

Scottish Parliament Region: Central Scotland

Case 201002521: Scottish Prison Service

Summary of Investigation

Category

Scottish Prison Service: Prisons; security; testing for controlled drugs

Overview

The complainant, Mr C, raised a number of concerns in relation to the drug testing procedures at HMP Shotts (the Prison) when he was suspected on two separate occasions of having taken controlled drugs.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the chain of custody was abused, procedure forms were not properly completed and Mr C was not given the chance to have his urine samples independently tested (*upheld*);
- (b) medication Mr C had been issued in the past, or at the time of the tests, was not checked (*not upheld*); and
- (c) notices had been put up in the halls regarding changes in the testing procedure after Mr C had been tested and he felt he should have had prior knowledge of this (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Scottish Prison Service (SPS):

- (i) provide further training to staff within the Prison who are involved in the drug testing of prisoners and ensure copies of the MDT Policy and Procedures manual are readily available to all staff;
- (ii) remind the Prison staff to accurately record on the chain of custody form when prisoners test positive for controlled drugs which they have been prescribed; and

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- (iii) consider devising and implementing a policy and protocol that deals with instances whereby a prisoner is suspected of taking non-controlled drugs which have not been prescribed to the prisoner.

22 September 2011

The SPS have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. On 12 April 2010 the complainant (Mr C) was suspected of having taken a controlled drug. A Mandatory Drugs Test Authorisation Form was completed and signed by Mr C which provided written authority for the Scottish Prison Service (SPS) to obtain a sample of his urine. A screening test was then carried out at HMP Shotts (the Prison) under Mandatory Drug Testing (MDT) Policy and Procedures and the paperwork reflected that Mr C's sample was negative for controlled drugs.

2. A screening test involves the Prison's MDT Unit carrying out a dip-test of a prisoner's urine sample at the Prison to check for the presence of nine separate groups of controlled drugs. If the screening test is positive for any of the groups of controlled drugs and if the prisoner pleads not guilty, then a more definitive test, known as the confirmation test is carried out by an external laboratory.

3. In Mr C's case, the MDT Unit then sent his sample to an external laboratory (the Laboratory) to undergo further analysis even although the test result was negative. On 11 May 2010, the Laboratory reported that the sample contained Quetiapine, an antipsychotic drug.

4. As Mr C had not been prescribed Quetiapine, he was then charged on 12 May 2010 with committing a breach of discipline under paragraph (y) of Schedule 1 of the Prison and Young Offenders Institutions (Scotland) Rules 2006 (the Prison Rules). Paragraph (y) states that 'a prisoner shall be guilty of a breach of discipline if he or she administers a controlled drug to him or herself or fails to prevent the administration of a controlled drug to him or herself by another person'.

5. Mr C then had to attend an Orderly Room hearing on 12 May 2010 regarding the charge. The hearing was thereafter adjourned at Mr C's request to allow him the opportunity to instruct a solicitor to arrange an independent analysis of his sample. The Orderly Room procedures allow for the postponement of hearings to enable prisoners the opportunity to have their sample analysed by an independent laboratory at their own expense.

6. On 7 May 2010 Mr C was suspected again of having misused drugs, therefore, another urine sample was obtained. The same procedure was

carried out and the paperwork noted no evidence of a controlled drug other than methadone which was in accordance with Mr C's prescribed medication.

7. Although Mr C had not tested positive for any other group of controlled drug (other than his prescribed methadone), the MDT Unit sent his sample to the Laboratory for further analysis and the presence of Quetiapine and Zopiclone, a drug used to treat insomnia, were identified on 10 June 2010. Mr C was subsequently charged on 11 June 2010 with a breach of discipline under paragraph (y) of Schedule 1 of the Prison Rules and attended another Orderly Room hearing on 12 June 2010. This hearing was also adjourned at Mr C's request to allow him the opportunity to also have that sample independently analysed.

8. Mr C did not manage to have either of his samples analysed within the timeframe specified in the SPS's Procedures for Conducting Independent Testing of Urine. A period of 14 days is normally allowed for each of the three stages of the process, totalling six weeks.

9. In relation to the first sample and Orderly Room charge on 12 May 2010, and after nearly seven weeks, Mr C had still not obtained legal aid by the third stage of the process. Furthermore, in relation to the second sample and Orderly Room charges on 12 June 2010, the requirements of stage one – that Mr C's solicitor notify the Prison in writing of the intention to have an independent test done – had not been met within the two week timeframe allowed. Consequently, the Governor did not consider it appropriate to delay proceedings any further and the Orderly Room hearing was resumed on 28 June 2010 where all charges from both 12 May 2010 and 12 June 2010 were considered by the Governor. Mr C was found guilty and punishment was awarded on the basis that Quetiapine and Zopiclone were controlled drugs which he had not been prescribed.

10. On 30 June 2010, it was reported by the laboratory carrying out the independent analysis of Mr C's first sample (a different laboratory from that used by the SPS), that he had tested positive for Quetiapine.

11. Mr C then complained to the Scottish Prisons Complaints Commission (SPCC) on 5 July 2010. The SPCC closed on 30 September 2010 and its functions transferred to this office on 1 October 2010. Therefore, we became responsible for considering Mr C's complaint about the SPS.

12. The complaints from Mr C which I have investigated are that:
- (a) the chain of custody was abused, procedure forms were not properly completed and Mr C was not given the chance to have his urine samples independently tested;
 - (b) medication Mr C had been issued in the past, or at the time of the tests, was not checked; and
 - (c) notices had been put up in the halls regarding changes in the testing procedure after Mr C had been tested and he felt he should have had prior knowledge of this.

Investigation

13. As our investigation progressed, my complaints reviewer identified that Quetiapine and Zopiclone were not classified as controlled drugs. The Prison Rules define a controlled drug as any drug which is a controlled drug for the purposes of the Misuse of Drugs Act 1971. This factor impacted significantly on the complaints raised by Mr C in that our findings have identified wider implications for the SPS when carrying out drug testing on prisoners.

14. During the investigation of the complaint, my complaints reviewer obtained copies of the paperwork associated with the urine samples Mr C had provided under the MDT process on 12 April 2010 and 7 May 2010. This included the MDT Drugs Test Authorisation Forms, the chain of custody forms and the toxicology reports. My complaints reviewer examined these documents along with the Orderly Room paperwork and Guidance on Orderly Room Procedures, the MDT Policy and Procedures, the Specimen Collection Procedures, the Procedures for Conducting Independent Testing of Urine Samples, the Prison Rules and the Prisons (Scotland) Act 1989.

15. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the SPS were given an opportunity to comment on a draft of this report.

(a) The chain of custody was abused, procedure forms were not properly completed and Mr C was not given the chance to have his urine samples independently tested

16. The chain of custody is a system of controls and procedures that document the progress of any urine sample from the point of collection through the Laboratory to its disposal after the results have been accepted.

17. MDT is carried out under the terms of Section 41B of the Prisons (Scotland) Act 1989. Section 107 of the Prison Rules enables an officer to require a prisoner to provide a urine sample for drug testing purposes to find out if they have any controlled drug in their body. The SPS's MDT policy states:

'For the process to remain lawful, Governors must follow meticulously all Rules and instructions connected with this legislation.'

18. The MDT policy makes clear that the initial screening test carried out at the Prison 'allows those samples testing negative to be screened out' and 'the positive screening result will be put to the prisoner at the Orderly Room'. The policy specifies that samples will only be sent to the Laboratory for confirmation if the screening test is positive and the prisoner pleads not guilty. In addition, under the SPS's Specimen Collection Procedures, urine samples should be destroyed if the screening test is negative.

19. The only time that samples testing positive for a controlled drug would not be sent to the Laboratory for further analysis is when it is known that the drug has been prescribed to the prisoner.

20. In line with the policy and procedures detailed in paragraphs 17 to 19, as both of Mr C's samples tested negative for controlled drugs (with the exception of methadone which had been prescribed), I suggested to the SPS that the samples should not have been sent to the Laboratory by the Prison for further testing, nor should the Orderly Room hearings on 12 May 2010 and 12 June 2010 have gone ahead.

21. Section 3.5 of the Orderly Room procedures advises that 'great care must be taken in framing the charge' and Section 117(4) of the Prison Rules specifies that 'the Governor will consider whether the charge has been proven beyond any reasonable doubt'.

22. The Prison advised my complaints reviewer that Mr C had not been prescribed either Quetiapine or Zopiclone and should, therefore, not have taken them. However, my specialist medical adviser (the Adviser) informed my complaints reviewer that, although both of these drugs can only be obtained on prescription, they are not classified as controlled drugs in terms of either the British National Formulary (2010) or the Misuse of Drugs Act 1971 and any amendment thereof. Therefore, with regard to proving the charge beyond any

reasonable doubt, my complaints reviewer raised concern with the SPS that Quetiapine and Zopiclone are not, in fact, controlled drugs.

23. As way of explanation, the Prison's MDT Co-ordinator advised my complaints reviewer that Mr C was located within the Independent Living Unit and had been attending an external five day work placement when suspicion arose that he may be under the influence of some sort of substance. Although Mr C had not tested positive for any other group of controlled drugs, other than his prescribed methadone, the MDT Unit remained suspicious that he was under the influence of some sort of substance.

24. The MDT Co-ordinator further explained that they are often confronted with situations where there remains reasonable suspicion that prisoners have misused substances despite them providing negative urine samples. As a result, with the approval of the Governor and the SPS, the MDT Co-ordinator said that an arrangement had been reached last year with the Laboratory to carry out further analysis on those screening tests which were negative but where reasonable suspicion of drug abuse, other than controlled drugs, still existed.

25. The SPS's legal department also considered my complaints reviewer's concerns about Quetiapine and Zopiclone not being controlled drugs and they agreed that Mr C should not have been charged with paragraph (y) of Schedule 1 of the Prison Rules. They further advised that, in future, they would consider an alternative charge in cases where substances, other than controlled drugs, have been misused.

(a) Conclusion

26. Although the Orderly Room procedures allows for amendments to be made to a charge if it becomes clear during the hearing that a prisoner's behaviour may have amounted to a lesser or different offence, I cannot see how the SPS could apply an alternative charge should a similar situation arise in future. As noted earlier, the Prison Rules allow for urine tests to be carried out for the purposes of establishing if a prisoner has taken a controlled drug. Under the MDT process both samples should have been destroyed immediately after the results of both screening tests on 12 April 2010 and 7 May 2010 were known. In my view, if the correct MDT procedures had been followed by the Prison, the Orderly Room hearings would not have taken place and Mr C would

not have been found guilty of administering controlled drugs and had punishment awarded.

27. Had Mr C tested positive for any other group of controlled drugs, other than his prescribed methadone, it is more than likely that the chain of custody, procedure forms and timescales given for both samples to be independently analysed, would have been appropriate and in line with the SPS's processes. The SPS should also ensure the correct charge is applied in cases where there is evidence to show that a prisoner has misused a controlled drug while on a work placement and not in prison custody. If the controlled drug had been administered while the Prisoner was not in prison custody, the MDT Policy and Procedures manual advises that it may be more appropriate to charge a prisoner with failing to comply with their Temporary Release Licence rather than Schedule 1, Paragraph (y) of the Prison Rules.

28. I should make clear that in upholding Mr C's complaint, I am not in any way condoning the misuse of substances which fall outwith the categories of controlled drugs and which have not been prescribed to prisoners. I recognise that Mr C had not been prescribed either Quetiapine or Zopiclone and should clearly not have taken them. I also appreciate that the SPS are committed to a drug free environment, especially in terms of health and safety within prisons and for rehabilitation purposes.

29. My role is to independently review whether the SPS have followed the correct processes and taken account of the relevant legislation. I consider that there is sufficient evidence to support that the Prison Rules and relevant policies were not appropriately followed by those members of staff who had been involved with the testing of Mr C's samples and Orderly Room hearings. Therefore, I uphold the complaint.

(a) *Recommendation*

30. I recommend that the SPS:

Completion date

- (i) provide further training to staff within the Prison who are involved in the drug testing of prisoners and ensure copies of the MDT Policy and Procedures manual are readily available to all staff.

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(b) Medication Mr C had been issued in the past, or at the time of the tests, was not checked

31. Mr C complained that the Prison did not check his prescribed medication at the time the samples were taken on 12 April 2010 and 7 May 2010.

32. When Mr C signed the Mandatory Drugs Test Authorisation Form to enable the SPS to obtain a sample of his urine, he also declared that he was on medication and gave written permission for his medical records to be accessed by the Prison.

33. The chain of custody form is used by prison staff to record the results of a screening test. My complaints reviewer noted that there was no mention of methadone in the paperwork for the first screening test conducted on 12 April 2010, albeit the MDT Co-ordinator had advised that Mr C had been prescribed methadone at this time.

34. The paperwork for Mr C's second screening test on 7 May 2010 indicated that he had been prescribed methadone. As stated earlier in the report, the only time that samples testing positive for a controlled drug would not be sent to the Laboratory for further analysis was when it was known that the drug had been prescribed to the prisoner.

35. The MDT Policy and Procedures sets out that where a screening test result was positive for controlled drugs and the prisoner gave consent to allow access to his medical records, disclosure should be sought using a specific document known as 'Form 3'. The main purpose of this was to confirm whether the prisoner had been prescribed the controlled drug or if there was any other medication which was likely to affect the positive result.

36. Although we know that Mr C's samples should not have been sent to the Laboratory, my complaints reviewer asked the MDT Co-ordinator whether Mr C's prescribed medication was checked prior to both samples being sent to the Laboratory.

37. The MDT Co-ordinator informed my complaints reviewer that there was no need to formally request disclosure from the medical team as Mr C had declared he was on methadone at the time both screening tests were carried out. In addition, the MDT staff were aware of Mr C's prescribed methadone through weekly meetings they held in relation to addiction intervention work.

(b) Conclusion

38. Although the MDT staff should have made clearer records at the time of the first screening test on 12 April 2010, they did have knowledge, through organised meetings, that Mr C had been prescribed methadone. Mr C did not test positive for any other controlled drug, therefore, in accordance with the MDT Policy and Procedures, the samples should not have been sent to the Laboratory, hence there was no need to carry out any further checks of his medication. Therefore, I do not uphold the complaint.

39. However, in the interests of continuous improvement, I recommend that the SPS take the following action.

(b) Recommendation

40. I recommend that the SPS:

Completion date

- (i) remind the Prison staff to accurately record on the chain of custody form when prisoners test positive for controlled drugs which they have been prescribed.

20 July 2011

(c) Notices had been put up in the halls regarding changes in the testing procedure after Mr C had been tested and he felt he should have had prior knowledge of this

41. In April 2010 there was a notice displayed throughout the Prison in relation to the testing of urine for the presence of any controlled drug in line with Section 41B of the Prisons (Scotland) Act 1989. The notice was then amended at the beginning of May 2010 to inform prisoners that laboratory testing could confirm all other types of drugs on the Prison's request, in addition to the nine groups of controlled drugs.

42. The MDT Policy and Procedures sets out that, before testing can be undertaken in a prison, the Governor must publish a formal notice authorising the introduction of drug testing. It also states that a general notice should be published to inform prisoners, amongst various matters, of the procedures to be followed in providing a sample.

43. During our investigation we identified that negative screening tests for controlled drugs should be disposed of and not sent to the Laboratory for further analysis. We also learnt that an arrangement had been put in place last year

between the Prison and the Laboratory to carry out further analysis on samples that proved negative at the screening stage which was contrary to the MDT Policy and Procedures.

44. As a result, my complaints reviewer queried the appropriateness of the amended notice with the MDT Co-ordinator. The MDT Co-ordinator suggested that the amended notice may not be lawful in terms of carrying out additional testing at the Laboratory, on samples which prove negative at the screening stage. As a result the MDT Co-ordinator has removed the amended notice until the Prison seeks further clarity from the SPS's legal department.

(c) Conclusion

45. When Mr C's first sample was tested on 12 April 2010, he would not have been aware that the Prison was sending negative screening test samples to the Laboratory for further analysis. This was because the Prison did not notify prisoners of the changes to the testing procedure until May 2010, when the amended notice was published.

46. When Mr C's second sample was tested on 7 May 2010, he would have been aware of the changes to the testing procedure, as the amended notice was published in May 2010. However, in light of my earlier findings in complaint (a) above, I do not consider that the arrangement with the Laboratory, or the amended notice, is acting in accordance with Section 41B of the Prisons (Scotland) Act 1989, the Prison Rules or the SPS's MDT Policy and Procedures. Therefore, I uphold the complaint.

(c) Recommendation

47. I recommend that the SPS:	<i>Completion date</i>
(ii) consider devising and implementing a policy and protocol that deals with instances whereby a prisoner is suspected of taking non-controlled drugs which have not been prescribed to the prisoner.	22 September 2011

48. The SPS have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the SPS notify him when the recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant
The SPS	The Scottish Prison Service
The Prison	HMP Shotts
MDT	Mandatory Drug Testing
The Laboratory	A laboratory used by the SPS for drug testing
The Prison Rules	The Prison and Young Offenders Institutions (Scotland) Rules 2006
SPCC	Scottish Prisons Complaints Commission
The Adviser	A medical adviser to the Ombudsman

Glossary of terms

British National Formulary (2010)	A publication which provides prescribers, pharmacists and other healthcare professionals with up-to-date information about prescribing the uses of medicines
Chain of custody	A system of controls and procedures that document the progress of any urine sample from the point of collection through the Laboratory to its disposal after the results have been accepted
Confirmation test	A test normally carried out by a laboratory to provide a more definitive drug test result
Controlled drug	Any drug which is a controlled drug for the purposes of the Misuse of Drugs Act 1971
Dip-test	A test carried out in the Prison's MDT Unit, also known as a screening test which tests for nine groups of controlled drugs, namely Amphetamines, Barbiturates, Buprenorphine, Benzodiazepines, Cocaine, Ecstasy, Methadone, Opiates and Cannabis
Orderly Room hearing	A hearing for the purposes of inquiring into alleged breaches of discipline by a prisoner
Quetiapine	An antipsychotic drug
Screening test	A test carried out in the Prison's MDT Unit to test for nine groups of controlled drugs, namely, Amphetamines, Barbiturates, Buprenorphine, Benzodiazepines, Cocaine, Ecstasy, Methadone, Opiates and Cannabis

Zopiclone

A drug used to treat insomnia

List of legislation and policies considered

Paragraph (y) of Schedule 1 of the Prison and Young Offenders Institutions (Scotland) Rules 2006 (the Prison Rules)

Section 41B of the Prisons (Scotland) Act 1989

Mandatory Drug Testing Policy and Procedures

The Specimen Collection Procedures

The Procedures for Conducting Independent Testing of Urine Samples

The British National Formulary (2010 edition)