DRUG TESTING

Legal Framework

The Powers to require prisoners to provide a sample for drug testing purposes were introduced as part of the Criminal Justice and Public Order Act 1994.

PSO3601 governs the drug testing within prison and this lengthy PSO should be freely available in your library.

There are three main types of drug testing in operation within prison establishments -
1. Testing for clinical purposes (can only be carried out by Healthcare staff with the informed consent of the prisoner)
2. Voluntary drug testing (often undertaken as part of a voluntary agreement or compact with the prisoner) and
3. Mandatory Drug testing (carried out under the terms of Section 16A of the Prison Act 1952 and Prison Rule 50 (YOI Rule 53); disciplinary action may result from a positive test (under Prison Rule 51(9) or YOI Rule 55(10));)

Prison rules covering arrangements for mandatory drug testing, together with a disciplinary offence of administering a controlled drug, came into force on 9 January 1995. Mandatory drug tests can be used in a number of ways, including on reasonable suspicion of drug misuse, as part of a random programme of testing, or prior to certain risk-related activities such as temporary release.

Certain conditions must be followed if a requirement to provide a sample for drug testing purposes is to be considered lawful.

Before the sample is taken a prisoner shall be informed, as far as is reasonably practicable:

- that the sample is required under Section 16A of the Prison Act 1952 [Prison Rule 50(3)a/YOI Rule 53(3)a];
- of the reason why a sample is required (e.g. random test, on-suspicion test, etc);
- of the consequences he/she may face should the sample show the presence of a controlled drug in his/her body;
- that refusal to provide a sample may lead to disciplinary proceedings being brought against him
- that if they are unable to provide a sample of urine when told to do so they may be confined for up to five hours to facilitate the process

It is necessary to inform prisoners of points one and two above before being escorted to the MDT unit. Full details of MDT procedures are set out in PSO 3601.
When will I be tested?
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.

What if a Prisoner refuses to provide a sample for an MDT?
There may be some circumstances for exemption from MDT:
• 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.

You could however be charged under RULE 51 (22) for disobeying a lawful order if you do not provide a sample. This is viewed as serious as returning a positive drug test.

If a positive MDT is provided a prisoner can be charged under Rule 51(9) (YOI Rule 55(10)). Rule 52 (YOI Rule 56) contains the express defences to Rule 51(9) (YOI Rule 55(10)):
• proper medication
• tricked or accidentally took drug
• forced to take drug

PSI 47/2011 clearly states that this charge should only be laid following a positive result from a Mandatory Drug Test (MDT) (not a compact or voluntary drug test failure), with separate charges being laid for each controlled drug indicated in the test result.

The offence is ‘discovered’, and the 48 hours time limit for charging normally begins, when the MDT result arrives at the establishment from the laboratory (not when the fax or email is first noticed). But if the MDT test result indicates that an opiate or amphetamine has been taken, and the prisoner has been receiving prescribed medication, the Governor/Director may delay charging until the result of a confirmation test is received. If the confirmation test indicates that a different drug to that originally identified was taken, the original charge will be dismissed and a new charge, naming the drug that the test has now identified, laid within 48 hours of the confirmation test being received. If the confirmation test indicates that a non-controlled drug, such as medication (not prescribed to the accused prisoner), rather than a controlled drug was taken, a charge of unauthorised possession may be appropriate (since the prisoner will have previously been in possession of the medication when it was taken) (PSI 47/2011)

Punishments
The charge must be proved beyond reasonable doubt. All the range of disciplinary punishments are available (including up to 42 additional days).

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.
How often can I be tested?
Table 8.1 of PSO3601 shows that there are minimum waiting periods before you can be tested again after providing positive test result:

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

The European Convention on Human Rights (ECHR) Provided that the requirements set out above and in PSO 3601 are followed, mandatory drug tests are lawful under domestic law. The best defence to a challenge under the provisions of the Human Rights Act 1998 is to ensure that MDT processes and adjudications procedures are carried out strictly in accordance with the guidance.

However there maybe some circumstances in which there could be a basis of challenge on these grounds, for example:

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

Can I be drug tested on licence?
The aims of the licence period are to protect the public, to prevent re-offending and to secure the successful re-integration of the offender into the community. Licence conditions should be preventative as opposed to punitive and must be proportionate, reasonable and necessary. It is therefore clear that some prisoners, dependant on their index offence and reasons for committing said offence, may have drug testing as a licence condition. Each case would be determined on its own facts.