



Rachel Stephen-Smith MLA

Minister for Health

Minister for Families and Community Services

Minister for Aboriginal and Torres Strait Islander Affairs

Member for Kurrajong

Mr Jeremy Hanson CSC MLA

Chair

Standing Committee on Justice and Community Safety Committee (Legislative Scrutiny)

ACT Legislative Assembly

London Circuit

CANBERRA ACT 2600

Our ref: M-21/1390

Dear Mr Hanson

I refer to Scrutiny Report No 6 of the Standing Committee on Justice and Community Safety regarding the Disallowable Instrument (DI2021-69) Children and Young People (Drug Testing) Standards 2021 (No 1) (the Standards) made under section 887 of the *Children and Young People Act 2008* (the Act). I thank the Committee for its observations in relation to potential implications on human rights.

The Standards provide instruction for Child and Youth Protection Services (CYPS) staff when making drug testing arrangements for a person named on a Care and Protection Order, such as a primary caregiver. The Committee raised that the Standards may restrict or limit the rights of individuals protected by the *Human Rights Act 2004*. It also advised that in recent years, it has become common for explanatory statements that support subordinate legislation to outline human rights implications. The Committee raised the explanatory statement which accompanies the Standards did not clearly outline any potential impact to human rights.

The Government acknowledges that in the course of providing child protection services and support for vulnerable families, practice must be compatible with the *Human Rights Act 2004* and any limitation to human rights must occur in the least restrictive way possible. These rights need to be balanced with the right of children to special protection because of their vulnerability to exploitation and abuse, including the right to be safe (United Nations Convention on the Rights of the Child).

The Act, and CYPS staff guidance, outline processes that contribute to upholding human rights and natural justice obligations, such as ensuring transparent information sharing, client access to advocacy and support, informed decision making and decision review options. In addition, CYPS must consider the views of the children and young people, along with their right to be protected from abuse and neglect. Ultimately, CYPS is guided by section 8 of the Act, that the best interests of a child or young person must be the paramount consideration of all decision making.

ACT Legislative Assembly London Circuit, GPO Box 1020, Canberra ACT 2601

 +61 2 6205 2661

 stephen-smith@act.gov.au

 [@RachelSS_MLA](https://twitter.com/RachelSS_MLA)

 [rachelSSMLA](https://facebook.com/rachelSSMLA)

 [rachelss_mla](https://instagram.com/rachelss_mla)

The Government recognises the potential for the Standards to impact on the human rights of primary caregivers directed to undertake drug testing. However, the limitations to human rights are considered proportionate given that:

- the objective of a drug use provision, and the Standards that support the operationalisation of the provision, is to understand potential substance use of a caregiver and comprehensively assess the risk environment applicable to a child or young person
- CYPS will only arrange drug testing when a risk assessment has found this is required to inform decision making about a child or young person's care and protection and their safety within their family unit
- the Standards, and CYPS staff guidance, outline that a caregiver will be requested to undertake drug testing on a voluntary basis as a first measure
- the Childrens Court will determine if it is necessary to include a drug use provision within a Care and Protection Order
- information gathered from drug testing may be used:
 - as evidence in court proceedings, including demonstrating that a caregiver has addressed substance misuse
 - to support the right of protection of the family and children, such as in support for family preservation, restoration of children in care or increased levels of contact.

The Standards seek, wherever possible, to operate in a fair and transparent manner, including requirements to:

- request a caregiver's voluntary engagement with drug testing
- clearly communicate drug testing arrangements in writing
- inform the caregiver undertaking drug testing of positive results in writing
- support compliance with drug testing arrangements by developing engagement strategies in consultation with the caregiver
- allow a caregiver undertaking drug testing to request a retest if a result is disputed.

I note the Committee's reference to Minister Cheyne's response to Scrutiny Report 3, in which the Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2021 (No 1) (DI2021-4) was reviewed. Minister Cheyne outlined a commitment to ensure all future explanatory statements for legislative instruments related to her responsibilities will clearly address human rights implications.

I can confirm that the Community Services Directorate will ensure all future explanatory statements for instruments under the *Children and Young People Act 2008* clearly explore human rights limitations and the application of proportionality.

Thank you for the opportunity to respond to the findings of the Committee, and for ensuring implications for human rights are given proper consideration.

Yours sincerely

Rachel Stephen-Smith MLA