



Delegated Powers and Law Reform Committee

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Via email

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20 December 2021

Dear Keith and Angela

At its meeting on Tuesday 14 December, the Delegated Powers and Law Reform (DPLR) Committee considered the [Prisons and Young Offenders Institutions \(Scotland\) Amendment Rules \(SSI 2021/446\)](#). As you will know, the instrument amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011. It was laid before the Parliament on 30 November and came into force on 13 December 2021 and so failed to comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This requires that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.

As you may have seen from the [Committee's report on the instrument](#), the Committee agreed to draw the SSI to the attention of the Parliament under reporting ground (j) for failure to lay it in accordance with laying requirements under the 2010 Act. The Committee was also not content with the Scottish Government's explanation of the breach of laying requirements.

Shortly before its consideration of the Amendment Rules, the Committee received a letter from Sarah Armstrong, Director of the Scottish Centre for Crime and Justice Research (SCCJR), as well as an open letter from a range of academics. I have included both of these in the annex.

During the Committee's discussion on the SSI and the correspondence from the SCCJR and academics, it was highlighted that the correspondence from the SCCJR and academics underlines why the parliamentary scrutiny of such changes, which have been made at short notice, is important and why the 28-day rule is in place. As one Member put it: "For such legislation to have public confidence, the public expect us to have had due time for consultation and that all-important scrutiny."

Full details of the Committee's discussion on the instrument can be found in the [Official Report of the meeting](#).

I would be grateful for a response to the Committee's concerns about the speed that this instrument was brought into force by **Friday 21 January 2022**.

Yours sincerely

Stuart McMillan MSP
Convener of the Delegated Powers and Law Reform Committee

Cc: Minister for Parliamentary Business
Convener of the Criminal Justice Committee

Letter to the Delegated Powers and Law Reform Committee from the Scottish Centre for Crime and Justice Research

Re: SSI - The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021 (SSI 2021: 446)

I write to you regarding the secondary legislation effective as of 13 December 2021, conferring broad power on the Scottish Prison Service to photocopy prisoner mail. I understand you will be considering this legislation in your meeting Tuesday.

I hope the Committee will take account of a letter of objection signed by numerous experts in substance abuse, public health, prison conditions and detention harms. In this letter, I attempt to specify and elaborate, given the Committee's remit, the rights concerns raised in that document.

The powers granted, and restriction of Article 8 rights, through the SSI are:

- **Not proportionate:** The new powers grant broad rights of interfering with prisoner correspondence primarily as a strategy of interfering with drugs supply in prison. Not only has there been insufficient scrutiny of the effectiveness of this approach (see next), there has been lack of attention to the impact on families and relationships, a crucial cornerstone in the wellbeing of imprisoned people, to assess the costs of the restriction and therefore its overall proportionality. Moreover, international human rights frameworks, which inform the ECHR, make clear that prisoner rights may only be infringed where they are 'demonstrably necessitated by the fact of incarceration'. In this case, the claimed necessity has been established by one body, that is neither expert in crime prevention operations nor drug strategy.
- **Not effective:** The aim of the new rule is, ultimately, to reduce drug use, overdose and death. However, even assuming successful interception of drug laced post, the majority of non-natural deaths in prison are due to suicide (mainly by hanging) and prescribed drugs. No drug death in 2020 or 2019 was listed as solely due to NPS; only two drug deaths mentioned NPS, always in combination with multiple prescribed substances.¹ A number of recent and highly publicised incidents involving NPS overdoses has overshadowed higher rates of death from other, preventable causes. Why have not these been the subject of emergency legislation? Moreover, study after study has documented the failure of supply focused drug strategies. On the other hand, demand focused strategies and harm reduction strategies have demonstrated stronger evidence of success. Extending the power of the state with poor evidence that these powers will be effective further renders the rights infringement disproportionate.
- **Not consistent with evidence and Government policy on a public health approach to drug use in Scotland.** The nation's world beating rate of drug deaths has been responded to by creation of task forces and a commitment to a public health approach. The powers of copying post are not consistent with this, and do not come with any comparable strategy of managing the drivers of drug use in prison. Evidence about the current state of mental health in prison

addressing causes of drug use is readily available, not least from a team I led who completed a rapid research study gathering information from every prison in Scotland during the pandemic. We have reported some of these results, and will be publishing within the next month detailed evidence of the state of wellbeing in prisons.² With other colleagues, we will also be publishing the most extensive literature review on drug use, interventions and support needs in prison in the next month.

- **Creating significant risk of abuse of power:** The extensive and permanent powers created can now be exercised, under rules allowing restriction of rights for maintaining good order or security, over a broad and unspecified range of issues beyond management of drug supply. The recent report of the Independent Review of the Response to Deaths in Prison Custody noted the great difficulty in obtaining SPS records and access to officers to carry out its work.³ The authors noted SPS resistance to transparency and accountability in relation to its own conduct in cases of deaths in custody was raised as a significant concern. This suggests that monitoring and regulating use of the new powers will be challenging. The difficulty of ensuring oversight of this power ought to be considered in assessing the proportionality of the new rule. Moreover, the claim of prison authorities of a problem and of the best way to address it should not be taken as self-evident. Numerous experts and civil society organisations are able and ready to provide rapid responses to assess powers such as these.

Seeking to prevent the tragedy of drug overdoses in prison should not come at the cost of granting carte blanche to penal authorities. This is a rule that has as much chance of worsening the current situation in prisons as ameliorating it, establishing a permanent power to interfere with correspondence and relationships of imprisoned people and their loved ones.

Sarah Armstrong
Professor of Criminology
Director of the Scottish Centre for Crime and Justice Research
13 December 2021

Open Letter expressing concern and objection to new powers to photocopy all prisoner mail

To Convenors and Members of the Criminal Justice Committee, Members of the Delegated Powers and Law Reform (DPLR) Committee, and all Members of the Scottish Parliament –

New powers, which will allow the Scottish Prison Service to [routinely photocopy prisoner mail](#), will come into effect on 13 December 2021, having been fast-tracked without consultation (i.e. (the Scottish Statutory Instrument (SSI): the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021 (SSI 2021: 446)).

This raises significant concerns on the grounds of human rights, human decency, resource efficiency and consistency with Scottish Government policy in relation to

trauma informed practice, family support, whole systems approaches, a [public health approach to drug use](#), harm reduction principles and evidence-based policy.

The [Policy Note](#) accompanying the law (SSI 2021: 446) offers no specific evidence that prisoner mail is the primary cause of drug overdoses in prison. No verified details are offered. It is admitted there is no specific evidence to support the legislation, claiming that 'there is no way of directly evidencing that the deaths in custody are as a direct result of substances that have been introduced exclusively via the prisoner mail system'. This is not correct. There are multiple methods of gathering factual information including via independent research with prisoners and staff, sample testing of letters, speaking with health professionals working with prisoners and more. That none of this has been undertaken prior to proposing legislation that has significant human rights and other implications is unwise, and in violation of human rights commitments in Scotland. For example, we know **according to the SPS's own published data that the majority of drug deaths in prison are due to prescribed substances, and not the new psychoactive substances that this law targets.**

The fact that the SPS's own determination of a need for this amendment to the Prison Rules is not being supplemented by independent views is deeply problematic. Significantly, the **lack of any consultation, formal or informal, with organisations with relevant expertise and independence such as human rights bodies, monitors, prison reform organisations, health organisations, substance misuse experts** and more is deeply concerning.

Among the issues of concern about broad powers the legislation confers are:

- Lack of specific and verified evidence of the problem it claims to address
- Violation of rights to privacy
- Violation of rights to family life
- Violation of right to correspondence
- Violation of right against excessive punishment and torture
- Potential violation of right to freedom of expression
- Potential violation of right against punishment without law
- No consideration of how this law will impact family relationships and personal wellbeing of those in prison
- No details on how the law will be implemented and its use monitored or regulated
- No information on resource implications of this legislation in staff time and copy equipment

It is unacceptable that this law is drafted with the recognition that 'prohibiting prisoners from receiving general correspondence interferes with Article 8 rights' (Policy Note) but nevertheless argues these are acceptable based only on consultation of those in SPS and a small circle of people in Scottish Government.

The sharp rise in deaths in prison during the pandemic is indeed a cause for concern. However, a review of drug deaths in 2020 and 2021 shows the majority of these deaths are from substances prescribed within prisons and not new psychoactive substances. **There is currently a mental health crisis in prison, as the sharp rise in prison**

suicides in 2021 shows. Research conducted by University of Glasgow has documented [intensifying levels of distress within prisons due to pandemic restrictions](#). Specifically, **lack of mental health support, family contact and meaningful opportunities of recreation and association were cited as causes for this.** The proposed law purports to address a symptom of pandemic lockdown in prison – increased drug use – by further intruding on imprisoned people’s vital connections to those on the outside. It will do nothing to address this underlying crisis.

What is known is that post is just one of many entry routes for drugs into prison, with [other well-known routes](#) including people entering prison for different reasons, not least prison officers themselves, as well as getting drugs over the wall. The many failed attempts to tackle the issue show that that control of supply has limited impact. **The issue will not be resolved by closing one route down, but only by addressing demand**, which involves addressing the quality of life for people in prison especially during the pandemic, including the importance of family contact, access to treatment and support for those who need it, as well as minimising the use of prison in the first place.

Drug deaths in Scotland are at unprecedented levels. There is broad acceptance that criminalizing use is not effective. Investment in mental health, recovery support, and greater family contact would more likely support those inside from feeling the need to turn to drugs. Compromising access to these things is likely to contribute to rather than alleviate deaths in prison.

We call on the Criminal Justice Committee to exercise its the power to annul implementation of this legislation. We call on the Delegated Powers and Law Reform Committee to consider the lawfulness of the legislation in terms of compatibility with the European Convention on Human Rights. This legislation constitutes an unjustified and disproportional infringement of human rights, lacking evidence and due deliberation on its necessity and on the negative impacts such an approach will have on prisoner rights, the wellbeing of them and their families and wider Government policy on family life and reduction of drug deaths.

Signed,

Prof Sarah Armstrong, University of Glasgow
Dr Sarah Anderson, Edinburgh Napier University
Prof Margaret Malloch, University of Stirling
Dr Marguerite Schinkel, University of Glasgow
Prof Fergus McNeill, University of Glasgow
Dr Caitlin Gormley, University of Glasgow
Dr Jamie Buchan, Edinburgh Napier University
Dr Sharon Greenwood, University of Glasgow
Dr Christine Haddow, Edinburgh Napier University
Dr Ryan Casey, University of Oxford
Dr Aileen O’Gorman, University of the West of Scotland
Prof Richard Sparks, University of Edinburgh
Dr Louise Brangan, University of Strathclyde
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Prof Anne Schwan, Edinburgh Napier University
Dr Niall Hamilton-Smith, University of Stirling
Dr Sarah Galloway, University of Stirling

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