

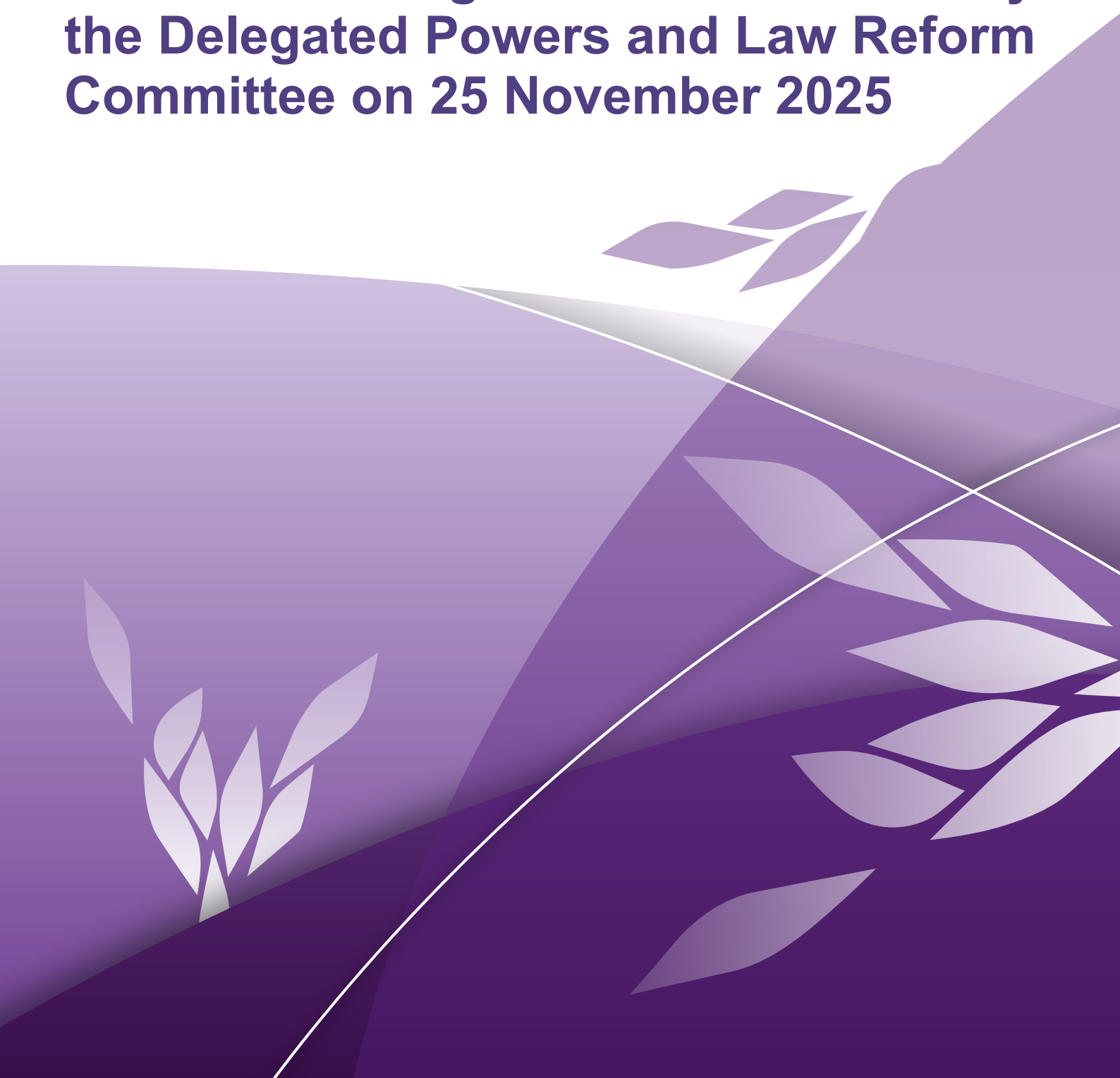


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Pàrlamaid na h-Alba

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

# **Subordinate Legislation considered by the Delegated Powers and Law Reform Committee on 25 November 2025**



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# Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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**Jeremy Balfour**  
Independent

# Introduction

1. At its meeting on 25 November 2025<sup>i</sup>, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the Parliament:
  - Management of Offenders (Scotland) Act 2019 and the Prisoners (Early Release) (Scotland) Act 2025 (Consequential Modifications) Regulations 2026 (SSI 2026/Draft)
2. The Committee's recommendations in relation to this instrument are set out in the next section of this report.
3. The Committee also determined that, in terms of its remit, it did not need to draw the Parliament's attention to the instruments at the end of the report.

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<sup>i</sup> Stuart McMillan MSP submitted apologies for this meeting.

# Scrutiny of instruments and documents under the Committee's remit: document drawn to the attention of the Parliament

## Management of Offenders (Scotland) Act 2019 and the Prisoners (Early Release) (Scotland) Act 2025 (Consequential Modifications) Regulations 2026 ([SSI 2026/Draft](#))

4. This draft instrument would be made under the powers in [section 62\(1\)](#) of the Management of Offenders (Scotland) Act 2019 (“2019 Act”) and [section 7\(1\)](#) of the Prisoners (Early Release) (Scotland) Act 2025. The instrument is subject to the affirmative procedure and, if approved by the Parliament, will come into force on 16 January 2026.
5. The purpose of this instrument is to facilitate the early release from prison of:
  - prisoners who are liable to be removed from the UK (under immigration powers); and
  - prisoners or who are “eligible” for removal, meaning that they have demonstrated, to the satisfaction of the Scottish Ministers, that they have the settled intention of residing permanently outside the UK if removed from prison.
6. The instrument would do this by modifying provisions that are treated as inserted into the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“1993 Act”): [sections 9B and 9C](#) <sup>ii</sup>. Sections 9B and 9C regulate the point in time at which such prisoners may be removed from prison for the purpose of being deported from (or leaving) the UK.
7. The instrument would make the following changes to those sections.
  - References to the half-way point of a prisoner’s sentence would be changed to refer not to a fixed point but to “the day on which the prisoner is entitled to be released under [Part 1 of the 1993 Act]”. The purpose of these changes is to mirror changes made by the Prisoners (Early Release) (Scotland) Act 2025 (“2025 Act”). The 2025 Act replaced automatic early release of short term prisoners at the half-way point with different automatic release points depending on the nature of the offence. The changes made by this instrument would have the effect that, under section 9B(1), instead of removal for deportation being possible during the period of 180 days ending with the half-way point of a prisoner’s sentence, this would be possible during the period of

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ii Sections 9A to 9C are to be found in the Custodial Sentences and Weapons (Scotland) Act 2007, schedule 6. Under paragraph 4 of schedule 6, the 1993 Act is to be read as if sections 9A to 9C were inserted into it. The current schedule 6 was substituted by the Criminal Justice and Licensing (Scotland) Act 2010, section 19. The provisions in schedule 6 are “transitory amendments”, intended to be in place until the coming into force of the repeal by the 2007 Act of Part 1 of the 1993 Act. They remain in place because the repeal has not yet happened. For ease, these provisions are referred to in this report simply as sections 9A, 9B and 9C of the 1993 Act.

180 days ending with new automatic release date under Part 1. The present instrument would not, however, change the additional requirement, in section 9B(2), that removal on this basis does not apply unless the prisoner has served a minimum of one quarter of their sentence.

- The instrument would also create a new power for Scottish Ministers, by order, to change the additional requirement in section 9B(2) (mentioned above) - that a prisoner must have served a minimum of one quarter of their sentence<sup>iii</sup>. The power would permit Ministers to change that time period to another period, or to a proportion of sentence. The draft [Policy Note](#) indicates that the Scottish Ministers would intend to use this power, if granted, to make regulations that would change “one-quarter” to 15%, to match the change made by the 2025 Act to the minimum sentence that must be served before early release on licence under section 3AA(2) of Part 1 of the 1993 Act. Early release on licence is known as home detention curfew (“HCD”)<sup>iv</sup>. An order made under the new power would be subject to the affirmative procedure.
8. In [correspondence with the Scottish Government](#), the Committee noted that regulation 2(2)(c) would create a new delegated power, and that it is relatively unusual for new powers to legislate to be conferred by subordinate legislation.
  9. The [Explanatory Note](#) for the instrument indicates that the enabling power being relied on for this new power is the ancillary power in section 62(1) of the 2019 Act, and the response from the Scottish Government confirmed this.
  10. It is particularly unusual for new power to legislate to be created by using an ancillary power. Accepted practice is that new powers to make subordinate legislation should be proposed in a bill and receive the full parliamentary scrutiny involved in a bill process. The creation of any new delegated power is a delegation of the Parliament’s power to legislate. The Parliament’s procedures reflect the significance of this, for example this Committee has a specific function of considering and reporting on such proposed powers and the Government produces a Delegated Powers Memorandum for every proposed new delegated power.

11. **The Committee considers that the creation by subordinate legislation of a new power to make subordinate legislation is unusual, and is generally undesirable because Parliament is unable to scrutinise and amend the proposal in the way it would if proposed in a bill.**
12. **The Committee considers that using an ancillary power to create a new power to make subordinate legislation is particularly unusual, and the Committee will expect particular justification to be provided for this.**

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<sup>iii</sup> The new power would be inserted by regulation 2(2)(c) of the instrument as section 9B(5)(b) of the 1993 Act.

<sup>iv</sup> HDC allows prisoners to serve the remainder of their custodial sentence in the community under licence conditions, earlier than their automatic early release date. Section 3AA(5)(e) expressly excludes prisoners who are liable to removal from the UK from this early release scheme. For such prisoners, sections 9A-9C provide a separate early release scheme.

13. The terms of the enabling power being relied upon to confer the new power are as follows ([section 62](#) of the 2019 Act):

**62 Ancillary provision**

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
  - (2) Regulations under subsection (1) may—
    - (a) modify any enactment (including this Act),
    - (b) make different provision for different purposes.
  - (3) Regulations under subsection (1)—
    - (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act,
    - (b) otherwise, are subject to the negative procedure.
14. This is a “Henry VIII” power, being used here to make subordinate legislation which amends an Act.
  15. Whether this use of the power is within *vires* depends on whether the creation of the new power is in the class of action that the Parliament must have contemplated when delegating the enabling power. It is a principle of statutory interpretation that ancillary powers are interpreted strictly, and particularly so when they enable the amendment of an Act.
  16. It is not standard to “read in” to a power the ability to sub-delegate. The general rule is that the person on whom a delegated power is conferred cannot use it to confer a further power to legislate (whether on themselves or on another person) unless this is expressly permitted.
  17. The draft Policy Note for the instrument explains that the reason for creating the power is to enable the time periods for release on HCD and the time periods for removal for deportation to be re-aligned. The creation of the new power will re-align the delegated powers that can be used to change the periods for each scheme.
  18. The Committee asked the Scottish Government to explain, in particular, why (as indicated in the Explanatory Note) the Scottish Government considered the conferral of the new power to be consequential / connected to the conferral of the power the minimum sentence to be served before release on HDC (in section 3AA(2) of the 1993 Act), given that that power relates to release on licence, whereas the new power relates to release for the purposes of removal from the UK.
  19. In its response, the Scottish Government explained that the new power is being conferred under the consequential powers, in light of the existing provision which has been made for early release, and consequent in particular on the 2019 Act having conferred the power in section 3AA(6)(b) to amend section 3AA(2) of the 1993 Act (power to amend the minimum sentence to be served before release on HDC).
  20. The enabling power authorises the Scottish Ministers to make any supplementary or consequential provision that they consider appropriate in connection with the Act, including by amending the Act.
  21. The Committee notes that this is a broad power, and that the test of “consider appropriate” is a low bar. The Scottish Government’s response demonstrates that

they clearly do consider this provision to be appropriate, and sets out why. The full text of the Scottish Government’s response is published in the [responses paper for this meeting](#).

22. The Scottish Government has provided detail on the connection between the new power and the HDC power, including helpful material from the accompanying documents for the 2010 Act, which introduced the section 9A-9C scheme for early release of prisoners for deportation. This material demonstrates that the original intention was for the deportation time periods to match those for early release on HDC.
23. Nonetheless, the Committee considers that it would have been preferable for the new power to be sought at the same time as the HDC power, in the bill for the 2019 Act. This would have enabled Parliament to consider whether it wished to maintain the linkage between the two time periods. This cannot necessarily be assumed given the passage of time between 2010 and 2019, and the different context in which the original time period was fixed.
24. It is a complicating factor that, from the records of the passage of the bill for the 2019 Act, it appears that the HDC power was introduced late, as a government amendment at stage 3<sup>v</sup>. Accordingly, there is no Delegated Powers Memorandum covering this power, and it was not considered by the DPLR Committee, or indeed any parliamentary committee.

**25. The Committee notes that, if the new power had been sought at the same time as the HDC power, this would have enabled this Committee and the Parliament to consider whether they were content for the Parliament to confer a power to match the HDC periods, confer a different power, or confer no additional power, and to amend the bill accordingly.**

**26. The Committee also notes the disparity between the level of parliamentary scrutiny that can be given to the proposed power now, in this SSI, compared to the scrutiny that could have been done had the proposed power been included, in the usual way, in the bill at introduction.**

27. Turning to the content of the proposed new power, the Scottish Government explained, in its response, that the policy intention behind introducing the new power is to enable the time periods for release on HDC and for release for removal from the UK to be fully aligned (should Parliament agree).
28. However, the wording of the proposed new power is not limited to enabling alignment with the HDC period. The wording of the proposed power is that the Scottish Ministers may:

” “amend a period for the time being specified in subsection (2) (which may be done by amending the subsection to describe a period as a particular length of time or a proportion of a prisoner’s sentence).”

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<sup>v</sup> [Marshalled list of amendments selected for stage 3](#), amendment 124. See also the [Official Report of the stage 3 debate](#), 25 June 2019, in which the debate on the amendment is in columns 67 – 72.

29. The qualifying period for release on HDC is now 15% of the sentence<sup>vi</sup>. The new power could be used to change the existing removal period (one quarter of sentence) to match the 15% figure, but it could equally be used to specify another period.

**30. Accordingly, the Committee considers that the proposed power is potentially wider than is necessary to achieve the stated policy intention.**

**31. In conclusion, the Committee draws this instrument to the attention of the Parliament on reporting ground (g) in respect that the conferral by regulation 2(2)(c) of a new power to make subordinate legislation appears to be an unusual and unexpected use of the enabling power.**

32. The lead committee for this Order is the Criminal Justice Committee.

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<sup>vi</sup> Under the amendment made to section 3AA(2) by the Home Detention Curfew (Amendment of Specified Time Periods) (Scotland) Order 2025, which came into force on 20 October 2025.

# No points raised

33. At its meeting on 25 November 2025, the Committee considered the following instruments under its remit and agreed not to draw them to the attention of the Parliament.

## Education, Children and Young People Committee

Disclosure (Scotland) Act 2020 (Commencement No. 6, Consequential Amendment, Saving and Transitional Provision) Regulations 2025 (SSI 2025/352 (C.26))

Scottish Languages Act 2025 (Commencement No. 1) Regulations 2025 (SSI 2025/348 (C.24))

Education (Scotland) Act 2025 (Commencement No. 1 and Transitory Provision) Regulations 2025 (SSI 2025/351 (C.25))

## Net Zero, Energy and Transport Committee

Companies Act 2006 (Scottish public sector companies to be audited by the Auditor General for Scotland) Order 2026 (SSI 2026/Draft)

## Standards, Procedures and Public Appointments Committee

Political Parties, Elections and Referendums Act 2000 (Non-Party Campaigner Code of Practice) (Appointed Date) (Scotland) (No. 2) Order 2025 (SSI 2025/347)

- In relation to this instrument, the Committee welcomes that this instrument fulfils the Scottish Government's undertaking to revoke SSI 2025 288, which the Committee drew to the attention of the Parliament on reporting ground (e) on 11 November 2025.

