

APPROVED PREMISES (SUBSTANCE TESTING) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Approved Premises (Substance Testing) Bill as brought from the House of Commons on 24 January 2022 (HL Bill 100).

- These Explanatory Notes have been prepared by the Ministry of Justice with the consent of Baroness Sater, the Peer in Charge of the Bill, in order to assist the reader of the Bill and to help inform debate on 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 provide a clear statutory framework for Approved Premises in England and Wales to test for the use of illicit substances by residents. Approved Premises provide temporary accommodation for bailees and the highest risk offenders in the community subject to supervision or rehabilitation. The Bill provides staff in Her Majesty's Prison and Probation Service (HMPPS) and other agencies with information to understand the full extent and nature of substance misuse within Approved Premises, while allowing Offender Managers to take targeted and appropriate action to support residents to engage with treatment and prevent their reoffending.
- 2 The Bill makes provision for testing residents in Approved Premises for controlled drugs, psychoactive substances and prescription only medicines. The Bill also contains an express power to test, on an anonymised basis, samples provided by those residents in order to better understand the prevalence of substances in Approved Premises.

Policy background

- 3 Approved Premises exist to ensure that bailees and offenders with the highest risk and most complex needs receive additional residential supervision in the community and additional rehabilitative support following release from custody. As part of ensuring Approved Premises are drug-free and safe, residents are presently drug tested if requested by staff. Such drug testing is provided for in the "house rules" of the Approved Premises which each resident is required to accept as a condition of their residence. Those house rules are made in accordance with Regulation 6 of the Offender Management Act 2007 (Approved Premises) Regulations 2014 (the 2014 Regulations).

Framework for testing illicit substances

- 4 While that provides a basis for drug testing, it does not set out a comprehensive statutory framework for the testing of illicit substances, the scope of substances which may be tested or the types of samples that may be taken. The framework provided for by this Bill intends to provide that statutory framework to allow Approved Premises and HMPPS to
 - respond effectively and flexibly to changing patterns of drug misuse;
 - improve identification of residents misusing substances to enable robust and appropriate referrals into treatment together with the development of appropriate targeted care planning;
 - better identify elevating or decreasing risk of serious harm to the public based on a resident's drug misuse; and
 - support the development of a comprehensive drug strategy and build a body of evidence on drug misuse within the resident cohort.

Changes to patterns of drug misuse

- 5 Patterns of drug misuse in both custody and the community are changing. These changes reflect new products on the drug market including increased prevalence of psychoactive substances, as well as increased levels of prescription drugs being misused to create sometimes lethal levels of toxicity. Drug testing technology has developed significantly in recent years and is now becoming more widely available and affordable. It is now possible to test simultaneously for a wide range of drugs. The changes to drug testing in this Bill seek to

build on the power of new technology to enable an approach for identifying and responding to drug misuse trends within the custodial and community environment, thereby facilitating continuity of support and intervention.

- 6 Equipping Approved Premises with clear powers to test residents for a wider range of drugs, including prescription medicines, improves the ability to identify the misuse of substances. For those for whom escalating drug-misuse is directly linked to their offending and risk of harm to the public, improved identification of a range of substances will allow Approved Premises to take appropriate action. This will allow for the identification of those who need support to access appropriate community treatment services and will also enable the provision of more effective continuity in care at an individual level.

Psychoactive substances and prescription medicines

- 7 In recent years, psychoactive substances have become much more prevalent within the illicit economy in Approved Premises. Alongside psychoactive substances, prescription medicines are also abused by some residents and can play a similar role in the illicit economy. Some residents may also 'bully' other residents for those prescription medicines they have been genuinely prescribed for medical reasons.

Legal background

- 8 Section 13 of the Offender Management Act 2007 (the 2007 Act) makes provision for the Secretary of State to approve premises, to be known as "Approved Premises", in which accommodation is provided for persons granted bail in criminal proceedings (within the meaning of the Bail Act 1976) and for, or in connection with, the supervision or rehabilitation of persons convicted of offences (for instance, those on licence or under community or suspended sentences). The Secretary of State may make regulations for the regulation, management and inspection of Approved Premises.
- 9 In exercise of that power the Secretary of State has made the 2014 Regulations. Regulation 6(1)(c) provides that a provider of Approved Premises must prepare house rules for those Approved Premises, governing the conduct of residents, which must comply with any requirements of the Secretary of State as to the content of such rules.
- 10 Section 2 of the Misuse of Drugs Act 1971 defines "controlled drug" as any substance or product specified in Part I, II or III of Schedule 2 to that Act or in a temporary class drug order as a drug subject to temporary control, in accordance with the provisions of that Act.
- 11 Section 2 of the Psychoactive Substances Act 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.
- 12 Regulation 2(1) in the Human Medicines Regulations 2012 defines "medicinal product" and Regulation 5(3) of those Regulations defines "prescription only medicine".

Territorial extent and application

- 13 Clause 2(1) sets out the extent of the provisions in the Bill. The provisions of the Bill extend to England and Wales only.
- 14 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: Substance testing of residents in Approved Premises

- 15 Clause 1 makes provision for substance testing and prevalence testing through amendments to the Offender Management Act 2007.
- 16 Clause 1(3) inserts a new section 13A into the 2007 Act.
- 17 Subsection (1) of that new section provides the manager of an Approved Premises may give an authorisation that sets out when the express power to drug test residents may be exercised and that such authorisation is in force. Subsection (2) contains that express power, providing that in accordance with any authorisation given, a member of Approved Premises staff may require a resident provide a sample of urine for the purpose of ascertaining whether the resident has in their body a “controlled drug”, “prescription only medicine” or “psychoactive substance”. Subsection (3) provides that instead or in addition to a sample of urine, a sample of another description may be required, provided that is not an “intimate sample”, such as saliva.
- 18 Subsection (4) makes provision for anonymised prevalence testing by the Secretary of State of samples provided pursuant to subsection (2) or (3) or voluntarily, which can be used to test for “controlled drugs”, “medicinal products” and “psychoactive substances”.
- 19 Subsections (5) and (6) provide that in giving an authorisation or exercising the drug testing power, Approved Premises managers and members of staff (respectively) must have regard to any guidance issued by the Secretary of State on such matters.
- 20 Subsection (7) defines terms used within that section 13A. Those include “controlled drug”, defined by reference to the Misuse of Drugs Act 1971, “intimate sample” by reference to Part 5 of the Police and Criminal Evidence Act 1984, “medicinal product” and “prescription only medicine” by reference to the Human Medicines Regulations 2012 and “psychoactive substance” by reference to the Psychoactive Substances Act 2016.
- 21 Subsection (8) 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 circumstance, the subsection confers a regulation making power for the Secretary of State to make such consequential changes as are necessary to section 13A of the 2007 Act. Subsection (9) clarifies that “subordinate legislation” has the same meaning as in the Interpretation Act 1978.
- 22 Clause 1(4) makes provision, through amendment to section 36 (orders and regulations) of the 2007 Act, for any regulations made under the new section 13A(8) to be subject to the affirmative resolution procedure in Parliament.

Clause 2: Final Provisions

- 23 This Clause confirms the short title of the Bill and makes provision for its coming into force. Clause 2(1) provides that the Bill extends to England and Wales only.

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Commencement

- 24 Clause 2(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

- 25 To illustrate the nature of the costs involved, during the 2019/20 financial year, spend on drug testing kits (including costs associated with laboratory testing, such as screening and confirmatory test costs) in Approved Premises was approximately £300,000. 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 the identification of and response to changes in patterns of drug misuse by those in the criminal justice system, using current and future innovative solutions. The estimated costs to carry out the enhanced testing regime brought in under this Bill on Approved Premise residents is approximately £1.2 million per year.

Parliamentary approval for financial costs or for charges imposed

- 26 The additional expenditure arising from the Bill requires a Money Resolution to be passed. The House of Commons has agreed on 29 November 2021 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.

Compatibility with the European Convention on Human Rights

- 27 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.
- 28 The Ministry of Justice has, nevertheless, considered the question of compatibility and has concluded that while Article 8 ECHR may be engaged the Bill is nevertheless compatible with the ECHR.
- 29 Possible interference with Article 8 rights arises from the new express power to take a urine or other sample from Approved Premises residents which may represent an interference with that person's physical integrity.
- 30 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) ECHR, namely the prevention of crime and disorder and public safety and the protection of health.
- 31 Any interference would be a proportionate means of achieving those aims, given the importance of the aims pursued. Moreover, the Bill makes provision for important safeguards regarding the new power. Those safeguards include:
- a requirement for the Approved Premises manager to authorise the exercise of the power by staff, and for staff to only exercise the power in the circumstances and manner specified by that authorisation;

- a requirement for managers to have regard to guidance issued by the Secretary of State when giving an authorisation. That guidance is expected to be on similar lines to the existing guidance, which sets out when testing should take place on suspicion or risk grounds, with additional guidance for testing to be conducted once on a resident's entry to the Approved Premises and once more during their residency;
 - a requirement for staff to have regard to guidance published by the Secretary of State regarding the exercise of the drug testing power. That guidance is also expected to be on similar lines to the existing guidance on drug testing in Approved Premises, which contains detailed procedures and instructions to ensure the integrity of the testing and that accurate records are kept;
 - new published policy guidance would be introduced containing safeguards covering the handling of health-related data that is obtained as a result of the testing programme.
- 32 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 on protection from discrimination.
- 33 The main consideration in relation to Article 14 is the possibility that inclusion within the drug testing programme of provision to test for prescription only medicines may have an adverse impact for disabled and elderly residents who may legitimately require these substances.
- 34 However, the following protections are in place to ensure that the potential impact does not arise:
- a singular positive drug test result does not automatically lead to punitive action. Rather it forms part of the evidence relied on in recommending breach or recall decisions. Offender Managers will also use their professional judgement as well as any other relevant evidence;
 - where a positive drug test is consistent with the prescribed medicines a resident is taking, no further action will be taken;
 - where a negative drug tests demonstrates that residents are not taking the medicine they have been prescribed, it is expected they would be supported to ensure that they are not being bullied or having their medicines stolen; and
 - the broadest range of drugs tested will be during prevalence testing which are anonymised samples and residents will not be identifiable in this process, therefore no action can be taken.
- 35 In relation to the power to conduct prevalence testing, this does not require additional resident samples to be taken. Consequently, there is no further potential interference with a resident'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 residents, and no adverse outcome for any individual resident can follow.

Related documents

- 36 There are no related documents relevant to the Bill.

Annex A – Territorial extent and application in the United Kingdom

Subject matter and legislative competence of devolved legislatures

- 37 The Bill extends to England and Wales only.
- 38 A corresponding provision making changes to the drug testing framework for Approved Premises would not be within the competence of Senedd Cymru.

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