



The Scottish Parliament
Pàrlamaid na h-Alba

Published 10 January 2023
SP Paper 291
2nd Report, 2023 (Session 6)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

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



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
<http://www.parliament.scot/abouttheparliament/91279.aspx>

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Overview of the Bill	2
Delegated Powers	3
Annex	11

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is 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; and

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

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



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Paul Sweeney
Scottish Labour



Oliver Mundell
Scottish Conservative
and Unionist Party



Jeremy Balfour
Scottish Conservative
and Unionist Party

Introduction

1. At its meetings on 15 November and 20 December 2022, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Bail and Release from Custody (Scotland) Bill (“the Bill”) at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#)

Overview of the Bill

3. This Scottish Government Bill was introduced by the Cabinet Secretary for Justice and Veterans, Keith Brown MSP, on 8 June 2022. The Lead Committee is the Criminal Justice Committee.
4. The Policy Memorandum to the Bill “the provisions of this Bill are intended to introduce a number of reforms designed to deliver on the Scottish Government’s commitment to refocus how imprisonment is used. They are intended to ensure that, as much as possible, the use of custody for remand is a last resort for the court, and to give a greater focus to the rehabilitation and reintegration of individuals leaving custody. The provisions are also underpinned by a commitment to public safety and the protection of victims and are intended to lead to a reduction in the risk of future re-offending.”
5. The Bill consists of 15 sections, divided into three parts. The more substantive matters are contained in Parts 1 and 2. The [Explanatory Notes](#), at paragraph 5, explain that Part 1 of the Bill reforms the legislative framework for bail decisions in respect of accused persons awaiting trial and amends Part 3 of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”).
6. Paragraphs 8 and 9 of the Policy Memorandum explain that provisions in Part 1 of the Bill 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. 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. Part 2 of the Bill makes a number of changes related to the release of prisoners which the Policy Memorandum states is with an emphasis on providing greater opportunities to support the reintegration of those leaving prison to reduce the risk of future reoffending and to enable people to move on towards more positive outcomes. The provisions in Part 2 include: not releasing prisoners on certain days of the week, changing the existing regime for release of long-term prisoners (a person serving a sentence of imprisonment for a term of four years or more), making provision for early release of prisoners in emergency situations, imposing new duties in respect of release plans, throughcare support provision and provision of information about prisoners.
8. Part 3 of the Bill comprises the standard provisions of a Bill namely the ancillary (section 13) and commencement (section 14) provisions.

Delegated Powers

9. The Bill confers 10 powers to make subordinate legislation on the Scottish Ministers.
10. At its meeting on 15 November 2022, the Committee was content with the following delegated powers:
 - Section 5 – Power to (1) amend definitions (2) modify new section 210ZA of the Criminal Procedure (Scotland) Act 1995 and other enactments for the purposes of that section and (3) make ancillary power provision;
 - Section 7(5) - Power to (1) amend statutory exclusions which apply to temporary release (2) amend the maximum period on temporary release licence (3) amend how far in advance of the halfway point of a sentence an individual may be released on licence and (4) make ancillary provision;
 - Section 7(8) – Power to prescribe standard conditions;
 - Section 9 – Power to amend list of identified partners subject to duty to engage with release planning;
 - Section 10 – Power to amend list of persons subject to duty to comply with published standards;
 - Section 11 – Power to modify definition of “support services” and to make ancillary provision; and
 - Section 13 – Power to make ancillary provision; and
 - Section 14 – Power to make commencement provision.
11. However, the Committee agreed to write to the Scottish Government to raise questions in relation to the following delegated powers:
 - Section 8 – Power to release early in specific circumstances; and
 - Section 11 – Power to prescribe description of persons to whom information can be provided and to make ancillary provision.
12. On receipt of the response from the Scottish Government, the Committee reconsidered these delegated powers at its meeting on 20 December 2022.
13. A copy of all correspondence can be found in the **Annex**.
14. The issues considered by the Committee in relation to these powers, together with its recommendations, are set out below.

Section 8 - Power to release early in specific circumstances

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

15. Section 8 of the Bill amends the Prisoner and Criminal Proceedings (Scotland) Act 1993 to make provision for the early release of prisoners in emergency situations. Section 8(4) inserts new sections 3C to 3E into the 1993 Act. New Section 3C provides that the Scottish Ministers may, by regulations, provide for defined groups of persons to be released early from prison (or young offenders institute).
16. 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, for the purpose of protecting the security and good order of any prison to which the regulations would relate or the health, safety or welfare of prisoners, or those working, in any such prison.
17. An “emergency situation” is defined in the new Section 3C(7) and includes the incidence or spread of infection or contamination, or a situation resulting in part of the prison estate being unusable and any other event or situation which is reasonably considered by the Scottish Ministers to place at significant risk (1) the security and good order of a prison or prisons more generally and/or (2) the health, safety, and welfare of prisoners, or those working, in any such prison.
18. Section 3C(3) makes provision such that any regulations made under this section may provide that any long term prisoners released by virtue of the regulations are released on licence and specify standard conditions which must be included in any such licence. Section 3C(4) provides for prisoners who would be excluded from being released by virtue of the regulations and this includes life prisoners, untried prisoners and terrorist prisoners.
19. The new Section 3D makes provision for the parliamentary procedure applicable to regulations made under section 3C. The regulations will be subject to the affirmative procedure unless the regulations do not provide for the release of a person more than 180 days before they would otherwise be released, and that they contain a statement of urgency by the Scottish Ministers that it is necessary to make the regulations without their being subject to the affirmative procedure. The regulations, in this case, will be subject to the made affirmative procedure.

Committee consideration

20. The Committee asked the Scottish Government for further information as to how section 8 of the Bill, or Scottish Government plans for implementation of this provision, meets (or will meet) each of the four principles set out in the Committee’s report of its [Inquiry into the use of the made affirmative procedure](#) during the coronavirus pandemic. It highlighted that whilst delegated powers in a Bill are considered on a case-by-case basis, these principles form the basis of the Committee’s scrutiny of primary legislation making provision for the made affirmative procedure to be used.
21. The Committee also asked the Scottish Government for details of the potential circumstances in which specified prisoners may be released in an emergency situation and how it will be determined that the exercise of the power is necessary and proportionate.

22. In its response, in relation to Principle 1, that the use of the affirmative procedure should be the default position in all but exceptional and urgent circumstances, the Scottish Government stated that new section 3D(1) of the 1993 Act makes clear that the affirmative procedure is the default procedure if the Scottish Ministers exercise this power. Further, it noted that 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. This 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.
23. The Scottish Government stated 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. It considered that examples of potential circumstances which might constitute an "emergency situation", as defined in the Bill, could include:
- being able to respond to any future pandemic, to avoid the need for emergency legislation and the ability to respond to 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 – such as fire, flood or structural damage which means that prisoners cannot be safely held in that prison (or part of) and cannot be relocated to other prisons without overstressing their resources and compromising the safety and good order of the wider prison system; and
 - 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.
24. The Scottish Government explained that while the first two parts of the definition of "emergency situation" are designed to cover situations that could reasonably be predicted to occur in the future, the third part 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.
25. In its response, the Scottish Government also explained that any proposed use of an early release power under such circumstances would still be underpinned by a commitment to public protection. Statutory exclusions, as set out in the Bill, would prevent specific groups of prisoners from being considered under any early release process and 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. Longterm 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.
26. With regards to determining if the exercise of the power is necessary and

proportionate, the Scottish Government explained that the 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. Further, prior to proposing an emergency early release process, the Scottish Government stated that it would be assessed 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.

27. The Scottish Government also stated that where the use of an early release process was considered necessary, then the SPS and the Scottish Government would discuss the number and location of prisoners that would need to be released, to provide a proportionate response to the emergency situation. It also highlighted that 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.
28. Principle 2 concerns the giving of an assurance that a situation is urgent and that there should be an opportunity for debate in a timely fashion. The Scottish Government explained, in relation to this principle that new 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 and explain why they are of that opinion.
29. The Scottish Government noted that the made-affirmative procedure still requires the consideration of the statutory instrument by Parliament, and a parliamentary vote on the instrument for it to continue in force after 28 days, giving the opportunity for Parliamentary scrutiny.
30. Principle 3 sets out that an assessment of the impact of the instrument on those affected by it, and Scottish Ministers' plans to publicise its contents and implications, should also be provided. The Scottish Government explained with reference to this principle that an instrument 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 particular emergency situation. Further, the regulations would also set out when and how the process would take place, as well as how long the release process would last.
31. In its response, the Scottish Government detailed an example of an early release process that took place in May 2020 under the provisions in the Coronavirus (Scotland) Act 2020. This included informing justice organisations, public and third sector services, and local government stakeholders and the involvement in such bodies in the planning and delivery of the process. The Scottish Government noted that Victims organisations were consulted before the regulations for the process were confirmed and views were considered. It also advised that any future early

release process would also ensure that victims registered with the Victim Notification Scheme were informed if the prisoner in their case was released under this process.

32. In relation to Principle 4, this sets out a general expectation that legislation containing provision for the made affirmative procedure will include provision for sunset clauses. In this regard the Scottish Government confirmed that the power to release early in specific circumstances will be a permanent power. As these provisions are intended to support action in response to emergency situations, with time sensitive considerations, the Scottish Government considered it appropriate that the powers remain available to permit a swift response.
33. The Scottish Government highlighted that a built-in sunset clause may over-ride the ability 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. It also highlighted that a sunset clause would undermine the intention that the provision be used to avoid the need for emergency legislation in the event of a future pandemic or other emergency.
34. The Scottish Government confirmed that the regulations will 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. The Scottish Government also detailed a number of safeguards provided for in the Bill, namely that 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. Although, the Scottish Government noted that the regulations may set a period less than this.
35. Furthermore, the Scottish Government noted that any regulations made using the made-affirmative procedure would cease to have effect at the end of 28 days, unless 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.
36. Finally, the Scottish Government stated that it is not intended that that this power would be used routinely explaining that 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.
37. With regards to the Scottish Government's response, which considered the four aforementioned principles, and the Committee's remit in considering delegated powers provisions, the majority of the Committee accepted the power in principle on the basis that the power reflects the need for the Scottish Ministers to have emergency powers available to them in the event of a resurgence of coronavirus or other emergency situation as defined in the Bill. In the absence of such a power, the majority of the Committee also considered that the Scottish Ministers would not be able to act as quickly to relieve pressures on prison estate should that be required. The majority of the Committee accepted that the power has been clearly drafted and goes no further than necessary noting that regulations may only be made if the Scottish Ministers are satisfied that making the regulations is necessary and

proportionate.

38. The majority of the Committee also acknowledged that the affirmative procedure is the appropriate level of parliamentary scrutiny considering the power may implement significant public policy measures. The majority of the Committee also noted that the power may be exercised subject to the made affirmative procedure if regulations provide for the release of a prisoner, who would in any event, be released within 180 days of making the regulations and where the Scottish Ministers consider that the regulations must be made urgently. A declaration of urgency necessitating the use of the made affirmative procedure must then be included with any such regulations.

39. **The majority of the Committee is content with the explanation provided by the Scottish Government and accepts the power in principle. The majority of the Committee is also content that the exercise of the power will be subject to the affirmative procedure but may be subject to the made affirmative in specified circumstances and by reason of urgencyⁱⁱ.**

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

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

40. Section 11 of the Bill amends the Criminal Justice (Scotland) Act 2003 (the “2003 Act”) and the Victims and Witnesses (Scotland) Act 2014 so that information about prisoners, which can be provided to victims of the offences they have committed, can also be provided to “victim support organisations” (“VSO”) providing assistance to those victims.
41. Section 11(2) inserts a new section 16ZA. Under this new section, victim support organisations can be provided with information (described in section 16(3) of the 2003 Act) where this has been requested by the victim or the organisation itself and the Scottish Ministers are satisfied that the organisation needs the information in order to provide support services to the victim.
42. The information that can be provided is information about the dates on which a prisoner is to be or may be released from prison, whether or not the prisoner has died, if the prisoner has been transferred outside Scotland, if the prisoner is unlawfully at large, the date a prisoner released or unlawfully at large is returned to prison, and if the prisoner is made subject to various orders relating to mental

ii For the purposes of this paragraph, the majority is Stuart McMillan MSP, Bill Kidd MSP and Paul Sweeney MSP. Oliver Mundell MSP and Jeremy Balfour MSP did not agree with the points in the recommendation.

health and detained in hospital rather than prison.

43. Section 16ZA(2)(a) provides that the persons to whom information can be provided (referred to as a “supporter” in this section) are to be of a description prescribed by the Scottish Ministers in regulations. This must be a person who is providing support services to the victim in relation to the offence perpetrated against the victim. Support Services is defined in new section 16ZA(5) and means any type of service or treatment which is intended to benefit the physical or mental health or wellbeing of the victim.
44. Regulations made under section 16ZA(2)(a) may include incidental, supplementary, consequential, transitional, transitory or saving provisions and may also modify enactments (including this Bill). The power is subject to the affirmative procedure where primary legislation is modified and the negative procedure otherwise.
45. Section 11(7) of the Bill will amend the Victims and Witnesses (Scotland) Act 2014 by inserting a new section 27B which will make provision similar to section 16ZA of the 2003 Act for the provision of information to VSOs where prisoners are serving less than 18 months. As with section 16ZA, a VSO will be provided with the information where the victim or the VSO has requested it and the Scottish Ministers are satisfied the VSO needs the information to provide support to the victim. The information provided under section 27B is the same as that already provided under section 27A of the 2014 Act (Notification of victims in relation to release etc. of short term prisoners), namely information about the prisoner’s release or escape from prison.

Committee consideration

46. In its consideration of this power, the Committee asked the Scottish Government for an explanation as to why the negative procedure is considered appropriate when specifying the description of persons that may be supplied with information regarding prisoners in the specified circumstances set out in the Bill, and whether affirmative procedure may be more appropriate.
47. In its response, the Scottish Government explained that the parameters for sharing information with VSOs is set out on the face of the Bill. This includes what information can be shared and for what purpose. The Scottish Government also explained that these provisions replicate the existing provisions in the Criminal Justice (Scotland) Act 2003 that govern the information-sharing with victims. It went on to explain that 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. As set out on the face of the Bill, this is subject to full Parliamentary scrutiny as the Bill progresses through Parliament.
48. The Scottish Government also explained that 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.
49. The Scottish Government 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 the negative procedure. It explained that

many VSOs are non-statutory services and could change their name to reflect changing requirements. The Scottish Government explained that if that happened, then this organisation would need to be prescribed by regulations to reflect the change. As it would still be the same organisation, the Scottish Government therefore considered that the affirmative procedure would not be appropriate for that.

50. The Committee noted that the Scottish Government has provided further explanation as to why the negative procedure is considered appropriate in relation to this power. It also noted that provisions are set out on the face of the Bill for the sharing of information with those persons or organisations providing support services to a victim or qualifying person in relation to the offence perpetrated against the victim. In practice, this is likely to be a VSO. The Committee also noted that the provisions include what information may be shared and for what purpose. Those provisions will be subject to full parliamentary scrutiny as the Bill progresses through Parliament.
51. The Committee noted that the power to prescribe the description of persons to whom information can be provided is intended to be used in circumstances where for example a VSO changes name and the renamed VSO would be prescribed by regulations to reflect the name change. This power, as the DPM explained, allows for flexibility in ensuring the description of such persons or organisations can be efficiently amended should this be required.
52. The majority of the Committee considered that, given the matters that are set out on the face of the Bill that will be subject to full parliamentary scrutiny, the limited circumstances in which this power will be used, and the use of parliamentary time, the negative procedure is an appropriate level of parliamentary scrutiny in these circumstances.

53. **The majority of the Committee is content with the explanation provided by the Scottish Government. The majority of the Committee also accepts the power in principle and is content that the exercise of the power will be subject to the negative procedure, unless modifying primary legislation in which case subject to affirmative procedureⁱⁱⁱ.**

ⁱⁱⁱ For the purposes of this paragraph, the majority is Stuart McMillan MSP, Bill Kidd MSP and Paul Sweeney MSP. Oliver Mundell MSP and Jeremy Balfour MSP did not agree with the points in the recommendation.

Annex

Letter from the Clerk to the Delegated Powers and Law Reform Committee, to the Scottish Government, 23 November 2022

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on 15 November 2022 and would appreciate an explanation of the points set out below.

Section 8 – Power to release early in specific circumstances

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

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. Section 8(4) inserts new sections 3C to 3E into the 1993 Act. New Section 3C provides that the Scottish Ministers may, by regulations, provide for defined groups of persons to be released early from prison (or young offenders institute).

The Committee notes that 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, for the purpose of protecting the security and good order of any prison to which the regulations would relate or the health, safety or welfare of prisoners, or those working, in any such prison.

An “emergency situation” is defined in the new Section 3C(7) and includes the incidence or spread of infection or contamination, or a situation resulting in part of the prison estate being unusable and any other event or situation which is reasonably considered by the Scottish Ministers to place at significant risk (1) the security and good order of a prison or prisons more generally and/or (2) the health, safety, and welfare of prisoners, or those working, in any such prison.

The Committee notes that a similar temporary power, to that being provided in the Bill, was provided for in the Coronavirus (Scotland) Act 2020. Furthermore, a replacement temporary power has been included in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 which received Royal Assent on 10 August 2022. 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. The power contained in this Bill will provide a permanent power for the Scottish Ministers to act when necessary and proportionate in response to future emergencies not limited to Coronavirus.

As you know, the Committee’s report of its Inquiry into the use of the made affirmative procedure during the coronavirus pandemic^{iv} set out four principles which would form the basis of the Committee’s scrutiny of primary legislation making provision for this procedure

iv [Inquiry into the use of the made affirmative procedure during the coronavirus pandemic \(azureedge.net\)](https://www.azureedge.net)

to be used. The four principles are:

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.
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.
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.
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.

Please set out how section 8, or Scottish Government plans for implementation of this provision, meets (or will meet) each of the above principles.

In relation to principle 1, the commentary should include:

- **further explanation of the potential circumstances in which specified prisoners may be released in an emergency situation, with reference to specific examples, including those intended to be covered by the description: “any other event or situation which is reasonably considered by the Scottish Ministers to place at significant risk (1) the security and good order of a prison or prisons more generally and/or (2) the health, safety, and welfare of prisoners, or those working, in any such prison.”**
- **how it will be determined that the exercise of the power is necessary and proportionate.**

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

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative

Section 11 of the Bill amends the Criminal Justice (Scotland) Act 2003 (the “2003 Act”) and the Victims and Witnesses (Scotland) Act 2014 so that information about prisoners, which can be provided to victims of the offences they have committed, can also be provided to

“victim support organisations” providing assistance to those victims.

Section 11(2) inserts a new section 16ZA. Under this new section, victim support organisations can be provided with information (described in section 16(3) of the 2003 Act) where this has been requested by the victim or the organisation itself and the Scottish Ministers are satisfied that the organisation needs the information in order to provide support services to the victim.

The Committee notes that the information that can be provided is information about the dates on which a prisoner is to be or may be released from prison, whether or not the prisoner has died, if the prisoner has been transferred outside Scotland, if the prisoner is unlawfully at large, the date a prisoner released or unlawfully at large is returned to prison, and if the prisoner is made subject to various orders relating to mental health and detained in hospital rather than prison. As such, this provision concerns the sharing of personal information.

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. Regulations made under section 16ZA(2)(a) may include incidental, supplementary, consequential, transitional, transitory or saving provisions and may also modify enactments (including this Bill). The power is subject to the affirmative procedure where primary legislation is modified and the negative procedure otherwise.

The Committee notes that regulations making provision for the description of persons who can receive information under section 16ZA(2)(a) will be subject to the negative procedure.

Please set out why the negative procedure is considered appropriate when specifying the description of persons that may be supplied with information regarding prisoners in the specified circumstances set out in the Bill, and whether affirmative procedure may be more appropriate.

I would be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 12 noon on Wednesday 7 December.

Letter from the Scottish Government, to the Clerk to the Delegated Powers and Law Reform Committee, 7 December 2022

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 overstretching 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.

