



Delegated Powers and Law Reform  
Committee The Scottish Parliament  
Edinburgh  
EH99 1SP

07 December 2022

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

Dear Lucy,

Thank you for your letter of 23 November 2022 relating to the Delegated Powers within the above Bill following the Committee's consideration of this Bill on 15 November.

In your letter, you sought clarification on two specific provisions within the Bill – at Section 8 and Section 11, both within Part 2 of the Bail and Release from Custody (Scotland) Bill (the Bill). I have addressed these points below.

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

As you set out in your letter, 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. That includes the insertion of a new Section 3C which provides that the Scottish Ministers may, by regulations, provide for defined groups of persons to be released early from prison (or young offenders institution).

As you note, 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. The purpose of using this power must be to protect the security and good order of any prison, or the health, safety or welfare of prisoners or prison staff. This power would be subject to the affirmative procedure but may be made affirmative by reason of urgency.

We thought carefully about the use of the made affirmative when drafting this Bill. This drew on our experience from the use of the similar power in the Coronavirus (Scotland) Act 2020 and the consideration of the made affirmative procedure in relation to the Coronavirus (Recovery and Reform) Act 2022 to align as closely as possible with the four principles underpinning the Committee's consideration of legislation, making provision for the use of made affirmative procedure. I have provided some detail below as to how we would intend to



apply the four principles – in the event of made affirmative procedure being required by reason of urgency.

**Principle 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.*

New section 3D(1) of the 1993 Act makes clear that affirmative procedure is the default procedure if the Scottish Ministers exercise this power. The made affirmative procedure is an alternative which is only to be used where the Scottish Ministers consider it is necessary to make regulations under the power without their being subject to the affirmative procedure.

The reason that the Bill includes the ability for regulations under this power to be made affirmative is to enable the Scottish Ministers to act without delay in an emergency situation which places the lives of prisoners and prison staff and the security of prisons at immediate risk.

As you note, the Bill sets out a definition of ‘emergency situation’ at Section 3C(7). In your letter you sought further explanation of the potential circumstances which might constitute an ‘emergency situation’ as defined in the Bill. I have provided some illustrative examples below, as you will appreciate it is not possible to provide a comprehensive list. However, an important point to note is that a key test in any potential future decision on whether or not to use this power is that the emergency situation is placing, or is likely to place, the security and good order of a prison, or prisons, or the health, safety and welfare of prisoners and prison staff at risk.

The definition of emergency situation in the Bill includes:

- The incidence or spread of infection, contamination or the source of contamination which presents or could present significant harm to human health. This power is intended to be able to respond to any future pandemic, to avoid the need for emergency legislation. It would also provide the ability to respond to, for example, a more localised outbreak of a harmful infection which cannot be contained, or local contamination of a water source which affects prisoners and staff and means that the prison regime cannot run safely.
- An event or situation which has resulted in a prison (or part of a prison) to which the regulations would relate being unusable - for example, fire, flood or structural damage which means that prisoners cannot be safely held in that prison, or part of that prison – and cannot be relocated to other prisons without overstressing their resources and compromising the safety and good order of the wider prison system.
- Any other event or situation which is reasonably considered by the Scottish Ministers to place at significant risk the security and good order of a prison or prisons generally and/or the health safety and wellbeing of prisoners, or those working in any such prison. While the first two limbs are designed to cover situations we can reasonably predict could occur in the future, this third limb is intended to give some flexibility for the power to be used in future emergency circumstances which, at the time of drafting, cannot easily be predicted.

Any proposed use of an early release power under such circumstances would still be underpinned by a commitment to public protection. Statutory exclusions would prevent specific groups of prisoners from being considered under any early release process, as set

out in the Bill. Furthermore, prison governors would retain a power to veto the early release of any eligible prisoner where this would present a known risk to a specific individual. Long-term prisoners could only be released under this mechanism if their release at their Parole Qualifying Date had already been recommended by the Parole Board at the point of the emergency release process.

You also sought confirmation of how it will be determined that the exercise of the power is necessary and proportionate, as provided for in the Bill. Scottish Ministers' decision whether or not to use this power will be informed by operational analysis by the Scottish Prison Service (SPS) as to whether the emergency situation places the good order of prisons or the safety and wellbeing of prisoners and prison staff at risk. This would include, for example, analysis of prison population levels, staffing levels and the impact on SPS' ability to safely run the prison regime. Before proposing an emergency early release process, the SG would also work with the SPS and other justice and public service leaders to assess whether another course of action could deliver the necessary effect, in a safe, legal, timely and practicable manner, in order to maintain good order and public health across the prison system.

Depending on the nature of the emergency situation, SPS may also consult with local Infection Control Teams, the emergency services, or other specialists. As noted above, the presence of the emergency situation in and of itself may not trigger the use of the power, rather it will be the impact that situation is having or is likely to have on the security of prisons and/or the safety and wellbeing of prisoners and staff. Where the use of an early release process was considered necessary, then the SPS and SG would confer on the number and location of prisoners that would be need to be released, to provide a proportionate response to the emergency situation. Any exercise of the power will be informed by considerations of the rights of prisoners, prison staff and members of the public under the European Convention on Human Rights, which will encompass proportionality considerations for the measures taken.

**Principle 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.*

Section 3D(2)(b) provides that, in circumstances where the Scottish Ministers are of the opinion that, by reason of urgency, it is necessary to make the regulations without their being subject to the affirmative procedure, the Scottish Ministers must make a declaration of urgency within the regulations. Section 3D(3)(c) also requires the Scottish Ministers to explain why they are of that opinion. This is in line with the approach taken under the Coronavirus (Recovery and Reform) (Scotland) Act 2022.

Made-affirmative procedure still requires the consideration of the SSI by Parliament, and requires a parliamentary vote on the SSI for it to continue in force after 28 days, so there is opportunity for Parliamentary scrutiny. As noted above, made affirmative procedure would only be used if immediate action was required in order to protect the security of prisons and the lives of prisoners and prison staff. The emergency release process, by necessity, would need to happen extremely quickly.

**Principle 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.*

As noted above, Section 3D(3)(c) requires the Scottish Ministers to explain why they are of the opinion that, by reason of urgency, it is necessary to make the regulations without their being subject to the affirmative procedure.

The SSI setting out regulations for any future emergency early release process would be expected to provide full details on the eligibility criteria (and restrictions) being applied to identify which individuals would be granted an early release. These criteria will be defined in co-operation with the SPS, to ensure that any release process would deliver only the number of releases that were necessary and proportionate to achieve an effective response to the emergency at hand. In light of this, it would be clear how many and which prisoners could be affected by any future process before was begun. The regulations would also set out when and how the process would take place, as well as how long the release process would last.

If this power is ever used in future, Scottish Government and SPS would give careful consideration to the most appropriate means in which to highlight the use of the emergency release mechanism. Following the example of the May 2020 early release process under the Coronavirus (Scotland) Act 2020, appropriate justice organisations, public and third sector services, and local government stakeholders were kept informed and involved in the planning and delivery of the process. Victims organisations were consulted before the regulations for the process were confirmed, and their views were taken into account (such as on the exclusion of prisoners sentenced for domestic abuse or harassment offences).

As in May 2020, any future early release process would also ensure that victims registered with the Victim Notification Scheme (VNS) were informed if the prisoner in their case was released under this process. The VNS is the commonly accepted process by which individuals can register their wish to receive appropriate information about a prisoner, and as such it provides an effective, commonly understood, and timely means to notify victims and other affected individuals if a specific individual was to be released under an emergency process.

**Principle 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.*

The power within the Bill will be a permanent power, as there is currently no permanent power of executive release in Scotland as there is in other jurisdictions, including England and Wales. Given that these provisions are intended to support action in response to emergency situations, where it is likely that time will be a factor in delivering an effective response, it is appropriate that the powers remain available to permit a swift response.

We do not want the regulations for any possible future emergency release to be time-limited as we want to ensure that licence conditions imposed on any long-term prisoners who might be released (where they have already been approved for an upcoming release by the Parole Board) will continue to have effect. A built-in sunset clause may over-ride that. Furthermore, this provision is intended to avoid the need for emergency legislation in the event of a future pandemic or other emergency. A sunset clause would undermine that intention. The regulations will also only require prisoners to be released. Once the last prisoner is released the Scottish Ministers will not be taking any further action under the regulations.

However, there are a number of safeguards built into the Bill.

The regulations for any potential emergency release will specify the latest date by which people can be released under them. This effectively time-limits the specific period of emergency release under the regulations to a maximum of 180 days. That said, the actual regulations set out for any future process may be less than that maximum. For example, in the May 2020 process, the maximum period for which an individual's release was brought forward was only 90 days from the date of the SSI.

Furthermore, the Bill also provides that any SSI made using the made-affirmative procedure would cease to have effect at the end of 28 days, unless the SSI was approved by the Parliament within that time.

The Bill also requires that the Scottish Ministers are satisfied that making regulations under the power is necessary and proportionate in response to the effects that the emergency situation is having or will have. That further limits the power by ensuring that the Scottish Ministers do not make regulations which do more than is necessary, including extended periods for releasing prisoners.

#### *Previous use of the power*

It is not the intention that that this power would be used routinely. Indeed, the emergency release power within the Coronavirus (Scotland) Act 2020 was only used once and the power in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 has not been used to date.

The application of that power in May 2020 was clearly made in response to exceptional and urgent circumstances, where there was a need for swift action that would reduce the prison population to ensure sufficient cell capacity was available to facilitate essential quarantining or "shielding" of prisoners and protect the health of staff and prisoners – and there was no other practicable way to deliver this outcome quickly.

The power was applied to the minimum extent necessary to achieve the necessary change, with clear restrictions to the scope and time period for its use being set out in the relevant statutory instrument. The regulations that defined the process set out very clearly which individuals could potentially be affected by the process, with the SPS able to identify how many and which individuals were to be considered.

Action was taken to ensure appropriate public services were involved in planning and delivery, and the Victim Notification Scheme was used to inform any victims who had requested to be kept notified of the status of any specific prisoners who were to be released.

The (then) Cabinet Secretary for Justice notified the Parliament in advance that plans to utilise the power were being considered, setting out the necessity for swift action, and the full details were listed in the SSI for the Parliament's subsequent consideration. As such, the Committee may take some reassurance that the Scottish Government's handling of the equivalent power in 2020 reflected the four principles that the Committee have subsequently defined for the use of made affirmative.

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

In your letter you also sought information on why the negative procedure was considered appropriate for the regulation making provision for the description of persons who can receive information relating to prisoner release under section 16ZA(2)(a).

The Bill provides the parameters for sharing information with victim support organisations (VSOs). That includes what information can be shared and for what purpose. However, these provisions simply replicate the existing provisions in the Criminal Justice (Scotland) Act 2003 that govern the information-sharing with victims. Rather than expanding the type of information that is to be made available, the Bill expands the category of person to whom this information can be made available to include VSOs.

This expansion is provided on the face of the Bill and is thus subject to full Parliamentary scrutiny as the Bill progresses through Parliament. To be provided with information, this new category of person will also have to provide “support services” (as defined in the Bill) to the victim and the Scottish Ministers will have to be satisfied that the person requires the information to provide those services to the victim. This provides additional safeguards for the information being shared.

We therefore considered that the description of bodies for the purposes of those provisions, which will have been subject to full Parliamentary scrutiny, can appropriately be subject to negative procedure. For examples, many VSOs are non-statutory services and could change their name to reflect changing requirements. If that was to happen then this organisation would need to be prescribed by regulations to reflect the change. Affirmative procedure would not be appropriate for that, as it would still be the same organisation.

I hope this is helpful and I would be happy to provide additional information, if required, once you have considered.

Yours sincerely,

**Cat Dalrymple**

Deputy Director, Community Justice  
Directorate For Justice