



The Scottish Parliament  
Pàrlamaid na h-Alba

Alison Irvine  
Head of Cabinet, Parliament and  
Governance Division  
Scottish Government

Delegated Powers and Law Reform  
Committee  
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23 November 2022

### **Bail and Release from Custody (Scotland) Bill at Stage 1**

Dear Alison,

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on 15 November 2022 and would appreciate an explanation of the points set out below.

#### **Section 8 – Power to release early in specific circumstances**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish Statutory Instrument  
**Parliamentary procedure:** affirmative but may be made affirmative by reason of urgency

Section 8 of the Bill amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 to make provision for the early release of prisoners in emergency situations. Section 8(4) inserts new sections 3C to 3E into the 1993 Act. New Section 3C provides that the Scottish Ministers may, by regulations, provide for defined groups of persons to be released early from prison (or young offenders institute).

The Committee notes that this power can only be exercised by the Scottish Ministers if they are satisfied that it is a necessary and proportionate response to an emergency situation affecting a specific prison or prisons more generally, for the purpose of protecting the security and good order of any prison to which the regulations would relate or the health, safety or welfare of prisoners, or those working, in any such prison.

An “emergency situation” is defined in the new Section 3C(7) and includes the incidence or spread of infection or contamination, or a situation resulting in part of the prison estate being unusable and any other event or situation which is reasonably considered by the Scottish Ministers to place at significant risk (1) the security and good order of a prison or prisons more generally and/or (2) the health, safety, and welfare of prisoners, or those working, in any such prison.

The Committee notes that a similar temporary power, to that being provided in the Bill, was provided for in the Coronavirus (Scotland) Act 2020. Furthermore, a replacement temporary power has been included in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 which received Royal Assent on 10 August 2022. These powers are specific to the impact that Coronavirus is having on a prison or prisons and for no other purpose and are time limited. The power contained in this Bill will provide a permanent power for the Scottish Ministers to act when necessary and proportionate in response to future emergencies not limited to Coronavirus.

As you know, the Committee's report of its Inquiry into the use of the made affirmative procedure during the coronavirus pandemic<sup>1</sup> set out four principles which would form the basis of the Committee's scrutiny of primary legislation making provision for this procedure to be used. The four principles are:

1. Given the lack of prior parliamentary scrutiny and risks to legislative clarity and transparency in the made affirmative procedure, use of the affirmative procedure should be the default position in all but exceptional and urgent circumstances. Legislation making provision for the made affirmative procedure must be very closely framed and its exercise tightly limited.
2. The Parliament will require an assurance that a situation is urgent. Provision in primary legislation will need to encompass a requirement to provide an explanation and evidence for the reasons for urgency in each case where the procedure is being used. There should be an opportunity for debate in a timely fashion and open to Members to seek to contribute.
3. Any explanation provided by Scottish Ministers should also include an assessment of the impact of the instrument on those affected by it and Ministers' plans to publicise its contents and implications. This could include details of the relevant Scottish Government website where links to the instrument, including where relevant any consolidated version of the instrument it amends, as well as any associated guidance, can be found.
4. There will be a general expectation that legislation containing provision for the made affirmative procedure will include provision for sunset clauses to the effect that (a) Ministers' ability to use the power will expire at a specified date and that (b) any instrument made under the power will be time-limited.

**Please set out how section 8, or Scottish Government plans for implementation of this provision, meets (or will meet) each of the above principles.**

**In relation to principle 1, the commentary should include:**

- **further explanation of the potential circumstances in which specified prisoners may be released in an emergency situation, with reference to specific examples, including those intended to be covered by the description: "any other event or situation which is reasonably considered by the Scottish Ministers to place at significant risk (1) the security and good order of a prison or prisons more generally and/or (2)**

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<sup>1</sup> [Inquiry into the use of the made affirmative procedure during the coronavirus pandemic \(azureedge.net\)](https://www.azureedge.net)

**the health, safety, and welfare of prisoners, or those working, in any such prison.”**

- **how it will be determined that the exercise of the power is necessary and proportionate.**

**Section 11 – Power to prescribe description of persons to whom information can be provided and to make ancillary provision**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: affirmative**

Section 11 of the Bill amends the Criminal Justice (Scotland) Act 2003 (the “2003 Act”) and the Victims and Witnesses (Scotland) Act 2014 so that information about prisoners, which can be provided to victims of the offences they have committed, can also be provided to “victim support organisations” providing assistance to those victims.

Section 11(2) inserts a new section 16ZA. Under this new section, victim support organisations can be provided with information (described in section 16(3) of the 2003 Act) where this has been requested by the victim or the organisation itself and the Scottish Ministers are satisfied that the organisation needs the information in order to provide support services to the victim.

The Committee notes that the information that can be provided is information about the dates on which a prisoner is to be or may be released from prison, whether or not the prisoner has died, if the prisoner has been transferred outside Scotland, if the prisoner is unlawfully at large, the date a prisoner released or unlawfully at large is returned to prison, and if the prisoner is made subject to various orders relating to mental health and detained in hospital rather than prison. As such, this provision concerns the sharing of personal information.

Section 16ZA(2)(a) provides that the persons to whom information can be provided are to be of a description prescribed by the Scottish Ministers in regulations. Regulations made under section 16ZA(2)(a) may include incidental, supplementary, consequential, transitional, transitory or saving provisions and may also modify enactments (including this Bill). The power is subject to the affirmative procedure where primary legislation is modified and the negative procedure otherwise.

The Committee notes that regulations making provision for the description of persons who can receive information under section 16ZA(2)(a) will be subject to the negative procedure.

**Please set out why the negative procedure is considered appropriate when specifying the description of persons that may be supplied with information regarding prisoners in the specified circumstances set out in the Bill, and whether affirmative procedure may be more appropriate.**

I would be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 12 noon on Wednesday 7 December.

Yours sincerely,

Lucy Scharbert  
**Clerk to the Delegated Powers and Law Reform Committee**