

Testing

Legal position

Unlike the drug rehabilitation requirement (DRR), the mandatory testing of offenders is not permissible as part of an alcohol treatment requirement (ATR) or any other requirement of a community order (CO) or suspended sentence order (SSO) through which alcohol related interventions are delivered. This is because consumption of alcohol is lawful in most circumstances for those over 18 years of age, whereas that is not the case with illegal drugs. There are likely to be human rights issues associated with imposing mandatory testing for any substance that an individual is legally entitled to consume (although these could possibly be mitigated if the individual gave his/her informed consent to be tested) particularly if the intention is to enforce abstinence.

There is also no provision in law for offenders to be tested at the pre-sentence stage and the results used as evidence that they are trying to abstain from alcohol or reduce their intake which could then be taken into account when sentence is passed.

Testing on a voluntary basis

Offenders may be tested on a voluntary basis as a means of gauging their progress in reducing their use of alcohol to low risk levels or moving towards total abstinence, whichever is the agreed treatment goal. Offender managers (OMs) need to be aware, however, that alcohol is metabolised comparatively quickly (at the rate of approximately 7g per hour) so it would be possible for an individual to consume a substantial amount and still test negative the following morning. Therefore, it would be difficult to accurately measure reductions in alcohol use or be certain that an individual isn't drinking unless testing was very frequent. This would be very costly, both in terms of time and resources, particularly if a number of tests required laboratory verification, and may render it impractical.

The direct measurement of pure alcohol (ethanol) levels can be achieved using a breathalyser¹ (blood tests are too invasive and urine alcohol concentration is a crude measure although it may conveniently be tested for along with other drugs of misuse). NOMS does not have any specific guidelines in place regarding the use of breathalysers to test offenders in a probation setting. Testing is more of an issue for prisons to deter the supply and use of alcohol within prison establishments and detect illicit alcohol use. The Prison Service Alcohol testing manual of policy and procedures, *Alcohol Testing for Prisoners - Manual of Policy and Procedures*², which describes policy, procedures and good practice

¹ Breath testing is an approach used by some clinicians providing alcohol detoxification, to assess levels of intoxication and subsequent withdrawal.

² <http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=88>

relating to alcohol testing and the equipment recommended for use by establishments, includes a preferred specification for the purchase of approved breath testing equipment and advice about chain of custody standards.

Alcohol Testing for Prisoners advises that 'the limit above which there is considered to be incontrovertible evidence that some alcoholic drink has been consumed has been set at 9 micrograms of alcohol in 100 millilitres of breath – normally written as 9 µg% or 9µg/100ml.'

Testing offenders prior to programme sessions

Testing should stand the test of being reasonable and proportionate, in order to comply with administrative law and the Human Rights Act 1998. The testing of every offender for alcohol before each session of a programme meets neither of these criteria. Paragraph 3.3 on page 10 of *Alcohol Testing for Prisoners* is instructive when it states that:-

'It is also important to ensure that any response to alcohol misuse is proportionate to the harm caused and the circumstances of the individual prisoner. Patterns of behaviour often provide firmer grounds to take robust action than one-off incidents. A fixed and inflexible response gives the impression of a 'blanket' approach not designed to match individual circumstances and should be avoided.'

The fact that before being accepted on to a programme every offender should sign a declaration at the pre-sentence report (PSR) stage agreeing to be tested could overcome the aforementioned human rights objections on the basis that informed consent had been given. However, this would depend on precisely how the declaration was worded and that the individual understood what he/she was signing. Even with signed consent, however, testing offenders without reasonable suspicion may constitute an infringement of their human rights under Article 8 of the European Convention (the right to freedom from interference with his/her physical integrity).

Testing all offenders for alcohol is also a waste of scarce resources, when testing positive for alcohol, even on several occasions, is not grounds, in itself, for breach. It will usually be apparent if an individual is unable to participate in sessions and/or is disruptive as a result of being inebriated without the need for a breath test e.g. violent or unpredictable behaviour; smell of alcohol on an offender's breath; unsteady gait; elated behaviour beyond the point of self control.

Testing in approved premises

Testing for alcohol should be based on a clear link to alcohol-related offending and would normally only apply where alcohol consumption was prohibited and

where alcohol is a known disinhibiting factor in previous offending or there is a likelihood of disorder.

Paragraph 2.6 of PC 05/2006 - *Approved Premises: Drug Testing of Residents* advised that 'testing for alcohol.....should be on reasonable suspicion and where there is concern about possible outcomes (such as where alcohol is a known disinhibiting factor in previous offending or there is a likelihood of disorder in the hostel). Residents with a previous history of alcohol-related offending can be tested randomly.'

Paragraph 3.12 stipulated that hostel rules should have in place:

- A prohibition of alcohol, solvents and controlled drugs
- Provision to test residents for alcohol, on reasonable suspicion
- Provision to test randomly those residents who have a previous history of alcohol-related offending

The legal basis for testing for alcohol in approved premises is National Standards, the statutory basis for which is The Offender Management Act 2007 (Commencement No. 2 and Transitional Provision) Order 2008, and related guidance e.g. PC 05/2006. These specify that on arrival the rules and requirements of residence (which should include prohibition of alcohol use and provision for testing in prescribed circumstances) and the consequences of any failure to comply should be explained to the offender, who then signs a copy of the rules confirming that these have been explained and are accepted. This informed consent to abide by the rules provides the basis for any infringements to result in a caution, if not too serious, or withdrawal of a place, 'which is normally treated as a breach requiring immediate enforcement action.'

The need for signed consent was highlighted and reinforced in the *National Rules for Approved Premises* (see PC19/2007) which, along with prohibiting the use of alcohol and drugs on the premises, states that a resident should undergo drug and/or alcohol testing if required to do so by staff (Clarification of the need to enforce the Approved Premises (AP) rules in relation to substance misuse can be found in the *National Standards for the Management of Offenders 2007*).

The AP Performance Improvement Standard (2008) stated:

AP Standard 7 – Managing Illegal Drugs & Alcohol

AP has a policy and procedure for dealing with residents who are using illegal drugs and/or alcohol. All APs will have facilities for on-site drug and alcohol testing and supporting policies, procedures and protocols.

Evidence of how the criteria will be met

- 1 AP has drugs and alcohol policy and procedures
- 2 AP has a policy regarding the role of the unit in the provision of drug and alcohol treatment
- 3 Staff are aware of the AP procedures
- 4 The requirement for drug and alcohol testing is incorporated in AP documentation (such as National Rules) which is made available to offenders, prisons and key stakeholders
- 5 Management Committees will incorporate drug testing into their Annual Business Plan/report and all APs will have facilities and equipment for on site drug testing
- 6 Probation areas/Management Committees will require reports on testing and treatment from AP managers and partners
- 7 Staff will receive training and support in the administration of testing
- 8 Arrangements will be in place with partner agencies to facilitate entry into treatment
- 9 Staff are trained and receive briefings on working with misusers of alcohol and illegal drugs
- 10 AP will have in place a policy and supporting procedures for the disposal of any illegal drugs and alcohol found in AP
- 11 Appropriate action is taken if illegal drugs or alcohol are found on the premises or in a resident's possession, or a resident is under their influence

The legal basis for AP Rules is:

OFFENDER MANAGEMENT ACT 2007 (APPROVED PREMISES) REGULATIONS 2008 – General duties

7.—(1) Each local probation board and other body should—

(c) prepare **house rules** for the Approved Premises, governing the conduct of residents, which should comply with any requirements of the Secretary of State as to the content of such rules; and

(d) bring the **house rules** to the attention of every resident of the Approved Premises and take all appropriate measures to ensure that they are complied with by all such residents.

Also – National Standards for Offender Management:

2d.12	Approved Premises	Implementation Guidance 2007
General Provisions		
2d.12.1	APs maintain a set of house rules	<ul style="list-style-type: none"> · The prohibition on controlled drugs does not extend to prescribed drugs, provided that these are notified to the AP staff · The rules cover the elements prescribed by national guidance, and may be supplemented by additional rules to reflect local condition

When the guidance in PC 05/2006 was issued, we considered that the initiative would 'comply with the Human Rights Act because residents agree to abide by the hostel rules', which specified that testing would only take place on reasonable suspicion or randomly if the offender had a previous history of alcohol related offending. We know of no instances where an offender has challenged testing as an infringement of his/her human rights under Article 8 of the European Convention (the right to freedom from interference with his/her physical integrity) and would be very surprised if any succeeded, because of the consent aspect. We also believe that such a challenge could be countered by the APs' need to manage risk (of harm) to each resident, other residents, staff, visitors, contractors, the public, especially in the case of a resident (offender) whose criminal behaviour was linked to alcohol.

The equipment used to undertake testing in APs is similar to the breathalyser which the police use to test for alcohol by the roadside. That is good enough to permit arrest and the Department for Transport (DfT) is so confident in the efficacy of the technology that the Government plans to abolish the right of drivers who fail a breathalyser test to demand a blood test except for those who cannot complete the roadside breath test, such as those with breathing problems. As such, corroborative tests (requiring different equipment) would not need to be used in approved premises. If there was doubt about someone being intoxicated, the better course would be to avoid breach/recall unless absolutely necessary and give the offender a warning instead.

Alcohol testing is necessary in APs because alcohol is banned (without ways of checking for alcohol on-site we may as well not have the prohibition). Offenders don't have to be indulging in unacceptable behaviour for that to amount to a breach of the rules - the mere fact of having alcohol on-site is a breach in itself. Having said that, though, being under the influence is probably not enough for a breach, so long as there are no other problems and the alcohol was consumed off-site. In those circumstances, the focus should mainly be on the resulting behaviour, rather than on the core fact of intoxication although that might itself give indications as to risk. However, we can envisage situations where staff think that an offender is intoxicated *and* should have access to

alcohol on-site simply because they've not been anywhere else. Testing the resident might be a useful way to decide whether to conduct a search.

In summary, APs should have alcohol testing equipment available, but shouldn't necessarily use it very intensively. This represents a permissive rather than prescriptive approach, which gives the power to test residents where staff think it will be helpful to reinforce the rules and maintain order but recognising that there's a whole range of behaviour for which offenders are breached without test results of any kind.

The costs of testing equipment would have to be met by probation areas/trusts, as testing in this context would not fall within the alcohol provision commissioned through Primary Care Trusts or other local commissioning forums.

The 2009 Approved Premises Handbook³ contains more information about testing.

³ http://npsintranet.probation.gsi.gov.uk/approved_premises_policy