

# Prisoners (Early Release) (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This Delegated Powers 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 Prisoners (Early Release) (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 53–EN);
  - a Financial Memorandum (SP Bill 53–FM);
  - a Policy Memorandum (SP Bill 53–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 53–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

### Outline of Bill provisions

4. The provisions of the Bill change the point at which some short-term prisoners (i.e. those serving a sentence of less than four years) are automatically released from prison. Currently, most short-term prisoners are released from prison unconditionally after they have served half (50%) of their sentence. The Bill proposes changes to that release point so that those eligible are released after they have served two fifths (40%) of their sentence. This change does not apply to those serving sentences for domestic abuse or sexual offences, and relevant individuals will continue to be released after 50% of their sentence has been served in prison.
5. The changes will apply to those serving a short-term sentence when the legislation comes into force and those sentenced to short-term sentences following that date. This will be subject to transitional provisions so that those immediately eligible for release are released in tranches, reducing the burden on various community services.

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6. The Bill also provides for a subordinate legislation-making power to enable the Scottish Ministers to make further changes to the automatic release point for short-term and long-term prisoners. In relation to short-term prisoners, the power would also allow the Scottish Ministers to make different provision (e.g. different points of release) for different purposes (e.g. categories of offender). In relation to long-term prisoners, the power is limited in that it only permits the Scottish Ministers to amend the point of release. Equivalent provision is also made in respect of those detained as children.

7. Further information about the background and policy objectives of the Bill is contained in the Policy Memorandum.

## Rationale for subordinate legislation

8. The Bill contains a number of delegated powers. These are explained in more detail in the sections below with an 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.

9. In deciding whether legislative provisions should be set out in the subordinate legislation rather than specified on the face of the Bill, the Scottish Government has had 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;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

## Delegated powers

### Section 3: Power to modify timing of automatic early release

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

#### Provision

10. Section 3 inserts a new section 27A into the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”). Section 27A provides for subordinate legislation-making powers to amend the point at which the Scottish Ministers must automatically release certain short-term and long-term prisoners or those detained as children, which could be set by reference to either a proportion of the sentence or a fixed period of time.

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11. The power will allow changes to be made to the automatic release points of short-term and long-term prisoners who are released under section 1 of the 1993 Act, children detained in solemn proceedings under section 208 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), and fine defaulters and those in contempt of court who are released under section 5 of the 1993 Act. The power will also extend to children detained in summary proceedings who are released under section 44 of the 1995 Act.

12. In relation to prisoners (and those detained as children) who are serving a sentence of less than four years, the power provides that the regulations may make different provision for different purposes. For example, this could allow for different release points to be set based on the offences committed by different prisoners, or the length of a sentence, and so on. It will therefore allow the categories of prisoner already set out in section 1 of the Bill (which sets different release points for those serving a sentence for sexual offences or domestic abuse) to be changed.

13. The ability to make different provision for different purposes does not apply in relation to long-term prisoners (those serving sentences of four years or more). As a result, while the power could be used to change the point of release on non-parole licence for long-term prisoners, it could not be used to specify different release points for different purposes. This limitation also applies in relation to those detained as children who are serving sentences of four years or more. However, some limited flexibility is provided for in relation to both long-term prisoners and those detained as children for four years or more in that different provision can be made based on when such individuals were imprisoned or detained (for example, to specify that a change does not apply to those sentenced before a particular date).

14. The power can make provision applying to a prisoner who began serving a sentence, or a child held in detention, before the regulations come into force. This means that those in custody at the point of any change of release point could be affected by it rather than the change only applying to those who are sentenced or detained from that point onwards. It will also allow provision to be made for those who are on licence at the point when the rules change, so that provision can be made about the date on which their licence ends.

15. The power will allow any regulations made to include incidental, supplementary, consequential, transitional, transitory or saving provision.

### Reason for taking power

16. The Scottish Ministers already have the power under section 27(2)(b) of the 1993 Act to provide that references to a particular proportion of a prisoner’s sentence should be read as referring to another proportion of a prisoner’s sentence. This would therefore already allow secondary legislation to be used to make changes to the point at which short-term prisoners, and some long-term prisoners, are automatically released. A similar power exists under section 7(1A)(b) of the 1993 Act in respect of those detained

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as children under section 208 of the 1995 Act. However, these powers are limited in a number of ways.

17. First, these existing powers do not allow different provision to be made for different purposes. This means that more nuanced changes could not be made for different groups of prisoners such as those who are imprisoned or detained for particular offences.

18. Second, the changes made by the Prisoners (Control and Release) (Scotland) Act 2015 (“the 2015 Act”) mean that Ministers can no longer use the power under section 27(2)(b) of the 1993 Act to change the release point for long-term prisoners who have been sentenced since 1 February 2016. This is because the power only allows the Scottish Ministers to change references to a proportion of sentence to another proportion, and the 2015 Act amended the release point to a fixed period of time (6 months before the end of sentence). In addition, while the power continues to operate in relation to long-term prisoners sentenced before 1 February 2016, it could only be used to impose a rule which operated by reference to a different proportion of sentence. The Bill therefore gives the Scottish Ministers power to amend the release point of long-term prisoners to either another proportion of the sentence or a fixed period of time, which addresses the inadvertent consequence of amendments made by the 2015 Act.

19. Third, any changes made under the existing powers would not be shown on the face of the 1993 Act (as they provide that a proportion should be read as referring to another proportion, rather than actually changing the relevant provisions) which does not provide transparency for readers.

20. The Bill therefore provides for more flexible subordinate legislation-making powers to amend the point at which the Scottish Ministers must automatically release short-term and long-term prisoners (which could be to either another proportion of the sentence or a particular period of time). It also allows the Scottish Ministers to make different provision for different purposes in relation to short-term prisoners and those detained as children where their sentence is under four years.

21. This approach is considered necessary and appropriate as it will allow the changes made to the release point for short-term prisoners – including the different approach taken in relation to those serving sentences for certain offences – to be kept under active review, taking into account how the changes made by the Bill have operated in practice, any new evidence available, or new offences created or commenced. In relation to long-term prisoners, it will address an inadvertent consequence of the 2015 Act by enabling changes to be made to the point at which long-term prisoners must be released. It will also ensure that any changes to release points are made on the face of the 1993 Act, aiding transparency and understanding for anyone seeking to determine the current position.

22. Should it appear necessary for any further amendments to release points to be made in future, the Scottish Government considers it appropriate that these should be capable of being dealt with by subordinate legislation rather than requiring further

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primary legislation. This conclusion takes into consideration the powers already available in the 1993 Act as well as the fact that future changes could be fairly minor. Although section 27A is framed as a new power, it is in practical terms only an adaption of the power in section 27A(2)(b): the existing power is finessed in order to marry up with the more nuanced changes being made in respect of short-term prisoners by section 1 of the Bill, to take account of the gap left by the 2015 Act changes, and to provide greater accessibility to those viewing the legislation.

## Choice of procedure

23. Regulations made under this power will be subject to the affirmative procedure. The Scottish Government considers this procedure is appropriate in order to allow the Parliament to apply a high level of scrutiny to the detail of any changes proposed, reflecting the significance these provisions could have on the prison service, on individuals leaving prison, and on the communities to which they return, including victims of crime. This level of procedure also accords with the existing order-making power in section 27(2) of the 1993 Act which is, under section 45(3) of the 1993 Act, subject to the affirmative procedure. It ensures that the changes will not be able to take effect unless they are agreed to by the Parliament.

## Section 5: Ancillary

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative

## Provision

24. Section 5 enables the Scottish Ministers to, by regulations, make any incidental, supplementary, consequential, transitional, transitory or saving provisions they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill.

## Reason for taking power

25. While the Scottish Government has given careful consideration to the provisions of the Bill, it cannot rule out the possible 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. The Scottish Government considers that it is appropriate to take a power so that any unexpected issues can be dealt with effectively and the purpose of the legislation as agreed to by Parliament is not inadvertently obstructed. Without the powers to deal with minor matters that are necessary to give full effect to the Bill, it may be necessary to return to Parliament with primary legislation. This would not be an effective use of either the Parliament's or the Government's resources.

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## Choice of procedure

26. Regulations made under this section which contain a provision which adds to, replaces or omits any part of the text of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this nature and is considered to provide for an appropriate level of Parliamentary scrutiny.

## Section 6: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Laid, no procedure

## Provision

27. Section 6 provides that the Scottish Ministers may make regulations to bring the substantive provisions of the Bill into force. These regulations may include transitional, transitory or saving provision related to commencement and may make different provision for different purposes. The Bill also already includes some transitional provision about how the release of individuals is to take place immediately following the commencement.

## Reason for taking power

28. It is usual practice for commencement provisions to be dealt with by subordinate legislation, and the Scottish Government considers it appropriate for those provisions in the Bill not coming into effect on Royal Assent to be commenced at such a time as the Scottish Ministers consider suitable. The Bill provides that those immediately eligible for release would be released in tranches. People will be released within each tranche based on time served, thereby providing for those who would have been released sooner under the previous release point to be released sooner within the tranches. The dates of the release tranches will be tied to the commencement date set by those regulations, and so this approach will help ensure effective pre-release planning for the prison service, the individuals being released, and the services delivered in the community.

## Choice of procedure

29. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. The Scottish Government considers this appropriate because commencement regulations bring into force provisions the underlying policy of which has already been considered by the Parliament during the passage of the Bill.



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