

The Privacy Implications

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An American worker who was subjected to drug testing by way of urine sample said this:

I was not informed of the test until I was walking down the hall towards the bathroom with the attendant. I thought no problem. I have had urine tests before and I do not take any type of drugs besides occasional aspirin. I was led into a very small room with a toilet, sink and a desk. I was given a container in which to urinate by the attendant. I waited for her to turn her back before pulling down my pants, but she told me she had to watch everything I did. I pulled down my pants, put the container in place—as she bent down to watch—gave her a sample and even then she did not look away. I had to use the toilet paper as she watched and then pulled up my pants. This may sound vulgar—and that is exactly what it is.... I am a forty year old mother of three and nothing I have ever done in my life equals or deserves the humiliation, degradation and mortification I felt.

Drug testing in any context, whether it be for law enforcement, competitive sport, medical or employment purposes, raises significant privacy issues. The issues are numerous and arise throughout the process from the very earliest decision to test an individual or a class of individuals through to the handling of the results.

Drug testing regimes involve requiring individuals to provide bodily substances to agencies so that those agencies can extract information about them. Except in the medical context, there is inevitably going to be an unequal power balance between the agency implementing a drug testing regime and the individual the agency seeks to drug test. In the employment and sports sphere the power balance will generally be so unequal that the test can, for all intents and purposes, be described as mandatory because of the negative consequences that may flow from a refusal to submit to testing. Unless there are no negative consequences flowing from a refusal to test, then it is a nonsense to talk about a "voluntary drug testing regime" or a "regime involving the consent of the participants". Rather, what we are talking about will be a regime involving the violation of the physical autonomy and privacy of individuals.

Society will, every now and again, be called upon to decide between competing public interests. This may require society to accept that certain rights, or the rights of a certain group of people must be compromised to meet a greater or more pressing social need or interest. The New Zealand Drug Testing Agency Act is an example of an attempt to resolve competing public interests. Privacy rights of individuals might well be better served if there were no drug testing regime in sport. However, there are other public interests in addition to expectations of individual privacy. There are demands for fairness in sport. There are needs to comply with international agreements to ensure our athletes can compete internationally. There are concerns about the harmful effects of drugs on athletes.

In my submission to the select committee looking at the New Zealand Sports Drug Testing Bill I noted my belief that it was for the promoters of the Bill to establish their case and show why the new law was needed. It was for the Committee to balance the need for the law against any losses of rights. Restrictions on rights, including the right to privacy should be reduced only to the extent necessary to meet established need. Athletes should not be forced to abandon their fundamental rights at the locker room door, no matter how many sportspeople may be willing to do that to compete in their sport.

It was my view that the New Zealand Sports Drug Testing legislation contained no real limits on which competitors may be drug tested. Hundreds and thousands of ordinary New Zealanders involved in recreational, club and other low levels of competition could be required to provide a sample to the agency.

I am aware of the practicalities and I am aware of the New Zealand tendency for pragmatism and to say, "we know there are good jokers in charge of this. They are not interested in taking people's rights away, they are not interested in doing any more than fighting an evil". But when I consider these matters I have to look at it the legislation itself, not consider how good the people are who are going to be involved in administering it in its early years. Both in the preliminary discussions that we had with the Interim Agency, in which I hope we tried to be helpful, and in the submissions we made on the Bill, a lot of the points that were raised by me and Blair Stewart from my office, were taken aboard and I believe that the Bill was improved as a result. However, there was a feature introduced into the Bill that really caused me concern. The sample was defined to include any human biological tissue or fluid so providing the agency with the ability to require and test blood and tissue sample. Now in fact provisions of the Bill, also as it was altered provided that the blood sampling was only to take place in accordance with regulations. But it gave the executive the power to introduce by regulation an enormous extension of the Bill about which no submissions were made except possibly my own.

When the Bill was reported back there was no committee stage or debate. As was mentioned earlier it might have been a jolly good last sprint for the sports drug testing agency but I do not think it was good for the law that we reached a situation where the Bill was rushed through the House, if not in 24 hours in something very close to that. It was reported back as being a non-controversial measure and it was not even possible to read a copy of the amended Bill before it was passed. I simply did not know exactly what had been put in the Bill. So I was concerned about that part of the process and the failure to introduce limits on coverage.

I do not accept the arguments that because it is difficult to draw the boundary or because it is difficult to establish a system where the agency would work under certain criteria in applying its powers to non-elite competitors that we should not make an attempt. If we were to adopt that attitude generally then very few rights would be established because of the difficulty of drawing the boundary lines.

It should be made clear that I did not oppose the Bill; I did not oppose the concept of there being sports drug testing. I asked that the case be put for the legislation.

Drug testing involves the collection, storage and use of personal information. And of

course that is what the Privacy Act is about. One has to look at the totality of the reality of consent in these situations when there is an unequal power as in the employment situation. It is also necessary to have a look at the means by which information is collected. If you are wanting to collect information about past drug use you really have got to have a look at principle 4 of the information privacy principles which says first of all, it shall not be collected by unlawful means, which raises the Bill of Rights Act, and secondly, by means that are in the circumstances of the case unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned.

I think it is important when looking at the application of the Privacy Act to remember a little bit about what this testing is about. And there have been two good reports on drug testing and privacy: one by the Privacy Commissioner of Canada and one by the Privacy Committee of New South Wales. You would not be surprised that I tend to agree with the conclusions drawn in those reports.

But it is well just to remember exactly what you are learning when you are drug testing by urinalysis. At best it shows that the person who tests positive may have been impaired at some past time. A test cannot confirm that the person has been impaired. Nor can it confirm that a person was impaired when the test was taken. It cannot determine precisely when the drug was used. Nor can it identify the quantity of the drug ingested. So to summarize, urinalysis can detect past use, it cannot confirm present impairment, it cannot confirm past impairment, it cannot confirm present use and it cannot determine the quantity of the drug consumed. So the limited information provided is of little use in many situations where employers and others are anxious to test. At best testing may deter drug use but this effect has not been conclusively shown. In fact there is some suggestion of substitution of drugs. I think the New Zealand Navy found staff tended to move back to alcohol again.

A positive result means that the test has detected a drug or a metabolite of the drug being tested for and there can be a number of explanations. I am not going to go into those in detail now.

Those who are marketing these services tend to move pretty quickly from talking about drug use to drug abuse and it is an easy slip to make in the workplace situation to assume that because the person uses a drug that they abuse it. If that assumption were applied to alcohol use for employing staff it would be pretty hard to actually get a workforce together.

Yet that step of testing for alcohol in the workplace is obviously the first place to start. Not with the expensive processes presented by laboratories and the makers of chemicals as part of the drug abuse testing industry.

I think if you look at the situation regarding the use of alcohol in New Zealand it is the dominant problem. It can be dealt with by a breathalyser which produces a result with some link to the actual impairment of the individual concerned. So if employers are really being objective and impartial about what they are trying to achieve by testing, they will be looking at the alcohol situation to see how they can deal with that first.

It is interesting to see that when it comes to the recommendations that have been brought out in these reports. There is an acceptance that workplace drug testing should only take place when a person's impairment would impose a substantial and demonstrable safety risk to that person or to other people and that there is reasonable cause to believe that the person to be tested may be impaired by drugs. The form of drug testing to be used must be capable of identifying the presence of a drug at concentrations which may be capable of causing impairment. That was the first New South Wales recommendation. And the second one was that it should be prohibited other than when a person's impairment by drugs would impose a substantial and demonstrable safety risk to that person or to other people, there is reasonable cause to believe that the person to be tested may be impaired by drugs and that the form of drug testing to be used is capable of identifying the presence of a drug at concentrations which may be capable of causing impairment. The third one was that if it is permitted it should be subject to proper procedural standards in legislation.

In Canada the armed forces have had a policy of drug testing both for cause and at random. The Privacy Commissioner of Canada was informed in February this year that the Canadian Armed Forces had directed that the implementation of the random testing segment of the programme be indefinitely postponed.

I suggest to you that getting aboard the North American popular bandwagon and introducing extensive workplace drug testing may be just an expensive and costly effort by employers to achieve something that could really be achieved by other means and certainly the attempt should be made to do that first.