EXPLANATORY MEMORANDUM TO

THE PRISON AND YOUNG OFFENDER INSTITUTION (AMENDMENT) (NO. 2) RULES 2018

2018 No. 960

1. Introduction

1.1 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 This statutory instrument amends the Prison Rules 1999 and the Young Offender Institution (YOI) Rules 2000 to specify listed substances that prisoners can be tested for under existing statutory arrangements for mandatory drug testing in prisons and young offender institutions. Any product or substance listed in the instrument is classed as a specified drug for these purposes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales only.

4.2 The territorial application of this instrument is England and Wales only.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 Section 16A of the Prison Act 1952 gives a prison officer the power to require a prisoner to provide a sample of urine (or a sample of any other description specified in the authorisation not being an intimate sample) for the purpose of ascertaining whether the prisoner has any drug in their body.

6.2 The definition of drug for the purposes of section 16A of the 1952 Act includes a drug which is a controlled drug under the Misuse of Drugs Act 1971 or a specified drug. Section 16A(3) of the 1952 Act states that a specified drug means any substance or product specified in Prison Rules for the purposes of this section. Two previous statutory instruments listed substances that were to be classed as specified drugs, all of

which were psychoactive substances. This statutory instrument lists further substances that would also be classed as specified drugs.

7. Policy background

What is being done and why?

7.1 The purpose of this instrument is to further extend the range of drugs that prisoners can be tested for in prisons and young offender institutions under the existing Mandatory Drug Testing (MDT) programme. Currently, prisoners can only be tested for substances controlled under the Misuse of Drugs Act 1971 and for the specified drugs added by two earlier statutory instruments.[1] This instrument would insert further commonly misused substances into the Prison Rules and YOI Rules, so that prisoners can be compulsorily tested for them. Seven further psychoactive substances and twenty six medicines are being added to the testing framework as specified drugs by this instrument.

7.2 To aid future reading of the Prison and YOI Rules, all the specified drugs added previously and those being added by this instrument have been listed in what will become Schedule 2 to both sets of Rules. The specified drugs being added by this instrument are listed from (q) to (z23) in new Schedule 2.

7.3 Misuse of illicit substances in prisons in England and Wales causes significant harm. Many prisoners coming into prison (around 55%) have very high levels of substance misuse problems, characterised by abuse of traditional drugs and prescribed medications, and high levels of injecting behaviour. Misuse of these substances can have a significant impact on the physical and mental wellbeing of individuals taking them, both in the short and long-term. They also fundamentally undermine an individual's ability to engage in rehabilitation.

7.4 In addition to the health problems caused by substance misuse, debt resulting from the supply, distribution and use of such substances within the illicit economy in prisons is a major cause of violence, bullying and self-harm.

7.5 In recent years, prisons have faced additional challenges from changes in the type of illicit substances available within the illicit economy. The emergence of psychoactive substances, in particular, has been described as a 'game changer' by the former Prisons and Probation Ombudsman.2 In July 2016, HM Chief Inspector of Prisons described the 'unpredictable and extreme… dramatic and destabilising' effects of psychoactive substances, which in his view contributed in 'large part' to the violence in prisons. New substances can appear regularly with slight alterations to the chemical formula, meaning that they cannot compulsorily be tested for as part of the MDT process, without being added to the testing framework.

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[1] The two earlier SIs were:
The Prison and Young Offender Institution (Amendment) Rules 2016 (2016 No. 583)
http://www.legislation.gov.uk/uksi/2016/583/contents/made.
This added nine specified drugs, all of which were psychoactive substances.
The Prison and Young Offender Institution (Amendment) (No. 2) Rules 2016 (2016 No. 945)
http://www.legislation.gov.uk/uksi/2016/945/made
This added a further seven specified drugs. Once again, all of these were psychoactive substances.

[2] https://www.ppo.gov.uk/new-psychoactive-substances-play-a-part-in-yet-more-prison-deaths-says-ombudsman/

7.6 In addition to problems posed by psychoactive substances, there is increasing evidence of the misuse of medicines in prison, either on their own or taken with other substances for additive effect. A study of drug use in the north-west of England found widespread abuse of prescription medicines.[3] There is also evidence that some prisoners engage in poly-drug misuse: for example, combining traditional drugs, prescribed medications and psychoactive substances. This results in a particularly toxic mix and can cause significant harm to an individual's health. Currently, the prison drug testing framework does not include provision for mandatory testing for any medicines unless covered by the Misuse of Drugs Act 1971.

7.7 During the development of this instrument, analysis was carried out to test whether adding medicines to the drug testing framework might have an adverse differential impact for certain protected characteristic groups, such as disabled and elderly prisoners. Such prisoners are more likely to legitimately require medicines, and therefore may be more likely to test positive for those substances.

7.8 Following analysis, the Department is satisfied that ultimately there will be no disproportionate prejudicial effects so far as groups such as disabled or elderly prisoners are concerned. The starting point is that the decision whether or not to lay a disciplinary charge is a discretion rather than a duty under the Prison Rules 1999 so a charge does not automatically follow a positive test. Furthermore, published guidance in the Prison Service Order on Mandatory Drug Testing (PSO 3601) contains clear policy instructions to protect vulnerable individuals so no disciplinary action is taken after a positive test where the substance in question was legitimately prescribed or supplied.

7.9 If, despite this guidance, a disciplinary charge was laid in inappropriate circumstances, at any subsequent hearing the prisoner concerned could rely on the defence in rule 52(a) of the Prison Rules 1999, which applies where the drug is lawfully in the prisoner's possession or administered to him via lawful supply. This defence would act to prevent a finding of guilt in unintended circumstances.

7.10 The instrument is one part of wider work by Her Majesty's Prisons and Probation Service (HMPPS) to address drugs in prison, and meets the commitment set out in the Home Office national drug strategy to increase the range of drugs tested. HMPPS's wider work to address drugs brings together partner agencies and key stakeholders to take a holistic approach to tackling the problem of drug misuse in prisons. A joint HMPPS and MoJ Drugs taskforce has been created, which includes representation from NHS England, Public Health England and representation from law enforcement agencies, with a cross-government steering group to help progress the key strands of work

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 There are no current plans to consolidate the Prison Rules 1999 and the YOI Rules 2000.

[3] https://www.lgcgroup.com/services/drug-and-alcohol-testing-in-the-workplace/odtcase-study/

9.2 It is possible that further associated legislation may be necessary if evidence suggests that new substances not covered by the testing framework are being misused become available and if new tests emerge.

10. Consultation outcome

10.1 Consultation has taken place with a number of key stakeholders including substance misuse providers, selected prison governors and service users, NHS England and Public Health England. The amendments made by this instrument were welcomed.

11. Guidance

11.1 The amended Rules will be published and made available on the Government's legislation website (https://www.legislation.gov.uk/).

11.2 Guidance on the new provisions will be issued to all prison establishments prior to implementation and the policies on Mandatory Drug Testing and the Prisoner Discipline Procedures will be updated as soon as possible afterwards.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector. The instrument could give rise to some additional laboratory costs because the laboratory would be testing for a wider range of substances. This might also give rise to a larger number of positive results, which could involve increased costs for providing therapeutic support such as substance misuse courses or increased adjudication costs.

12.3 To illustrate the nature of the costs involved, during the financial year 2017/18, spend on drug testing kits and analytical services in prisons was £4.04m. To understand the capabilities of the various testing providers, HMPPS is going out to the market via a procurement exercise. The aim is to procure a drugs testing service that will support HMPPS to identify and respond to changes in patterns of drug misuse by offenders both in custody and in the community, using current and future innovative solutions.

12.4 An Impact Assessment has not been prepared for this instrument because it does not give rise to a significant financial impact.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The provisions will amend the Prison Rules 1999 and YOI Rules 2000 and will be kept under review.

14.2 The impact of the introduction of the new provisions will be reviewed by HMPPS after six months and then after a year. This will involve consideration of the extent of the wider use of psychoactive substances, and the extent to which prescribed medications are being used illicitly. HMPPS will also look at the steps that prisons and healthcare providers take to prevent the illegal use of prescribed medication and at referral rates into treatment following positive tests. In addition, HMPPS will consider the outcome of positive tests, for example looking at the number of adjudications and any punishments imposed. HMPPS will also consider the overall impact on reported

random MDT results and monitor outcomes for prisoners with protected characteristics.

15. Contact

15.1 Caroline Bonds, Her Majesty's Prison and Probation Service (email: caroline.bonds@noms.gsi.gov.uk telephone: 07773069732) and Sue Roberts, Her Majesty's Prison and Probation Service (email: susan.roberts@noms.gsi.gov.uk telephone: 07809490243) can answer any queries regarding the instrument.

15.2 Nick Poyntz, Deputy Director for prison policy at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lucy Frazer, Parliamentary Under Secretary of State for Justice at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.