

# Criminal Justice Committee

**10th Meeting, 2022 (Session 6),  
Wednesday, 16 March 2022**

## Subordinate legislation

### Note by the clerk

#### Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
  - [The Prisons and Young Offenders Institutions \(Coronavirus\) \(Scotland\) Amendment Rules 2022](#).
2. The Committee is considering whether to make any recommendations on the negative instrument.
3. **If the Committee agrees to report to the Parliament on the instrument, the Committee has until 18 April.**

#### Delegated Powers and Law Reform Committee Consideration

4. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 8 March 2022.
5. **The DPLR Committee agreed that it did not need to draw the Parliament's attention to the instrument.**

#### Background and previous scrutiny

6. The SSI being considered today extends the application of certain amendments initially made to the Prison Rules by Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020. The policy note in **Annex A** sets out what amendments are being made to the Prison Rules.

7. The Scottish Prison Service (SPS) argue that the continuing uncertainty regarding the course of the pandemic and the uncertainty around the increasing spread of new variants of COVID-19, means that it is “necessary to take steps to retain the current flexibility afforded by previous SSIs made during the pandemic, to ensure that [SPS] are prepared and able to focus on any immediate priorities that may arise.”
8. The SPS explain the current amendments to the Prison Rules are due to expire on 31 March 2022 and this new instrument extends the application of the amendments detailed in Annex A until 30 September 2022.
9. The Committee has taken evidence previously on this matter. On 12 January, the Cabinet Secretary and the SPS provided [evidence](#) on an SSI which made the first set of amendments to the Rules which this new SSI now proposes to extend. The Committee then [agreed](#) that it had no comments to make on the first SSI on 19 January. The Committee also took evidence on 23 February from the Howard League and the SPS on the proposal to introduce this SSI, and from the Cabinet Secretary for Justice and Veterans on 9 March. The SPS provided further correspondence to follow up this appearance (see **Annex B**).
10. The SPS also published the consultation responses, which can be accessed [here](#).

## **Procedure for negative instruments**

11. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
12. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
13. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
14. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
15. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another

instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

16. Each negative instrument appears on the Criminal Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
17. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

## **Guidance on subordinate legislation**

18. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

19. **The Committee is invited to consider the instrument and agree whether it wishes to make any comments to Parliament.**

**Clerks to the Criminal Justice Committee  
March 2022**

**POLICY NOTE**

[The Prisons and Young Offenders Institutions \(Coronavirus\) \(Scotland\) Amendment Rules 2022](#)

**THE PRISONS AND YOUNG OFFENDERS INSTITUTIONS (CORONAVIRUS)  
(SCOTLAND) AMENDMENT RULES 2022**

**SSI 2022/73**

1. The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2022 are made in the exercise of the powers conferred by section 39 of the Prisons (Scotland) Act 1989. These Rules amend The Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the Prison Rules”) and they are subject to negative procedure.

The purpose of this instrument is to extend the application of certain amendments initially made to the Prison Rules by Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 (SSI 2020/122).

**Policy Objective**

2. The Prison Rules set out provisions relating to the regulation and management of Prisons and Young Offenders Institutions and various matters concerning those who are required to be detained in these institutions (such as their classification, treatment, discipline, employment and control).

3. These amendments extend the application of certain amendments made to the Prison Rules by the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 (SSI 2020/122), which were extended and slightly amended by the Prisons and Young Offenders Institutions (Scotland) Amendment (No.2) Rules 2020 (SSI 2020/264), then extended by the Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2021 (SSI 2021/80) and further extended and amended by the Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No.2) Rules 2021 (SSI 2021/289). Given the continuing uncertainty regarding the course of this pandemic and the uncertainty around the increasing spread of new variants of COVID-19, SPS considers it necessary to take steps to retain the current flexibility afforded by previous SSIs made during the pandemic, to ensure that we are prepared and able to focus on any immediate priorities that may arise.

4. The amendments to the Prison Rules are due to expire on 31 March 2022 and

this instrument extends the application of the amendments detailed below until 30 September 2022, which are identical to the amendments extended by SSI 2021/289 and are as follows:

- **Part 5 – Health & Welfare** - Rule 40A (Recommendation by healthcare professional – coronavirus) allows a Governor, on the recommendation of a Healthcare Professional (in response to the effects Coronavirus is having or is likely to have on the prison), to confine particular prisoners or groups of prisoners to their cells or prohibit them from participating in activities such as exercise or recreational activities for a period of up to 14 days. The Governor may subsequently apply to Scottish Ministers for an extension of this 14-day period on the advice of a healthcare professional. In response to such a request, senior SPS HQ staff on the advice of a Healthcare Professional will be able to authorise, on behalf of Scottish Ministers, that the 14-day period be extended for further periods of up to 14 days. Rule 41A (Accommodation in specified conditions – coronavirus) extends the time scales in Rule 41 (Accommodation in specified conditions) from 72 hours to a maximum of 14 days with regard to the length of time a prisoner can be accommodated in specified conditions on the advice of a healthcare professional.
- **Part 8 – Communications** - Rule 63A (Visits to prisoners – coronavirus) allows the Governor to suspend prison visits where it is a necessary and proportionate response to the effects coronavirus is having or is likely to have in relation to the prison. In doing so, the Governor may make different provision for different purposes including by reference to different types of prisoner and different types of visit. This means that provision can, for example be made by the Governor for prisoners to continue to be entitled to receive a visit from a legal advisor. The Governor must regularly review a suspension of visiting to assess whether it remains necessary and proportionate.
- **Part 9 – Work, Education, Earnings and Recreation** - 84A (Purposeful activities – coronavirus), and 88A (Recreation – coronavirus) allows the Governor to suspend or curtail work, educational activities, counselling, other purposeful activities and recreation where it is necessary and proportionate to do so in response to the effects coronavirus is having or is likely to have in relation to the prison. The Governor must regularly review a suspension of work, educational activities, counselling and other purposeful activities to assess whether it remains necessary and proportionate
- **Part 15 – Temporary Release** - Rule 136B (Extension of certain periods of temporary release – coronavirus). Scottish Ministers are able to extend the period a prisoner is on home leave for up to 14 days from the normal 7 days. It is anticipated that this could be used where prisoners advise that they or someone in their home has developed symptoms of Coronavirus and in compliance with government advice they are required to self-isolate for a further period of time.

## Consultation

5. In July 2021, SPS conducted a targeted consultation on SSI 2021/289. As this SSI extends the amendments of SSI 2021/289 for a further 6 months, SPS wrote to all

those consulted with previously to advise them of this extension and to ask them to provide any additional views/comments. There was also further consultation with SPS operational managers and policy colleagues and Scottish Government.

**Impact Assessment**

6. An Equality and Human Rights Impact Assessment was carried out which determined that without the flexibility provided by these measures the Article 3 rights (Prohibition of torture, or of inhumane or degrading treatment or punishment) of the prisoners in the care of SPS could be engaged. The assessment also recognised that the changes continue to engage the Article 8 rights (the right to respect for private and family life, home and correspondence) of prisoners.

**Financial Effect**

7. Cabinet Secretary for Justice and Veterans confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

**Scottish Prison Service  
February 2022**

**Letter from the Scottish Prison Service (3 March)**

Dear Ms Nicoll

**The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2022**

Thank you for your letter of 25 February 2022 concerning the following: Her Majesty's Chief Inspectorate of Prisons for Scotland (HMCIPS) response to the recent targeted consultation; use of the Coronavirus specific powers extended by The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No.2) Rules 2021 (the Amendment Rules), which the above SSI will extend for a further 6 months; information regarding any plans to make improvements to the information which is made publicly available about the occasions in which the powers are used in the future; confirmation that COVID public health guidance for prison settings dated July 2021 is the guidance that is being followed by the Scottish Prison Service and whether there is more up to date guidance available.

**HMCIPS Consultation Response**

European Convention on Human Rights (ECHR) - Whilst we note the concerns raised by HMCIPS regarding Articles 2, 3 and 8 of European Convention on Human Rights (ECHR), it is SPS' position that these amendments have a positive impact on protecting these rights. In terms of Articles 2 and 3, these rule changes are designed to help SPS to prevent and reduce the risks of the virus spreading within prisons to protect the health and safety of those living, working and visiting our prisons. This includes all persons in our care aged 16 and 17 and those visiting our prisons aged 16 and 17. Covid-19 does not discriminate in regards to who it impacts, therefore it is essential that Prison Governors are able to implement measures if necessary, to protect all prisoners in their care and persons visiting their sites regardless of their age. It is our view that without the availability of these measures the Article 3 rights of the prisoners in our care could be engaged.

SPS recognised the measures in these Rule Amendments have the potential to engage the Article 8 rights of prisoners when utilised. However again SPS consider that these rule amendments are necessary for the protection of the health, safety and security of SPS and NHS staff and prisoners during this pandemic. It is our view that the Amendment Rules can be applied in a proportionate way to have the least impact possible upon prisoners' Article 8 rights and thus do not breach those rights.

As a critical public service, the continuity of our day-to-day operations is imperative. For SPS, the health & safety of our employees, partners and those in our care is of paramount importance. Like many organisations in Scotland, we continue to closely monitor the Coronavirus (COVID-19) outbreak data and follow the advice provided by the Scottish Government and health authorities and we have had to make reasonable and defensible temporary alterations to daily regimes during the course of the pandemic to date to enable us to adhere to this advice. These alterations have

aided us in the delivery of a prison regime which is compliant with evolving SG guidance and have helped us contain a number of infection outbreaks in several SPS establishments.

Reporting on the use of the Powers - SPS do not hold centralised data on the use of the powers extended by The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No.2) Rules 2021 as their use has been dynamic throughout the prison estate. I have however provided at Annex A, some high level information in regards to its use during the period October 2021 to February 2022.

### **Information regarding the use of the powers**

SPS may not be able to put in place systems that would make this information readily publically available, due to the dynamic nature of the requirement to use these powers, their temporary nature and that they are local decisions taken by Governors in conjunction with local Incident Management Team (IMT) or local Health Protection Team. We will actively consider how this might be done and provide an update to the committee.

Governors are already under a legal duty to act compatibly with human rights in the discharge of their functions they can only use these powers where it is necessary and proportionate to do so and they must keep their decision under regular review. The use of the powers by prison governors is monitored by SPS Operations Directorate through regular discussions with prison governors and HMCIP through their remote monitoring framework and on-site liaison visits.

SPS and HMCIP also meet on a regular basis to discuss the impact of the pandemic on the prison estate. SPS is working closely with the Scottish Government, Health Protection Scotland and a range of other partners to manage the impact of the Pandemic in prisons. Centrally SPS have set up a National Coronavirus Response Group (NCRG) to support staff and establishments with their local planning and response. The NCRG is working with senior SPS staff, Scottish Government and NHS colleagues to ensure SPS Governors have the most up-to-date information available to inform their response to the pandemic. Each establishment has a Local Coronavirus Response Group (LCRG) which is a multi-disciplinary group that includes representation from NHS and often local public health colleagues.

Where there is a declared outbreak in the prison, an Incident Management Team (IMT) or local Health Protection Team, which comprise of NHS and Public Health Scotland staff will discuss and advise the governor on any protective measures which are required to be implemented and this can include restrictions on visits and regime.

### **COVID Public Health Guidance**

The COVID public health guidance for prison settings dated July 2021 is the current guidance. The Scottish Prison Service is currently working with Public Health Scotland to update this guidance to reflect Scottish Government changes to Covid guidance. I hope this information is helpful to the Committee.

**Teresa Medhurst**  
Annex

The table below provides high level information on when the Covid-19 SSI amendments have been used in establishments between October 2021 and February 2022 in relation to visits, exercise and purposeful activity.

Establishment	Use of SSI since October 2021
Addiewell	<p><b>Exercise and Visits</b> - On the weekend of 2 and 3 October 2021 (and following public health advice at an Incident Management Team (IMT) the establishment were advised to isolate all individuals on 4 wings and suspend exercise and visits for this group. There had been an outbreak declared in this area, and a mass testing exercise was ongoing with Public Health support. This identified significant numbers of asymptomatic cases. It was felt that fully isolating the four wings presented time to receive the outstanding test results, to prevent further avoidable transmission and assist in controlling the outbreak. The order was rescinded on the Monday 4 October 2021 morning once all test results had been received and with a greater understanding of the situation then known.</p> <p><b>Exercise and Recreation</b> - On the weekend of 18 and 19 December 2021 exercise and recreation were suspended across the full establishment. This was on safety grounds, and related to the volume of staff who were absent as a result of Covid-19. The establishment did not have enough staff available to safely open and had to focus on the provision of basic needs, visits and access to healthcare. On Saturday the 18 December 2021 the establishment had 68 operational staff unavailable due to Covid-19 related reasons. On Sunday 19 December 2021 they had 61 operational staff unavailable due to Covid-19 related reasons. The orders were rescinded on Monday 20 December 2021 morning with additional staff available to be deployed.</p>
Greenock	<p><b>Visits</b> - Decision was taken to restrict visits due to reduced staffing levels. This commenced on 24 December 2021 and concluded on 7 January 2022. On 24 December 2021, there were 13 staff requiring to isolate due to Covid-19. The total absence rate for all deployable staff was 24%, therefore, visits were required to be suspended for 2 weeks to ensure a suitable staffing complement was available.</p>
Dumfries	<p><b>Exercise</b> - On 10 December 2021, decision was taken to restrict exercise to 30 minutes per day and restrict attendance at recreation and other purposeful activity such as work, for those in D Hall (STP/Remand). The decision was reviewed weekly and the restrictions ended on 14 January 2022. Visits – On 10 December 2021, decision was taken to restrict visits</p>

	<p>for those in D Hall as a result of the management of COVID-19 cases in the establishment. The decision was reviewed weekly and the restrictions ended on 23 December 2021. These restrictions were considered necessary due to the significant rise in isolation cases, an outbreak being declared by Dumfries and Galloway Public Health and the need to prevent further infection spread to other areas of the establishment. On 10 December 2021 there were 40 individuals requiring to isolate and 7 members of staff also isolating.</p>
Low Moss	<p><b>Exercise</b> – Decision was taken on 30 December 2021 to restrict exercise to three times per week for individuals being managed under Rule 40(a) or Rule 41 conditions. The restrictions ended on 22 January 2022. These restrictions were considered necessary due to the significant rise in isolation cases and therefore the need for additional exercise periods. On 30 December 2021 there were 93 individuals requiring to isolate, on the 2 January 2022 this increased to 156. The numbers peaked at 157 on 4 January 2022, and continued to fluctuate until late January 2022.</p>
Shotts	<p><b>Exercise</b> - Decision was taken on 31 December 2021 to restrict exercise to 30 minutes per day for all individuals in its care as a result of the management of isolation cases in the establishment. The restrictions ended on 10 January 2022. The restrictions were considered necessary due to the significant rise in isolation cases, and therefore the need for additional exercise periods. On 31 December 2021 there were 261 individuals requiring to isolate, as well as an additional 48 staff absent due to isolation.</p> <p><b>Purposeful Activity</b> – On 10 January 2022, HMP Shotts suspended all non-essential work parties for a period of 2 weeks. The reason for this was due to the number of staff absences within the establishment that were connected to Covid-19, and the need to staff both the Residential, and Operations function. At this time, they had around 83 staff that were not operationally deployable and therefore required to utilise the Offender Outcomes staff by redeploying them to the Residential, or Operations area. Programmes delivery was kept open, and was therefore not impacted.</p>
Glenochil	<p><b>Purposeful Activity</b> – On 10 January 2022, HMP Glenochil suspended the majority of work parties (essential work parties were not included) and programmes delivery for a period of 6 weeks. The reason for this was due to the number of staff absences within the establishment that were connected to Covid-19, and the need to staff the Residential function. At this time, they had around 65 staff that were not operationally deployable and therefore required to utilise the Offender Outcomes staff by redeploying them to the Residential area.</p>

	Some work parties are still suspended; however, programme delivery has recommenced.
Grampian	<b>Exercise</b> - Decision was taken on 21 January 2022 to restrict exercise for those on Rule 41 and R40A conditions to 30 minutes per day. The restrictions ended on 21 February 2022. The restrictions were considered necessary is due to the significant rise in isolation cases and therefore the need for additional exercise periods. On the 21 January 2022, HMP Grampian had a total of 234 individuals requiring to be isolated. It was not operationally feasible to complete an hour of exercise for each individual in isolation, therefore this is the reason why it was restricted in these areas to 30 minutes per day