Inquiry: Inquiry into workplace drug testing in Victoria

Hearing Date: 22 May 2024

Question[s] taken on notice

Directed to: La Trobe University

Received Date: 14 June 2024

1. **The CHAIR, page 15**

   Question Asked:
   I will just follow up. Is there any model across the world, in any organisation across the world, that you have come across or that you are aware of?
   Kate SEEAR: I would have to take that question on notice I think, because I have not done a careful global analysis.

   Response: We have an undertaken a review of some international approaches. Although it is likely there will be an exemplar in use somewhere it is difficult to locate one in the time available to us, without undertaking a more systematic review. We would therefore revert to our earlier advice to the Committee, detailed in our written submission and evidence, which is that a best practice approach to workplace drug testing is one that has several criteria, including that: it is only undertaken in those industries and settings (and for specific types of employment) where there is a clear and clearly articulated public policy rationale; workers are offered various protections (including in relation to how testing is to be conducted, how privacy and confidentiality are to be afforded, and various other 'stigma-sensitive' approaches including in how conversations about testing are to unfold); workers are afforded procedural fairness and other rights including rights of review/appeal; and workers have these processes and their rights explained to them. We reiterate the importance and relevance of impairment-based testing (as opposed to presence-based testing) in most instances. We note that Canadian jurisprudence holds that workplace drug testing may only be used 'with demonstrable justification, based on reasonable and probable grounds' (*Re Canadian National Railway Company and United Transportation Union* (1989) 6 LCA 381 at 387). Whilst noting again that we have not had time to undertake a systematic international review of workplace drug testing regimes, we believe that WorkSafe's guide for developing a workplace alcohol and other drugs policy should be updated in line with the best practice approach articulated above and this principle in Canadian law. We would also note the point made in our

evidence that there should be a consistent legislative approach that governs workplace drug testing across industries that require it, in line with the recommendations of the 2005 Victorian Law Reform Commission report on workplace privacy. This could be achieved through three possible methods: (1) expanding the currently very narrow part 2A on workplace drug testing in the *Surveillance Devices Act 1999*; (2) including a part on workplace drug testing in the Occupational Health and Safety Regulations 2017, in accordance with section 158 of the *Occupational Health and Safety Act 2004*; or (3) creating a stand-alone Workplace Drug Testing Act, as contemplated in Allan, Prichard and Grant, 'A Workplace Drug Testing Act for Australia' (2013) 32(2) *University of Queensland Law Journal* (although we do not endorse all aspects of their approach in that article). Any legislative reform should, of course, ensure compatibility with the *Charter of Human Rights and Responsibilities Act 2006*.

2. **The CHAIR, page 15**

Question Asked:
Have you touched base with or looked into the ADF – Australian Defence Force – model in drug and alcohol testing regarding their soldiers?
Kate SEEAR: I do not think we have at the moment.
The CHAIR: Okay.
Kate SEEAR: I am looking at Sean to see if we have looked at it, but I do not think we have it for this.
The CHAIR: No. It would be good, if you do look at that, to see what your opinion is in relation to their model in relation to confidentialities and stigma and the way they rehab their soldiers. If you could take that as a question on notice, just your opinions and your findings on that.

Response: We have reviewed the model. Some important caveats apply: we have not conducted any empirical research on features of the Act including questions of its effects or effectiveness in addressing its stated policy rationales. This matters because it is important to critically examine such policies from a range of perspectives including those who are responsible for administering the policy and those who are its subjects. Our assessment of the model is therefore confined to observations based on the extent to which the model appears, on the surface, to comply with the various principles we outlined in our submission for this inquiry, including the extent to which the model has the potential to generate stigma and discrimination, and is underpinned by a sound and consistent public policy rationale, or the extent to which it risks generating other unintended consequences.

With these caveats in mind, we note that:

- Testing is governed by the Part VIIIA of the *Defence Act 1903*.
- The object of the Part can be found in section 92 of the Act, which states that it is 'to make provision for the testing of persons to whom this Part applies to determine whether they have used any prohibited substance'.
- Several other provisions detail how positive test results are to be handled and what happens thereafter. For our purposes the most important provision is section 101 of the Act, which establishes that the Chief of the Defence Force may terminate a person's service if they test positive, that person has provided a statement about the positive test, and the Chief nevertheless takes the view that their service should be terminated. In practical terms, this means that termination of service is discretionary in certain circumstances and depends on whether the Chief of the Defence Force is persuaded that the person may continue to serve.
- Prohibited substances are not defined in the Act. Instead, section 93B(1) of the Act confers power on the Chief of the Defence Force to, 'by legislative instrument, determine that a substance, or a substance included in a class of substances, is a prohibited substance for the purposes of this Part'.
- Several important safeguards on the conduct of testing appear in section 95 of the Act. It is not clear whether those being tested are tested by people of the same gender as them or if they have a choice to request testers be of a specific gender, but this would be an important component of any testing policy.
- We note that a wide range of substances appear to have been categorised as prohibited substances. As we have argued in our written submission and evidence to this Committee, the question of whether a particular Act, Regulation or policy gets testing right depends *first and foremost on whether there is a clear and clearly articulated public policy rationale for the relevant approach*. It is also important to consider whether the approach to be taken (including the specific substances to be tested for and the approach used) are compatible with human rights. This is a requirement under Commonwealth law and is also relevant to Victoria because of the operation of the Victorian Charter, as explained in our written submission.
- In 2021, the Parliamentary Joint Committee on Human Rights considered the determination of prohibited substances and raised a number of significant concerns, including the absence of information on the rationale for a range of substances being included and

prohibited, and various human rights issues including that the approach might unreasonably limit work and privacy rights by, for instance, prohibiting certain substances including hormonal substances taken by people with intersex variations, or people experiencing medical conditions such as polycystic ovarian syndrome. One of the reasons why the Committee raised concerns about the very broad range of substances being prohibited was that the prohibition might raise concerns on equality grounds, including because some substances might be taken by people with intersex variations, or by women, or by people experiencing infertility, and thus apply disproportionately. Also, the prohibition would likely require people to disclose details of these medical conditions and/or disabilities, thus exposing them to stigma. We direct the Committee to the excellent analysis of the Parliamentary Joint committee here.

- The Minister considered questions from the Committee, with the Minister's response and Committee's analysis being found here. The Committee concluded that even after the Minister provided a response, important concerns about the approach to testing remained.
- We agree, and similarly question whether a clearly established public policy rationale has been properly articulated for each of the substances prohibited under the ADF system. It is not that such a rationale might not exist, but rather, that it has yet to be properly particularised. There is a risk that the approach remains unreasonably or unnecessarily broad, that it unjustifiably limits rights and exposes people to humiliation, degradation (in Charter terms, as discussed in our written submission) and thus stigma.
- Finally, it is important to note that much also depends on how the Act and policy is operationalised. This includes, for instance, how the Chief of the Defence Force exercises their discretion under section 101 if a person has provided a statement outlining why they believe their service should not be terminated. To understand how this provision works in practice and whether there are separate areas for concern, we would need to be able to analyse all the relevant data and have not been able to do so here. (We note that access to workplace drug testing data is challenging. For instance, Victoria Police provides deidentified data on drug testing in its annual reports, but the Independent Broad-based Anticorruption Commission does not and has not provided access to that data upon request.) Nevertheless, we do express concern about the possibility that some of those in service would be unwilling to even submit a statement on the basis that doing so would require them to share

personal and potentially stigmatising information (e.g. about medical conditions) that they would not want to share. In other words, even though the system includes apparent safeguards, or checks and balances in the event the Chief of the Defence Force is considering termination, the need for those safeguards and the risks of stigma could be avoided if some of these substances were either not prohibited in the first place, or if other systemic protections were in place earlier in the employment process which, for instance, protected people from being unnecessarily tested to begin with.