



MINISTRY OF SOCIAL DEVELOPMENT

Te Manatū Whakahiato Ora

Bowen State Building, Bowen Street, Wellington 6011, PO Box 1556, Wellington 6140 • Telephone: 0-4-916 3300 • Facsimile: 0-4-918 0099

- 5 DEC 2012

Ms Alex Harris
fyi-request-533-9dd14ddc@requests.fyi.org.nz

Dear Ms Harris

Thank you for your email of 31 August 2012 requesting, under the Official Information Act 1982, all documents relating to the policy to drug test beneficiaries, particularly information about the costs of the policy and the compliance with the Bill of Rights Act.

As you may be aware, from July 2013 clients who refuse to apply for drug-tested jobs will face sanctions. Currently, when Work and Income considers whether to refer a beneficiary to a job that requires drug testing, and the person indicates they will not pass the test, they are generally not required to apply for the job.

However, with the introduction of the new policy announced by the Minister on 28 August 2012, it will be made clear to those on benefits with any work expectations that they must remain drug free in order to take up suitable work opportunities. Those on benefits with full or part-time work obligations will be sanctioned if they refuse job opportunities which require a drug test or if they fail a test. This policy only applies to those with a work expectation attached to their benefit and only for available work opportunities requiring drug tests.

Where a client fails a drug test or fails to apply for a drug tested job three times (including their warning), they will need to provide a clean drug test within 30 days to get their benefit back. If they fail to provide a clean drug test within 30 days their benefit will be cancelled. Beneficiaries with children will never lose more than 50 per cent of their benefit.

Beneficiaries will not be referred to jobs with pre-employment drug tests where they are dependent on drugs. People identified as being dependent will be referred to appropriate drug treatment services, where these are available.

I can advise that the Cabinet paper *Welfare Reform Paper D: Pre-employment Drug Testing Requirements* and the *Regulatory Impact Statement Welfare Reform – Proposals for Bill Two of Welfare Reform* are available on the Ministry's website.

The Social Security (Benefit Categories and Work Focus) Amendment Bill was read for a first time on 20 September 2012 and has now been referred to the Social Services Committee.

Page 1 of 3

I also refer to you legal advice received for the consistency with the New Zealand Bill of Rights Act 1990: Social Security (Benefit Categories and Work Focus) Amendment Bill at: www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/social-security-benefit-categories-and-work-focus-amendment-bill.

In regards to your request I have released to you the following documents:

- Report: *Drug Testing of Beneficiaries*, dated 20 July 2011
- Memo: *Further information on sanctions for drug test failures*, dated 21 December 2011
- Report: *Briefing on Drug Screening*, dated 16 February 2012
- Memo: *Meeting with the New Zealand Drug Detection Agency*, dated 27 June 2012
- Memo: *Further Changes to the Drug Testing Proposals*, dated 18 July 2012.

Please note I have withheld the names and contact details of some Ministry staff members under section 9(2)(a) of the Official Information Act to protect their privacy. The greater public interest in this instance is in the right of these persons to privacy. In addition, the name of one organisation within the document *Further information on sanctions for drug test failures*, dated 21 December 2011, has been withheld under section 9(2)(ba)(i) of the Act which protects information which is subject to an obligation of confidence, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied. Further information is being withheld under section 9(2)(g)(i) of the Act which protects the free and frank provision of advice.

Within the Report: *Drug Testing of Beneficiaries*, dated 20 July 2011, you will see I have withheld information that contains legal advice under section 9(2)(h) of the Official Information Act as this information is subject to legal professional privilege.

The memo *Further Changes to the Drug Testing Proposals*, dated 18 July 2012, has a small amount of information withheld on page three under section 9(2)(f)(iv) and section 9(2)(g)(i) of the Official Information Act. These sections are explained in detail below.

Two documents, *Briefing: WELFARE REFORM – Drug test related requirements* and *Briefing: WELFARE REFORM – Drug test failures*, are being withheld under section 9(2)(f)(iv) and section 9(2)(g)(i) of the Official Information Act. Section 9(2)(f)(iv) of the Act applies as the information contained within these documents relate, in part, to decisions that are under active consideration.

The remainder of the information is being withheld under section 9(2)(g)(i) of the Act which protects the free and frank provision of advice. The policy process depends on the continued ability of officials to provide information freely and frankly to the Minister's office. While there is a significant public interest in this information, in this case the public interest does not outweigh the necessity to protect the policy development process. The release of this information would likely prejudice the quality and impartiality of reports and advice generated, and the wider public interest of effective government would not be served.

I hope you find this information on pre-employment drug testing requirements helpful. You have the right to seek an investigation and review of my response by the Ombudsman, whose address for contact purposes is:

The Ombudsman
Office of the Ombudsman
PO Box 10-152
WELLINGTON 6143

Yours sincerely

A handwritten signature in black ink, appearing to read 'Cathy Scott', written in a cursive style.

Cathy Scott
Associate Deputy Chief Executive, Social Policy and Knowledge



MINISTRY OF
SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

Date: 20 July 2011

Security Level: IN CONFIDENCE

Report to: Minister for Social Development and Employment

DRUG TESTING OF BENEFICIARIES

Purpose of the Report

- 1 You have expressed concern that a number of beneficiaries, and in particular young beneficiaries, are missing out on job opportunities because they have been unwilling to take, or unable to pass, a pre-employment drug test.
- 2 This note provides you with information you have requested on drug testing of beneficiaries, as well as advice and legal opinion on options for change.

Recommended Actions

We recommend that you:

- 1 **note** that Work and Income does not have statutory authority to drug test beneficiaries
- 2 **note** that Work and Income does not currently send beneficiaries to a job interview requiring a drug test when they know the client will fail, as they aim to match clients to jobs they can do and efficiently meet employers' recruitment needs
- 3 **note** that this paper presents two options to amend the current legislation and approach in relation to drug testing of beneficiaries:
 - **option 1** legislative authority to sanction clients who refuse to apply for jobs that require a pre-employment drug test, or who fail the test; (recommended option)
 - **option 2** in addition to the provisions in option 1 above, legislative authority to require work-tested beneficiaries to undertake a MSD initiated drug test as part of their work obligations, if required to do so
- 4 **note** option 2 raises more significant human rights and implementation challenges
- 5 **direct** officials, as part of the benefit reform project, to progress work on:
 - **option 1** (recommended option) YES / NO
 - **option 2** YES / NO
- 6 **direct** MSD officials to work with officials from the Ministries of Health and Justice, the Department of Prime Minister and Cabinet, and relevant drug and alcohol experts on the development of the option selected above (rec 5 refers) YES/NO

- 7 **agree** that alongside developing option 1 or 2, further work should be undertaken with the expert Health and Disability Panel on the medical assessment of clients with drug or alcohol addiction, to avoid perverse incentives such as clients seeking medical certification to avoid pre-employment drug testing.

YES / NO



Sue Mackwell
Deputy Chief Executive Social Policy and
Knowledge

20/7/11
Date

Hon Paula Bennett
Minister for Social Development and Employment

Date

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Background

- 3 You have expressed concern that some beneficiaries are missing out on job opportunities because they have been unwilling to take, or unable to pass, a pre-employment drug test.
- 4 Pre-employment drug-testing is increasingly common in occupations involving the use of dangerous equipment or machinery (such as forestry), or where using a vehicle is a prerequisite of employment.

Legal basis of drug testing

- 5 To carry out drug and alcohol testing lawfully, there must either be consent or a statutory authority to test.

By industry with consent

- 6 Applicants for employment are asked to consent to a drug test as part of the pre-employment interview process and consent to ongoing drug testing can form part of the employment contract (this is legally justifiable due to the safety risks involved). If an applicant will not consent to a drug test they will not be considered for employment (as it is a precondition of employment).

By government agencies with statutory authority

- 7 Police and Corrections have statutory powers in relation to drug and alcohol testing. For example, section 124 of the Corrections Act 2004 provides statutory authority to require prisoners to submit to drug or alcohol tests in certain circumstances. A prisoner may be required to submit to a drug or alcohol test where:
 - the manager believes, on reasonable grounds, that the prisoner has committed a criminal offence (specifically consuming drugs or alcohol inside a prison or while on temporary release)
 - the prisoner's name has been selected under a random-testing programme established by regulations
 - if the prisoner has volunteered to take part in a drug and alcohol programme under which they consent to drug and alcohol testing
 - if the manager believes, on reasonable grounds, that the prisoner has provided a tainted sample for drug testing under any of the above provisions.
- 8 Even where Corrections are authorised to conduct drug testing, the method of testing is limited as the legislation prohibits any procedure that requires a prisoner to supply a sample of his or her blood. This limits Corrections to saliva and urine based tests, which may be more susceptible to manipulation.

Limitations of testing

- 9 Drug tests cannot generally detect current impairment or extent of use (whether occasional or at the level of addiction), only past use.

- 10 Further, drugs vary greatly in the timeframe over which they are detectable, with drugs such as cannabis detectable for up to a month, while others such as methamphetamine, are detectable for much shorter periods¹.
- 11 Drug tests are also not infallible, with many reports of false negative, or false positive, results.

Current legal situation in relation to beneficiaries

- 12 Work and Income does not have any statutory authority in relation to drug testing² and does not require clients to apply for jobs that require a pre-employment drug test where it is clear the client will fail the test.
- 13 Current legislation requires work-tested clients to attend and participate in any interview for any opportunity of 'suitable employment'. Currently we do not consider a job to be suitable if a client cannot meet the entry criteria, eg, they do not hold a prerequisite qualification or they make the case manager aware that they will fail a drug test.
- 14 Case managers therefore advise clients if a prospective job requires a pre-employment drug test. If clients indicate they would fail a drug test they are not required to apply, as the case manager will deem that the job is not suitable.
- 15 If clients consent to a drug test, the job would be deemed suitable, and they would apply, and undertake the drug test. If they fail the drug test, this is then considered a failure of the client's work obligations and a sanction could be initiated.
- 16 This approach was designed to prevent prospective employers facing large numbers of inappropriate applications from unsuitable or unqualified Work and Income applicants. Without such a provision beneficiaries could potentially make inappropriate applications to meet their work search obligations, without having a realistic prospect of securing the job. This wastes employers' time and degrades the employers' relationship with Work and Income.
- 17 Clients applying for a benefit that is subject to work obligations who have lost their job due to a failed drug test are subject to the 13-week voluntary unemployment stand-down (because of a 'misconduct' termination, not specifically because of a failed drug test).

Welfare Working Group

- 18 The Welfare Working Group was concerned that "*alcohol and recreational drug use is becoming a barrier to unemployment*" and proposed an approach where people "*cannot refuse to apply for jobs because the employer is drug testing, and failing a work-related drug/alcohol test is equivalent to refusing to look for work*". This would require legislative change.

¹ For example, a 2-30 day cannabis testing range is indicated in guidelines for New Zealand Drug Detection Agency's urine tests, with variation depending on dose, body weight, other medications and environmental factors.

² There is no statutory authority or reference in relation to drug testing in the Social Security Act 1964

Options for change

- 19 Two options are set out below to change the approach towards work obligations and employment-related drug tests - both require legislative change and are likely to raise New Zealand Bill of Rights Act 1990 (BoRA) issues and litigation risks.

Option 1: sanctions for 'opting out' of jobs with pre-employment drug tests or for failing the test

- 20 The Government could introduce legislation giving MSD statutory authority to sanction clients who refuse to apply for jobs that require a pre-employment drug test or who fail an employer's pre-employment drug test.

Option 1 scenario:

John Smith refuses to apply for a job at a local saw mill as he says he will fail the pre-employment drug test due to recreational cannabis use. John's case manager informs him that refusing to apply means that benefit sanctions will apply unless he attends the interview and passes the drug test.

Pros

- 21 This would ensure that there are consequences for work-tested beneficiaries who 'opt out' of jobs where drug testing is a pre-employment or employment criteria. Work-tested clients refusing to apply for jobs with a pre-employment drug test, or failing pre-employment drug tests could be sanctioned. Re-compliance activities could range from attending drug education seminars, to attaining a clean drug test result.
- 22 These pre-employment drug tests are initiated, arranged and paid for by the prospective employer, who considers them necessary to maintain a safe working environment. Applicants are required to consent to the test as part of the pre-employment process. Health and safety grounds and a consent based process are key elements of the approach.
- 23 This option reinforces that clients are expected to be actively seeking and available for work, which includes being in a position to pass pre-employment drug and alcohol tests.

Cons

- 24 Work and Income referring clients, who subsequently fail drug or alcohol tests to employers, is likely to have a negative impact on the employer's relationship with Work and Income and may deter them from considering Work and Income referrals in future. However, it is anticipated that most clients would seek to comply by passing the test, or finding alternative employment.
- 25 Clients may also try to sidestep the policy by gaining medical certification that they are addicted to drugs or alcohol and should be on a non-work tested benefit due to the medical effects of that addiction. It is proposed, (recommendation 7 of this paper), that the expert Health and Disability Panel be asked to examine how the impact of addiction on work capacity is assessed.

- 26 While this approach may be subject to challenge under BoRA, we would argue that there is strong individual and public benefit in people finding employment and it is reasonable to ensure people do not indulge in illegal or discretionary behaviour that limits their ability to secure employment.

Option 2: a work obligation to undertake drug tests, including MSD initiated tests

- 27 The Government could introduce legislation that allowed the Chief Executive to require work-tested beneficiaries to undertake a drug test as part of their work obligations.

Option 2 scenario:

In addition to the powers contained under Option 1:

Joan Smith has been on the unemployment benefit for six years and attends a Work and Income interview with her case manager. Joan smells strongly of marijuana and her case manager suspects this is why she has been unsuccessful in her recent job search endeavours. Joan's case manager informs her that she can be required to undertake a drug test and that her case manager will arrange one for her – she is warned that if she fails the test or refuses to undertake it her benefit will be sanctioned.

Pros

- 28 This option would ensure that there are consequences for work-tested beneficiaries who 'opt out' of jobs requiring drug tests, and allow us to proactively require some clients to take drug tests.
- 29 Clients refusing to apply for jobs where drug testing is a pre-employment or employment criteria could be sanctioned. Clients suspected of deliberately using substances to remain 'unemployable' could be asked to undertake a drug test. If they fail, they could be sanctioned.
- 30 As with option 1, re-compliance activities could range from attending drug education seminars, to attaining a clean drug test result.

Cons

- 31 This option would be harder to justify from a BoRA perspective than option 1 as it includes an MSD initiated test, based on our suspicions. It would involve the Ministry in drug testing without direct association with a particular job opportunity or with particular workplace health and safety concerns, (rather than option 1 which supports referral to a particular job opportunity that involves an employer mandated drug test to which the client consents).
- 32 The costs and practicalities of arranging drug testing of clients would also require careful examination.
- 33 Option 2 also risks perverse outcomes, with clients potentially seeking medical certification of diminished work capacity due to addiction, and thereby seeking to move from a work tested benefit to a non-work tested Sickness or Invalid's Benefit. This could be addressed through the experts panel process proposed at paragraph 25 and recommendation 7 above.

9(2)(h)

Next steps

38 Properly addressing drug and alcohol abuse by beneficiaries will require a comprehensive approach that together addresses:

- work search obligations in relation to drug and alcohol tests for work-tested clients
- pre-employment activation and rehabilitation expectations for clients who abuse alcohol or drugs
- the medical gateway to non-work-tested benefits such as Sickness and Invalid's in relation to clients who abuse drugs or alcohol.

39 It is proposed that alongside developing recommended legislative option 1 or option 2, officials work with the expert Health and Disability Panel on the medical gateway to non-work-tested benefits for clients who are addicted to drugs or alcohol.

File Reference : A5701074



MINISTRY OF
SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

memo

To: 9(2)(a) Belinda Milnes
From: Penny Nelson
Date: 21 December 2011
Security level: In Confidence

Further information on sanctions for drug test failures

Action: For Discussion with the Minister

9(2)(g)(i) The Minister
sought clarification on the chart for the proposed sanctions regime.

9(2)(g)(i)

This memo provides answers to the questions and attaches an A3 with three options for activities that people who are sanctioned can undertake to resume receiving their benefit at each stage. MSD recommends Option 3.

Do employers use alcohol tests?

In the note we asked whether alcohol should be treated in the same way as other recreational drugs as part of this policy change. The Minister has queried the extent to which employers include alcohol testing in their pre-employment drug testing.

Regional staff have indicated that alcohol testing is done by employers in a number of industries including transport, trucking, forestry and fishing. An example is a large company that provides casual labour 9(2)(ba)(ii) who are currently implementing processes to alcohol test all of the workers they send to businesses.

Alcohol use may be as much of a concern to employers as other types of recreational drugs and there are indications that the use of alcohol testing is increasing. One drug testing organisation (the NZ Drug Detection Agency) reported that the number of breath alcohol tests they administered for employers increased from 5,923 in 2009 to 13,821 in 2010.

As we noted in our advice, we are only proposing to sanction people for alcohol use where employers require a pre-employment drug test that includes a specific test for alcohol which a person fails.

Approach to prescription drugs

In the note we recommended that people who are using prescription drugs may not be sent to jobs with pre-employment drug tests on the basis they would be unsuitable. The Minister indicated that she agrees but would like more information on how people on prescription drugs for depression would be treated.

We are proposing to take a flexible approach to the issue of prescription drug use among beneficiaries. We are currently doing further work looking at what we can do to:

- ensure that only drugs which are known to affect drug tests are considered (many prescription drugs may not show up on drug tests)
- to use drug tests to distinguish between prescription drugs and recreational drugs (we understand some tests can specifically report which substance has been detected but we need to investigate this further to find out how feasible using these tests would be)

Even where a client is using a prescription drug that would affect a drug test we are not proposing to automatically rule them out of consideration for jobs with pre-employment drug tests – some employers may be prepared to employ these people in other roles or with specific arrangements in place.

Reimbursing employers for failed drug tests

In our advice we proposed an option for Work and Income to reimburse employers where clients referred by Work and Income fail pre-employment drug tests, and indicated that it may be possible to recover the cost of these tests from clients. We need to do further work to identify what the cost of these tests would be for different employers but initial the information we have seen so far suggests a cost of up to \$100 per failed test.

The Minister indicated that she favors the cost of failed tests being recovered from clients but wanted to discuss how this would be done.

Work and Income have indicated that in order to reimburse employers for the cost of failed drug tests in a timely manner and keep the administration relatively simple, it will be necessary to:

- first, have Work and Income reimburse employers for drug tests immediately, then
- create a debt for each client which is recovered in small weekly amounts over time.

Sanctions process and activities to resume benefit

At the back of our advice we provided a flow chart illustrating a possible sanctions process up to the first failure.

In her comments the Minister queried what would happen at later stages under this approach and the point at which people who have failed a drug test would have to wait a number of weeks to pass another test before they could resume receiving benefit.

The attached A3 sets out three options for possible processes and the sanctions that would be imposed at each stage.

We have increased the period that is suggested before clients have to complete drug tests from four weeks to six weeks following advice from beneficiary advocates that cannabis can take 42 days to clear a person's system. We will do further work to confirm what a reasonable period would be based on evidence. We will recommend that legislation to enable this policy refers to 'a reasonable amount of time' rather than a set period to allow some flexibility in this area.

The difference between the options lie in the types of activities that people at each stage of the process are required to complete to have their benefit resumed.

All of the options:

- fit with the current graduated sanctions process for other work-related failures
- will see clients who are sanctioned and give a verbal commitment to stop using drugs continue to be required to meet their other work obligations including being referred to any suitable jobs that do not have drug tests
- will see clients who are sanctioned three times required to pass a drug test to resume receiving benefit or wait for 13 weeks without any benefit before they can reapply
- will see clients pay for failed drug tests.

Option 1 is less punitive with:

- clients given two opportunities to be sanctioned and then have their benefit restored by making a verbal commitment - this commitment is backed-up with a drug test six weeks after each failure with clients further sanctioned if they fail these tests
- clients who are sanctioned on a third occasion cannot receive a benefit until they pass a drug test or do not receive a benefit for 13 weeks (at which point they can reapply).

Option 2 is more punitive with:

- clients given one opportunity to be sanctioned and then have their benefit restored by making a verbal commitment - this commitment is backed-up with a drug test six weeks after the initial failure with clients further sanctioned if they fail this test
- clients who are sanctioned on a second occasion cannot receive a benefit until they pass a drug test
- clients who are sanctioned on a third occasion cannot receive a benefit until they pass a drug test or do not receive a benefit for 13 weeks (at which point they can reapply).

Option 3 is a variation of Option 2 with:

- clients given one opportunity to be sanctioned and then have their benefit restored by making a verbal commitment
- unlike option 2 this commitment is not backed-up with a drug test, instead after six weeks Work and Income commence referring the client to other jobs with pre-employment drug tests and sanction them they fail
- clients who are sanctioned on a second occasion are unable to receive benefit until they pass a drug test
- clients who are sanctioned on a third occasion are unable to receive a benefit until they pass a drug test or do not receive a benefit for 13 weeks (at which point they can reapply).

We recommend the third option as it is relatively tough on recreational drug users, while:

balancing the efforts of case managers between referring people to jobs (where people have been sanctioned once) with arranging drug tests (where people have been sanctioned two or three times)

- reducing the number of drug tests that must be organised by Work and Income by limiting these to situations where clients have been sanctioned more than once
- reducing the risk of MSD being viewed as a 'drug testing agency'
- reducing the risk of challenges to Work and Income directed drug tests on human rights grounds - as Work and Income will need an established history of drug use (though

multiple drug-related failures) before requiring a person to under a drug test to demonstrate they are drug free.

Organising drug tests for clients to resume receiving benefit is likely to be costly, even if the actual tests are paid for by clients. These costs arise from:

- establishing testing arrangements or contracts with suppliers
- processes to refer clients to testing agencies and follow-up with agencies to obtain and verify results
- processes to create and recover debts from clients to pay for drug tests.

Limiting the number of tests that are required by the Ministry will limit these costs.

Next steps

If you can let us know whether the Minister is comfortable with Option 3 or would prefer one of the other options we will undertake further work to develop this process in detail. This will include further work to develop:

- the exact amendments to legislation that will be required
- possible justifications for any elements of the policy that are inconsistent with human rights legislation
- costings related to paying for drug tests (even if these costs are recovered from clients they will still need to be costed)
- detailed options for administration/oversight of drug tests (e.g. contracting with national or local providers)
- detailed operational policy settings (e.g. the types of tests to be used, rules for reimbursing employers and amounts that can be paid).

File ref: A5968270

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report

Date: 16 February 2012 Security Level: IN CONFIDENCE
To: Hon Paula Bennett, Minister for Social Development

Briefing on Drug Screening out of scope
out of scope

Purpose of the report

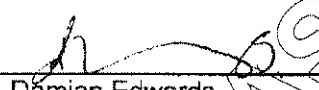
- 1 This report responds to Minister Joyce's request for a briefing on the possibility of screening young people for drugs before they are accepted on training programmes, out of scope

Recommended actions

It is recommended that you:

- 1 forward the attached report to Minister Joyce.

AGREE / DISAGREE


Damian Edwards
General Manager
Youth Policy

17/2/12
Date


Hon Paula Bennett
Minister for Social Development

22/2/12
Date

Background

- 2 This report follows up a meeting between Minister Joyce and 9(2)(a) on 9 February. out of scope
out of scope

Drug-related expectations and sanctions

- 3 On 15 November 2011, the National Party released a manifesto document entitled *Welfare Obligations* which sets out the following commitment to address drug use by beneficiaries:
- "If a person doesn't apply for a job because a potential employer asks them to take a drug test, or if they fail such a pre-employment drug test, their benefit will be cancelled. ... those who suffer from drug addiction will be offered help and support to deal with their addiction. If there is doubt about whether a person suffers an addiction or is a recreational drug user, a National Government would be guided by expert professional medical advice."
- 4 In December 2011, the Ministry of Social Development (MSD) provided the Minister for Social Development with initial advice on introducing sanctions in the benefit system for people who fail pre-employment drug tests or refuse to apply for jobs with drug tests.
- 5 In line with initial comments from the Minister, we are preparing proposals that will:
- introduce a requirement for clients with work obligations to undertake any pre-employment drug tests (including alcohol testing) alongside other work obligations
 - apply the same sanctions for clients who fail a pre-employment drug test or refuse to apply for a job with a drug test that apply to clients who fail to meet other work obligations (a 50% reduction, 100% suspension or cancellation of benefit)
 - allow Work and Income to pre-screen clients before referring them to jobs with pre-employment drug tests and exclude people who:
 - have a diagnosed substance abuse problem
 - are in some form of drug treatment or rehabilitation
 - take prescription medications that mean they would not pass a drug test.
 - allow Work and Income to require clients to take and pass a drug test to resume receiving their benefit where they have previously been sanctioned for failing a pre-employment drug test or refusing to apply for a job with a drug test.
- 6 We are currently preparing advice on these proposals so that the Minister for Social Development can discuss these with you and other members of the Welfare Reform Ministerial Group at one of the upcoming meetings (tentatively scheduled for discussion on 4 April).

Addressing 9(2)(a) concerns

- 7 It is likely that the issue that 9(2)(a) has raised – young people not getting employment because of drug use – will be directly addressed through proposals to introduce drug-related expectations and sanctions. Under this approach young people who fail to get jobs because they fail a pre-employment drug test will be financially

sanctioned. This change will send a strong message that recreational drug use prevents beneficiaries from moving into employment and is not acceptable.

8 While MSD could investigate the option of requiring all young people who attend training programmes to pass a drug test, this would involve significant additional complexity and cost which may not be warranted given that planned proposals will address the issue of young people failing to get jobs due to drug use.

9 The 9(2)(a) [redacted] could undertake drug screening themselves and offer treatment. While young people can be encouraged to undergo treatment for drug problems, there are human rights issues around compelling people to take up medical treatment. Funding the cost of screening would be a key issue.

out of scope

out of scope

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out of scope

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MINISTRY OF
SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

memo

To: 9(2)(a)
From: s9(2)(a), Senior Policy Analyst
Date: 27 June 2012
Security level: IN CONFIDENCE

Meeting with the New Zealand Drug Detection Agency

Action: For Information

We understand that the Minister is meeting with representatives from the New Zealand Drug Detection Agency (NZDDA) on Thursday to discuss work that is occurring in the drug testing space.

NZDDA is New Zealand's largest workplace drug testing agency. They provide on-site drug testing services to a range of employers throughout New Zealand. They also provide advice on drug testing policies for employers and sell a range of drug testing products.

Staff from Policy and Work and Income met with s9(2)(a) (National Risk, Compliance and Training Manager) and a colleague from the NZDDA on 12 June to discuss proposed policy to place requirements on beneficiaries to undertake and pass pre-employment drug tests.

This meeting was largely about gathering information about the way employers use workplace drug testing and gaining answers to a number of specific questions that have implications for the proposed policy. Areas where we sought information from NZDDA included:

- the cost of pre-employment drug testing
- the amount of time it takes to get test results
- the proportion of people who fail pre-employment drug tests
- the way the results of tests are reported
- how employers address diluted and adulterated test results
- how employers communicate drug testing policies and educate staff about drug use
- drug testing standards and how legal challenges to testing results are managed
- services that NZDDA offer in terms of on-site drug testing (e.g. mobile testing facilities).

MSD people: put people first – team up to make a bigger difference – act with courage and respect –
empower others to act – create new solutions – are 'can do', and deliver – honour achievement

None of the answers raised any major issues around the proposed policy to introduce pre-employment drug testing requirements for beneficiaries.

We also talked about the proposed policy and indicated that we think NZDDA will be a useful partner as we work on detail around implementation. NZDDA indicated that they were supportive of the policy and are very happy to keep working with us as needed.

The areas where we think NZDDA will be able to help us with implementation include helping to develop procedures and systems to arrange drug tests for beneficiaries who need to take and pass a drug test to lift a sanction, and providing input into communications materials.

Linking policy to drug testing standard 4308

Probably the most important thing to come out of the meeting with NZDDA and a previous meeting with Environmental Science and Research (ESR) is a recommendation (which we will include in the relevant Cabinet paper) that drug testing requirements and sanctions are limited to drug tests conducted under the Australian and New Zealand drug testing standard *AS/NZS 4308:2008 - procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* (standard AS/NZS 4308:2008).

A range of different drug tests are available in New Zealand, including kits that employers can buy and use themselves. Tests vary in their accuracy and results can be affected by the way tests are conducted and analysed. It would not be reasonable to sanction people based on the results of a drug test unless the results are considered reliable.

Standard AS/NZS 4308:2008 sets out requirements around the way samples are collected, transported, analysed and reported. The standard requires a two stage testing process that involves an initial screening test which provides either a negative or 'non-negative' result, and a confirmatory test which is analysed by an accredited laboratory.

Someone is only considered to have failed a drug test under the standard where they have failed a confirmatory test. Confirmatory tests are considered evidential with results regarded as irrefutable. This standard is used by many larger employers and NZDDA. Three laboratories are certified to conduct confirmatory tests including ESR.

Linking the policy to standard AS/NZS 4308:2008 will mean that:

beneficiaries will only be sanctioned where they fail a test that complies with the standard, or fail to undertake a test that complies with this standard (e.g. they take a screening test but refuse to take a confirmatory test or sign a waiver giving up their right to take a confirmatory test)

Work and Income will only reimburse employers for failed drug tests (and recover these costs from beneficiaries) where these tests comply with the standard.

Further work

We plan to continue working with representatives of NZDDA on implementation of the policy in the second half of 2012 once policy proposals have been agreed to by Cabinet.



memo

To:

CC: Chris Bunny, Anna Butler

From: Senior Policy Analyst

Date: 18 July 2012

Security level: IN CONFIDENCE

FURTHER CHANGES TO THE DRUG TESTING PROPOSALS

This memo provides you with information on two additional changes to the proposed drug testing policy settings. The first involves a proposal to include an additional warning step as queried by the Minister on Monday. The second involves a proposal to extend the policy to include training opportunities where providers drug test applicants before taking them on.

Adding an additional warning step to the sanction and recompliance process

On Monday the Minister queried whether an additional step could be added to the sanction process for drug test related failures so that the first time people fail to undertake or pass a drug test, they are given a warning without any financial penalty.

Current processes

When a client fails to comply with an obligation, Work and Income will initiate a work test failure. A letter is sent to the client that explains that they have five working days from the date of the letter to start a recompliance activity or dispute the decision before the sanction takes effect. The five working days is calculated from the day after the notice is posted, as set out in the example below:

Day one	Day two	Day 3-4	Weekend	Day 7-9	Day 10	Following week
A work test failure is initiated	The letter is sent	Five working day notice period starts	Saturday - Sunday	Five working day notice period continues	Benefit sanctioned	Benefit payments stopped

Because benefits are paid in arrears, clients won't see a change in the amount of benefit they receive until the week after their benefit is sanctioned. So for the example above, although

the benefit has been sanctioned, the effect on the payment would not occur until as much as two weeks later. Also it shows that the client has the opportunity to re-comply before losing any benefit payment.

Introducing an additional step

The following table shows how the sanction and re-compliance process could operate with the extra warning stage added.

<p>First failure in a 12 month period</p>	<p>Warning - not counted as a failure of work obligations</p> <p>Client receives a verbal warning – no sanction</p> <p>Client is not referred to any further drug tested jobs for 30 days (to allow time for drugs to leave their system)</p>
<p>Second failure in a 12 month period</p>	<p>First failure of work obligations – grade one sanction</p> <p>Client advised that they have failed to meet their obligations. They have a five day notice period to verbally agree to stop using drugs before a 50% sanction is imposed. The length of time they are sanctioned depends on how quickly they verbally agree to stop using drugs. This process effectively functions as a second warning.</p> <p>Client is not referred to any further drug tested jobs for 30 days (to allow time for drugs to leave their system)</p>
<p>Third failure in a 12 month period</p>	<p>Second failure of work obligations – grade two sanction</p> <p>Client advised that they have failed to meet their obligations. They have a five day notice period to verbally agree to provide a clean drug test within 30 days before a 100% suspension of benefit is imposed. The length of time they are sanctioned depends on how quickly they agree to provide a clean drug test within 30 days.</p> <p>Client is not referred to any further drug tested jobs until they have provided a clean drug test (up to 30 days).</p>
<p>Fourth failure in a 12 month period</p>	<p>Third failure of work obligations – grade three sanction</p> <p>The client has their benefit cancelled if they do not provide a clean drug test within 30 days of when they previously agreed to provide a clean test. They cannot re-apply for the benefit for up to 13 weeks. During this time they can apply for a 'provisional' benefit which is paid conditional on them participating in specific approved activities, usually for six weeks. These activities include undertaking employment, voluntary work, work experience or employment related training.</p> <p>Note that a client could also fail their obligations for another reason and this would also result in their benefit being cancelled.</p>

While the extra warning will not involve any financial sanction and would not be counted as a failure of obligations, we expect that the employer would still be reimbursed for the cost of a failed drug test, and this amount would then be recovered from the client.

Adding the extra warning step delays the effect of sanctions so that a client must fail to undertake or pass a pre-employment twice before they face financial sanctions (though these

are easily avoided by agreeing to stop using drugs), and three times before they are required to provide a 'clean' drug test to avoid having their benefit cancelled.

It is difficult to give exact figures on timing for this process as different clients may take different lengths of time to re-comply at each stage. Also, even though a sanction is initiated following a five day notice period, benefit payment periods mean that a client will not actually see a reduction in their benefit payment until the next payment day, which may be as much as two weeks later.

If we view this process from a 'worst case scenario' perspective, we note that:

- the minimum amount of time that it would take for someone to get to a point where they can be financially sanctioned would be 35 days
- the minimum amount of time that it would take for someone to get to a point where they can be financially sanctioned and required to provide a 'clean' drug test to avoid having their benefit cancelled would be 70 days
- the minimum amount of time that it would take for someone to get to a point where they have their benefit cancelled for failing to provide a 'clean' drug test would be 100 days.

In practise it would be very rare for people to reach these points within the timeframes given as this would depend on people being immediately sent to drug tested jobs following the end of each 30 day period which seems unlikely.

We have investigated options to give effect to this additional warning. While we have looked at specifying this step in legislation, we think that this extra warning can be provided operationally without amending legislation. This has the advantage of allowing this step to be easily removed at a later stage to strengthen the policy if numbers indicate that the policy is not having the desired effect.

This additional warning has been included within the relevant draft Cabinet paper and 9(2)(g)(i), 9(2)(f)(iv)

Expanding the policy to include drug tests for training courses

The current policy proposal is to require a beneficiary to pass a pre-employment drug test where this is required as part of a job application.

We propose to extend this policy, to include passing a drug test where this is required as a prerequisite to attend an employment related or industry focused training course. Some Work and Income employment courses have a requirement to pass a drug test before the client is accepted on the course. This is where the course has onsite training and health and safety requirements that are the same as the health and safety requirements of the job (that the course is preparing them for). These courses are often run in the Meat and Seafood Industries and for Forestry jobs.

The service or training provider would not be reimbursed for the costs of the tests nor would debts be established for clients who fail the test. This is because the contracts with the providers include this.

