

EXPLANATORY MEMORANDUM TO
THE PRISON AND YOUNG OFFENDER INSTITUTION (AMENDMENT) RULES 2015

2015 No. 1638

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 The Prison and Young Offender Institution (Amendment) Rules 2015 (“the Amendment Rules”) amend the Prison Rules 1999 (“the Prison Rules”) and the Young Offender Institution Rules 2000 (“the YOI Rules”) in response to the finding by the Supreme Court in R (on the application of Bourgass & another) v Secretary of State for Justice on 29 July 2015, that under the current Rules Governors cannot lawfully authorise removal from association (also known as segregation) for more than 72 hours. The purpose of the Amendment Rules is to enhance the existing system to allow governors in a prison, or young offender institution, to authorise continuing segregation beyond 72 hours, but to provide additional safeguards including a requirement for the Secretary of State to give permission before decisions can be taken to continue segregation beyond 42 days.

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

Timing:

- 3.1 Due to the need to comply with a Supreme Court judgment handed down on 29 July 2015 which found current segregation procedures to be unlawful, the Amendment Rules will come into force as soon as possible.
- 3.2 Subject to the following exceptions, the Amendment Rules will come into force on 4 September 2015. The exceptions are that rules 2(3) and 3(3), in so far as they insert new rule 45(2B) and (2C) of the Prison Rules and new rule 49(2B) and (2C) of the YOI Rules (which concern the requirement for leave of the Secretary of State for removal from association for more than 42 days) will come into force on 16 October 2015. That later commencement date is necessary to ensure that segregation decisions can continue to be made pending the roll out of that additional safeguard whilst the Secretary of State prioritises review of longer term segregation cases.
- 3.3 Given the need to consider what measures could be introduced across the prison estate in the light of the judgment, it was not possible to prepare the Amendment Rules more quickly following the date of the judgment in order that they could be made and laid at an earlier date. It is necessary to breach the 21 day Rule in

relation to the coming into force of the Rules (subject to the exceptions referred to above) to ensure that the segregation system is being operated lawfully following the Supreme Court judgment. It is considered that there will be no particular disadvantage to prisoners or staff caused by commencing this provision in breach of that Rule.

4 Legislative Context

4.1 The Amendment Rules are necessary following the Supreme Court judgment in R (on the application of Bourgass & another) v Secretary of State for Justice [2015] UKSC 54 which held that current segregation procedures, where governors within a prison authorise continuing segregation after 72 hours, are unlawful because under the construction of the current Rule 45(2) of the Prison Rules these decisions must be taken under the authority of the Secretary of State – in practice by officials from outside the prison.

5 Territorial Extent and Application

5.1 The Amendment Rules apply to England and Wales.

6 European Convention on Human Rights

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

7 Policy background

7.1 The Prison Rules make provision for the management of prisons, including the treatment of prisoners and conduct of prison officers.

7.2 The aim of segregation is to provide a fair and safe process by which governors are able to remove from normal association (under Prison Rule 45/Young Offender Rule 49) any prisoner who by their behaviour, presents a risk to the maintenance of good order or discipline or, who is themselves at risk of harm from other prisoners. Segregation is always a last resort option used for the shortest time necessary and the prisoner must be returned to normal location as soon as it is safe and practicable. Currently decisions on whether to continue to authorise segregation are carried out by a senior member of prison staff with advice from the Segregation Review Board (SRB) within 72 hours and thereafter every 14 days.

7.3 Following the judgment, the Secretary of State considered two options.

7.3.1 Option 1 – An independent review process under the current formulation of Rule 45(2).

A number of possible options that might allow an official external to the prison to take both the 72 hour review and all subsequent decisions to authorise continuing segregation were considered. These included involvement of: the Independent Monitoring Board; Independent Adjudicators; the Deputy Director of Custody (DDC), officials from the Area Office acting on behalf of the DDC or a central committee supported by caseworkers. None of these were possible without huge investment in additional resources and all presented considerable logistical

problems given that there are approximately 24,000 segregation decisions within scope per year.

Importantly, the National Offender Management Service¹ (NOMS) considered that the current system is procedurally fairer than a system relying on a structurally independent decision maker who would in reality, given the volume of cases, have to take many decisions on the papers and who would be detached from the circumstances of the case. The current system involves a range of people who know the prisoner and prison and allows the prisoner to express views.

7.3.2 Option 2 – Achieving greater procedural fairness within the existing authorisation process

Amend Prison Rule 45(2) to allow for the existing process for governors in a prison to authorise continuing segregation of prisoners beyond 72 hours but provide additional safeguards including a requirement in the rules for a review by the Secretary of State who must give permission before decisions can be taken to continue segregation beyond 42 days. The arrangements for the review set out in policy would be designed to introduce a greater separation and independence between decision maker and reviewer.

7.4 After careful evaluation by NOMS, the Secretary of State decided to pursue option 2. It was considered that the current, multi disciplinary review of segregation by the SRB within the prison, with a decision on continuing segregation taken by a governor, provides the best and safest system of ensuring that segregation decisions are reasonable and proportionate and protect both the interests of the segregated prisoner and those of the wider population of the establishment. The composition of the SRB provides a broad and experienced mix of people able to weigh up the merits and difficulties in returning a prisoner to normal location. It is considered therefore, that amendment of the Prison Rules to enhance the existing system so that it provides an extra degree of procedural fairness and independence provides the proper procedural safeguards to ensure that prisoners are segregated fairly and safely within a system that is practical to operate.

7.5 Rule 2 of the Amendment Rules provides that a prisoner may not be removed from association for more than 72 hours without the written authority of the Governor. Such authority given by the Governor may last for up to 14 days from the date the authority is given, but may be renewed for periods not exceeding 14 days, The Governor may not authorise removal where that would take the total period of segregation beyond 42 days, starting with the date of initial segregation, without the leave of the Secretary of State given in writing. The Governor must obtain such leave for any subsequent authorisation which would take the total period of segregation beyond a further 42 days from the previous grant of leave. Rule 3 amends the YOI Rules so that the same amendments apply to segregation procedures in Young Offender Institutions.

¹ NOMS is an executive agency of the Ministry of Justice responsible for the management of prisons.

- 7.6 In addition to the additional safeguards in the Amendment Rules (see above) the new policy on Authorising and Reviewing Continuing Segregation will provide the following further safeguards:
- a) The revised policy sets out that other than in exceptional circumstances the person who considers whether to authorise continuing segregation of prisoners at or before 72 hours and at or before 14 days thereafter, must be a different person to the one who originally segregated the prisoner. This provides an added degree of fairness in the system and ensures that the person who takes the second decision to authorise does so with a fresh mind.
 - b) As provided for in the proposed new rules, Governors will need to have permission from the Secretary of State to segregate for longer than a total period of 42 days starting with the initial date of segregation. Subject to the process at 6 month intervals (see below) in practice, Deputy Directors of Custody (DDC, who oversee a number of prisons in an area) will take this decision on behalf of the Secretary of State in relation to public sector prisons, and the Deputy Director of Custodial Services (who is the Senior NOMS representative with responsibility for ensuring that private sector prisons operate as required by the Secretary of State) will take the decision in relation to private prisons. This process requires Governors to justify their actions in segregating to-date and asks key questions about what plans there are in the future to return prisoners to normal location should a further period in segregation be permitted.
 - c) The relevant Director (which could be the Director of Public Sector Prisons, NOMS in Wales or Commissioning and Contract Management-Custodial Services) to review any segregation of adult prisoners beyond 6 months and thereafter at 6-monthly intervals. This is in addition to the 42 day reviews by DDCs and the on-going cycle of 14-day authorisations by prison SRBs.
 - d) Decisions in respect of Young People (under 18s) in segregation will be made and reviewed in a similar manner but in recognition of the additional vulnerabilities of Young People, this will be reviewed by the relevant DDC at the 21 day point and at the 3 month point by the Director (although currently no Young People have been in segregation for as long as 3 months).
 - e) SRBs, who are responsible for reviewing the segregation of all prisoners at a maximum of 14-day intervals, will continue to operate as now. Their composition has been more clearly mandated in the reviewed policy to make sure that there is an appropriate mix of experience and skills on the SRB. The attendance of the Independent Monitoring Board (IMB) member is recognised as critical to the effective functioning of the SRB and prisons have been instructed in the policy that they must do all they can to facilitate involvement of the IMB at the SRB.
 - f) The revised policy specifies more clearly that prisoners must be able to attend SRBs and make representations relating to continuing segregation to the SRB

and underlines that they must be provided with meaningful reasons for segregation so as to allow representations to be made.

- g) Improvements have been made to the monitoring procedures showing the number of prisoners in segregation, for how long and for what reason and how many are subject to self-harm or suicide prevention measures.

7.7 The Amendment Rules will be supplemented with a statement of Prison Service policy (summarised above). This will contain detailed guidance about implementation of the Amendment Rules and additional safeguards which will apply to segregated prisoners. It will be published at the same time the Amendment Rules come into force and will be sent to all prisons under cover of a note from the Director and be available on NOMS internal Intranet as well as the external .GOV website.

7.8 The Ministry of Justice recognises that both the Prison Rules and YOI Rules have 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 policy has been subject to consultation within the Ministry of Justice and the IMB whose members attend the multi-disciplinary SRBs. As part of that process, policy and operational colleagues have had the opportunity to comment on the proposals. Senior Operational Managers within NOMS have welcomed the changes which are felt to provide for greater procedural safeguards for prisoners and to provide DDCs with greater capability to monitor and control medium and long term segregation.

8.2 Formal consultation with external stakeholders has not taken place. For the reasons outlined in section 3, it has been necessary to move quickly towards a lawful system. However, the Ministry considers that it would be desirable to seek the views of external stakeholders on the new rules and how they are working, once the Amendment Rules have come into force and the policy has been published. Those discussions will take place with a range of external organisations and this will inform the initial review of the implementation of the Amendment Rules, as discussed in section 12 below.

9 Guidance

9.1 A Prison Service policy document will be issued to all prison establishments and Headquarters groups to coincide with the bringing into force of the new rules. This will provide detailed guidance in relation to the implementation of provisions in the Amendment Rules regarding prisoners who are being considered for continued segregation beyond 72 hours. Due to the need to introduce these changes urgently it has not been possible to attach a copy of the final policy with these rules but the key changes are summarised for the benefit of the Committee.

The policy will take effect on commencement of the Prison Rules and YOI Rules. It will be available on the Government website (GOV.UK).

10 Impact

- 10.1 The Statutory Instrument will impact on prisoners and inmates held in prison and young offender institutions in England and Wales. It will also impact on prison staff responsible for the continuing segregation of prisoners beyond 72 hours and on DDCs who will now be responsible for review of segregation at more frequent intervals and Directors who will for the first time be involved in reviews of longer-term segregation.
- 10.2 It is not expected that the instrument will have any impact on business, charities or voluntary bodies.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11 Regulating small business

- 11.1 The legislation does not apply to small business.

12 Monitoring & review

- 12.1 The commencement of the Amendment Rules and policy will be reviewed by the National Offender Management Service. An initial review will commence in November 2015 and a further review will commence within 12 months of implementing these changes.

13 Contact

- 13.1 Bob Waterman of the National Offender Management Service's Security Group is able to answer any queries regarding the Instrument as well as more general policy queries regarding the segregation of prisoners. He can be contacted on: 0300 047 6208 or at bob.waterman@noms.gsi.gov.uk.