

LEGAL ISSUES PERTAINING TO THE SUBSTANCE ABUSE MEASURES

Outcome: 1.10 Working Age Payments

POSSIBLE ISSUE: Legal issues pertaining to the substance abuse measures, including human rights, disability discrimination and privacy.

TALKING POINTS

- DSS has consulted with, and received advice from, a number of other agencies, including the Attorney-General's Department (AGD), Australian Government Solicitor (AGS), Office of International Law (OIL), and Office of Parliamentary Counsel (OPC) (see [Attachment A](#)).

Legislation and constitutional assessment

- Legal and constitutional advice from the AGS is that these measures are **permissible under the broad social welfare powers in the Constitution** (for example, section 51(xxiiiA)).
- Amendments will be made to the *Social Security Act 1991* (the SS Act), *Social Security (Administration) Act 1999* (the Admin Act) and related legislative instruments (summary at [Attachment B](#)).
- DSS working with the OPC to develop the required legislation for introduction in a portfolio bill in the winter sittings 2017.

Human rights

- Advice from the OIL on the three DSS measures indicates **these measures are likely to be consistent with Australia's international human rights obligations**, provided they do not result in people being unable to meet their basic needs or adverse treatment as a result of inability to access services.
- Placing a job seeker on welfare quarantining will not reduce their level of income support. Job seekers will not be penalised if appropriate treatment services are not available.

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Disability discrimination

- Advice from AGS is that drug dependency can fall within the definition of disability for the *Disability Discrimination Act 1992* (the DDA).
- Aspects of social security law (the SS Act) are already exempt from the DDA. This enables payments for people with disability to be appropriately targeted according to the purpose of those payments.
Amendments will be required to also exempt the Admin Act from the DDA.
- This will not affect the broader protections that the DDA provides to people with disability. DSS has been consulting with AGD in relation to the amendments to the DDA.

Privacy

- **Disclosure of personal information under the drug testing trial will only occur in accordance with the secrecy provisions** in the Admin Act. These provisions allow personal information to be disclosed for the purposes of administering the social security law.
- Drug test results will be provided to DHS in order to place the job seeker on welfare quarantining or refer them to a medical assessment where applicable. Results may also be provided to the medical professional to inform their assessment.
- Where the assessment recommends treatment, that recommendation will be provided to the job seeker's employment services provider to update their Job Plan. The provider will therefore be aware that the job seeker has had a positive test because only these job seekers may be referred to a medical assessment and required to have a treatment activity in their Job Plan; however, the actual results and details of the test will not be shared with employment services providers.
- Drug test results will not be shared with the police, future employers or child protection services.

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	Action Officer:	Group Manager
Name:	Section	Cath Halbert
Position:	Director	Group Manager
Branch:	Work and Study Payments	Payments Policy Group
Work phone number:	Section	Section
Mobile phone number:	Section 47F	Section 47F
Cleared by Branch Manager	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	Date:
Witness who will address this question at the Estimates hearing	GM Initial	
	Cath Halbert	

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ATTACHMENT A**LEGAL ADVICES – TACKLING SUBSTANCE ABUSE BY WELFARE RECIPIENTS**

	Advice sought	Response
Australian Government Solicitor	Is the proposal to drug test welfare recipients legally sound (including Commonwealth duty of care)?	The proposal is achievable, with legislative change.
Australian Government Solicitor	Constitutional risk assessment (CRA)	Measures assessed as not creating any new constitutional risk
Office of International Law	Compatibility of DSS substance abuse measures with Australia's international human rights obligations.	These measures are likely to be consistent with Australia's human rights obligations, provided they do not result in people not being able to meet their basic needs or adverse treatment of a person as a result of inability to access services. Risk of inconsistency with those rights if drug testing regime is continued despite evaluation indicating it is not effective in meeting its objective.
Attorney-General's Department	Advice regarding the application of the Disability Discrimination Act (DDA) to the measures	Constitutional risk assessment recommended exemption of Admin Act from the DDA to reduce the risk that the measures may contravene the DDA (the SS Act is already exempt from the DDA – when it was exempted it included the provisions that are now in the Admin Act so the exemption of the Admin Act would be consistent with the original intent). AGD advised that exempting all three social security acts and associated legislative instruments from the DDA would be the best way to achieve this, subject to policy authority.
Internal DSS legal branch	Privacy and disclosure of personal information under the drug testing trial	Information about recipients subject to the trial may be recorded, used or disclosed in accordance with secrecy provisions the Admin Act, e.g. for the purposes of administering the social security law; for research/statistical analysis; where certified to be in the public interest.

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Australian Government Solicitor	Duty of care where a job seeker tests positive (i.e. if they then leave the office, drive under the influence and cause injury to themselves or others)	Unlikely that there would be any duty of care owed by the Commonwealth, noting that DHS and testing service staff would have no control over job seeker once they leave the office and no power to detain the job seeker. Any perceived duty of care could be addressed by providing information about not driving or engaging in other activities (e.g. using machinery) while drug affected and alternative transport options.
Australian Government Solicitor	<p>Advice on certain aspects of the drug testing measures:</p> <ol style="list-style-type: none"> 1. Requirement for job seekers in trial sites only to consent to drug testing as part of claims process 2. Use of different drug test methods and requirement to attend drug testing provider offsite 3. Recovery of the cost of positive subsequent drug tests or positive re-tests 	<p>Various detailed advices received:</p> <ol style="list-style-type: none"> 1. Low risk that place-based trial would contravene provisions in the Constitution prohibiting preferential treatment between states or parts of states. 2. No new constitutional or other legal difficulties associated with using different drug test methods. 3. No new constitutional risk associated with re test cost repayment – ability to specify the rate of payment (including a reduced rate) is part of the core of s51(xxiiiA) of the Constitution.

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ATTACHMENT B**Remove Table 6 for DSP** (DSS measure)

- Start date – 1 July 2017
- Primary legislation – no amendments required
- Subordinate legislation – amendment required (*Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*) to remove table 6 from the legislative instrument

Remove drug/alcohol-related exemptions (DSS measure)

- Start date – 1 January 2018
- Primary legislation – amendments required (*Social Security Act 1991*) to preclude a eligibility for exemptions where the reason for the exemption is predominantly attributable to drug and/or alcohol misuse
- Subordinate legislation – no amendments required

Trial drug testing in targeted locations (DSS measure)

- Start date – 1 January 2018
 - Primary legislation – amendments required (*Social Security Act 1991, Social Security (Administration) Act 1999, Disability Discrimination Act 1992*) to:
 - make acknowledgement of a potential requirement to undertake a drug test a condition of claim
 - allow a person to be required to give a sample for the purposes of a drug test
 - suspend payment for failing to attend appointment with back pay only if job seeker has a reasonable excuse for non-attendance
 - cancel payment and apply 4 week waiting period if the person refuses to undertake a drug test
 - enable the operation of welfare quarantining in the trial locations
 - place a person on welfare quarantining if they test positive to a drug test
 - recover the costs of a positive subsequent drug test (or a recipient initiated re-test) through payment rate reduction
 - Subordinate legislation – amendments required (*Social Security (Employment Pathway Plan Requirements) Determination 2015 (No.1)*) to:
 - require a person to undertake appropriate treatment as a compulsory activity in a Job Plan (the current instrument precludes a person from being required to undergo involuntary psychiatric/psychological or medical treatment).
 - Existing provisions would be used to:
 - require a person to attend an appointment with DHS (i.e. for the purposes of undertaking a drug test)
 - require a person to attend a medical assessment (i.e. where they have had two positive drug tests and are referred to a contracted medical professional).
 - apply normal compliance arrangements for failing to comply with a requirement in a Job Plan
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Restrict reasonable excuse for drug/alcohol-related reasons (Employment measure)

- Start date – 1 January 2018
- Primary legislation – amendments required (*Social Security (Administration) Act 1999, Disability Discrimination Act 1992*) to remove access to reasonable excuse provisions for drug/alcohol related reasons where the person has chosen not to undertake appropriate treatment
- Subordinate legislation – amendments required (*Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No.1)*) to amend the guidelines for reasonable excuse to require consideration be given to the extent to which the person has participated in appropriate and available treatment

Allow drug/alcohol treatment as an approved activity (Employment measure)

- Start date – 1 January 2018
- No amendments to primary or subordinate legislation required (implemented through changes to jobactive and policy guidelines)