

POLICY NOTE

THE BAIL AND RELEASE FROM CUSTODY (SCOTLAND) ACT 2023 (COMMENCEMENT NO. 1) REGULATIONS 2024

SSI 2024/145 (C. 13)

The above instrument was made in exercise of the powers conferred by section 5, section 11 and section 14 of the Bail and Release from Custody (Scotland) Act 2023. The instrument is laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Summary Box

The purpose of this statutory instrument is to commence section 5, section 11 and section 14 of the Bail & Release from Custody (Scotland) Act 2023.

Section 11 and section 14 are to be brought into force on 26 May 2024.

Section 5 will be brought into force on 1 July 2024

The Bail and Release from Custody (Scotland) Act 2023, section 18(2) enables these powers to come into force.

Policy Objectives

The Bail and Release from Custody (Scotland) Act 2023 received Royal Assent in August 2023. Part 1 of the Act reforms the legislative framework for bail decisions in respect of accused persons awaiting trial. Part 2 of the Act makes a number of changes related to the release of prisoners. This includes ending liberation on certain days of the week, introducing a duty on named public bodies relating to release planning, improving throughcare support standards, introducing a new release on temporary licence provision for long-term sentenced individuals, emergency release powers, new powers for the Parole Board to review their decisions and also makes adjustments to the way victims can receive information about the linked individual in their case.

This SSI commences three of the provisions in the Act as summarised below.

Section 5 – Time spent on electronically monitored bail

Adds new section 210ZA to the Criminal Procedure (Scotland) Act 1995, which will require the court to have regard to the period of time a person has spent on “qualifying bail” (as defined by section 210ZA(6)) and take account of this when passing sentence. The court is required to have regard to the bail period and specify a period of time which is to be treated as “time served” towards the sentence. That period is referred to as “the relevant period” and section 210ZA provides a formula for the court to use when considering the period of time to be taken into account. It provides that each day of the qualifying bail period should be counted as half a day spent in custody. While giving the court discretion to disregard all or part of this bail

period if it considers it appropriate, if the court decides that all or part of the bail period is to be disregarded then the court must then state its reasons for doing so.

At present, the time that an accused person has spent on electronically monitored curfew whilst on bail cannot be taken into account by the court when setting sentence. This curfew restricts the individuals whereabouts for up to 12 hours each day, and can be applied upon them for an extended period whilst awaiting trial (or sentencing).

In comparison, when an accused person is remanded to custody, the days spent on remand are subtracted from the period of any custodial sentence they eventually receive.

The Scottish Government recognises that there is a restriction on movement and impact on a person's liberty by virtue of being on electronically monitored bail (although not to the same degree as being on remand in custody). To acknowledge the difference in impact on a person's life, this provision ensures that, when the court determines a period of electronically monitored bail is appropriate to factor into the sentence in a given case, there is a prescribed formula for the court to apply to convert the relevant period of electronically monitored bail into an equivalent portion (if not all) of the sentence that is to be treated as time served. This provides for consistency and fairness in the sentencing process.

This provision is also intended to incentivise and support the use of EM bail as an alternative to remand, including the acceptance of EM bail by accused persons. If a person knows that time spent on EM bail may be set against the custodial element of any sentence they ultimately receive, it may encourage them to accept EM bail instead of remand.

Commencing this provision will allow courts to take account of time spent on EM bail when imposing a custodial sentence, in the manner described above.

Section 11 - Power to release early

Inserts new sections 3C to 3E into the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"), enabling Scottish Ministers to instruct, by regulations, the early release of prisoners in order to protect the security and good order of a prison or prisons, and/or to protect the health, safety and welfare of prisoners or prison staff in the event of an emergency situation. It also makes a consequential amendment to section 12 of the 1993 Act and inserts new section 12ZA into that Act in relation to standard conditions which may be imposed on a prisoner released under regulations made under new section 3C.

Emergency situation is defined in the Act as follows:

- The incidence or spread of infection, contamination or the source of contamination which presents or could present significant harm to human health in Scotland (whether from risks originating there or elsewhere);
- An event of situation which has resulted in any prison (or part of a prison)- to which the regulations would relate being unusable;
- Any other event of situation which is reasonably considered by the Scottish Ministers to place at significant risk –
 - The security and good order of a prison or prisons generally;
 - The health, safety and welfare of prisoners, or those working in any such prison.

There are statutory exclusions to release under this power as listed in the provision and a Governor's Veto applies whereby a Governor of the prison within which the person is detained can veto the release of an otherwise eligible person if they consider that the person would, if

released, pose an immediate risk of harm to an identified person or an identified group of people.

Section 14 - Provision of information to victim support organisations

Will insert new sections 16ZA, 16D, 17ZA and 17DA into the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) and section 27ZB into the Victims and Witnesses (Scotland) Act 2014 so that victims can nominate a victim support organisation (VSO) to receive certain information about the offender in their case, such as release from prison or conditional discharge from hospital. It also makes some consequential amendments to the 2003 Act.

VSOs (listed in regulations as noted below) will also be able to request certain information relating to the prisoner in their case or certain information pertaining to the offender in the victim’s case where they are subject to a compulsion order.

The information which can be provided to, or requested by VSOs is as is set out in Sections 16 and 16C of the Criminal Justice (Scotland) Act 2003. This provision does not allow for the provision of any additional information.

This provision is intended to support the delivery of trauma-informed support to victims of crime.

The VSOs who will be able to receive or request this information will be listed in separate regulations, following consultation with those organisations.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government’s policy to maintain alignment with the EU.

Consultation

Detailed public and stakeholder consultation was undertaken in the development of the Bail and Release from Custody (Scotland) Bill 2023 and during the Bill’s passage which included consultation on these three provisions.

A formal consultation has not been undertaken on this SSI which brings those powers into force. Engagement continues with partners in the justice and wider public sector in relation to implementation of the Act. This involved consultation with a range of public bodies, key stakeholders and various partners across the third sector landscape who have an interest on the operation of the sections within the Act.

Impact Assessments

The following Impact Assessments were prepared during the passage of the Act and are kept under review:

- Business and Regulatory Impact Assessment (BRIA)
- Child Rights and Wellbeing Impact Assessment (CRWIA)
- Equality Impact Assessment (EIA)

- Data Protection Impact Assessment (DPIA)
- Fairer Scotland Duty Assessment (FSD)
- Island Communities Impact Assessment (ICIA)
- Strategic Environmental Assessment (pre-screening notification – not published) (SEA)

Financial Effects

The financial effects of this policy were set out under the financial memorandum which accompanied the Bill for the 2023 Act.

Scottish Government
Justice Directorate

May 2024