

PRISONS (SUBSTANCE TESTING) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Prisons (Substance Testing) Bill as brought from the House of Commons on 12 March 2021 (HL Bill 181).

- These Explanatory Notes have been prepared by the Ministry of Justice, with the consent of Baroness Pidding, the Peer in charge of the Bill, in order to assist the reader of the Bill. 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 and prison custody officer powers to carry out mandatory tests on prisoners for drugs. It also creates powers for prison officers and prison custody officers in private prisons to carry out mandatory tests on prisoners for prescription only and pharmacy medicines, in response to growing evidence of these substances are being misused in prisons. Finally, the Bill also sets out a clear statutory framework for the established practice of prevalence testing.

Policy background

- 3 The current legislative framework for drugs testing in prison in England and Wales allows mandatory tests to be carried out for controlled drugs and "specified drugs" listed in the Prison Rules 1999 and the Young Offender Institution Rules 2000 ("YOI Rules 2000").
- 4 This mandatory drug testing power is an important tool for prisons and Young Offender Institutions ("YOIs") in preventing misuse of illicit substances, which are a significant driver of debt, violence and self-harm amongst prisoners. It allows prison governors and staff to understand the extent and nature of drug abuse in each establishment, and to target their efforts appropriately in response, whether that is working with health providers to offer the right treatment, pursuing sanctions against those involved in trade within the prison, or working with law enforcement agencies to follow supply chains into the community.
- 5 Currently, prisons can require prisoners to provide a sample for any drug which is a controlled drug for the purposes of the Misuse of Drugs Act 1971 ("MDA 1971"), or for other drugs specified in prison rules. New drugs which start to be used in prisons can be added to the list of those that can be tested by secondary legislation.
- 6 In recent years, psychoactive substances have become much more prevalent within the illicit economy in prisons. The chemical composition of psychoactive substances is subject to rapid change, meaning that repeated amendments to the Prison Rules 1999 and the YOI Rules 2000 are needed in response to small changes to the chemical composition of psychoactive substance as criminals adapt their drug use to evade detection on mandatory drug tests. This means a delay in the ability of prisons to detect and act on the use of new or evolving drugs until a statutory instrument can be prepared and agreed by Parliament. This Bill would address this by removing the requirement continually to amend the Prison Rules 1999 and YOI Rules 2000 by adopting the wider definition of psychoactive substances used in the Psychoactive Substances Act 2016 ("PSA 2016").
- 7 Alongside psychoactive substances, prescription and pharmacy medicines are also abused by some prisoners, and can play a similar role in the prison illicit economy. Some but not all of these medicines are already included in the list of specified drugs that prisons can currently test for. The Bill would, in a similar way, remove the requirement to add substances to this list by permitting prisoners to be tested for prescription-only and pharmacy medicines as defined by the Human Medicines Regulations 2012.
- 8 Alongside mandatory drug testing, 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 section 16A of the Prison Act 1952. However, this has not to date been given an express statutory footing. This Bill would create such a legislative basis.

Legal background

- 9 Section 16A of the 1952 Act sets out the existing power which allows a prison officer (or prison custody officer in private prisons) 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 mandatory drug testing.
- 10 Under section 16A(3), “drug” is defined to include any controlled drug for the purpose of the MDA 1971, or any “specified drug,” meaning any substance or product specified in rules made under section 47 Prison Act 1952. The relevant rules are the Prison Rules 1999 and the YOI Rules 2000.
- 11 Rule 2 of the Prison Rules 1999 and YOI Rules 2000 defines “controlled drug” in the same way as section 16A of the 1952 Act and “specified drug” as any product or substance containing one or more of the chemical compounds listed in Schedule 2. Rule 50 of the Prison Rules 1999 (rule 53 YOI Rules 2000) sets out the arrangements that apply to compulsory drug testing, including the information that prison officers and prison custody officers are obliged to provide to prisoners and the arrangements to prevent the adulteration or falsification of samples.
- 12 The list of specified drugs in Schedule 2 of each of the Prison Rules 1999 and YOI Rules 2000 can be amended by secondary legislation under powers in section 47(3A) of the 1952 Act. 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 in Schedule 2 of the respective rules.
- 13 Rule 51(9) of the Prison Rules 1999 and rule 55(10) of the YOI Rules 2000 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. This offence is subject to defences in rule 52 of the Prison Rules 1999 (rule 56 of the YOI Rules 2000) if the substance has been lawfully administered, the prisoner did not know or have reason to suspect it was being administered, or it was administered under duress.
- 14 Section 2 PSA 2016 defines “psychoactive substance” as any substance which is capable of producing a psychoactive effect in a person who consumes it and is not an exempted substance under section 3 of that Act.
- 15 Regulation 2(1) in the Human Medicines Regulations 2012 defines “medicinal product”. Regulation 5(3) in the Human Medicines Regulations 2012 defines “prescription only medicine” and regulation 5(5) in the Human Medicines Regulations 2012 defines “pharmacy medicine”.

Territorial extent and application

- 16 Clause 3(3) sets out the extent of the provisions in the Bill. The provisions of the Bill extend to England and Wales only.
- 17 See Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.
- 18 As the Bill is a Private Member’s Bill, the English votes provisions in the Standing Orders of the House of Commons relating to Public Business did not apply to the Bill.

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Commentary on provisions of Bill

Clause 1: Testing prisoners for psychoactive substances and other substances

- 19 Clause 1 sets out the changes to the 1952 Act to adopt the generic definition of a psychoactive substance from Section 2 of 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 to the Prison Rules 1999 and YOI Rules 2000 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.
- 20 Clause 1 also maintains the power to test for controlled drugs and 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.
- 21 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 2(A) into section 16A of the 1952 Act. The provision would allow for the anonymised testing for “medicinal products” as well as controlled drugs, psychoactive substances and specified substances (described in the next paragraph). “Medicinal products” is a wider category of substances than “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.
- 22 Clause 1 makes further amendments to section 16A of the 1952 Act arising from the substantive changes to the framework set out in the Clause. Clause 1(3)(e) 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 section 16A and means any substance or product specified in prison rules made under section 47 of the 1952 Act 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

- 23 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 made under section 47 of the 1952 Act 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.
- 24 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 consequential 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.

- 25 Clause 2(2)(b) provides that any regulations made under the new section 16A(4) of the 1952 Act will be subject to the affirmative resolution procedure in Parliament.
- 26 Clause 2(3) and (4) make several necessary consequential changes to secondary legislation. Clauses 2(3) and (4) removes the definition of “specified drug” that currently appears in several places in the Prison Rules 1999 and YOI Rules 2000. These changes are necessary because all of the chemical compounds that are currently on the list of specified drugs for which prisoners can be tested in Schedule 2 of the Prison Rules 1999 and YOI Rules 2000 are now covered by the generic definitions of psychoactive substance, prescription only medicines and pharmacy medicines. Clause 2(5) revokes the two statutory instruments that added those compounds to the definition of specified drug. Clause 2(6) amends the Prison and Young Offender Institution (Amendment) (No. 2) Rules 2018 to omit the lists of specified drugs in Schedule 2 of each of the Prison Rules 1999 and YOI Rules 2000. Clause 2(7) amends the Prison and Young Offender Institution (Coronavirus, etc) (Amendment) (No. 3) Rules 2020 to omit the specified drug added to Schedule 2 of each of the Prison Rules 1999 and YOI Rules 2000.

Clause 3: Final provisions

- 27 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

- 28 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.
- 29 Secondary legislation will be brought in to coincide with the commencement of the Bill to update the disciplinary offences in the Prison Rules 1999 and YOI Rules 2000 to make them applicable to the new list of substances.

Financial implications of the Bill

- 30 Although the Bill would provide powers to test for a wider range of substances than are currently covered in the prison drugs testing framework, the legislation would not significantly affect the practice or volume of mandatory drug testing in England and Wales. There may be additional lab costs which will be covered by existing budgets, so any financial impact would be modest.
- 31 Depending on how HMPPS uses the Bill’s powers, they could give rise to a larger number of positive test results than would otherwise happen. If so, this change could involve increased costs for providing therapeutic support such as substance misuse treatment and/ or increased adjudication costs.
- 32 To illustrate the nature of the costs involved, during the 2019/20 financial year, spend on services related to drug testing was £4m. To understand the capabilities of the various testing providers, HMPPS has undertaken extensive market engagement with potential suppliers and will do so again during the contract tendering process. 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

- 33 The additional expenditure arising from the Bill was subject to a Money Resolution. The House of Commons were asked on 24 November 2020 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 or charged on and paid out of the Consolidated Fund. The Money Resolution was approved.

Compatibility with the European Convention on Human Rights

- 34 This is a Private Member's Bill and the Government is not required to give a statement of compatibility with the European Convention on Human Rights (ECHR) in accordance with section 19(1)(a) of the Human Rights Act 1998.
- 35 The Ministry of Justice has, nevertheless, considered the question of compatibility and has concluded that while article 8 of the ECHR may be engaged the Bill is nevertheless compatible with the European Convention on Human Rights.
- 36 Possible interference with prisoners' article 8 rights arises from the taking of a urine sample which may represent an interference with the prisoner's physical integrity. This stems from section 16A of the Prison Act 1952, is limited in nature and is not materially expanded by the amendments in this Bill.
- 37 The Ministry of Justice considers that any interference with article 8 rights would be in accordance with the law and in pursuit of one or more of the legitimate aims set out in article 8(2) of the ECHR (ensuring good order in the prison estate, the prevention of crime and disorder and public safety and the protection of health) .
- 38 Any interference 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. Those safeguards include:
- a. Rule 50 of the Prison Rules 1999 and rule 53 of the YOI Rules 2000, which contain important procedural safeguards, including for privacy when giving samples;
 - b. revised policy would make clear that the emphasis should be on therapeutic responses, including the provision of support and referral to healthcare rather than on punitive measures;
 - c. there are defences in rule 52 of the Prison Rules 1999 and rule 56 of the Young Offender Institution Rules 2000 which apply to a disciplinary offence under rule 51(9) of the Prison Rules 1999 and rule 55(10) of the YOI Rules 2000 and cover the scenarios of lawful possession or lawful supply, spiking, and duress;
 - d. new published policy guidance would be introduced containing safeguards covering the handling of health-related data that is obtained as a result of the expanded testing programme.
- 39 Given that it is accepted that article 8 of the ECHR may be engaged, it has been considered whether the provisions of the Bill might engage article 14 of the ECHR.
- 40 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 impact for disabled and elderly prisoners who may legitimately require these substances.

- 41 However, the following protections are in place to ensure that the potential impact does not arise:
- a. the intention is that those who test positive for prescription only medicines and pharmacy medicines will be referred to healthcare services (where necessary) for appropriate assessment, treatment and support rather than punishment;
 - b. the Prison Service Order on Mandatory Drug Testing (PSO 3601) already makes sure that no disciplinary action is taken after a positive test where the substance in question was legitimately prescribed or supplied;
 - c. the defence in rule 52(a) of the Prison Rules 1999 (rule 56(a) of the YOI Rules 2000) applies where the drug had been lawfully in the prisoner's possession or was administered to him via lawful supply;
 - d. Independent Monitoring Boards, Her Majesty's Inspectorate of Prisons or the Prison and Probation Ombudsmen could identify concerns if drug testing policies were being disproportionately implemented.
- 42 In relation to the power to conduct prevalence testing, this does not require additional prisoner samples to be taken. Consequently, there is no further potential interference with a prisoner's physical integrity. 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.

Related document

43 The following document is relevant to the Bill:

- National Prison Drugs Strategy (2019):
<https://www.gov.uk/government/publications/national-prison-drugs-strategy>

Annex A – Territorial extent and application in the United Kingdom

Subject matter and legislative competence of devolved legislatures

- 44 The Bill extends to England and Wales only.
- 45 A corresponding provision making changes to the prisons drug testing framework would not be within the competence of Senedd Cymru.

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