

Release

Drugs, The Law & Your Rights

RELEASE'S RESPONSE TO THE CRIMINAL JUSTICE BILL 2023 - PROVISIONS ON DRUG TESTING ON ARREST

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.

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 Bill imagines that this will reduce drug use, cut general crime and help people. It does so without an evidential base, presumably because all of the evidence points the other way - that increasing drugs enforcement does not reduce use, 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.

DRUG TESTING ON ARREST (DTOA)

1. Release opposes the expansion of DTOA. Drug testing is abusive, disproportionate, expensive and ineffective. Testing is an invasive intrusion on people's right to privacy, and incurs substantial personal costs in terms of time, problems with employment or family responsibilities and so on. As such it is clearly disproportionate.
2. The expansion is additionally alarming as it sits alongside other measures in relation to the criminalisation of so-called nuisance begging, rough sleeping and antisocial behaviour which our colleagues at Liberty have separately briefed on. We share Liberty's concerns about those provisions.
3. The most troubling aspect of the suite of changes the Bill would introduce is the effective criminalisation of poverty, potentially subjecting those caught by new offences to drug testing and assessment, and additionally punishing them for non-attendance at assessment. This is clear from the introduction of Nuisance begging prevention orders by Clause 43 and the explanatory note outlining that terms of such an order could "*require the individual to take part in a course of drug treatment if the nuisance begging was to fund a drug addiction*".
4. Expansion of DTOA is devoid of any justification or evidence to support its efficacy, and represents a harmful and broad police power at risk of abuse.
5. At present, police can test people for specified Class A drugs (heroin and cocaine) where they have been charged with a *trigger offence*, namely possession and other drugs offences and so-called acquisitive offences such as theft or robbery. The rationale for taking this approach is to identify people whose drug use may be connected to the offence and require them to attend an initial drug treatment assessment. Failure to attend the assessment is a separate criminal offence, essentially criminalising people for not engaging in health care. For other offences, where a police inspector, or higher rank, has reasonable grounds for suspecting that an offence was linked to the use of a specified Class A drug, a sample can also be authorised.
6. The Bill would allow testing for all drugs controlled by the Misuse of Drugs Act 1971, and for a wider range of trigger offences to be introduced by the Secretary of State under future Regulations.
7. The controls of this approach, and the safeguard for offences other than trigger offences, recognises that enforced drug testing is an infringement on a

person's autonomy, dignity and bodily integrity. It can only therefore be appropriate in very narrow, justifiable circumstances. We strongly oppose the expansion of DTOA to all drugs and a yet unknown list of potential offences, particularly as no defensible policy objective has been put forward.

Lack of sufficient justification

8. The inclusion of DTOA in the Bill is particularly disappointing in view of the Home Office's reference to evidence that does not support its efficacy in its consultation papers on the White Paper on drug possession. Release highlighted this evidence in its consultation response. Specifically, drug testing has been shown to be "*ineffective*", having "*no impact on drug use*" or "*recidivism*".¹ It is entirely unclear why DTOA has been included in the Bill against the Home Office's knowledge and citation of this evidence.
9. 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.

Unjustifiable expansion of offences

10. Release does not support the current drug-testing regime but recognises that it was founded upon an identifiable, albeit in our view fundamentally flawed, policy objective. The consultation's proposal lacks any clear policy objective and is set in unreasonably wide terms.
11. 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.

¹ 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.

12. There is no clear definition of what is meant by “night-time economy-related offending”. There is simply nothing to suggest that police need additional powers to address criminal offences simply 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.
13. 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.
14. 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.
15. 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 already 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.
16. 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. Specifically, the consultation fails to outline what actions will follow from a person being found to have a drug in their system, or what the “right interventions” actually are in relation to the huge range of potential cases that would be captured by the suite of policy change.

Unjustifiable expansion of drugs

17. 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.
18. 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.
19. 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.
20. 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.

Exacerbating harms

21. There’s significant evidence of the failure of our 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.² 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 particularly young people, and arguably it will exacerbate that fear. The Home Office's own research has shown that our drug laws have no impact on levels of use³ and that law enforcement has little impact on disrupting the illegal drug supply market⁴.

22. 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.

23. 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.

Conclusion

24. Release calls on all MPs to reject the expansion of DTOA under Clauses 15 to 17 of the Bill.

25. For more information, please contact aleister@release.org.uk.

² Ozcubukcu, A and Towl, G (2022) Illicit drug use in universities: zero tolerance or harm reduction?, Higher Education Policy Institute, 3 March. Available at: <https://www.hepi.ac.uk/2022/03/03/illicit-drug-use-in-universities-zero-tolerance-or-harm-reduction/>

³ [Drugs: international comparators - GOV.UK](#)

⁴ [An evaluation of the Government's Drug Strategy 2010](#)