



Law Council  
OF AUSTRALIA

Office of the President

11 August 2017

Senator Jonathon Duniam  
Chair  
Senate Community Affairs Legislation Committee  
Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [community.affairs.sen@aph.gov.au](mailto:community.affairs.sen@aph.gov.au)

Dear Chair

**SOCIAL SERVICES LEGISLATION AMENDMENT (WELFARE REFORM) BILL 2017**

1. The Law Council is pleased to provide a submission to the Senate Community Affairs Legislation Committee's (**the Committee**) inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (**the Bill**).
2. The Law Council is grateful for the assistance of its National Human Rights Committee, the Law Society of New South Wales and the Law Institute of Victoria in the preparation of this submission.
3. The Bill seeks to introduce a new, single jobseeker payment, which will replace or consolidate seven existing payments in order to simplify the working-age payment system.<sup>1</sup> It also aims to 'strengthen' welfare conditionality for jobseekers with drug and alcohol abuse issues and better encourage and support them to pursue treatment.<sup>2</sup>
4. The Law Council provides comments primarily in respect of Schedule 12 of the Bill.
5. Schedule 12 of the Bill would set up a pilot scheme where, in three selected areas, recipients of *Newstart* and *Youth Allowance* would be 'randomly' picked via a 'data driven profiling tool' that would identify 'relevant characteristics that indicate a higher risk of substance abuse issues' to undergo drug testing.<sup>3</sup>

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<sup>1</sup> Minister for Social Services, the Hon Christian Porter MP, *Second Reading Speech Social Services Legislation Amendment (Welfare Reform) Bill 2017*, 22 June 2017.

<sup>2</sup> Ibid.

<sup>3</sup> Department of Social Services (Cth), *Welfare Reform Budget 2017 - Factsheet*, (2017) 3 <[https://www.dss.gov.au/sites/default/files/documents/05\\_2017/budget\\_2017\\_-\\_welfare\\_reform\\_-\\_fact\\_sheet\\_for\\_web\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2017/budget_2017_-_welfare_reform_-_fact_sheet_for_web_0.pdf)>.

6. The Law Council understands that the drug testing trial areas would be selected by considering a range of factors, including crime statistics, drug use statistics, social security data and health service availability.<sup>4</sup>
7. The Law Council is concerned that the approach taken in Schedule 12 of the Bill has not been demonstrated to be a necessary or proportionate response to dealing with alcohol and drug dependency issues within the welfare system. These issues are complex and require nuanced policy responses.
8. In the event that Schedule 12 of the Bill proceeds, it should be amended in the following ways:
  - Given that the Government intends that testing be random, the Bill should refrain from using personal and sensitive information (particularly if initially collected for other reasons) and other data-driven profiling tools in determining the drug test trial areas, and in determining individual participants.
  - Participation in the scheme, particularly the income management aspects of the scheme, should be on a voluntary basis.
  - Recipients of *Youth Allowance* who are children should be exempt from the scheme.
  - Obtaining consent for participation in the trial should be separated from seeking to claim *Newstart* or *Youth Allowance* to ensure that individuals are in fact able to provide voluntary and informed consent.
  - Consideration should be given to removing provisions that may compound disadvantage, such as requiring individuals to bear the cost of second and subsequent drug tests, waiting periods, involuntary and indefinite income management.
  - Limit the use of subsequent legislative instruments and, instead, provide detail on the operation of the scheme in the primary legislation.
  - Provide for a clear and independent appeal process in respect of the validity of drug test results, and for referrals to income management.
  - There should be a mechanism for monitoring and evaluating the efficacy of the scheme.
  - The Bill not be passed until it is assessed by the Parliamentary Joint Committee on Human Rights and any concerns raised by that Committee have been addressed.

## **Schedule 12**

9. Item 3 of Schedule 12 provides that the Minister may make drug testing rules via legislative instrument. Such drug testing rules would encompass the following matters:
  - (a) prescribing up to 3 discrete areas for the purposes of the definition of drug test trial area;
  - (b) prescribing substances for the purposes of the definition of testable drug;
  - (c) giving and taking samples of persons' saliva, urine or hair for use in drug tests;

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<sup>4</sup> Ibid.

- (d) dealing with such samples;
- (e) carrying out drug tests;
- (f) giving results of drug tests in certificates or other documents and the evidentiary effect of those certificates or documents;
- (g) confidentiality and disclosure of results of drug tests;
- (h) requirements relating to contracts entered into for the carrying out of drug tests;
- (i) keeping and destroying records relating to:
  - (i) samples for use in drug tests; or
  - (ii) drug tests.

10. The effect of items 4-8 and 12 of Schedule 12 appears to be that the person making a claim for *Newstart* or *Youth Allowance* would be required to acknowledge in the claim form that they may be required to undergo drug testing as a condition of payment. Their claim may be rejected if they do not acknowledge this in the claim form. If they apply again for the benefit, after having refused to submit to drug testing, they will be subject to a waiting period of 28 days.
11. Such testing would be administered by a contracted third-party provider. Those who tested positive would be put on income management, via referral of the third-party contractor (item 24). Item 24 inserts new subsection 123UFAA(1B) which provides that, although the pilot is for 24 months, the Secretary may, by legislative instrument, extend the period of income management for longer than 24 months.
12. The cost of the drug test for second or subsequent tests will be deducted from the payment received by the person (up to a maximum of 10%, an amount to be determined by legislative instrument) (item 11).
13. Individuals who fail to comply with notices to do certain things may have their payments suspended, unless they have a reasonable excuse for not complying. It appears that the burden of proving reasonable excuse would fall on the individual. However, the benefit will not be backdated to the date of the suspension, but will only be payable from the date the person attended an appointment in accordance with the later notice (item 20).

### **Procedural fairness**

14. The Law Council is concerned that the Minister has discretion to do certain things, such as make the drug testing rules by legislative instrument (item 3), rather than in the primary legislation. The Secretary is also provided with similar discretion in other instances. For example, item 18 provides that the Secretary may enter into contracts with third parties to carry out drug testing. However, there is no detail on how the contractors will be selected and regulated, including how personal information, and the results of the testing, will be safeguarded.
15. From a rule of law perspective, the Law Council is in principle opposed to this approach to the legislative process given that legislative instruments are exercises of executive

power that are not subject to similar scrutiny and transparency to that to which Acts of Parliament are subject.

16. Further, the Law Council queries whether and how individuals will be able to appeal false positives or any other procedural concerns related to testing. The Bill does not appear to make any provision for avenues of appeal, in this regard, nor in respect of referrals to income management. Given the onerous obligations and significant consequences for individuals as a result of the operation of this Bill the Law Council makes the following recommendations.

### **Risk of compounding disadvantage**

17. As a data-driven profiling tool will be used to select individuals for testing, ‘randomness’ in selection may be unlikely. The Law Council is concerned that the amendments contained in Schedule 12 may disproportionately impact already vulnerable people, including Aboriginal and Torres Strait Islander peoples, and people with cognitive or other impairments.
18. By definition the program will be likely to target the most vulnerable groups and their families, given that these are most likely to be recipients of social security benefits and may have problems with drugs. As such, imposing income limitations on them may risk compounding disadvantage on vulnerable groups. This may be particularly so if the measures in the Bill regarding the deduction of the costs of second and subsequent drug tests from benefits (item 11) proceed.
19. There is an additional risk that if no actual support to deal with drug abuse is provided, that people receiving income support under income management will turn to crime to support their ongoing and unaddressed drug problems. Such an intervention would only work if additional support mechanisms are provided.

### **Monitoring and evaluation**

20. The Australian Privacy Principles state that an “entity must not collect personal information (other than sensitive information) unless the information is reasonably necessary for, or directly related to, one or more of the entity’s functions or activities”.<sup>5</sup>
21. It is arguable whether the collecting of information about an individual’s health through drug testing is reasonably necessary for the Department of Human Services to carry out its function of providing social security.
22. However, given that the program represents a significant reach of government into the private lives of Australians, if it is to proceed, there must be strong oversight and clear compliance mechanisms imposed on the third party provider of drug testing and government agencies including the Department of Human Services, Centrelink and any other agencies involved in the program.

### **Human Rights concerns**

23. A question may arise as to whether Schedule 12 of the Bill meets the criteria set out by the Australian Human Rights Commission (**the Commission**) in respect of ensuring that income management measures comply with the *Racial Discrimination Act 1975*

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<sup>5</sup> *Privacy Act 1988* (Cth) sch1 (The Australian Privacy Principles, Principle 3.1).

(Cth) (**RDA**), namely, that the proposed measures are evidence based, last resort, and the least restrictive option.

24. A further question may arise as to whether Schedule 12 of the Bill is consistent with Australia's international human rights obligations, including for example (but not necessarily limited to):

- the *International Covenant on Civil and Political Rights* and the *International Covenant on Social, Economic and Cultural Rights* in terms of requirements for necessity and proportionality; and
- Articles 3, 16 and 26 of the *Convention on the Rights of the Child* insofar as children may be affected by the amendments relating to *Youth Allowance*.

25. Accordingly, the Law Council recommends that the Bill not be passed until it is assessed by the Parliamentary Joint Committee on Human Rights and any concerns raised by that Committee have been addressed.

26. Thank you for the opportunity to provide these observations.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiona McLeod', is written in a cursive style.

**Fiona McLeod SC**  
**President**