



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

28th Meeting, 2018 (Session 5)

Tuesday 6 November 2018

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decisions on taking business in private:** The Committee will decide whether to take items 5 and 6 in private.

2. **Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012:** The Committee will take evidence from—

Simon Routh-Jones, HM Chief Inspector, Scottish Fire and Rescue Service, HM Fire Service Inspectorate in Scotland;

Douglas Scott, Senior Policy Adviser, and Graham Jones, Safer Communities and Community Justice Manager, Scottish Borders Council;

and then from—

Kate Frame, Commissioner, John McSporran, Head of Investigations, and Michael Tait, Head of Communications, Police Investigations and Review Commissioner;

Diego Quiroz, Policy Officer, Scottish Human Rights Commission.

3. **Subordinate legislation:** The Committee will consider the following negative instrument—

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2018 (SSI 2018/293).

4. **Management of Offenders (Scotland) Bill:** The Committee will consider reports from HM Inspectorate of Constabulary in Scotland and HM Inspector of Prisons for Scotland on Home Detention Curfews in relation to the scrutiny of the Bill at Stage 1.

5. **Management of Offenders (Scotland) Bill:** The Committee will consider its approach to the scrutiny of the Bill at Stage 1.
6. **Brexit and the civil and criminal justice systems and policing in Scotland:** The Committee will consider a draft report to the Parliament.

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The papers for this meeting are as follows—

Agenda item 2

Paper by the clerk - Police and Fire Reform (Scotland) Act 2012 J/S5/18/28/1

Private paper - Police and Fire Reform (Scotland) Act 2012 J/S5/18/28/2 (P)

Agenda item 3

Paper by the clerk - SSI 2018-293 J/S5/18/28/3

Agenda item 4

Paper by the clerk - Management of Offenders (Scotland) Bill J/S5/18/28/4

Agenda item 5

Private paper - Management of Offenders (Scotland) Bill J/S5/18/28/5 (P)

Agenda item 6

Private paper - Brexit J/S5/18/28/6 (P)

Justice Committee

28th Meeting, 2018 (Session 5), Tuesday 6 November 2018

Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012

Note by the clerk

Introduction

1. The Scottish Parliament's Justice Committee is undertaking post-legislative scrutiny of the [Police and Fire Reform \(Scotland\) Act 2012](#). The 2012 Act created a single police service and a single fire and rescue service, replacing the eight police forces and the eight fire brigades that had existed previously.
2. The Committee is to examine whether:
 - the policy intentions of the Police and Fire Reform (Scotland) Act 2012 have been realised and are being delivered in relation to the police service and the fire and rescue service; and whether
 - any further policy or legislative changes are required to improve the effectiveness of the Police and Fire Reform (Scotland) Act 2012.
3. There will be two panel evidence sessions on 30 October. The purpose is to explore whether the legislation and the policy intentions of the reform of the police and fire and rescue services are being met. The panel will explore the views of Her Majesty's Fire Service Inspectorate in Scotland (HMFSI), Scottish Borders Council, the Police Investigations and Review Commissioner (PIRC), and the Scottish Human Rights Commission.

Justice Committee consideration

4. At its meeting of 6 November 2018, the Committee will hear from two panels of witnesses. This is the Committee's sixth evidence session on the 2012 Act. The first panel will comprise Simon Routh-Jones, HM Chief Inspector of the Scottish Fire and Rescue Service, HMFSI, and Douglas Scott, Senior Policy Adviser, and Graham Jones, Safer Communities and Community Justice Manager, Scottish Borders Council. The second panel will comprise of Kate Frame, Commissioner, John McSparran, Head of Investigations, and Michael Tait, Head of Communications, Police Investigations and Review Commissioner; and Diego Quiroz, Policy Officer, Scottish Human Rights Commission.
5. Written submissions from the witnesses can be found [here](#).
6. At its meeting of 18 September 2018, the Committee held a roundtable evidence session. It heard from Chief Superintendent Ivor Marshall, President, Association of Scottish Police Superintendents, Councillor Elena Whitham, Spokesperson for Community Wellbeing, and Mike Callaghan, Policy Manager, COSLA, Denise Christie, Scottish Regional Secretary, Fire Brigades Union Scotland, Sandy Brindley, Chief Executive, Rape Crisis Scotland, and Professor Nick Fyfe, Founding Director, Scottish Institute for Policing Research.

7. At its meeting on 25 September 2018, the Committee heard from two panels of witnesses. It heard from Police Scotland, Fife Council, the Auditor General for Scotland, and Her Majesty's Inspector of Constabulary in Scotland.
8. At its meeting on 2 October 2018, the Committee heard from the Scottish Police Authority and Police Scotland.
9. At its meeting on 23 October 2018, the Committee heard from representatives of the Scottish Police Federation, the Association of Scottish Police Superintendents, Unison Scotland, the Fire Brigades Union, and the Fire and Rescue Services Association.
10. At its meeting of 30 October 2018, the Committee heard from the Chief Constable of Police Scotland, Iain Livingstone, Susan Deacon, Chair of the Scottish Police Authority, and then from Alasdair Hay, Chief Officer of the Scottish Fire and Rescue Service and Kirsty Darwent, Chair of the Scottish Fire and Rescue Service Board.
11. The Committee's remaining evidence session on the 2012 Act is scheduled for 13 November 2018.
12. Official Reports of all meetings will be published on the Committee's [webpage](#).

Justice Committee

28th Meeting, 2018 (Session 5), Tuesday 6 November 2018

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:
 - [Prisons and Young Offenders Institutions \(Scotland\) Amendment Rules 2018 \(SSI 2018/293\)](#) [see page 3];
2. If the Committee agrees to report to the Parliament on the instruments it is required to do so by 19 November 2018.

Procedure for negative instruments

3. 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. 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).
4. 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.
5. 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.
6. Each negative instrument appears on the 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.
7. 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

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

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

Recommendation

9. **The Committee is invited to consider the instrument.**

PRISONS AND YOUNG OFFENDERS INSTITUTIONS (SCOTLAND) AMENDMENT RULES 2018 (SSI 2018/293)

Introduction

10. The instrument is made under section 39 of the Prisons (Scotland) Act 1989. The Rules make provision for a smoking ban in prisons and to enable the authorisation of the use of nicotine vapour products.

11. Further details on the purpose of the instrument can be found in the policy note (see below).

12. The instrument comes into force on 30 November 2018.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

13. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 23 October 2018 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

14. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 19 November 2018.

Policy Note: Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2018 (SSI 2018/293)

Policy Objective

1. 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).
2. 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.
3. 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.

4. 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.
5. 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.
6. 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.
7. 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

8. 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*, 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

9. 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

10. 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.

Justice Committee

28th Meeting, 2018 (Session 5), Tuesday 6 November 2018

Management of Offenders (Scotland) Bill

Introduction

1. The Justice Committee is the lead committee for the consideration of the Management of Offenders (Scotland) Bill. The [Bill](#) is currently at Stage 1 and has a deadline of 21 December 2018.
2. The Bill makes provision for electronic monitoring of offenders and as to certain other restrictive measures imposable on offenders; makes provision about periods and processes as regards disclosure of convictions by offenders; and makes provision relating to the organisation and functions of the Parole Board for Scotland.
3. Just prior to the summer recess, the Committee delayed the publication of its report on the Bill to take account of two independent inquiries announced by the then Cabinet Secretary of Justice. These inquiries – by Her Majesty's Inspectorate of Constabulary in Scotland (HMICS) and Her Majesty's Chief Inspector of Prisons for Scotland (HMIPS) – looked into the circumstances surrounding the murder in Paisley of Craig McLelland by James Wright, whilst the latter was on release from prison as part of a Home Detention Curfew (HDC) regime.
4. Both HMICS and HMIPs have now published their independent reports:

<https://www.hmics.scot/news/hmics-publishes-review-police-scotland%E2%80%99s-response-breach-home-detention-curfew>

<https://www.prisoninspectorscotland.gov.uk/publications/report-review-arrangements-home-detention-curfew-within-scottish-prison-service>
5. Additionally, the Cabinet Secretary for Justice made a [statement](#) in the Chamber on 25 October. The Cabinet Secretary said he would accept all the recommendations made in the two reports.¹
6. Amongst other comments he made, he indicated that the Scottish Government is considering making remaining 'unlawfully at large' a specific offence. That would also provide associated powers of entry for the police. He indicated this would be achieved by an amendment at Stage 2 of the Bill. This would be a new provision on which the Committee has not previously taken evidence.

¹ Scottish Parliament, Official Report, 25 October, col 57.

Action/recommendation

7. Members of the Committee are invited to discuss their views of the findings of the two independent reports and their response to the Cabinet Secretary's statement to the Chamber.
8. Members will note that it is the Convener's intention that the detail of what further consideration, if any, at Stage 1 the Committee wishes to take and timescales will be discussed as a subsequent agenda item. The Committee will be asked if it wishes to take this subsequent item in private as this is likely to relate to decisions on the choice of witnesses assuming that the Committee decides that further oral evidence is required.

Clerking Team
October 2018