

4 September 2017

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

By email: community.affairs.sen@aph.gov.au

Dear Chair

SOCIAL SERVICES LEGISLATION AMENDMENT (WELFARE REFORM) BILL 2017

1. Thank you for the opportunity to appear before the Senate Community Affairs Legislation Committee (**Committee**) for the inquiry into Social Services Legislation Amendment (Welfare Reform) Bill 2017 (**the Bill**) at the public hearing 31 August 2017 (**Hearing**). The Law Council provides this supplementary submission to the Committee to address the question on notice that arose from the Hearing.
2. The Law Council is grateful for the assistance of its National Human Rights Committee in the preparation of this submission.
3. The question on notice received by the Law Council at the Hearing was as follows:

Senator KAKOSCHKE-MOORE: Ms McLeod, I have a couple of questions, and one of them will be something for you to take on notice, if you wouldn't mind, and that is that yesterday the department tabled to the committee a draft version of the drug testing rules. I wonder if you wouldn't mind having a look at those rules and providing the committee with some feedback now that they've been made public.
4. Brief comments by way of an answer are below, should it assist the Committee. However, the Law Council notes that there may be other problematic features with the Social Security (Drug test) Rules 2017 (**the Rules**), which should be addressed should the Bill and Rules proceed. In the timeframe available for response (two business days since the date of the Law Council's appearance), the Law Council has not had sufficient time to undertake a comprehensive analysis of the Rules.
5. As an overarching comment, the Law Council notes that the Rules and testing regime focus on drug use rather than dependence, which is significantly broader than the stated intention of the amendments.

Proportionality

6. The Law Council reiterates its concern expressed at the Hearing that the scheme has not been demonstrated to be a necessary or proportionate response to drug dependency issues among welfare recipients. This is particularly so where one

positive drug test appears to be sufficient to trigger the two year scheme despite a one-off positive drug test not necessarily being evidence for drug dependency. That is, one positive drug test likely to be insufficient to establish dependency because (for example) it is possible in the case of inhaled substances for people to test positive without having intended to use the drug. Alternatively, the usage might have been a one-off or rare instance of drug use for which there is no evidence of a pattern of addiction.

Procedural fairness

7. The Rules require the testing provider to give the Secretary notice of a positive test. However, there does not appear to be a requirement to give the 'drug test trial pool member' the results, either before or after the Secretary receives them. Such a requirement should be provided in the event that the Rules and Bill are to proceed.
8. The Rules outline what the provider must do if the member disputes the test, but there is no clarity as to how the member can raise a dispute. This would seem to raise a high risk of a lack of procedural fairness as identified in the Law Council's initial written submission to the Committee. Procedural fairness in the drug testing process is critical to ensuring the efficacy of the scheme.
9. In addition, the proposed Rules 7(5) and 7(10) as to when a positive result could be invalid are vague. It appears for example that a person tested could supply evidence that the drug taking was involuntary but that would not necessarily mean the test result was 'invalid'.
10. There is no clarity or definition of either the exculpatory 'circumstance' which might lead to a positive result or the evidence required of it. Further there is no definition of 'invalid'. It is unclear whether evidence of mistaken belief as to the identity of a drug would render a positive result invalid.
11. The decision under these two sub-rules is made by a laboratory without necessarily having any qualifications to assess evidence or apply the vague legal test involved.
12. Rule 16 deals with testing of the second sample (after a disputed result on the first). However, Rule 16 means that the second sample would be sent back to the same analyst. There must be provision for the second analysis to be done by a second independent lab should the scheme proceed.
13. In the Law Council's view the threshold has been set too low. A question arises as to whether the administration of a harm-reduction approach should be through the medical system, as opposed to decisions by administrators not skilled in detecting or treating addiction.

Privacy protections in contracts

14. The contracts with testers will need to contain rigorous provisions protecting privacy and security of records. There is some mention of that in the Rules, but there must also be detailed provision in contracts.

Inquiry should be deferred

15. The Law Council recommends that the Committee's current inquiry should be deferred until sufficient time is given for organisations to undertake a comprehensive

analysis of the Rules. Otherwise Parliament's decision about the appropriateness of enacting the Bill with its associated Rules may not be made on the basis of robust informed advice.

Thank you for the opportunity to make these observations.

Yours sincerely

Fiona McLeod SC
President