



Report

Date: 16 June 2021

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development and Employment

Welfare Overhaul: Pre-employment drug test obligation and sanctions

Purpose of the report

1 s9(2)(f)(iv) OIA

Executive summary

- 2 The pre-employment drug test policy was introduced in 2013, and places an obligation on clients receiving a main benefit to take and pass a drug test if a suitable job which requires one has been identified. Multiple reasons were cited for the introduction of the policy, including improving employment outcomes by preventing the use of illicit drugs from being a barrier to employment, providing appropriate support for clients with drug-related addictions, and sending a signal that drug use is not a suitable reason to refuse employment.
- 3 Approximately 40 percent of vacancies advertised through Work and Income require pre-employment drug tests, primarily for health and safety reasons. People referred to these jobs or employment-related training courses must take and pass a drug test, and may be sanctioned otherwise.
- 4 People who fail to meet their pre-employment drug test obligations without good and sufficient reason (such as a diagnosed substance use disorder or waiting to receive medical treatment) are subject to a graduated sanctions regime. After successive refusals or positive results over a 12-month period, a client may have their benefit reduced, suspended, and eventually cancelled.
- 5 Limits on the scope of these sanctions apply to clients with dependent children (who can receive a maximum 50 percent reduction in their benefit) and clients who have good and sufficient reasons for not taking or passing a drug test, who can have their drug test referral delayed for 30 days. This delay can in turn be extended for up to six months.
- 6 Following your agreement to a review of obligations and sanctions, we have undertaken a review of the pre-employment drug test obligation and related sanctions over the last 6 months as part of this work. s9(2)(f)(iv) OIA
- 7 Our review of the pre-employment drug test policy considered a range of criteria, which included:

- ensuring people with drug-related addictions get the support they need
- ensuring we support clients into employment in a way that treats people with dignity
- ensuring the approach is fiscally feasible (taking into account budget constraints due to the Government's ongoing response to COVID-19)
- reducing unnecessary compliance-based activities for our clients, and unnecessary administrative activity for staff
- building trust between and enhancing the mana of our frontline staff and clients, with an overall focus on work readiness and suitability
- aligning any proposal with our overall commitment to Te Tiriti o Waitangi.

8 s9(2)(f)(iv) OIA

9 The review also found that barriers for people to work can be much broader than drug use, and are often compounded. Other factors can include, but are not limited to, poor physical or mental health, other psychological factors (such as psychological distress, low self-esteem and lack of confidence), transportation (such as inaccessible public transportation, lack of car ownership or absence of a driver's licence), family commitments (such as caring for ill or elderly family members and cultural responsibilities), domestic violence and abuse, and geographical location. This raises broader questions around work readiness and supporting people to find suitable and sustainable employment.

10 Since 2015, there have been between 35,000 and 47,000 annual referrals for pre-employment drug testing, of which between 0.1 and 0.3 percent of clients are sanctioned in any given year. Of those who are sanctioned, the majority are male, of Māori ethnicity, aged 20 to 29, and living in the Auckland region. This raises further concerns about the disparity in the treatment of Māori and non-Māori in the welfare system.

11 s9(2)(f)(iv) OIA

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14 In addition, improvements to how we can support people to find suitable employment are partly addressed through the wider review of work obligations and sanctions workstream. As part of this overall process, there would be questions regarding how MSD can support clients into employment in a way that treats people with dignity and fosters open and meaningful conversations between staff and clients.

15 s9(2)(f)(iv) OIA

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s9(2)(f)(iv) OIA

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Recommended actions

It is recommended that you:

- 1 **note** the Welfare Expert Advisory Group recommended the removal of some obligations and sanctions, including pre-employment drug testing with a stronger focus on providing specialised support for people with substance use disorders
- 2 **note** Cabinet agreed to a welfare overhaul work programme in response to the Welfare Expert Advisory Group’s recommendation and you signalled your intent to review pre-employment drug testing sanctions with referral to support services

s9(2)(f)(iv) OIA

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- 5 **note** the review of work obligations and sanctions will focus on how the Ministry of Social Development can support clients into employment in a way that treats people with dignity and fosters open and meaningful conversations

s9(2)(f)(iv) OIA

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Bede Hogan
 Policy Manager
 Welfare System and Income Support Policy

Date

Hon Carmel Sepuloni
 Minister for Social Development and Employment

Date

Background

The Government is committed to overhauling the welfare system

- 18 In February 2019, the Welfare Expert Advisory Group (WEAG) released its report '*Whakamana Tāngata—Restoring Dignity to Social Security in New Zealand*', which recommended significant and large-scale reform of the welfare system. The WEAG recommended rebalancing the social contract by improving the operation of the welfare system. More specifically, it recommended the Government remove some obligations and sanctions, including pre-employment drug testing, with a stronger focus on providing specialised support for people with substance use disorders.
- 19 In November 2019, Cabinet agreed to a welfare overhaul work programme in response to the WEAG report and you signalled your intent to review pre-employment drug testing sanctions with referral to support services [SWC-19-MIN-0168 refers]. In July 2020, you agreed to our phased approach to reviewing obligations and sanctions of the Social Security Act 2018 (the Act) with an initial focus on obligations and sanctions that impact children, which include pre-employment drug testing [REP/20/7/804 refers].
- 20 In November 2020, we provided you with an update on the progress of the welfare overhaul work programme and potential priorities over the next two to three years, s9(2)(f)(iv) OIA

Current settings

The pre-employment drug testing policy focuses on improving employment outcomes

- 21 The pre-employment drug testing policy was introduced in 2013 and has two primary objectives, which focus on:
 - ensuring welfare recipients who have drug-related addictions are provided appropriate support; and
 - providing a clear signal that the use of illicit drugs for recreational purposes is not a reasonable excuse to turn down suitable employment.
- 22 There is a requirement for people receiving a main benefit with part-time or full-time work obligations to take and pass a drug test if they are referred to a job or employment-related training course where drug testing is part of the application process. Approximately 40 per cent of vacancies advertised through Work and Income require pre-employment drug tests.¹

We have a graduated sanctions regime for people who fail multiple drug tests

- 23 We currently have a graduated sanctions regime for people who fail to meet their pre-employment drug test obligations without good and sufficient reason.² A person receiving a main benefit with work obligations can fail a pre-employment drug test if they advise us that they cannot apply for a suitable job as they do not think they will receive a negative drug test result, refuse to take a drug test for a suitable job, or receive a positive drug test result when referred to a suitable job or employment-related course.

¹ There is a requirement in the Health and Safety Act 2015 for employers to keep their staff safe, which can be given effect through the use of drug tests if this is a condition in their employment agreement or workplace policies.

² Good and sufficient reasons for not taking or failing to pass a drug test include: that the person is taking prescription medication; undertaking or awaiting an assessment for, or an opportunity to undertake, addiction treatment; or has a diagnosed drug addiction or dependence.

- 24 If the person receives a positive drug test for the first time without a good and sufficient reason, they have to verbally agree to stop using drugs. If the person receives a second positive drug test without a good and sufficient reason, they must pass another drug test and provide the result of the test to MSD within 30 working days. If the person receives a third positive drug test, or if they do not provide a drug test result following a second positive drug test within 30 working days, then their benefit will be cancelled for 13 weeks for having subsequent failures over a 12-month period. A six-week re-compliance activity needs to be completed to have this cancellation removed.
- 25 People with dependent children can receive a maximum sanction of a 50 percent benefit reduction. People who have good and sufficient reasons for not taking or passing a pre-employment drug test receive a drug test referral delay for 30 days, which can be extended for up to six months.
- 26 The current pre-employment drug testing obligation runs parallel to general work obligations and are included in the total obligation failure count. For example, a person will face a third obligation failure if they have one pre-employment drug test obligation failure and two other work obligation failures (such as the person did not attend employment-related interviews, or seminars, or training) within 12 months.
- 27 MSD is required to give at least five working days written notice to people to either dispute or re-comply with the drug test obligation before any sanction is imposed. The person who has failed a pre-employment drug test has the right to dispute or review that decision, including any decisions relating to a sanction. An overview of the pre-employment drug test obligation process is attached as **Appendix One**.

Only a small number of people are sanctioned from year-to-year for failing a drug test

- 28 Since 2015, there have been approximately 35,000 to 47,000 annual referrals for pre-employment drug testing, of which between 0.1 and 0.3 percent of clients are sanctioned in any given year. Of those who are sanctioned, the majority are male, of Māori ethnicity, aged 20 to 29, and living in the Auckland region. A detailed breakdown of the pre-employment drug test data we have available since 2015 is attached as **Appendix Two**.

There are multiple limitations of the current drug testing model

Pre-employment drug testing is ineffective at meeting health and safety objectives

- 29 Most drug tests only identify the presence of a substance in the body and do not distinguish between the use of illegal drugs and the legitimate use of certain prescription and over the counter drugs.³ Drug testing cannot distinguish between occasional substance use and more regular or heavy use that may indicate substance use disorder.
- 30 Drug testing mechanisms are limited. For example, employment-based drug testing only indicates the use of specific substances within a recent timeframe. It is poor at indicating impairment and whether drug use has contributed to health and safety risks.
- 31 Urine based drug testing is more likely to identify use of easily detectable substances such as cannabis rather than more harmful substances like methamphetamine or synthetic cannabinoids. For example, regular cannabis use can be detected up to 20 days after use, whereas methamphetamine up to five days prior and synthetic cannabinoids are not detectable at all.
- 32 Oral fluid or saliva drug testing is a faster and less invasive way to test for drugs. This method can pick up drugs that may have just been taken but have not yet been fully processed and may be causing impairment. However, this method is relatively

³ NZ Drug Foundation, Policy Briefing on Welfare Reform and substance use, July 2011.

new, and was only approved as a testing mechanism in New Zealand early this year. It may take some time before saliva drug testing is used more broadly with employers who traditionally use urine drug testing.

- 33 Whilst drug tests can detect the recent use of drugs, they do not provide any information on the frequency of use, impairment, or treatment needs. Many individuals who are likely to test positive will be using drugs occasionally, do not have a substance use disorder, and are not impaired at work because of their drug use.⁴

The use of illicit drugs is only one part of a wide range of issues regarding work readiness

- 34 While the use of illicit drugs can be a barrier to employment for welfare recipients with work obligations, this is only one part of a wide range of issues that people face in terms of being work-ready and transitioning into suitable employment, and addressing this in isolation does not necessarily support a transition to employment. Other factors include, but are not limited to:

- poor physical and mental health
- psychological factors (such as psychological distress, low self-esteem and lack of confidence)
- transportation (such as inaccessible public transportation, lack of car ownership or absence of a driver's licence)
- family barriers (such as caring for ill or elderly family members and cultural responsibilities)
- domestic violence and abuse
- geographical location.

s9(2)(f)(iv) OIA

- 35 You received joint advice last year from MSD, the Ministry for Primary Industries, the Ministry of Business, Innovation and Employment, and Forestry New Zealand on drug testing and barriers to forestry employment. The report noted that pre-employment and random drug testing is seen as a barrier for the Forestry sector to find or retain employees, but a necessary one due to the nature of the work.

- 36 The report noted that each year, around 180 forestry workers are severely injured and on average, four forestry workers die. Pre-employment drug testing is perceived as a way to help meet the health and safety requirements of the field and minimise the risk in this industry.

- 37 However, the report also noted that there are several other barriers to employment for the Forestry sector – reiterating that barriers to employment in primary industries can go far beyond drug testing requirements. These include, but are not limited to:

- remote locations of work sites, with potential employees having limited access to transport
- forestry work requiring long and inflexible working hours
- applicants being unprepared and unaware of the physical nature of the work.

- 38 Whilst the report was focused on barriers to the Forestry sector, many of the above barriers would also apply to other high-risk sectors such as fisheries, meat-works, and manufacturing industries. s9(2)(f)(iv) OIA

- 39 Over the last two years, we have been partnering with the Forestry sector to help people address employment barriers through the Silviculture Recruitment Campaign. These work readiness programmes and pastoral support have had a positive impact

⁴ Obligations and Sanctions Rapid Evidence Review Paper 4: Drug Testing Obligations and Sanctions, report prepared for the Welfare Expert Advisory Group, November 2018.

on participants and help to resolve barriers people face with such employment – for example, some people received gym memberships to help them transition into the physical nature of forestry work. The success of such programmes reinforces the need to apply a more holistic approach to supporting people to find suitable and sustainable employment.

Criteria for reviewing pre-employment drug test obligation and sanctions of the Social Security Act 2018

40 We have developed the following criteria for the review of the pre-employment drug test obligation and related sanctions of the Act based on information available to date. The criteria focus on:

- ensuring people with drug-related addictions get the support they need
- ensuring we support clients into employment in a way that treats people with dignity
- ensuring the approach is fiscally feasible (taking into account budget constraints due to the Government’s ongoing response to COVID-19)
- reducing unnecessary compliance-based activities for our clients, and unnecessary administrative activity for MSD staff
- building trust (and mana) between our frontline staff and clients with an overall focus on work readiness and suitability
- aligning any proposal with our overall commitment to Te Tiriti o Waitangi.

Providing adequate support for people experiencing drug-related harm

41 The welfare system needs to provide a clear pathway and communications strategy between MSD and the Ministry of Health (MoH) to ensure people with drug-related problems are receiving the right support. s9(2)(f)(iv) OIA

42 One such initiative, the Alcohol Drug Helpline, has been set up to support people in the welfare system who have indicated that they are unable to stop using illicit drugs without help. The Helpline offers free and confidential information, advice, and support, which can include:

- screening services to determine whether or not a drug problem is present;
- general online support;
- comprehensive face-to-face assessments and treatment plans; and
- referrals to other health or social service agencies.

43 The Helpline is funded by the Health Promotion Agency and MoH, and is provided by Whakarongorau Aotearoa (formerly known as Homecare Medical).

44 MSD also provides Social Rehabilitation Assistance payments. This payment goes towards supporting people in the welfare system who are residents of an approved residential rehabilitation programme where the person’s benefit is not sufficient to meet the fees charged.

45 In addition, the Government is committed to a health-based approach to reduce alcohol and other drug (AOD)-related harm. A health-based approach applies to people using AOD, local communities and the general public, and can be broadly defined as:

- provision of harm reduction or treatment support, as opposed to arrest or criminal justice/court processes;
- non-judgemental approaches that destigmatise seeking help; and
- approaches that prevent harm and intervene earlier in the development and/or experience of drug harm.

46 A central concept underpinning a health approach to AOD is harm reduction. This refers to policies, programmes and practices that aim to prevent or reduce avoidable

negative health, social and legal impacts associated with AOD use, related policies and laws.

47 s9(2)(f)(iv) OIA

Cross-agency work is already underway and led by MoH, such as:

- creating a licensing regime for drug checking;
- the referral pathway to the AOD helpline (this supports the amendments to Section 7 of the Misuse of Drugs Act 2019 and re-affirms the ability of NZ Police to use discretion for personal possession and use of drugs); and
- Drug Information and Alert Aotearoa NZ (drug early warning) network and its website, High Alert.

The focus should be on supporting clients into employment in a way that treats them with dignity

48 s9(2)(f)(iv) OIA

49 s9(2)(f)(iv) OIA

Providing low-intensity support that focuses on raising awareness of the negative impacts of illicit drug use could prompt behavioural change for some people where intensive support is not needed. The

The approach needs to be fiscally feasible

50 s9(2)(f)(iv) OIA

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Improved client experience by reducing unnecessary compliance-based activities

52 Drug test obligation failures represent less than 0.1 percent of all work-related failures. s9(2)(f)(iv) OIA

53 s9(2)(f)(iv) OIA

s9(2)(f)(iv) OIA

54 s9(2)(f)(iv) OIA

For an employer to claim back the cost of a drug test, they need to complete a form for each client. As

s9(2)(f)(iv) OIA

A total of six employers were reimbursed in 2019.

Building trust within the welfare system with an overall focus on work readiness and suitability

55 s9(2)(f)(iv) OIA

56 As noted earlier in the paper, there are a wide range of issues that can impact a person's ability to meet work obligations. Focusing on work readiness and suitability would help draw out some of these barriers and ensure the person is getting the appropriate support as early as possible.

The proposal needs to align with our overall commitment to Te Tiriti o Waitangi

57 The majority of people that have been sanctioned since 2015 for failing a pre-employment drug test are young Māori males. The pre-employment drug test obligation was introduced in response to the Welfare Working Group's (the Group) recommendation in 2011. This Group was set up to provide advice to the then-Government on reducing long-term 'welfare dependency' for working-age people receiving a benefit. Whilst the Group recommended the need to partner with Māori leaders to provide better outcomes for Māori, there was no analysis on how the pre-employment drug test obligation and sanctions would impact Māori in terms of improving employment outcomes.⁵

58 This was also reflected in the Regulatory Impact Statement, where it noted the Group consulted with the public in April – June 2010 but there was no specific engagement with Māori and iwi on the proposed policy. The Regulatory Impact Statement also noted MoH's concern with the drug testing proposal and that some people who fail a pre-employment drug test may end up overstating their drug use to claim that they are drug dependent to avoid financial sanctions, which could lead to unnecessary referrals to drug addiction services and pressure on scarce resources.

59 s9(2)(f)(iv) OIA

Engagement with Māori in 2018 by the WEAG heard that there is a lack of cultural capability within the welfare system. s9(2)(f)(iv) OIA

s9(2)(f)(iv) OIA

⁵ Welfare Working Group, Reducing Long-Term Benefit Dependency recommendations, February 2011.

60 s9(2)(f)(iv) OIA [redacted] The number of people that are sanctioned from year-to-year is very low, and even though there has been a decrease in the number of people being sanctioned over the last two to three years, the numbers are very small and fairly insignificant. Despite this, demographic data suggests that the current policy continues to disproportionately affect young Māori.

61 s9(2)(f)(iv) OIA [redacted]

s9(2)(f)(iv) OIA [redacted]

62 s9(2)(f)(iv) OIA [redacted]

63 s9(2)(f)(iv) OIA [redacted] The use of illicit drugs by welfare recipients is only one part of a range of issues that people may face when looking for work.

s9(2)(f)(iv) OIA [redacted]

64 s9(2)(f)(iv) OIA [redacted]

65 We have recently provided you with advice on the potential scope for the review of work obligations. The initial scope covers a wide range of areas due to the various interdependencies and complexities associated with work obligations, and the significant impact on Māori.

66 At a high level, the review of work obligations will focus on whether we have the right settings to support people in the welfare system, who are able to work, transition into suitable and sustainable employment. As part of this overall process, there would be questions regarding how MSD can support clients into employment in a way that treats people with dignity and fosters open and meaningful conversations between staff and clients.


s9(2)(f)(iv) OIA [redacted]

67 s9(2)(f)(iv) OIA [redacted]

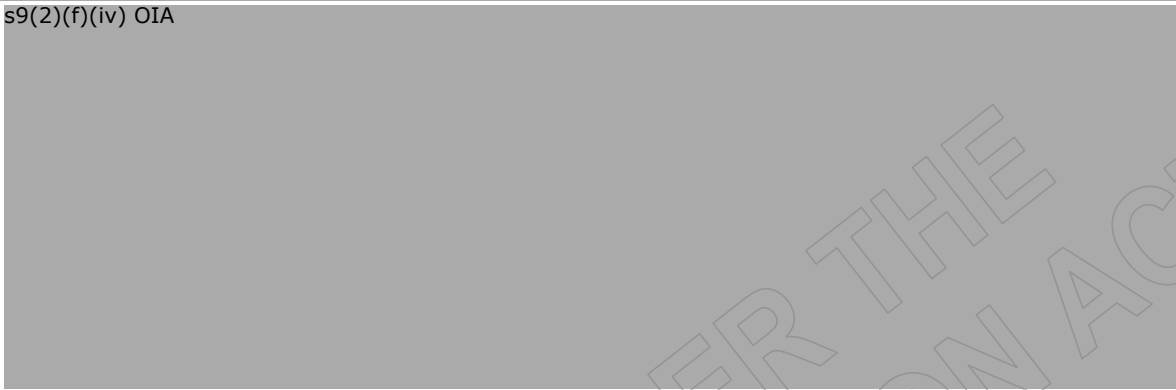
68 [redacted]

⁶ Our latest data shows that as of March 2016, Maori made up 98,442 of working age recipients receiving a main benefit, which had risen to 116,271 in December 2019 (pre COVID-19).

s9(2)(f)(iv) OIA



69 s9(2)(f)(iv) OIA



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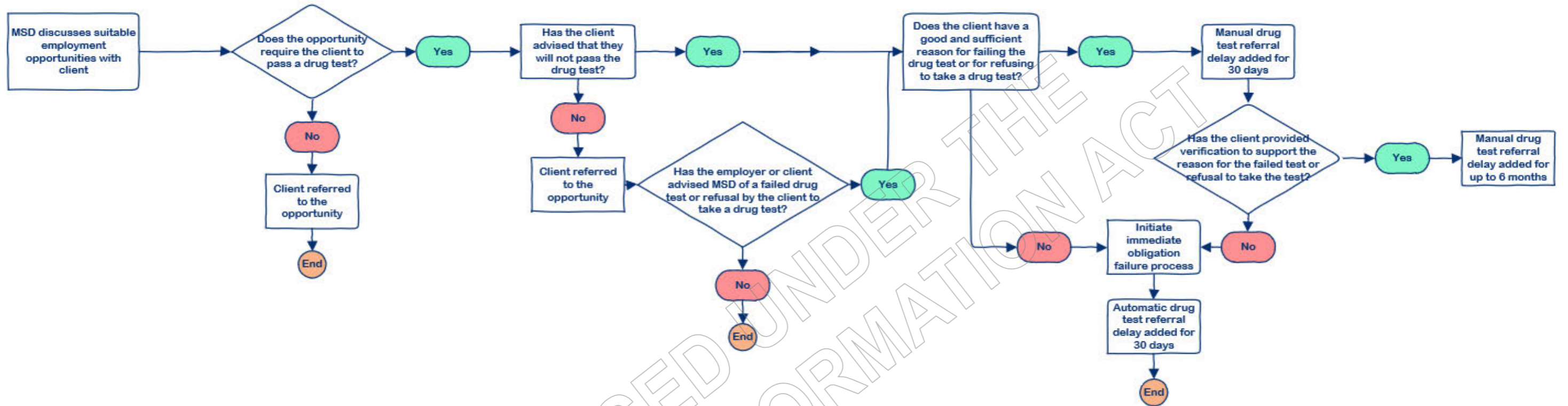
Author: s9(2)(f)(iv) OIA, Policy Analyst, Welfare System and Income Support Policy

Responsible manager: Bede Hogan, Policy Manager, Welfare System and Income Support Policy

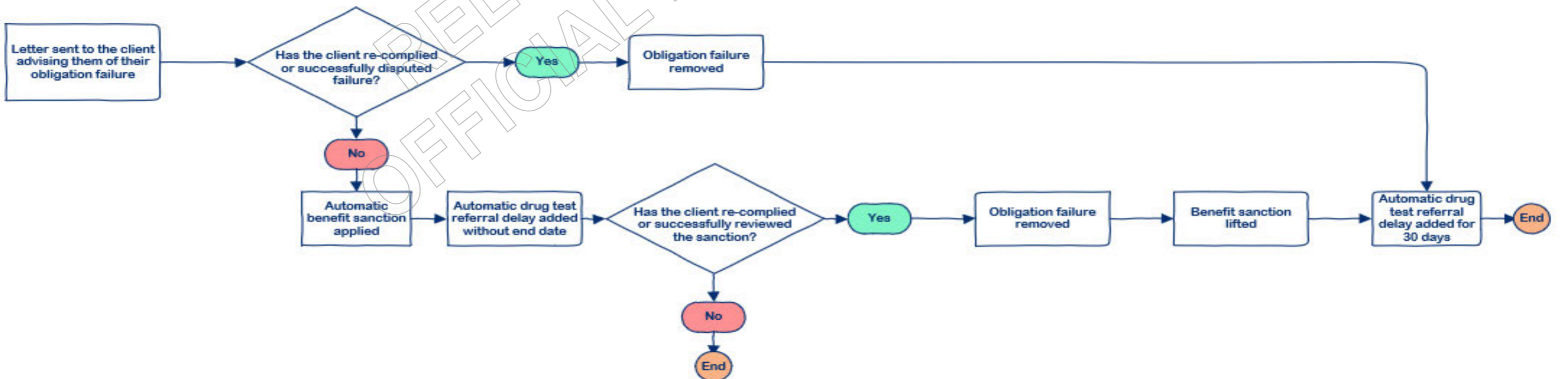
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Appendix One: Pre-employment drug test overview process

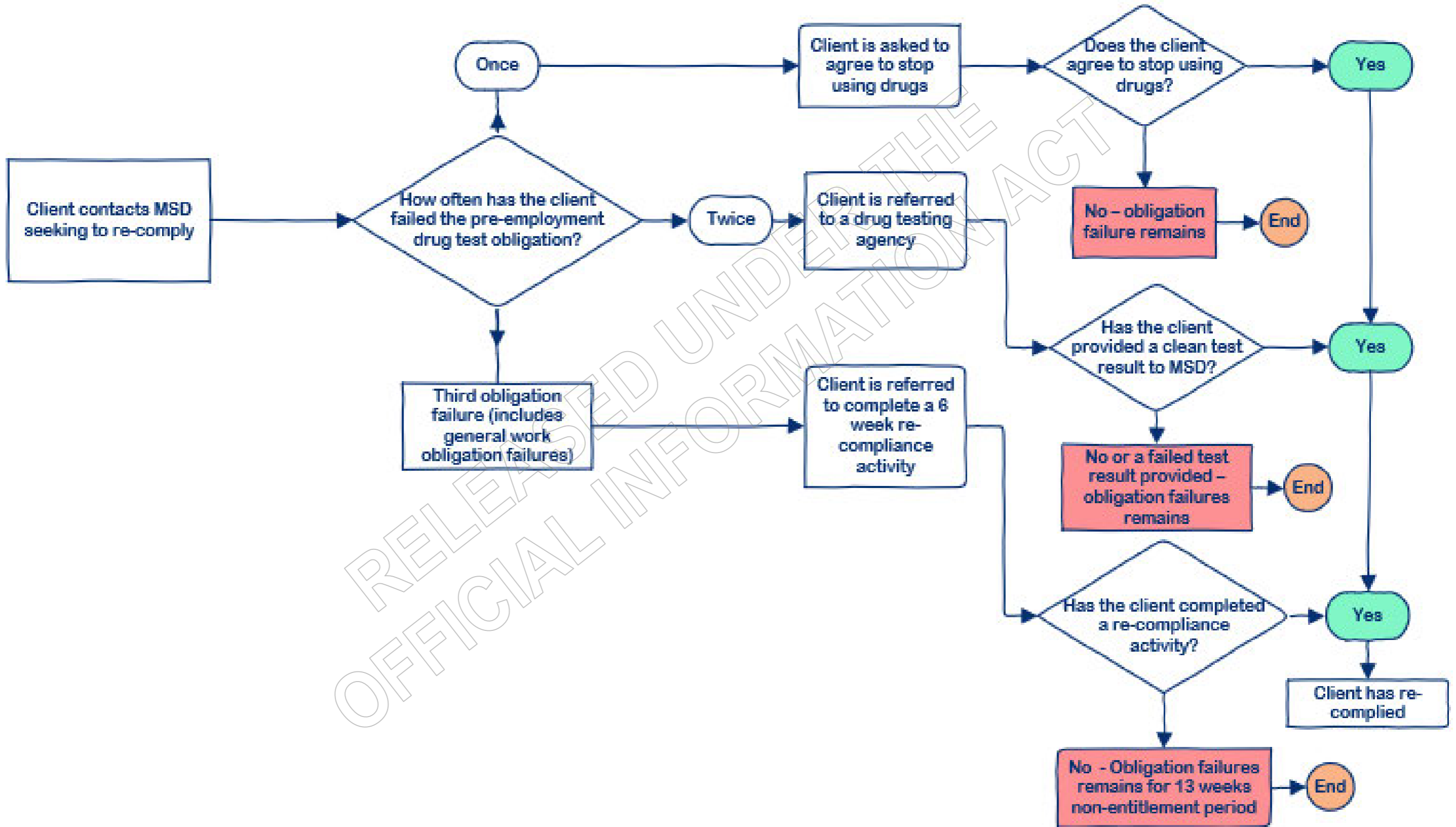
Employment referral process with drug test obligation



Drug test obligation failure and sanctions process

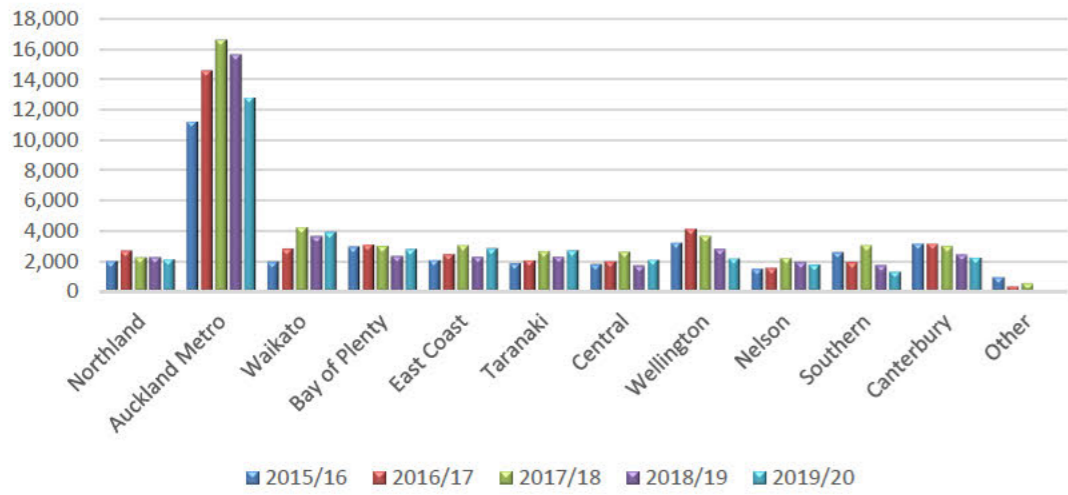


Drug test obligation failure and re-compliance process

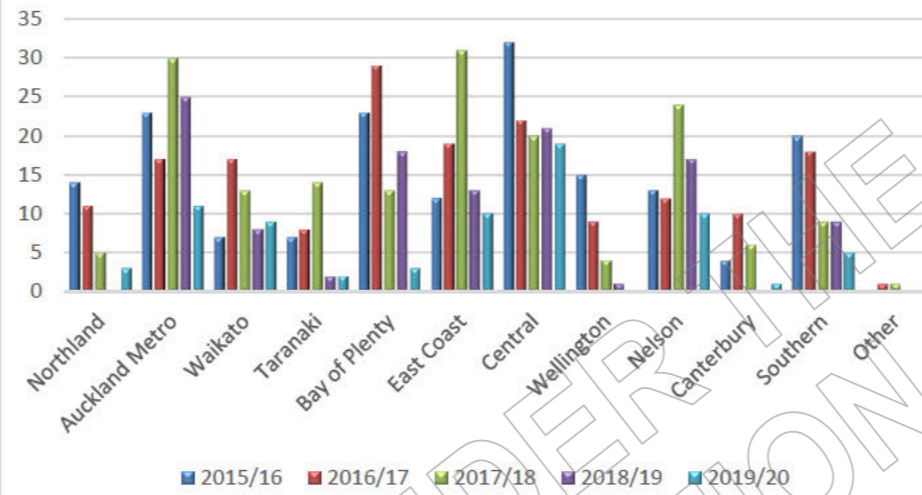


Appendix Two: Pre-employment drug test data

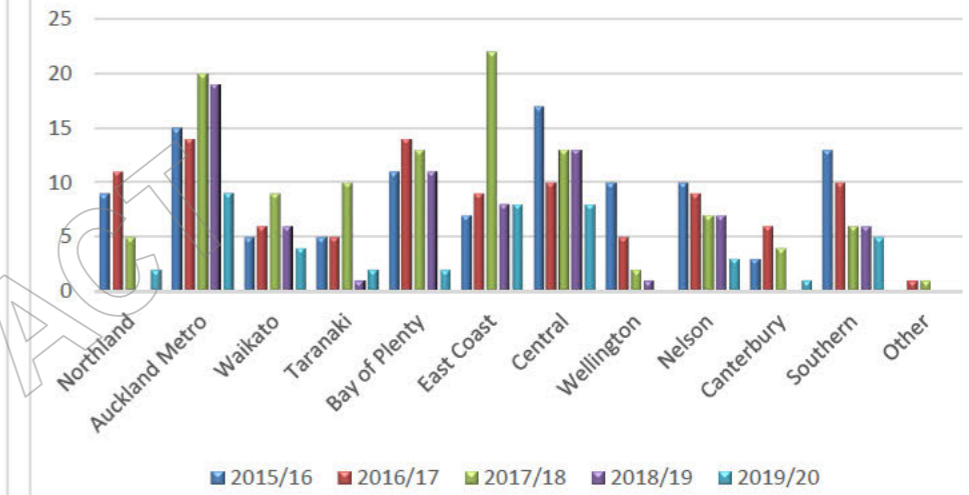
Drug test referrals by region



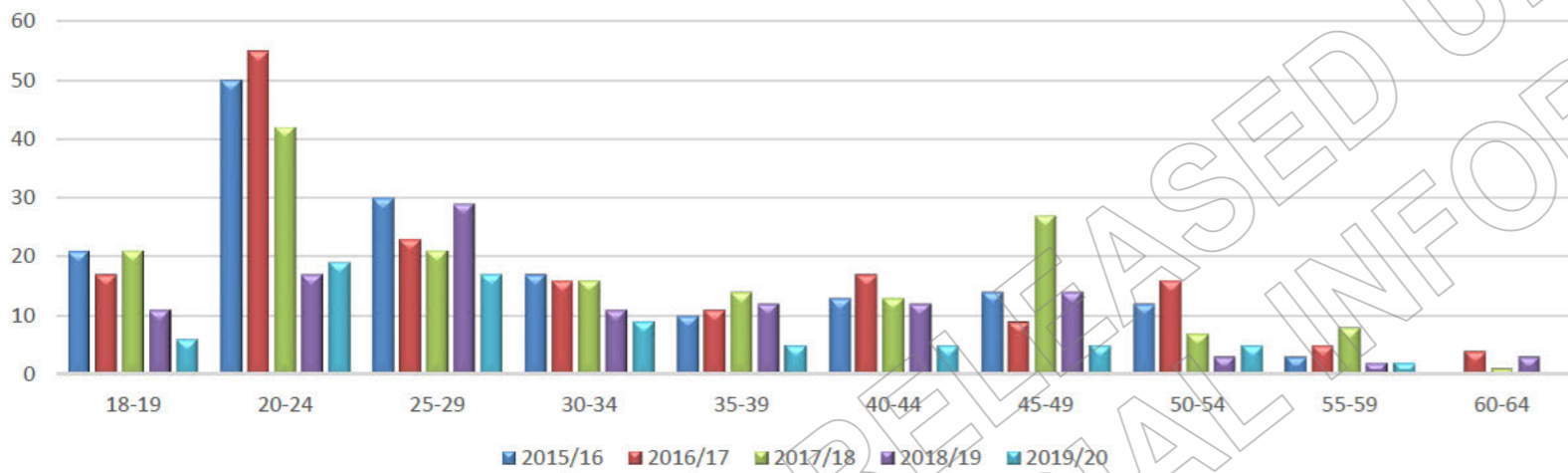
Drug test obligation failures by region



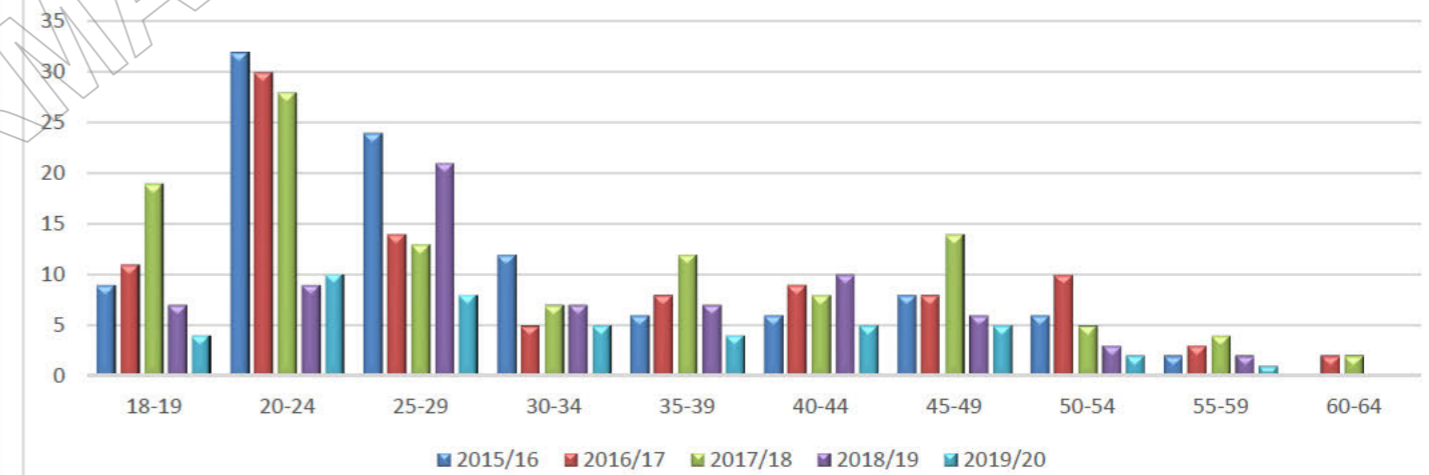
Drug test sanctions by region



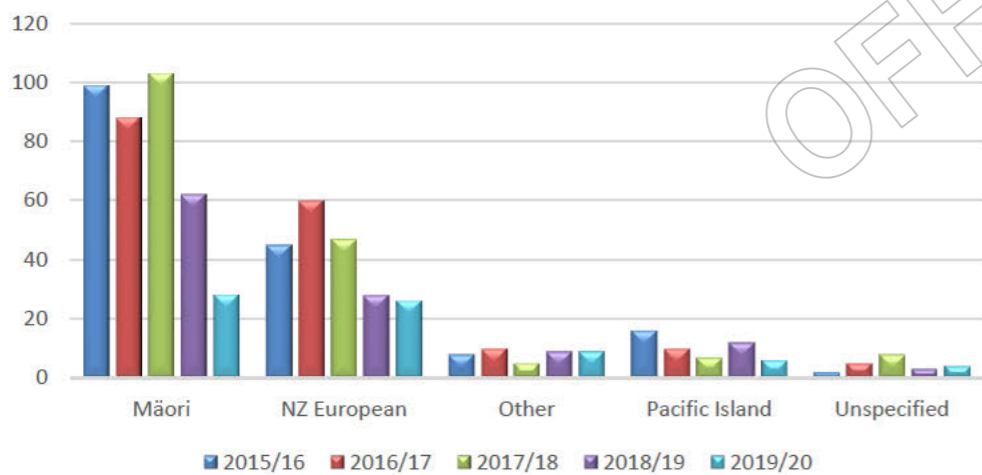
Drug test obligation failures by age group



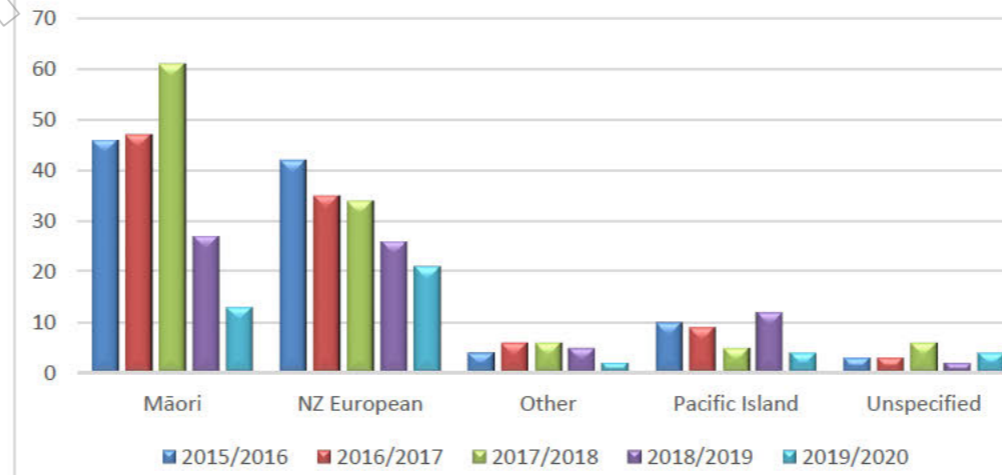
Drug test sanctions by age group



Drug test obligation failures by ethnicity



Drug test sanctions by ethnicity



Drug test sanctions for clients with a child by ethnicity

