

# insideinformation – fact sheet

## MDT & Drug Testing

Information courtesy of Rajan Mawji of Harrison Bunday Solicitors Leeds

### Legal position

Section 16A of the Prison Act 1952, as amended by Section 151 of the Criminal Justice and Public Order Act 1994 made it an offence against prison discipline to:

- Administer a controlled drug to himself, or:
- Fail to prevent the administration of a controlled drug by another.

A prisoner maybe required to provide a sample of urine, saliva, sweat or non-pubic hair (but not blood or semen), to check for the use of a controlled drug.

The relevant regulations are contained in:

- PSO 3601 Mandatory Drugs Testing.
- PSO 3605 Procedure for independent analysis of MDT samples.
- PSO 3610 Measures to deal with prisoners and their visitors who smuggle drugs.
- PSO 3620 Voluntary Drugs Testing.

Prison Rule 52 also created statutory defences:

- Proper medication – The controlled drug was, prior to its administration, lawfully in his possession. i.e. prescribed. Many painkillers contain controlled drugs (opiates), and you may be asked to sign a consent form to allow the medical officer to verify.
- Accidentally took drug. – The controlled drug was administered to or by him in which he did not know and had no reason to suspect that it was.
- Forced to take drug – The controlled drug was administered by him under duress or without his consent and it was not reasonable for him to have resisted.

### Who can be tested?

All categories of prisoners are liable for testing:

- Remanded
- Convicted.
- Immigration detainees.

### What if I refuse?

You could be charged under Rule 51 (22) for disobeying a lawful order. This is viewed as serious as returning a positive drug test. There may be some circumstances for exemption from MDT:

- Health grounds – on the basis that you are unfit to attend the suite.
- Dangerous prisoner – On the basis that you are a danger to yourself, staff or other prisoners.
- Pregnant women - but not automatic and will be on health grounds. They should not be confined and allowed to provide the sample in their own cells.
- Menstruation - Not an acceptable defence for not providing sample.
- Religious and cultural grounds. – Considered on own merits by the adjudicator, but not an automatic reason for refusing.

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### Types of Drug testing

Prisoners must be informed of the statutory authority for the drugs test and the reason for the MDT. Testing can be required for one of the following reasons:

- Random Test – Prisons with over 400 inmates must randomly select 5 % of the population for testing each month.
- Reasonable suspicion – prisoners are selected if there is reasonable suspicion that the prisoner is using drugs.
- Risk assessment - If the prisoner is being considered for a privilege such as ROTL, where a high degree of trust is required.
- Frequent Drug Testing – If they have a previous history of drug use.
- Reception Testing – On reception to the prison on a routine or occasional basis.

### Sample collection

All samples must be collected by the prison and despatched to the laboratory in accordance with the chain of custody procedures. The important ones are summarised:

- The entire process must be completed before another prisoner is tested.
- The area must be uncontaminated, e.g. free of cleaning fluids etc.
- The testing kit must be opened in front of the prisoner.
- Paragraph 7 above complied with.
- If the prisoner cannot provide a sample immediately they can be confined for up to 5 hours.
- The prisoner must be provided with at least 1/3 pint of water at the beginning of each hour.
- Chain of custody record kept.
- Whilst providing sample you must not be in direct view of the officer, however, indirect observation is permitted. The officer must not be of the opposite sex.
- Sample must be at least 35 millilitres and it is then divided into a sample A and sample B. They must be sealed in your presence and asked to sign then, in accordance with chapter 6 of PSO 3601.
- Sample A is sent to the prison contracted laboratory for testing (after a positive results following initial screening the charge must be laid within 48hrs )and sample B is stored in a fridge, with its seal intact, for 9 months in case you require it for independent analysis.
- A confirmation test must be requested for all opiates and amphetamines. Independent analysis.

Sample B can be requested by you or your legal representative and follow the procedure outlined in Appendix 17 to PSO3610.

- This is at the prisoners own expense.
- Must be requested within 2 weeks of the test and completed within 6 weeks of the adjournment or the adjudication may proceed on the available evidence.

### Frequency of Drug tests

After you have given a positive drug test there are minimum waiting periods before you can be tested again, this is shown at table 8.1 of PSO3601.

- 30days for cannabis.
- 7 days for heroin.
- 3 days for LSD

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### Punishments

The charge must be proved beyond reasonable doubt. All the range of disciplinary punishments are available (including up to 42 additional days). If more than one drug is found you could face a charge for each drug. The punishments should be proportionate to the type of drug found, for e.g., Class A drugs will receive a more severe punishment than Class B or C drugs.

### Appeal

Any guilty finding from an adjudication carried out by a governor, director or controller of a is made on an ADJ1 form, which will be sent to the briefing and casework unit or Directorate of High Security prisons as appropriate. You should request all the relevant documentation, such as the charge sheet and the record of the hearing before preparing your appeal. This is available free of charge. If you are unhappy with their decision you can take your appeal to the prison ombudsman, within one month of the decision. If the finding of guilt was made by an independent adjudicator the only way you can challenge the decision is by way of Judicial review. You should seek legal advice if you think this applies.

### Human Rights

The MDT programme itself is not considered to contravene article 3, degrading or inhumane treatment. However there may be some circumstances in which there could be a basis of challenge on these grounds. Some of the examples are:

- Giving sample in front of an officer of the opposite sex.
- If suffering from "shy bladder syndrome," and
- Privacy is not given.

### Relevant case law

R v Governor of Swaleside, ex p Wynter

(1998) – Court held that although screening and confirmation reports are hearsay there was no obligation to call the scientist because it was evidence of the highest quality.

R v Home Secretary, ex p Russell (2000) – Court held that the prison must prove randomness and sufficient evidence of the selection procedure so that the prisoner can decide whether or not to comply with the order.

### IMPORTANT NOTICE

Information is given on a strictly 'without-liability' basis, and should be considered for use as guidance only. If you propose taking further action based upon this information you are strongly advised to take further and more specific legal advice before doing so.

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