

Submission

By



to the

Social Services Select Committee

on the

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

1 November 2012

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Social Security (Benefit Categories and Work Focus) Amendment Bill

While BusinessNZ supports the general thrust of the bill, this submission focuses specifically on the bill's drug testing provisions

1. RECOMMENDATIONS

1. That the drug testing provision of the bill should proceed after first addressing the points made in this submission.

- a. Currently, the definition of drug test in clause 39 (amending section 88A of the principal Act) gives cause for concern since a drug test is not an impairment test and will not necessarily show that a potential employee is unfit to do the job in question. On the basis of the proposed definition, both the drug test result and any subsequent benefit cancellation could well be open to challenge. Therefore the use of a broader definition, along the following lines, is recommended:

Drug test means a test to determine whether a candidate for employment or training would be unsuitable for the job or training otherwise offered because of the presence in that person's body of one or more illegal drugs, where the job or training offer is contingent upon a negative test result –

or, alternatively, a simpler test such as:

drug test, for a person, means a test to determine whether one or more controlled drugs are present in that person's body

- b. Regarding the clause 39 definition of *fail*, it is recommended that for consistency purposes it would be better to adopt the terminology of AS/NZS 4308:2008, that is, *not negative* and *negative*. The reason for saying so is that on-site screening devices can return false positive results whereas the results of subsequent laboratory testing are negative.
- c. Also in clause 39, it is recommended that the words *quicker, less formal and less expensive* be removed from the definition of *screening drug test*. Those words do not always apply to screening tests and their inclusion could leave a screening test open to challenge on the basis that a test was not quicker, less formal and less expensive. Their removal would not appear to detract from the definition's meaning or intent.

- d. Because screening drug tests can at times produce a negative result, it is recommended that two further paragraphs be added to subsection (2) of new section 102B, namely:
 - (c) an evidential drug test of the candidate undertaken notwithstanding a negative result from the screening drug test, where an evidential drug test is considered to be necessary, or*
 - (d) an evidential drug test of the candidate where a prior evidential drug test has yielded an inconclusive result.*
- e. Clause 45 (inserting an amended section 117) contains, in new subsection (1C), a rather curious use of the word '*mentioned*' in relation to the preceding new subsection (1B). It is recommended that '*mentioned*' be replaced by '*referred to*', to read: '*... that is referred to in subsection (1B)*'.

2. DISCUSSION

- 1. BusinessNZ is in agreement with the Government's proposal to require beneficiaries to undergo pre-employment drug testing, if that is a requirement of the job or training offered and notes that particularly with jobs in safety sensitive areas, pre-employment testing regimes are now well-established. However, as the discussion below indicates, the bill's current drug testing provisions are somewhat difficult to interpret and would be easier to follow if more clearly stated.
- 2. While the drug testing obligation clearly applies if drug testing is required by potential employers and training providers (clause 43), pursuant to clause 42¹ it also applies to the work test obligations (in section 102A) '*to be available for, and take reasonable steps to obtain suitable employment*' (102A(1)(a)), '*to attend and participate in an interview for any opportunity of suitable employment to which the beneficiary is referred by the chief executive*' (102A(1)(c)) and to '*employment-related training specified by the chief executive*' (102A(1)(f)(iv)). It is presumed that in these circumstances the test might be ordered by Work and Income prior to the beneficiary seeking employment or training and might possibly be required by the employer before a job candidate is interviewed. If this happens and a candidate can show that he or she is attending in a drug-free state, as a general proposition, the candidate will be seen as more employable. However, the prospective employer will also need to take into account the particular candidate's job-related skills before a job offer can be made.

¹ Clause 42 inserts a new subsection (1A) into the current work test obligations section, 102A

3. And it is not entirely clear, where drug testing is required in terms of amended section 102A, who will be responsible for carrying it out (and bear the cost) or who might require it. But if drug testing does occur in those situations and sanctions apply in the event of failure, the provision of advice or counselling might also be considered. That would help make future job offers far more likely.
4. Amended section 102A notwithstanding, the more usual sequence of events is a job interview, followed by a job offer (if there is a job offer) made contingent upon passing a drug test. In other words, most employers are unlikely to require drug testing before an interview has been held. It is suggested that also applying the drug testing obligation to section 102A(1)(b) (which requires acceptance of a job offer) might help to clarify the relationship between job offers and employer-required drug testing. For a candidate required by the departmental chief executive to attend a job interview, the prospect of a probable drug test in the event of a job offer would go some way towards ensuring attendance in a drug-free state, particularly so if failure to attend carried with it the possibility of at least partial benefit cancellation (as section 117(1)(c)).
5. Where drug testing is required, the drug test is to be undertaken and passed 'by a specified time' (clause 43, new section 102B(1)). This provision might be taken as indicating that candidates who might not initially be able to pass a drug test are to be given the chance to show they can be drug free but raises the question of who is to decide what the specified period should be. Will it be set by regulation or determined by the employer, or possibly, by Work and Income? This needs to be made clear.

3. SPECIFIC RECOMMENDATIONS

1. Currently, the definition of drug test in clause 39 (amending section 88A of the principal Act) gives cause for concern since a drug test is not an impairment test and will not necessarily show that a potential employee is unfit to do the job in question. On the basis of the proposed definition, both the drug test result and any subsequent benefit cancellation could well be open to challenge. Therefore the use of a broader definition, along the following lines, is recommended:

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2. Regarding the clause 39 definition of *fail*, it is recommended that for consistency purposes it would be better to adopt the terminology of AS/NZS 4308:2008, that is, *not negative* and *negative*. The reason for saying so is that on-site screening devices can return false positive results whereas the results of subsequent laboratory testing are negative.
3. Also in clause 39, it is recommended that the words *quicker, less formal and less expensive* be removed from the definition of *screening drug test*. Those words do not always apply to screening tests and their inclusion could leave a screening test open to challenge on the basis that a test was not quicker, less formal and less expensive. Their removal would not appear to detract from the definition's meaning or intent.
4. Because screening drug tests can at times produce a negative result, it is recommended that two further paragraphs be added to subsection (2) of new section 102B, namely:
 - (c) *an evidential drug test of the candidate undertaken notwithstanding a negative result from the screening drug test, where an evidential drug test is considered to be necessary, or*
 - (d) *an evidential drug test of the candidate where a prior evidential drug test has yielded an inconclusive result.*
5. Clause 45 (inserting an amended section 117) contains, in new subsection (1C), a rather curious use of the word '*mentioned*' in relation to the preceding new subsection (1B). It is recommended that '*mentioned*' be replaced by '*referred to*', to read: '*... that is referred to in subsection (1B)*'.

4. APPENDIX

Background Information on BusinessNZ

- 9.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association, Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), its 71 member Major Companies Group comprising New Zealand's largest businesses, and its 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is New Zealand's largest business advocacy body. BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.
- 9.2 In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.
- 9.3 BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.