EXPLANATORY MEMORANDUM TO

THE PRISON AND YOUNG OFFENDER INSTITUTION (INTERCEPTION OF COMMUNICATIONS) (AMENDMENT) RULES 2024

2024 No. 1217

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. Declaration

2.1 Lord Timpson, Minister of State for Prisons, Probation and Reducing Reoffending at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Brendan Christie, Deputy Director for Custodial Capacity, at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Maria Madsen and Hansa Ladva at the Ministry of Justice maria.madsen@justice.gov.uk and hansa.ladva@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The purpose of the Prison and Young Offender Institution (Interception of Communications) (Amendment) Rules 2024 is to make changes to the Prison Rules 1999 (S.I. 1999/728) and the Young Offender Institution Rules 2000 (S.I. 2000/3371) ('the Prison and YOI Rules'). This change is intended to allow prison governors to make arrangements to intercept the images, but not the sound, of video calls between a prisoner and their legal advisor or an approved 'Confidential Access' body or organisation ('legal and confidential video calls') in order to visually monitor them, where necessary and proportionate, thereby reducing the burden on prison staff of carrying out routine visual checks of such video calls in order to ensure that all participants' conduct is appropriate and that all are authorised to be present. It will mirror the current permitted practice under the Prison and YOI Rules of monitoring in-person legal visits by keeping the participants out of hearing of prison officers but in sight; enabling the same level of monitoring to be applied in respect of legal and confidential video calls and in-person legal visits.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument is England and Wales.

4.3 The territorial application of this instrument is England and Wales.

5. Policy Context

What is being done and why?

5.1 Prisoners have a statutory right to confidential legal communications, which can include letters, phone calls and video calls. They also have a statutory right to confidential communications with an approved range of 'Confidential Access' bodies and organisations. These communications can currently only be intercepted where the governor has reasonable cause to believe that the communication is being made with the intention of furthering a criminal purpose, and this has been authorised by a listed official in the National Offender Management Service (now His Majesty's Prisons and Probation Service).

5.2 With the introduction of legal and confidential video calls in prisons, to complement in-person legal and confidential visits, prison staff are required to carry out routine visual checks of such video calls in order to ensure that all participants' conduct is appropriate and that those at the other end are all authorised to be present. This is particularly important from a security perspective and mirrors the physical monitoring of in-person legal visits (keeping them in sight of prison officers but out of hearing) which is already permitted by the Prison and YOI Rules.

5.3 To carry out routine visual checks, prison staff can either physically observe the prisoner and their screen through the door of the room where the call is taking place, or they can intermittently intercept the images (but not the sound) of the video calls, in order to allow remote checks. Physical observation is far more resource intensive, but the interception to enable remote checks requires lawful authority under the Investigatory Powers Act 2016. As currently drafted, the Prison and YOI Rules do not provide for prison staff to intercept legal and confidential video calls for the purpose of routine visual checks without consent. Lawful authority under the Investigatory Powers Act 2016 is instead currently provided by seeking the consent of the prisoner and lawyer/'Confidential Access' caller in every case and having to rely on resource-intensive physical observation when this is refused. However, if the Prison and YOI Rules permitted such interception, this would provide a lawful authority which could be relied upon in every case without having to seek consent, as well as mirroring the legal position for monitoring in-person legal visits.

What was the previous policy, how is this different?

5.4 Governors could only make arrangements for interception of any communication (this includes video calls) between a prisoner and either their legal advisor or an approved 'Confidential Access' body or organisation without their consent, where a single set of conditions are fulfilled - where the governor had reasonable cause to believe that the communication was being made with the intention of furthering a criminal purpose, and where this had been authorised by a listed official in the National Offender Management Service (now His Majesty's Prisons and Probation Service). In the absence of the lawful authority as required by the Investigatory Powers Act 2016, it was unlawful to intercept this type of communications for monitoring or observational purposes without seeking explicit consent each time.

6. Legislative and Legal Context

How has the law changed?

6.1 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 Young Offender Institutions ('YOIs'), and the Prison and YOI Rules are made using this power. The Prison and

YOI Rules set out a range of powers, duties, and obligations that govern how prisons and YOIs are run on a day-to-day basis, including the interception in a prison of any communication by any prisoner where considered necessary and proportionate to maintain security, good order and to prevent crime. This is set out under Prison Rule 35Aand YOI Rule 11.

6.2 The Prison and Young Offender Institution (Interception of Communications) (Amendment) Rules 2024 amend the Prison and YOI Rules to maintain the effective monitoring of prisoner communications. The Government has determined that the Prison and YOI Rules should be modified to amend existing rules: Prison Rule 35 and YOI Rule 11. This will mean that staff can intercept the image, but not the sound, of legal and confidential video calls, in order to monitor them through routine visual checks.

6.3 Specifically, Prison Rule 35A(2A) and YOI Rule 11(2A) have been amended to add a new condition, which if fulfilled allows the Governor to make arrangements for the interception of communication between a prisoner and their legal advisor or a 'Confidential Access' body or organisation. This condition is that communication is by means of a video call system, that the interception is only of images and not of sound, and the governor considers that the arrangements are both necessary on a ground specified in paragraph (4) of the relevant Rule and proportionate to what is sought to be achieved. This Rule also contains a minor update to remove references to the National Offender Management Service, replacing them with His Majesty's Prison and Probation Service.

Why was this approach taken to change the law?

6.4 This is the only possible approach to enable visual monitoring without resource intensive physical checks or individual consent being required from legal advisors and "Confidential Access" bodies and organisations, because interception to enable remote checks without consent requires lawful authority under the Investigatory Powers Act 2016.

7. Consultation

Summary of consultation outcome and methodology

7.1 Formal consultation was not deemed necessary for this change because, for the majority of video participants who would currently consent to interception, the only practical difference will be that they will no longer have to do so each time they participate in a call. Those who would not consent will now be subject to interception regardless of their preferences, but this is a relatively minor change given that the current alternative is physical observation by prison staff.

8. Applicable Guidance

8.1 Guidance notices will be given to prisons to advice governors and staff of the changes to the Rules and updates made to training materials and guidance. An update will be provided on the Legal Aid Bulletin and gov.uk website to inform legal visitors of the changes.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because the SI relates to maintenance of existing regulatory standards.

Impact on businesses, charities and voluntary bodies

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

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector because prisons and staff will continue to conduct legal and confidential video calls as before without the need to seek consent to monitor or observe the images (not sound) of the legal or confidential video calls due to the modification created by this instrument.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is for governors to monitor compliance within their establishments to ensure that the required outcomes are being achieved. In addition, the Investigatory Powers Commissioners Office (IPCO) provides oversight of interception and restriction arrangements in prisons and conducts inspections of prisons, ensuring these powers are used in accordance with the law.

10.2 The instrument does not regulate business, and therefore the statutory duty under section 28 of the Small Business, Enterprise, and Employment Act 2015 (to include review provisions or to publish a statement that it is not appropriate in the circumstances to do so) does not apply.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts.