



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

8th Meeting, 2014 (Session 4)

Tuesday 11 March 2014

The Committee will meet at 10.00 am in Committee Room 1.

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

2. **Fire and Rescue Service Reform:** The Committee will take evidence from—

John Duffy, Scottish Secretary, Fire Brigades Union;

John Hackett, Regional Organiser, Unison Scotland;

Nick Croft, Corporate Policy and Strategy Manager, Edinburgh Community Safety Partnership;

and then from—

Pat Watters, Chair, Scottish Fire and Rescue Service Board;

Alasdair Hay, Chief Officer, Scottish Fire and Rescue Service;

Steven Torrie, HM Chief Inspector of the Scottish Fire and Rescue Service.

3. **Petition PE1504:** The Committee will consider a petition by Kathie Mclean-Toremar on party litigants - civil appeals to the Supreme Court.

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

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26).

5. **Standards, Procedures and Public Appointments Committee inquiry into the procedures for considering legislation in the Parliament:** The Committee will consider a draft response.

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The papers for this meeting are as follows—

**Agenda item 2**

Private paper

J/S4/14/8/1 (P)

[Written submissions received on fire and rescue service reform](#)

**Agenda item 3**

Paper by the clerk

J/S4/14/8/2

**Agenda item 4**

Paper by the clerk

J/S4/14/8/3

[Prisons and Young Offenders Institutions \(Scotland\) Amendment Rules 2014 \(SSI 2014/26\)](#)

**Agenda item 5**

Private paper

J/S4/14/8/4 (P)

**Justice Committee**

**8<sup>th</sup> Meeting, 2014 (Session 4), Tuesday 11 March 2014**

**Petition PE1504**

**Note by the clerk**

**Introduction**

1. This paper invites the Committee to consider petition PE1504 (Civil Appeals from the Court of Session to the Supreme Court).

2. The terms of the petition are:

“Asking the Scottish Parliament to urge the Scottish Government to consider changing the current legislation regarding Civil Appeals from the Court of Session to the Supreme Court. In accordance with paragraph 1.8 appeals from the Court of Session to the Supreme Court, a party litigant does not have the same rights as a criminal, a murderer, a sex offender or another person making the same Appeal.”

**Courts Reform (Scotland) Bill**

3. The Public Petitions Committee (PPC) considered the petition on Tuesday 18 February and agreed to refer it to the Justice Committee as part of its scrutiny of the Courts Reform (Scotland) Bill. Part 4 of the Bill deals with civil appeals and so the petition could be considered as part of the Committee’s scrutiny of this part of the Bill.

4. A SPICe briefing, provided for the PPC is annexed for information.

5. The Committee will begin Stage 1 evidence taking on the Bill on 18 March.

**Recommendation**

6. **The Committee is therefore invited to consider the petition in the context of its scrutiny of the Courts Reform (Scotland) Bill.** The petitioner will be advised of this action. Once the Committee has concluded that scrutiny the Committee may wish to consider closing the petition.

## ANNEXE

## SPICe Briefing for the Public Petitions Committee

**Petition Number:** PE01504

**Main Petitioner:** Kathie Mclean-Toremar

**Subject:** Party litigants - Civil Appeals to the Supreme Court

Calls on the Parliament to urge the Scottish Government to consider changing the current legislation regarding Civil Appeals from the Court of Session to the Supreme Court. In accordance with paragraph 1.8 appeals from the Court of Session to the Supreme Court, a party litigant does not have the same rights as a criminal, a murderer, a sex offender or another person making the same Appeal.

## Background

The petition relates to a legal dispute in which the petitioner was involved and the rules which apply to party litigants (i.e. those without legal representation) who want to appeal

Court of Session cases to the United Kingdom Supreme Court (Supreme Court).

### The petitioner's legal dispute

The legal dispute involved an insurance claim made by the petitioner in relation to a fire which broke out in the hotel which she owned. The insurance company did not accept this claim and voided the policy. The petitioner subsequently sued the insurance company in the Outer House of the Court of Session<sup>1</sup> and represented herself as a party litigant.

The Outer House found in favour of the defenders (i.e. the insurance company)<sup>2</sup> and the petitioner appealed this judgment to the Inner House of the Court of Session (Inner House),<sup>3</sup> again representing herself.<sup>4</sup> The Inner House also found in favour of the insurance company. It appears that the petitioner then wished to appeal the judgment of the Inner House to the Supreme Court (i.e. the final court of appeal for Scottish civil cases), but was unable to meet the procedural requirements to do so (see below).

<sup>1</sup> The Outer House of the Court of Session hears cases at first instance (i.e. cases that have not previously been to court). For details see the [Scottish Judiciary Court Structure guide](#)

<sup>2</sup> McLean or Toremar v CGU Bonus Ltd [2009] CSOH 78, para. 103

<sup>3</sup> The Inner House is primarily an appeal court, hearing civil appeals from both the Outer House and Sheriff Courts. For details see the [Scottish Judiciary Court Structure guide](#)

<sup>4</sup> McLean or *Toremar* v CGU Bonus Ltd [2012] CSIH 90

## Appeals to the Supreme Court

### *Scotland*

In Scotland the general rule is that civil appeals to the Supreme Court are of right (i.e. without the requirement for the Inner House to grant permission – known as “leave to appeal”).<sup>5</sup> However, [Supreme Court Practice Direction 4](#)<sup>6</sup> puts certain procedural limits on such appeals (including those brought by party litigants),<sup>7</sup> providing that:

“In appeals where permission to appeal is not required (for example, in most Scottish appeals) the notice of appeal must be certified as reasonable by two counsel<sup>8</sup> from the relevant jurisdiction and signed by them” (para 4.2.2).

Under Rule 19 of the [Supreme Court Rules](#), the notice of appeal must be filed with the Supreme Court within 42 days of the date of the order/decision of the court.<sup>9</sup> For more details on Scottish Supreme Court appeals see paras 1.7–1.11 of the Supreme Court’s [guide to bringing a case to The Supreme Court](#).

### *England and Wales and Northern Ireland*

The rules for appeals to the Supreme Court from other UK courts differ from those in Scotland. Leave to appeal from the Supreme Court’s Appeal Panel (Appeal Panel) is needed. According to [Supreme Court Practice Direction](#) 3.3.3 this will only be granted for applications that:

“raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.”

In other words, for non-Scottish cases the Appeal Panel carries out a sift of cases considered suitable for appeal.

### Petitioner’s arguments

It appears that the petitioner was not able to find two counsel who would certify the appeal and so could not appeal to the Supreme Court.

The petitioner argues that the rule that two counsel have to certify an appeal provides “insurmountable hurdles and barriers ... for a Scottish party litigant to

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<sup>5</sup> Section 40 of the Court of Session Act 1988 as amended

<sup>6</sup> The Supreme Court’s Practice Directions are forms of procedural rules issued by the President of the Supreme Court which are used to regulate minor procedural matters

<sup>7</sup> See footnote 1 to [Supreme Court Practice Direction 4](#)

<sup>8</sup> The term “counsel” is defined by the [Supreme Court Rules](#) and includes advocates and enrolled solicitors (i.e. solicitor-advocates) with a right of audience in the Supreme Court

<sup>9</sup> This time limit can, however, be varied by the Supreme Court under Supreme Court Rule 5

proceed to the Supreme Court”, and that it gives rise to an “inequality of arms” as it limits those who can appeal. The petitioner notes in particular that:

- in her view, party litigants are not able to approach counsel directly to request certification, but only through a solicitor;<sup>10</sup>
- solicitors may not have experience of dealing with party litigants and may be confronted with conflicts of interest preventing them from acting; and
- the 42 day period for filing a notice of appeal is too short.

The petitioner also appears to argue that the rule breaches Article 6 of the European Convention on Human Rights (ECHR) on the right to a fair hearing.

### **Scottish Government Action**

The Scottish Government recently (May 2013) consulted on [the treatment of civil appeals from the Court of Session](#). The consultation paper contrasted the current system in Scotland with that which applies in the rest of the UK and proposed that the rule that two counsel have to certify an appeal to the Supreme Court should be replaced by a more general requirement for the parties to seek leave to appeal.

The [Courts Reform \(Scotland\) Bill](#), introduced on 6 February 2014, builds on the above consultation paper and proposes that the current provisions for appeals (i.e. certification by two counsel) be replaced with a provision requiring the permission of the Inner House, or, failing such permission, permission of the Supreme Court (see section 111 of the Bill). If this section of the Bill becomes law, the requirement that two counsel certify appeals would no longer apply. Instead leave to appeal would be needed.

### **Scottish Parliament Action**

The Scottish Parliament does not appear to have conducted investigations into the specific issues raised by the petitioner.

### **Key Organisations**

Amongst others, the following organisations could be asked to comment on the proposal: the Scottish Government; the Faculty of Advocates, the Law Society of Scotland, the Lord President, the UK Supreme Court.

Angus Evans  
Senior Research Specialist  
10 February 2014

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<sup>10</sup> In contrast, in its [response](#) to the recent Scottish Government consultation on [the treatment of civil appeals from the Court of Session](#), the Faculty of Advocates suggests that party litigants can approach the Faculty directly for assistance in this regard (see pages 3–4)

**Justice Committee**

**8<sup>th</sup> Meeting, 2013 (Session 4), Tuesday 11 March 2014**

**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 2014 (SSI 2014/26).
2. Further details on the procedure for negative instruments are set out in Annexe D attached to this paper.

**Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014  
(SSI 2014/26)**

**Justice Committee consideration**

3. The Committee first considered this instrument at its meeting on 4 March. The Committee agreed at this meeting to write to the Scottish Government and the Association of Visiting Committees seeking their comments on the Delegated Powers and Law Reform Committee's view that there is a lack of transitional arrangements in relation to both this instrument and the proposed draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014. Responses from the Scottish Government and the Association of Visiting Committees are attached at Annexes A and B (pages 9-11).
4. The 40-day period for the instrument ends on Wednesday 19 March. There would therefore be further opportunity for the Committee to consider the instrument at its meeting on 18 March if there was a decision to do so.

**Background**

5. The purpose of the instrument is to amend Schedule 2 to the Prisons and Young Offenders Institutions (Scotland) Rules 2011, which provide for the constitution of visiting committees, to reflect the opening of HMP & YOI Grampian and the closure of HMPs Aberdeen and Peterhead.
6. The instrument comes into force on 3 March 2014.
7. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/ssi/2014/26/contents/made>

## **Consultation**

8. The policy note on the instrument confirms that operational managers and policy colleagues within the Scottish Prison Service, the relevant local authorities and the Association of Visiting Committees have been consulted and that the local authorities for the new prison, HMP & YOI Grampian, have agreed the visiting committee's membership.

## **Delegated Powers and Law Reform Committee consideration**

9. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 18 February 2014 and draws to the attention of the Justice Committee that no saving or transitional provision is made for the visiting committees for Aberdeen and Peterhead prisons which are being wound up to allow them to complete any investigations into complaints which are ongoing notwithstanding the closure of those prisons and to report for the period 1 April 2013 to their abolition.

10. The DPLR Committee also draws to the attention of the Committee and the Scottish Government that similarly no saving or transitional provision is made in the proposed draft order abolishing visiting committees and replacing them with lay prison monitors (the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014).

11. The DPLR Committee further reports to the Parliament a failure in communication and planning within the Scottish Prison Service, which resulted in non-compliance with the 28 day rule.

12. The relevant extract from the DPLR Committee's report on the instrument is reproduced on page 3 of this paper.

13. In addition, the Convener of the DPLR Committee has written to the Justice Committee highlighting the DPLR Committee's concerns. In his letter to the Committee, Mr Don intimated that he had written to the Scottish Government on this matter (a copy of the letter is attached at Annexe C).

## **Policy Note: Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)**

1. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 ("the Amendment Rules") were made in the exercise of the powers conferred by sections 8 and 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 Cabinet Secretary announced in August 2007 that a new publicly operated prison was to be built in the Peterhead area to replace the existing facilities there and at HMP Aberdeen. HMP & YOI Grampian has been built on part of the HMP Peterhead site and is scheduled to open in March 2014 and will be fully operational by late April. HMPs Peterhead and Aberdeen have been closed and their status as



prisons will be discontinued once the Discontinuance of Aberdeen and Peterhead Prisons (Scotland) Order 2014 comes into force.

3. 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).

4. In terms of section 8 of the 1989 Act, Rules made under section 39 must provide for the constitution of visiting committees. Schedule 2 to the Prison Rules details the number of VC members to be appointed for each prison and the name of the appointing Authority. This Schedule requires to be amended to reflect the opening of HMP & YOI Grampian and closure of HMPs Aberdeen and Peterhead.

### **Impact Assessment**

5. The Equality and Diversity impact assessment was carried out and it was determined that the changes to Schedule 2 would have no impact on prisoners, staff or visitors to the prison.

### **Consultation**

6. There has been consultation with operational managers and policy colleagues within the Scottish Prison Service, the relevant local authorities and the Association of Visiting Committees. The local authorities for the new prison, HMP & YOI Grampian have agreed the VC membership.

### **Financial Effect**

7. The Cabinet Secretary for Justice confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

### ***Extract from the Delegated Powers and Law Reform Committee 15<sup>th</sup> Report 2014***

#### **Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) (*Justice Committee*)**

1. This instrument amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the 2011 rules") in order to establish a prison visiting committee for the new prison at Grampian and to dis-establish the existing prison visiting committees for HMP Aberdeen and HMP Peterhead.

2. The Rules are subject to the negative procedure and will come into force on 3 March 2014.

3. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points relating to the application of rule 146 and 153 of the 2011 rules. The correspondence is reproduced at the Appendix.

4. The correspondence sets out the Scottish Government's view on how the members of the visiting committees for HMP Aberdeen and HMP Peterhead will be removed from office once the instrument takes effect on 3 March 2014.

5. In this context the Committee notes that the instrument makes no saving provision for the visiting committees for Aberdeen and Peterhead beyond the date of closure of the prisons. Such a period would permit those committees to complete any ongoing investigations or to report on their activities under rule 153 for the period from 1 April 2013 to their abolition. The Committee notes that in relation to previous prison closures such a period has been allowed for such purposes by way of transitional and saving provision.

6. The Committee takes a keen interest in ensuring that transitional and saving provision is made where that is appropriate. The Committee accepts that it is not aware of whether there are any ongoing complaints or other administrative matters which require to be dealt with and that questions about how any such matters should be handled raise questions of policy.

**7. The Committee therefore draws to the attention of the Justice committee that no saving or transitional provision is made for the visiting committees for Aberdeen and Peterhead prisons which are being wound up to allow them to complete any investigations into complaints which are ongoing notwithstanding the closure of those prisons and to report for the period 1 April 2013 to their abolition.**

**8. The Committee also agreed to write to the Justice committee and the Scottish Government drawing to their attention that similarly no saving or transitional provision is made in the proposed draft order abolishing visiting committees and replacing them with lay prison monitors (the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014).**

9. The instrument is subject to the negative procedure and therefore is subject to the 28 day rule in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA"). This instrument does not observe the rule. As required by section 31(3) of ILRA the Scottish Prison Service has provided an explanation for this as follows:

"The member of staff who was tasked to prepare the SSI misread instructions from SPS operational colleagues regarding the opening of the new prison, HMP & YOI Grampian. It had been their understanding that although the new prison would open on 3 March 2014, it would not be operational until April 2014. Further that there would be no prisoners located in the Prison until April and hence no requirements for a visiting committee until this time. However, while reviewing the paperwork to begin the preparations for the SSI, it was noted that a small number of prisoners will be relocated to HMO & YOI Grampian on the day it opens, 3 March 2014. Although HMP & YOI Grampian will become fully operational by April 2014, it will become operational in March 2014."

10. The Committee accepts that having found itself in the position outlined in the explanation, as a matter of practical expediency, the Scottish Government had little alternative but to proceed to make the instrument without observing the requirements of the 28 day rule. The reason why the Scottish Government found itself in this position appears to the Committee to have resulted from a failure in communication and planning within the Scottish Prison Service. The Committee considers that this is completely unsatisfactory and could have been avoided.

**11. The Committee draws the instrument to the attention of the Parliament under reporting ground (j). The requirements of section 28(2) of the Interpretation and**

**Legislative Reform (Scotland) Act 2010 have not been complied with as fewer than 28 sitting days have been allowed between the instrument being laid before the Parliament and the date on which it comes into force.**

**12. The Committee finds that a failure in communication and planning within the Scottish Prison Service is the reason for non-compliance with the 28 day rule. The Committee finds this to be completely unsatisfactory and reports to the Parliament accordingly.**

## **Appendix**

### **Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)**

**On 6 February 2014, the Scottish Government was asked:**

Rule 146(1) of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 requires that a visiting committee must be constituted in accordance with the remainder of that rule for each prison specified in column 1 of Schedule 2 to those regulations. Rule 146(2) and columns 2 and 3 of that Schedule identify by whom the membership of that committee is to be appointed by allocating responsibility to local authorities. Rule 146(4) determines by when the local authorities must make those appointments. Rule 146(5) sets out when persons appointed under rule 146(4) take office. Rule 146(6) specifies when members of visiting committees cease to hold office as read with rule 146(7).

The purpose of the instrument appears to be to dis-establish the visiting committees for HMP Aberdeen and HMP Peterhead with effect from 3 March 2014 and to establish a visiting committee for HMP Grampian with effect from that date.

1. The instrument modifies Schedule 2 to the principal regulations. The effect of article 2(b) is to require a visiting committee to be constituted for HMP Grampian in accordance with rule 146. A question arises as to whether this instrument goes far enough to establish a visiting committee for HMP Grampian since rule 146(4) does not appear to make provision for the establishment of a new visiting committee other than immediately after a council election. Rule 146(4)(a) deals with that scenario. By contrast rule 146 (4)(b) deals with circumstances where the requisite number of members were not elected in accordance with (4)(a), (4)(c) deals with vacancies as a result of committee members ceasing to hold office and (4)(d) deals with “any other vacancy” occurring. The question is whether “vacancies” have occurred for the purposes of rule 146(4)(d) by virtue of the modification made to Schedule 2 or not. It would appear to require a strained construction to be placed on rule 146(4)(d) were it intended to include the creation of a completely new visiting committee as “vacancies occurring in that committee”. In particular the operation of (4) is material to determining under (5) the date on which functions will vest in the members of the new visiting committee. It is suggested that the current circumstances are not provided for by the drafting of rule 146 and that specific provision is required to achieve that legal effect. I am aware that this was the approach taken in SSI 2012/26. Nevertheless, on a proper construction of rule 146 I consider that this question requires to be addressed.

2. The effect of the removal of references to HMP Aberdeen and HMP Peterhead from Schedule 2 will be to disapply the duty imposed by rule 146(1) to constitute a visiting committee for those prisons. It is submitted that this is a different legal effect to

the desired effect of dis-establishing the visiting committees that were established under this rule. It would appear that rule 146(6)(7) does not achieve this effect either. Is separate provision to this effect not required?

3. The Scottish Government is also asked whether its policy is that rule 153 will apply to the proposed visiting committee for HMP Grampian for the period up to 31 March 2014. If not, is a transitional provision not required to disapply this rule?

**The Scottish Government responded as follows:**

1. The purpose of the Amendments Rules is to dis-establish the visiting committees (VCs) for HMP Aberdeen and HMP Peterhead and to establish a VC for HM Grampian. The Amendment Rules remove the entries for HMP Aberdeen and HMP Peterhead from the table in Schedule 2 and add an entry for HMP Grampian to that table. The Scottish Government's position is that this is sufficient to provide for the dis-establishment of the VCs for HMP Aberdeen and HMP Peterhead and that it is also sufficient for the establishment of a VC for HMP Grampian.

Section 8 of the Prisons (Scotland) Act 1989 provides that rules made under section 39 of the Act must provide for the constitution of VCs appointed in accordance with those rules. This obligation is given effect to by rule 146 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the Prison Rules"). Rule 146(1) of the Prison Rules provides that a VC must be constituted (in accordance with rule 146) for each prison listed in the table in Schedule 2 to the Prison Rules. Accordingly, the addition of HMP Grampian to the table in Schedule 2 provides that a VC must be established for HMP Grampian.

Rule 146(2) of the Prison Rules makes provision for the appointment of VC members by local authorities. The number of VC members to be appointed by each council, and the number of VC members appointed by each council who must not be members of that council are all specified in the table in Schedule 2. The addition of HMP Grampian to the table in Schedule 2 means that the members of that VC must be appointed by the councils specified in that entry and in line with the numbers specified in that entry.

As the Committee have rightly pointed out, rule 146(4) is key to the appointment of members of a new VC such as HMP Grampian. It is clear from paragraph (1) of rule 146 that a VC must be appointed and the nature of the VC's membership is made clear by paragraph 2 of that rule. Paragraph (4) of rule 146 provides how the appointment of the VC members should take place.

Paragraph (4)(a) provides that members must be appointed at a meeting of the council held no later than 2 months after the council elections. The members of the VC for HMP Grampian cannot be appointed through this process as there have been no recent council elections held by the relevant councils. Paragraph (4)(c) does not apply here as it caters for the situation where a VC member resigns, has their membership terminated or ceases to be a member of the relevant council.

Paragraph (4)(b) provides that the member or members of a VC to be appointed by a council in terms of paragraph (2) must be appointed—

*"if for any reason the requisite number of members of a visiting committee is not appointed at the proper time in terms of sub-paragraph (a), at a meeting of the council held as soon as possible after that time;"*

The Scottish Government's position is that, as the requisite number of members of HMP Grampian cannot be appointed at a meeting held within 2 months of the council elections in terms of paragraph (4)(a), they must be appointed under paragraph (4)(b) at a meeting of the council held as soon as possible thereafter.

Once the Amendment Rules come into force, there will be an obligation to constitute a VC for HMP Grampian (rule 146(1)) and the obligation to appoint members to that VC will fall on the relevant councils specified in Schedule 2 to the Prison Rules (rule 146(2)). The relevant councils will therefore require to convene a meeting in accordance with rule 146(4)(b) in order to appoint the requisite number of members. The members of the VC for HMP Grampian will consequently take office on the day following their appointment in accordance with rule 146(5)(b).

2. Rule 146(1) of the Prison Rules creates an obligation to constitute VCs for the prisons specified in Schedule 2 and this obligation is carried out by local authorities appointing VC members under rule 146(2) and Schedule 2. The removal of a prison from Schedule 2 removes the obligation to constitute a VC for that prison and the obligation to appoint members to that VC. However, there is no provision in the Prison Rules for the discontinuance of a VC by the Scottish Ministers or for the automatic termination of the appointment of VC members on the discontinuance of the committee.

The Scottish Government's position is that a VC will be formally discontinued once the necessary amendments have been made to Schedule 2 to the Prison Rules and the members of the relevant VC have been removed from office. Rule 146(7) makes provision for the cessation of the term of office of VC members. Rule 146(7)(b) provides that a member of a VC ceases to hold office if the council who appointed that member terminates the member's appointment on one of four specific grounds. Rule 146(7)(b)(ii) provides that a council can terminate the appointment of a member on being satisfied that the member is, for any reason (other than a failure to perform his or her duties), incapable of carrying out his or her duties.

The VCs for HMP Aberdeen and HMP Peterhead will have no continuing duties as both of those prisons have now been closed and are to be formally discontinued as prisons once the Discontinuance of Aberdeen and Peterhead Prisons (Scotland) Order 2014 comes into force. The members of the VCs for Aberdeen and Peterhead are therefore incapable of carrying out their duties and it will be open for the relevant councils to terminate the appointment of the members of the VCs for HMP Aberdeen and HMP Peterhead under rule 146(7)(b)(ii). The termination of the membership of the VCs for HMP Aberdeen and HMP Peterhead by the relevant councils will be the final step in discontinuing the VCs.

Aberdeen City Council and Aberdeenshire Council are currently tasked with appointing the members of the VCs for HMP Aberdeen and HMP Peterhead and on the coming into force of the Amendment Rules, those councils will be obliged to appoint some of the members of the VC for HMP Grampian. From discussions between Aberdeen City Council, Aberdeenshire Council and SPS, those councils intend to appoint most of the HMP Aberdeen and HMP Peterhead VC members to the VC for HMP Grampian. It will fall to those councils to firstly terminate the appointment of the HMP Aberdeen and HMP Peterhead VC members under rule 146(7)(b)(ii) before appointing those individuals to the VC for HMP Grampian under rule 146(2).

Accordingly, it is not considered necessary to provide for the termination of the appointment of the members of the VCs for HMP Aberdeen and HMP Peterhead as that can be attended to as part of the appointment process for the VC for HMP Grampian.

3. The Scottish Government does not propose to disapply the obligations in rule 153 to the VC for HMP Grampian and the VC for HMP Grampian will be required to report in accordance with that rule. It is acknowledged that any such report will only encompass a few weeks and will not be as detailed as would otherwise be the case. However the Scottish Ministers have the power, in terms of rule 149(1) to require the VC to inquire into and report upon any matter in connection with the prison. The VC also have ongoing duties to report to the Scottish Ministers in terms of rule 149(2) and (3). Even though the initial report under rule 153 may be necessarily limited, there are opportunities for more detailed reporting later in the year.

**ANNEXE A**

**RESPONSE FROM THE SCOTTISH GOVERNMENT**

**Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) and draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014**

I note the concerns raised by the Delegated Powers and Law Reform Committee at their meeting on the 18 February 2014 regarding the omission of saving and transitional provisions for the visiting committees for Aberdeen and Peterhead prisons. Further, their concerns that similarly no saving or transitional provision have been made in the proposed draft order abolishing visiting committees and replacing them with lay prison monitors (the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014). It may be helpful if I address the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) and Draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014.

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)

I can confirm that there is no need for any saving and transitional requirements for this statutory instrument to allow the Visiting Committees to complete their investigations, as SPS have confirmed with the relevant visiting committees that at the time of their abolition there were no on-going investigations.

Draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014

I am grateful to the committee for raising this matter in relation to this draft Order. The need for any such saving and transitional will continue to be assessed and, if required, will be included in the final version to be laid in parliament.

I hope this information is helpful.

Kenny MacAskill  
Cabinet Secretary for Justice  
6 March 2014

**ANNEXE B****RESPONSE FROM THE ASSOCIATION OF VISITING COMMITTEES****Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)**

I am replying on behalf of the AVC to your email of 4 March seeking our views of the Delegated Powers and Legislative Reform (DPLR) Committee's comments on the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26).

You asked for our views on two points:

*1. The DPLR Committee's view that there is a lack of transitional provision in place to allow the visiting committees at Aberdeen and Peterhead to complete any investigations into ongoing complaints and to ensure the completion of an Annual Report*

The AVC shares that view. Transitional provisions are necessary to ensure that ongoing complaints and enquiries are completed. It is not at all clear why the savings and transitional arrangements, which have been a feature of all previous orders relating to the closure of a prison, have been omitted in this case. We have established from the two VCs that complaints investigations and enquiries were concluded before the prisoners transferred. This is just as well as the prisoners from Peterhead were dispersed to other prisons before Christmas and the prisoners from Aberdeen were similarly dispersed by the end of January. In the case of Aberdeen, the VC has commented that the Governor gave every assistance to ensure a smooth transition.

The Amendment to the Rules should also make a provision to ensure that records and documents are transferred from the Peterhead and Aberdeen VCs to Grampian VC

In relation to the completion of an Annual report, we regard it as essential that the legal requirement remains in place for this to be undertaken by the Aberdeen and Peterhead VCs for the period commencing 1 April 2013 until the closure of the two prisons. However, the Government do not appear to intend this although, oddly, they intend to require the new Grampian VC to complete an Annual Report for the less than one month period from the establishment of the VC until 31 March.

There is a further point on which you did not request views but on which we wish to comment. This is in relation to the termination of the appointments of the members of the Peterhead and Aberdeen VCs. The Government suggests that councils can use Rule 146(7)(b)(ii) which provides that a council can terminate the appointment of a member on being satisfied that the member is, for any reason (other than a failure to perform his or her duties), incapable of carrying out his or her duties. These powers, by their context, are clearly intended to be used where is incapacity or other deficiency on the part of the VC member. To suggest it would be appropriate to use these powers to terminate an appointment where the prison has been closed is gratuitously insulting to unpaid volunteers who have devoted a lot of time to protecting the human rights of prisoners in accordance with national and international law.



*2. The DPLR Committee's comment that, similarly, no saving or transitional provision is made in the proposed draft order abolishing visiting committees and replacing them with lay prison monitors (the Public Services Reform (Prison Visiting Committees)(Scotland) Order 2014).*

It is the clear view of the AVC that the Order should contain savings and transitional provisions to ensure that prisoners' rights are protected, that ongoing inquiries and investigations into complaints etc can be continued, that records are transferred and that Annual Reports are completed.

It is disappointing, but regrettably not surprising in the light of other numerous drafting failures and omissions, that the Order does not include the necessary provisions. Whatever the transitional arrangements from visiting committees to some replacement system, these transitional arrangements must be robust and effective.

Finally, we would question yet again, the appropriateness of leaving it to the Scottish Prison Service to lead on drafting legislation in relation to VCs when SPS is the very body that VCs are established to monitor. This simply demonstrates once more that the Government either does not care about or understand its responsibilities in relation to the legislative framework or about the legal protections afforded by VCs.

Neil Powrie DL  
Convenor  
6 March 2014

**ANNEXE C****Letter from the Convener of the Delegated Powers and Law Reform Committee  
to the Convener of the Justice Committee**

Dear Christine

The Delegated Powers and Law Reform Committee considered the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) on 18 February. The instrument amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011 in order to establish a prison visiting committee for the new prison at Grampian and to dis-establish the existing prison visiting committees for HMP Aberdeen and HMP Peterhead.

The Committee agreed to draw the instrument to the attention of the Parliament under reporting ground (j) as it failed to comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

The Committee also agreed to draw certain other matters in relation to the instrument to the attention of the Justice Committee, as lead Committee for the instrument. These are detailed in the Committee's [report on the instrument](#).

In particular, the Committee noted that the instrument makes no saving provision for the visiting committees for HMP Aberdeen and HMP Peterhead beyond the date of closure of the prisons. Without such a period those committees would be unable to complete any ongoing investigations or to report on their activities under rule 153 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 for the period from 1 April 2013 to their abolition. The Committee also noted that in relation to previous prison closures such a period has been allowed for such purposes by way of transitional and saving provision.

In considering the instrument, the Committee noted that a similar issue arises in relation to the forthcoming draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 which proposes to abolish visiting committees and to replace them with lay monitors. Again, the Committee noted that no provision is made for saving the functions of the visiting committees that are to be abolished in order for them to complete their investigations into complaints which are ongoing at the time the public service reform order takes effect.

The Committee was concerned by the apparent lack of transitional and saving provisions contained in the forthcoming order. However, the Committee considers that questions regarding how ongoing complaints or other administrative issues should be dealt with during the transitional period are primarily matters of policy. Accordingly, I write to draw this matter to the attention of the Justice Committee, as the likely lead Committee for the draft order when it is laid before Parliament in due course.

I have also written to the Scottish Government on this matter.

Nigel Don MSP  
Convener  
27 February 2014

**ANNEXE D****Negative instruments: procedure**

Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. 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).

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.

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.

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. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

**Guidance on subordinate legislation**

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/64215.aspx>