EXPLANATORY MEMORANDUM TO

THE CRIMINAL JUSTICE ACT 2003 (SUITABILITY FOR FIXED TERM RECALL) ORDER 2024

2024 No. 408

1. Introduction

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

2. Declaration

2.1 The Right Honourable Edward Argar MP, Minister of State, at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Claire Fielder, Director for Youth Justice and Offender Policy, at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Sam Lynch, Recall Policy Team Lead, Prison Demand and Release policy, at the Ministry of Justice can be contacted with any queries regarding the instrument: Sam.Lynch@justice.gov.uk.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This Instrument amends the test applied to offenders serving a determinate sentence of under 12 months prisoners recalled to custody which determines whether they qualify for automatic re-release ("fixed term recall") or are liable to be detained until the end of their sentence, subject to re-release by the Secretary of State or Parole Board ("standard recall"). The test is being amended to mandate the application of fixed term recall for offenders who are aged 18 or over at the point of recall and serving a sentence of less than 12 months. This does not apply to offenders who are managed at level 2 or 3 under the Multi Agency Public Protection Arrangements ("MAPPA") and those who have been charged with a serious further offence; such offenders will continue to be considered for automatic release only if the Secretary of State is satisfied that the person will not present a risk of serious harm to members of the public if released at the end of their fixed term recall.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

5.1 Recall is a preventative measure that is available to the Probation Service to bring an offender managed in the community, following release from prison, back to custody. This measure is used when offenders released from custody on licence breach their licence conditions, for example for failing to keep in touch, missing their curfew, being under the influence of alcohol or failing to reside at their agreed residence, they can be recalled to prison. When recalled, offenders will either be issued a fixed term recall of 14 (where serving a sentence of under 12 months) or 28 days (where serving a sentence of over 12 months), after which they are released automatically; or a standard recall, after which release may be directed only by the Parole Board or the Secretary of State. Under a standard recall an offender may be held in custody on recall to the end of their sentence.

5.2 Until 2003, prisoners released early on licence could be recalled to prison by the Secretary of State following a recommendation to do so by the Parole Board for longer-term sentenced prisoners. For short-term sentenced prisoners, magistrates' courts could suspend licences and order an offender's recall for a period not exceeding six months. The Criminal Justice Act 2003 dispensed with the distinction between long-term and short-term prisoners, and under section 254 introduced a power for the Secretary of State to revoke an offender's licence and recall him or her to prison without reference to the Parole Board. This change to recall powers coincided with changes to sentencing, which resulted in offenders serving standard determinate sentences being released automatically at the half-way point of their sentence and remaining on licence (and so liable to recall) until the end of their sentence. This has now been changed (under the Police, Crime, Sentencing and Courts Act 2022) to ensure that serious offenders do not get released automatically at the halfway point and must serve a minimum of 2/3rds of their sentence in custody.

5.3 Fixed term recall (for 28 days) was introduced in 2008, when only an offender serving a sentence of more than 12 months' imprisonment was subject to licenced supervision upon release. In 2014, the Offender Rehabilitation Act introduced licensed supervision upon release for offenders serving a sentence of less than 12 months' imprisonment, with the distinction that FTR must be for 14 days for this cohort. This significantly increased the number of people who could be recalled.

5.4 The average time spent on recall has increased by around half since 2017. This is due to a number of factors including, serious further offences, changes to offender behaviour and risk profiles and overall capacity constraints across the Criminal Justice System meaning release considerations can take longer. For example, the average time offenders spend behind bars increased by almost 50% over the last 10 years,

5.5 This order would mandate a 14-day fixed term recall, in cases where probation determines that recall is necessary, for offenders serving sentences of less than 12 months, excluding:

- Offenders managed under MAPPA levels 2 and 3. This includes cases involving offenders deemed a high or very high risk of harm to others, and offenders deemed to pose the highest risk of causing serious harm or whose management is so problematic that multi-agency co-operation and oversight at a senior level is required with the authority to commit exceptional resources. These cohorts are excluded to ensure this measure continues to protect the public.

- Offenders who have been charged with a serious further offence whilst on probation. These are specific violent and sexual offences such as murder, manslaughter, kidnapping, false imprisonment, rape and other offences under Schedule 18 of the Sentencing Act 2020. This cohort will be excluded as our top priority is public protection.
- Offenders under the age of 18 at point of recall who are serving sentences of less than 12 months. Offenders under 18 years old almost always serve Detention and Training Orders and if they breach the conditions of these orders they will return to court for a decision regarding recall – it is not a Secretary of State discretion. Children who could be affected by this order would be those sentenced under Section 250 of the Sentencing Code (youths convicted of certain serious offences) and receive a custodial sentence of under 12 months, however this would only happen in very rare cases where there were significant mitigations (e.g., significant learning disabilities) which reduce the sentence length. Given these are very rare cases, we consider it would be in the youth offender population's best interest to retain all options for recall in order to respond appropriately to the individual child's risk and consider what length of recall would best support the child's rehabilitation. Custody is regarded as the last resort for children, which means that children in youth custody have generally committed a serious offence and are generally high risk.

5.6 The scope of this order is limited to offenders serving sentences of less than 12 months for mandatory fixed term recall. For those serving short sentences of less than 12 months, there is often too little time to have a parole review prior to the end of their sentence, meaning that once an offender is recalled to custody, they are often released at the end of their sentence without a licence period and therefore without any support and supervision. Releasing them quickly following a fixed term recall will mean they are back out in the community with effective support and supervision for the remainder of their short sentence unless they need to be recalled again. Offenders serving under 12 months are lower-level offenders for which a 14-day recall period and automatic release on licence is appropriate and proportionate.

5.7 This order will reduce demands on parts of the Criminal Justice System. At the same time, it will enable offenders to access support to aid their rehabilitation and thereby reduce the likelihood of reoffending and therefore contribute to reducing crime.

5.8 This Order has retrospective application and so will apply to those already recalled. This process will be managed by the local prison and probation services, and so that they can be safely managed in the community. They can be recalled again if it is deemed necessary.

What was the previous policy, how is this different?

5.9 Currently, the legislation provides a test to determine whether a fixed term recall or a standard recall is appropriate when an offender breaches their licence conditions and is recalled back to custody. The test provides that fixed term recall is only suitable if it is assessed that the offender would not present a risk of serious harm at the end of this period (14 days for sentences under 12 months and 28 days for sentences of 12 months or more). For standard recall, release may only be directed by the Parole Board or the Secretary of State. This can mean people are held in custody on recall to the end of their sentence.

5.10 The difference in the new policy is that it removes the possibility of standard recall for a limited cohort of offenders (those 18 or over, serving a sentence of less than 12

months, not charged with a serious further offence or managed under MAPPA levels 2 and 3). This will provide for the automatic release on licence of such offenders after 14 days. They would still be subject to further recall. Those not in scope of these changes will continue to be considered as under the current test.

6. Legislative and Legal Context

How has the law changed?

6.1 Sections 255A to 255C of the 2003 Act provide for the release of prisoners after recall. There are two different releases from recall schemes under these provisions. Under section 255B recalled prisoners are automatically released after 28 days imprisonment (14 days if the sentence is less than 12 months). Recalled prisoners not suitable for automatic release are released under section 255C and are liable to imprisonment until the end of their sentence unless re-released earlier by the Secretary of State or the Parole Board. Section 255A identifies which process will apply to a prisoner and section 255A(4) sets out the test for suitability for automatic release.

6.2 Sections 255A to 255C of the 2003 Act were originally inserted into the Act by the Criminal Justice and Immigration Act 2008 ("the 2008 Act") and then replaced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The 2008 Act first introduced the concept of a fixed term recall and the test as to which recall was appropriate. Prior to the 2008 Act all recalled offenders were liable to be detained until the end of sentence. The test as to which recall applied has remained unchanged since 2008.

6.3 The power to amend the test under section 256AZB was inserted by the Police, Crime, Sentencing and Courts Act 2022 and has not previously been used.

6.4 Provisions in section 256AZB of the Criminal Justice Act 2003 gives a power under the affirmative procedure for the Secretary of State to change the test for release following recall, in deciding under section 255A whether a person in suitable for automatic release from prison, and for that to be applied retrospectively.

6.5 The current test under section 255A(4) is that fixed term recall only applies if the Secretary of State is satisfied that the person will not present a risk of serious harm to members of the public if released at the end of the automatic release period. This instrument amends that test so that offenders who are 18 or over at the point of recall serving a sentence of less than 12 months who are not managed at level 2 or 3 under Multi Agency Public Protection Arrangements (MAPPA) and have not at point of recall been charged with a serious further offence must be given a fixed term recall. Offenders who do not automatically qualify for automatic release will be considered under the current test, which remains unchanged. This order will be applied retrospectively to eligible offenders (per the above criteria) who are currently in custody on recall, who have served 14 days of their recall.

Why was this approach taken to change the law?

6.6 The power was enacted to allow for such a change to be made by affirmative SI. Changing the test for fixed term recall can only be achieved through legislation. We considered whether we could achieve a similar behavioural change without legislation but concluded that it would not be possible to do so.

7. Consultation

Summary of consultation outcome and methodology

7.1 No consultation exercise has been conducted.

8. Applicable Guidance

8.1 Updates to operational guidance is being drafted and will be provided to prison staff as is usual process.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because it refers to secondary legislation which will not meet the £5m a year threshold required for a full impact assessment.

Impact on businesses, charities and voluntary bodies

9.2 The impact on business, charities or voluntary bodies would mean an increase in support necessary from charity and voluntary organisations to support those in the community, who would otherwise be in custody.

9.3 The legislation does not impact small or micro businesses.

9.4 The impact on the public sector would be an increased workload for the probation service. Although this will reduce the burden on the prison estate, probation officers will be managing additional offenders within the community.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is through recorded recalls and probation reporting. The numbers of prisoners recalled quarterly offender management statistics will be published on gov.uk.

10.2 The instrument does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Minister of State, the Right Honourable Edward Argar MP, has made the following statement regarding Human Rights.

"In my view the provisions of the Criminal Justice Act 2003 (Suitability for Fixed Term Recall) Order 2024 are compatible with the Convention rights".

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").