

Mandatory Drug Testing

Legal framework

Under the Prison Act 1952 16A and B and the Prisons (Substance Testing Act) 2021 any prison officer can require a prisoner to provide a urine (and/or other non-intimate) sample to look for traces of any controlled drug, pharmacy medicine, prescription medicine, psychoactive substance or specified substance. Prisoners can also be required to provide a breath test for alcohol. Anonymised test results can be used to assess the prevalence of substances in the prison population.

Can I refuse to be tested?

Refusal or failure to provide a sample can result in a charge for disobeying a lawful order under Rule 51(22). Adulterating a sample can result in charges under 51(6) for obstructing an officer or other person working in the prison. Punishments for refusing are similar to that of a positive test.

Full details of MDT procedures are set out in **PSO 3601** 'Mandatory Drug Testing'. The adjudication process for MDTs is set out in **PSI 05/2018**. However these have not yet been updated to take account of the amendments to the Prison Act 1952 16A and B made by the 2021 Act.

Who can be tested?

All prisoners (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.

Generating random tests

In the case of *R v the SSHD ex parte Russell (10/7/02 HC)*, the applicant, refusing an order to attend a random MDT, disputed the randomness of the latest test and the lawfulness of the order due to the volume of previous random tests. The judge found that the governor should have investigated and established whether the test was random and made those findings available to the applicant before proceeding with the adjudication. The failure to do this resulted in the adjudication being quashed. The Prison Service have confirmed that the details of the random selection process will now be made available to any prisoner selected for an MDT. A similar matter was investigated by the PPO in 2002 and the complaint upheld.

How should the test be carried out?

You must be given the reasons why you are being tested and be searched before providing 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 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. 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 happens when the test is positive?

If the screening test proves negative you should be notified. If the screening test proves positive you will be charged. If you enter any other plea than a definite "guilty" the adjudication must then be adjourned for a confirmation test, which is more accurate than a screening test. If an MDT test result indicates opiates or amphetamines a confirmation test will be requested regardless of plea. The confirmation test provides results which are deemed to be 'beyond reasonable doubt'. If the confirmation test proves negative the charge will be dropped.

Charges following a positive test

If a prisoner tests positive for a controlled drug they can be charged under Rule 51 (9) '*administers a controlled drug to himself or fails to prevent the administration of a controlled drug to him by another person (but subject to rule 52)*'.

It is a defence to a charge under Rule 51 (9) if:

- the controlled drug was lawfully in your possession – ie 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

Where the substance detected is not a controlled drug, charges may be brought under 51(12) for being in possession of an unauthorised article.

Detection of alcohol could lead to charges for being intoxicated under 51 (10) or knowingly consuming an alcoholic beverage under 51 (11).

What are the Cut Off Values?

The most up-to-date cut offs applied in MDT testing are listed in the table below. Tramadol has recently replaced Barbiturates in the MDT panel.

Drug	Screening ng/ml	Confirmation ng/ml
Amphetamines	1000	250
NPS / Spice	5	5
Benzodiazepines	200	200
Buprenorphine	10	2
Cannabinoids	50	15
Cocaine metabolite	300	150
Tramadol	200	100
Methadone	300	300
Opiates	300	300
6-Monoacetylmorphine	2	1

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 have 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 adjudication adjournment 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, 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 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. For example, 30 days for cannabis, 5 days for heroin, 3 days for LSD.

Can I cross-examine the laboratory technician?

In general, you cannot be found guilty at an adjudication solely on hearsay evidence. However,

although the written evidence of the laboratory technician is hearsay, the courts have accepted that you can be found guilty on the basis of the report from the lab. This means that MDT confirmation test result reports are accepted as evidence, even though the laboratory scientist who performed the test is not present at the hearing.

Will it be referred to an Independent Adjudicator?

Normally, unless sufficiently serious, MDT failures or other drug-related offences should not automatically be referred to an IA (PSI 05/2018 p31). MDT refusals and drug smuggling will normally be referred.

What punishment can be given?

You can receive the normal range of disciplinary punishments (up to 42 additional days if your case is heard by an IA). If you test positive for more than one drug, you can face a charge for each drug. The punishments should match the seriousness of the offence and, for example, repeatedly failing a test will warrant a more severe punishment.

Appeals against governors' adjudications

You can appeal against a finding of guilt at an internal adjudication by submitting form DIS8 within six weeks of completion of the hearing. The prison must forward this to the Prisoner Casework unit. They will then consider the review request and make a recommendation to the Prison Group Director who will then decide the appeal. The reviewer may:

- uphold the adjudicator's decision;
- reduce the punishment to something less severe;
- quash the finding of guilt and punishment.

If your appeal is unsuccessful, you can complain to the PPO within three months. The PPO can make a recommendation to NOMS which, although not binding, will usually be accepted. In very limited circumstances you could apply for judicial review of a governor's adjudication, if an aspect of the adjudication was unlawful. **Please see our self-help toolkit on governors' adjudications.**

Appeals against independent adjudications

To appeal against the **punishment** given by an IA you should complete a form IA4 (not DIS8) and submit it to the governor within 14 days of the end of the hearing. Appealing a finding of guilt can only be done by means of judicial review. In some cases, there may be grounds for judicial review if some aspect of the procedure or adjudication was unlawful. You should seek legal advice if you think this may apply.

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