

**EXPLANATORY MEMORANDUM TO**  
**THE PRISON AND YOUNG OFFENDER INSTITUTION (CORONAVIRUS)**  
**(AMENDMENT) (NO 2) RULES 2020**

**2020 No. 508**

**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 The purpose of the Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020 (hereafter referred to as ‘The Amendment Rules’) is to allow prisons and young offender institutions (YOIs) to manage the effects or likely effects of coronavirus, and to facilitate the effective running of prisons and young offender institutions for this purpose, by continuing to implement a restricted regime. It will also enable governors to inquire into charges which have been referred to an Independent Adjudicator (IA) where there are practical difficulties arising from coronavirus. This will allow the determination of issues involving disciplinary offences to continue as far as possible, to enable justice to continue to be done.

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

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

- 3.1 The instrument is subject to negative resolution procedure and will breach the 21-day rule for laying in Parliament. It will come into force on 15 May 2020. This is emergency legislation in response to the coronavirus crisis where policy has had to be developed at pace to respond to an emergent situation within the prison estate. The changes required in the instrument could not have been predicted to lay in time to meet the 21-day rule. The instrument needs to come into force immediately to ensure that the Prison Rules 1999 and Young Offender Institution Rules (YOI Rules) 2000 contain sufficient flexibility to allow for aspects of the continuing restricted regime in prisons and ensure that outstanding charges referred to IAs can be dealt with as soon as possible as a delay may result in dismissal of charges.
- 3.2 While the Ministry acknowledges the general desirability of observing the 21-day convention, in the current fast-moving circumstances of the spreading coronavirus and the urgent need to ensure prisons can continue to operate safely and protect prisoners and staff, the Ministry’s view is that this power needs to be made available the day after the SI is made and cannot be delayed for 21 days.

*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**

- 6.1 The Prison Rules 1999 and YOI Rules 2000 set out a range of powers, duties and obligations that govern how prisons are run on a day to day basis.
- 6.2 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 YOIs and the Prison Rules 1999 and YOI Rules 2000 are made using this power.
- 6.3 These modifications to the Prison Rules 1999 and YOI Rules 2000 will cease to have effect on 25th March 2022.
- 6.4 Prison Rule 9A and YOI Rule 5A will cease to have effect on 25th March 2022.
- 6.5 The modifications to the Prison Rules 1999 and YOI Rules 2000 only apply during a “coronavirus period”. A “coronavirus period” is defined as the period of time of 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 the incidence or transmission of coronavirus which constitutes a serious and imminent threat to public health in England, and the Secretary of State for Health and Social Care has made a declaration of risk to that effect. A “transition period” is defined in a new rule 2A and automatically applies for 3 months following the end of the transmission control period. The “transition period” can be extended for subsequent periods of up to 1 month by the Secretary of State where considered necessary due to the effects of coronavirus. The “transition period” cannot exceed a total of 6 months.
- 6.6 Prison Rules 14, 16, 32, and 46 and YOI Rules 31, 33, 37, 38, 39 and 41 are modified to provide that the prison must comply with the existing requirements contained in those rules to the extent reasonably practicable during a “coronavirus period”.
- 6.7 Prison Rule 35 and YOI Rule 10 have been modified to allow the Secretary of State to suspend a prisoner’s statutory entitlement to visits where considered necessary as a result of the effects of coronavirus. The Amendment Rules modify Prison Rule 73 and YOI Rule 77 to allow the Secretary of State to prohibit visits by all visitors, or classes of visitors, as the Secretary of State considers necessary as a result of the effects of coronavirus.
- 6.8 The Amendment Rules modify the Prison Rules 1999 and YOI Rules 2000 to add a new Prison Rule 53B and YOI Rule 58B. Where a charge has been referred by a governor to an IA, these rules allow for the Chief Magistrate to refer a charge back to a governor to inquire. The Chief Magistrate may do this when she determines that it is not reasonably practicable for the charge to be inquired into by an IA because of coronavirus. A governor will have 14 days to inquire into a charge once referred back. The charge is to be treated as a charge inquired into by a governor and cannot receive a punishment set by an IA. The Amendment Rules modify Prison Rule 53A to allow a

governor to still refer a charge to the IA where it meets the sufficiently serious criteria.

## **7. Policy background**

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

- 7.1 Her Majesty's Prison and Probation Service (HMPPS) has taken advice from Public Health England (PHE) on reducing the risks associated with outbreaks of coronavirus in prisons and the clinical risks to vulnerable prisoners.
- 7.2 Following this advice, HMPPS has determined that there is a need to put in place mechanisms to allow the implementation of a restricted regime during the "coronavirus period". This is part of a package of measures that HMPPS has put in place for managing the prison population which balances the need to protect the public and maintain law and order, with protecting the health and safety of those working and detained in prison. The measures are necessary in order to: delay the spread of coronavirus within the prison system; protect the welfare of staff and prisoners; isolate and manage any prisoners infected; enhance social distancing protocols; reduce the risk of explosive outbreaks associated with closed settings; and, protect those in custody who are within vulnerable groups. Consequently, the Prison Rules 1999 and YOI Rules 2000 must be amended to reflect the various new operational requirements. The modifications to the Prison Rules 1999 and YOI Rules 2000 will cease to have effect two years after the introduction of the Coronavirus Act 2020 on 25th March 2022. This is in line with the fact that the majority of the Coronavirus Act 2020 will currently expire after two years.
- 7.3 The modifications set out in the Amendment Rules are designed to enable a legal basis which gives prisons the flexibility they need to respond to the coronavirus pandemic and impose a restricted regime. Importantly, however, the modifications do not mandate that the Governor must follow a more restricted regime. To ensure that the modifications are available to HMPPS as required throughout the period of coronavirus, the Amendment Rules include a "transition period" for up to a maximum of six months following the end of the "transmission control period". The "transition period" will help to mitigate the practical challenge of reverting from more restrictive prison regimes to a business as usual regime, in accordance with the existing Prison Rules 1999 and YOI Rules 2000, across the estate if the restrictions are still in place and following a significant period of change. Further, whilst the "transmission control period" may end in the community, PHE advice on the management of coronavirus in detention settings may differ. The "transition period" will ensure that the modifications in the Amendment Rules continue to be available to HMPPS if this is the case.
- 7.4 However, the Government is clear that it will look to return to a less restrictive regime as soon as it is safe and practical to do so, rather than the end of the "transition period". Since the Amendment Rules have been laid, a conditional roadmap for easing restrictions in a custodial setting has been set out in the publication of 'COVID-19: National Framework for Prison Regimes and Services'<sup>1</sup> and describes how prisons

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/889689/prisons-national-framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889689/prisons-national-framework.pdf)

will ease some measures of the restricted regime earlier, where these are no longer required to ensure the health of prisoners and staff, as appropriate to the local context of the prison. The Framework recognises the serious consequences of restricting prison regimes, and HMPPS will act on public health advice in balancing the need to mitigate the spread of infection with the implications for the mental health and wellbeing of those in our care.

### *Visits*

- 7.5 Many of the modifications made in the Amendment Rules provide flexibility to existing rules by ensuring that appropriate caveats are in place. For Prison Rule 35 and YOI Rule 10, a slightly more substantial modification is made to suspend a prisoner's entitlement to visits as a result of the effects of coronavirus. Social visits at all prisons were temporarily suspended on 24<sup>th</sup> March 2020. The decision to suspend social visits reflects UK public health advice and government guidelines around social distancing and restrictions on non-essential travel, and was taken as part of the response to coronavirus with the aim of preventing spread of infection and to protect lives. The modifications provide a clear legal basis to the suspension of social visits.
- 7.6 During the period of coronavirus restrictions, prisons are focusing resources on a number of regime areas including prisoner safety and welfare, and family contact. As such prisons are prioritising essential safer custody arrangements such as Assessment, Care in Custody and Teamwork (ACCT) - which is the care planning process for prisoners identified as being at risk of suicide or self-harm – and alternative ways prisoners can maintain contact with family and friends. Alternative arrangements include:
- Providing 900 locked mobile phones to establishments that do not yet have in-cell telephony.
  - Promoting other ways to contact someone in prison, such as writing a letter, using the Email a Prisoner Service or the Prison Voicemail Service, where a voice message can be left for a prisoner.
  - Introducing secure video calls to prisons and YOIs across England and Wales.
- 7.7 The Prime Minister set out a conditional roadmap for a step-by-step lifting of restrictions in the community. HMPPS aims to take a similar approach, but because prisons are a closed setting with many vulnerable individuals it is right that HMPPS proceeds cautiously with lifting any restrictions. It may be safe for some prisons to resume visits earlier than others, depending on their local circumstances. We will take a data and evidence-based approach to making decisions about lifting the current restrictions, informed by public health advice.
- 7.8 As HMPPS develops plans to support the resumption of visits, safeguards will be put in place to ensure any restrictions to visits which remain continue as a health protection measure and are not used for disciplinary purposes.

### *Independent Adjudications*

- 7.9 To maintain effective operation of the prison discipline system, the Government has also determined that Prison Rules 1999 and YOI Rules 2000 are modified to introduce new rules (Prison Rule 53B and YOI Rule 58B) to enable governors to review cases which have been referred to an IA but are unlikely to be considered by an IA due to the coronavirus.

### *Issue*

- 7.10 Prison Rule 53B and YOI Rule 58B will ensure charges can be dealt with by governors whilst the Chief Magistrate is unable to send district judges to progress cases in prisons due to coronavirus and maintains the ability for a referral to the IA for sufficiently serious cases. This will reduce the risk of a significant number of IA cases potentially being dismissed due the passage of time before the charge could be inquired into by an IA and resulting in no punishment. This could undermine the integrity of the adjudication system, send a message of impunity in prisons and risk employee relations. Alongside this, we are implementing a process for IA referrals to be heard over video technology.

### *Existing system*

- 7.11 When a disciplinary charge is laid, it can either be inquired into by a suitably trained adjudicating governor or, where they deem the charge sufficiently serious in accordance with Prison Rule 53A/YOI Rule 58A that it may merit days being added to the prisoner's custodial time to serve, or is necessary or expedient for some other reason, the charge can be heard by an IA. IAs are District Judges or Deputy District Judges who attend establishments to hear the cases referred to them.
- 7.12 The seriousness test for referral to an IA, as set out in Prison Service Instruction 05/2018, Prisoner Discipline Procedures, is whether the offence poses a very serious risk to order and control of the establishment, or the safety of those within it. Governors will assess each case on its merits. They have statutory powers to punish prisoners where they commit offences against prison discipline. There is an exhaustive list of punishments which a governor can impose under Prison Rule 55/YOI Rule 60. Only IAs can impose additional days as well as any of the punishments that a governor can award.
- 7.13 Under the Prison Rules 1999 and YOI Rules 2000, IAs are required to first inquire into a charge within 28 days of it being referred to them by the adjudicating governor, save in exceptional circumstances.

### *Mitigations adopted*

- 7.14 To mitigate against the problems created by coronavirus and as an immediate response to the difficulties in opening IA hearings across the prison estate, the 'exceptional circumstances' provision in the Prison Rules 1999 and YOI Rules 2000 has been applied to charges. Therefore, those charges already referred to an IA can be first inquired into outside of the 28 days period due to the exceptional circumstances arising from coronavirus. Adjudicators (both governors and IAs) must decide whether, under all the circumstances, proceeding after a delay or adjournment would be contrary to the principles of natural justice.
- 7.15 We have also issued governors with revised seriousness guidance for the seriousness test when referring to an IA to help reduce referrals given the IAs limited capacity. The seriousness test for referral to an IA, as set out in Prison Service Instruction 05/2018, Prisoner Discipline Procedures, is whether the offence poses a very serious risk to order and control of the establishment, or the safety of those within it.
- 7.16 However, to prevent cases from being outstanding for a long period of time because IAs are unable to hear charges due to coronavirus, Government wants to enable the case to be heard as quickly as possible. One way of doing this is for the charge to be referred back to the Governor, however the existing Prison Rules 1999 and YOI Rules

2000 contain no express power which allows an IA to refer a case back to the governor. The new Prison Rule 53B and YOI Rule 58B enables the Chief Magistrate to refer charges back to the governor, who will be able to respond in three ways (as they already can under the Prison Rules 1999 and YOI Rules 2000): i) a dismissal; ii) continue with the charge at governor adjudication level, or; iii) determine the charge is sufficiently serious that it must be heard by an IA.

- 7.17 This is designed to give governors maximum flexibility to progress the cases as they see fit where the Chief Magistrate has determined that it is not reasonably practicable for IAs to inquire into a charge due to coronavirus and enables the Governor to consider the charge in light of the revised seriousness guidance outlined. Key decisions in a prisoner's sentence can also be affected by outstanding IA hearings, and the option to refer back to governors can keep the system moving for some prisons. The judiciary are supportive of this proposal.

## **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 None

## **10. Consultation outcome**

- 10.1 No consultation exercise was conducted.

## **11. Guidance**

- 11.1 Guidance on the temporary restricted regime is being delivered to governors.

## **12. Impact**

- 12.1 There is no impact on business, charities or voluntary bodies.
- 12.2 There is no significant, impact on the public sector. Staff within establishments will engage in other duties where their usual duties are impacted by the modifications. Further the modifications set out in this SI will only be in force for a limited time period and as such no definitive cost can effectively be monetised.
- 12.3 An Impact Assessment has not been prepared for this instrument because there is no adverse economic impact and will only be in force for a limited time period (it will expire alongside the Coronavirus Act 2020 on 25<sup>th</sup> March 2022).

## **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 changes set out in this legislation will be kept under review.
- 14.2 The regulation does not include a statutory review clause.

**15. Contact**

- 15.1 Katie Hewitt at the Ministry of Justice, [katie.hewitt@justice.gov.uk](mailto:katie.hewitt@justice.gov.uk), can be contacted with any queries regarding the instrument.
- 15.2 Adam Bailey, Deputy Director for Reducing Reoffending and Cohorts, at Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister of State, Lucy Frazer at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.