

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE (SPECIFIED CLASS A DRUGS) ORDER 2023

2023 No. 784

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The Order brings into force an updated list of ‘specified Class A drugs’ (namely, the substances and products specified in paragraphs 1 to 5 of Part 1 (Class A drugs) of Schedule 2 to the Misuse of Drugs Act 1971 (c. 38) (“the 1971 Act”) for the purposes of Part 3 of the Criminal Justice and Court Services Act 2000 (c. 43) (“the 2000 Act”). The effect is to expand the Class A drugs for which: drug testing may be carried out in police detention; drug testing requirements may be imposed prior to sentencing or as part of licence conditions, post sentence supervision requirements or Terrorism Prevention and Investigation Measure (“TPIM”) requirements; and for which assessments relating to drug dependency may be imposed as a condition of bail. It revokes the previous specification order (The Criminal Justice (Specified Class A Drugs) Order 2001 (S.I. 2001/1816)).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The legal basis for drug testing is set out across a number of pieces of primary legislation:

- under section 63B of the Police and Criminal Evidence Act 1984 (c. 60) (‘the 1984 Act’), and Part 3 of the Drugs Act 2005 (c. 17), persons in police detention may be required to undertake a drug test and, in the event of a positive test, they may be required to attend assessments of their drug misuse; under section 3(6D) of the Bail Act 1976 (c. 63), as a condition of bail being granted, persons aged 18 or over may be required to attend, where they agree, an assessment and/or

follow up assessment relating to their dependency upon or misuse of Class A drugs;

- under section 64 of the Criminal Justice and Court Services Act 2000 (c. 43) ('the 2000 Act'), offenders aged 18 or over released from prison on licence may be required to take a drug test. Such drug testing conditions may, for example, be added to offenders' licences, under section 250 of the Criminal Justice Act 2003 (c. 44) or section 31 of the Crime (Sentences) Act 1997 (c. 43);
- under section 256D of the Criminal Justice Act 2003 (c. 44), offenders can be tested when they are subject to post sentence supervision requirements for drug testing;
- under paragraph 10ZB of Schedule 1 to the Terrorism Prevention and Investigation Measures Act 2011 (c. 23), persons subject to a Terrorism Prevention and Investigation Measure or 'TPIM' subjects may be required to submit to drug testing; and
- in the future, pre-sentence drug testing requirements may be imposed under section 34A of the Sentencing Act 2020 (c. 17), which is not yet commenced.

6.2 Under the section 70 (1) of 2000 Act, the Secretary of State has a power to specify the drugs for which a person may be tested. Specification under section 70(1) is for the purposes of Part III of the 2000 Act (and, consequently, section 64 of that Act which relates to drug testing conditions which may be imposed on licences). However, it has the effect of also specifying for the purposes of the provisions outlined above, which rely on the definition of 'specified Class A' drugs in the 2000 Act.

6.3 This power has been used once before, in 2001 (The Criminal Justice (Specified Class A Drugs) Order 2001 ('the 2001 Order') (S.I. 2001/1816)). The 2001 Order only specifies cocaine and diamorphine (as well as their salts and preparations or products containing those drugs) as 'specified Class A drugs'.

6.4 This Order revokes and replaces the 2001 Order. It expands the list of 'specified Class A drugs' to all substances and products which are specified, at the date this Order enters into force (2nd August 2023), in paragraphs 1 to 5 of Part 1 of Schedule 2 to the 1971 Act. This captures all Class A drugs presently controlled under the 1971 Act, with the exception of preparations of Class B drugs designed for injection (which are Class A drugs under the 1971 Act by virtue of paragraph 6 of Part 1 of Schedule 2).

6.5 If the list of substances and products specified as Class A drugs under the 1971 Act is amended in the future, the Class A drugs specified under this Order will not be automatically updated. Where appropriate, this Order will be amended, or revoked and replaced, at the same time as any amendment to the 1971 Act.

7. Policy background

What is being done and why?

7.1 The Government is expanding the definition of 'specified Class A drugs' for the purposes of drug testing in police detention, and subsequent follow up assessments, following the white paper consultation *Swift, Certain, Tough: New consequences for*

*drug possession*¹ and as announced within the *Anti-Social Behaviour Action Plan*², published on 27th March 2023.

- 7.2 The 2021 Drug Strategy, *From Harm to Hope: A 10-year drugs plan to cut crime and save lives*³ outlines the Government's commitment to achieve a generation shift in the demand for drugs, and drug testing in police detention (referenced as Drug Testing on Arrest) is a core part of the Reducing Demand strand of the Strategy.
- 7.3 The aim of expanding drug testing in police detention powers to all Class A drugs (with the exception of preparations of Class B drugs designed for administration by injection), the highest harm drugs, is to identify a wider cohort of drug users whose drug use may be associated with their criminality, so that they can be appropriately referred to treatment or intervention services. This in turn will allow them to address their drug using behaviours, and ultimately reduce drug use and reoffending. It is this expansion into wider cohorts beyond drug-dependent users that will enable drug testing in police detention to make an important contribution to the ambition outlined in the Drug Strategy to reduce overall demand for drugs. The implementation of the expanded drug testing in police detention is dependent on the available technologies and subject to operational decisions, and it is not envisaged that all Class A drugs will be tested for in police detention. Rather, this expansion will provide the police with the powers to do so, and allow police forces to tailor drug testing capabilities to address the drug treatment and support needs of the local area.
- 7.4 This legislation will, as a consequence, also expand the definition of "specified Class A drugs" for the purposes of assessments relating to drug dependency upon or misuse of Class A drugs as a condition of bail, pre-sentence drug testing requirements or drug testing as part of licence conditions or post sentence supervision requirements. The Government will consider the potential opportunities to implement drug testing or assessments relating to the wider category of specified Class A drugs (beyond cocaine and/or diamorphine) in these settings in the future.
- 7.5 The drug testing measure that may be imposed in respect of TPIM subjects will reflect this legislative change, and the expanded definition of 'specified Class A drugs' will be implemented. If the drug testing measure is imposed, a TPIM subject would be required to submit to drug testing by way of providing a relevant sample. The condition may only be imposed on an individual as part of a TPIM if Condition D in section 3 of the 2011 Act is met: the Secretary of State must reasonably consider the testing requirement to be necessary for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity. The necessity and proportionality of the drug testing measure is kept under review throughout the lifespan of the TPIM. Testing is limited to testing for the presence of specified Class A and B drugs. Work is ongoing to develop one unified drug testing function across the country to ensure consistency in all regions, no matter where the TPIM subject may live. Expanding the definition of 'specified Class A drugs' for TPIM subjects will enable greater opportunities to test individuals whose drug testing directly relates to their national security risk and where necessary mandate attendance at rehabilitation programmes.

¹ Swift, Certain, Tough: New Consequences for Drug Possession' white paper - GOV.UK (www.gov.uk)

² [Anti-Social Behaviour Action Plan - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

³ [From harm to hope: A 10-year drugs plan to cut crime and save lives - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

9.1 Consolidation is not relevant to this Order. This statutory instrument revokes and replaces the previous specification Order (the 2001 Order).

10. Consultation outcome

10.1 The Government consulted publicly on the expansion of drug testing in police detention powers between July and October 2022, *Swift, Certain, Tough: New consequences for drug possession*⁴. The Government's response to the consultation will be published in due course.

10.2 The Government engaged with operational partners on the introduction of the drugs measure when the Counter-Terrorism and Sentencing Act 2021 (c. 11) TSA 2021 was passed through Parliament. This was fully supported by operational partners due to previous experience of TPIM cases where individual's substance abuse increased their national security risk.

11. Guidance

11.1 The expansion of the "specified Class A drugs" for which drug testing in police detention may be carried out will be communicated to key stakeholders and the wider public. Updated guidance on drug testing in police detention, to advise operational partners of the legislative changes and updated best practice, will be issued by the Home Office. Further legislative changes are planned for drug testing in police detention over the next year, and updated guidance will be issued once these further changes are implemented.

11.2 There is ongoing work to unify capabilities for drug testing TPIM subjects nationally, and accompanying guidance will be published as necessary.

12. Impact.

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

12.2 The impact on the public sector for drug testing in police detention is broken into initial set-up costs and ongoing costs, in relation to police forces. It is estimated that the total costs will be around £3.05 million, with £980,000 of these for set up costs. This is dependent on a range of factors, including how police forces chose to operationalise the legislative change. The change to legislation does not require the implementation of expanded testing in police detention, rather it provides the powers to expand testing if it is deemed appropriate and operationally beneficial.

12.3 The impact on the public sector for drug testing measures that may be imposed in respect of TPIM subjects is expected to be minimal. TPIMs are a tool of last resort where deportation or prosecution is not possible. While there may be some costs associated with drug testing TPIM subjects, these are expected to be negligible given the low volumes. The impact assessment for the introduction of this measure under the Counter Terrorism and Sentencing Act 2021 can be found here: [Impact Assessment \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/111111/Impact-Assessment-Drug-Testing-TPIM-Subjects.pdf).

⁴ [‘Swift, Certain, Tough: New Consequences for Drug Possession’ white paper - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/swift-certain-tough-new-consequences-for-drug-possession)

12.4 A full impact assessment for drug testing in police detention is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 This instrument does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is through the Drug Testing on Arrest expansion project, led by the Drug Misuse Unit. Annual reviews of the expansion project will continue while Home Office funding is offered to police forces to support the set-up and expansion of Drug Testing on Arrest activities, and the impact of this legislation will be considered as it is implemented in police forces.

14.2 The ongoing necessity and proportionality of a TPIM and all the measures imposed on a subject is kept under regular review as stipulated by the TPIM Act 2011. The TPIM regime is also reviewed by the Independent Reviewer of Terrorism Legislation.

15. Contact

15.1 Helena Thompson at the Home Office, telephone: 07443 204107 or email: Helena.Thompson1@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Marcus Starling, Deputy Director for the Drug Misuse Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Crime, Policing and Fire, Rt Hon Chris Philp MP, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.