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Prisons and Young Offenders Institutions (Scotland) Amendment Rules (SSI 2021/446)

Thank you for your letter of 20 December. I am writing in response to the concerns raised by the Committee regarding the time between the instrument being laid and coming into force. I also thought it would be helpful to address the key concerns raised in the letters you received from Sarah Armstrong, Director of the Scottish Centre for Crime and Justice Research (SCCJR), and the open letter from a number of academics.

Timing for instrument coming into force

I announced to Parliament on 2 November 2021 that I had taken the decision to make a change to the Prisons Rules to allow prison officers and staff to copy general correspondence and hand only the copy to the prisoner which this instrument implements. In the run up to taking this decision, a serious incident occurred at a Scottish prison linked to illicit substances. On 25 November there was a further serious incident linked to illicit substances at another Scottish prison.

I considered that the threat from psychoactive substances (PS) in prisons had escalated following the incidents at HMPs Shotts & Addiewell involving illicit substances. This, combined with the anticipated increase in mail volume due to the approaching festive period meant that there was a real risk that SPS would experience a further escalation in the volume of PS being sent into prisons via general correspondence to prisoners. I therefore considered that it was necessary to have the provisions in the instrument come into force in a time-frame which was less than the normal 28 days, to mitigate against the harm that may be caused by further increases in the volumes of PS entering prisons and to ensure the health and safety of SPS staff and those in their care, and the safe and stable operation of our prisons.

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My reasons for requesting the SSI came into force on 13 December 2021 were detailed in my letter to the Presiding Officer dated 30 November 2021: (1) I recognised that the changes to the Prisons and Young Offenders Institutions (Scotland) Rules 2011 may interfere with the Article 8 ECHR rights (the right to respect for private and family life, home and correspondence) of prisoners. Therefore, given the serious nature of the amendments, I considered that it was important to give some time for Parliament to be aware of this and at least some time to scrutinise the proposals prior to their implementation; and (2) SPS needed time to finalise preparations for the implementation of the changes to ensure that prisoners would continue to receive copies of their correspondence timeously and thus minimise disruption. To mitigate against the possibility of unrest in the prison estate, SPS also needed time to inform those in their care of the changes.

Letter: Sarah Armstrong, Director of the Scottish Centre for Crime and Justice Research (SCCJR)

- **Not proportionate:** I recognise that prohibiting prisoners from receiving the original copy of their general correspondence may interfere with their Article 8 rights (the right to respect for private and family life, home and correspondence). However, I consider that any such interference falls within the range of measures permitted by the ECHR; they are a necessary and proportionate means by which to maintain the good order of prisons, and to reduce the risk of harm to prisoners and those working in prisons being caused by drugs, including PS, being sent into prisons via prisoners' general correspondence.

The escalation in emerging evidence that psychoactive substances were being introduced to prisons through the mail system required the Scottish Ministers to take quick action to provide further protection for the convention rights of those impacted. The Scottish Ministers are under positive obligations to protect prisoners' and prison staff's Article 2 (right to life – see *Osman v UK*, 23452/94), 3 (protection from torture or inhuman or degrading treatment – see *A v UK* [1998] ECHR 85) and 8 (right to private life, specifically the right to protection of an individual's physical integrity – see *MC v Bulgaria* [2003] ECHR 651) convention rights. That applies to the prisoners at risk from taking psychoactive substances but also to the prisoners and staff who are at risk from the unpredictable behaviour of those who have taken such substances, and those prisoners who are used by criminal gangs to receive the impregnated mail and then face threats and intimidation to provide it to its intended recipients.

The impact on families was carefully considered. The prison service recognises the importance of maintaining close connections while in custody. SPS consulted with Families Outside via the Short Life Working Group to gather views of how to mitigate any detrimental impact for family correspondence. Families Outside wrote to the Criminal Justice Committee in early December, noting their support for the proposals. In their letter to the Criminal Justice Committee, they advised 'We support the action that the SPS and Scottish Government are taking in Scottish Statutory Instrument (SSI) 2021/446 to reduce the opportunities for psychoactive substances and other drugs to come in to prisons, protect the safety of those in custody and preserve life.'

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SPS establishments facilitated prisoner focus groups in order to gain feedback from prisoners on the proposed changes, which allowed SPS to gauge the extent of any negative reactions. Although there were some initial negative reactions from prisoners during the focus groups the majority accepted the need and reasoning for these changes. There were reports of prisoners stating that this change would assist them with their addiction issue and also help to reduce bullying in the prisons related to the drugs and pressure being put on individuals and their families to send and receive contaminated mail.

The claimed necessity for these powers does not come from one body alone, who are practitioners in the provision of custodial care in Scotland. Others such as HM Chief Inspector of Prisons have been calling for the introduction of the routine photocopying of prisoner mail. The Prison Officers Association and those in the care of SPS who have lived experience and those that represent their families also recognised the purpose and need for the powers.

- **Not effective:** The SSI has only been in force for a short time and SPS will require time to assess its impact. The SPS Public Protection Unit (PPU) have however been monitoring incident and intelligence information across the estate as establishments introduce this new process in order to assess its impact. The PPU have identified a significant decrease in recorded drug taking incidents and drug related emergency escorts for the month of December 2021 compared with the previous 2 months. There were 248 drug taking incidents in October 21, 305 in November and 131 in December. There were 39 drug related emergency escorts for the month of October 2021, 37 in November and 15 in December. The PPU has also noted the number of 'perimeter wall' recoveries in December has almost doubled when compared to the previous month, and there has been an increase in the number of drug recoveries within prisoner property. This would indicate that prisoners are seeking to utilise other methods of introduction due to general correspondence now being photocopied. SPS will continue to closely monitor and gather evidence on the impact of this change across the estate. The SPS will continue to work to adapt its security measures to prevent, detect and deter the introduction of contraband entering the estate.

The fact that prescribed substances have been involved in a number of drug deaths in Scottish Prisons does not negate the necessity that SPS should take action to address the concerns that other drugs such as PS is having on the health and welfare of those who live and work in Scottish Prisons and good order concerns caused by PS or other drugs. During 2021 there have been 5 confirmed deaths in SPS custody linked to suspected drug overdoses involving the PS substance 'Etizolam'. This is an illicit Class C drug which can be infused into paper, cards and clothing.

I recognise that drug use in Scotland is a complex, multi-faceted problem in our society with no simple answer. I do not consider that it is to the detriment of other strategies that Scotland adopt to address this issue that the SPS be provided with additional powers that enable it to adapt and strengthen its security measures to prevent, detect and deter the introduction of contraband such as PS from entering the prison estate and thus reduce the harm it causes to those who live and work in our prisons.

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The SPS is not only focused on preventing drugs entering its establishments, but is also working with partners to support those in their care with drug and alcohol problems. On admission to an SPS establishment individuals are interviewed by both SPS and NHS staff to identify any concerns about drug/alcohol use. Where such concerns are identified, referrals are made to specialist support. NHS partners will support any immediate medical concerns including management of withdrawal.

SPS establishments work directly with local NHS, Criminal Justice, Housing and Third Sector partners to co-ordinate care plans for an individual's time in custody and liberation plans for after release.

A developing recovery hub/café approach is being adopted across the prison estate with SPS staff identified as Recovery/Programme staff. The SPS' work with the Scottish Recovery Consortium and Scottish Drugs Forum has increased access to peer support/mentor work and engagement with lived experience in designing and developing interventions.

- **Not consistent with evidence and Government policy on a public health approach to drug use in Scotland:** As per my earlier comments, I recognise that drug use in Scotland is a complex, multi-faceted problem in our society with no simple answer, but I do not consider that it is to the detriment of other strategies that Scotland adopt to address this issue that the SPS be provided with additional powers that enable it to adapt and strengthen their security measures to prevent, detect and deter the introduction of contraband such PS from entering the prison estate.

People in custody present higher levels of risk and vulnerability than the general population as a whole, and often have complex mental health needs, and our frontline prison officers and NHS colleagues work hard every day to support people in custody. The Scottish Ministers takes the health and wellbeing of all those in its care in custody very seriously. The safe treatment of health issues, particularly mental health issues, of all those in custody is a key priority for Scottish Government.

SPS, NHS and partners have policies and practices in place to support those in their care with addictions and their recovery.

I note with interest your intention to publish evidence of the state of wellbeing in prisons and literature review on drug use, interventions and support needs in prison.

- **Creating significant risk of abuse of power:** The amendments add psychoactive substances (within the meaning of section 2 of the Psychoactive Substances Act 2016) to the list of items that are included in the definition of “prohibited articles”. This reflects the fact that it is already an offence in Scotland to possess a psychoactive substance with the intention of using it, in a custodial institution. The amendments provide prison officers and employees with powers that will allow them to: photocopy prisoner's general correspondence; provide the prisoner with the photocopy of the correspondence; and retain the original correspondence for return to the prisoner upon his or her release. The amendments are designed to mitigate against the risks of illicit substances, particularly PS, being introduced via the prisoner mail system and thus reduce the risk of such substances causing harm to those in the care of SPS, and to those working in or visiting our prisons.

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As I have detailed above, the view that these powers are necessary does not come from SPS alone, who are practitioners in the provision of custodial care in Scotland. Others such as HM Chief Inspector of Prisons have been calling for the introduction of the routine photocopying of prisoner mail. The Prison Officers Association and those in the care of SPS who have lived experience and those that represent their families also recognised the purpose and need for the powers.

In terms of oversight of the power, I will be reviewing the operation and impact of the new measures in 3 months' time, in April.

Letter: Open letter from a range academics

- **Violation of Various rights:** I do not share the human rights concerns with the measures taken. The law allows us to take necessary and proportionate steps which affect the right to privacy, family life, and correspondence if these steps are necessary in order to protect prisoners and staff. There is clear evidence of real harm to health, wellbeing and good order being caused by psychoactive substances smuggled into prisons by way of general correspondence. This measure prevents those substances reaching prisoners but still ensures a copy of all correspondence will be received by them. I am content that it is justified and proportionate.
- **No consideration of how this law will impact family relationships and personal wellbeing of those in prison:** As detailed in my earlier comments, the impact on families and personal wellbeing of those in prison was carefully considered. SPS recognise that the maintenance of personal connections and family contact is essential to the lives of people in their care and of course their families. SPS has implemented a range of measures to support this. These measures include access to physical and virtual visits, telephones and the email a prisoner and prisoner voicemail schemes.
- **No details on how the law will be implemented and its use monitored or regulated:** SPS has developed policy and guidance to support the implementation of the SSI. The use of the powers by prison Governors will be monitored by SPS Operations Directorate. SPS have guidance and policy in place to support the implementation of the SSI that makes it clear to prison officers and staff what they can do with mail that is photocopied, tested or retained. HM Chief Inspector of Prisons for Scotland (HMCIP), who is able to inspect the conditions and treatment of prisoners in prison, can also monitor and review how the powers are used in practice. Those in the care of SPS can use the existing prisoner complaints process to raise any concerns or complaints about the use of these powers, and their complaints can be escalated to the Scottish Public Services Ombudsman, who is independent of SPS.
- **No information on resource implications of this legislation in staff time and copy equipment:** This was considered, the changes are currently being delivered utilising SPS' current resources and funding. However, the impact of the changes is being monitored by SPS. Where it becomes apparent that additional support is required by establishments this will be considered by SPS to determine appropriate actions.

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- **Mental Health Crisis:** This is an important issue raised by the academics, however the focus of this SSI was prevention and deterrence. The SSI is seeking to prevent PS from entering prisons and thereby reduce its negative impact and harms to the physical and mental welfare of prisoners and prison staff. SPS, NHS and partners have in place policies and practices to support those with addictions and their recovery.
- **The issue will not be resolved by closing one route down, but only by addressing demand:** Tackling the use of illicit substances in prisons is and remains a priority and the prison service have a comprehensive range of robust security measures in place to prevent the introduction of contraband entering our prisons, including the use of Rapiscan machines and trained drug detection dogs. This instrument is, of course, only enabling one of a range of measures. A continuing coordinated effort from the Scottish Prison Service, NHS and Police Scotland and other criminal justice partners to limit the supply of drugs, including psychoactive substances both inside and outside prisons and the provision of support and treatment will be required. I acknowledge that in our approach to tackling the problem we have to consider a balance between security and deterrence and also recovery and support.

I gave a commitment to Members of the Criminal Justice Committee on 12 January to provide an update in 3 months' time in April, on how the measure has been implemented and its impact. I would be happy to provide this to Delegated Powers and Law Reform Committee if Members would find this useful.

I hope this information is helpful to the Committee. I am sharing a copy of this letter with the Minister for Drugs Policy.

KEITH BROWN

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