



Australian
Human Rights
Commission

Social Services Legislation

Amendment (Drug Testing Trial)

Bill 2019

Senate Community Affairs Legislation Committee

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1	Introduction	3
2	Summary	3
3	Recommendations.....	5
4	Overview of the proposed mandatory drug testing trial	8
5	Key relevant human rights	11
5.1	<i>Rights to social security and adequate standard of living</i>	11
5.2	<i>Right to privacy and health.....</i>	12
5.3	<i>Right to equality and non-discrimination.....</i>	13
5.4	<i>Children’s rights</i>	14
6	Incompatibility of the Bill with human rights	15
7	Improving human rights compatibility	18
7.1	<i>Conditionality and punitive compliance.....</i>	18
7.2	<i>Overreach of measures to persons without drug dependency.....</i>	19
7.3	<i>Income management through cashless debit card</i>	21
7.4	<i>Free, informed, prior consent to medical treatment.....</i>	22
7.5	<i>Discriminatory operation.....</i>	23
(a)	<i>Aboriginal and Torres Strait Islander peoples</i>	23
(b)	<i>Persons with disabilities.....</i>	24
(c)	<i>Young people and children.....</i>	25
7.6	<i>Privacy and confidentiality</i>	26
7.7	<i>Consultation on Drug Testing Rules.....</i>	28
7.8	<i>Evaluation and expansion of trial.....</i>	31

1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Senate Community Affairs Legislation Committee (the Committee) for its inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (the Bill).
2. While the Commission notes the importance of reducing social harms caused by drug dependence, and supports the goals of assisting people that are fit for work to obtain and maintain decent work, it holds serious concerns that the introduction of mandatory drug testing, treatment and income management for welfare recipients under threat of punitive measures will not achieve these goals.
3. Further, the Commission is concerned about the potentially severe detrimental impacts on the human rights and financial security of affected persons. The Bill will affect some of the most vulnerable members of the Australian community, including welfare recipients who are children as young as 15 years old, Aboriginal and Torres Strait Islander peoples, and people with a drug dependency that constitutes a disability.
4. The Commission considers that the significant limitations on human rights have not been shown to be reasonable, necessary or proportionate, in particular with respect to the human rights to privacy, social security and equality and non-discrimination. It considers that the proposed safeguards will not adequately protect human rights.
5. The Commission does not support passage of the Bill in its present form. In the event that the Bill does proceed, the Commission makes 13 recommendations that will help ameliorate, but not resolve, the adverse human rights impacts identified. It also emphasises the importance of ensuring available and appropriate medical treatment, including accessible, adequately funded drug rehabilitation programs run by suitably qualified staff.

2 Summary

6. The Bill establishes a two-year mandatory drug testing trial in three local government areas—being Canterbury-Bankstown in New South Wales,

Logan in Queensland, and Mandurah in Western Australia—for 5,000 randomly selected new recipients of the Newstart Allowance or Youth Allowance (other).

7. The Explanatory Memorandum states that the purpose of the Bill is to improve employment and education outcomes by assisting people with drug use issues to undertake treatment:

The aim of the trial is to improve a recipient's capacity to find employment or participate in education or training by identifying people with drug use issues and assisting them to undertake treatment. The trial will test the effectiveness of decreasing substance abuse through random drug testing, in an effort to improve employment outcomes for trial participants.¹

8. The Commission notes that in 2018, a similar scheme was proposed in the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (the 2018 Bill). However, that Bill lapsed with the prorogation of the 45th Parliament. The 2018 Bill was also inquired into by the Committee. The Commission made a submission on the 2018 Bill, recommending that it not proceed, in similar terms to this submission.²
9. Many concerns were raised by submitters and by other parliamentary bodies in relation to the 2018 Bill.³ For example, the Parliamentary Joint Committee on Human Rights found that “the proposed mandatory drug testing trial was likely to be incompatible with the right to privacy, the right to social security and right to an adequate standard of living, and the right to equality and non-discrimination”.⁴
10. The Commission also notes that while the report of the Committee with respect to the 2018 Bill made a recommendation that the 2018 Bill be passed, a dissenting report was issued by Labor Party Senators who stated that “in light of the overwhelming evidence presented to this Committee on a number of occasions that these trials will not be successful, Labor Senators on this Committee are nonetheless strongly of the view that the Bill should not be passed”.⁵ This dissenting report stated:

[T]he Committee was overwhelmed by evidence from the health sector, including from specialists in addiction medicine, as well as the community sector that the proposal to drug test income support recipients will not be effective, will further exacerbate long

waiting times for treatment, will be very expensive and also risks increasing levels of crime and homelessness.⁶

A dissenting report was also issued by the Australian Greens, strongly opposing the passage of the Bill.⁷

11. The Commission urges the Committee to consider the concerns raised in this submission and the recommendations made below.

3 Recommendations

Recommendation 1: That the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) not be passed in its present form.

Recommendation 2: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, participation in the trial should be voluntary.

Recommendation 3: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, the “drug test refusal waiting period”, which applies upon reapplication for social security after cancellation, should be removed.

Recommendation 4: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, a recipient should not be required to meet the high threshold of “severe” financial hardship to warrant a reduction in the rate of social security deductions for the purposes of repaying the costs of positive drug re-testing.

Recommendation 5: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, it should be amended so that measures: (a) imposing income management, (b) deducting amounts from social security, and (c) suspending or cancelling social security, should only apply to a recipient who has been recommended by a medical professional to undertake treatment for their drug dependency.

Recommendation 6: Mandatory income management for social security recipients should:

- a. be imposed for a defined period of time proportionate to the recipient’s circumstances such as the length of their medical

treatment, with 24-months being reserved for only the most severe of cases

- b. only be permitted to be extended beyond a 24-month period under s 123UFAA if the extension is supported by the recommendation of an appropriate treating medical professional
- c. be subject to periodic review by the Department, with particular attention paid to any serious risk posed to a person's mental, physical or emotional wellbeing.

Recommendation 7: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, that the following measures with respect to medical treatment be incorporated:

- a. requiring that a person's full, free and informed consent to any medical treatment be obtained in advance
- b. ensuring that mechanisms are in place to allow recipients to have appropriate decision-making input into the type, length, location and other aspects of their recommended treatment
- c. ensuring that incorporation of treatment obligations into a Job Plan are documented in the least onerous form possible with respect to potential punitive action for non-compliance
- d. to the extent that the Bill applies to persons under the age of 18, ensuring that any medical examination and treatments are carried out with regard to their developmental needs by appropriately qualified practitioners in child health.

Recommendation 8: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, the applicable "reasonable excuse" provisions should appropriately recognise drug dependency that amounts to a disability under international human rights law.

Recommendation 9: Should Recommendation 2 not be accepted, application of the trial with respect to welfare recipients under the age of 18 should only occur with their voluntary consent, rather than being mandatory.

Recommendation 10: Should Recommendation 9 not be accepted, Services Australia should be required to consider in advance whether or not to apply the trial to a relevant child or young person on a case-by-case

basis, in particular with respect to welfare recipients under the age of 18 years old, with the best interests of the child constituting the primary consideration.

Recommendation 11: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds:

- a. unless the relevant person consents, drug test information should be unable to be used or disclosed for purposes other than those directly related to the payment of a relevant Newstart of Youth Allowance (other) entitlement
- b. privacy protections should be included in the Drug Testing Rules
- c. appropriate measures should be put in place, for example in relevant contracts or the Drug Testing Rules, to ensure that contractors conducting drug tests treat test results with an appropriate level of security and confidentiality
- d. mechanisms should be put in place to ensure that people are informed in advance of the purposes for which drug test result information can be used and disclosed, and give their full, informed and free consent to these uses and disclosures.

Recommendation 12: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, the Australian Government should consult widely on the Drug Testing Rules, including with human rights bodies.

Recommendation 13: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds:

- a. an evaluation of the effectiveness and impacts of the trial should be conducted by an independent, appropriately qualified expert research body on the basis of both quantitative and qualitative indicators
- b. the evaluation body should consider the impacts on and compliance with Australia's human rights obligations, as part of the assessment of the effectiveness of the program
- c. the evaluation report should be made publicly available for review by stakeholders

- d. a public consultation process should inform any consideration of an expansion of the trial or extension of its duration
- e. any expansion or extension of the trial should only occur following a positive report on the effectiveness of the trial and improved human rights outcomes, and with the support of key stakeholders
- f. the trial should be reviewed for compliance with Australia's international human rights obligations one year after commencement.

4 Overview of the proposed mandatory drug testing trial

12. In summary, the Explanatory Memorandum to the Bill states that the drug testing trial scheme would operate as follows:⁸
 - a. 5,000 randomly selected new recipients of the Newstart Allowance or Youth Allowance (other) (being Youth Allowance recipients who are not full-time students or Australian apprentices) residing in the three selected areas would be subject to mandatory drug testing in order to receive their welfare entitlements
 - b. the scheme would be administered by Services Australia, using contracted third party drug testing providers
 - c. new social security claimants would have to acknowledge in their claim form that they may be required to undergo drug testing as a condition of payment
 - d. selected recipients would be notified to attend an appointment at their local Centrelink office, where they would be notified that they are required to undertake a random drug test immediately
 - e. the drug test would be carried out in a private space at the Centrelink office, or at the drug testing provider's premises nearby
 - f. testing of a person's hair, saliva or urine would be carried out to identify a "testable drug", defined to include methamphetamine, heroin, cocaine, tetrahydrocannabinol or another substance prescribed by the drug test rules under proposed s 38FA
 - g. recipients who test positive to the first mandatory drug test would be made subject to income management for 24 months and further

random drug tests throughout that period (the first further test being conducted within 25 days of the first positive test)

- h. income management would take the form of the quarantining of the majority of a welfare payment onto a cashless debit card; the person is unable to use the card to withdraw cash and also unable to use the card to gamble, buy alcohol or tobacco products
- i. recipients who test positive to more than one mandatory drug test would:
 - i. be referred for medical, psychiatric or psychological examination and assessment in accordance with a notice given under s 63(4) of the *Social Security (Administration) Act 1999* (Cth)
 - ii. if treatment is recommended, be required to undertake treatment for use of drugs, or make an undertaking to commit to future treatment, such as counselling, rehabilitation and/or ongoing drug testing as part of a mandatory 'Employment Pathway Plan' (Job Plan) linked to their welfare payments
- j. recipients who refuse to undertake drug testing will have their payments cancelled with immediate effect on the day of the refusal unless they have a "reasonable excuse" (suspension will not be an option)
- k. recipients who do not comply with the terms of their Job Plan, for example failing to attend a drug counselling appointment or not being punctual, may have their social security payments suspended or cancelled in accordance with mutual obligation requirements under the Targeted Compliance Framework, that is:
 - i. payment suspension for failing to attend a scheduled appointment with Services Australia (with the possibility of requesting to reschedule an appointment, with prior notice)
 - ii. resumption of payment when the appointment is attended, but no back-dating of payment, unless the recipient has a "reasonable excuse" for non-attendance
 - iii. cancellation of payment if the recipient has not attended an appointment after 13 weeks.

- l. if a person's payment is cancelled due to refusing to undertake a drug test, they will be subject to a "drug test refusal waiting period" of 28 days before Newstart or Youth Allowance (other) is payable again following reapplication
 - m. if a person successfully reapplies for Newstart or Youth Allowance (other) payments after their payment is cancelled for refusing to undertake a drug test, they will be subject to the trial again including continued random drug testing (and if previously subject to income management will continue to be subject to income management)
 - n. if a recipient disputes the results of a drug test and requests another test, they will be required to repay the cost of the re-test if the result is positive (by way of deduction from their social security payments, capped at a rate of 10%).
13. The Explanatory Memorandum states that the following measures apply as safeguards:
- a. the Secretary may determine to reduce the recipient's rate of deduction from their welfare payment to repay the cost of positive drug re-tests (i.e. to less than 10%), if satisfied that their circumstances are "exceptional", and the recipient would suffer "severe financial hardship"
 - b. "reasonable excuse" provisions apply to some instances of non-compliance with mandatory obligations, but not where the excuse is wholly or substantially attributable to drug or alcohol use and the person has refused available and appropriate treatment
 - c. new subsection 1206XA(5) provides that a drug test repayment amount is taken not to have arisen from a positive drug test if the contractor who carried out the test gives written notice to the Secretary that the test should not be taken into account, for example if the contractor becomes aware of a false positive test result such as when they are provided with evidence that the person is taking legal medication which may have caused the result
 - d. the Secretary must determine that a person not be subject to income management if satisfied that it poses a serious risk to their mental, physical or emotional wellbeing.⁹

The Commission is concerned that these and other safeguards are inadequate to protect the human rights of affected persons, including those of children and young people, as discussed further below.

5 Key relevant human rights

5.1 Rights to social security and adequate standard of living

14. The right to social security is recognised in several international legal conventions to which Australia is a party.
15. For example, article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises “the right of everyone to social security”.¹⁰
16. The right to social security encompasses the right to access and maintain benefits, without discrimination, in order to secure protection from social risks and contingencies.¹¹ It includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.¹²
17. The Committee on Economic, Social and Cultural Rights (ESCR Committee) has stated that this right is of “central importance” in “guaranteeing human dignity for all persons ... faced with circumstances that deprive them of their capacity to fully realise [their economic, social and cultural rights]”,¹³ including those unemployed and those with drug dependency.
18. The right to social security is inextricably linked with the right to an adequate standard of living,¹⁴ which ensures the availability, adequacy and accessibility of food, clothing, water and housing for all people.¹⁵ Importantly, social security benefits must be “adequate in amount and duration” to ensure an adequate standard of living.¹⁶
19. Australia’s obligation to promote these rights is one of “progressive realisation”,¹⁷ whereby it must take reasonable measures within its available resources to progressively secure their broader enjoyment.¹⁸ Correspondingly, it must not impermissibly take backwards steps (or “retrogressive measures”).¹⁹

20. While the right to social security requires progressive realisation, ICESCR also imposes some obligations of *immediate* effect. These include that the right to social security will:
- be exercised without discrimination of any kind (article 2(2))
 - be fulfilled through taking deliberate, concrete and targeted steps towards the full realisation of the right (article 2(1)).²⁰
21. The Commission considers that the Bill limits the right to social security, and to an adequate standard of living, in the following ways:
- a. by requiring recipients to acknowledge that they may be required to undergo drug testing as a condition of a social security payment, and thereby potentially discouraging people from applying for social security entitlements (or having a broader “chilling effect”)
 - b. by requiring recipients to undertake drug testing as a condition of receiving social security, and imposing mandatory income management measures, thereby making social security entitlements subject to intrusive conditionality (that the Commission considers has not been shown to be reasonable, necessary or proportionate)
 - c. by reducing the amount or availability of social security provided through the punitive compliance regime in certain circumstances, in the form of payment deductions, suspensions or cancellation
 - d. by reducing the amount of social security provided, to cover the cost of drug re-testing requests where the result is positive
 - e. by having a discriminatory impact on:
 - i. persons whose drug dependency rises to the level of disability
 - ii. Aboriginal and Torres Strait Islander peoples (who make up a large proportion of social security recipients)
 - iii. children and young people (being Youth Allowance (other) recipients).

5.2 Right to privacy and health

22. Many international human rights treaties protect a person’s right to privacy. Most notably, article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

23. The scope of the right to privacy is very broad,²¹ covering privacy in the sense of data and personal information,²² as well as unwarranted incursions by the state into the private sphere, such as arbitrary or unreasonable searches.²³
24. Article 12(1) of the ICESCR also relevantly protects “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The CESCR Committee has stated this right includes the right to control one’s health and body, and to be free from non-consensual medical treatment.²⁴
25. The Commission considers that the Bill limits the right to privacy and/or health in numerous ways, including:
 - a. drug testing of urine, hair and/or saliva, being an invasive and mandatory procedure, and the apparent potential limitless number of drug tests to which a person may be subjected
 - b. requiring recipients to divulge private medical information to third parties contracted to conduct the drug tests, and the potential use of this information for other purposes and the adequacy of security measures to ensure the confidentiality of this information
 - c. requiring certain recipients to undertake medical treatment in order to receive welfare entitlements
 - d. income management by way of a cashless debit card which would immediately disclose upon use that a person is a social security recipient that receives quarantined payments, which could reasonably be expected to cause a level of social stigma.

5.3 Right to equality and non-discrimination

26. The right to equality and non-discrimination is protected by numerous international human rights treaties to which Australia is a party,²⁵ as well as our domestic anti-discrimination laws.²⁶

27. The right ensures equality before the law and equal protection of the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁷
28. The Commission is concerned that the Bill has a disproportionate impact on Aboriginal and Torres Strait Islander peoples, people with disability, and young people and children, thereby operating in a discriminatory manner on the basis of race, age and disability.
29. The Explanatory Memorandum to the Bill relies on the principle of legitimate differential impact to justify any discriminatory impact, for example stating that “[t]o the extent that certain cohorts may be more likely to test positive, this constitutes legitimate differential treatment and does not discriminate on the basis of race or disability”.²⁸ However, the Commission considers that these assertions are not supported by further information justifying why the difference in treatment is appropriate, by reference to evidence.
30. In the Commission’s view, the additional compliance obligations as proposed in the drug testing trial do not amount to legitimate differential treatment. These measures do not appear to guarantee full and equal enjoyment of human rights and fundamental freedoms. Rather, they may have the effect of undermining the equal enjoyment of human rights by particular groups.
31. As discussed in Part 7.5 below, such discriminatory limitations on human rights engage the right to equality and non-discrimination, but also exacerbate other adverse human rights impacts and undermine the overall proportionality of the Bill.

5.4 Children’s rights

32. Children enjoy all the same human rights protections as adults under key international human rights conventions such as the ICCPR, as well as particular and special protections under the *Convention on the Rights of the Child* (CRC).²⁹
33. International human rights law recognises that, in light of their evolving physical and mental capacities, and developing neurological makeup,

children have special need of safeguards, care and protection and should therefore be treated differently from adults.³⁰

34. Article 3 of the CRC requires the government to take account of the best interests of the child as a primary consideration in decision-making:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

35. Under the CRC and other human rights treaties, key relevant human rights of children include the right to: social security, protection against arbitrary or unlawful interference with their privacy, family and home, enjoyment of the highest attainable standard of health, an adequate standard of living, and the protection of families (particularly when they are responsible for the care and education of dependent children).³¹

6 Incompatibility of the Bill with human rights

36. Under international human rights law, the right to privacy and the right to equality and non-discrimination may be justifiably limited where limitations:

- a. are “prescribed by law”
- b. pursue a legitimate aim
- c. are necessary and proportionate to pursue that legitimate aim.³²

37. Under article 4 of ICESCR, the right to social security can only be subject to limitations that are both:

- a. determined by law, only in so far as this may be compatible with the nature of these rights
- b. solely for the purpose of promoting the general welfare in a democratic society.³³

38. Further, any limitations on the right to social security must be proportionate, the least restrictive alternative, of limited duration and subject to review. That is, if there are readily available alternatives to achieve a legitimate objective that are less restrictive of human rights,

those means should be used. With respect to social security, this could include incentive based models rather than punitive models.

39. There is a strong presumption that *retrogressive* measures taken against the right to social security are prohibited under ICESCR.³⁴ If deliberately retrogressive measures are taken, the ESCR Committee has stated that:

[T]he State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.³⁵

40. According to the Statement of Compatibility with Human Rights accompanying the Bill, the aims of the drug testing trial are as follows:
- to maintain the integrity of, and public confidence in, the social security system by ensuring that tax-payer funded welfare payments are not being used to purchase drugs or support substance abuse;
 - to provide new pathways for identifying recipients with drug abuse issues and facilitating their referral to appropriate treatment where required.³⁶
41. In relation to the first stated aim, the Commission does not consider that the “integrity of, and public confidence in, the social security system” has been shown to be undermined to any extent that would warrant the imposition of the mandatory drug test trial scheme in the Bill. The Commission notes that the Statement of Compatibility does not provide evidence of any such undermining of the social security system. In the absence of any supporting evidence, the Commission considers that this aim has not been shown to be legitimate under international human rights law.
42. The Commission accepts that the second stated aim is legitimate. Aspects of the regime, such as the referral to medical treatment and the

use of employment pathway plans, may be effective and beneficial for some recipients. However, to be compliant with international human rights law these measures must also be necessary, proportionate and use the least restrictive means. For example, undertaking medical treatment should require free, full and informed prior consent.

43. Further, the Commission does not consider that the conditional and punitive compliance approach to welfare set out in this Bill, including compulsory income management, and payment deductions, suspension and cancellation, has been shown to be effective in achieving the stated aims of the trial.
44. That is, it considers that no compelling evidence has been relied upon to demonstrate that mandatory random drug testing, drug treatment, income management and punitive compliance measures will effectively reduce drug dependence that interferes with obtaining employment, and assist drug dependent or formerly drug dependent persons to obtain and maintain employment.
45. Also key to any potential effectiveness of this scheme, and therefore to its proportionality, is ensuring connection to available and appropriate rehabilitation or other treatment services.
46. The Commission has previously expressed concerns about the validity of data relied upon to conclude that punitive compliance measures, such as the cashless debit card, will achieve their stated goals.³⁷ It has similar concerns about the impacts of proposed s 123UFAA.
47. The Commission considers that outcomes of the Bill would be “retrogressive” for the right to social security—as they could reduce the accessibility or amount of social security below minimum essential levels needed for a person to meet their basic financial needs. In the Commission’s view the relevant measures have not been duly justified, contravening Australia’s obligation of progressive realisation.
48. Further, this scheme will affect some of the most vulnerable members of the Australian community, including children, young people and Indigenous Australians living with intersectional disadvantage. The detrimental impacts on their financial security and human rights are potentially severe, and risks entrenching and exacerbating poverty and inequality for affected people.

49. The Commission notes that it has previously commented on the potential inadequacy of certain welfare payments, even before any reduction or suspension is applied, by reference to objective measures such as the median household income poverty line. It continues to hold these concerns and emphasises the importance of ensuring access to a level of income support that permits an adequate standard of living.³⁸
50. For these reasons, and the additional reasons discussed below, the Commission considers that the Bill is not compliant with the right to social security among other human rights and should not be passed.

Recommendation 1: That the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) not be passed in its present form.

7 Improving human rights compatibility

51. As discussed above, the Commission's primary position is that the Bill should not be passed in its present form. If, however, the Bill does proceed, the Commission considers that substantial reforms are necessary that would improve but not resolve the identified human rights issues, as discussed below.

7.1 Conditionality and punitive compliance

52. Should the trial proceed, compliance with the human right to social security could be enhanced by making participation voluntary rather than mandatory.
53. The Commission is also concerned about the human rights implications of the "drug test refusal" waiting period. If a person's social security is cancelled for refusal to undergo a drug test, a 28 day waiting period will be imposed before their payments will resume on successful reapplication. The Commission considers that the waiting period constitutes a punitive measure, the legitimacy and purpose of which is not adequately justified in the explanatory materials. The Commission considers that this measure is an unjustified limit on the right to social security.
54. The Commission is further concerned by the proposed provisions requiring repayment of drug re-testing costs where a result is positive, by way of deduction from social security payments. The Commission

considers that these deductions are effectively a punitive measure, and operate to reduce social security payments below minimum essential levels in a manner that limits the right to social security.

55. The Commission welcomes the safeguard in proposed s 1206XD, allowing the Secretary to reduce the amount deducted from social security payments in cases of financial hardship. However, it considers this safeguard sets an unnecessarily high threshold — a person must have “exceptional circumstances” and be in “severe” financial hardship.³⁹ The human rights compatibility of the deduction measures could be enhanced by removing the requirement of “severity”.

Recommendation 2: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, participation in the trial should be voluntary.

Recommendation 3: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, the “drug test refusal waiting period”, which applies upon reapplication for social security after cancellation, should be removed.

Recommendation 4: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, a recipient should not be required to meet the high threshold of “severe” financial hardship to warrant a reduction in the rate of social security deductions for the purposes of repaying the costs of positive drug re-testing.

7.2 Overreach of measures to persons without drug dependency

56. Selection of recipients for drug testing under the trial is not connected to any reasonable suspicion that a person has a drug dependency problem that interferes with their ability to obtain work. For example, the regime could capture occasional drug use that does not constitute a barrier to employment.
57. The failure of the Bill’s measures to distinguish such recipients from those that it intends to identify, namely those with a drug dependence that interferes with the ability to obtain employment, is concerning.
58. Ultimately, it means that the human rights of occasional drug-users, who are not the intended targets of the Bill, may be affected by the Bill’s

measures including drug tests, income management, and social security deduction, suspension and cancellation, since these measures flow from the initial positive drug test result.

59. These measures are inappropriate to apply to a person who is not drug dependent in a manner that interferes with their ability to obtain employment. The Commission considers that this overreach of the Bill is disproportionate.
60. The Commission acknowledges that there may be numerous practical difficulties in identifying persons with drug dependency issues, and targeting drug testing to this cohort. However, the Commission considers that the rights limitations imposed by measures which flow from an initial positive drug test are not reasonable, necessary or proportionate. Rather, these measures could be limited only to those recipients whose drug use has been assessed by a qualified medical professional as requiring treatment, rather than all recipients who return a positive result after an initial drug test.
61. Proposed s 544B(1AA) requires that a recipient undertake treatment following two or more positive drug tests, if a medical, psychiatric or psychological examination is conducted and the health professional makes a recommendation to that effect. This appears to be the point at which a person with problematic drug dependency has been identified.
62. To enhance proportionality, the Commission considers that measures negatively affecting the human rights, such as income management and social security deductions, suspensions and cancellations, should only apply to recipients in the trial from this point onwards. That will help safeguard against the imposition of restrictive measures where there has been no identified drug dependency.

Recommendation 5: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, it should be amended so that measures: (a) imposing income management, (b) deducting amounts from social security, and (c) suspending or cancelling social security, should only apply to a recipient who has been recommended by a medical professional to undertake treatment for their drug dependency.

7.3 Income management through cashless debit card

63. Should mandatory income management in relation to the Bill proceed, the Commission considers that this measure could be made more proportionate by the following features:
 - a. income management is a measure of last resort, rather than being automatically applied
 - b. tailored and proportionate income management measures are considered in advance of application to each individual case
 - c. income management measures are imposed for a defined and reasonable period of time
 - d. review and appeal processes are permitted.
64. However, rather than being tailored and proportionate to each individual case, the scheme proposes an automatic, blanket and extensive time period of 24 months of income management for any person that tests positive to a drug test on one occasion. This long period of time may not be appropriate for every person, for example if a person is able to address their drug dependency within 24 months.
65. Notably, pursuant to proposed s 123UFAA(1B), the Secretary may also determine to extend income management for a period longer than 24 months. The Explanatory Memorandum states that this provision “would be used where it is considered to be beneficial to a person’s drug rehabilitation outcome to remain on income management for a longer period of time”.⁴⁰ There is a risk that this discretion could be exercised to keep recipients on income management arbitrarily, beyond a period that is proportionate to their individual case.
66. A further concern is the inadequacy of the safeguard in proposed s 123UFAA(1C). This provision requires that the Secretary must determine that a person not be subject to income management if it poses a serious risk to their mental, physical or emotional wellbeing, this consideration is not automatic.⁴¹ However, the Secretary is not required to actively take steps to assess every trial participant who is referred to income management under this test. Rather, the Secretary will consider this determination once made aware of facts which indicate a relevant serious risk.

67. It is not clear how the Secretary would reach this awareness or be satisfied that the relevant risk is “serious”. In effect, it appears that the recipient themselves (or someone acting on their behalf) will be required to identify a risk and then make a case. This may in practice be very difficult for a person suffering serious mental, physical or emotional difficulties or complex circumstances, or may not be identified by a relevant support person.

Recommendation 6: Mandatory income management for social security recipients should:

- a. be imposed for a defined period of time proportionate to the recipient’s circumstances such as the length of their medical treatment, with 24 months being reserved for only the most severe of cases**
- b. only be permitted to be extended beyond a 24-month period under s 123UFAA if the extension is supported by the recommendation of an appropriate treating medical professional**
- c. be subject to periodic review by the Department, with particular attention paid to any serious risk posed to a person’s mental, physical or emotional wellbeing.**

7.4 Free, informed, prior consent to medical treatment

68. The Commission holds concerns that one implication of the Bill could be participants feeling pressured to undertake medical treatment for drug use under threat of suspension, reduction or cancellation of their welfare entitlements.
69. That is, if a person tests positive for a relevant drug on more than one occasion, they will be referred to a medical professional for assessment. If that professional recommends treatment for drug dependence, such as counselling or rehabilitation, the treatment will be incorporated into a person’s Job Plan. This will have the effect of attaching punitive compliance obligations to medical treatment.
70. As discussed above, the right to health under article 12 of the ICESCR protects the right to control one’s health and body, and the right to be free from non-consensual medical treatment. Article 25(d) of the *Convention on the Rights of Persons with Disabilities* also specifically

recognises the right to health for persons with disability, including requiring health professionals to “provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent”.⁴²

71. The Commission acknowledges that treatment for drug dependency may be beneficial for certain recipients. However, mandatory treatment under threat of financial penalty is a significant limitation on a person’s right to health and to their privacy. The Commission considers that reasonableness and proportionality could be enhanced by use of less restrictive means, for example by ensuring that appropriate consent is obtained and consultation with respect to treatment is undertaken.

Recommendation 7: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, that the following measures with respect to medical treatment be incorporated:

- a. requiring that a person’s full, free and informed consent to any medical treatment be obtained in advance**
- b. ensuring that mechanisms are in place to allow recipients to have appropriate decision-making input into the type, length, location and other aspects of their recommended treatment**
- c. ensuring that incorporation of treatment obligations into a Job Plan are documented in the least onerous form possible with respect to potential punitive action for non-compliance**
- d. to the extent that the Bill applies to persons under the age of 18, ensuring that any medical examination and treatments are carried out with regard to their developmental needs by appropriately qualified practitioners in child health.**

7.5 Discriminatory operation

(a) *Aboriginal and Torres Strait Islander peoples*

72. The right of Indigenous peoples to social security is particularly recognised and protected by article 5(e)(iv) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, articles 11(1)(e) and article 21(1) of the *United Nations Declaration on the Rights of Indigenous Peoples*.⁴³

73. Further, the United Nations Human Rights Committee has stated:

Particular care should be taken to ensure that Indigenous peoples and ethnic and linguistic minorities are not excluded from access to social security through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.⁴⁴

74. Although the trial locations are not in Community Development Program areas,⁴⁵ the Commission is concerned about the disproportionate effect of the Bill on Indigenous and Torres Strait Islander people in practice. Government pensions and allowances constitute the main source of income for approximately 46.9% of Indigenous Australians and Torres Strait Islander people.⁴⁶ Therefore, while the trial does not directly target Aboriginal and Torres Strait Islander peoples, it is likely to have a disproportionate impact.

75. The Commission is particularly concerned about the effects of income management measures, and notes that it has previously identified that Indigenous and Torres Strait Islander people are a group that are disproportionately affected by such measures.⁴⁷ This emphasises the need for an income management scheme that is reasonable, necessary and proportionate. In this regard, the Commission refers to Recommendation 6 of this submission.

(b) *Persons with disabilities*

76. The Commission notes that the United Nations Committee on the Rights of Persons with Disabilities has acknowledged that drug dependence or addiction may constitute a disability under international human rights law.⁴⁸

77. If a drug dependence amounts to a disability, the right to social security must not be limited by way of discrimination due to that disability. The ESCR Committee has also emphasised the importance of:

...providing adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost, or received a reduction in, their income, have been denied employment opportunities or have a permanent disability.⁴⁹

78. The effect of the Bill is that drug treatment activities will form part of a person's Job Plan, with punitive measures attaching to non-compliance.

Further, recipients with a drug treatment activity in their Job Plan may still be required to undertake other mandatory activities, including job searches, depending on their circumstances.

79. The Commission recommends that drug dependency amounting to disability should be within the “reasonable excuse” provisions.

Recommendation 8: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, the applicable “reasonable excuse” provisions should appropriately recognise drug dependency that amounts to a disability under international human rights law.

(c) *Young people and children*

80. The Commission notes that the trial targets recipients of Youth Allowance (other) payments (as well as Newstart recipients), limiting the right of children and young people to social security.
81. Youth Allowance (other) is an income support payment for means tested jobseekers aged 16 to 21 years old, who are looking for work or undertaking other approved activities to improve their employment prospects.⁵⁰ Further, a 15 year old can qualify if they are independent and have reached minimum school leaver age in their state or territory.
82. The Commission is particularly concerned about the targeting of this program to children as young as 15 years of age, and the adverse impacts of punitive conditional welfare on children and young people generally. These measures, where resulting in mandatory drug testing, mandatory medical treatment, and/or payment reductions, suspensions or cancellations, could seriously affect a child’s best interests in a way that adversely impacts their human rights.
83. These concerns are compounded with respect to children and young people experiencing intersectional disadvantage or complex circumstances, such as children with disability (including where drug or alcohol dependency constitutes a disability), who are homeless, who are facing mental health challenges or experiencing domestic violence.
84. Further, children of recipients of Youth Allowance and Newstart may also be adversely affected by the suspension or cancellation of their parent’s benefits, through no fault of their own. While these benefits comprise

income support for the relevant person, as a parent these benefits may be used to pay for rent, food, and utility bills, phone bills, and other basic needs of a family. The adverse impacts on a person's standard of living will extend to their dependant children or other dependants.

85. Given the special needs of children for safeguards, care and protection, and the importance of the best interests of the child, the Commission recommends that the application of the trial should only apply to children with their consent. For example, informed consent from Gillick competent children and young people, or consent on their behalf from a parent or guardian, as appropriate in the relevant circumstances.
86. If this recommendation is not accepted, Services Australia should be required to consider in advance whether or not to apply the trial to a relevant child or young person on a case-by-case basis, in particular with respect to relevant welfare recipients under the age of 18, with the best interests of the child constituting the primary consideration.

Recommendation 9: Should Recommendation 2 not be accepted, application of the trial with respect to welfare recipients under the age of 18 should only occur with their voluntary consent, rather than being mandatory.

Recommendation 10: Should Recommendation 9 not be accepted, Services Australia should be required to consider in advance whether or not to apply the trial to a relevant child or young person on a case-by-case basis, in particular with respect to welfare recipients under the age of 18 years old, with the best interests of the child constituting the primary consideration.

7.6 Privacy and confidentiality

87. The Commission notes that the Bill and the explanatory materials do not specify how sensitive personal information gathered in relation to the trial, including drug test results, will be able to be used or disclosed, or measures that will be applied to ensure confidentiality and the security of the information.
88. The Explanatory Memorandum states that the existing privacy laws will apply to information gathered as part of the trial:

With respect to privacy concerns, there are existing privacy safeguards in place under the Privacy Act 1988 and the confidentiality provisions in Division 3 of Part 5 of the Social Security Administration Act. These confidentiality provisions stipulate that protected information, including any personal information such as health information, can only be accessed, used or disclosed in limited circumstances. This includes for the purposes of administering the social security law; for research, statistical analysis or policy development; and where it has been certified as being in the public interest. These existing safeguards will apply to any information gathered as part of this trial, including that obtained or generated by the drug test provider. Any accessing, use or disclosure of this information, including test results, will only occur in accordance with these existing laws.

89. It is noted that the Drug Testing Rules will also permit the Minister to make rules with respect to confidentiality and disclosure of results of drug tests, and keeping and destroying records in relation to samples for use in drug tests or drug trials.
90. The Commission is concerned about any potential to disclose a person's positive drug test to law enforcement or other government agencies or departments, for purposes other than those directly related to the payment of a Newstart of Youth Allowance entitlement. For example, any risk of criminal prosecution, visa cancellation or removal of children with respect to disclosure of information relating to drug test results. These issues are unrelated to the stated goals of the Bill, and therefore use of this information in these regards is disproportionate. Such outcomes could have a "chilling effect" on people applying for social security, further limiting the rights to social security and an adequate standard of living.
91. Further, the Commission urges that appropriate measures be put in place to ensure that private contractors who are conducting the drug tests are adequately trained, and that robust procedures are put in place, to ensure the security and confidentiality of drug test result information. This includes ensuring that drug testers do not disclose the results to any unauthorised third parties, and that databases and hardcopy locations used to store health information are sufficiently protected against unauthorised access, to protect the privacy rights of recipients.

92. The Commission considers that, unless the relevant person consents, drug test information should be unable to be used or disclosed for purposes other than those directly related to the payment of a relevant Newstart of Youth Allowance (other) entitlement. These privacy protections should be included in the Drug Testing Rules.
93. Further, in accordance with the *Privacy Act 1998* (Cth), mechanisms should be put in place to ensure that people are informed in advance of the purposes for which drug test result information can be used and disclosed, and full, informed and free consent obtained to these uses and disclosures.

Recommendation 11: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds:

- a. unless the relevant person consents, drug test information should be unable to be used or disclosed for purposes other than those directly related to the payment of a relevant Newstart of Youth Allowance (other) entitlement**
- b. privacy protections should be included in the Drug Testing Rules**
- c. appropriate measures should be put in place, for example in relevant contracts or the Drug Testing Rules, to ensure that contractors conducting drug tests treat test results with an appropriate level of security and confidentiality**
- d. mechanisms should be put in place to ensure that people are informed in advance of the purposes for which drug test result information can be used and disclosed, and give their full, informed and free consent to these uses and disclosures.**

7.7 Consultation on Drug Testing Rules

94. Proposed s 38FA also allows the Minister to make Drug Test Rules by way of a future legislative instrument that would govern the more practical aspects of drug testing, in relation to the following:
 - a. prescribing substances for the purposes of the definition of testable drug in s 23(1)
 - b. giving and taking of samples of persons' saliva, urine or hair for use in drug tests

- c. dealing with such samples
 - d. carrying out drug tests
 - e. giving of results of drug tests in certificates or other documents and the evidentiary effect of those certificates or documents
 - f. confidentiality and disclosure of results of drug tests
 - g. requirements relating to contracts entered into for the carrying out of drug tests
 - h. keeping and destroying records relating to samples for use in drug tests or drug tests.
95. The Commission notes and shares the concerns of the Standing Committee for the Scrutiny of Bills, about the appropriateness of including such significant matters, opposed to technical and administrative matters, in delegated legislation rather than primary legislation.⁵¹
96. The Explanatory Memorandum states that the Drug Testing Rules will provide a high level protocol for conducting drug testing and related issues:

The intention is that the drug test rules will set out high level protocols that will apply for conducting the drug tests, including in relation to the use and disclosure of test results. This provides additional safeguards to ensure the operation of the drug testing is consistent with the requirements under the Privacy Act 1988 and the confidentiality provisions in the Social Security Administration Act. In addition, the collection, use and disclosure of information for the purposes of the drug testing trial is regulated under the confidentiality provisions in Division 3 of Part 5 of the Social Security Administration Act.

The reason for the use of delegated legislation to set out the rules for conducting the tests is that these technical and more administrative details will rely, to an extent, on information provided by the preferred tenderer for the provision of drug testing trial services, as well as other stakeholders. Use of a legislative instrument gives the necessary flexibility to ensure that the arrangements for the drug testing will meet the intention of the legislation but can accommodate practicalities that may be unknown.

The Department of Social Services (the department) has been engaging with stakeholders from the health, alcohol and other drug, and welfare

sectors and this consultation will be ongoing. The department has spoken to all state and territory governments, as well as a range of drug and alcohol treatment providers and peak bodies, and related experts across the country, and in the trial sites. The feedback of stakeholders will be considered in finalising the drug test rules.

The minimum requirements, including qualifications, of the drug test provider and its officers will also be set out in the drug test rules. While the drug test rules have not been finalised at this stage, it is intended that the drug testing provider will need to deliver testing services in accordance with the relevant Australian Standards (where these exist.) These are the AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine and AS4760:2019 Procedures for specimen collection and the detection and quantitation of drugs in oral fluid. These standards can be obtained, for a fee, from the Standards Australia website at www.standards.org.au. Alternatively, copies of the Standards are available for viewing at the department on request.

It is also intended that the provider will be required by the drug test rules to utilise authorised laboratories (that is, those accredited by the National Association of Testing Authorities, Australia) and to use authorised analysts and collecting agencies for the purposes of analysing the results of samples taken for drug testing.

...

An exposure draft copy of the Social Security (Drug Test) Rules was tabled by the department when it appeared at the hearings for the Senate Community Affairs Legislation Committee's inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017 on 30 August 2017. The drug test rules remain subject to change, including after consideration of any information obtained from the procured drug testing provider.

97. Given the broad discretion afforded to the Minister to make relevant rules, the significant human rights issues associated with the Bill, and the fact that Executive-made rules may not be subject to the same level of scrutiny as legislative action by the Parliament, at the very least the Commission recommends that broad consultation should take place in relation to the Drug Test Rules before they are finalised.

Recommendation 12: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds, the Australian

Government should consult widely on the Drug Testing Rules including with human rights bodies.

7.8 Evaluation and expansion of trial

98. The Bill proposes a trial of the proposed drug testing scheme. The Commission considers it critical that an evaluation of the effectiveness and impacts of the trial be conducted by an independent, appropriately qualified expert research body on the basis of both quantitative and qualitative indicators.
99. The Commission considers that the evaluation body should consider the impacts on and compliance with Australia's human rights obligations, as part of the assessment of the effectiveness of the program. The evaluation report should be made publicly available for review by stakeholders. These views align with recommendations previously made by the Committee with respect to the evaluation strategy for the trial and need for public reporting of the results of the trial.⁵²
100. The Commission would welcome a public consultation process to inform any consideration of an expansion of the trial or extension of its duration. It considers that any expansion or extension of the trial should only occur following a positive report on the effectiveness of the trial and improved human rights outcomes, and with the support of key stakeholders after public consultation.
101. To help ensure that the human rights of affected persons are being adequately protected and realised throughout the trial, the Commission would also support a review of the trial for compliance with Australia's international human rights obligations one year after commencement.

Recommendation 13: In the event that the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) proceeds:

- a. an evaluation of the effectiveness and impacts of the trial should be conducted by an independent, appropriately qualified expert research body on the basis of both quantitative and qualitative indicators**
- b. the evaluation body should consider the impacts on and compliance with Australia's human rights obligations, as part of the assessment of the effectiveness of the program**

- c. the evaluation report should be made publicly available for review by stakeholders**
- d. a public consultation process should inform any consideration of an expansion of the trial or extension of its duration**
- e. any expansion or extension of the trial should only occur following a positive report on the effectiveness of the trial and improved human rights outcomes, and with the support of key stakeholders**
- f. the trial should be reviewed for compliance with Australia's international human rights obligations one year after commencement.**

¹ Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) 3.

² Australian Human Rights Commission, Submission to the Senate Community Affairs Legislation Committee, Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (Cth) (11 April 2018).

³ The Commission also notes that a mandatory drug testing trial was previously proposed in Schedule 12 of the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (Cth). That Bill underwent parliamentary inquiry and many concerns were raised. Schedule 12 was omitted from the Welfare Reform Bill before it passed both houses of Parliament in March 2018.

⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Report 3 of 2018: Human rights scrutiny report* (2018) 128.

⁵ Senate Community Affairs Legislation Committee, Parliament of Australia, *Report of inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (Cth)* (May 2018), Dissenting Report by Labor Party Senators, 30.

⁶ Senate Community Affairs Legislation Committee, Parliament of Australia, *Report of inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (Cth)* (May 2018), Dissenting Report by Labor Party Senators, 19.

⁷ Senate Community Affairs Legislation Committee, Parliament of Australia, *Report of inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (Cth)* (May 2018), Dissenting Report by the Australian Greens, 31.

⁸ Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, 3–5.

⁹ Proposed s 123UFAA(1C), Social Services Legislation Amendment (Drug Testing Trial) Bill 2019.

¹⁰ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 9. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iv), *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981) arts 11(1)(e), 14(2)(c); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

- art 26; *Convention on the Rights of Persons with Disabilities (Disability Convention)*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 28.
- ¹¹ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art 9 of the Covenant)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [2].
- ¹² Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art 9 of the Covenant)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [9].
- ¹³ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art 9 of the Covenant)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [1].
- ¹⁴ McBeth, Nolan and Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 142.
- ¹⁵ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11.
- ¹⁶ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [22].
- ¹⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2.1: 'Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...'
- ¹⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art 9 of the Covenant)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [4].
- ¹⁹ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art 9 of the Covenant)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [9].
- ²⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (article 9)*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) 12 [40].
- ²¹ McBeth, Nolan and Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 96.
- ²² McBeth, Nolan and Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 96–97. Such information should not 'reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the [ICCPR]'. See UN Human Rights Committee, *General Comment 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess (1988), [10]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6624&Lang=en.
- ²³ McBeth, Nolan and Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 96–97. See also UN Human Rights Committee, *General Comment 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess (1988), [8]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6624&Lang=en. The Human Rights Committee said at [8]: 'So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should be only examined by persons of the same sex.'
- ²⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to health (article 12)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [8].
- ²⁵ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1), 26; *International Covenant on*

Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2; *Convention on the Rights of Persons with Disabilities (Disability Convention)*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

²⁶ For example, the *Racial Discrimination Act 1975* (Cth) and *Disability Discrimination Act 1992* (Cth).

²⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

²⁸ Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Cth) 31.

²⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) arts 3, 8(1).

³⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) preamble; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg UN Doc A/810 (10 December 1948) article 25(2).

³¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) articles 3, 16(1), 28, 24, 27, 18(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) articles 10(1), 11, 12.

³² See, generally, United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). See also McBeth, Nolan and Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 116–117.

³³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) article 4.

³⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (article 9)*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) 13 [42].

³⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (article 9)*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) 13 [42].

³⁶ Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, Statement of Compatibility with Human Rights, 27.

³⁷ See for example Australian Human Rights Commission, Submission to the Senate Affairs Legislation Committee, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (Cth) (20 July 2018); Australian Human Rights Commission, Senate Standing Committees on Community Affairs, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (Cth) (forthcoming).

³⁸ See for example Australian Human Rights Commission, Submission to the Senate Community Affairs References Committee, ParentsNext, including its trial and subsequent broader rollout (1 February 2019); Australian Human Rights Commission, Submission to the Senate Community Affairs References Committee Adequacy of Newstart and related payments and alternative mechanisms to determine the level of income support payments in Australia (25 September 2019).

³⁹ Proposed s 1206XD, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019.

⁴⁰ Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, 20.

⁴¹ Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, 20.

⁴² *Convention on the Rights of Persons with Disabilities*, GA61/106, 61st sess, 106th plenary meeting, A/RES/61/106 (24 January 2007) Art 25(d).

- 43 International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) article 5(e)(iv); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) articles 11(1)(e), 14(2)(c); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) article 21(1).
- 44 UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (article 9)*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) 11 [35].
- 45 Explanatory Memorandum, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, 3.
- 46 Productivity Commission, *Overcoming Indigenous Disadvantage Report 2016*, 9.31. At <https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-chapter9-economic-participation.pdf>.
- 47 See for example Australian Human Rights Commission, Submission to the Senate Affairs Legislation Committee, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (Cth) (20 July 2018).
- 48 Committee on the Rights of Persons with Disabilities, *Concluding Observations on Ireland* (2000), UN Doc A/55/40, [422]–[451], [29e]; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Report 3 of 2018: Human rights scrutiny report* (2018) 125.
- 49 Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (art 9 of the Covenant)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [20].
- 50 Australian Government, *Social Security Guide* (20 September 2019) [1.2.1.20] available at <https://guides.dss.gov.au/guide-social-security-law/1/2/1/20>.
- 51 Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest No 3 of 2018* (2018) 37.
- 52 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report of inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (Cth)* (May 2018), 11 (Recommendations 1 and 2).