

POLICY NOTE

THE PRISONS AND YOUNG OFFENDERS INSTITUTIONS (SCOTLAND) AMENDMENT RULES 2018

SSI 2018/293

1. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2018 (“the Amendment Rules”) were 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.

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. The Scottish Prison Service (SPS) have made a number of policy changes over the last decade to restrict smoking in Scottish prisons. Under current Prison Rules, those in custody are only permitted to smoke in their own cells and during outdoor recreation. Staff, visitors and contractors are not permitted to smoke anywhere on SPS property. In 2013 the Scottish Government published their tobacco control strategy, ‘Creating a Tobacco-free Generation’, in which it was recognised that creating a smoke-free Prison Service was a key step in achieving a smoke-free generation. The move to smoke-free prisons was informed by a large scale Tobacco in Prisons Study (TIPS), led by the University of Glasgow. The study measured levels of second hand smoke in prisons. The results of this study revealed that there were high levels of second hand smoke present in a number of Scottish prisons.

4. The high levels of second hand smoke pose a serious health risk to prison staff, those in custody and staff from partner agencies. The high level of active smoking amongst those in custody has a significant impact on the health of prisoners and contributes to the poor health profile in the prison population. SPS, in consultation with Scottish Government Health Directorate, NHS and trade union colleagues and academics, has determined that the only way to remove the risks associated with second hand smoke and address the health inequalities

associated with smoking, is to prohibit the use and possession of tobacco products in all prisons in Scotland.

5. A partial ban on smoking in prisons (for example, allowing smoking in outdoor areas) would not deal with the health risks discussed above. Evidence from other jurisdictions where partial restrictions have been implemented shows that a partial smoking ban is difficult to manage and enforce. For example in Quebec, despite the indoor smoking restriction, a study found that 93% of those in custody who smoked still reported using tobacco products inside the prison. It also found this option had a limited impact on tobacco use with 48% of those in custody who smoke reporting no reduction in their tobacco use.

6. One of the downsides noted from the implementation of a partial smoke-free policy at the State Hospital was that patients tended to smoke more when they could, and patients' daily schedules revolved around opportunities to smoke. A partial restriction therefore creates an environment where it is difficult to quit smoking. Furthermore, restricting smoking to designated outdoor areas does not address secondary issues associated with smoking in prisons, including the misuse of tobacco as a currency by those in custody.

7. Accordingly, the Amendment Rules are designed to implement the move to smoke-free prisons in November 2018. The proposed amendments to the Prison Rules will:

- prohibit the use and possession of tobacco products in all prisons in Scotland;
- enable the unlawful possession of tobacco by prisoners to be dealt with under Part 11 of the Rules (Discipline);
- make it a criminal offence under section 41 of the Prisons (Scotland) Act 1989 for visitors/SPS staff to take tobacco/tobacco products into a prison.

8. The Prisons and Young Offenders Institutions (Scotland) Rules 2011 (Prison Rules) were amended in 2017 to allow prisoners to use e-cigarettes/ nicotine vapour products (collectively referred to as "NVPs"). Technical amendments are also being made to allow prisoners to continue to use NVPs in prisons, but only in their own cells and during time in the open air.

Impact Assessment

9. An Equality and Human Rights Impact Assessment was carried out and the Scottish Minister's position is that the smoking ban does not involve any unlawful discrimination or any breach of Convention rights. In the case of *McCann v State Hospitals Board for Scotland*¹, the Supreme Court held that the smoking ban at the state hospital in Carstairs had a clear public health motive and was proportionate for the purposes of ECHR Article 8 given the difficulties associated in partially banning smoking. The Scottish Ministers' position is that the circumstances set out in the *McCann* case are analogous to the circumstances in prisons in Scotland and this supports the Scottish Ministers' position that a comprehensive smoking ban in prisons is a justified interference with the Article 8 rights of prisoners.

Consultation

10. There has been extensive consultation with those in the care of the Scottish Prison Service, operational managers and policy colleagues within the Scottish Prison Service, Scottish Government Health Directorate, NHS and trade union colleagues. There was also a public consultation. The responses received to the consultation were all positive in their support for the creation of a smoke-free prison environment.

Financial Effect

11. SPS has consulted with the retail supplier of tobacco products to SPS and they have advised that the impact of this policy on them will be a limited loss of revenue. Whilst the impact will mean a limited loss of revenue, this loss is accepted by the supplier, who is supportive of the SPS move to smoke-free prisons.

Scottish Prison Service
September 2018

¹ [2017] SLT 451