSW understands that few if any appeals have been made to the Chief Health Officer after an application determination.

Importantly, the PANSW also understands that there have been no Part 8A complaints made in relation to an application, order or enforcement of an order.

Stakeholders who opposed the Bill during its passage through Parliament were concerned the Bill would frequently require a blood test from people who committed violent acts against emergency service workers, without medical justification.

That concern has not eventuated;

- the total number of applications for an order is small,
- only when a medical practitioner advises a testing order would assist in the risk assessment do those applications progress to final decision,
- the total number of people ordered to provide samples is small,
- few, if any, third parties had an experience that prompted them to make an appeal or complaint.

While the impact on third parties has been rare, on those occasions an order has been made, it has been important information for the affected police officers' treating medical practitioner to assess their risk.

As evidenced by the number of applications withdrawn after the required consultation with a relevant medical practitioner, this step in the process is ensuring application are only made when they are beneficial to the health of the affected officer.

The PANSW also consulted a small number of police officers that had experienced exposures to bodily fluid as a result of deliberate and violent acts. This was a mix of officers' whose exposure occurred before and after the Act coming into force.

Almost all of the respondents had suffered *numerous* exposures to bodily fluid as the result of violent and deliberate acts throughout their policing career.

The respondents were asked how useful the test results of the person who deliberately exposed them to bodily fluid would have been/was (depending on whether the exposure occurred since the Act came into effect) in relation to the risk assessment and advice provided by treating medical practitioners, and for the officer's mental health.

67.9 % rated the results as either "very useful" or "useful" for the medical risk assessments and treatment advice conducted by their treating medical practitioners.

75.6% rated the results as either "very useful" or "useful" for the officer's mental health and peace of mind.

Recommendation 1

The Act is operating as intended; it is being used in a small number of cases, and the final decisions are reached and influenced according to the medical utility of the information. The test results are valuable to an affected police officer and their treating medical practitioner. Only a small number of third parties have been affected by the Act, and few if any have made an appeal or complaint.

Improvements to the Act to increase effectiveness

Recommendation 2:

Monitor ongoing efforts to ensure relevant medical practitioners are available after an exposure to provide advice and treatment to affected police officers.

It is crucial to achieve the objectives of the Act that all police officers exposed to bodily fluid can access health services from a medical practitioner with qualifications or experience in blood-borne diseases.

Doing so ensures that

- Police are made fully aware of the risk of contracting a blood-borne disease arising out of the exposure they experienced, including where that risk is low or there is no risk. This is crucial to ensure they select treatment and testing options most suitable to their circumstances, and where there is no risk, avoid undue stress or unnecessarily progressing an application under the Act.
- Police are provided with expert advice regarding the impact of test results obtained under the Act have on their risk assessment, including where the risk assessment indicates they should still undergo treatment and testing themselves.

Prior to the Act coming into effect, too many police officers had inadequate access to medical practitioners with such expertise or experience. This exacerbated police officers' suffering from anxiety and fear when expert advice and support could have alleviated that.

Ensuring police have access to relevant medical practitioners in the immediate aftermath of an exposure incident, and to provide ongoing advice and treatment throughout the process after an exposure should be a priority to achieve the objectives of the Act.

We submit this should be monitored, and where resources or processes create barriers to that access, strategies to rectify that should be considered.

Recommendation 3:

Allow other emergency service workers to make an application on behalf of an eligible applicant.

Incidents in which exposures occur that carry a risk of transmission of a blood-borne virus often involve violence, and police officers can be seriously injured to the point of hospitalisation.

We have received requests for support where the risk assessment for such an officer may be better informed by the test results of the third party, and the affected officer would like to make an application but cannot do so due to being hospitalised and receiving treatment for injuries.

In those circumstances it is difficult for the affected officer to access the required procedural steps.

Their colleagues have enquired how they or their Command can make an application on their behalf, but this has not been possible.

The result is a delay in the making and determination of an application. This impacts the utility of the test results, undermining the objectives of the Act.

We recommend consideration of a process by which an application can be made on behalf of an affected officer.

Recommendation 4:

Police should have the power to convey a third party to a health facility whenever doing so is reasonable to ensure compliance with an order under the Act.

Our members report a problem with third parties that are either subject to an order, or consent to providing a sample, subsequently delaying or not following through with attending a health facility and providing a sample.

When they do so, it creates challenges in locating the person again and ensuring the Act is followed or receiving results from a test.

Where an order is made or consent is given to voluntarily provide a sample, police should be able to convey the third party to a health facility to do so.

Recommendation 5:

If consent is given, but no sample provided, an order is made.

There is concern regarding a potential scenario in which a senior officer seeks the third party's consent, that consent is given, and therefore no order is made.

The third party, despite giving their consent., does not attend a health facility to provide a sample.

In these circumstances, the current situation is no sample from the third party is obtained, and the opportunity to obtain the test results promptly while they are of the most utility is missed.

To rectify this, where consent is given but then no sample is provided within the timeframe that would be required by an order (2 business days), an order should be made and served on the third party, and as per Recommendation 4 they can be conveyed to a facility.

Recommendation 6:

Young people and their guardians should be able to consent to voluntarily provide a sample.

The Act imposes various requirements and restrictions where the third party is under 18 years of age, or under 14 years of age.

Separate to the requirements and restrictions regarding the making of an order, we do not believe the Act should prevent a young person and their guardians from consenting to providing a sample voluntarily.

However, we have been informed the Act is currently being applied so as to prevent that occurring; even when a young person and their guardians want to voluntarily provide a sample, so as to assist an officer, no sample is allowed to be provided and the test results not disclosed to the officer's treating medical practitioner.

If this is occurring, this should be rectified in practice or by legislative amendments where necessary.

Recommendation 7:

The definition of vulnerable third party should remain unchanged.

The current definition of vulnerable third party is based on age or mental health or cognitive impairment.

We have been informed that some stakeholders have recommended additions be made to that definition, based on characteristics that have no relevance to those factors, or any other factor affecting the person's capacity to consent to providing a sample.

We would oppose such an amendment.

Were the definition expanded to include factors that in no way influence a person's capacity to consent, that would be demeaning to people included in the definition and impose additional barriers to achieving the objectives of the Act.

Recommendation 8:

The impact of the definition of "deliberate" may need to be reviewed, for example whether reckless acts of a third party should also be included as an act for which an application and order can be made.

Our members report that people often create circumstances that make it highly likely a police officer will be exposed to a bodily fluid.

Examples of such conduct include hiding uncapped syringes prior to an arrest or search, or resisting arrest and assaulting police officers in circumstances that makes exposure to their blood in open wounds likely.

These circumstances may create some difficulties in the interpretation of the definition of "deliberate".

If in the Ombudsman's role monitoring the operation and administration of the Act, any instances of this type of behaviour occurring but current interpretation of the Act frustrating police officers' access to obtaining an order, we recommend this be reviewed and rectified, including if needed, an inclusion of exposures caused by recklessness as exposures to which the Act applies and testing orders may be made.

Conclusion

In relation to its application to police officers, the Act is operating as intended:

- it is providing police officers with important information in assessing risk and selecting appropriate treatment plans,
- the medical advice provided to the police officer is highly influential in the decision whether or not to progress with an application,
- only a small number of third parties have been impacted by the Act, and we understand few if any have made an appeal or a complaint, and
- there are some recommended improvements that should be made to increase the effectiveness of the MDT scheme in achieving the objectives of the Act.

Just as there was strong support for the introduction and passing of the Bill, there is strong support now for the Act to be retained with some improving amendments.

Thank you for the opportunity to contribute to this review, the PANSW is happy to provide any further information that could be of use.