

**Social Security (Benefit Categories and Work Focus) Amendment Bill 67-1**

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**Submission by the Privacy Commissioner  
to the Social Services Committee**

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5 November 2012



Privacy Commissioner  
Te Mana Matapono Matatapu

## **1. Introduction and summary**

- 1.1 This submission focuses on clauses 42 and 43 of the Social Welfare (Benefit Categories and Work Focus) Amendment Bill.
- 1.2 These clauses place obligations on beneficiaries to submit to pre-employment drug tests. They also enable the Ministry of Social Development (MSD) to suspend or even cancel benefits based on drug test results, or failure to take such a test. But pre-employment drug tests may be unlawful, particularly where the position concerned is not safety-sensitive. The Bill would allow MSD to suspend or cancel a benefit even if the drug test was unlawful. This is inherently unfair. It insulates the State agency from responsibility, while leaving the beneficiary to bear the risks of any failure of an employer to comply with the Privacy Act.
- 1.3 I therefore recommend that the Bill should be amended to require the Chief Executive of MSD to ensure any pre-employment drug test is a valid pre-requisite for the specific employment or training position concerned, before taking adverse action against a beneficiary on the basis of drug test results.
- 1.4 The Bill also contains a number of other provisions with privacy implications because they require information sharing between agencies. I am comfortable that sufficient safeguards for this information sharing can be accommodated either within the existing provisions of the Privacy Act, or the Privacy (Information Sharing) Bill currently before the House.
- 1.5 Finally, clause 32 of the Bill makes a minor technical change to the Privacy Act that gives me no cause for concern.

## **2. Pre-employment drug-testing may not be lawful, particularly if the position concerned is not safety-sensitive**

- 2.1 In order to comply with the Privacy Act, pre-employment drug testing must be undertaken for a clearly described purpose, and must be an effective means of achieving that purpose. The importance of the purpose and the effectiveness of drug testing to achieve it must be weighed against the intrusive nature of taking a bodily sample.
- 2.2 Good examples of industries where drug testing may be relevant include transport, manufacturing and processing and those using heavy machinery. Drug testing will not be appropriate for all jobs within these industries, but will be relevant to positions where drug impairment might pose a risk to the safety of staff or the public. For example, this was discussed in the landmark Employment Court decision in the 2004 case of *New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated v Air New Zealand*. In this decision, the Employment Court upheld Air New Zealand's right to implement a drug testing programme, but only in the context of staff in safety sensitive positions.
- 2.3 Employers will have responsibilities to ensure that any pre-employment drug test complies with the Privacy Act. However, not all employers will comply with the law.

### **3. The Bill allows unlawfully collected information to be used by MSD**

- 3.1 This Bill explicitly overrides the Privacy Act's protections against unwarranted drug testing by authorising MSD to make use of information even if it is collected in breach of the Privacy Act. There are no safeguards in the Bill for MSD to verify that an employer's requirement for a drug test is reasonable before MSD takes adverse action against a beneficiary, even where that test constitutes a breach of the beneficiary's rights under the Privacy Act.
- 3.2 The Bill as currently drafted also construes failure to pass or refusal to take any pre-employment drug test as a failure to meet a work availability obligation, whether or not the test is warranted. Vulnerable beneficiaries will be faced with a "Catch 22". They are not likely to challenge the legality of a drug test, as refusing to give consent would leave them at risk of having their benefit cancelled.
- 3.4 This Bill places all the cards, and none of the obligations, in the hands of MSD.
- 3.5 This Bill needs to provide for greater certainty for beneficiaries that they will not be adversely affected by testing that is not appropriate or necessary. It should limit the use of test results, or the fact that a beneficiary has refused to undertake a test, to situations where drug tests are directly relevant to the employment sought.
- 3.6 I therefore recommend that the Bill be amended to require the Chief Executive of MSD to ensure any pre-employment drug test is a valid pre-requisite for the specific employment or training position concerned, before taking adverse action against a beneficiary on the basis of drug test results.

### **4. Concluding comment regarding other provisions in the Bill that have potential privacy impacts that are manageable or minor**

- 4.1 For the Committee's further information, I note that there are a number of other provisions in the Bill that have privacy implications because they require some form of information sharing between agencies, including:
- Requiring a person on a benefit on the grounds of sickness, injury or disability to have a medical examination to assess their ability to work
  - Enabling MSD to suspend benefits if criminal proceedings have been commenced against the beneficiary or a warrant has been issued for their arrest
  - Identifying whether beneficiaries are meeting social obligations, such as having their children enrolled in early childhood education.
- 4.2 I am comfortable that this information sharing can be accommodated either under the Privacy Act or the Privacy (Information Sharing) Bill currently before the House.
- 4.3 Clause 32 of the Bill also makes a minor technical amendment to the Privacy Act to account for the effect of the expanded work test obligations on an existing information match with NZ Customs to identify time beneficiaries spend outside New Zealand.
- 4.4 Although more people may be affected by the match because of the changes to the work test thresholds the change still applies only to the work test obligation. It is therefore a minor technical change and it gives me no cause for concern.