

Instrument Responses

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

On 13 November 2025, the Committee asked:

Please could further explanation be provided as to why regulation 2(2)(c) is considered to be within the scope of the enabling powers.

Regulation 2(2)(c) would create a new delegated power. We note that it is relatively unusual for new powers to legislate to be conferred by subordinate legislation. The new power relates to prisoners who are liable to, or eligible for, removal from the UK, and who are entitled to be released under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. The new power would allow Scottish Ministers to amend, by order, the minimum period of time or proportion of their sentence that such a prisoner must serve before being removed from prison for the purpose of being removed from the UK (currently one quarter of their sentence).

The Explanatory Note indicates that the enabling power being relied on for this new power is the ancillary power in section 62(1) of the Management of Offenders (Scotland) Act 2019, and that the creation of the new power is in consequence of and in connection to the substitution by that Act of a new section 3AA(6)(b) into the 1993 Act. Section 3AA(6)(b) is a power for Scottish Ministers to amend the period/proportion of time that a prisoner must serve before Scottish Ministers may release the prisoner on licence. Further explanation would be appreciated in particular as to why the conferral of the new power is consequential / connected to the conferral of the power in section 3AA(2), given that the power in section 3AA(2) relates to release on licence, whereas the new power relates to release for the purposes of removal from the UK.

On 19 November, the Scottish Government responded:

Regulation 2(2)(c) is being made under the consequential powers of the Management of Offenders (Scotland) Act 2019 (“the 2019 Act”), in light of the existing provision which has been made for early release. The ancillary powers under the 2019 Act are within section 62 and provide broad powers to the Scottish Ministers to use regulations to make consequential provisions. Section 62(1) provides that:

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.

Of particular note for the purpose of regulation 2(2)(c), is that section 62 provides that the enabling power may be exercised to make any consequential provision which Scottish Ministers consider appropriate in connection with the 2019 Act.

Section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) provides Scottish Ministers with the power to release a prisoner on licence. Section 3AA sets out

the time period within which such release can take place. The provision provides for prisoners to be released from prison earlier than their automatic release point to serve their remaining custodial sentence in the community under licence conditions. This is commonly known as release on home detention curfew ("HDC"). Section 3AA(5)(e) expressly excludes prisoners who are liable to removal from the UK (being those described within section 9 of the 1993 Act) from being able to be released from prison into the community on licence in this way.

Schedule 6 of the Custodial Sentences and Weapons (Scotland) Act 2007 was substituted by section 19 of the Criminal Justice and Licensing (Scotland) Act 2010. Paragraph 4 of schedule 6 of the 2007 Act, as amended, means that the 1993 Act should be read as if sections 9A-C have been inserted into the 1993 Act after section 9 (which sets out the immigration grounds on which a prisoner is deemed liable to removal from the UK).

Paragraph 82 of the policy memorandum for the 2010 Act explains the purpose behind sections 9A-C and the link with section 3AA:

While "domestic" prisoners can be placed on Home Detention Curfew and curfewed to their home address, foreign prisoners are often either subject to deportation on release, or have no address in Scotland to which they can be curfewed, and have to remain in prison until they reach the point at which they are automatically released. The Bill will give Scottish Ministers discretionary powers to release early a prisoner, subject to the requirement that they are liable for removal from the UK or have the settled intention of residing permanently outside the United Kingdom once removed from prison.

Sections 9A-C provide the basis for an early release scheme which foreign nationals subject to removal from the UK can access; similar to the early release opportunity which section 3AA provides but which is expressly not available to those foreign nationals under section 3AA(5)(e). The policy memorandum sets out that the provisions are connected in purpose and that section 9B permits a form of release similar to that which is permitted for domestic offenders, but tailored to their removal from the country after release rather than their release into the Community on licence.

As introduced by the 2010 Act, section 9B(5) gives Scottish Ministers a delegated power to amend the time period in subsection (1) by order. Subsection (6) of section 3AA conferred a similar order-making power on Scottish Ministers for release of prisoners on licence.

The Delegated Powers Memorandum for the 2010 Act, at paragraph 52, explains the reason for taking the SSI enabling powers in s.9B(5):

The early removal scheme needs to correlate to the existing provisions for Home Detention Curfew contained in section 3AA of the 1993 Act. The period during which a prisoner can be removed under the new scheme is equivalent to the period during which HDC is available for other prisoners. Were the period for HDC to be changed, as provided for by section 3AA(6)(c), it would be desirable to keep the period for the early removal scheme in line.

Section 48 of the 2019 Act substituted subsection (6)(b) of section 3AA to provide for the then existing SSI enabling powers to now extend to amending subsection (2) as that sets out the minimum term of sentence the prisoner must serve before they can be released on HDC.

The delegated power under section 3AA(6)(b) was then exercised in the Home Detention Curfew (Amendment of Specified Time Periods) (Scotland) Order 2025 which reduced the minimum sentence served before a prisoner is eligible for release on home detention curfew from one quarter to 15%.

As set out in paragraph 52 of the Delegated Powers Memorandum for the 2010 Act, *“were the period for HDC to be changed, [] it would be desirable to keep the period for the early removal scheme in line.”*

Section 9B(2) currently provides that prisoners must serve one-quarter of sentence before being eligible for early removal under section 9B.

In connection to the amendment made by the 2019 Act to section 3AA, in order to be able to keep the time periods during which short-term prisoners can be removed from prison early under section 3AA and section 9B the same, it is necessary to amend the existing SSI enabling power under section 9B(5) to include the power to amend subsection (2).

On the proper use of consequential powers, Craies on Legislation explains, at paragraph 3-041, that a consequential provision can be a desirable consequential rather than a necessary consequential, but it has to flow as a consequence from the first provision.

The Scottish Government considers it appropriate, in light of the connection between the two powers, to modify the power in section 9B in consequence of the changes made by the 2019 Act to the powers in section 3AA. By doing so it will enable these time periods to be fully aligned (should Parliament agree). It is considered appropriate to maintain the operational intention behind the power delegated to Scottish Ministers in section 9B(5) as introduced.

The Scottish Government therefore considers that using the consequential powers in section 62 of the 2019 Act by regulations to extend the existing order-making power in section 9B(5) to include a power mirroring that created by virtue of section 48 of the 2019 Act is appropriate in connection with the 2019 Act, and therefore within the scope of the enabling powers under section 62.