

BAIL AND RELEASE FROM CUSTODY (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders, in relation to the Bail and Release from Custody (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. This Bill provides for the introduction of a number of reforms designed to deliver on the Scottish Government's commitment to refocus how prison custody is used, with a specific focus on remand and to give greater emphasis to the rehabilitation and reintegration of individuals leaving prison custody. The provisions in the Bill are underpinned by a commitment to public protection and the safety of victims.
4. The Bill has 15 sections and is arranged in three Parts as follows:

PART 1: BAIL

5. The provisions in Part 1 focus on the use of bail and remand in recognition of the negative impact short periods of custody can have - particularly for those who have not been convicted of a crime. These provisions provide a new bail decision making framework so that remanding a person in custody is reserved only for those that pose a risk of serious harm, making bail (with appropriate support and supervision in the community as needed) the option for those accused of offences who do not pose such a risk. The provisions are intended to emphasise the importance of maximising use of bail and limiting the use of remand in the context of seeking to make the best and most appropriate use of custody.
6. The underpinning principle of the provisions is that the use of remand should be limited to reasons related to the protection of public safety (including victim safety) and protecting the delivery of justice.

7. The sections in this Part of the Bill make provision as follows:

- **Section 1** enables the court to receive information from a justice social worker to inform its decision on whether or not to grant bail to a person charged with an offence;
- **Section 2** reframes the test which the court must apply when considering whether to grant bail to a person accused of or charged with an offence;
- **Section 3** repeals section 23D of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) (which provides that in certain solemn cases that a person is only to be granted bail in exceptional circumstances). This repeal means that the general bail test (as reframed by section 2) will apply in all cases;
- **Section 4** expands on the court’s general duty under section 24(2A) of the 1995 Act to state its reason whenever it grants or refuses bail . Section 4 will expand that duty to require, in particular, the court to state and record particular matters when refusing bail to an accused person; and
- **Section 5** makes provision for the court to take account of time spent on bail subject to a curfew monitored by electronic monitoring (EM bail) when imposing a custodial sentence.

8. Section 5 of the Bill includes delegated powers which will enable the Scottish Ministers to make subordinate legislation:

- to modify, by regulations, the meaning of the terms “qualifying bail”, “bail period” and “relevant period” for the purposes of new section 210ZA of the 1995 Act, and to further modify new section 210ZA (or any other enactment) for the purposes of new section 210ZA) as the Scottish Ministers consider appropriate, subject to the affirmative procedure.

PART 2: RELEASE FROM CUSTODY

9. The provisions in Part 2 are intended to improve opportunities for the successful reintegration of people leaving prison, including improving the provision of support for people leaving custody in order to reduce the risk of reoffending and deliver better outcomes for people and communities. These measures are also intended to provide opportunities for certain categories of long-term prisoner to access structured temporary release, again with the intention of supporting reintegration.

10. The Bill includes provisions to allow sharing of certain information with victim support organisations in relation to prisoner release.

11. The Bill also provides for an executive release power which would allow the Scottish Ministers to release groups of prisoners in emergency situations to protect the security and good order of prisons and the health, safety and welfare of prisoners and prison staff.

12. The sections in this Part of the Bill, make provision as follows:

- **Section 6** prevents the release of prisoners on certain days of the week (Friday and the day before a public holiday) and also moves the release date of individuals who would ordinarily be released on a Thursday to the preceding Wednesday;

- **Section 7** removes long-term prisoners from the Home Detention Curfew mechanism in section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) and establishes a new approach to the temporary release on licence in advance of the Parole Qualification Date (PQD) (or release at subsequent review if not released at PQD) for this cohort of prisoner;
- **Section 8** allows the Scottish Ministers, by regulations, to release certain groups of prisoner early in emergency situations to protect the security and good order of prisons and the health, safety and welfare of prisoners and prison staff;
- **Section 9** places a duty on named public bodies to engage in release planning in relation to a prisoner when requested to do so by the Scottish Ministers (as the Scottish Prison Service (SPS));
- **Section 10** places a duty on the Scottish Ministers to publish throughcare support standards and places a duty on named bodies to comply with these standards when providing throughcare support to people leaving prison; and
- **Section 11** allows for Victim Support Organisations to receive information about prisoner release to inform the support they provide to their clients.

13. Sections 6 to 11 set out a series of delegated powers that will enable the Scottish Ministers to make subordinate legislation:

- to amend, by regulations, the prisoners excluded from release under the new approach to temporary release of long-term prisoners introduced by the Bill, the period before a prisoner’s PQD during which a prisoner cannot be released and the maximum period for which a prisoner can be released, all subject to the affirmative procedure;
- to prescribe, by order subject to the negative procedure, the standard conditions to be included in the licence of a prisoner released under new section 3AB(1) of the 1993 Act (inserted by section 7 of the Bill);
- to provide, by regulations, that in certain emergency situations a person can be released from custody early, subject to affirmative procedure but in cases of urgency, using a made affirmative procedure;
- to amend, by regulations, the list of “identified partners” who are required to engage with release planning when requested by the Scottish Ministers (as SPS), subject to the affirmative procedure;
- to amend, by regulations, the list of bodies placed under the duty to comply with the throughcare standards, subject to affirmative procedure;
- to prescribe, by regulations, descriptions of the persons to whom information on a prisoner’s release may be supplied when that person or organisation is providing support to a victim, subject to negative procedure; and
- to modify, by regulations, the definition of the “support services” that a person or organisation who is receiving information regarding a prisoner’s release is required to be providing to a victim in order to be eligible to receive the information, subject to affirmative procedure.

PART 3

14. Part 3 (sections 12 to 15) provides for the usual commencement power and ancillary provision.

15. Sections 13 and 14 contain delegated powers that will enable the Scottish Ministers to make subordinate legislation:

- to make, by regulations, any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, or in connection with or for giving full effect to the Act. These regulations are subject to affirmative procedure if they add to, replace or omit any part of the text of an Act. Otherwise, they are subject to negative procedure; and
- to appoint, by regulations, the day on which the provisions in Parts 1 and 2 of the Act are to come into force, not subject to any procedure.

RATIONALE FOR SUBORDINATE LEGISLATION

16. The Bill contains delegated powers which are explained in more detail below. The majority of these relate to Part 2 of the Bill. In deciding whether legislative provisions should be set out in subordinate legislation rather than specified on the face of the Bill, the Scottish Government has had due regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances and to make changes quickly without the need for further primary legislation; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill, and why the selected form of Parliamentary procedure is considered appropriate.

DELEGATED POWERS

Section 5 – Time spent on electronically monitored bail

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative procedure

17. Provision Section 5 of the Bill inserts section 210ZA into the Criminal Procedure (Scotland) Act 1995, which requires the court to have regard to the time (“the bail period”) an individual has spent on “qualifying bail” when passing a custodial sentence. Qualifying bail is defined in section 210ZA(6)(a) as bail subject to a curfew of at least 9 hours per day and monitored via electronic monitoring. In having regard to this, the court must specify the period of time (“the relevant period”) which is to be treated as time served by the person (i.e. all, some or none of the bail period).

18. New section 210ZA(3) provides that where the court has specified that a period of time spent on qualifying bail will be taken into account when passing a custodial sentence, the relevant period is to be equal to one half of the bail period or the bail period less such periods as the court chooses to disregard.

19. This section includes a power for the Scottish Ministers to amend, by regulations, the meaning of “qualifying bail” or the “bail period” and the meaning of “the relevant period”. This would allow the Scottish Ministers to extend new section 210ZA to apply to other types of bail, or to change how the period to be treated as “time served” is to be calculated. The power also enables the Scottish Ministers to modify new section 210ZA or any other enactment to make such further provision for the purposes of that section as they consider appropriate. There is also a power to make incidental, supplementary, consequential, transitional, transitory, or saving provisions.

Reason for taking power

20. The Bill provides the ability for the courts to take account of time spent on electronically monitored bail when imposing a custodial sentence. Therefore the principle of this will be set out in primary legislation. The power to amend the definitions above provides the Scottish Ministers with the ability to amend the parameters of this approach to take account of any future changes to practice and policy in this area, including developments in the technology used to electronically monitor bail conditions. For example, use of GPS technology may impact on the use of electronically monitored bail in future and may change the way in which curfew conditions are used. Having the ability to respond to these more detailed changes in policy and practice via secondary legislation will provide flexibility.

21. The power to modify the section or any other enactment to make such further provision for the purposes of new section 210ZA as the Scottish Ministers consider appropriate is required because it allows a mechanism for making proportionate changes, without the need for primary legislation, that allow the same policy objective to be achieved, if practice and policy in this area changes. Together with the ancillary power to make incidental, supplementary, consequential, transitional, transitory or savings provision this will ensure the effectiveness of any future reform.

Choice of Procedure

22. As this relates to the courts’ sentencing powers and would also make amendments to primary legislation, it is considered that affirmative procedure would allow for an appropriate level of Parliamentary scrutiny.

Section 7 – Release on licence of long-term prisoners

Power conferred on:	the Scottish Ministers
Power exercisable by:	section 7(5) of the Bill: regulations made by Scottish Statutory Instrument section 7(8) of the Bill: order made by Scottish Statutory Instrument
Parliamentary procedure:	section 7(5) of the Bill: affirmative procedure section 7(8) of the Bill: negative procedure

Provision

23. Section 7 of the Bill removes long-term prisoners (i.e. those sentenced to a period of imprisonment of four years or more) from the application of section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”), which provides for a form of release on licence, and amends the 1993 Act by inserting a new section 3AB which provides that long-term prisoners may instead access a form of release on licence either in advance of their Parole Qualifying Date (PQD) or after. The PQD for long-term prisoners is the half-way point of their sentence. This approach will operate in two ways.

24. Section 3AB(1) provides that a long-term prisoner can be granted temporary release where the Parole Board have not recommended release under section 1(3) of the 1993 Act (i.e. release can be in advance of the Parole Board’s consideration at PQD or subsequent to that date if the Board did not recommend the prisoner for release at PQD).

25. In this circumstance, release will be decided by the Scottish Ministers, subject to statutory exclusions for certain types of prisoner, risk assessment and consultation with the Parole Board for Scotland. This approach is intended to support the reintegration of long-term prisoners who meet this criteria and will also provide the Parole Board with further evidence to inform their decision as to whether to recommend release at PQD or subsequent review. Release on this licence will be subject to conditions – including curfew which can be monitored via electronic monitoring, supervision by Justice Social Work and prescribed standard conditions. It will be for a maximum of 180 days. An individual cannot be released on this licence earlier than 180 days before the half-way point of their sentence.

26. Section 3AB(3) provides that a long-term prisoner can be released on licence where the Parole Board have considered the case and have recommended release at PQD (the decision to recommend release having been taken in advance of that date).

27. In this circumstance, the Parole Board may direct the Scottish Ministers to release an individual (where the Board have recommended release at PQD) on this licence. This will not be subject to the same statutory exclusions as release under section 3AB(1), with only terrorist prisoners excluded. As above, release will be subject to conditions, including curfew which can be monitored via electronic monitoring and supervision by Justice Social Work but not to prescribed standard conditions. It will be for a maximum of 180 days until the individual’s PQD when they will be released under section 1(3) of the 1993 Act and will therefore move onto a parole licence. As above, an individual cannot be released on this licence earlier than 180 days before the half-way point of their sentence.

28. Section 7(5) of the Bill also inserts new section 3AC of the 1993 Act. Section 3AC includes a power for the Scottish Ministers to amend, by regulations, the statutory exclusions which will apply to release under section 3AB(1), as well as the maximum time period an individual can spend on temporary release licence under both section 3AB(1) and (3) and how far in advance of the half-way point of an individual's sentence they could be released on this licence. There is also a power to make incidental, supplementary, consequential, transitional, transitory, or saving provisions.

29. As mentioned above, a licence granted under new section 3AB(1) of the 1993 Act must include the standard conditions. Section 7(8) of the Bill will amend section 12AA of the 1993 Act to include references to licences granted under section 3AB(1). The standard conditions are those conditions which may be prescribed by order made by the Scottish Ministers (section 12AA(3) and (4)).

Reason for taking power

30. The power to amend the statutory exclusions, the number of days an individual can spend on this licence and how far in advance of the half-way point of an individual's sentence they could be released on this licence provides the Scottish Ministers with the ability to amend the parameters of this approach to temporary release if required to ensure the continued protection of public safety, reductions in reoffending and that this licence continues to work as intended in supporting the reintegration of long-term prisoners. This is comparable to the power which already exists under section 3AA(6) of the 1993 Act.

31. The power in new section 3AC includes the ability to make incidental, supplementary, consequential, transitional, transitory or saving provision means that, for instance, any exercise of the power in section 3AC can include provision as to the effect of the change on existing licences at the time the power is exercised, in case such provision is needed.

32. The power to prescribe the standard conditions to be included in licences granted under new section 3AB(1) of the 1993 Act will provide flexibility for the standard conditions to be updated in light of experience and developments of the system in practice.

Choice of procedure

33. As the power that will be conferred by new section 3AC of the 1993 Act relates to the release of prisoners and would amend primary legislation it is considered that the affirmative procedure would allow for an appropriate level of Parliamentary scrutiny.

34. As regards the power to prescribe the standard conditions for licences, the negative procedure is considered to be appropriate. This will follow the same approach taken to the comparable power to prescribe the standard conditions to be included in licences granted under section 3AA of the 1993 Act.

Section 8 – Power to Release Early

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

Provision

35. Section 8 of the Bill amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) by inserting a new section 3C which provides that the Scottish Ministers may, by regulations, provide for a person of a description specified in the regulations to be released early from prison or a young offenders institution (subsequent references to prison include young offenders institutions and references to prisoners should be read accordingly).

36. The Scottish Ministers can exercise this power only if they are satisfied that it is a necessary and proportionate response to an emergency situation occurring within a prison or prisons to protect the security and good order of any prison or the health, safety or welfare of prisoners and prison staff. The Bill defines “emergency situation” as meaning:

- the incidence or spread of infection, contamination or the source of contamination which presents or could present significant harm to human health in Scotland (whether from risks originating there or elsewhere);
- an event of situation which has resulted in any prison (or part of a prison) to which the regulations relate being unusable, or
- 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;
 - the health, safety or welfare of prisoners, or those working, in any such prison.

37. New section 3D provides for the parliamentary procedure applicable to regulations made under section 3C. New section 3E makes provision for prisoners released by virtue of the regulations to be deemed to have been released under specified provision of the 1993 Act. It is necessary for the effect of that deeming provision to continue to ensure that prisoners released under regulations made using this power continue to be subject to the relevant provisions of Part 1 of the 1993 Act (which includes, among other things, provision concerning the recall of long-term prisoners to prison and the revocation of their licence in certain circumstances).

Reason for taking power

38. The power to authorise the early release of specified groups of prisoners will enable the Scottish Ministers to act quickly, effectively and proportionately to relieve the pressure on the prison estate caused by an emergency situation (as defined in the Bill as above) to protect the security and good order of prisons, and/or the health, safety or welfare of prisoners and prison staff. There is currently no other general power for the Scottish Ministers to order the release of groups of prisoners in such a way but such a power is available in other jurisdictions.

39. A similar, temporary power was provided for in the Coronavirus (Scotland) Act 2020, the availability of which was extended by and under the Coronavirus (Extension and Expiry) (Scotland) Act 2021. A replacement temporary power has been included in the Coronavirus (Recovery and Reform) (Scotland) Bill. 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. This power will instead provide a long term option for the Scottish Ministers to act when necessary and proportionate in response to future emergencies.

Choice of procedure

40. As this power would be used to authorise the early release of prisoners it is considered that the affirmative procedure would allow for an appropriate level of Parliamentary scrutiny.

41. It should be noted, however, that the Scottish Ministers may be required to act immediately in response to rapidly changing circumstances in prison – such as fire or flooding making sections of a prison unusable, or a public health emergency requiring high numbers of prisoners to be kept in isolation. The timescales involved in the affirmative procedure may not allow action to be taken sufficiently quickly, and therefore a form of made affirmative procedure is considered appropriate to enable the Scottish Ministers to make regulations with immediate effect.

42. Regulations made subject to the made affirmative procedure could only provide for the release of a prisoner who would, in any event, be released within 180 days of making the regulations. The early release of a limited number of prisoners who are due to be released shortly is considered to present a much lower risk to the public in comparison to the significant risk to the effective operation of prisons and the risk to the health of prison staff and prisoners. Furthermore, release under this power would be subject to statutory exclusions and a Governor's veto where the release of a prisoner presents an immediate risk of harm to a specific individual. It is considered that this justifies the use of an expedited procedure in relation to such prisoners where the situation is urgent and it is necessary to make the regulations without their being subject to the affirmative procedure.

43. In the event that the power to release prisoners needs to be exercised, the regulations which will be prepared for each individual release process will allow the Scottish Ministers to implement a release action that is appropriate and proportionate for the circumstances being addressed.

44. The regulations will include a declaration that the Scottish Ministers are of the opinion that, by reason of urgency, it is necessary to make the regulations without them being subject to affirmative procedure. Furthermore, Scottish Ministers must provide an explanation why they are of the opinion that, by reason of urgency, it is necessary for the regulations to be subject to the made affirmative procedure.

Section 9 – Duty to Engage in Release Planning

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative

Provision

45. Section 9 of the Bill amends the Community Justice (Scotland) Act 2016 (“the 2016 Act”) by inserting a new section 34A which places a duty on identified partners to engage with release planning for prisoners, when required to do so by the Scottish Ministers (as the Scottish Prison Service).

46. This engagement relates to providing input into the development, management and delivery of an individual’s release plan within a set timescale. In complying with this request the identified partners must also have regard to the role which third sector bodies are able to play in the development, management and delivery of an individual’s release plan and may commission services from third sector bodies as they consider appropriate.

47. The identified partners are:

- each local authority;
- each health board;
- the chief constable of the Police Service of Scotland;
- Skills Development Scotland; and
- an integration joint board established by virtue of section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014.

48. This section of the Bill also provides a power for the Scottish Ministers to amend, by regulations, the list of identified partners laid out above, should it be necessary.

Reason for taking power

49. The power to amend the list of identified partners who are subject to the duty to engage with release planning will enable the Scottish Ministers to quickly and effectively make any changes to the aforementioned list either to insert, remove or vary the name of an identified partner who is to be involved in the duty to engage in prisoners’ release planning. This provides future flexibility to ensure that the relevant bodies which provide support for people leaving prison are included so that release planning is holistic, supports risk assessment and management and meets the needs of people leaving custody.

Choice of procedure

50. It is considered appropriate that regulations made using this power are subject to affirmative procedure given that they will be amending primary legislation. Affirmative procedure will allow for appropriate Parliamentary scrutiny. Furthermore, use of affirmative procedure here

would mirror the approach taken at section 13 of the 2016 Act which lists the community justice partners and gives the Scottish Ministers the power to amend that list.

Section 10 – Throughcare Support

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative

Provision

51. Section 10 of this Bill further amends the 2016 Act by inserting new sections 34B and 34C. Section 34B places a duty on the Scottish Ministers to publish standards on the throughcare support to be provided to those leaving custody following a period of remand or imprisonment following conviction.

52. The Bill provides a definition of throughcare support as meaning:

- the provision of advice and guidance;
- the provision, and facilitation or access to, opportunities to participate in activities designed to eliminate or reduce future offending;
- the provision of, and facilitation of access to, emotional and practical support;
- the provision of help including in particular to-
 - access and make use of relevant general services, and any relevant specialist services which are available,
 - co-operate and comply with any relevant conditions, court orders and ongoing judicial or court processes.

53. New section 34C places a duty on a specified list of partners who, in exercising functions in relation to the provision of throughcare support, must have regard to the aforementioned throughcare support standards. This list includes:

- each local authority;
- each health board;
- Skills Development Scotland;
- an integration joint board established by virtue of section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014; and
- the Scottish Ministers;

54. This section of the Bill provides a power for the Scottish Ministers to amend, by regulations, the list of identified partners who must have regard to the statutory throughcare support standards when exercising functions relating to the provision of throughcare support.

Reason for taking power

55. The power to amend the list of identified partners who are subject to the duty to comply with the throughcare support standards when exercising functions relating to the provision of throughcare support will enable the Scottish Ministers to quickly and effectively make any changes to the aforementioned list either to insert, remove or vary the name of an identified partner who in the provision of support to people in or leaving prison is to have regard to the national throughcare standards. This provides future flexibility to ensure that the relevant bodies which provide throughcare support for people leaving prison are included.

Choice of procedure

56. It is considered appropriate that regulations made using this power are subject to affirmative procedure to allow for appropriate Parliamentary scrutiny, given that they will be amending primary legislation.

Section 11 – Provision of Information to Victim Support Organisations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: negative, unless modifying primary legislation in which case subject to affirmative procedure.

Provision

57. Section 11 of this Bill amends the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) and inserts a new Section 16ZA. Under this section, Victim Support Organisations (VSOs) can be provided with the information mentioned in section 16(3) of the 2003 Act where either the victim has requested this or the organisation itself has done so, and the Scottish Ministers are satisfied that the organisation needs the information in order to provide “support services” to the victim.

58. 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. This must be a person or organisation who is providing support services to the victim or qualifying person in relation to the offence perpetrated against the victim. In practice, this person or organisation is likely to be a VSO. Regulations under this section may include incidental, supplementary, consequential, transitional, transitory or saving provisions and may also modify enactments (including this Bill).

Reason for taking power

59. The Scottish Ministers having the power to specify the person or organisation to whom information may be supplied allows them the ability to restrict the sharing of information about a prisoner to organisations it considers appropriate to receive it. That includes the organisation’s ability to comply with data protection legislation. Providing the power to the Scottish Ministers to describe these organisations by regulations allows for flexibility in ensuring the description of such persons or organisations can be efficiently amended should the need arise to ensure that victims can be provided with appropriate support.

60. The power to make ancillary provision will ensure that if, for instance, the description of prescribed bodies who can be VSOs is changed, any necessary saving and transitional provision can be made. There may be a need for the further ancillary provisions if there is provision elsewhere which restricts a VSO meeting the prescribed description from receiving information and a change is required in order to facilitate the sharing of this information..

Choice of procedure

61. It is considered appropriate that regulations made using this power are subject to negative procedure unless they make ancillary provision which modifies primary legislation, in which case they will be subject to affirmative procedure.

62. The Bill sets out the key aspects of this measure such as the fact that information can be shared, the purpose for which it can be shared and the limits of who the information can be shared with (the person must be providing support services (which are defined in the Bill) to the victim in relation to the offence perpetrated against them). The description of which persons are to receive the information will be mainly technical as there is no widely used definition of a victim support organisation elsewhere in Scottish legislation.

63. These regulations will also not amend primary legislation and it is considered that negative procedure is appropriate. When primary legislation is modified by ancillary provision made in regulations under this power it is considered that it is appropriate to give greater Parliamentary scrutiny to those regulations by use of the affirmative procedure.

Section 11– Provision of Information to Victim Support Organisations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative

Provision

64. As noted above, section 11 of the Bill inserts section 16ZA into the 2003 Act. Section 16ZA(5) provides a definition of the “support services” that a person or organisation is required to be providing to a victim in order to be eligible to receive the information mentioned in section 16(3) of the 2003 Act. Support services are defined as any type of service or treatment which is intended to benefit the physical or mental health or wellbeing of the victim, and includes providing the victim with information, assisting the victim with safety planning and assisting the victim with the making of representations under section 17(1) of the 2003 Act.

65. Section 16ZA(6) provides that the Scottish Ministers may, by regulations, modify the definition of “support services”. Regulations under this section may include incidental, supplementary, consequential, transitional, transitory or saving provisions and may also modify enactments (including this Act).

Reason for taking power

66. Allowing the Scottish Ministers to modify the definition of “support services” would allow the flexibility to add any additional supports that may be identified at a later date and ensures that action can be taken quickly to ensure the most appropriate support can be provided to victims.

67. The power to make ancillary provision will ensure that if the definition is changed in a manner which might exclude a VSO already providing support to a victim from being eligible to receive information that saving or transitional provision can be made to allow that VSO to continue receiving the information, enabling it to continue to provide trauma informed support to that victim. The 2003 Act does not contain a general ancillary power provision in relation to regulations made under it which would otherwise enable such provision to be made in regulations which amend the definition of support services.

68. The Scottish Government consider that the use of this power may also give rise to the need for consequential, incidental or supplementary provision if the definition of support services is amended and consider it appropriate to take a power to deal with such ancillary matters which might emerge. This will allow those matters to be dealt with effectively and efficiently so that the support offered to victims is not inadvertently impacted.

Choice of procedure

69. It is considered appropriate that regulations made using this power are subject to affirmative procedure given that this is a power to amend primary legislation. Use of affirmative procedure here would mirror associated sections of the Criminal Justice (Scotland) Act 2003 (see for example section 16(4)).

Section 13 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure if modifying primary legislation.
otherwise negative procedure

Provision

70. Section 13 provides the Scottish Ministers the power, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Any such regulations may also make different provision for different purposes, and may modify any enactment.

Reason for taking power

71. This enabling power is sought to provide flexibility to quickly and effectively make any necessary adjustments that might be needed for the purposes of, in connection with, or for giving full effect to the Bill. Several of the Bill’s provisions are inserted into or interact with other legislation, particularly the 1993 Act and the 2003 Act. While the Scottish Government has given careful consideration to such interactions, the Bill may give rise to a need for ancillary provision.

The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible.

72. The Scottish Government considers that it is appropriate to take a power to deal with any ancillary matters that might emerge in the course of implementing the Bill, so that any unexpected issues which require ancillary provisions can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

Choice of procedure

73. If regulations made using the power were to textually amend any primary legislation, they would be subject to the affirmative procedure. Otherwise, the regulations would be subject to the negative procedure.

74. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that these procedures would provide for an appropriate level of Parliamentary scrutiny and control in such cases.

Section 14 – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: laid, no further procedure

Provision

75. Section 14(2) confers a power on the Scottish Ministers to, by regulations, appoint the day on which each provision of the Bill comes into force. Section 14(3) provides that the regulations may include transitional, transitory or savings provision, and may make different provision for different purposes.

Reason for taking power

76. It is standard for Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. It is also necessary to ensure that commencement regulations can also make provision for effective transitional arrangements when provisions of the Bill are brought into force and to ensure that provisions of the Bill can be commenced for different purposes if necessary.

Choice of procedure

77. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. It is considered that this provides for an appropriate level of Parliamentary scrutiny. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before Parliament as soon as practicable after being made.

This document relates to the Bail and Release from Custody (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 8 June 2022

BAIL AND RELEASE FROM CUSTODY (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

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