

Business and Regulatory Impact Assessment

Title of Proposal: The Early Release of Prisoners and Prescribed Victim Supporters (Scotland) Regulations 2024

Purpose and intended effect

Background:

The Bail and Release from Custody (Scotland) Act 2023 s11 provides Scottish Ministers with a power to release a defined group of prisoners if it is considered necessary and proportionate to respond to an emergency situation, which Ministers consider is placing, or is likely to place, the security and good order of prisons, or the health, safety and welfare of prisoners and prison staff at significant risk.

S14 of the 2023 Act makes provision so that victims can nominate a victim support organisation to receive information at the same time as the victim, or on their behalf, under either of the two statutory schemes of information for victims. The intention of this provision is to provide victims with greater choice in how the schemes work for them, to enable delivery of information in a more trauma-informed and person-centred and facilitate greater access to support alongside information provision.

Objective:

1) Emergency release regulations:

To lay regulations detailing the plans for the early release of a defined group of prisoners on the basis that an emergency release is necessary to mitigate the effects of the recent sudden rise in the prison population, which has the potential to place the security and good order of prisons, and the health, safety and welfare of prisoners and prison staff at significant risk.

2) Victim Support Organisations:

To prescribe victim support organisations (VSOs) for the purposes of section 14 of the 2023 Act to ensure the two victim information schemes can be delivered in a more trauma-informed and person-centred way

Rationale for Government intervention:

1) Emergency release of prisoners

Due to a sharp and unanticipated rise in the prison population, creating an unprecedented pressure on the prison estate, immediate action is needed to ensure the safety and wellbeing of those who live and work within Scotland's prisons. It is essential that prisons can function effectively, ensuring the custody of those who pose the greatest risk of harm, and providing the necessary prison regime and programmes that help reduce reoffending.

The drivers of the prison population are multi-faceted. In the long-term, growth appears to have been driven by an increase in average sentences imposed for certain offences and an increase in the number of serious sexual offence cases prosecuted in the courts. In addition, success in other areas of our justice system including policing and convictions, improvement in clear-up rates and increased reporting and investigation of crimes such as sexual offending, has had an impact.

In the previous two months there has been a sharp rise in the prison population, which was unanticipated. This is having a significant impact on our prisons, including the safety of prisoners and staff, and immediate action is required.

The SPS, with the support of the Scottish Government, have implemented all appropriate and available measures to maximise the available capacity, and to maintain the necessary prison regime. Multi-agency discussions have been convened (Prison Population Leadership Group) to examine and implement other potential actions to help address the situation

However, the ongoing impact of high prison population and overcrowded facilities is having a clear, substantial and sustained negative impact on the management of the prison estate, and the maintenance of proper prison regime (including availability of healthcare, purposeful activity, prison visits, rehabilitative programmes and other activities). There is increasing impact on the health, safety and welfare of prison officers and other prison staff. The increasing numbers in custody is also removing any remaining contingency that would have enabled SPS to any future unpredictable pressures.

These issues have been reinforced by the concerns that have been raised to Ministers by the SPS leadership, HM Inspector of Prisons, and the Prison Governors Association.

In light of this, Scottish Ministers consider that the use of the emergency release power is the necessary and proportionate action to alleviate the pressure across the prison estate for a period of time.

Scottish Ministers have no alternative powers to instruct the release of groups of prisoners.

The instruction will require SPS to plan and manage the release of an increased number of individuals over a short period of time, whilst maintaining normal operations. SPS management have confirmed that the schedule of work is manageable, and have drawn up operation plans to conduct the own internal activities, and to co-ordinate with other statutory, public and third sector services to expedite work to support the release and reintegration of individual prisoners.

The release process for those being released early due to this measure will be the same as it would have been had they been released at the scheduled date for their sentence. Most short-term prisoners are not required to engage with justice social work or other forms of monitoring following their release. The emergency release legislation reflects this, and does not provide the application of additional restrictions, supervision or conditions upon their release.

However, those short-term prisoners who would be subject to monitoring after release – such as sex offenders, or individuals subject to specific post-release orders – are automatically excluded from the process by legislation.

There is already voluntary support available from local authorities to people leaving short-term sentences, should the individual request it within 12 months of leaving prison. Short-term prisoners may also receive throughcare assistance from a range of third sector service. There are also existing duties on a range of other public bodies to provide essential services to those who require them, such as healthcare, housing and welfare, and these duties are not specific to those leaving prison.

Therefore the legislation may have some business impact on these public bodies and local authority and third sector services, including increased demand for voluntary throughcare and support upon release.

The emergency release will produce a short term surge in demand upon SPS and community services including health and housing, but it will also produce a slowing in demand for such services in the subsequent months, when the emergency release cohort would have been released more gradually at their scheduled release date.

2) Prescription of Victim Support Organisations under s14 of 2023 Act

The second aim of this SSI is to indicate which VSOs are to be prescribed for the purposes of s14 of the 2023 Act, which will enable them to be nominated by victims to receive information from the SPS under the Victim Notification Scheme (which applies where an offender has been sentenced to more than 18 months' imprisonment) or short-term information scheme (which applies where an offender has been sentenced to fewer than 18 months' imprisonment) at the same time as the victim, or no their behalf.

The operation of the emergency release process further highlights the importance of the VNS and the short-term information scheme generally, as well as the specific need to operationalise s14 of the 2023 Act to enable VSOs to provide additional support to victims who wish to receive it in regard to information schemes.

SG officials have been in dialogue with a range of VSOs, to confirm which organisations wish to be prescribed for this process. The Scottish Ministers are satisfied that the VSOs that wish to be included (Victim Support Scotland, ASSIST, Rape Crisis Scotland and Children 1st) fall within the category of "support services" (as defined in section 16ZA(5) of the Criminal Justice (Scotland) Act 2003 as inserted by s14 of the 2023 Act), and that they understand and accept the duties and obligations that are set out in s14 of the 2023 Act.

SG National Outcomes

This SSI contribute towards the following objectives of the National Outcomes: “We live in communities that are inclusive, empowered, resilient and safe” and “We respect, protect and fulfil human rights and live free from discrimination”.

Options

Emergency release regulations:

Required consideration of “Do nothing” option.

As noted above, the rising prison population and levels of overcrowding are creating substantial negative impacts on conditions within the prison estate. SPS have deployed appropriate measures to mitigate the situation as far as possible, but further action is urgently required. Given the imperative to mitigate the impact of the recent sharp and unanticipated rise in the prison population, there are no other measures by which Scottish Ministers can instruct the release of prisoners to achieve the necessary and proportionate impact quickly. As such, there is no realistic “do nothing” option.

Proposed regulations

The proposed regulations have been devised in co-operation with SPS to deliver a swift reduction in the prison population on a scale that is proportionate to the current circumstances.

Hypothetically, conducting an emergency release process on a smaller scale would be possible, but doing so would undermine the key aim of delivering a robust, proportionate impact on conditions within the prison system. A smaller scale action would not achieve the necessary outcome – whilst still adding short-term demand on the resources of SPS and public bodies.

As noted by the Cabinet Secretary for Justice & Home Affairs in her statement to Parliament on 16 May, this proposal for an emergency release is being brought forward alongside proposals for further measures that will impact on the prison population in the medium and longer term. These include proposals to change the operation of automatic early release (which will be the subject of consultation in the next few months), and proposals to expand the scope of Home Detention Curfew (which will be brought forward in secondary legislation later in the year).

SG and SPS will also continue to examine other measures that have potential to mitigate the impact of high prison population in the medium term – including the potential to utilise modular accommodation.

Listing of Victim Support Organisations in regard to s14 of 2023 Act

Until the regulations come into force, the organisations listed above cannot make use of the opportunity established in s14 to provide additional support to victims.

Potentially, this action to prescribe the relevant organisations could be delayed until a later time, but this would prevent the process of bringing this process into operation until that point – at a point in time where we are aiming to increase the available

support to victims (to improve support services generally, and to help address any concerns that victims may have in the context of an emergency release process).

Scottish Firms Impact Test

Is this measure likely to impact on international trade and investment?

No. Given the impact will largely fall on public and third sectors, it was not considered necessary for Scottish Government officials to carry out face to face discussions with businesses about the SSI. The measures are not likely to impact on international trade or investment.

Competition Assessment

The SSI is not expected to have any impact on competition. It will not limit the number or range of suppliers for relevant services, limit the ability of stakeholders to compete, limit suppliers' incentives to compete vigorously or limit choices and information available to consumers. As such a competition assessment has not been completed.

Consumer Assessment

The SSI is not expected to have negative impact on consumers.

Test run of business forms

No aspects of the SSI apply.

Digital Impact Test

The SSI has no provisions specifically relating to digital/online content.

Legal Aid Impact Test

No aspects of the SSI apply.

Enforcement, sanctions and monitoring

The SPS will monitor the operation of the emergency release process, recording the details of the eligible cohort, any veto decisions, and release arrangements. The SPS' regular reporting to local authorities on upcoming prison releases will be utilised to notify statutory services about the rescheduling of prisoner releases.

SPS will also record whether any individual released under the emergency release process is returned to custody in the period before their originally scheduled release date.

Follow-up and review activities will be managed in co-operation with key stakeholders after the conclusion of the process.

Implementation and delivery plan

Details of the proposed planning and governance of the emergency release process have been discussed in sections above.

Parliament will be asked to agree to an expedited affirmative SSI process for this instrument, so that the emergency release process can be implemented as soon as practical.

The proposed timescale for the release process is for releases to be made between 26 June and 18 July, in four tranches spread over the four week period. This arrangement gives greater clarity for prisoners, the public and external services over when an eligible prisoner will be scheduled to be released. Spreading the release over four tranches will help to spread the additional demand upon SPS and other services, whilst delivering the intended positive impact in a timely manner.

The release process is proposed to be operated as follows:

- 1) Prisoners with 1-45 days until their scheduled earliest date of liberation (“EDL”) would be released no earlier than 26 June 2024 and no later than 27 June 2024;
- 2) Prisoners with 46-90 days remaining until their EDL would be released no earlier than 3 July 2024 and no later than 4 July 2024;
- 3) Prisoners with 91-135 days remaining until their EDL would be released no earlier than 10 July 2024 and no later than 11 July 2024.
- 4) Prisoners with 136-180 days remaining until their EDL would be released no earlier than 17 July 2024 and no later than 18 July 2024.

If any prisoner who is eligible for emergency release is not released within their scheduled tranche, there is scope within the regulations for their release to be rescheduled in a following tranche, but not later than 25 July.

Summary and recommendation

Under the current circumstances, it is clear that urgent action is required to reduce the prison population, in order to mitigate the significant and ongoing negative effect that it is having on the operation of the prison system.

There are no other measures available to Scottish Ministers that would enable an release of a group of prisoners, in order to achieve the necessary change in an effective and timely manner.

These circumstances meet the legal test set out in section 3C(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as inserted by section 11 the 2023 Act), limiting the use of the release power to instruct a “necessary and proportionate” action in response to in circumstances in the prison estate where (i) the security and good order of a prison or prisons generally and (ii) the health, safety and welfare of prisoners or those working in any such prison, are at risk.

The second aspect of the SSI will enable the victim support activities established under s14 of the 2023 Act to be put into operation. Doing so at this point will help expand the support available to victims, which is timely in the context of the emergency release process.

Declaration and publication

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non-departmental public bodies and other agencies if appropriate) is required to sign off all BRIAs prior to publication.

Sign-off for Final BRIAs: I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland

Signed: Angela Constance

Date: 29 May 2024

Minister's name: Angela Constance

Minister's title: Cabinet Secretary for Justice and Home Affairs

Scottish Government Contact point: Jennifer Stoddart