

PRISONS (SUBSTANCE TESTING) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Prisons (Substance Testing) Bill as introduced in the House of Commons on 17 April 2018 (Bill 195).

- These Explanatory Notes have been prepared by the Ministry of Justice, with the consent of Bim Afolami MP, the Member in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1. The purpose of the Bill is to improve the capability of prisons in England and Wales to test for the use of illicit substances by prisoners. This will help staff in Her Majesty's Prison and Probation Service (HMPPS) and other agencies to understand the full extent and nature of substance misuse in prisons, and to take appropriate action to prevent it.
2. The Bill simplifies the current process for adding newly identified psychoactive substances to existing prison officer powers to carry out mandatory tests on prisoners for drugs. It also creates powers for prison officers to carry out mandatory tests on prisoners for prescription only and pharmacy medicines, in response to growing evidence of these substances being misused in prisons. Finally, the Bill also sets out a clear statutory framework for the established practice of prevalence testing.

Policy background

3. Currently, three main types of drug testing are carried out in prisons in England and Wales:
 - a) Clinical testing is undertaken by healthcare professionals and is provided to prisoners entering or already in treatment. It looks to discover what drugs a patient has taken recently to inform a diagnosis of dependence and consequential clinical management. The results of tests are considered as 'clinical in confidence' and are not shared with HMPPS staff.
 - b) Voluntary/therapeutic drug testing (VDT) is, as its name suggests, undertaken by consent. The results of the tests are used to validate a prisoner's success in compliance with treatment and in becoming drug free. Results are not used for evidential or punitive action.
 - c) Mandatory drug testing (MDT) is undertaken on a compulsory basis. There are five types of MDT testing: "on reception"; "on suspicion" testing where there is reason to believe someone has used drugs; "frequent" testing to ensure compliance; "risk assessment" testing used for those going out on release on temporary licence or using machinery or undertaking a driving job; and "random" testing which takes place monthly in all prisons on a random selection of 5 to 10% of the population. This last type of MDT is used to measure the level of drug misuse in prisons. Independent research carried out by the Office for National Statistics (published in 2005) concluded that MDT broadly meets its objectives and that random MDT provides a reliable and statistically valid way of measuring patterns and trends of drug misuse in prisons at national and regional level.
4. In addition, periodic prevalence testing is an established process undertaken in prisons in England and Wales to help identify any new substances that are being found routinely in either mandatory or voluntary drug testing samples. Prevalence studies use anonymised samples and cover a much wider range of drugs than are tested for under the drug testing framework above.
5. Between 2012/13 and 2016/17, the rate of positive random tests for conventional controlled drugs in prisons increased by a third. In 2012/13, 7.0% of random mandatory drugs tests were positive compared to 9.3% in 2016/17. Drug use in prisons occurs across the estate, but is especially prevalent in male local prisons, and in male Category B and C training prisons.
6. Misuse of illicit substances causes significant harm not only to those taking, but to other prisoners and to those working in prisons. Many prisoners coming into prison (around 55%) have very high levels of substance misuse problems, characterised by abuse of traditional drugs and prescribed medications, and high levels of injecting behaviour. Misuse of these

substances can have a significant impact on the physical and mental wellbeing of individuals taking them, both in the short and long-term. They also fundamentally undermine an individual's ability to engage in rehabilitation.

7. In addition to the health problems caused by substance misuse use, debt resulting from the supply, distribution and use of such substances within the illicit economy is a major cause of violence, bullying and self-harm.
8. The drugs market in prisons also has an adverse effect on the wider community. Family and friends of prisoners can be drawn into the illicit trade, through extortion and coercion. Organised crime gangs generate significant profits from supplying drugs into prisons (some drugs in prisons can sell at significantly more than street value) and use them to fund criminal activity in the community.
9. In recent years, prisons have faced additional challenges from changes in the type of illicit substances available within the illicit economy. The emergence of psychoactive substances was described as a "game changer" by the former Prisons and Probation Ombudsman.¹ There were 851 recorded seizures of psychoactive substances in prison during October and November 2015.² The PPO found that in 39 deaths in prison between June 2013 and June 2015, the prisoners were known, or strongly suspected, to have been using psychoactive substances before their deaths.³ In July 2016, HM Chief Inspector of Prisons described the 'unpredictable and extreme... dramatic and destabilising' effects of psychoactive substances, which in his view contributed in 'large part' to the violence in prisons.⁴ In his 2017 annual report, the Chief Inspector repeated concerns about new psychoactive substances (NPS):

In particular, NPS remained a significant issue in most adult male prisons. As identified in our last two annual reports, NPS continued to be linked to violence, debt, organised crime and medical emergencies.⁵

10. In addition to problems posed by psychoactive substances, there is increasing evidence of the misuse of prescription only and pharmacy medicines in prison, either on their own or taken with other substances for additive effect. A study of drug use in the north-west of England found widespread abuse of prescription medicines.⁶ There is also evidence that some prisoners engage in poly-drug misuse: for example, combining traditional drugs, prescribed

¹ <https://www.ppo.gov.uk/new-psychoactive-substances-play-a-part-in-yet-more-prison-deaths-says-ombudsman/>

² House of Lords written question HL4385

³ Prisons and Probation Ombudsman (2015) *Learning lessons bulletin: New psychoactive substances*, London: PPO

⁴ Her Majesty's Chief Inspector of Prisons, *Annual Report, 2016*:
<https://www.justiceinspectors.gov.uk/hmiprison/media/press-releases/2016/07/hm-inspectorate-of-prisons-annual-report-201516-prisons-unacceptably-violent-and-dangerous-warns-chief-inspector/>

⁵ https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2017/07/HMIP-AR_2016-17_CONTENT_201017_WEB.pdf

⁶ <https://www.lgcgroup.com/services/drug-and-alcohol-testing-in-the-workplace/odtcase-study/>

medications and psychoactive substances.⁷ This results in a particularly toxic mix and can cause significant harm to an individual's health.

11. Currently, the prison drug testing framework does not include provision for mandatory testing for medicines.

Legal background

12. Section 16A of the Prison Act 1952 ("the 1952 Act") sets out the existing power which allows a prison officer to require a prisoner to provide a urine sample to ascertain whether he or she has any "drug" in his or her body. This is the statutory basis for MDT testing.
13. Under this existing legislation, "drug" is defined to include any controlled drug under the Misuse of Drugs Act 1971 ("MDA 1971"), or any "specified drug," meaning any substance or product specified in the Prison Rules 1999. In relation to the Prison Rules 1999, Rule 2 sets out the definition of "specified drug" which includes several listed chemical compounds. Rule 50 sets out the arrangements that apply to compulsory drug testing, including the information that prison officers are obliged to provide to prisoners and the arrangements to prevent the adulteration or falsification of samples.
14. Rule 51(9) sets out that it is a disciplinary offence for a prisoner to be found with a substance in his or her urine which demonstrates that a controlled drug or a specified drug has been administered.

Territorial extent and application

15. Clause 3(3) sets out the extent of the provisions in the Bill. The provisions of the Bill extend to England and Wales only.
16. The provisions of Standing Orders Nos. 83J to 83X do not apply to Private Members' Bills.
17. See Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Clause 1: Testing prisoners for psychoactive substances and other substances

18. As noted above, the current legislative framework for drugs testing in prison in England and Wales in section 16A of the 1952 Act allows mandatory tests to be carried out for controlled drugs under the Misuse of Drugs Act 1971 and for "specified drugs". If a new drug is identified that is not a controlled drug for the purposes of the MDA 1971, it can be added to the list of "specified drugs" in the Prison Rules by secondary legislation.
19. Permitting specified drugs to be added by secondary legislation to the list of drugs that can be tested for was a response to the rise in the use in prison of psychoactive substances. The change

⁷ <https://www.lgcgroup.com/services/drug-and-alcohol-testing-in-the-workplace/odtcase-study/>

was made by section 16 of the Criminal Justice and Courts Act 2015 at a time when psychoactive substances were not banned or controlled, hence their alternative name of “legal highs”. The change was also made because at that time there was no statutory definition of a psychoactive substance. The Psychoactive Substances Act 2016 (“PSA 2016”) subsequently introduced a statutory definition of psychoactive substances, as well as criminalising the following activities regarding psychoactive substances: production; supplying or offering to supply; possession with intent to supply; importing or exporting; and possession in a custodial institution.

20. Clause 1 sets out the necessary changes to adopt the generic definition of a psychoactive substance from the PSA 2016 so that in future tests can be carried out for psychoactive substances covered by this definition, without the need to add each individual psychoactive substance by secondary legislation. It is a feature of psychoactive substances that new substances appear regularly with slight alterations to the chemical make-up. The generic definition is adopted by subsection (2) adding “psychoactive substances” into the title of section 16A of the 1952 Act and subsection (3) adding “psychoactive substances” into section 16A(1). Subsection (5) adds the definition of a psychoactive substance to section 16A(3), stating that it has the same meaning as in the PSA 2016.
21. Clause 1 also sets out the necessary changes so that in future tests can be carried out for prescription only and pharmacy medicines. Subsection (3) adds “prescription only medicines” and “pharmacy medicines” into section 16A(1) of the 1952 Act. Subsection (5) adds the definition of “prescription only medicine” and “pharmacy medicine” to section 16A(3). Clause 1(5)(b) makes clear that these terms are defined by reference to regulation 8 of the Human Medicines Regulations 2012.
22. Clause 1(4) also makes provision for anonymised prevalence testing, which can be used to test for “controlled drugs”, “medicinal products”, “psychoactive substances” and “specified substances”. It does this by inserting a new subsection (2A) into section 16A of the 1952 Act. This provision would allow for the anonymised testing for “medicinal products”. This is a wider category of substances, which includes both “prescription only medicines” and “pharmacy medicines”. Clause 1(5)(b) makes clear that “medicinal product” is defined by reference to regulation 2 of the Human Medicines Regulations 2012.
23. Clause 1 makes further amendments to the existing testing framework arising from the substantive changes to the framework set out in the clause. Clause 1(3)(b) provides that a prisoner can be tested for a “specified substance” and the further change at clause 1(5)(d) makes clear that “specified substance” replaces “specified drug” in the existing framework and means any substance or product specified in Prison Rules for the purposes of section 16A. Clause 1(5)(c) provides a definition of “prisoners’ samples” with respect to the prevalence testing provisions at clause 1(4).

Clause 2: Consequential amendments

24. Clause 2 sets out the consequential amendments following the changes in clause 1. Clause 2(1) amends section 47(3A) of the 1952 Act to make clear that, while Prison Rules can be made to specify any substance for which a prisoner will be required to provide a sample for the purposes of section 16A of the 1952 Act, it is not possible to specify any substance that is: a controlled drug; a pharmacy medicine; a prescription only medicine; or a psychoactive substance because these categories are now already included and defined in section 16A.
25. Clause 2(2) makes provision in case there is any future change in the Human Medicines Regulations 2012 or other subordinate legislation relating to human medicines. In those circumstances, clause 2(2)(a) inserts a new subsection (4) into section 16A of the 1952 Act to provide a regulation making power for the Secretary of State to make such changes as are necessary to either section 16A or section 47 of the 1952 Act. A new subsection (5) is also inserted into section 16A to clarify that “subordinate legislation” has the same meaning as in the

Interpretation Act 1978.

26. Clause 2(2)(b) provides that any regulations made under this provision will be subject to the affirmative resolution procedure in Parliament.
27. Clause 2(3) and (4) make several necessary consequential changes to secondary legislation. Clause 2(3) removes the definition of “specified drug” that currently appears in several places in the Prison Rules 1999, namely Rule 2 (interpretation), Rule 50 (compulsory testing for controlled or specified drugs), Rule 51(9) and (24) (offences against discipline) and Rule 52 (defences to Rule 51(9)). Clause 2(4) makes equivalent consequential changes to the Young Offender Institution Rules 2000. These changes are necessary because all the chemical compounds that are currently on the list of specified drugs for which prisoners can be tested in Rule 2 of the Prison Rules 1999 are now covered by the generic definition of psychoactive substance. Clause 2(5) revokes the two statutory instruments that added those compounds to the definition of specified drug.

Clause 3: Final provisions

28. This clause confirms the short title of the Bill and makes provision for its coming into force. Clause 3(3) provides that the Bill extends to England and Wales only.

Commencement

29. Clause 3(2) makes clear that the provisions in the Bill will be brought into force by means of regulations made by the Secretary of State.

Financial implications of the Bill

30. The Bill would provide powers to test for a wider range of substances than are currently covered in the prison drugs testing framework. Depending on how HMPPS uses these powers, they could give rise to some additional laboratory costs because the laboratory would be testing for a wider range of substances. This might also give rise to a larger number of positive results, which could involve increased costs for providing therapeutic support such as substance misuse courses or increased adjudication costs.
31. To illustrate the nature of the costs involved, during the financial year 2017/18, spend on drug testing kits and analytical services in prisons was £4.04m. To understand the capabilities of the various testing providers, HMPPS is going out to the market via a procurement exercise. The aim is to procure a drugs testing service that will support HMPPS to identify and respond to changes in patterns of drug misuse by offenders both in custody and in the community, using current and future innovative solutions.

Parliamentary approval for financial costs or for charges imposed

32. The additional expenditure arising from the Bill is subject to a Money Resolution. The House of Commons will be asked to agree that any expenditure arising out of the Bill that is incurred by the Government will be taken out of money provided by Parliament.

Compatibility with the European Convention on Human Rights

33. This is a Private Member's Bill and the Government is not required to give a statement of compatibility with the Human Rights Act 1998 in accordance with section 19(1)(a) of that Act.
34. The Ministry of Justice has, nevertheless, considered the question of compatibility and has concluded that the Bill is compatible with the European Convention on Human Rights.
35. Article 8 ECHR (the right to respect for private and family life) may be engaged. This is because the taking of a urine sample from the prisoner represents an interference with the prisoner's physical integrity. However, the Ministry of Justice considers that any interference with Article 8 rights would be in accordance with the law, given the statutory underpinning and published policy on mandatory drug testing, which contains important multi-layered procedural safeguards⁸. Any interference would be in pursuit of one or more of the legitimate aims of public safety and protection of health set out in Article 8(2) and would be a proportionate means of achieving those aims, given the importance of the aims pursued and the safeguards in place around drug testing in prisons.
36. In relation to the extent of the interference, the Ministry of Justice's position is that any interference is limited in nature, and will not be materially increased by the amendments which are being made to section 16A. On the status quo position, prisoners are already subject to a programme of mandatory drug testing for controlled drugs and certain psychoactive substances. Where, in the future, the same samples will be tested for a broader range of substances (encompassing more psychoactive substances, prescription only medicines and pharmacy medicines) the prisoner will experience no additional interference with their right to respect for physical integrity. The Ministry of Justice does not intend to materially increase the frequency of testing within the existing mandatory drug testing framework.
37. In relation to the power to conduct prevalence testing, this places an existing practice on a clear statutory footing to promote clarity and transparency, rather than representing a departure from the status quo. Again, prevalence testing does not require additional prisoner samples to be taken; rather it relies on the testing of samples that have already been obtained through the mandatory drug testing programme or through voluntary testing. Prevalence testing is conducted on an anonymised basis which means that the results and the associated data cannot be linked to specific prisoners, and no adverse outcome for any individual prisoner can follow.
38. Given that it is accepted that Article 8 of the ECHR may be engaged by the expanded drug testing programme contemplated by the Bill, the Ministry of Justice has also separately considered whether the provisions of the Bill might engage Article 14 of the ECHR.
39. The main consideration in relation to Article 14 is the possibility that the expansion of the drug testing programme to incorporate prescription only medicines and pharmacy medicines may have an adverse differential impact for certain protected characteristic groups, in particular disabled and elderly prisoners, who are more likely to legitimately require prescription only medicines and pharmacy medicines, and therefore may be more likely to test positive for those substances. The

⁸ PSO 3601 – Mandatory Drug Testing <https://www.justice.gov.uk/offenders/psos>

potential concern was that a charge might be laid for the disciplinary offence in Rule 51(9) of the Prison Rules 1999, resulting in disabled and elderly prisoners being exposed to punitive action via the adjudications system.

40. The Ministry of Justice has considered the case of *DH and Others v Czech Republic*⁹ regarding indirect discrimination. This acknowledges that a difference in treatment may take the form of “disproportionately prejudicial effects” of a general policy or measure which, though couched in neutral terms, discriminates against a group. Such a situation would amount to indirect discrimination, which does not necessarily require a discriminatory intent.
41. The Ministry of Justice is satisfied that ultimately there will be no disproportionate prejudicial effects resulting from the policy in so far as disabled or elderly prisoners are concerned, and therefore no indirect discrimination arises. This is because there is no intention to take punitive action via the prison disciplinary system for a positive test for legitimately prescribed prescription only medicines, or legitimately supplied pharmacy medicines. Further, whether to lay a disciplinary charge is a matter of discretion rather than a duty under the Prison Rules 1999. Clear policy instructions are in place in the Prison Service Order on Mandatory Drug Testing (PSO 3601) to protect vulnerable individuals and to make sure that no disciplinary action is taken after a positive test where the substance in question was legitimately prescribed or supplied. The Ministry of Justice’s view is that the existing Prison Service Order already contains sufficient safeguards to prevent any disproportionate prejudicial effect.

Related documents

42. The following document is relevant to the Bill and can be read at the stated location:

- Prison Safety and Reform White Paper:
<https://www.gov.uk/government/publications/prison-safety-and-reform>

⁹ (2008) 47 EHRR 3 ECtHR (Para 175)

Annex A - Territorial extent and application in the United Kingdom

Subject matter and legislative competence of devolved legislatures

1. The Bill extends to England and Wales only.
2. A corresponding provision making changes to the prisons drug testing framework would not be within the competence of the National Assembly for Wales.

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