

EXPLANATORY MEMORANDUM TO
THE TIME OFF FOR PUBLIC DUTIES ORDER 2018
2018 No. 665

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Employment Rights Act 1996 (ERA) to grant unpaid time off work to four groups of volunteers in the criminal justice system, who all monitor conditions of those in custody. Currently, employers are not obliged to grant time off work to these volunteers so that they can perform their public duties. The four groups are:

the Lay Observers (who monitor conditions in court custody and in cellular vehicles);

the Independent Prison Monitors (who monitor conditions in Scottish prisons);

the Immigration Visiting Committees (who monitor conditions in Immigration Removal Centres); and

the Short Term Holding Facilities (STHF) Visiting Committees (who monitor conditions at immigration facilities at ports and airports).

This instrument will bring provision for these groups in line with that for Prison Independent Monitoring Boards. They perform a very similar role to those listed above, but are already granted time off work by the ERA. The instrument also aims to attract applicants with full-time employment, who tend to be younger, and thereby improve the diversity profiles of each group, which are currently skewed in favour of older age groups.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The ERA has been amended several times to include various additional bodies in its provision for time off work. The most relevant precedent was when Prison Independent Monitoring Boards were added by primary legislation in 2007. For reasons unknown, Visiting Committees were not granted time off work in 2007, although they are very similar to Prison Independent Monitoring Boards.

- 4.2 Scottish prisons were formerly monitored by Visiting Committees, who were granted time off work, but these were replaced by a new group, the Independent Prison Monitors, in 2015. They perform the same role as volunteer monitors of Scottish prisons but have not yet been granted time off work. There is no specific reason why the Lay Observers have not yet been granted time off work. This instrument aims to resolve these discrepancies between different custody monitoring groups and standardise provision for time off work between them.

5. Extent and Territorial Application

- 5.1 This instrument will extend to England, Wales and Scotland only.
- 5.2 Lay Observers operate in England and Wales only, so this aspect of the provision will not apply in Scotland.
- 5.3 Independent Prison Monitors operate in Scotland only, so this aspect of the provision will not apply in England and Wales.
- 5.4 Immigration and STHF Visiting Committees operate throughout the UK, but this aspect of the provision will apply to employers in England, Wales and Scotland and not employers in Northern Ireland.
- 5.5 Northern Ireland controls its own employment legislation and may pursue equivalent legislation of its own in the future.

6. European Convention on Human Rights

- 6.1 The Parliamentary Under-Secretary of State for Justice has made the following statement regarding Human Rights:

In my view the provisions of the Time Off for Public Duties Order 2018 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 This instrument amends the ERA to include four groups of voluntary custody monitors in provision for statutory, unpaid time off work. The aim is twofold: to bring provision for these groups in line with that for Prison Independent Monitoring Boards (who are already included in the ERA); and to improve the diversity profile of each group by attracting younger members.
- 7.2 The Commissioner for Public Appointments is keen to improve the diversity profiles of public appointees. The diversity profiles of the groups in the instrument's scope are all over-represented in the older age groups. Only 28% of the UK population was 55 and older at the 2011 census, but 42% of recent Visiting Committee appointees and 81% of Lay Observers are over 55. Age data is not reliably recorded for Independent Prison Monitors, but it is estimated that a third of members are retired indicating a high average age. It is hoped that by making it easier to take time off work to perform public duties, people with full-time employment will be more attracted to the role. People with full-time employment are more likely to be younger and below retirement age.
- 7.3 Membership levels of all four groups, and particularly the Lay Observers, have historically been difficult to maintain. Making it easier to take time off work to

perform these public duties will make the roles more attractive to applicants, helping the Government to maintain an appropriate level of custody monitoring.

- 7.4 The number of volunteers who will be directly affected by the instrument is as follows. There are currently around 40 Lay Observers, 120 Immigration Visiting Committee and STHF Visiting Committee members, and 140 Independent Prison Monitors who will be affected by the instrument. The Scottish Government hopes to increase Independent Prison Monitor numbers to 155 in the near future. The Ministry of Justice would like to increase Lay Observer numbers, subject to affordability. The Government estimates that a maximum of 30% of Lay Observers, Immigration Visiting Committee members and STHF Visiting Committee members will make use of provision for statutory time off work. The Scottish Government estimates that a maximum of 70% of Independent Prison Monitors will make use of the provision.
- 7.5 Employers will be obliged to grant time off work to members of the above groups who are in their employ to perform their public duties. The amount of time off which an employee is to be permitted to take, and the occasions on which and any condition subject to which time off may be taken, are those that are reasonable in all the circumstances having regard, in particular, to:
- (a) how much time off is required for the performance of the duties of the office or as a member of the body in question, and how much time off is required for the performance of the particular duty;
 - (b) how much time off the employee has already been permitted under section 50 of the ERA or sections 168 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (which relate to time off for trade union duties and activities); and
 - (c) the circumstances of the employer's business and the effect of the employee's absence on the running of that business.

These employers will therefore be affected by the instrument in the form of lost working days.

- 7.6 The Government pays for the expenses of members of the above groups.
- 7.7 This area has low public, Parliamentary and media interest. Visiting Committees occasionally feature in the media or Parliament (where they are referred to as Independent Monitoring Boards), normally highlighting failure to implement their recommendations.

Consolidation

- 7.8 This instrument does not amend another and so consolidation is not required.

8. Consultation outcome

- 8.1 We did not consider formal consultation appropriate for this instrument on policy grounds. The fact that Prison Independent Monitoring Boards are already included in the ERA's provision provides a strong justification for including the four similar groups in the instrument's scope. The equality impacts on affected groups have been submitted alongside this memorandum in an Equality Statement annexed to the Impact Assessment. There is no legal obligation in the ERA to consult for the amendments made by the instrument.

9. Guidance

9.1 No specific guidance on the instrument is considered necessary.

10. Impact

- 10.1 The impact on English, Welsh and Scottish business is a loss of earnings due to employees taking time off work. The scale of this impact is dependent on the number of additional volunteer monitors recruited and the uptake of the statutory right to time off work among these volunteers. A high estimate for this cost is £510k per year. The impact on voluntary bodies is the inclusion of four voluntary bodies (Lay Observers, Independent Prison Monitors and Immigration and STHF Visiting Committees) in provision for unpaid time off work. There is no impact on charities.
- 10.2 The impact on the public sector is a probable increase in expenses payments for members of the voluntary groups in the instrument's scope. The scale of this impact is dependent on the number of additional volunteer monitors recruited and the uptake of the statutory right to time off work among these volunteers. A high estimate for this cost is £83k per year (£68.5k to be paid by the Ministry of Justice and £14.5k to be paid by the Home Office).
- 10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 11.3 The basis for proposing no specific action to assist small businesses is the low number of volunteers affected by the instrument, just a few hundred nationwide, and the low estimated uptake of the provision for time off work. When deciding how much time off to allow, section 50 permits employers to take into account the circumstances of the employer's business and the effect of the employee's absence on the running of that business.

12. Monitoring & review

- 12.1 Having had regard to sections 28 to 32 of the Small Business Enterprise and Employment Act 2015 and the Statutory Review Guidance for Departments published under section 31(3) of that Act, we have decided that it is not appropriate to make provision for review in this instrument. The instrument has expected impacts of up to £593k per year, which is below the +/- £5million annualised impacts to business threshold, and we do not believe there are any additional factors which make the inclusion of a review clause desirable. The instrument and its effects will still be subject to ongoing monitoring and evaluation and will, if necessary, be reviewed.

13. Contact

- 13.1 Oscar Rushton at the Ministry of Justice Telephone: +447412912003 or email: oscar.rushton@justice.gov.uk can answer any queries regarding the instrument.