Social Services Legislation Amendment (Drug Testing Trial) Bill 2019

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Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at January 2020.
Social Services Legislation Amendment (Drug Testing Trial) Bill 2019

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

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History of the Bill

This is the third time that the Government has introduced legislation in the Parliament to establish a drug testing trial:

- the first Bill was the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (2017 Bill). Schedule 12 of the first Bill contained the relevant amendments. However, the Government failed to gain support for the measure during negotiations with the Senate, leading to a decision to sever the Schedule from the Bill;

- the second Bill was the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (2018 Bill). The 2018 Bill had been agreed to by the House of Representatives and was introduced into the Senate. The 2018 Bill subsequently lapsed at the end of the 45th Parliament;

- the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (the Bill) contains minor variations from those amendments in the 2018 Bill.

Purpose of the Bill

The purpose of the Bill is to establish a drug testing trial of 5,000 new recipients of Newstart Allowance (NA) and Youth Allowance (other) (YA) in three discrete locations over two years.

Structure of the Bill

The Bill comprises two Parts:

- Part 1 amends the Social Security Act 1991, the Social Security (Administration) Act 1999 (Administration Act) and the Farm Household Support Act 2014 (FHS Act) to establish the drug testing trial;

- Part 2 amends the same Acts to make minor consequential changes and insert transitional provisions.

Background

Drug testing has been part of the international welfare reform debate since the 1990s. Proposals for drug testing income support recipients have been debated in Australia, Canada and the United Kingdom. A number of American state governments have introduced drug testing schemes and the New Zealand Government has a policy that supports pre-employment drug testing of income support recipients by employers and training providers.

According to a 2016 paper by the Congressional Research Service, there is little evidence for the effectiveness of drug testing measures in the United States. Part of the problem is a lack of clarity about what policymakers are trying to achieve with these measures. Such policy objectives could

2. For more information on this Bill see: D Arthur, Social Services Legislation Amendment (Drug Testing Trial) Bill 2018, FlagPost, Parliamentary Library blog, 7 March 2018.
include restricting payments to those deemed worthy of support, punishing individuals for engaging in undesirable behaviour or deterring people from engaging in illicit drug use.6

**The drug testing trial proposal**

The Government, through the Bill, proposes trialling mandatory drug testing for 5,000 new recipients of NA and YA (other) followed by mandatory treatment for those considered likely to benefit from it. The Government will conduct the trial in three separate sites:

- Canterbury-Bankstown (New South Wales)
- Logan (Queensland)
- Mandurah (Western Australia).7

The Government plans to evaluate the trial. According to the Department of Social Services’ (DSS) submission to the Senate inquiry into the Bill, ‘the results of the evaluation will inform any decisions about the trial or rolling out drug testing more broadly.’8

Officers of the Department argued in 2017 that there is no evaluation evidence on the effectiveness of drug testing initiatives and the purpose of the trial is to provide such evidence.9

**What problems does the trial address?**

According to the Explanatory Memorandum, there are two major problems with drug use by income support recipients. The Explanatory Memorandum notes that substance abuse:

- is a major barrier to social and economic participation and
- is not consistent with community expectations around receiving taxpayer funded welfare payments.10

DSS’ submission to the inquiry focuses on the first problem. It argues that the trial will test new approaches to identifying job seekers with substance use issues and assisting them to seek treatment.11 It does not mention community expectations.

**Initial testing**

Recipients who test positive to an initial test for illicit drugs will be placed on income management for 24 months.12 Income management is designed to prevent recipients from spending payments on excluded goods such as alcohol, tobacco, pornography and gambling.13 Recipients will receive 20 per cent of their income support payments in cash with the remaining 80 per cent income managed.14
Recipients who test positive in the first test will be subject to random tests during the trial period, with the second test occurring within 25 working days after the first positive test. Those who test positive again will be referred to a medical professional for assessment. If the medical professional recommends treatment, the treatment will become part of the recipient’s Employment Pathway Plan. Those who fail to meet the requirements set out in their Plan may have their income support payment suspended or cancelled.

How many recipients will require treatment for substance abuse?

DSS estimates that around 425 recipients will test positive to the first drug test and will be placed on income management. The Department expects that a further 120 of these recipients will test positive in the second test and be referred to a medical professional for assessment.

A relatively small number of recipients will require expensive forms of treatment such as residential rehabilitation, according to Ministers. As the then Minister for Social Services in May 2017, Christian Porter, noted:

... when people think about recovery and rehabilitation from drug abuse they often think of residential rehabilitation, which is probably at the very high end of the spectrum of treatments. The overwhelming-the largest percentage of treatment is usually counselling, and indeed assessment that leads to counselling.

As the then Minister for Human Services in September 2017, Alan Tudge noted that only around 50 or 60 people would ‘require some sort of residential rehabilitation or detox.’

It is not clear what results DSS expects from treatment services or what improvement in employment outcomes it expects for the approximately 120 recipients who are referred to some kind of treatment.

Funding for drug treatment

The Government plans to establish a $10 million Treatment Fund to provide additional treatment support in the three trial sites. A number of submitters have argued that $10 million is not enough to meet existing levels of demand in the trial sites. However, the Government is not planning to use the $10 million to meet existing demand, instead, more than half of this funding is targeted exclusively to meeting the needs of trial participants. According to DSS, there is:

... $6 million [of the $10 million], which is for individuals. If a person needs a particular service in a particular area, and it’s not available from either a Commonwealth or a state-funded service, their case

19. A Tudge (Minister for Human Services), Interview with Jan Faine, ABC 774 Melbourne, transcript, 7 September 2017, p. 4. For data on treatment services in Australia see: Australian Institute of Health and Welfare (AIHW), Alcohol and other drug treatment services in Australia 2017–18, Drug Treatment Series, 33, AIHW, Canberra, 2019.
21. For example, Australian Association of Social Workers, Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, [Submission no. 20], September 2019, p. 3.
manager would apply to the Department of Social Services for a bucket of funding that could be used to meet the need of that individual person, whether that be for residential rehabilitation or counselling.22

This underscores the point that the trial is not part of any broader illicit drugs strategy. Instead it appears focused on meeting the Government’s welfare reform objectives.

**A major part of the trial will be placing around 425 recipients on income management**

According to the Department’s estimates, there will be up to 305 recipients who are placed on income management but will not be referred to treatment.23

According to DSS, the Government has chosen to use income management rather than the cashless debit card ‘because it provides a more individualised approach to welfare quarantining’.24

**Objectives of the proposal**

Relevant Ministers and DSS have cited three objectives for the drug testing trial. The most commonly cited objective is to identify income support recipients who have a substance abuse problem that interferes with their ability to prepare for and find work.

**Assisting recipients who are drug dependent into employment**

According to DSS’s submission to the inquiry:

> The drug testing trial is designed to identify job seekers who may have ongoing drug dependency issues and may benefit from pursuing treatment. The aim is to improve the capacity of job seekers with illicit drug use issues to find employment, or participate in relevant education or training, by assisting them to access appropriate treatment and overcome their barriers to work.25

The Minister for Social Services, Anne Ruston, has indicated that this is the trial’s major focus. According to a recent media release:

> Minister for Families and Social Services Anne Ruston said job seekers struggling with substance abuse issues would benefit from the trial as its primary focus was to help people access support services through a $10 million Treatment Fund.26

**Deterring drug use**

A second objective of the trial is to deter income support recipients from using illicit drugs so as to prevent them from developing a drug problem that may later seriously interfere with their ability to find and keep paid work.

In 2017 the then Minister for Human Services, Alan Tudge, said: ‘My hope is that our trials will not just help with those who are addicted, but encourage non-addicts to stop taking drugs.’27

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23. DSS estimates that around 425 recipients will test positive to the first drug test and will be placed on income management. The Department expects that a further 120 of these recipients will test positive in the second test and be referred to a medical professional for assessment. Assuming they have not left payment before the second test, this would leave an estimated 305 recipients who test positive to the first test but not a second. See: DSS, ‘Budget measure – tackling substance abuse by welfare recipients,’ brief for 2017–18 Budget Estimates hearings, May 2017, p. 1.
25. DSS, Submission to Senate Community Affairs Legislation Committee, op. cit., p. 3.
26. A Ruston (Minister for Families and Social Services), Drug testing trials to help welfare recipients become job ready, media release, 6 September 2019.
The current Minister for Social Services has reinforced this point saying:

We hope that the risk of being tested will encourage people to think twice about taking drugs. For those who may be just meddling around the edges of taking drugs, being put on the BasicsCard after one positive test might give them a wake-up call to say to themselves, ‘this really isn’t a smart thing to be doing’, and hopefully prevent them from heading off down the path of drug addiction.28

This objective provides a rationale for placing recipients on income management after the first positive drug test.

**Maintaining the integrity of, and public confidence in, the social security system**

A third objective is 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’.29

This objective appears in the Statement of Compatibility with Human Rights that forms part of the Explanatory Memorandum. It addresses the problem of maintaining consistency with community expectations that is discussed in the Explanatory Memorandum.30

However, the Minister for Social Services has stated that maintaining public confidence in the system is not the main objective of the trial. She explained the Government’s position in response to a question during a September 2019 radio interview:

DAVID BEVAN: Is this being driven by a simple belief that taxpayers don’t want to fund drug taking?

MINISTER RUSTON: No, not at all. I mean, I think you’re right. I think taxpayers do have a view about spending the money that they pay in their taxes to and having people use it and spend it on drugs and alcohol. But that’s not the purpose behind this. The main purpose behind this is that we believe that if somebody has a substance abuse or a drug addiction they are very, very likely not to be able to be ready to be able to take on a job. And we want to make sure that we get anybody and everybody job ready, because the most important thing we can do for the Australian community, the Australian economy, and the individual is to make sure that people are ready to have a job so we can get them into work.31

**Earlier Australian proposals**

During the 2007 election campaign the Coalition announced that, if the Government was re-elected, income support recipients convicted of criminal drug offences involving hard drugs would be placed on income management.32 Then Prime Minister John Howard said: ‘we take the view that it’s not right that people should have control of taxpayer money when they have been convicted of such offences’.33 The policy was not part of the Coalition’s 2013 election campaign.

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30. Ibid., p. 3.
33. J Howard (Prime Minister) and Peter Costello (Treasurer), *Joint press conference: Phillip Street, Sydney: tough on drugs policy; the economy; climate change*, transcript, 18 November 2007, p. 1.
In 2012 Liberal National Party MP George Christensen (Member for Dawson) proposed that income support payments for the unemployed should be conditional on passing a drugs test.  

However, Kevin Andrews, then Shadow Minister for Families, Housing and Human Services, stated that this was not Coalition policy.  

In 2013 the Australian National Council on Drugs (ANCD) published a position paper on drug testing. The paper concluded:

There is no evidence that drug testing welfare beneficiaries will have any positive effects for those individuals or for society, and some evidence indicating such a practice could have high social and economic costs. In addition, there would be serious ethical and legal problems in implementing such a program in Australia. Drug testing of welfare beneficiaries ought not be considered.  


The interim report referred to pre-employment drug testing requirements for jobseekers in New Zealand and there was speculation in the media that the Australian Government was considering introducing a similar measure.  

Then Minister for Social Services, Kevin Andrews, said that the Government was unlikely to go ahead with implementing drug testing requirements, noting that drug testing requirements largely involve state jurisdictions and responsibilities.  

In November 2015 Senator Jacqui Lambie asked the Attorney-General, Senator George Brandis, if the Government would support testing income support recipients for illicit drugs. The Attorney-General responded that ‘the government has no present intention to legislate in that respect’.  

**Drug testing overseas**  

Drug testing for income support recipients has been introduced in a number of states in the United States, and in New Zealand. However those jurisdictions use models that differ significantly from that proposed for Australia.  

As discussed below, there appears to be little evidence for the effectiveness of these measures.  

**United States**  

According to a 2017 report by the National Conference of State Legislatures, at least 15 states have passed legislation for drug screening or testing for people applying for or receiving public assistance.  

 Critics of drug testing in the United States argue that these screening and testing schemes are costly and ineffective. For example, according to a report by journalists Bryce Covert and Josh Israel in *ThinkProgress*, 10 states spent $850,909 to find just 321 people who tested positive.
According to the most recent data for the state of Missouri, officials referred 258 people to drug testing in 2018 with four of these returning a positive test.\(^{43}\)

Perhaps the major reason US schemes produce such low numbers of positive tests is that many schemes screen recipients and applicants before testing them. Only those flagged by the screening tool are tested.\(^{44}\) In Missouri the screening question is:

How many times in the past year have you used an illegal drug or used prescription medication for non-medical reasons?\(^{45}\)

US schemes adopt this approach because of constitutional protections against ‘unreasonable searches’ (the Fourth Amendment). Two states, Florida and Michigan, created schemes using random drug testing and were challenged in the courts. To avoid similar challenges, other states have forgone random testing and adopted approaches where a drug test is only administered where there is individualised suspicion of drug use.\(^{46}\)

A 2016 report by the Congressional Research Service notes that there is little evidence for the effectiveness of drug-related restrictions in US welfare programs.\(^{47}\)

**Pre-employment drug testing in New Zealand**

Work and Income New Zealand does not test income support recipients for drugs. However, recipients with work obligations cannot refuse to apply for a job where the employer requires applicants to pass a drug test. Recipients are also required to take a drug test if a training provider requires it (for example, a course to get a heavy truck licence).\(^{48}\)

According to the New Zealand Ministry of Social Development:

The primary policy rationale was to prevent drug use being a barrier to employment for beneficiaries, and to set the expectation that recreational drug use is “not an acceptable excuse for avoiding available work”. At the time, around 40% of vacancies advertised through Work and Income required pre-employment drug tests, primarily for health and safety reasons. Prior to the policy’s introduction, clients could opt out of applying for suitable jobs that required a preemployment drug test, if they would not be able to pass.

A graduated sanctions regime applies for failing to meet these obligations without good and sufficient reason. Under this regime, clients may have their benefit reduced, then suspended, then cancelled for 13 weeks for subsequent failures over a 12-month period. Clients with dependent children face a

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42. B Covert and J Israel, ‘Drug testing welfare recipients is a popular new policy that cost states millions. Here are the results’, *ThinkProgress* website, 19 February 2016 (updated 29 March 2019).
44. As well as drug testing recipients identified by the screening test Missouri also administers drug tests to recipients who have an arrest or conviction for a misdemeanour or felony drug offense for the previous 12 months. Department of Social Services (Missouri), *Temporary Assistance drug testing requirements*, 19 February 2013.
45. A Campbell (Director), *Memorandum: temporary assistance drug testing manual revision #10*, Family Support Division, Department of Social Services (Missouri), 20 February 2013. For background information on this screening test see: P Smith, S Schmidt, A Allensworth-Davies and R Saitz, ‘A Single-Question Screening Test for Drug Use in Primary Care’, *Archives of Internal Medicine*, 170(13), 12 June 2010.
maximum sanction of a 50% benefit reduction. A client must have been given at least five working days to dispute or re-comply before any sanction is imposed.\footnote{New Zealand, Ministry of Social Development, \textit{Obligations and sanctions rapid evidence review: paper 4: drug testing obligations and sanctions}, paper prepared for the Welfare Expert Advisory Group, November 2018, p. 3. Footnote references have been omitted from this quotation and can be viewed in the source document.}

Work and Income will not refer the person to a job that requires a drug test if they are aware that a recipient is dependent on drugs, undergoing or waiting for drug treatment or taking prescription medication that could cause them to fail a drug test.\footnote{Work and Income New Zealand, \textit{Drug testing}, op. cit.} Work and Income cannot require a recipient to undertake medical treatment as a condition of receiving income support.\footnote{New Zealand, Ministry of Social Development, op. cit., p. 3.}

When the New Zealand Government announced drug testing requirements in 2012, the Prime Minister John Key said the Government had no plans to drug test all beneficiaries and was not swayed by arguments that drug users were spending income support payment on drugs. He said:

\begin{quote}
Some people would say people on benefits shouldn’t smoke or shouldn’t drink. Everyone has their own views on those matters. For the most part, other than very young people, we are leaving people to make their own assessment but our expectations are clear—if you can work, you should work and if the only reason you’re not working is because you’re failing a drug test because of recreational drug use, we think that’s unacceptable and the Government is going to do something about that.\footnote{C Trevett, \textit{Addicts escape beneficiary drug testing}, \textit{New Zealand Herald}, 3 July 2012.}
\end{quote}

According to the Ministry of Social Development, ‘There is no research on the effects of New Zealand drug testing obligations and sanctions.’\footnote{New Zealand, Ministry of Social Development, op. cit., p. 2.}

**Committee consideration**

**Standing Committee on Community Affairs**

The Bill was referred to the Senate Standing Committee on Community Affairs (the Community Affairs Committee) for inquiry and report by 10 October 2019.\footnote{Details of the terms of reference, submissions to the Community Affairs Committee and the Committee’s final report are available on the \textit{inquiry homepage}.} The majority report recommended that the Bill be passed.\footnote{Senate Community Affairs Legislation Committee, \textit{Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 (Provisions)}, The Senate, Canberra, October 2019, p. ix.}

However, Australian Labor Party (Labor) Senators on the Community Affairs Committee submitted a dissenting report, as did the Australian Greens (Greens) Senators on the Committee. In both cases the recommendation was that the Bill not be passed. The dissenting views of Labor and the Greens are canvassed below.\footnote{Ibid., pp. 21–36.}

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) did not comment directly on the Bill.\footnote{Senate Standing Committee for the Scrutiny of Bills, \textit{Scrutiny digest}, 6, 2019, 18 September 2019, p. 22.} Instead, it reiterated the comments it had previously made in relation to the 2018 Bill.\footnote{Senate Standing Committee for the Scrutiny of Bills, \textit{Scrutiny digest}, 3, 2018, 21 March 2018, pp. 34–44.} The Scrutiny of Bills Committees concluded its examination of the 2018
Bill by noting that it had significant concerns about private contractors making referrals regarding persons to be subject to income management:

The committee notes that private contractors are not subject to the same level of accountability and oversight that apply to members of the Australian Public Service. The committee’s scrutiny concerns are heightened by the fact that it does not appear that the contractor’s decision to make the referral will be subject to any form of merits or judicial review, as only the question of whether or not the notice was actually given appears to be reviewable under the Administration Act.\(^{59}\)

The Scrutiny of Bills Committee also had concerns regarding the process whereby a person can challenge a positive drug test not being contained in legislation.\(^{60}\)

**Policy position of non-government parties/independents**

**Labor**

The Labor members of the Community Affairs Committee that held the inquiry into the Bill noted that ‘medical experts, drug and alcohol treatment agencies, social and health policy experts, and community services organisations all oppose the Bill’.\(^{61}\) The Labor Senators supported the ‘overwhelming consensus of experts’ that the Bill should be opposed.\(^{62}\)

**Greens**

The primary reason for the Greens Senators’ rejection of the Bill is that it fails to ‘address drug and alcohol abuse as the serious and complex health issue that it is’.\(^{63}\) In addition, the Greens expressed concern about the following:

- the lack of consultation with the communities across the three trial sites prior to the introduction of the Bill\(^{64}\)
- the imposition of income management on people who may have substance abuse issues\(^{65}\)
- issues with different drug testing techniques, including reliability issues and the risk of false positives\(^{66}\)
- the lack of treatment services and the long waiting lists for access to those services that do exist\(^{67}\)
- absence of support for addressing the underlying causes of addiction\(^{68}\) and
- the Government’s lack of transparency in disclosing the costs of the trial.\(^{69}\)

\(^{59}\) Ibid., p. 44.
\(^{60}\) Ibid.
\(^{62}\) Ibid., p. 26.
\(^{64}\) Ibid., p. 28.
\(^{65}\) Ibid., p. 29.
\(^{66}\) Ibid., p. 31.
\(^{67}\) Ibid., pp. 32–33.
\(^{68}\) Ibid., p. 34.
\(^{69}\) Ibid., p. 35.
**Centre Alliance**

Speaking in relation to the 2018 Bill, Rebekha Sharkie MP stated:

> The government refuses to publish the cost of the trial to the taxpayer. The government argues there are commercial implications for this nondisclosure. I do not believe this. Government knows exactly how much it intends to spend on this particular pilot study, and it should know how much it intends to spend on this program or pilot study. Every single program should have a dollar figure attached. Publish the costings. Every other program has this. Why not this? In the absence of exceptional circumstances, I and my Centre Alliance colleagues will never support legislation without knowing how much it’s going to cost the Australian taxpayer. We believe it is irresponsible, and we believe we would be doing a great disservice to the Australian taxpayer if we did that. ⁷⁰

Ms Sharkie reiterated her earlier comments during the debate on this Bill. ⁷¹

**Position of major interest groups**

Many of the submitters to the Community Affairs Committee also submitted to Committee inquiries about the 2017 Bill and the 2018 Bill. They have reiterated their earlier comments in relation to this Bill.

**Medical professionals**

The Royal Australian & New Zealand College of Psychiatrists (RANZCP) ‘does not consider that drug testing welfare recipients is an appropriate way to support people experiencing addiction or substances use issues’. ⁷² The RANZCP also expressed its concern about the effect that the measure would have ‘on the mental health of welfare recipients and their families generally’ and urged the Government ‘to consider the social and health impacts of this proposed program on an already vulnerable population’. ⁷³

The Australian Medical Association (AMA) listed amongst its concerns the following factors:

- Substance dependence or addiction is primarily a health problem, and that those affected must be treated in the same way as other patients with serious health conditions;
- Random drug testing does not distinguish between those who are one off, or occasional drug users, and those with significant dependence or addiction problems;
- The demand for drug and alcohol treatment outweighs capacity to provide timely access to appropriate treatment and support;
- Referring individuals who test positive to treatment will increase demand on these services, resulting in less capacity to assist those individuals who are actively seeking treatment (independent of the trial). ⁷⁴

**Drug and alcohol services**

The Victorian Alcohol and Drug Association (VAADA) decried the image of ‘problematic substance use by the “drug user” who “chooses” to indulge their habit at the expense of the “hard working

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72. RANZCP, Submission to the Senate Community Affairs Legislation Committee, Inquiry into provisions of the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, [Submission no. 5], 26 September 2019, p. 1.
73. Ibid., p. 2.
taxpayer” which it considers underpins the amendments in the Bill. It cites a review of the effectiveness of compulsory drug treatment and notes the conclusion of the review that ‘there is a lack of evidence to show that compulsory drug treatment is effective’.

The Monash Addiction Research Centre expressed its concern that the ‘trial’ does not represent acceptable science stating:

- False positives occur when the test says that there are drugs in the system when there actually isn’t.
- False positives can occur in up to 5% of test, depending on the tests used. The tests used are not stated in the bill. The AS/NZS 4308 standard for testing of drugs of abuse in urine does not stipulate an acceptable level of false positives. This means there is no bar with which we can hold these tests against. Clinical drug test interpretation is ‘a complicated task requiring knowledge of recent prescription, over-the-counter and herbal drug administration, drug metabolism and analytical sensitivities and specificities’.
- The information on the types of tests to be used, who will be conducting and interpreting them, and their accuracy is insufficient.

Community services groups

UnitingCare Australia is concerned that the drug testing ‘trial’ is not proposed ‘merely in the absence of evidence that it is likely to succeed, but in the presence of evidence to the contrary: previous trials in New Zealand and the US indicate that the approach does not work’.

Anglicare Australia is ‘strongly opposed to this measure’.

The drug testing trial established under this Schedule is discriminatory. It will further demonise welfare recipients, and it is not supported by evidence that this measure would reduce drug use or help people find work. Mandatory drug rehabilitation has repeatedly been found to be one of the least effective ways for people to overcome a drug addiction and Anglicare Australia’s most recent Jobs Availability Snapshot found that in 2018 between four and five people were competing for each low-skill, entry level job.

Mission Australia recommended that the Bill ‘be rejected in its entirety’ and argued that drug dependence ‘should be treated as a health issue, rather than a social security compliance or justice issue’.

Local Government

The City of Logan’s position is that Logan should be suspended as a trial site. The City has asked the Commonwealth Government to address the shortfall in treatment and other services before
implementing any drug testing trial. If the Government decides to proceed with the trial, the City of Logan has suggested the following changes to the model:

- allowing for voluntary participation and support options
- bringing forward intervention and treatment support if the recipient fails the first drug test
- incorporating a holistic approach to help people overcome barriers to employment (including support around domestic and family violence, mental health issues and homelessness, financial management etc.)
- providing incentives for welfare recipients to complete treatment programs
- providing incentives to stay on treatment plan and cease problematic drug use.

Financial implications

The Explanatory Memorandum to the Bill states that its financial implications ‘are not for publication’. This is consistent with the Explanatory Memoranda for the 2017 Bill and the 2018 Bill.

The Assistant Minister to the Prime Minister and Cabinet has however noted:

The government has announced a dedicated treatment fund of up to $10 million to support jobseekers in the drug-testing trial across all three locations, after listening to feedback from the drug and alcohol treatment sector. The treatment fund will provide for additional treatment support in the trial locations where the existing state or Commonwealth services and supports are not sufficient to meet additional demand due to the trial.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (the Human Rights Committee) reported on the Bill on 5 December 2019.

The Committee noted that the Bill engages and limits a number of human rights, including the:

• right to privacy
• right to social security

82. City of Logan, Submission to the Senate Community Affairs Legislation Committee, Inquiry into provisions of the Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, [Submission no. 15], 24 September 2019, pp. 1–2.
83. Ibid., p. 3.
88. The Statement of Compatibility with Human Rights can be found at pages 25–33 of the Explanatory Memorandum to the Bill.
89. Parliamentary Joint Committee on Human Rights (PJCHR), Human rights scrutiny report, 6, 2019, 5 December 2019, pp. 54–63.
• right to an adequate standard of living and
• right to equality and non-discrimination.\(^{90}\)

As noted by the Human Rights Committee, it is permissible to limit these rights where a measure seeks to achieve a legitimate objective, is rationally connected to that objective and is proportionate to that objective.\(^{91}\)

The Committee accepted:

Pursuing the objectives of the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency, are likely to constitute legitimate objectives under international human rights law.\(^{92}\)

However, the Committee did not comment on the legitimacy of the objective of maintaining ‘the integrity of, and public confidence in, the social security system’.

The Committee went on to raise concerns about whether the measure had sufficient rational connection to the legitimate objectives and whether it was proportionate to these objectives.

A measure has a rational connection to an objective when there is good evidence that it is likely to achieve the objective. The Committee noted that the explanatory materials did not provide any evidence to demonstrate that the trial would be likely to achieve its stated objectives.\(^{93}\)

The Committee also commented—citing an American study—that ‘it is not clear that the single use of an illicit drug would constitute a barrier to employment or would necessarily lead to dependence’.\(^{94}\)

On the issue of proportionality the Committee questioned whether the measure is sufficiently circumscribed, noting:

It would appear that the trial would limit the privacy rights of a large group of people, in order to identify a very small number of people who had used illicit drugs or have a drug abuse problem.\(^{95}\)

The Committee asked for information on the evidence the Government used to select the three trial sites. It also questioned why the Government should automatically place a person on income management after a single positive test without assessing whether this was necessary or appropriate in the person’s circumstances.\(^{96}\)

Under the measures proposed in the Bill, a person who is referred to drug treatment can have their payments suspended if they do not attend. The Committee noted that ‘there are questions regarding whether withholding subsistence payments for failure to attend treatment takes into account evidence that addiction often involves cycles of relapse before recovery.’ While delegates of the Secretary have discretion over the use of compliance action, the Committee stated that ‘it is unclear how a delegate’s discretion will prevent those addicted to drugs from being unable to afford basic needs if their welfare payments are suspended’.\(^{97}\)

\(^{90}\) Ibid., p. 55.
\(^{91}\) Ibid., p. 57.
\(^{92}\) Ibid., p. 58.
\(^{93}\) Ibid., p. 58.
\(^{94}\) Ibid.
\(^{95}\) Ibid., p. 59.
\(^{96}\) Ibid., p. 60.
\(^{97}\) Ibid., p. 62.
The Committee asked for more information in order to fully assess the likely effectiveness and proportionality of the proposed measures. 98

At the time of writing, the Minister’s response had not been received by the Committee. 99

Key issues and provisions

Establishing the drug test trial

What is a drug test?

Item 1 of Part 1 of the Bill inserts a number of new definitions into subsection 23(1) of the Social Security Act. A drug test is formally defined as a test that has two characteristics:

- first, it is carried out directly or indirectly under a contract with the Commonwealth for the carrying out of the test and is in accordance with the drug test rules and
- second, it is a test for the presence of a testable drug in a sample taken in the drug test trial period from the person’s saliva, urine or hair.

For the purposes of that definition, a testable drug is:

- methamphetamine
- methylenedioxy-methamphetamine
- tetrahydrocannabinol
- heroin
- cocaine or
- another substance prescribed by the drug test rules for the purposes of this definition. 100

Stakeholder comments

The submission to the Community Affairs Committee by the Workplace Drug Testing Association (WDTA) provides some insight into the nature of testing. The submission states:

For Oral Fluid (saliva) or urine testing, the overall principles for detection of drugs of abuse in onsite devices are the same. Both detect closely related drugs within a drug family, which may include illicit and prescription drugs. Typically, the drug families are opiates, cocaine, amphetamine, methamphetamine, cannabis, benzodiazepines. The recent revision to the oral fluids Australian Standard now includes oxycodone. 101

And further:

Drug testing using hair is a reliable and convenient alternative to tests that rely on saliva or urine. It is particularly useful in detecting drug use in the longer term (typically several months prior to the test being performed) … It is regarded as less personally intrusive than urine testing and more difficult to manipulate than other approaches.

...
Unlike urine or saliva testing there is no current Australian Standard for detecting drugs of abuse in hair. However, a number of laboratories in Australia are NATA accredited to perform hair testing based on international guidelines and procedures such as those published by the (International) Society of Hair Testing which allows for the detection of:

- Amphetamines (speed, ice, crystal Meth)
- THC (Cannabis, marijuana)
- Opiates (Codeine, heroin, morphine)
- Cocaine
- Benzodiazepines (sleeping tablets, tranquilizers).  

The AMA expressed its concern about the possibility that there may be tests for other substances stating that it is:

... vitally important that participants in the trial have a clear understanding of what substances they are being tested for.

It is also worth noting that a program of testing for certain illicit substances may increase demand for other substances. One particularly concerning area is synthetic drugs. These drugs have largely been developed to avoid positive drug tests, but pose an equal if not higher risk if consumed. Monitoring demand for synthetics in trial sites should be undertaken over the two year period of the trial.

What are the drug test rules?

Item 3 in Part 1 of the Bill inserts proposed section 38FA into the Social Security Act. This item provides that the Minister may, by legislative instrument, make rules (the drug test rules) about:

- prescribing substances for the purposes of the definition of testable drug
- giving and taking samples of persons’ saliva, urine or hair for use in drug tests
- dealing with those samples
- carrying out drug tests
- giving results of drug tests in certificates or other documents and the evidentiary effect of those certificates or documents
- confidentiality and disclosure of results of drug tests
- requirements relating to contracts entered into for the carrying out of drug tests
- keeping and destroying records relating to the samples for use in drug tests or drug tests.

The Government’s intention regarding the content of the drug test rules (such as qualifications and procedures) is discussed at pages 8–9 of the Explanatory Memorandum.

Where and when does the trial occur?

For the purpose of the Bill, a person is a drug test trial pool member at a time if:

- that time is in the drug test trial period

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102. Ibid., pp. 6, 7.
103. AMA, Submission to the Senate Committee on Community Affairs, op. cit., p. 3.
• the person’s usual place of residence is in a drug test trial area
• the person is receiving NA or receiving YA (otherwise than on the basis that the person is a new apprentice or undertaking full-time study)—because the person made a claim in the drug test trial period and
• if the claim was for YA—the claim was not based on the person being a new apprentice or undertaking full-time study.\textsuperscript{104}

The drug test trial period is 24 months commencing on the day of commencement of Part 1 of Schedule 1 to the Bill.\textsuperscript{105}

There are three drug test trial areas:

• the part of New South Wales that was the area named Canterbury-Bankstown for the purposes of the \textit{Local Government Act 1993} (NSW), as at the start of 1 January 2018
• the part of Queensland that was the local government area named Logan for the purposes of the \textit{Local Government Act 2009} (Qld), as at the start of 1 January 2018
• the part of Western Australia that was the district named Mandurah for the purposes of the \textit{Local Government Act 1995} (WA), as at the start of 1 January 2018.\textsuperscript{106}

\textbf{Grant of claims lodged by pool members}

Subsection 37(1) of the \textit{Administration Act} states that the Secretary must determine that a claim for a social security payment is to be granted if the Secretary is satisfied:

• the claimant is qualified for the social security payment and
• the social security payment is payable.

The section also sets out other requirements to be satisfied before a claim is granted.

\textbf{Requirement to be tested}

Currently section 63 of the \textit{Administration Act} contains two subsections which work slightly differently from each other. However, understanding how they operate is important to identify what provisions will be relied on to require a person to give a sample and for a drug test to be carried out on that sample.

\textbf{First}, subsection 63(2) of the \textit{Administration Act} empowers the Secretary to notify a person that he or she is required, within a specified time, to:

• attend an office of the Department
• contact the Department
• attend a particular place for a particular purpose or
• give information to the Secretary.

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• contact the Department
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• give information to the Secretary.

\begin{itemize}
  \item \textsuperscript{104} \textit{Social Security Act}, subsection 23\textsuperscript{(1)}, amended by \textbf{item 1} of Part 1 of the Bill.
  \item \textsuperscript{105} \textit{Social Security Act}, subsection 23\textsuperscript{(1)}, amended by \textbf{item 1} of Part 1 of the Bill. As set out above, this will be the first 1 January, 1 April, 1 July or 1 October occurring at least two months after the Bill receives Royal Assent.
  \item \textsuperscript{106} \textit{Social Security Act}, subsection 23\textsuperscript{(1)}, amended by \textbf{item 1} of Part 1 of the Bill.
\end{itemize}
However, the Secretary must not issue a notice under subsection 63(2) requiring a person to do an act or thing that is referred to in subsection 63(4).

**Second,** subsection 63(4) of the *Administration Act* empowers the Secretary to notify a person that he, or she, is required to:

(a) complete a questionnaire or

(b) undergo a medical, psychiatric or psychological examination (whether or not at a particular place), and provide to the Secretary the report, in the approved form, of the person who conducts the examination.

**Item 19** of Part 1 of the Bill inserts **proposed paragraph 63(4)(c)** to allow the Secretary to require a drug test trial pool member to give a sample of a particular kind at a particular place for a drug test to be carried out on that sample.

The Secretary’s power is limited so that only 5,000 persons may be required to give samples.\(^{107}\) Importantly though, there is no limit to the number of times that the Secretary may require a single person to be tested.\(^{108}\)

According to the Explanatory Memorandum to the Bill:

> Recipients selected will be notified to attend an appointment at their local Centrelink office consistent with the standard Services Australia (the Department of Human Services) appointment requirements.

> At the appointment, recipients will be notified they are required to undertake a random drug test **immediately**. Drug testing of selected Newstart Allowance and Youth Allowance (other) recipients will be administered by third party drug testing providers contracted for that purpose, either in a private space at the Centrelink office or on the provider’s premises nearby.\(^{109}\) [emphasis added]

It appears then, that a person might receive a notice to attend an office of the Department (under subsection 63(2)) and be given a pre-prepared notice to provide a drug testing sample there and then (under subsection 63(4)). As per **item 12** discussed above, the person would have already acknowledged that they may be subject to drug tests.

**Change to mutual obligation requirement**

**Current law**

Division 3AA in Part 3 of the *Administration Act* allows the Secretary to take action to ensure that, amongst other things, people in receipt of NA or YA meet their obligations.

Currently, under Division 3AA a person in receipt of NA or YA commits a **mutual obligation failure:**

- for failing to comply with a requirement of which they were notified under subsection 63(2) and 63(4)\(^{110}\)
- for failing to attend, or be punctual for, an appointment that the person is required to attend under subsection 63(2)\(^{111}\) or

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\(^{107}\) *Administration Act*, proposed paragraph 63(4A) inserted by **item 20** in Part 1 of the Bill.

\(^{108}\) *Administration Act*, see Note under proposed paragraph 63(4A) inserted by **item 20** in Part 1 of the Bill.


\(^{110}\) *Administration Act*, paragraph 42AC(1)(a).

\(^{111}\) *Administration Act*, paragraph 42AC(1)(c).
• for acting in an inappropriate manner during an appointment that the person is required to attend under subsection 63(2).  

The general rule is that in such a case, the Secretary must make a determination that NA or YA is not payable to the person, if payment of NA or YA is not payable to a person for a period, the person may then receive back pay once he or she has complied with the relevant requirement (called a reconnection requirement). The payment must be cancelled if the person fails to comply with the reconnection requirement within four weeks.  

What the Bill does  

Items 13–16 in Part 1 of the Bill amend the operation of Division 3AA of Part 3. 

Proposed paragraph 42AC(1a) operates so that a person who fails to comply with a requirement set out in a notice under subsection 63(2) or 63(4) of the Administration Act will not have committed a mutual obligation failure if: 

• the requirement notified under subsection 63(2) was such that it is reasonable to expect that, if the person complied with the requirement, the person would be required to do an act described in paragraph 63(4)(c)—that is, give a sample for a drug test to be carried out or  

• the requirement was to give a sample for a drug test to be carried out under paragraph 63(4)(c). 

The effect of this amendment is to remove the drug testing regime from Division 3AA. 

Relevant to later amendments in the Bill, in the absence of a mutual obligation failure, it is not possible for the Secretary to apply the usual rule in section 42AF to determine that the person’s payments are not payable for a period. 

Failure to attend  

Existing subsection 64(1) of the Administration Act applies to a person who is receiving, or has made a claim for, a social security payment. It sets out the effect of failing to comply with a requirement about which the person has been notified under subsection 63(2) or 63(4). In that case, existing subsection 64(1) operates so that the payment that the person is receiving, or has claimed, is not payable if the requirement in the notice is reasonable and the person does not comply with the requirement. 

In particular, paragraph 64(1)(e) of the Administration Act has the effect that the Secretary is able to decide that a person’s participation payment (which includes NA and YA) is not payable for a failure to comply with a requirement imposed under a section 63 notice without first having to consider whether the person had a reasonable excuse for that failure. 

Item 21 of Part 1 of the Bill inserts proposed subsection 64(1AA) into the Administration Act to make clear that the requirement to give a sample for drug testing is not in and of itself unreasonable. That being the case, subsection 80(1) of the Administration Act provides that the payment may be cancelled or suspended.

112. Administration Act, paragraph 42AC(1)(g).  
113. Administration Act, subsection 42AF(1).  
114. Administration Act, section 42AL.  
115. Administration Act, section 42AM.  
If the person takes a subsequent drug test

Proposed subsections 110A(2) and (3) of the Administration Act apply to set the date from which suspended payments will be resumed if the person then complies with subsequent notices to do the relevant act or thing.117

According to the Explanatory Memorandum to the Bill:

The intention is that a person’s Newstart Allowance or Youth Allowance will not be backdated to the date of suspension but will only be payable from the date the person attended an appointment in accordance with the later notice, unless the Secretary is satisfied that the person had a reasonable excuse (for example, was required to attend a job interview at short notice) for not attending the appointment in accordance with the earlier notice and can provide evidence of this.118 [emphasis added]

Refusal to undertake a drug test

According to the Explanatory Memorandum a person ‘who refuses to take the test (whether first of subsequent tests) will have their payment cancelled…unless the person has a reasonable excuse. Suspension will not be an option’.119

In that case, if the person lodges a new claim, proposed sections 549EA and 549EB of the Social Security Act (item 6 of Part 1 of the Bill) provide that the person serves a drug test refusal waiting period of 28 days before YA is payable.120 Proposed sections 623C and 623C of the Social Security Act provide for a drug test refusal waiting period in equivalent terms in respect of NA.121

Positive drug test disputed

A positive drug test for a person means an indication by a drug test that a testable drug was present in a sample of the person’s saliva, urine or hair given by the person in compliance with a requirement notified to the person under paragraph 63(4)(c) of the Administration Act.122

A recipient who disputes the result of a drug test can request to have the sample retested—although the mechanics of requesting a second drug test are unclear. The Human Rights Committee sought an explanation about this issue from the Minister in relation to the 2017 Bill. The Minister advised that ‘it is intended that the sample taken by the drug testing provider will be split into two samples, and that if a job seeker requests a re-test, this will be done using the second sample’.123

Paying the cost of a re-test

However, if that test also has a positive result, the person will be required to pay the cost of the second test. Item 11 of Part 1 of the Bill inserts proposed Part 3.16C—Drug test repayment deductions into the Social Security Act setting out the manner of calculating the drug test repayment amount and the method for its recovery. Under proposed subsections 1206XA(6) and 1206XA(7) in new Part 3.16C, the Secretary may make a legislative instrument about the drug test repayment amount. In doing so, the Secretary must have regard to the lowest cost to the

117. Inserted by item 24 of Part 1 of the Bill.
120. Inserted by item 6 of Part 1 of the Bill.
121. Inserted by item 8 of Part 1 of the Bill.
122. Social Security Act, subsection 23(1), amended by item 1 of Part 1 of the Bill.
Commonwealth of any drug test that could be carried out at the time the legislative instrument is to commence.

The Explanatory Memorandum to the Bill provides the following example of how the repayment by deductions will work:

An amount of $80 has been used for the purposes of this example. Repayment will commence from the person’s next social security payment once Services Australia becomes aware of a drug test repayment requirement for a person. If the repayment rate is set by the Secretary at 5 per cent, and the person’s rate of Newstart Allowance is calculated to be $555.70 (that is, the maximum basic rate per fortnight for a single recipient with no children) this person will have an amount of $27.80 deducted from their payment rate and credited to their drug test repayment balance. This will reduce their outstanding balance to $52.20. If they subsequently return a further positive drug test and request a re-test that is again positive, the amount to be repaid for that re-test will be added to their balance.124

The payment of a drug test repayment of $80 as set out in the example looks somewhat benign. However, it is not known what the drug test repayment will be until the Secretary makes the relevant legislative instrument. Estimates of cost vary. For instance, the Australian Council of Social Service has been reported as saying it is ‘likely to cost between $500–$900 per person per test’.125 By comparison, the WDTA states that ‘typical costs for all equipment, testing and chain of custody transport are in the range of around $100–$150 per individual tested, depending on the choice of program and testing method’.126

**Positive drug test—income management**

Part 3B of the *Administration Act* sets out the income management regime. Broadly speaking it applies to recipients of certain welfare payments for specified reasons. **Item 25** inserts **proposed paragraph 123TA(gb)** into the *Administration Act* so that one of the specified reasons is that there is a positive drug test for the person and the tester tells the Secretary that the person should be subject to the income management regime.

A person who is subject to the income management regime has an income management account. Amounts are deducted from the person’s welfare payments and credited to the person’s income management account. Amounts are debited from the person’s income management account for the purposes of enabling the Secretary to take action directed towards meeting the priority needs of:

- the person
- the person’s children (if any)
- the person’s partner (if any) and
- any other dependants of the person.127

**Item 28** of Part 1 of the Bill inserts **proposed subsection 123UFAA(1A)** into the *Administration Act*. The amendment operates so that a person who has had a positive drug test will be subject to the income management regime for a period of the 24 months, or a longer period as determined by the Secretary. Under **proposed paragraph 123UFAA(1A)(c)**, it is the role of the contractor who

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126. WDTA, [Submission](#) to the Senate Community Affairs Legislation Committee, op. cit., p. 3.
127. See simplified outline of the income management regime: *Administration Act*, section 123TA.
carried out the drug test to provide the Secretary with a written notice saying that the person should be subject to income management. As discussed above in this Digest, this was a point of concern for the Scrutiny of Bills Committee.

However, proposed subsection 123UFAA(1C) requires the Secretary to determine that a person is not subject to the income management regime if being subject to the regime poses a serious risk to the person’s mental, physical or emotional wellbeing.

How income management works

According to DSS:

Under Income Management, Services Australia makes Income Management payments to businesses through a number of mechanisms. Merchants can be approved for BasicsCard which allows them to accept payment through their standard EFTPOS facilities ... If a merchant cannot accept the BasicsCard, DHS can make a payment to them in a number of other ways. Income Management Third Party Organisations are businesses that generally do not have EFTPOS to support BasicsCard activation. They include service providers receiving fortnightly payments without the customer needing to attend the business, as is the case for BasicsCard. Income Management Third Party Organisations also include a large number of private landlords that cannot be paid by BasicsCard. Using the Services Australia system, a payment can be made to a contracted or un-contracted third party’s nominated bank account without the need for manual processing.128

Second positive drug test

In order to qualify for YA a person must, amongst other things, enter into an Employment Pathway Plan (EPP).129 In addition, while an EPP is in force, the person must comply with its requirements.130 Equivalent requirements apply in relation to NA.131

Currently, section 544B of the Social Security Act sets out the terms of a YA Employment Pathway Plan. Item 4 of Part 1 of the Bill inserts proposed subsection 544B(1AA) into the Social Security Act so that one of the requirements of a YA Employment Pathway Plan must relate to undertaking treatment of the person for use of drugs if:

• the person is a drug test trial pool member
• the person has two (or more) positive drug tests
• the person has undergone a medical, psychiatric or psychological examination in compliance with a notice given to him, or her, under subsection 63(4) of the Administration Act after the person has had two (or more) positive drug tests and
• the report of the examination given to the Secretary recommends that the person undertake treatment for the use of drugs.

Item 7 of Part 1 of the Bill inserts proposed subsection 606(1AA) into the Social Security Act in equivalent terms. It operates to add the same requirements to a NA Employment Pathway Plan.

This relates to the Government’s Treatment Plan commitment discussed above in this Digest.

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129. Social Security Act, Part 2.11, section 544A.
130. Social Security Act, paragraph 544(1)(b).
131. Social Security Act, Part 2.12, subsections 605(1) and 606(1).
Concluding comments

It is unclear how the Government plans to proceed if the trial goes ahead and is favourably evaluated.

The trial relies on the income management system rather than the cashless debit card. According to the report of the Forrest Review—Creating Parity—income management is ‘unsustainable and unsuitable for broader application.’ Income management imposes a larger workload on Centrelink and Services Australia than the cashless debit card. Services Australia has to do a considerable amount of work to establish income management in a new location.

The Government is planning to replace income management with the cashless debit card in the Northern Territory and Cape York. This leaves a relatively small number of income management sites around Australia. To expand the drug testing model outlined in this Bill to new locations, the Government would also need to expand the number of income management sites. However, apart from the measure in this Bill, the Government appears to be moving in the opposite direction.

Some commentators have questioned whether the trial is focused on political rather than policy objectives and whether these can be accomplished by proposing a trial rather than implementing a broader roll-out. For example, Sky News commentator Peta Credlin has described the measure as ‘a shopping list out of the focus groups’ and Philip Coorey of the Australian Financial Review has critiqued recent statements by the Prime Minister to suggest that the Government is using the Bill to position the Opposition on the wrong side of popular policy.

132. A Forrest, The Forrest review: creating parity, Department of the Prime Minister and Cabinet, Canberra, 2014, p. 27.
134. Ibid.