

Criminal Justice Committee

**1st Meeting, 2022 (Session 6), Wednesday,
12 January 2022**

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
 - the [Prisons and Young Offenders Institutions \(Scotland\) Amendment Rules \(SSI 2021/446\)](#) [see page 3];
2. **If the Committee agrees to report to the Parliament on the instruments, the Parliament has until 22 January 2022 to decide whether the SSI should be annulled.**

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 14 December 2021.
4. **The DPLR Committee drew the instrument to the attention of the Parliament under reporting ground (j) for failure to lay it in accordance with laying requirements under the Interpretation and Legislative Reform (Scotland) Act 2010.**
5. **The DPLR Committee said it was not content with the Scottish Government's explanation for breach of the requirement in section 28(2) of the 2010 Act, and highlighted, as the Committee has done in the past, that the Scottish Government should normally comply with laying requirements to facilitate timely parliamentary scrutiny of such important policy choices.**
6. **The Committee also highlighted the correspondence it received from the Scottish Centre for Crime and Justice Research to the lead committee (see Paper 1).**

7. **Finally, the DPLR Committee agreed to write to the Cabinet Secretary for Justice, who is responsible for prison reform and prisoner policy, and the Minister for Drugs Policy, to highlight its concerns about the speed of change in policy..**

Procedure for negative instruments

8. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
9. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
10. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
11. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
12. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
13. Each negative instrument appears on the Criminal Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
14. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

15. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

16. The Committee is invited to consider the instrument.

Clerks to the Committee
6 January 2022

POLICY NOTE

**THE PRISONS AND YOUNG OFFENDERS INSTITUTIONS (SCOTLAND)
AMENDMENT RULES 2021**

SSI 2021/446

1. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021 are made in the exercise of the powers conferred by section 39 of the Prisons (Scotland) Act 1989. These Rules amend the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the Prison Rules”) and they are subject to negative procedure. The purpose of this instrument is to add psychoactive substances (within the meaning of section 2 of the Psychoactive Substances Act 2016) to the list of prohibited articles in the Prison Rules and to provide Prison Governors with powers that will enable them to mitigate against the risk of illicit substances being introduced through general correspondence sent to prisoners via the prisoner mail system.

Policy Objective

2. The Prison Rules set out provisions relating to the regulation and management of Prisons and Young Offenders Institutions and various matters concerning those who are required to be detained in these institutions (such as their classification, treatment, discipline, employment and control).

3. Drug misuse in Scottish Prisons has evolved over the last few years, shifting from well-known and readily identifiable controlled substances such as heroin, cocaine, cannabis and prescribed medication(s) to Psychoactive Substances (PS) including synthetic cannabinoids. Synthetic cannabinoids are very potent drugs which can be soaked into paper at low concentrations but still have a significant psychoactive effect. Easy access to PS within the community, the low cost and the ability to introduce these relatively easily and with minimal risk into the prison system in large quantities has resulted in the use of PS becoming the preferred drug of choice in prisons. The most common method of introducing this substance into prisons is to spray the substance onto sheets of paper which are then posted in via the prisoner mail system.

4. It is an offence under the Psychoactive Substances Act 2016 to supply psychoactive substances for the purpose of consumption. It is also an offence under that Act to possess psychoactive substances in a custodial institution such as a prison.

5. Over the course of the 12-month period August 2020 – July 2021 there have been 9 deaths in SPS custody linked to suspected drug overdoses. Recent information indicates that the number of emergency escorts to hospital which were drug related and incidents of prisoners being found suspected to be under the influence of drugs has escalated.

6. There is no way of directly evidencing that the deaths in custody, emergency escorts and the incidences of prisoners being found under the influence of drugs are as a direct result of substances that have been introduced exclusively via the prisoner mail system. However, given the high number of positive mail indications and the intelligence suggesting that this is the most commonly used method, SPS have assessed that there is a high probability that the substances used in these instances have been introduced via this method.

7. The amendments add psychoactive substances (within the meaning of section 2 of the Psychoactive Substances Act 2016) to the list of items that are included in the definition of “prohibited articles”. Prohibited articles are items which prisoners are not allowed to possess in prison and currently include controlled drugs, alcohol, offensive weapons and other items. The amendments also provide prison officers and employees with powers that will allow them to: photocopy prisoner’s general correspondence; provide the prisoner with the photocopy of the correspondence; and retain the original correspondence for return to the prisoner upon his or her release. The prison officers and employees will also be provided with the power to test general correspondence for the purposes of investigating if it contains a prohibited article or unauthorised property.

8. The Scottish Prison Service and Police Scotland are reviewing the current Memorandum of Understanding concerning the management of illicit substances found in prisons, including the investigation, collection and destruction of such substances.

9. These amendments mitigate against the risks of illicit substances, particularly PS, being introduced via the prisoner mail system and thus reduce the risk of such substances causing harm to those in the care of SPS, and those working in or visiting our prisons. It is also hoped that the amendments will have a positive impact on the NHS and Scottish Ambulance Service, by reducing the incidences of prisoners requiring to utilise these services as a result of taking drugs introduced via the prisoner mail system.

10. The amendments will only effect general correspondence sent to prisoners, not confidential correspondence such as privileged correspondence, court correspondence and medical correspondence (all of which are defined in rule 56 of the Prison Rules (opening and reading of confidential correspondence)).

Consultation

11. There has been consultation with operational managers and policy colleagues within the SPS and Scottish Government, the Prisoner Officers Association and those in the care of SPS.

Impact Assessment

12. Impact Assessments have not been prepared for this instrument because of the need to make and lay the instrument urgently. SPS recognise that prohibiting prisoners from receiving general correspondence interferes with Article 8 rights (the right to respect for private and family life, home and correspondence) of prisoners.

SPS however consider that these rule amendments are a necessary and proportionate means by which to maintain the good order of prisons, reduce the risk of harm to prisoners and those working in prisons being caused by drugs, particularly PS, being sent into prisons via prisoner's general correspondence, and to prevent crime in prisons.

Financial Effect

13. The Cabinet Secretary for Justice and Veterans confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Prison Service
November 2021