

Response to Supplementary Questions

Question

- 1. You noted that the first report on the Mandatory Disease Testing scheme was delayed due to the slow take-up by agencies and their officials. What mechanisms and processes have you put in place to raise awareness and have you identified any need for amendments to the Act after the first 18 months of its operation? (Transcript, p18)**

Answer

The NSW Ombudsman's function under the *Mandatory Disease Testing Act 2021* (MDT Act) is to independently monitor and report on the operation and administration of the Act (s 36).

Following our first report, the Minister is then required to conduct a statutory review of the MDT Act itself to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing the objectives (s 37).

Our role is not to promote the MDT Act or seek to increase the take-up of the scheme.

That said, we have taken steps to raise awareness of our function under the MDT Act, including:

- On its commencement, we met with each of the relevant agencies to which the MDT Act applies to explain our role.
- We have information on our website including links to fact sheets developed by the Department of Communities and Justice¹ and the Chief Health Officer's *Guidelines for the MDT Act*.²
- In August 2023, we invited submissions on the operation of the MDT Act from persons who may have been subject to an MDT order, workers who have made an application for an MDT order, and organisations who have advised or otherwise represented these persons. Our open submission process was advertised on our website.³ Additionally, we ran social media campaigns and distributed leaflets to organisations such as the Aboriginal Legal Service, Legal Aid and the Public Interest Advocacy Centre.
- We also asked relevant agencies to disseminate a survey to workers who have made applications under the MDT Act.

We are currently preparing the first report about our monitoring of the operation of the MDT Act. The report will include our observations on the operation and administration of the MDT Act, and may include recommendations including, if relevant, recommendations for legislative amendment.

Prior to tabling our report publicly, procedural fairness will require that we give agencies whose conduct is the subject of critical comment in the report an opportunity to respond to that proposed comment. Subject to timely responses by agencies in that process, we anticipate that our final

¹ Department of Communities and Justice website: [Mandatory Disease Testing Scheme | Communities and Justice \(nsw.gov.au\)](#)

² NSW Health website: [Chief Health Officer's guidelines for the Mandatory Disease Testing Act 2021 - Infectious diseases \(nsw.gov.au\)](#)

³ NSW Ombudsman website: [Invitation for public submissions on the Mandatory Disease Testing Act 2021 - NSW Ombudsman](#)

report, addressing the 18 months from July 2022 to December 2023 will be finalised and tabled by September 2024.

Question

- 2. With the complexity associated with investigating artificial intelligence systems and decision-making processes, how is your office preparing to address the anticipated increase in complaints or issues related to the use of artificial intelligence (AI)? (Transcript, pp 20-21)**
- a. Can you explain any specific methodologies and frameworks in place to detect the use of AI in administrative decision-making within government agencies?**
 - b. Do you plan to further monitor and evaluate the ethical implications of AI usage by government agencies?**

Answer

- a. Can you explain any specific methodologies and frameworks in place to detect the use of AI in administrative decision-making within government agencies?**

There is currently no general legal requirement (in legislation or in policy), for agencies to disclose the use of automated technology (including AI) in their administrative decision-making. Where administrators make decisions that legally do require the giving of reasons, it may be necessary for those reasons to explain the role played by AI in the decision-making process.

Our November 2021 report to Parliament, *The new machinery of government: Using machine technology in administrative decision-making*,⁴ raised the importance of increasing the visibility of how government agencies are using technologies (including AI).

As we outlined in that report, in our view, where administrative decisions are made that affect (particularly adversely) the rights or interests of individuals, reasons should be given and those reasons should explain, in a way that people can understand, any role played by AI in the decision and the decision-making process.

In March this year, we tabled *A map of automated decision-making in the NSW Public Sector*.⁵ In that report, by use of survey methodology, we sought to comprehensively identify all current and in development uses of AI for automated decision-making in the NSW public sector. The mapping report followed up our observation about lack of visibility in the 2021 report, and provided a point-in-time overview of the current and planned use of automated decision-making (ADM) systems (including AI) across the public sector.

This compendium will be a valuable resource for our office to identify specific agency use of ADM and AI in addition to possible applications in like agencies or by agencies with similar functions to those that reported systems in place.

⁴ NSW Ombudsman report: [The new machinery of government: using machine technology in administrative decision-making \(nsw.gov.au\)](https://www.nsw.gov.au/ombudsman/reports-and-articles/reports/the-new-machinery-of-government-using-machine-technology-in-administrative-decision-making)

⁵ NSW Ombudsman report: [A map of automated decision-making in the NSW Public Sector: A special report to Parliament - NSW Ombudsman](https://www.nsw.gov.au/ombudsman/reports-and-articles/reports/a-map-of-automated-decision-making-in-the-nsw-public-sector-a-special-report-to-parliament-nsw-ombudsman)

However, we do not plan ourselves to develop and maintain an ongoing register of AI uses. Whether there would be utility in that being done was a matter canvassed at a recent Parliamentary Committee *Inquiry into AI in NSW*, which is yet to hand down its report.

In terms of our complaint work, when members of the public now make a complain to us about a decision made by a public authority, our complaint handlers are alive to the need to consider whether the decision may implicate the use of AI (even if that was not raised by, or even known to, the complainant). We have, and will continue to run, internal information and education sessions for our complaint handlers on AI in administrative decision-making, including in relation to our recent mapping report.

b. Do you plan to further monitor and evaluate the ethical implications of AI usage by government agencies?

The Department of Customer Service is the lead policy agency for the NSW Government approach to AI including the AI Strategy, AI Ethics Policy and the AI Assurance Framework. That Department also leads the 'AI Review Committee' which provides 'oversight and governance on AI use in government'.⁶ Under the AI Assurance Framework, an agency assessment of their adherence to the framework must be submitted to the AI Review Committee to review and make recommendations to mitigate risk.⁷

We will continue to make inquiries and, where appropriate, conduct investigations relating to agency use of AI in administrative decision-making in accordance with our functions under the *Ombudsman Act 1974*. See for example our April 2024 investigation report into the lawfulness of Revenue NSW's automated garnishee order process.⁸

Question

3. Will your office be involved in the development of the AI Assurance Framework by the Department of Customer Service?

Answer

We provided our 2021 and 2024 special reports to the Department of Customer Service after they were tabled, and expect that the observations and guidance they provide will be considered by the Department as relevant to its work in developing future frameworks for regulating the use of AI by government agencies.

The Department of Customer Service has not otherwise consulted our office on the development of a proposed new AI Assurance Framework.

We note that, where agencies do seek to consult with us on the development of policies or other regulatory frameworks of this nature, we would need to be circumspect in how we respond to ensure that any involvement as these instruments are prepared will not interfere (or be perceived to interfere) with our capacity to independently and objectively receive complaints and if necessary, investigate and make findings about relevant conduct of agencies going forward.

⁶ Digital.NSW website: [Artificial Intelligence | Digital.NSW](#)

⁷ Artificial Intelligence Assurance Framework: [nsw-government-assurance-framework.pdf](#)

⁸ NSW Ombudsman report: [Revenue NSW - The lawfulness of its garnishee order process - NSW Ombudsman](#)

Question

- 4. Could you provide further insights into the impact that the changes to your funding have had on your office's operations, particularly in terms of handling complaint and investigations?**

Answer

With the additional resources, we have increased the number of complaints in respect of which we have been able to take investigatory steps, such as preliminary inquiries. We reported an increase of 69% for the 2022-23 financial year compared to the previous year. This financial year (2023-24) we anticipate the upward trend will continue.

Additional staffing in our investigations area has also already had a direct impact on our capacity to respond to complaints that raise concerns about serious maladministration by way of formal investigation. 'Formal investigations' are those that require us to use our compulsory information gathering powers under the *Ombudsman Act 1974*, and result in a formal report with findings about maladministration. Last year we reported that we commenced 10 formal investigations in the 2022-23 financial year, compared with 1 investigation commenced in the previous year. So far this financial year, we have commenced 9 formal investigations (at 31 May 2024).

As noted at the hearing on 2 May 2024, with the additional staffing in our complaints intake and resolution area, we have also been able to commence work to reorganise those staff into teams whose roles it will be to deal end-to-end with complaints from particular sectors. We expect that complainants will benefit from dealing with case officers with more sector specific understanding. We also anticipate improved efficiency as staff can build greater knowledge and expertise in particular areas. Streaming complaints handling should also increase our ability to identify and focus on those sectors where constrained resourcing may have previously meant complaints that would have warranted further investigatory action were not able to be prioritised.

Additional funding will also be applied to increase our capacity to offer complaint conciliation services, which can be a highly effective but also resource demanding method of resolving some complaints (13A *Ombudsman Act*).

Question

- 5. What is the current status of the operating model developed by the Ombudsman's office to participate in the Optional Protocol to the Convention Against Torture (OPCAT) regime? (Transcript, p22)**

Answer

We finalised an operating model for OPCAT in 2023. The model is necessarily flexible in recognition that it is not yet clear which specific roles the NSW Ombudsman may be conferred under OPCAT – for example: sole National Preventive Mechanism (NPM) for all places of detention in NSW; one of a number of NPMs dealing with some but not all places of detention; co-ordinating state NPM similar to the role played by the Commonwealth Ombudsman nationally.

The document sets out the foundational requirements for the establishment and operation of any such NPM/s in NSW under the provisions of OPCAT.

The operating model would provide the necessary framework to enable us to quickly respond to the overdue implementation of OPCAT in NSW, and to take the required steps to stand up any NPM role we are conferred under OPCAT – including establishment and recruitment to staffing roles, establishment of working procedures, and the expedited commencement of an inspection regime.