

EXPLANATORY MEMORANDUM TO
THE PRISON AND YOUNG OFFENDER INSTITUTION (AMENDMENT)
RULES 2011

2011 No. 1663

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Prison and Young Offender Institution (Amendment) Rules 2011 (“the Amendment Rules”) amend the Prison Rules 1999 (“the 1999 Rules”).

2.2 The Amendment Rules give effect to the Prisoners’ Earnings Act 1996 by setting a threshold above which deductions from prisoners to whom the Act applies’ earnings may be made, the amount of those deductions, and persons to whom the amounts generated may be paid.

2.3 They also amend the 1999 Rules and the Young Offender Institution Rules 2000 (“the 2000 Rules”) in respect of prisoners’ complaints, prisoner discipline, and the authorisation of the interception of legal communications.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Under section 47 of the Prison Act 1952, the Secretary of State has power to make rules for the regulation and management of prisons, remand centres, young offender institutions or secure centres, as well as for the classification, treatment, employment, discipline and control of those detained within. The Rules that are being amended by the Amendment Rules are the 1999 Rules and the 2000 Rules.

4.2 The Prisoners’ Earnings Act 1996 (Commencement) (England and Wales) Order 2011 (SI 2011 No. 1658 (C. 63)) (“the Commencement Order”) brings the Prisoners’ Earnings Act 1996 into force on 26th September 2011 in relation to England and Wales. This instrument enables the Amendment Rules to be made in order to give effect to the Prisoners’ Earnings Act 1996, but is not itself subject to any Parliamentary procedure.

4.3 The Prisoners’ Earnings Act 1996 authorises deductions from or levies on prisoners’ earnings and provides for the application of such deductions or levies. This Act gives the Secretary of State powers to prescribe (in rules made under section 47 of the Prison Act 1952) the threshold above which deductions

from a prisoner's earnings may be made, the amount of those deductions, and persons to whom the amounts generated may be paid.

5. Territorial Extent and Application

5.1 The Amendment Rules apply to England and Wales.

6. European Convention on Human Rights

6.1 The Amendment Rules are subject to the negative resolution procedure and do not amend primary legislation. Consequently no statement is required.

7. Policy background

Prisoners' Earnings

7.1 The Prisoners' Earnings Act 1996 applies to prisoners doing work which they are not required to do in accordance with the 1999 Rules, and for which they earn 'enhanced wages' (that is, more than they would earn for work which they are required to do). The Act will be applied to prisoners working outside the prison for external employers. In practice, the Act will apply to a relatively small group of prisoners, currently up to 500 in number. It would potentially also capture those working in closed prisons who volunteer for non-core prison work and receive enhanced pay, albeit that no such situations arise under the current system.

7.2 The Commencement Order and Amendment Rules give effect to a commitment in the Coalition Agreement to implement the Prisoners' Earnings Act 1996. Deductions or levies will be taken, after tax and National Insurance and other court-ordered and child support payments, from earnings over £20 per week, subject to a 40% maximum rate and with no upper limit on the earnings from which deductions or levies are taken. Our approach, including the implementation terms, is designed to balance the provision of funds for reparation with the disincentive effect the deductions or levies could have on prisoners working, which can improve resettlement and reduce reoffending. We estimate that the scheme under the Act will allow us to generate around £1 million per year.

7.3 All amounts generated from the deductions or levies will be provided to Victim Support, who provide services to victims of crime across England and Wales. The organisation therefore has national reach and already works in partnership with numerous other, smaller organisations providing support to victims and communities. Victim Support is keen to expand this partnership work. Focusing the money on Victim Support will allow us to deliver a significant change in victims' lives.

Complaints by prisoners and inmates of young offender institutions

7.4 The Amendment Rules reframe provisions about complaints by prisoners and inmates of young offender institutions (YOIs) to emphasise that

they are entitled to submit requests and complaints relating to their imprisonment to a governor or the Independent Monitoring Board. They remove the reference to the manner in which requests and complaints may be made, in order to ensure operational flexibility. The mechanisms for making requests and complaints are set out in Prison Service Instruction (“PSI”) 10/2011 in respect of requests (referred to as ‘applications’) and Prison Service Order (“PSO”) 2510 in relation to complaints, which are issued by the National Offender Management Service (NOMS).¹ (The policy in respect of requests in PSO 2510 has been superseded by the relevant text in PSI 10/2011.) These policies are issued to prisons and YOIs, and are made available to prisoners and inmates.

7.5 The Amendment Rules also remove the requirement for a governor to hear complaints daily and instead impose a requirement for complaints to be considered by a governor as soon as possible. This is designed to ensure that complaints will be dealt with expeditiously and with due regard to their particular circumstances. PSO 2510 sets out current timeframes which governors are expected to adhere to for responding to formal written complaints, but following the rule changes this will be superseded by a new instruction which will include a more flexible set of deadlines linked to the urgency of the matters raised.

Prison discipline

7.6 The 1999 and 2000 Rules provide for disciplinary punishments, including additional days, to be suspended for up to six months. If a prisoner who has previously been awarded a suspended punishment of additional days is charged with a further offence during the period of suspension the governor may refer the charge to an independent adjudicator to inquire into the charge and, if the prisoner is found guilty, to decide whether to activate the suspended additional days. The Amendment Rules ensure that, where the governor of a prison or YOI has referred a charge in these circumstances, the adjudicator must first inquire into the charge within 28 days. Under the Rules as they currently stand, there is no time period for the adjudicator to begin the inquiry.

7.7 The 1999 and 2000 Rules currently provide for disciplinary cases to be referred to an independent adjudicator when the prisoner is eligible for the punishment of additional days. Prisoners serving indeterminate sentences are not eligible for additional days and the Rules do not make express provision for disciplinary charges against them to be referred to an independent adjudicator. However, in *Smith* [2009] EWHC 109, the High Court held that, in some exceptional cases, a charge against an indeterminate prisoner might be so serious that Article 6 of the ECHR is engaged and the charge should therefore be inquired into by an adjudicator. The amendment to the Rules will allow for this. The amendment will also ensure that, where a prisoner or YOI inmate who is serving an indeterminate sentence is jointly charged with a person serving a

¹ Prison Service Instruction 10/2011 can be found at http://psi.hmprisonservice.gov.uk/psi_2011_10_residential_services.doc and Prison Service Order 2510 at http://pso.hmprisonservice.gov.uk/PSO_2510_prisoners_requests_and_complaints_procedures.doc.

determinate sentence, both charges may be referred to an adjudicator to hear the cases together.

Interception of prisoners' communications

7.8 The Amending Rules will allow the Chief Executive Officer, director responsible for national operational services or duty director of the National Offender Management Service to authorise the interception of the legal or other confidential communications of a prisoner or YOI inmate if the grounds set out in the rules are satisfied. The reference to the interception being authorised by the Chief Operating Officer of the prison service is removed. This reflects recent changes to the executive management structure of NOMS and continues to ensure that interception may be authorised only by a person of sufficient seniority within the organisation.

Consolidation

7.9 The Ministry of Justice recognises that both the 1999 and 2000 Rules have now been subject to a number of amendments. There are no current plans to consolidate either set of Rules but the Ministry remains mindful of the need to keep this matter under review.

8. Consultation outcome

8.1 The Government stated its intention to implement the Prisoners' Earnings Act 1996 at paragraph 58 of its December 2010 consultation document 'Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders' (Cm. 7972).² Nearly all respondents supported the proposal.

8.2 The rule change which will enable disciplinary charges to be referred to independent adjudicators where the prisoner is not eligible for the punishment of additional days reflects a judicial review judgment. The other changes relating to referral of disciplinary charges to independent adjudicators reflect comments received in response to consultation on the draft of a forthcoming Prison Service Instruction that will replace current guidance on adjudication procedures.

8.3 The changes to the complaints rules have been subject to consultation with the Independent Monitoring Boards.

8.4 The change to the Rule on the interception of legal and confidential communications has not been subject to consultation because the amendment relates solely to who may authorise such interceptions and reflects changes to the executive management structure of the National Offender Management Service.

² 'Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders' can be found at <http://www.justice.gov.uk/consultations/consultation-040311.htm>.

9. Guidance

9.1 Guidance on the Prisoners' Earnings Act 1996 will be set out in a Prison Service Instruction, which will be available to all prison staff and prisoners. Affected current and future employers will also be informed.

9.2 Regarding prisoner requests and complaints, prisoner governors will be informed about the amendments to the Rules. The amendments will also be explained within the relevant PSIs when these are next revised.

9.3 Guidance on referring disciplinary charges to Independent Adjudicators will be in a Prison Service Instruction due to be published in October 2011, and separate guidance will be issued to Governors on the exceptional circumstances in which prisoners who are not eligible for the punishment of additional days should be referred to independent adjudicators.

9.4 Revised guidance will be issued to reflect the changes to who may authorise the interception of prisoners' communications. This will be achieved through amendment to the National Security Framework (PSO 1000) when the Amendment Rules come into force, and will also form part of the revised policy on the interception of prisoner communications, to be published by the end of 2011.

10. Impact

10.1 The Impact Assessment which accompanied 'Breaking the Cycle: Government Response' included, at paragraph 17, a summary assessment of the Prisoners' Earnings Act 1996.³ Analysis showed that our proposals would provide around £1,000,000 per year in deductions. Our analysis also shows a cost to the National Offender Management Service of under £60,000 a year. These figures remain accurate. A further Equality Impact Assessment has now been prepared and will be published alongside the Explanatory Memorandum on the OPSI website. It shows that the Prisoners' Earnings Act should not disproportionately impact any protected groups (for those where we have available data) in Category D prisons, when compared to the total prison population.

10.2 An Equality Impact Assessment has been prepared showing that although black prisoners are more likely to be charged with disciplinary offences than other ethnic groups, the number of indeterminate sentence prisoners who will meet the criteria for exceptional referral to an independent adjudicator is not expected to be significant. Referral will depend on the individual circumstances of each case, and equality issues should not affect the decision. The rule change regarding the time within which independent adjudicators must inquire into charges is intended to codify existing practice, so will not impact significantly on prisoners.

³ The Impact Assessment, and Equality Impact Assessment, of the consultation can also be found at <http://www.justice.gov.uk/consultations/consultation-040311.htm>.

10.3 An Equality Impact Assessment has been prepared which shows that there is not expected to be any detrimental effect on offenders, staff or other stakeholders from amendments in respect of prisoner complaints. The proposed amendments will still provide for a statutory framework under which prisoners may bring requests and complaints.

10.4 The changes concerning the interception of prisoners' legal and other confidential communications update who may authorise such interceptions to reflect structural reform of the National Offender Management Service. An Equality Impact Assessment has been prepared which shows that this change is not expected to impact significantly on prisoners.

10.5 The legislation does not apply to business, charities or voluntary bodies.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 With regard to the Prisoners' Earnings Act 1996, the National Offender Management Service will monitor the levels of deductions and numbers of relevant prisoners working.

12.2 Arrangements for prisoner complaints are kept under regular review.

12.3 Local monitoring and oversight of adjudications by prison management is already in place. Governors will be instructed to keep the effects of the rule changes under review.

12.4 Whilst the changes concerning the authorisation of the interception of prisoners' communications simply reflect structural changes within the National Offender Management Service, the arrangements for interception will continue to be kept under review.

13. Contact

13.1 James Martin of the Ministry of Justice can be contacted by telephone on 020 3334 5022 or by email at james.martin@justice.gsi.gov.uk and can answer any queries regarding the Prisoners' Earnings Act 1996.

13.2 Simon Greenwood of the National Offender Management Services can be contacted by telephone on 0300 047 5686 or by email at Simon.Greenwood@noms.gsi.gov.uk.cjsm.net and can answer any queries regarding the making and hearing of complaints, the referral of complaints to an Independent Adjudicator and the authorisation of the interception of legal communications.