

Mandatory Drug Testing

What is my position legally?

Following an amendment to the Prisons Act in 1994 it became an offence against prison discipline to:

- administer a controlled drug; or
- fail to prevent the administration of a controlled drug.

The rules also created statutory defences to these offences:

- the controlled drug was lawfully in your possession – i.e. a prescription;
- the drug was administered without consent or under duress where it was unreasonable to resist;
- there was no reason to suspect or know that the drug was being administered.

Who can be tested?

All prisoners (whether on remand or convicted) can be tested. There are three main procedures for selecting people for testing:

- computer generated random tests are carried out on 10% of the prison population each month;
- targeted testing if there is a reasonable suspicion that drugs have been used;
- risk assessment testing in relation to privileges such as temporary release or transfer to an open prison.

Can I refuse to be tested?

Any refusal will be treated as disobeying a lawful order and a charge can be made under prison rule 51(22). Punishments for refusing are usually as severe as for a positive test.

How should the test be carried out?

You must be given the reasons why you are being tested and searched before being asked to provide a urine sample. Whilst providing a sample you should not be in the direct view of a prison officer. Indirect observation is however considered appropriate. You should not be required to provide a sample in the sight of a person of the opposite sex.

If you cannot provide a sample you may be kept segregated for up to five hours and given controlled amounts of water to drink (a 1/3 of a pint of water at the start of each hour). If you still fail to provide a sample it is likely you will be charged with disobeying a lawful order.

Once the sample has been provided it is divided into two A and B sample tubes which should be sealed in your presence. You should be asked to sign the seals. Tube A will then be sent to a laboratory contracted by the Prison Service for analysis (currently Medscreen Ltd.) Tube B is your part of the sample and is stored securely in a fridge with its seal intact for 9 months in case it is required for your own independent analysis.

What then?

If the screening test proves negative you should be notified accordingly. If the screening test proves positive you will be charged accordingly. If you enter any other plea than a definite “guilty” the adjudication must be adjourned to request a confirmation test, which is more accurate than a screening test. The confirmation test provides results which are deemed to be ‘beyond reasonable doubt’. If the confirmation test proves negative the charge will be dropped.

How can I obtain an independent test?

If you request an independent analysis you or your solicitor must follow the procedure set out in Appendix 17 to PSO 3601 which explains how to obtain independent analysis.

Once you or your representative has found a laboratory to carry out your test a letter must be sent to the Prison Service asking them to authorise the release of your sample. You must do this within two weeks. You then have six weeks from the adjournment of the adjudication to present your evidence, otherwise the adjudication may be reconvened and concluded on the available evidence.

Can anything interfere with the test?

Some medication can give positive results. Many pain killers and anti-depressants for example contain controlled drugs. You will be asked to sign a consent form to enable the medical officer to confirm whether you have been prescribed any medication.

How often can I be tested?

You should only be tested for periods during which you have been in continuous prison custody or released on temporary licence. After you have given a positive sample there is a minimum waiting period for each drug before you can be tested again. This period depends on how long the drug stays in your system and so it will be 30 days for cannabis, 7 days for heroin, 3 days for LSD etc.

Can I cross-examine the laboratory technician?

You cannot normally be found guilty at an adjudication solely on hearsay evidence. The written evidence of the laboratory technician is hearsay but the courts have accepted that you can be found guilty on the basis of the report from the lab. However if you dispute the laboratory's findings or if you are concerned about the chain of custody of your sample, you can still ask for the technician to be called to the hearing to give evidence although this request will rarely be granted.

What punishment can be awarded?

You can receive the normal range of disciplinary punishments (up to 42 additional days). If you test positive for more than one drug, you can face a charge for each drug found in your system. The punishments should match the seriousness of the offence and, for example, repeatedly failing a test will warrant a more severe punishment. Class A drugs (heroin, cocaine etc.) will be treated more severely than class C drugs (normally cannabis.)

Can I appeal?

You can appeal against a finding of guilt if the adjudication was carried out by a Governor, Director or Controller by submitting a blue form ADJ 1, which will be forwarded to the Briefing and Casework Unit in Prison Service Headquarters. You are entitled to obtain a copy of the written record of the hearing free of charge before making an appeal (Prison Service Order 2000, para 9.5). You can also seek legal advice and assistance with the appeals process.

If Headquarters uphold the adjudication, then you can make a complaint to the Prisons Ombudsman within one month of their reply.

You cannot appeal against a finding of guilt if your adjudication took place before an independent adjudicator, except by judicial review. You will only be able to ask the Senior District Judge that the punishment awarded be reviewed, within 14 days from the conclusion of such an adjudication.

In some cases, there may be grounds to apply for judicial review if some aspect of the testing procedure or adjudication was unlawful. You should always seek legal advice if you think this may apply.

Do MDTs breach the European Convention on Human Rights?

The European Convention prohibits inhuman or degrading treatment or punishment. Previous cases have shown that the European Court does **not** consider MDTs to amount to inhuman or degrading treatment. There may be individual cases where human rights have been breached but

the MDT programme as a whole would not be considered in breach of the Convention.

Relevant Case Summaries.

R v the Secretary of State for the Home Department ex parte Russell (10/7/02 HC)

The applicant refused a lawful order to attend a random MDT. Due to the volume of previous random tests he had disputed the randomness of the latest test and therefore the lawfulness of the order. The adjudicating governor argued that the challenge to the lawfulness of the order was not relevant and found against the applicant, punishing him with 14 additional days. Even though the Prison Service presented evidence at the JR which demonstrated that the applicant's test had been random, the judge found that the governor should have investigated and established whether the test was random and then made those findings available to the applicant before proceeding with the adjudication. Because of this failure on the adjudicating governor's part the judge quashed the adjudication – and the Prison Service confirmed that in the future the details of the random selection process would be made available to any prisoner selected for an MDT.

A similar matter was investigated by the Prisons and Probation Ombudsman in March 2002

'A' was targeted for an MDT on grounds of "reasonable suspicion" (indicated on the notification form by a tick in the appropriate box) and then charged with disobeying a lawful order by refusing to provide a urine sample. His reason for the refusal was that he had not been given any specific information as to the nature of the "reasonable suspicion." Explaining that such information was "sensitive" and could not be divulged the adjudicating governor found against 'A'. However citing a "read-across from the Russell case" the Ombudsman ruled that a simple tick-box on a form indicating that reasonable suspicion was the reason for the MDT was not a sufficient explanation – and that "some evidence was necessary" so that the lawfulness of the order to cooperate with the MDT could be explored before proceeding with the adjudication. Accordingly the Ombudsman recommended that the finding of guilt should be quashed and the punishment remitted.

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