

EXPLANATORY MEMORANDUM TO
THE PRISON AND YOUNG OFFENDER INSTITUTION (CORONAVIRUS, ETC.)
(AMENDMENT) (NO. 3) RULES 2020

2020 No. 1077

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

2. Purpose of the instrument

- 2.1 Section 47(1) of the Prison Act 1952 allows for the Secretary of State to make Rules for the regulation and management of prisons and other custodial institutions listed in that section. The Prison Rules 1999 (Prison Rules) and Young Offender Institution Rules 2000 (YOI Rules) set out a range of powers, duties and obligations that govern how prisons and young offender institutions respectively are run on a day to day basis.
- 2.2 This instrument amends:
- the Prison Rules and YOI Rules to:
 - add to the list of specified drugs that prisoners and inmates can be tested for under section 16A of the Prison Act 1952 pursuant to mandatory drug testing arrangements in prisons and young offender institutions; and
 - clarify that directions made by the Secretary of State under rule 9A of the Prison Rules and rule 5A of the YOI Rules describing a class or classes of prisoners who will be released under those rules may only be in accordance with the other terms of the relevant rule; and
 - the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020 to remove the provision for the Secretary of State to extend the “transition period” during which the modifications made by those rules have effect following the end of the “transmission control period”.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Relating to the second amendment above, this instrument makes a clarifying amendment to rule 9A(4) of the Prison Rules and rule 5A(4) of the YOI Rules, reported by the JCSI for doubtful vires in its Eleventh Report of Session 2019–21, published on 15 May 2020.
- 3.2 Relating to the third amendment listed above, this instrument amends the Prison and Young Offender Institution (Amendment) (No.2) Rules 2020, which was reported by the JCSI for doubtful vires in its Fifteenth Report of Session 2019–21, to remove the ability of the Secretary of State to extend the “transition period” in the Rules beyond 3 months.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

Amending prison drug testing

- 6.1 Section 16A of the Prison Act 1952 gives a prison officer the power to require a prisoner or inmate to provide a sample of urine (or a sample of any other description specified in the authorisation not being an intimate sample) for the purpose of ascertaining whether the prisoner has any drug in their body.
6.2 The definition of drug for the purposes of section 16A of the 1952 Act includes a drug which is a controlled drug under the Misuse of Drugs Act 1971 or a specified drug. Section 16A(3) of the 1952 Act states that a specified drug means any substance or product specified in prison rules for the purposes of this section. Three previous statutory instruments listed substances that were to be classed as specified drugs, which were a combination of psychoactive substances and prescribed and pharmacy medications. This statutory instrument lists an additional substance that is to be classed as a specified drug.

Amending the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020

- 6.3 The Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020 provides a legal basis for the restricted regime where HM Prison and Probation Service (HMPPS) would be no longer able to adhere to some of the Prison and YOI rules.
6.4 These modifications only apply during a “coronavirus period”. A “coronavirus period” is defined as a “transmission control period” and a “transition period”. A “transmission control period” is defined, via paragraph 5 of Schedule 21 to the Coronavirus Act 2020, as a period of time:
(a) starting with the Secretary of State for Health and Social Care’s declaration that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health in England and the measures in the Coronavirus Act 2020 will be an effective means of means of delaying or preventing significant further transmission of coronavirus in England; and
(b) ending with the date that declaration is revoked.

- 6.5 Whilst the “coronavirus period” is triggered by a declaration in England as defined above, as prisons are a reserved matter, the modifications to the Prison Rules and YOI Rules apply equally to Prisons and YOIs in England and Wales.
- 6.6 This statutory instrument defines the “transition period” within the “coronavirus period” as a 3 month period following the end of the “transmission control period”.

Amending the Prison Rules and YOI Rules in relation to the end of custody temporary release (“ECTR”) Scheme

- 6.7 Rule 9A of the Prison Rules authorises the Secretary of State to make a coronavirus restricted temporary release direction describing specified prisoners, or classes of prisoners, who may be released for the purposes of managing coronavirus in the prison estate or managing appropriate prison staffing. Rule 5A of the YOI Rules makes the same provision for people detained in YOIs.
- 6.8 This statutory instrument makes a clarifying change to rule 9A(4) of the Prison Rules and rule 5A(4) of the YOI Rules, to put beyond doubt that when the Secretary of State is describing prisoners and inmates within a coronavirus restricted temporary release direction, such a description must not exceed the scope of the relevant Rule.

7. Policy background

What is being done and why?

Amending prison drug testing

- 7.1 Currently, prisoners and inmates can only be tested for substances controlled under the Misuse of Drugs Act 1971 and for the specified drugs added by three earlier statutory instruments¹. This instrument inserts a further substance to the list of specified drugs in schedule 2 to each of the Prison Rules and YOI Rules, so that prisoners and inmates can be compulsorily tested for them.
- 7.2 Misuse of illicit substances in prisons in England and Wales causes significant harm and can have a significant impact on the physical and mental wellbeing of individuals taking them, both in the short and long-term. They also fundamentally undermine an individual’s ability to engage in rehabilitation. In addition to the health problems caused by substance misuse, debt resulting from the supply, distribution and use of such substances within the illicit economy in prisons is a major cause of violence, bullying and self-harm.
- 7.3 There is increasing evidence of the misuse of medicines in prison, either on their own or taken with other substances for additive effect. An equalities analysis has been carried out and concludes that the addition of a metabolite of a medicine, that can produce a psychoactive affect, to the list of specified drugs that can be tested for would not have an adverse impact on any protected characteristic group. Although some prisoners and inmates are more likely to legitimately require medicines, Prison Service Order on Mandatory Drug Testing (PSO 3601) contains clear policy instructions that no disciplinary action is to be taken after a positive test where the substance in question was legitimately prescribed or supplied.
- 7.4 The instrument is one part of wider work by Her Majesty’s Prisons and Probation Service (HMPPS) to address drugs in prison. In April 2019 HMPPS published the

¹ S.I 2016/583, 2016/945 and 2018/960.

Prison Drugs Strategy, committed to reducing drug misuse in prison through restricting supply, reducing demand and building recovery. Expanding the list of specified drugs supports these goals by allowing HMPPS to improve our knowledge of the threat posed by drugs in prisons, take disciplinary action where appropriate and identify individuals who would benefit from recovery programmes, ultimately reducing demand.

Amending the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020

- 7.5 The Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020 provide a legal basis for the restricted regime where HMPPS would no longer be able to adhere to some of the Prison Rules and YOI Rules as a result of the coronavirus pandemic, such as enabling the suspension of a prisoner's entitlement to social visits and allowing for the Chief Magistrate to refer charges back from an Independent Adjudicator to the Governor in the adjudication process.
- 7.6 The JCSI subsequently reported this instrument for doubtful vires regarding the ability of the Secretary of State to extend the transition period in the Rules beyond an initial period of 3 months up to a maximum of 6 months. The JCSI considered this provision to be a form of legislative sub-delegation and beyond the scope of the powers to make prison rules in section 47 of the Prison Act 1952.
- 7.7 This statutory instrument therefore removes this power of the Secretary of State to extend the transition period beyond a period of 3 months following the end of the "transmission control period".

Amending the Prison Rules and YOI Rules in relation to the ECTR Scheme

- 7.8 On 24 April 2020, the Secretary of State for Justice implemented measures to release offenders early on licence, as part of the Department's End of Custody Temporary Release (ECTR) scheme, under statutory criteria set out in rule 9A of the Prison Rules and rule 5A of the YOI Rules. The ECTR scheme enables specified prisoners, within 61 days of their release date, to be temporarily released from custody as part of the Department's wider coronavirus management strategy.
- 7.9 The JCSI subsequently reported the Rules for doubt as to whether the Secretary of State's direction provided for by the Rules is intra vires. In its view, the Rules as drafted could allow the Secretary of State to direct the use of ECTR in circumstances not explicitly provided for in the Rules.
- 7.10 The objective of this instrument is to put beyond doubt any risk of unlawful sub delegation.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no current plans to consolidate the Prison Rules or the YOI Rules.

- 9.2 It is possible that future associated legislation may be necessary if evidence suggests that new substances not covered by the testing framework are being misused become available and if new tests emerge.

10. Consultation outcome

- 10.1 Consultation has taken place with the National Pharmaceutical Adviser Health and Justice NHS England, NHS Improvement, with clinicians sitting on the Pharmacy Advisory Group and with some prison Governors. The amendments made by this instrument were welcomed.
- 10.2 No consultation has taken place on the amendments to the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020, as this is a minor clarifying amendment. In relation to the changes to the Prison Rules and YOI Rules in relation to the ECTR Scheme, parliamentary engagement was conducted at the time the ECTR scheme was introduced. This instrument serves to make a clarifying amendment and does not change the ECTR framework or the operation of the scheme. Therefore, no further engagement is required.

11. Guidance

- 11.1 Guidance on the new drug testing provisions will be reviewed prior to the commencement of testing for any new substances under Mandatory Drug Testing.
- 11.2 Regarding the amendment to the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020, guidance on the temporary restricted regime has been delivered to governors.
- 11.3 Guidance on the operation of the End of Custody Temporary Release scheme has been published and issued to practitioners. No change is required as a result of the amendments made in this statutory instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector. The instrument could give rise to some additional laboratory costs because the laboratory would be testing for one more substance. This might also give rise to a larger number of positive results, which could involve increased costs for providing therapeutic support such as substance misuse courses or increased adjudication costs.
- 12.3 To illustrate the nature of the costs involved, during the financial year 2019/20, spend on drug testing kits and analytical services in prisons was £4.13m.
- 12.4 An Impact Assessment has not been prepared for this instrument because it does not give rise to a significant financial impact.

13. Regulating small business

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

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that HMPPS will regularly review the impacts of adding to the list of specified drugs. This will involve consideration of the extent of the wider use of psychoactive substances, and the extent to which prescribed

medications are being used illicitly. HMPPS will also look at the steps that prisons and healthcare providers take to prevent the illegal use of prescribed medication and at referral rates into treatment following positive tests. In addition, HMPPS will consider the outcome of positive tests, for example looking at the number of adjudications and any punishments imposed. HMPPS will also consider the overall impact on reported random MDT results and monitor outcomes for prisoners with protected characteristics.

- 14.2 Regarding the modifications to the Prison Rules and YOI Rules in response to the coronavirus pandemic, the modifications will be kept under review.

15. Contact

- 15.1 Rachel Radice, Her Majesty's Prison and Probation Service, rachel.radice@justice.gov.uk, can be contacted with any queries regarding amendments to the mandatory drug testing framework contained within the instrument.
- 15.2 In relation to the amendment to the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020, Jessica Tucknutt at the Ministry of Justice can be contacted via email: jess.tucknutt@justice.gov.uk.
- 15.3 Anna Darke, Head of Release Policy, Ministry of Justice, Anna.Darke1@justice.gov.uk, can be contacted with any queries regarding the amendment to the Prison Rules and YOI Rules in relation to the ECTR Scheme.
- 15.4 Rachel Pascual, Deputy Director for Safety, Security and Operational Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.5 Lucy Frazer, Parliamentary Under Secretary of State for Justice at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.