The Joint Committee on Human Rights Call for Evidence: The Criminal Justice Bill

Release Evidence

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Release
Drugs, The Law & Your Rights

About Release

Release is the national centre of expertise on drugs and drugs law in the UK. The organisation, founded in 1967, is an independent and registered charity. Release provides free nonjudgmental, specialist advice and information to the public and professionals on issues related to drug use and to drug laws. The organisation campaigns directly on issues that impact on its clients - it is their experiences that drive the policy work that Release does and why Release advocates for evidence-based drug policies that are founded on principles of public health rather than a criminal justice approach. Release believes in a just and fair society where drug policies should reduce the harms associated with drugs, and where those who use drugs are treated based on principles of human rights, dignity and equality. Release is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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Introduction

1. Release has provided a briefing to the legislative Committee's members in relation to proposed changes to the law around drug testing on arrest ('DTOA') in Clauses 15 to 17 of the Criminal Justice Bill.

2. While this submission focuses predominantly on DTOA, Release shares and adopts the concerns raised by our colleagues at Liberty in their submission to the Joint Committee on Human Rights ('JCHR') in relation to the new measures proposed to deal with "nuisance begging", and "nuisance rough sleeping" and the range of offences that are introduced by Clauses 38 to 64 of the Bill. We similarly share and adopt Liberty's concerns in relation to proposed changes to powers to tackle antisocial behaviour.

3. In May 2023, Release and Liberty submitted a joint submission to the public consultation "Community Safety Partnerships Review and Antisocial Behaviour Powers".

4. Despite raising serious concerns during that consultation about the extension of DTOA to public places and broader changes in the Government's Antisocial Behaviour Action Plan, the Criminal Justice Bill is now working its way through the legislative process, seeking to implement some of the changes in that Plan.

The Bills's proposed framework

5. Against the backdrop of record-level drug-related deaths and the clear racial disparities in drug enforcement, Clauses 15 to 17 of the Criminal Justice Bill give police far-reaching new powers which will deepen the harms of unjust enforcement and most severely impact those that have unjustifiably been on the sharp end of drugs enforcement for far too long.

6. Clause 15 of the Bill amends the DTOA framework under the Criminal Evidence Act 1984. It extends the applicable group of substances from specified drugs under Schedule 2, Class A of the Misuse of Drugs Act 1971 ('MoDA'), namely heroin and cocaine, to *all* substances controlled under that Act. Clause 15 also extends the range of possible trigger offences by granting the Secretary of State power to pass further regulations in the form of statutory instruments specifying further, additional trigger offences.

7. Clause 16 of the Bill amends the Drugs Act 2005 ('DA 2005'), to extend the initial assessment "*for the purpose of establishing whether the person is dependent upon or has a propensity to misuse*" following testing to *all* controlled substances, where previously an assessment was only available in the event of a test returning positive for specified substances controlled under Class A of the MoDA. This is despite the fact that many of the drugs tested for are not considered drugs of dependence, and as such there is no available treatment, nor does all drug use require treatment.

8. Clause 17 of the Bill amends Section 63B of the PaCE, to remove the notification condition before a sample of urine or a non-intimate sample may be taken from a person in police detention for the purpose of ascertaining whether he has any specified Class A drug in his body. The notification condition requires a relevant chief officer to have been notified by the Secretary of State that appropriate arrangements have been made for the police area as a whole, or for the particular police station, in which the person is in police detention, and that the notice has not been withdrawn. Those appropriate arrangements are arrangements for the taking of samples from those who have been arrested, charged, or who have not attained the age of 18.

9. Similarly, Clause 17 also removes the notification condition from the DA 2005.

10. The potential issues arising under the European Convention on Human Rights ("ECHR") in relation to these clauses were considered by the Home Office in a Memorandum.[1]

11. Further, an additional clause has been added by the Public Bill Committee relating to testing for the presence of controlled drugs upon arrest at a place other than a police station.[2] This clause empowers an approved constable to take a single non-intimate sample from a person, where that person is aged 18 or over, has been arrested for trigger offence and where a constable at least the rank of inspector has reasonable grounds for suspecting that the misuse by the person of a drug caused or contributed to the offence for which the person was arrested and has approved the sample to be taken. Refusal of a sample can lead to prosecution.

12. The potential issues arising under the European Convention on Human Rights ("ECHR") in relation to this additional clause were considered by the Home Office in a supplemental Memorandum.[3]

13. The Bill will allow police to test individuals for a currently unknown list of potential offences and for any drug controlled under the Misuse of Drugs Act 1971, with a view to referring those that test positive into treatment and punishing them for failing to attend. The testing may also take place outside of the police station.

14. The Bill imagines that this will reduce drug use, cut general crime and help people. It does so without an evidential base, despite claims by the Home Office that its efforts from 2021 to fund an increased funding regime would "*build an evidence base of the link between drugs and criminality*". The dearth of evidence is presumably because it all points the other way - that increasing

[1] ECHR memo (publishing.service.gov.uhttps://assets.publishing.service.gov.uk/media/6553756350475b000dc5b58d/ECHR_Memo_Criminal_Justice_Bill_-_FINAL.pdfk) from p13

[2] See criminal_rm_pbc_0108.pdf (parliament.https://publications.parliament.uk/pa/bills/cbill/58-04/0010/amend/criminal_rm_pbc_0108.pdfuk) from p28.

[3] Supplementary Memorandum (publishing.service.gov.uhttps://assets.publishing.service.gov.uk/media/6582b608ed3c34000d3bfc28/Supplementary_ECHR_Memo_Criminal_Justice_Bill_-_FINAL.pdfk) from p4

drugs enforcement does not reduce use but can increase harms, that drugs policing is carried out in a racist manner and that harm reduction and treating people with compassion, dignity and respect is the best way to help people.

Engagement of the European Convention on Human Rights

Article 8: Right to respect for family and private life

15. The Home Office state that the Bill's changes are in accordance with the law as it will be prescribed in primary legislation, with clear and detailed safeguards. It is necessary and proportionate for the prevention of disorder and crime because it aims to address a person's Class B and Class C drug use which is suspected to contribute to their offence and reduce further reoffending.

16. It is not clear what these safeguards are, particularly as the notification requirement will be removed.

17. Compulsory medical intervention, even if it is of minor importance, must be considered an interference with the right to respect for private life and the European Commission on Human Rights has applied this standard to blood and urine testing for drugs when considering the question of admissibility to the European Court on Human Rights.[4]

18. The Home Office states that "*The interference is justified by the need to prevent disorder or crime. Testing can only take place where an individual has committed either a trigger offence or another offence which an officer of at least the rank of inspector has reasonable grounds for suspecting drug misuse has caused or contribute to*. (emphasis added)"

19. This is incorrect as a matter of law as the Home Office has conflated arrest and conviction. A person cannot be said to have committed an offence he has been arrested for unless and until he is convicted of it.

20. *Peters* was found by the Commission to be inadmissible as the testing regime was found not to be arbitrary or unreasonable, and therefore in accordance with the law and could be justified, inter alia, as necessary in a democratic society for the prevention of disorder or crime. For the reasons set out below, we submit that this testing regime is arbitrary and unreasonable, and cannot be justified for the prevention of disorder or crime.

Article 3: Prohibition of Inhuman and Degrading Treatment

21. Considering the admissibility of *Peters*, the European Commission of Human Rights had regard to Article 3 in relation to the way in which samples were taken. In that case, that a prison detainee had to produce urine in the presence of a supervisor did not attain the minimum level of severity required in order to

[4] See Peters v the Netherlands, App. No. 21132/93; X v Austria App. No. 8278/78

fall within the scope of Article 3, considering the "*generally accepted desirability to effectively control the use of drugs in prisons".*

22. *Peters* leaves open the possibility for Article 3 to be engaged, and breached, in certain circumstances where a person is required to be tested under national legislation. The clause on non-intimate testing outside of the police station provides that it can be carried out "*at or near the place where an approved constable requested the person to give the sample*". It is not clear what the government have in mind, but we submit that testing in public places may engage Article 3.The justification in *Peters* cannot be said to apply to the Bill, and we submit that no defensible justification has been set out.

Article 14: Prohibition of Discrimination

23. The Home Office Memorandum solely advises on discrimination in the context of Article 8 in relation to age. For the reasons that follow, we submit that this approach fails to consider evidence for the systemic discrimination inherent in drugs policing, notably along racial lines. We submit that, like all drugs policing before it, the Bill's provisions will disproportionately and unjustly impact upon Black people and ethnic minorities.In addition, we highlight the risk that people with disabilities could be unjustly targeted by these proposals by reason of their prescribed medication leading to positive tests.

Lack of sufficient justification

24. Drug testing has been shown to be "*ineffective*", having "*no impact on drug use*" or "*recidivism*".[5] It is entirely unclear why DTOA has been included in the Bill against the Home Office's knowledge and its own citation of this evidence.

25. DTOA for a wider range of offences and all drugs presupposes a causal relationship between offending behaviour and a person's use of drugs, but there is no evidence to support this view. There is also a presupposition that all those that test positive for a drug should be considered for treatment. The existing provisions around specified Class A drugs and acquisitive offences supposes that a person might illegally acquire property to generate funds to sustain their dependency. This supposition relies inextricably upon flawed and harmful assumptions while ignoring other potentially causative factors such as socioeconomic deprivation, and in any event simply cannot be deployed to justify testing for all drugs and all offences.

Prevention of Crime: unjustified expansion of offences

26. There's significant evidence of the failure of a punitive approach to drug control. Research about student drug use found that 16% of those who described having a "scary situation" with illegal substances did not seek emergency help for fear of punishment.[6]

[5] Barnett, G. D., & Fitzalan Howard, F. (2018). What doesn't work to reduce reoffending? A review of reviews of ineffective interventions for adults convicted of crimes. European Psychologist, 23(2), 111.
[6] Ozcubukcu, A and Towl, G (2022) Illicit drug use in universities: zero tolerance or harm reduction?, Higher Education Policy Institute

27. The increased surveillance and risk of punishment through the DTOA proposals will do nothing to alleviate people's fear of seeking help when they need it. The Home Office's own research has shown that our drug laws have no impact on levels of use[7] and that law enforcement has little impact on disrupting the illegal drug supply market.[8]

28. It is not clear what further offences the Secretary of State will designate as trigger offences. However, the Home Office Consultation on Community Safety Partnerships Review and Antisocial Behaviour Powers suggested that they would include so-called "night-time economy-related offending", violence against women and girls, domestic abuse, serious violence and Antisocial Behaviour.

29. There is no clear definition of what is meant by "night-time economy-related offending". There is nothing to suggest that police need additional powers to address criminal offences on the basis that some may at times take place in bars, pubs or clubs. In relation to all offences caught by the proposal, there is no evidence presented to suggest that public drugs testing would lead to a reduction in those offences.

30. The distinction between potential criminal-offending and Antisocial Behaviour also becomes blurred under this approach. Antisocial Behaviour itself is not a standalone criminal offence, nor a subset of criminal offences. The Government's action plan stated that ASB "covers criminal and non-criminal behaviour", citing the definition in Section 2 of the Anti-social Behaviour, Crime and Policing Act 2014:

    a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,

    b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or

    c) conduct capable of causing housing-related nuisance or annoyance to any person.

31. As the Act makes clear, this definition applies solely within Part 1 of the Act, relating to civil injunctions. It is simply not correct as a matter of law that this definition of ASB covers criminal offending. It does not. The proposal is unclear what power of arrest an officer might be exercising in relation to an instance of ASB that is not itself a separate criminal offence. This risks people being subjected to drug testing in the absence of any criminal offence, and this risk will be heightened by connecting it to a loosely defined concept of anti-social behaviour to be used against people in the night-time economy, may themselves be intoxicated when providing biological samples.

[7] Drugs: international comparators - GOV.UK (www.gov.uk)
[8] An evaluation of the Government's Drug Strategy 2010 (publishing.service.gov.uk)

32. No justification is offered for treating the approach to testing in relation ASB as it is treated in relation to identifiable criminal offences. There are a huge range of criminal offences that cover property damage, violent offending and harassment. In addition, the police are already empowered by the 2014 Act to apply for a civil injunction in relation to ASB, which can itself include a power of arrest where the person(s) subject to the injunction engage or threaten to engage in threats or the use of violence or present a significant harm to others. Finally, the possession of drugs is already subject to criminal controls and "being under the influence" of drugs already exists as an aggravating feature to myriad criminal offences.

33. The Bill is grounded in the Government's objective to tackle "drug related anti-social behaviour" and reduce drug demand, but so far no evidence has been put forward to show that expansion of offences subject to the testing regime will accomplish this more effectively than the current system of criminal justice, which is itself ineffective and perpetuates harmful outcomes.

Unjustified expansion of drugs

34. The current testing regime relies on the principle of intervening in criminal offending where a person may benefit from drug treatment. This formed the basis on which the current specified drugs are captured by that regime. Opening up the range of drugs subject to testing is a completely disproportionate measure considering there is no discernible policy objective to support the proposal. We raise three main issues here.

35. First, it is not clear how decision making vis-a-vis coercing people into treatment will be made despite the innumerable cases that might arise under the Bill. For example, a person found to have used cannabis following an arrest related to an allegation of noise nuisance may not justify a referral for a drugs assessment. Inappropriate referrals would not only be a disproportionate action against the individual but also risk further overwhelming an already stretched treatment provision.

36. Second, the proposal fails to draw a causative link or correlation between the behaviour it identifies and the broad range of drug consumption it aims to capture.

37. Third, it is unclear how police officers are expected to consistently discern when a suspected offence bears a sufficient nexus to a person's drug use to justify a test at all. There is a clear and appreciable risk that testing will be used in a discriminatory, harmful and fundamentally ineffective way. This has the added disadvantage of siphoning funds away from more effective measures.

Discrimination

38. The UK's drug framework is ineffective and fails in its own stated aim to reduce or eliminate drug use. Instead, drug policy, fuelled as it is by the criminal justice system, provides the architecture for racial and social control in society. Drug policy harms everyone, with particular and severe impacts on young people and racialised communities.

39. The Bill will have the effect of increasing drugs-related policing and the net-widening of individual interactions with the criminal legal system. The thread of racism, racial disparity in outcomes and prejudice that runs through our legal system is well understood.[9]

40. This prejudice has far-reaching consequences for people of colour. Currently, 61% of all stop and searches are for drugs accounting for just over 330,000 such police interactions.[10] Her Majesty Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) estimates that 70 per cent of these searches are for simple possession of drugs.[11] These searches fall most heavily on Black people and those from other ethnic communities, and people living in deprivation.[12] Black people are 7.7 times more likely to be stopped and searched for drugs[13], despite being less likely to use drugs.[14] And even though the "find" rate of drugs resulting from a police search is lower for Black people, when caught in possession they are more likely to receive a harsher punishment, for example, a Black person is sentenced to cannabis possession at almost 12 times the rate of white people.[15]

41. There is no evidence to suggest that the Bill, if passed, will be effective. Instead, the wholesale expansion of police powers to carry out drug tests in relation to a wider range of suspected offences and expanding the range of specified drugs, serves only to deepen the well-documented harms embedded in the policing of drugs. The Home Office Memoranda are silent on how the government plans to remediate or guard against the racism and disparate outcomes embedded in drugs enforcement. Without this due consideration, the

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[9] For example, recall: The Metropolitan Police, The Baroness Casey Review, March 2023. Available at:https://www.met.police.uk/police-forces/metropolitan-police/areas/about-us/about-themet/bcr/baroness-casey-review/

[10] Home Office, Police Powers and Procedures, Stop and Search Summary Data Tables, Year Ending March 2023. Available at: https://www.gov.uk/government/statistics/stop-and-search-and-arrests-yearending-march-2023/police-powers-and-procedures-stop-and-search-and-arrests-england-and-walesyear-ending-31-march-2023

[11] HMICFRS, PEEL: Police legitimacy 2017. Available at: https://hmicfrs.justiceinspectorates.gov.uk/publications/peel-police-legitimacy-2017/

[12] Release, The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales, 2017. Available at: https://www.release.org.uk/publications/ColourOfInjustice

[13] Home Office, Police Powers and Procedures, Stop and Search Summary Data Tables, Year Ending March 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1113377/stop-search-data-tables-summary-mar22.ods

[14] ONS, Drugs Misuse in England and Wales, 2022. Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/drugmisuseinenglandandwales/yearendingjune2022/relateddata

[15] Supra note 12.

government's march further down the line of harsher criminal penalties will do nothing but further ingrain those harms.

42. The Home Office Memoranda are also silent on the issue of prescribed controlled medications. There are a range of substances that are controlled under the MoDA that are prescribed as medicines, and could lead to a positive drugs test under the proposed regime. There has already been significant media coverage of people who have been prescribed cannabis based medical products being subject to police stop and search and arrest, despite their cannabis being legally allowed[16]. There is a significant risk this group would be negatively impacted by these proposals. As would the hundreds of thousands people prescribed benzodiazepines[17]. Some ADHD medications could trigger a positive for amphetamines. False positives have also been reported across certain drug types, including amitriptyline causing false positives for LSD and pseudoephedrine triggering amphetamine positives.[18] There seems to have been no consideration by the Home Office around these risks.

Conclusion

43. For the reasons set out, we submit that the clauses relating to DTOA raise issues under the ECHR that have not been considered at any stage. We have serious concerns about the lack of sufficient justification, the disproportionality of the measures proposed and the inevitable risk of discrimination. If you require any more information please do not hesitate to contact us.

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[16] 'They put handcuffs on me': UK users of medical cannabis tell of raids and arrests | Police | The Guardian
[17] Prescribed medicines review: summary - GOV.UK (www.gov.uk)
[18] Urine Drug Screening: Minimizing False-Positives and False-Negatives to Optimize Patient Care (uspharmacist.com)