EXPLANATORY MEMORANDUM TO

THE CRIMINAL JUSTICE (SPECIFIED CLASS B DRUGS) ORDER 2015

2015 No. 9

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order specifies particular Class B drugs for which a person released from a custodial sentence can be compulsorily tested under a drug testing requirement imposed as part of a licence period or post sentence supervision period. These are the two forms of compulsory supervision to which offenders can be subject after release from custody. The Class B drugs specified by the Order are cannabis and cannabis resin, and amphetamine.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Section 64 of the Criminal Justice and Court Services Act 2000 ("the CJCSA 2000") provides a power for the Secretary of State to require offenders aged 18 or over released from prison on licence to be tested for specified Class A drugs. Only offenders who have been convicted of a specified trigger offence can have the testing requirement imposed upon them. Section 70 of the CJCSA 2000 provides a power for the Secretary of State to specify particular Class A drugs by order.

4.2 The Class A drugs for which a person can be compulsorily tested under the aforementioned circumstances are specified in the Criminal Justice (Specified Class A Drugs) Order 2001 (S.I. 2001/1816). The Class A drugs specified by that Order are cocaine and diamorphine.

4.3 The Offender Rehabilitation Act 2014 ("the ORA 2014") makes a number of changes to these existing powers to compulsorily test offenders released from custody for drugs. Section 11 of the ORA 2014 amends section 64 of the CJCSA 2000 to extend the scope of testing to specified Class B drugs as well as specified Class A drugs. It also removes the condition that an offender must have committed a specified trigger offence in order to have a drug testing requirement imposed as part of a licence. Instead, it substitutes a two-limbed test such that a requirement can only be imposed if the Secretary of State is satisfied that:

a) The misuse of a specified Class A or B drug by the offender caused or contributed to a past offence or is likely to cause or contribute to further offending; and
b) The offender is dependent on, or has a propensity to misuse, a specified Class A or Class B drug.

4.4 Section 11 of the ORA 2014 also amends section 70 of the CJCSA 2000 to provide that the Secretary of State can specify both Class A and Class B drugs to be tested for.

4.5 Section 2 of the ORA 2014 inserts a new section 256AA into the Criminal Justice Act 2003 ("the CJA 2003") to create a new post sentence supervision period that applies to relevant offenders released from an immediate custodial sentence of more than 1 day or less than 2 year. The post sentence supervision period is added to the licence period the offender serves after release from custody, so that together the two make a total of 12 months subject to one form of supervision or another in the community. Offenders subject to a post sentence supervision period can be required to comply with a number of supervision requirements.

4.6 Schedule 1 to the ORA 2014 inserts a new section 256D into the CJA 2003 to create a drug testing requirement that can be imposed as part of a post sentence supervision period. As with the amended section 64 of the CJCSA 2000, this requirement involves compulsory testing for specified Class A and Class B drugs. Section 256D provides that the power in section 70 of the CJSCA 2000 is to be used to specify what Class A and Class B drugs can be tested for as part of a requirement imposed under section 256D.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The provisions of the ORA 2014 are part of a wider series of reforms known as the Transforming Rehabilitation programme. The objectives of this programme are to:

- Open up delivery of probation services for low and medium-risk offenders to a range of rehabilitation provider across the public, voluntary and private sectors.
- Introduce new payment incentives to give providers flexibility to do what works, but only paying them in full for reductions in reoffending.

- Create a new public sector National Probation Service, supervising high-risk offenders and providing advice to courts.
- Extend statutory supervision after release from custody to the 45,000 offenders released every year from custodial sentences of less than 12 months.
- Introduce a nationwide 'through the prison gate' resettlement service, so that most offenders are given continuous support by one provider from custody into the community.

7.2 As a result of these reforms, from 1 June 2014 onwards responsibility for delivering probation services in England and Wales transferred to a single public sector National Probation Service (NPS), managing the highest risk offenders in the community, and 21 Community Rehabilitation Companies (CRCs), supervising low and medium risk offenders. The 21 CRCs are at present in public ownership. On 18 December 2014, the Secretary of State for Justice announced successful bidders to take over ownership of the CRCs. Transfer of ownership is planned to take place on 1 February 2015.

7.3 As part of the reforms set out above, the ORA 2014 makes changes to the sentencing framework to extend statutory supervision to offenders released from short custodial sentences. It also makes a number of other changes to the sentencing framework to support more effective rehabilitation of offenders. These include the changes described at paragraphs 4.3 to 4.5 above to extend the scope for compulsory drug testing after release to a wider group of offenders, and to permit testing both for specified Class A and specified Class B drugs.

7.4 The purpose of post-release drug testing is to support an offender's rehabilitation. The requirement is a discretionary one, imposed by a prison governor when the offender is released on the advice of a member of probation staff. The requirement allows the member of probation staff supervising the offender after release to assess how the offender is complying with their licence conditions or post sentence supervision requirements. For example, the requirement can be used to test whether an offender's treatment is working in keeping them away from drugs. It can also test whether an offender is continuing to engage in behaviour that might increase their risk of reoffending. In both cases this can allow the offender's supervisor to change or step up the interventions the offender is receiving, in order to prevent them from reoffending.

7.5 The rationale for extending post-release drug testing to include Class B drugs is the prevalence amongst offenders of misuse of this Class of drugs and the potential link to an increased likelihood of reoffending. Drug use is common amongst offenders serving custodial sentences: a study conducted by the Ministry of Justice, the Surveying Prisoner Crime Reduction (SPCR) study, showed that 33% of prisoners serving custodial sentences of less than 12 months self-reported as

having a drug problem.[1] Around two-thirds (64%) of prisoners surveyed for the same study had ever used Class A drugs, and nearly three-quarters (74%) reported ever having used Class B and/or Class C drugs.

7.6 This study has also shown that drug use amongst prisoners is strongly associated with reconviction on release, with the rate of reconviction more than doubling for prisoners who reported using drugs in the four weeks before custody, compared with prisoners who had never used drugs. It is not just Class A drugs that are associated with higher reconviction rates. Offenders who used Class B and/or C drugs (but not Class A drugs) in the 4 weeks before imprisonment had a reconviction rate of 48%, compared to 30% for those had never used drugs.[2]

7.7 The decision to specify cannabis and cannabis resin and amphetamines as the Class B drugs for which relevant offenders can be tested has been informed by evidence about the prevalence of use of these drugs. Cannabis in particular was the most frequently reported drug in the SPCR, with 71% of prisoners reporting having ever used the drug. Of these prisoners, 77% reported using cannabis in the year before custody, and of these, 85% reported using it in the four weeks before custody. Use of amphetamines was less commonly reported; however 41% of prisoners reported having ever used amphetamines, and these were the next most commonly reported Class B drugs used after cannabis.[3]

7.8 Testing capability for both amphetamines and cannabis and cannabis resin already exists and some offenders are currently tested for these substances whilst in prison. The Order will allow for relevant offenders within the community to also be tested for the specified Class B drugs. The decision on which specified Class B drugs an offender should be tested for, together with the frequency of testing, will be at the discretion of the offender manager. Compliance with a drug testing requirement as part of a licence period or post sentence supervision period requires an offender to provide a sample for testing. Any refusal can result in a breach of the requirement. Positive tests for any of the specified Class B drugs result may also result in the breach of a "good behaviour" requirement of a licence or post sentence supervision period.

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[1] Surveying Prisoner Crime Reduction (SPCR) is a longitudinal cohort study of adult prisoners sentenced to between one month and four years in England and Wales in 2005 and 2006. Findings on drug use are published in 'Gender differences in substance misuse and mental health amongst prisoners' (MoJ, 2013): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220060/gender-substance-misuse-mental-health-prisoners.pdf

[2] Published in 'Compendium of re-offending statistics and analysis' (MoJ, 2010): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/199224/compendium-of-reoffending-statistics-and-analysis.pdf

[3] Published in 'Gender differences in substance misuse and mental health amongst prisoners' (MoJ, 2013): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220060/gender-substance-misuse-mental-health-prisoners.pdf

8. Consultation outcome

8.1 The Government consulted between December 2012 and February 2013 on its Transforming Rehabilitation proposals and published its response to the comments it received (*Transforming Rehabilitation: A Strategy for Reform: May 2013*). The drug testing provisions on the ORA 2014 were also subject to scrutiny and debate during the legislation's passage through Parliament. In addition, the decision on which Class B drugs to specify has been based on available evidence of drug misuse by prisoners. As a result, it was not considered necessary to undertake separate consultation for the purposes of drafting this Order.

9. Guidance

9.1 The National Offender Management Service has issued guidance, in the form of a national Probation Instruction, to both the NPS and CRCs on the operation of the drug testing requirement as part of a licence period or post sentence supervision period.[4]

10. Impact

10.1 The Order has no direct impact on business, charities or voluntary bodies.

10.2 The cost of delivering drug tests for offenders released from custody will fall to CRCs (in the case of low and medium-risk offenders) or the NPS (in the case of high-risk offenders). Successful bidders for CRCs include a range of public, private and voluntary organisations. Nineteen of the 21 contract areas will be led by new partnerships and joint ventures between private sector firms and charities, and six will be run with the involvement of a probation staff mutual. As drug testing requirements are discretionary, and only imposed on the basis of a recommendation of a member of probation staff to a prison governor, it will be a matter for CRCs to decide to what extent to make use of drug testing, and to fund appropriate provision of testing kits. The same applies to the NPS.

10.3 An Impact Assessment for the drug testing provisions in the ORA 2014 was prepared as part of the wider Impact Assessment for the legislation as a whole.[5]

10.4 As a result, no further Impact Assessment has been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

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[4] https://www.justice.gov.uk/downloads/offenders/probation-instructions/pi-30-2014-drug-appointment-testing.doc
[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208171/updated-rehabilitation-bill-impact-assessment.pdf

12. Monitoring & review

12.1 Use and delivery of drug testing requirements by the NPS and CRCs will be monitored by the National Offender Management Service through collection of management information from probation case management systems and through audit of delivery of rehabilitative services.

13. Contact

13.1 Dora Addei at the Ministry of Justice (Tel: 020 3334 3555 or email: Dora.Addei@justice.gsi.gov.uk) can answer any queries regarding the instrument.