

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]

Portfolio: Employment

Authorising legislation: Fair Work (Building Industry) Act 2012

Last day to disallow: 3 December 2015 (Senate)

Purpose

2.20 The Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the instrument) amends the Building Code 2013 (the code). The amendments require building contractors or building industry participants to show the ways in which they are managing drug and alcohol issues in the workplace in their work health safety and rehabilitation (WHS&R) management systems. For certain types of building work, to which the Commonwealth is making a significant contribution, building contractors and industry participants must also include a fitness for work policy to manage alcohol and other drugs in the workplace in their management plan for WHS&R.

2.21 Measures raising human rights concerns or issues are set out below.

Background

2.22 The committee first reported on the instrument in its *Thirtieth Report of the 44th Parliament* (first report) and requested further information from the Minister for Employment as to whether the instrument was compatible with the right to privacy.¹

2.23 The committee considered the minister's response in its *Thirty-fourth Report of the 44th Parliament* (previous report) and sought further information from the minister in order to conclude its examination of the instrument.²

Alcohol and drug testing of construction workers

2.24 Schedule 3 of the instrument sets out requirements relating to drug and alcohol testing that a fitness for work policy must address.

2.25 The committee considered in its previous analysis that establishing a policy framework for testing workers for drugs and alcohol engages and limits the right to privacy.

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 61-63.

2 Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 5-8.

Right to privacy

2.26 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including:

- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and
- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measure with the right to privacy

2.27 The statement of compatibility acknowledges that drug and alcohol testing implemented under the instrument engages the right to privacy.

2.28 The committee has previously considered that the objective, which is to ensure that building and construction workplaces are drug and alcohol-free, is important. The committee also considered that the objective is legitimate for the purposes of international human rights law, and that the measures are rationally connected to the objective.

2.29 However, the committee queried whether the instrument imposes a proportionate limitation on the right to privacy. On the face of the instrument, there is no requirement that the drug and alcohol policy have appropriate and necessary safeguards, or indeed any safeguards, to protect the privacy of individuals who are subject to testing.

2.30 The minister's first response did not explain the safeguards that would apply to drug and alcohol testing so as to ensure that the limitation on the right to privacy is a reasonable and proportionate measure to achieve the stated objective.

2.31 The minister stated that the measures do not prescribe the contents of a fitness for work policy, which would be decided at a workplace level subject to existing safety, privacy and industrial laws.

2.32 The committee considered that more information was required to establish that there were sufficient safeguards around drug and alcohol testing. The committee therefore requested further advice from the Minister for Employment as to the proportionality of the requirement that construction workers undergo drug and alcohol testing, in particular, whether there are sufficient safeguards in place to protect the right to privacy.

Minister's response

This letter is in response to your letter of 23 February 2016 concerning the *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015*.

The Parliamentary Joint Committee on Human Rights (the Committee) sought my further advice about the human rights compatibility of this instrument. I consider the measures are proportional and it is in the public interest to take steps to ensure that construction workers are not affected by drugs or alcohol in the workplace.

Should the Committee require further information, please contact my office.³

Committee response

2.33 The committee thanks the Minister for Employment for her response.

2.34 The committee notes that the minister's response merely states that the measures are 'proportional' and in the public interest. The minister's response provides no evidence or reasoning to support this view.

2.35 The committee's usual expectation where a measure may limit a human right is that there is a reasoned and evidence-based explanation of how that limitation is justified. Such a justification must demonstrate that the measure is proportionate. This conforms with the committee's Guidance Note 1,⁴ and the Attorney-General's Department's guidance on the preparation of statements of compatibility and advice on justifying limitations.⁵

2.36 Alcohol and drug testing is common in law enforcement agencies and the committee has previously considered that such schemes are compatible with the right to privacy on the basis that these testing regimes include rigorous safeguards. For example, the Australian Border Force (Alcohol and Drug Tests) Rule 2015, which sets out the rules for alcohol and drug testing of officers of the Australian Border Force, includes a suite of safeguards including that:

- (a) the alcohol or drug test must be conducted in a respectful manner and in circumstances affording reasonable privacy;

3 See Appendix 1, letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (received 13 April 2016) 2.

4 Appendix 2; see Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

5 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

- (b) the test must not be conducted in the presence or view of a person whose presence is not necessary and must not involve the removal of more clothing than is necessary for the conduct of the test;
- (c) if a hair sample is required, that it collected in the least painful manner and not from the genitals or buttocks;
- (d) a body sample collected for an alcohol or drug test must be kept in a secure location and destroyed after a prescribed period; and
- (e) that information revealed by the drug and alcohol test be shared only with individuals authorised by the legislative instrument.⁶

2.37 In this instance, the legislative instrument establishes a requirement that a fitness for work policy includes frequent and periodic drug and alcohol testing without providing for any safeguards as to how the information obtained from such testing is to be kept, used or shared.

2.38 **In the absence of any further advice or reasoning from the Minister for Employment as to any safeguards which are in place, even recognising the important objective of ensuring construction workplaces are drug and alcohol-free, the committee can only conclude that the instrument provides insufficient safeguards to ensure that the requirement that construction workers undergo drug and alcohol testing is a proportionate limitation on the right to privacy.**

6 Australian Border Force (Alcohol and Drug Tests) Rule 2015 (F2015L00973), sections 9-12.