MDT’s – Lawful or Not? Some commonly arising issues surrounding drug testing in prison

Mandatory drug tests (MDT’s) were introduced into the prison system in 1995. The Prison Act 1952 was amended to include a requirement for prisoners to submit to tests. Such tests are not to be confused with drug testing for clinical purposes to determine appropriate treatment, or voluntary drug testing as part of a compact, both of which require the informed consent of the prisoner and the outcome of which cannot lead to a disciplinary charge. Only MDT’s can be lawfully ordered of ‘any prisoner confined in the prison’ and carry the potential sanction of a charge under the Prison Rules. In particular, the refusal of a prisoner to take a valid MDT test often leads to a charge of disobeying a lawful order.

This article focuses the early stages of the MDT process, before the prisoner reaches the MDT suite, to highlight commonly arising issues to prisoners and lawyers alike.

There are five areas where MDT’s may be applied:

- Random testing – selection on a strictly random basis
- Reasonable suspicion – where there is reason to believe the prisoner has misused drugs
- Risk assessment – where a prisoner is being considered for a privilege or job and a high degree of trust is to be granted
- Frequent test programme – prisoners selected for this programme on the basis of previous history of drug misuse
- Testing on reception – prisoners may be selected for testing on reception on a routine or occasional basis
For testing to occur lawfully, there has to be in place already an authorisation from the governor. This requires a formal document to be signed by the governor and published – a copy should be displayed in the MDT suite and a copy may be placed in the library.

Rule 50 of the Prison Rules sets out conditions that must be followed if a requirement to provide a sample for drug testing purposes is to be considered lawful. Two of those are that before the sample is taken, a prisoner shall be informed, as far as is reasonably practicable, the legal basis for the requirement to provide the sample (section 16A Prison Act 1952, Prison Rule 50(3)a), and the reason why the sample is required of the five listed above.

The MDT Manual states, at 2.7, that officers should take the Test Authorisation Form (MDTA Form) when collecting the prisoner to simplify this process, presumably because when filled in correctly, it clearly shows the reason for the test. Lawyers involved in such cases should check to make sure that the form has been completed correctly as our experience has shown such a failure can render the order to provide a sample unlawful. The form itself does in fact satisfy the other conditions as to what is to be told to a prisoner before a sample is taken and the form must be given to the prisoner before a sample is taken. It is somewhat unclear whether a failure to provide the form at the point the request is made would render it unlawful, if the information as to the legal basis and the reason for the test is given orally and form given only at the testing suite. This would seem to remain a point for potential argument on the wording of the manual. It appears clear that failures at the point of the request (i.e. at the cell door) to either explain these two points or to hand over a copy of the form would render the order unlawful.

These requirements had been revisited to this present position in light of the judgement in R v Secretary of State for the Home Department ex parte Russell (2000) WL 976013. In summary, Mr Russell was authorised as a “random test” but refused to take it. He had recently been required to attend a number of such random tests and he took the view it would be improbable that he could have been selected again on this occasion at random. On that basis he refused to comply with the order, rendering him liable for the disciplinary offence of disobeying a lawful order. The
charge was found proven – the adjudicator considered the challenge to the lawfulness of the order was not relevant on the adjudication and the evidence satisfied him that the offence had been committed. 14 additional days added to his sentence. The matter reached the High Court, where it was clarified that randomness did have to be proven for the order to be lawful. In addition, the court ruled that the order to submit to a test is a single order to go to the suite and submit to a test, meaning a failure at that early stage may arguably invalidate the order even before the MDT suite is reached.

The order in Russell was proved to be random on evidence submitted to the court, but the prison had not publicised the selection process, meaning Mr Russell’s conviction was quashed because he honestly (and not without cause in the view of the court) believed his selection was not random and therefore the order was not lawful. This was considered a reasonable view in the absence of any explanation for his selection until the parties were at the High Court hearing itself. Whilst he did not have a defence to the charge, it was considered that he did not receive a fair hearing and the punishment of additional days may have reflected the error of law in the Governor’s view that randomness was irrelevant. Importantly, the Prison Service decided during the course of Russell’s case to publicise the procedure for random selection and in future to provide a document setting out that procedure (together with the MDTA form) to all prisoners ordered to take a test. It was noted by the court that if that procedure was followed, it was likely to be rare if much or any evidence as to randomness would be required at disciplinary hearings if the issue is raised.

The MDT manual is somewhat unclear as to precisely what is to be provided to prisoners at what stage. The manual provides that the booklet, ‘Information to Prisoners on Mandatory Drug Testing’ is to be made available on request at prison libraries, within MDT units and to be given to prisoners following a positive screen. In addition, the leaflet, ‘MDT Information to Prisoners’ is to be given to prisoners at reception and be available widely throughout prisons. Both documents are included within the appendices to the MDT manual. Further, a poster providing information is to be made available – it must be displayed within MDT units and on each wing, as well as at other sites at the discretion of the MDT co-ordinator. The only clarification is given at 5.16, which states that “Prisoners will need access to comprehensive
information about mandatory drug testing, specific information on each occasion when they are requested to provide a sample for testing...” (emphasis added). This would appear to confirm that something more than just the MDTA form is to be given to prisoners when a sample is requested, seemingly following the Prison Service’s intention for the future at the time of the Russell case. We know of at least one prison which, when faced with the argument that insufficient information was provided to a prisoner and therefore the order was unlawful, changed its procedures to ensure the leaflet, ‘MDT Information to Prisoners’, is to be given to prisoners every time they are requested to provide a sample.

It is a pre-requisite of any charge of disobeying a lawful order that the order is itself lawful, which the prison must prove. A failure to prove the lawfulness of the order should lead to a charge being dismissed. Whether this new step of providing the leaflet at the time of the test would prevent a potential argument that the order is illegal from an earlier stage, such as where the prison failed to provide information at reception, which is a mandatory requirement from the MDT manual at paragraph 5.17, or on the wings, pursuant to paragraph 2.8, remains a moot point and a likely subject for challenge in the future.

Conclusion

Remembering the burden of proof lies with the prison to prove the order given was lawful, any lawyer dealing with a charge of disobeying a lawful order in connection with MDT’s would be wise to consider the following issues in taking instructions from a prisoner and in cross-examining officers involved with the MDT process:

- Was a governor’s authorisation for testing in place and appropriately publicised at the time of the request?
- What information was provided to the prisoner on reception to the prison?
- What information is on display in relation to the MDT procedure? Where is it on display?
- Was the MDTA form given to the prisoner at the time of the request? Was it correctly completed?
• What precisely was said to the prisoner at the time of the request to provide a sample?
• Did the prisoner raise any issues at the time of the request?

With the above questions in mind, consideration can then be given to whether the order was in fact lawful and therefore whether any charge of disobeying a lawful order could be successfully challenged.

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