

**EXPLANATORY MEMORANDUM TO**  
**THE PRISON AND YOUNG OFFENDER INSTITUTION (AMENDMENT) RULES**  
**2018**

**2018 No. 549**

**1. Introduction**

- 1.1 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 This instrument amends Rules that make provision for the management of prisons and Young Offender Institutions.
- 2.2 As a result of these amendments, governors<sup>1</sup> of prisons and Young Offender Institutions will be able to establish their local privilege policy without approval of the policy by the Secretary of State.
- 2.3 The amendments also remove tobacco as a privilege and remove the authority of the governor to allow tobacco in prison. The prisoner privileges are incentives linked to their behaviour and currently tobacco is one of the privileges which prisoners can purchase. The amendments also add matches, lighters and e-cigarettes (including vaping devices) to the list of articles that may attract a fine if brought into prison without authorisation.

**3. Matters of special interest to Parliament**

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

- 3.1 None.

*Other matters of interest to the House of Commons*

- 3.2 This entire instrument applies only to England and Wales.
- 3.3 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

**4. Legislative Context**

Privileges

- 4.1 The Prison Rules 1999 and the Young Offender Institution Rules 2000 both make provision for the establishment at every prison of a system of privileges (in practice a local policy), approved by the Secretary of State and appropriate to the prisoners there. Both sets of rules provide that a policy on privileges must include arrangements under which prisoners can spend money they have earned in prison. If the policy includes arrangements under which privileges are granted depending on whether a

---

<sup>1</sup> All references to governors also apply to directors of contracted prisons

prisoner has met certain standards in behaviour and performance at work or in other activities, then the policy must also include procedures to be followed for determining the grant of the privileges; a requirement that the prisoner be given reasons for adverse decisions; and a statement of the means to appeal such a decision. A local policy may also include arrangements for time out of cell in addition to what is otherwise allowed to prisoners in that prison.

- 4.2 The requirement for the Secretary of State to approve privilege policies is removed by this instrument, so that governors will develop their local policies without approval by a senior official acting on the Secretary of State's behalf.

#### Smoke-Free Prisons and Criminal Penalties for Certain Articles

- 4.3 On the 29 September 2015 the Government committed to moving to a smoke-free prison estate in a safe and controlled way to protect staff and prisoners from the harmful effects of second-hand smoking. Since May 2016 this initiative has been carefully rolled out across the prison estate in a phased approach. Tobacco is already on the list of items that may attract a fine of up to £1,000 if brought into or out of custodial establishments without authorisation. In line with the rollout of smoke-free prisons and to discourage criminals from seeking to profit from smuggling tobacco-related products into prisons, this instrument places matches, lighters and e-cigarettes (including vaping devices) onto that list.

### **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is England and Wales only.
- 5.2 The territorial application of this instrument is England and Wales only.

### **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

### **7. Policy background**

#### *What is being done and why*

##### *Privileges*

- 7.1 In his keynote speech at the Royal Society of Arts on 6 March 2018, the Secretary of State for Justice recognised that governors need more flexibility over how incentives are used in prisons. He set out his ambition to reset and reinvigorate the system of incentives in prisons so that they work much more in favour of those prisoners who play by the rules and who want to turn their lives around, whilst coming down harder on those who show no intention of doing so. This builds on the commitments made in the The Prison Safety and Reform White Paper 2016 which said, 'Following our reforms, governors will have significantly greater authority and flexibility, (along with greater accountability) in determining how their prisons are run.' The white paper also identified the Incentives and Earned Privileges policy as a priority for review.
- 7.2 Prison Service Instruction (PSI) 30/2013; Incentives and Earned Privileges (IEP) is the current national policy which contains mandatory requirements on which governors must base their local schemes to allow prisoners to earn additional privileges by demonstrating responsible behaviour and participation in work or other

constructive activity. The system of privileges is a tool for encouraging and rewarding positive and responsible behaviour in prisoners and encourages sentenced prisoners to take an active part in their rehabilitation. This PSI is being reviewed and will be replaced with a Policy Framework which provides greater empowerment to governors to ensure their local policies can take account of the challenges in their prison, (in line with the commitments in the Secretary of State's speech and the White Paper), but continues to include mandatory requirements for prisons to ensure that practice is lawful, safe and decent, with consistency across prisons where necessary. The Government will soon consult stakeholders on a detailed draft Policy Framework.

- 7.3 The effect of the Instrument will be to allow individual governors to establish their own local policy, without the need for approval by a senior official on behalf the Secretary of State. As a matter of policy, governors will be expected to adhere to the mandatory requirements in the IEP PSI (or the Policy Framework when published), which provide a minimum standard for local privileges policies. The change in the rules will support the new IEP Policy Framework.
- 7.4 The rule change is necessary to support greater governor empowerment. The other option of maintaining the status quo would see governors continue to need to gain approval for their local privilege policies, which would undermine the government policy of greater empowerment for governors.

*Smoke Free*

- 7.5 Under current Prison Rules 1999; prisoners can have tobacco as a privilege and under the authority of the governor. By amending this rule, it will bring it in line with the smoke free rollout, which will see all prisons in the closed estate being smoke free with no tobacco being allowed in these prisons. Currently 100 prisons have moved to smoke free status and no smoking is allowed on these prison premises. It will also prevent governors from reverting back to a smoking status prison once it has become smoke free.
- 7.6 Under the Prison Act 1952 it is a criminal offence to bring about the movement of certain items, without authorisation, into or out of a custodial establishment. These items are set out on three lists - "List A", "List B" and "List C" - each of which has a maximum penalty attached to it for a person convicted of this offence. List C items may attract a fine of up to £1,000. Tobacco is already on List C and, in line with the move to smoke-free prisons, this instrument adds matches, lighters and e-cigarettes (including vaping devices) to that List through this instrument. This will address concerns about the health and safety risks these items can pose and help deter individuals from attempting to profit from smuggling them into prisons in order to circumvent the smoking ban. During the pilot phases of the smoke-free prisons initiative, it became apparent that these items were being traded within the illicit economy within prisons.
- 7.7 Prisoners are offered the choice of accessing Nicotine Replacement Therapy (NHS smoking cessation provision) to assist them in stopping smoking or purchasing alternative nicotine products in the form of e cigarettes and vaping devices.

*Consolidation*

- 7.8 The Ministry of Justice has no plans to consolidate the Prison Rules 1999 and the Young Offender Institutions Rules 2000.

## **8. Consultation outcome**

### *Privileges*

- 8.1 The change to the rules on privileges supports the Government policy of providing greater authority and flexibility to governors, as referenced in the Secretary of State's keynote speech (6 March) and in the Prison Safety and Reform White Paper (2016). A new IEP Policy Framework is currently being developed. The Government will soon undertake a consultation on the draft Policy Framework with internal and external stakeholders.

### *Smoke Free*

- 8.2 The Department of Health and Social Care, Public Health England, Courts and Police colleagues were consulted when undertaking the smoke free rollout process.
- 8.3 In devising the parts of this instrument applying to List C, the Ministry of Justice has consulted our counterparts in the Department of Health and Social Care, and in law enforcement, including the Crown Prosecution Service (CPS).

## **9. Guidance**

- 9.1 The amended Rules will be published and made available on the Ministry of Justice website.

### *Privileges*

- 9.2 Governors will be expected to adhere to the requirements in PSI 30/2013 Incentives and Earned Privileges, which includes approval of their local IEP policies by their Prison Group Director until this is replaced with the new IEP Policy Framework upon which they will no longer need to gain approval. The new Policy Framework will contain mandatory requirements to ensure a lawful, safe and decent system, with consistency across prisons where necessary. It will also provide detailed evidence based guidance to support governors to develop their local policies.

### *Smoke Free*

- 9.3 Prisoners and visitors to prisons are all notified of smoke free prison status via displayed notices at prisons. The publication of Her Majesty's Prison and Probation Service (HMPPS) Smoke Free Policy framework will be published and available to prisoners, staff on the HMPPS website and locally within prisons. The Ministry of Justice is discussing with the CPS what alterations may be needed in respect of their charging guidance as a result of the changes to List C. Changes are also being made to: (1) the relevant Her Majesty's Prison and Probation Service (HMPPS) Prison Service Instruction to staff – "*Conveyance and Possession of Prohibited Items and Other Related Offences*" – PSI 2012/10. This will set out, for example, who may bring items such as e-cigarettes into prisons and in what circumstances they may do that; and (2) signs and literature available to visitors.

## **10. Impact**

### *Privileges*

- 10.1 There are no cost implications of the change to the rules on privileges, as the legislation simply removes the need for public and private sector prisons to gain approval from a senior official for their local privilege policies.

### *Smoke Free*

- 10.2 Placing lighters, matches, e-cigarettes (including vaping devices) onto the list of items that could attract a fine if brought into prisons without authorisation could have an impact on business, including private-sector prisons. However, this is likely to be minimal since prisons and their contractors will be permitted to supply e-cigarettes and vaping devices to prisoners in certain circumstances e.g. as an alternative to smoking. Matches and lighters may still be brought into private-sector prisons by contractors so that prison staff can light items for use in prisoners' religious worship.
- 10.3 Public sector prisons will still be permitted to supply e-cigarettes and vaping devices to prisoners as an alternative to smoking. Matches and lighters may still be brought into public-sector prisons by contractors so that prison staff can light items for use in prisoners' religious worship. Public sector prisons will still be permitted to supply tobacco to prisoners in the open estate. In the open estate prisons where prisoners can continue to smoke in designated areas outside of the buildings; they will be allowed to purchase tobacco for their own use as the open prisons are not smoke free.
- 10.4 At the time of writing there are 100 prisons currently smoke free with the remaining closed estate prisons in the transition phase of becoming smoke free. They only move to smoke free when it has been deemed safe to do so and appropriate smoking cessation support services are in place. The open estate prisons continue to allow smoking as the prisoners have access to the grounds where they can smoke in the open air. As now, it will remain a criminal offence to bring tobacco into open prisons without authorisation by virtue of this article's continued presence on List C.
- 10.5 The Government anticipates that there will be very few prosecutions arising from this change to legislation. There were only 40 and 29 offenders convicted in respect of List C items in 2015 and 2016 respectively. Tobacco is already on List C and, although the Government cannot break down published statistics in respect of prosecutions for conveying this particular item, there were only 56 and 34 offenders prosecuted in respect of items on this list as the principal offence in 2015 and 2016 respectively. As now, factors particular to the circumstances of an individual case will affect decision-making on which cases to prosecute. These can include whether there are grounds for believing that the offence will be repeated and the scale of the contraband found.

## **11. Regulating small business**

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

## **12. Monitoring & review**

### *Privileges*

- 12.1 The rule change will be successful if governors are empowered to develop their local policies without higher approval. The outcome of the change will be subject to internal review 12 months after the publication of the IEP Policy Framework. A

sample of prison governors, representing all prison types will be contacted to confirm if the rule change has achieved the desired outcome.

*Smoke Free*

- 12.2 Prisons will be required to ensure compliance with the mandatory requirements of the HMPPS smoke free Policy Framework and lessons learnt of the process including a repeat of the air quality tests are being scheduled as part of the review.

**13. Contact**

Privileges: Stewart Morris at the Ministry of Justice, Telephone: 07971 825 984 or email: [stewart.morris@justice.gov.uk](mailto:stewart.morris@justice.gov.uk)

List C: Richard Bishop at the Ministry of Justice Telephone: 07976 793 148 or email: [richard.bishop1@justice.gov.uk](mailto:richard.bishop1@justice.gov.uk)

Smoke free: Caroline Vine at Her Majesty's Prison and Probation Service, Telephone: 0791 2541639 email: [caroline.vine01@hmpr.gsi.gov.uk](mailto:caroline.vine01@hmpr.gsi.gov.uk),