EXPLANATORY MEMORANDUM TO

THE PRISON AND YOUNG OFFENDER INSTITUTION (ADJUDICATION) (AMENDMENT) RULES 2023

2023 No. 321

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of the Prison and Young Offender Institution (Adjudication) (Amendment) Rules 2023 (hereafter referred to as 'The Amendment Rules' is to close gaps in the prisoner disciplinary procedures where charges referred by governors to Independent Adjudicators (IAs) are being dismissed to prevent further legal challenge. It will enable an Independent Adjudicator to determine the unsuitability of disciplinary charges that have been referred to them, and in doing so, enable them to refer the charges back to the governor, either for them to inquire themselves or for them to review for suitability to refer to the police. This will allow the determination of issues involving disciplinary offences to continue as far as possible, to enable justice to continue to be served.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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 Rules amend the Prison Rules 1999 (S.I. 1999/728) ("the 1999 Rules") and the Young Offender Institution Rules 2000 (S.I. 2000/3371) ("the 2000 Rules"), to maintain effective operation of the prison discipline system. The Government has determined that Prison Rules 1999 and YOI Rules 2000 are modified to replace existing rules (Prison Rule 53A and YOI Rule 58A) and introduce new paragraphs 5-

12 to enable IAs to consider the seriousness of rule breaches and to refer cases back to governors.

6.4 Specifically, paragraphs 5, 6 and 7 provide that, when a charge has been referred to an IA, they may determine the seriousness threshold, and whether for any reason the governor should instead review or inquire into that charge.

6.4.1 Paragraph 6(a) has been added to allow the IA to refer a charge back to the governor where the seriousness threshold has not been met. Paragraph 9 adds that this cannot be referred to the IA at any point.

6.4.2 Paragraph 7(a) has been added so that where an offence may attract a criminal penalty or punishment beyond those available to the IA, they can refer the charge back to the governor for review.

6.4.3 Paragraph 8 adds that the IA may continue to hear the charge if they agree with the governor's referral.

6.5 Paragraph 10 has been added to allow the IA after their inquiry, to refer a charge back to the governor for review before a punishment is imposed if they consider that the offence/s should attract a criminal penalty.

6.6 Paragraph 11 adds that where the IA has referred a charge back to the governor for review under 7(a), that the governor can consider if the offence/s should attract a criminal penalty or punishment and pursue alternative action for example refer the matter to the police, or refer the charge back to the IA, if no alternative action is pursued.

6.7 Paragraph 12 adds that where the governor has referred a charge back to the IA under paragraph 11(b), the IA must proceed with the hearing and the charge may not be referred to the governor again for any reason.

6.8 The new paragraphs outline that as with current procedures any associated charges from the same incident can also be referred to governors and IAs. Also, that prisoners must be kept informed at the relevant stages throughout the process and who has responsibility to keep the prisoner informed.

6.9 The process in existing paragraphs 1 to 4 of Prison Rule 53A and YOI Rule 58A remain the same, other than updates to wording to match the new provisions.

6.10 Prison Rule 54(3) and YOI Rule 59(3) have been modified with a new section 4 which says that the automatic right to legal representation for the prisoner is lost when a charge is referred to the governor to inquire into.

7. Policy background

What is being done and why?

7.1 Currently, the Prison Rules 1999 and YOI Rules 2000 do not allow an IA to consider the seriousness of a disciplinary charge referred to them or to refer a charge back to a governor to deal with if the case does not meet the threshold for referral or if the charge needs to be sent back because it should attract a criminal penalty. This is resulting in IAs dismissing the charges that they do not consider meet the seriousness threshold. This undermines the prisoner discipline procedures and there is a need to put in place flexible mechanisms to allow IAs to refer charges back to the governor to close the gaps in the system and ensure that responses to rule breaking are proportionate to the offence committed.

7.2 In addition, a recent Judicial Review judgement (*Kane v IA and SoS, 2022*), found that it was not for the IA to make a judgement on whether the case was serious enough for an IA hearing.

Explanations

What did any law do before the changes to be made by this instrument?

7.3 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 and they will follow the independent punishment guidelines issued by the Chief Magistrate.

7.4 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. These range from a caution, having privileges removed and having earnings stopped – they cannot impose additional days. Only IAs can impose additional days as well as any of the punishments that a governor can award. This is following the judgment of the European Court of Human Rights in *Ezeh and Connors v the United Kingdom 2003*, which dictates that where additional days are in contemplation, Article 6 (right to a fair trial) applies and so the charge must be heard by an independent and impartial tribunal. An IA can impose a maximum of 42 additional days per breach of the Prison Rules 1999 and YOI Rules 2000.

Why is it being changed?

7.5 PSI 05/2018 was amended in August 2022 to instruct governors to give reasons for referral to the Independent Adjudicator. However, without changing the Prison Rules and YOI Rules to expand how cases are referred there will continue to be inflexibility in the IAs' ability to refer cases back.

7.6 The Government wants to enable the cases to be heard as quickly as possible in manner that is a proportionate to the rule breaking and has certainty in outcome. Without changing the Prison Rules 1999 and YOI Rules 2000, there is a risk that a significant number of serious cases will continue to be dismissed. This undermines the integrity of the adjudication system, sends a message of impunity to prisoners and risks employee relations.

What will it now do?

7.7 The new Prison Rule 53A (paragraphs 6-12) and 54 (paragraph 4) and YOI Rule 58A (paragraphs 6-12) and 59 (paragraph 4) will enable an IA to consider the seriousness of a charge referred to them and to refer it back to the governor if the seriousness test has not been met. The governor then must inquire into the case themselves and give a punishment other than added days and will not be able to refer a charge back to the IA again. Prisoners will lose their automatic right to legal representation that they would otherwise get for an IA hearing. This will close the loop and ensure speedy resolution.

7.8 An IA will also be able to refer a charge back to the governor for review for a police referral where, for example more evidence comes to light during the IA hearing that the offence should merit a criminal penalty. The Amendment Rules outline that this can happen anytime from initial referral up to and before punishment is imposed (which is similar to the current governor and IA referral process). The governor could then refer it back to the IA, for example if the governor considers that the evidence has been compromised for a criminal referral or where a criminal referral comes back as not proceeded with. If the governor decides that the case can continue and refers the charge back to the IA again for the consideration of added days, the case cannot be returned to the governor. This closes the loop to enable speedy resolution.

7.9 The new Rules are designed to give governors and IAs maximum flexibility to progress the cases as they see fit. The judiciary are supportive of these proposals.

7.10 The Amendment Rules outline that any related charges would also be referred at the same time and the prisoner must be informed when the status of the referral changes, as is the case with the current process.

8. European Union Withdrawal and Future Relationship

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 plans to consolidate the Prison Rules at this time

10. Consultation outcome

10.1 The Chief Magistrate's Office has been consulted and is supportive of these amendments.

11. Guidance

11.1 Policy instructions and guidance is being given to prisons to advise governors and staff of the changes to the Rules and the new processes to follow, in consultation with the Chief Magistrate's Office.

12. Impact

12.1 There is no impact on business, charities, or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector Establishments and staff will continue to process adjudications as before with occasional changes in handling due to the modifications created by this SI.

12.3 A full Equalities Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

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. Governors are required to regularly review the conduct of adjudications within their establishments to ensure that the required outcomes are being achieved.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Abigail Tonkin at the Ministry of Justice, abigail.tonkin@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 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.

15.3 Minister Hinds at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.