

Delegated Powers Memorandum

Prisons (Substance Testing) Bill

Prepared by the Ministry of Justice

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Ministry of Justice with the agreement of Baroness Pidding, the member in charge of the Bill, to assist with the Committee's scrutiny of the Prisons (Substance Testing) Bill ("the Bill"). The Bill was introduced in the House of Lords on 12 March 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

2. The Bill expands the existing power to conduct mandatory prisoner drug testing within prisons via urine samples, so that prisoners can be tested for a broader and more comprehensive range of substances, including: all psychoactive substances, prescription only medicines and pharmacy medicines. This will obviate the need to produce further statutory instruments where different strands of substances enter the illegal market in prisons, although the power to make such statutory instruments is retained in the Bill.

Delegated Powers

3. The Bill contains one delegated power enabling the Secretary of State to use regulations to amend the provisions on prisoner drug testing in the Prison Act 1952 in consequence of the amendment or revocation of the Human Medicine Regulations 2012 or the making, amendment or revocation of other subordinate legislation relating to human medicines.

Clause by Clause analysis:

Clause 2(1) – Consequential Amendments

Power conferred on: *Secretary of State*

Power exercised by: *Rules Made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

Context and purpose

4. Section 47 of the Prison Act 1952 (“1952 Act”) provides powers for the Secretary of State to make rules for the regulation and management of prisons and other custodial institutions and for the classification, treatment, employment, discipline and control of persons detained there. Section 47(3A) currently provides a power for the Secretary of State to specify in rules any substance or product (other than a controlled drug) in relation to which a person may be required to provide a sample for the purposes of drug testing under section 16A of the 1952 Act. This is consistent with the current drafting of section 16A of the 1952 Act which gives powers to require prisoners to provide samples for the purpose of testing whether they have controlled drugs or specified drugs in their bodies. “Controlled drugs” are defined in the Misuse of Drugs Act 1971. “Specified drugs” are defined as substances or products specified in prison rules made under section 47 of the 1952 Act.
5. Clause 2 of the Bill amends section 16A of the 1952 Act so that prisoners can be drug tested for controlled drugs, psychoactive substances defined in the Psychoactive Substances Act 2016, prescription-only medicines as defined in the Human Medicines Regulations 2012 (“2012 Regulations”), pharmacy medicines as defined in the 2012 Regulations and specified substances, defined as substances specified in prison rules. Clause 1(5)(d) replaces the definition of “specified drug” in section 16A of the 1952 Act with “specified substance”. The effect of this is that the Secretary of State will no longer have powers to test for specified drugs currently listed in prison rules, in particular in schedule 2 of the Prison Rules 1999 and Young Offender Institution Rules 2000. The substances currently listed in schedule 2 of the respective prison rules all fall under the definitions of psychoactive substances, prescription-only medicines and pharmacy medicines so are no longer required to be separately specified in prison rules. However, in future it is possible that prisoners will misuse substances which do not fall within any of these definitions. Consequently, the Secretary of State continues to require the power to specify substances in prison rules made under section 47 of the 1952 Act, which will fall under the definition of specified substances in section 16A of the 1952 Act. However, section 47(3A) requires amendment so that it reflects the wider categories of substances that can be tested for under section 16A of the 1952 Act so that substances cannot be specified in prison rules if they fall within this broader category of substances. Therefore, clause 2(1) amends subsection (3A) to section 47 of the Prison Act 1952 so that rules made under that section

may specify any substance or product, which is not a controlled drug, psychoactive substance, prescription-only medicine or pharmacy medicine in relation to which prisoners may be required to provide a sample for drug testing under s16A of the 1952 Act. The only change to the rule making power under section 47(3A) of the 1952 Act is to provide that psychoactive substances, prescription-only medicines or pharmacy medicines cannot be “specified substances” as well as controlled drugs, as is the case under the current drafting of section 47(3A).

Justification for the power

6. There are no substantive changes to the power in section 47(3A). The changes made by clause 2(1) are simply for consistency so that substances cannot be both a specified substance and a controlled drug, psychoactive substance, prescription-only medicine or pharmacy medicine. This maintains the approach currently in section 47(3A) of the 1952 Act which provides that a substance cannot be both a specified drug and a controlled drug. The change to section 47(3A) is necessary so that it aligns with the amended drafting of section 16A of the 1952 Act. Without this change, it would be possible for a substance to be both a specified substance and a psychoactive substance, prescription-only medicine or pharmacy medicine. Whilst this would not change the powers to test for the relevant substance, it may cause confusion to those wishing to understand the exact scope of prison drug testing powers.

Justification for the procedure

7. The amendment to the rule making power does not change the essential nature of the power; accordingly, the negative procedure is considered to continue to provide the appropriate level of parliamentary scrutiny.

Clause 2(2) – Consequential amendments

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations*

Parliamentary procedure: *Affirmative*

Context and Purpose

8. Clause 1 of the Bill amends the existing prisoner drug testing power in section 16A of the Prison Act 1952 so that prisoners can be tested for a broader and more comprehensive range of substances. The status quo position is that prisoners can be tested for controlled drugs under the Misuse of Drugs Act 1971 and any “specified drugs”, meaning particular substances that have been specified in the Prison Rules 1999 or Young Offender Institution Rules 2000 via statutory instrument.
9. The effect of clause 1 is that it will be possible to test prisoners for all psychoactive substances (as defined in the Psychoactive Substances Act 2016), all prescription only medicines and all pharmacy medicines, as well as any specified substances that have been specified in the Prison Rules 1999 or Young Offender Institution Rules 2000 via statutory instrument. Clause 1(5) outlines that the definitions which will be used in section 16A(3) of the Prison Act 1952 for the terms “prescription only medicines” and “pharmacy medicines” are derived from the Human Medicines Regulations 2012, which is owned by the Department for Health and Social Care.
10. Clause 2 makes a series of consequential amendments to the Prison Act 1952, the Prison Rules 1999 and the Young Offender Institution Rules 2000. Clause 2(2) sets out a new delegated power in section 16A(4) of the Prison Act 1952. This enables the Secretary of State to use regulations to make amendments to section 16A (testing prisoners for drugs, psychoactive substances and other substances) and section 47 (prison rules) of the Prison Act 1952 in consequence of the amendment or revocation of the Human Medicines Regulations 2012, or the making, amendment or revocation of any other subordinate legislation relating to human medicines.

Justification for taking the power

11. The purpose of this new delegated power is to ensure that, in the event that:
 - the Human Medicines Regulations 2012 are amended or revoked; or
 - other subordinate legislation which relates to human medicines is made, amended or revoked,sections 16A and 47 of the Prison Act 1952 can be amended in line, so that the terminology used in the Prison Act 1952 continues to accurately reflect the broader legal framework relating to human medicines.
12. The power is limited. The Prison Act 1952 could only be amended to the extent that the Secretary of State considers appropriate in consequence of an amendment to the Human Medicines Regulations 2012 or other subordinate legislation on the same topic. The only references to the Human Medicines Regulations 2012 to be inserted in the Prison Act 1952 are to define “medicinal product”, “prescription medicine” and “pharmacy medicine”. Therefore, there is no provision for an open-ended power to

make broader substantive changes to the drug testing power in section 16A or the rule making power under section 47 for other, unconnected, policy reasons.

13. There are already other powers in the Prison Act 1952 to amend the Act via affirmative order. For example, the power to amend List A or B which sets out items of contraband that it is illegal to convey into prison.

Justification for the procedure

14. Clause 2(2)(b), which would become new section 52(2C) of the Prison Act 1952, provides that any regulations made under the procedure in clause 2(2)(a) will be made subject to the affirmative resolution procedure. It is long-established practice that powers to amend primary legislation using secondary legislation should be made using the affirmative procedure to provide the appropriate level of Parliamentary scrutiny.
15. Use of the affirmative procedure is appropriate to allow both Houses to scrutinise and agree, amend or disagree with any proposed changes.

Clause 3(2) Commencement

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and Purpose

16. It is standard procedure to make provision for commencement by way of regulations unless commencement provision is made for a clause on the face of the Bill. It is also standard that no parliamentary procedure attaches to the regulation. Parliament has approved the provisions and the power enables the Secretary of State to bring them into force at convenient time if required.

Ministry of Justice

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