POLICY NOTE

THE EARLY RELEASE OF PRISONERS (SCOTLAND) REGULATIONS 2025

SSI 2025/XXX

The above Regulations are made in exercise of the powers conferred on the Scottish Ministers by section 3C of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as introduced by section 11 of the Bail & Release from Custody (Scotland) Act 2023).

These Regulations are made under the affirmative procedure and are subject to an expedited process, as agreed by Parliament. These Regulations are being made as the Scottish Ministers are satisfied that the early release of prisoners authorised by these Regulations is necessary and proportionate, for the purpose of protecting: (a) the security and good order of prisons; and (b) the health, safety or welfare of prisoners, or those working, in any prison.

Summary Box

The purpose of this statutory instrument is to make provision using the powers conferred on the Scottish Ministers by section 3C of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") (as introduced by Section 11 of the Bail & Release from Custody (Scotland) Act 2023 ("the 2023 Act")), to release certain categories of persons early from prison and young offenders institutions.

Eligibility for release will be limited to those who are sentenced to less than four years in prison custody, who are due to be released within 180 days of certain dates between November 2025 and April 2026, and who are not automatically excluded by the provisions listed below, or by the Governor veto process.

Releases will take place across a six month period, through an initial sequence of three fortnightly release tranches (11 to 13 and 25 to 27 November, and 9 to 11 December 2025), followed by monthly release tranches at the end of January, February, March and April 2026.

Further details are provided below at 'Regulation 3'.

Section 3C(6) of the 1993 Act makes provision to exclude certain persons from early release under the Regulations, including but not limited to those serving a life sentence and those serving a sentence for a domestic abuse offence or subject to sexual offender notification requirements.

Additional criteria have been agreed as part of the Regulations in order to enhance public protection. Those additional criteria are in addition to the existing statutory exclusions set out in section 3C(6) and exclude individuals who have served a sentence for an offence aggravated under section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, or who have served a sentence of imprisonment or detention for an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018 from being released under this power. These exclusions will apply only where the associated conviction is <u>not spent</u> as per the Rehabilitation of Offenders Act 1974 at the time they would otherwise have been eligible for release under the Regulations. Where an individual's conviction becomes

spent during the release process, they will become eligible for release under it. Additionally, individuals who are subject to a non-harassment order will also be excluded.

The early release of a person under these Regulations is also subject to the prison governor's power to prevent release under section 3C(5)(b) of the 1993 Act, where the governor considers that the person would, if released, pose an immediate risk of harm to an identified person, or to an identified group of people.

Policy Objectives

The policy intent underpinning this SSI is to set out regulations for the emergency release of a group of prisoners under section 3C of the 1993 Act.

Ministers consider this action to be necessary and proportionate in response to the immediate risks across the prison estate as a result of the high prison population. These risks are exacerbated by the increasingly complex population, as a result of the growing number of prisoners with links to serious and organised crime, sex offenders, and prisoners with additional needs who require particular support or accommodation.

The Scottish Prison Service (SPS) has reported that up to ten prisons have been operating in active 'red' status across a sustained period of time, due to these concerns. This means the majority of prisons are not able to provide a fully functioning regime, with increased risks to the safe operation of the prison estate, and the SPS' ability to provide a safe environment for those living and working in Scottish prisons.

This includes challenges in providing proper access to appropriate activities and rehabilitative programmes, and the operation of key prison functions, like prisoner visits. There is also increased risk to the appropriate delivery of healthcare services, the maintenance of good order amongst those held in custody, and a decline in the acceptable working conditions for staff within prisons.

Since the previous use of the emergency early release powers in June and July 2024 (and the introduction of the Prisoner (Early Release) (Scotland) Act 2025), SPS has undertaken measures to maximise capacity across the prison estate. However, in the light of the continuing increase in the prison population, the prison estate is now significantly overcrowded, and has extremely limited capacity to respond to any further increases in population, or any resilience capacity to respond to larger scale, or more complex, operational emergencies.

As such, it is Ministers' view that these circumstances satisfy the conditions set out in section 3C of the 1993 Act for Ministers to instruct the early release of prisoners. Specifically, that the continued high prison population is resulting in an emergency situation across the prison estate which places at significant risk (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.

Releases have been scheduled into tranches (three fortnightly tranches in November-December, followed by monthly tranches in January-April) in order to: provide certainty for those due to be released; to ensure reasonable pre-release planning can take place between the Scottish Prison Service and community partners; to mitigate the impacts of the release process on community and public services; to facilitate the notification of any individual registered

with the Victim Notification Scheme in relation to a prisoner whose release date is changed; and to ensure releases happen timeously to reduce the prison population.

Operating the emergency early release process for six months will maintain the planned reduction in prison population – and with that, improved conditions for prisoners and prison staff – for as long as is permitted under legislation. This reflects Ministers' views that the emergency situation will last at least that long, based on prison population projections.

Maintaining the process will also give SPS management greater flexibility to plan and deliver any changes to prison estate or the distribution of prisoners which could improve conditions, where practicable.

These Regulations set out the eligibility criteria which will define the cohort of prisoners who will be eligible for release (alongside the statutory exclusions already set out in section 3C(6) of the 1993 Act).

It also sets out the structure and timing for the release process, with a staged process of releases to take place between November 2025 and April 2026. The latest release date under the regulations is 30 April 2026.

The Regulations are structured as follows:

Regulation 1 provides for the commencement and interpretation of these Regulations;

Regulation 2 specifies the class of persons who are to be released early from prison;

Regulation 3 makes provision for the calculation of the date of release; and

Regulation 4 makes provision in relation to prisoners whose previous conviction for certain domestic abuse offences (which made them ineligible for release) becomes spent during the release process.

Regulation 1: Citation, commencement and interpretation

These Regulations come into force on 10 November 2025, subject to Parliamentary approval.

The Regulations will apply to all prisons, including contracted out prisons, and young offenders institutions.

These Regulations will not apply to any institutions which are not part of the Scottish prison estate. This is because the emergency is being experienced in the prison estate and cannot therefore include any wider institutions which are not part of the Scottish Prison estate.

Individuals who have been released from prison on a Home Detention Curfew licence (HDC) at the point that these Regulations come into force, will be required to complete the agreed period on HDC they have begun (and will not be considered for emergency early release). Given that the basic eligibility criteria for HDC is similar to that of the EER process, it is to be expected that fewer individuals will apply for and be granted HDC whilst the EER process is operating.

The latest date that a person can be released under the Regulations is set out in regulation 1 as 30 April 2026.

Regulation 2: Class of persons who are to be released early

Regulation 2 specifies the class of persons who are to be released early from prison. Only individuals sentenced to less than four years imprisonment or detention will be eligible for release under the Regulations.

To be eligible for release in the tranches in November and December 2025, an individual must have been serving their sentence on 20 October 2025 and be due to be released within the 180 days following the date on which these Regulations come into force.

To be eligible for release in the tranche in January 2026, an individual must have been serving their sentence on 15 December 2025 and be due to be released within the 180 days following 26 January 2026.

To be eligible for release in the tranche in February 2026, an individual must have been serving their sentence on 30 January 2026 and be due to be released within the 180 days following 23 February 2026.

To be eligible for release in the tranche in March 2026, an individual must have been serving their sentence on 27 February 2026 and be due to be released within the 180 days following 23 March 2026.

To be eligible for release in the tranche in April 2026, an individual must have been serving their sentence on 27 March 2026 and be due to be released with the 180 days following 27 April 2026.

The early release of persons under these Regulations is subject to the prison governor's power to prevent release under section 3C(5)(b) of the 1993 Act where there would be a known risk to an identified individual or group, were the individual to be released early under this process. This may include a potential risk to the individual themselves, for example due to a temporary physical or mental health issue.

Section 3C(6) provides that the following persons are excluded from release under regulations made under section 3C:

(a) a life prisoner,
(b) an untried prisoner,
(c) a terrorist prisoner within the meaning of section 1AB,
(d) due to serve a terrorism sentence within the meaning of section 1B but, by virtue of that section, is not yet serving it,
(e) liable to removal from the United Kingdom for the purposes of section 9,
(f) subject to a supervised release order under section 209 of the Criminal Procedure (Scotland) Act 1995,
(g) serving a sentence passed under section 210A of that Act (extended sentences for sex, violent and terrorist offenders),
(h) the subject of proceedings under the Extradition Act 2003,

(i) subject to the notification requirements of Part 2 of the Sexual Offences Act 2003,
(j) serving a sentence of imprisonment or detention for an offence—
(i) that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,
(ii) under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
(iii) under section 7(1) or 17(1) of the Domestic Abuse (Protection) (Scotland) Act 2021,
(k) a long-term prisoner, unless that prisoner has been recommended for release by the Parole Board at the date on which the regulations are made.

Additional exclusions have been introduced as part of these Regulations, specifically to exclude those who:

(i) have served, a sentence of imprisonment or detention for an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, the conviction for which is not spent for the purposes of the Rehabilitation of Offenders Act 1974;
(ii) have served, a sentence of imprisonment or detention for an offence under section 1(1) of the Domestic Abuse (Scotland) Act 201, the conviction for which is not spent for the purposes of the Rehabilitation of Offenders Act 1974;
(iii) are the subject of a non-harassment order imposed under section 234A of the Criminal Procedure (Scotland) Act 1995 or section 8 or 8A of the Protection from Harassment Act 1997.

Regulation 2 also makes provision that anyone who is sentenced to a term of imprisonment or detention on or after 28 March 2026 is not eligible to be released as part of the release process under these Regulations.

Regulation 3: Calculation of the date of release

Regulation 3 makes provision for the calculation of an eligible individual's date of release under these Regulations.

Release is provided for in phases in order to provide certainty for those due to be released, to provide a reasonable period for release planning to take place for those involved so that services can be aligned with release, to facilitate the notification of individuals (led by SPS) who are registered with the Victim Notification Scheme, and so there is not an unmanageable number of prisoners becoming eligible and having to be released over a very short timeframe.

The proposed timescale for the release process is for releases to be made in two stages, with an initial sequence of three fortnightly release tranches. These will take place on 11 to 13 and 25 to 27 November, and 9 to 11 December 2025. Eligibility for release in these tranches is set by regulation 2 (described above). This will be followed by monthly release tranches lasting for three days each at the end of January, February, March and April 2026. Eligibility for release in these tranches is set by regulation 2 (described above).

The eligible cohort for each tranche will be fixed in advance of the actual release tranche, in order to allow a sufficient lead time for SPS to complete the assessment for the governor

veto, and then to notify the individuals, notify relevant external services and victims registered with the Victim Notification Scheme or Victim Information Scheme (together "VNS"), and conduct pre-release planning wherever practicable.

SPS will decide which day within the relevant three-day period an eligible individual will be released, in order to safely manage the overall release process, and to support the needs of the individual wherever practicable.

Where an individual was due to be released within a particular release tranche but that release did not take place, then that person is to be released as soon as reasonably practicable. This would be intended to be the next available release tranche or, if earlier, at the date that their sentence was otherwise due to come to an end. If released under the release process in these Regulations, that individual must be released no later than the last release date set out in regulation 1 as 30 April 2026.

Regulation 4: prisoners whose previous conviction for certain domestic abuse offences (which made them ineligible for release) becomes spent during the release process

Regulation 2 excludes individuals from eligibility for release under this release process if they have an unspent conviction for a domestic abuse offence. Regulation 4 provides that if that unspent conviction becomes spent during the release process, they become eligible for release under the process. Regulation 4 provides that they are to be released as soon as reasonably practicable and no later than the latest release date. It is expected that any individual to whom this applies would be released in the next available release tranche.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

The Scottish Ministers have made the following statement regarding children's rights.

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, the Early Release of Prisoners (Scotland) Regulations 2025 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

The emergency release aspect of this instrument is not relevant to the Scottish Government's policy approach to maintain alignment with the EU.

Informing victims registered with the VNS of a change in an individual's date of release will ensure ongoing alignment with Directive 2012/29/EU (Victims Rights Directive)[1], which strengthened victims' rights to information, support and protection. This includes at Article 6(5) an obligation on Member States to ensure that victims are offered the opportunity to be notified, amongst other things, of an offender's release.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029

Consultation

To comply with the requirements of the standard parliamentary approach to introducing new legislation in Scotland a detailed public consultation was undertaken in the development of the Bail and Release from Custody (Scotland) Act 2023. 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.

A full list of those consulted, including on the sections pertaining to this policy note – are set out in the public consultation in 2021[2] and the SG's formal response in 2022[3].

In respect of the laying of this SSI and the Regulations outlined therein, engagement has been ongoing with a number of key operational delivery partners to support the planning and delivery of an emergency release process, should Parliament approve it.

This development work will include liaison with public and third sector stakeholders whose activities include support for prison leavers, to examine how an emergency release process would impact on their activities, and how they could adjust to provide the necessary support.

It will also involve engagement with VSOs, to ensure that the victim notification and information schemes function in a -trauma informed matter, and also to ensure that the Government considers the impact on victims and VSOs in implementation plans to better ensure the needs of these groups were met.

Impact Assessments

Impact assessments were conducted prior to the passage of the Bail and Release from Custody (Scotland) Act 2023 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)

For the laying of this SSI the following impact assessments have been undertaken:

- Business and Regulatory Impact Assessment (BRIA)
- Equalities Impact Assessment (EQIA)
- Data Protection Impact Assessment (DPIA)
- Children's Rights and Wellbeing Impact Assessment (CRWIA)
- Island Communities Impact Assessment (ICIA)
- Fairer Scotland Duty Assessment (FSD)

[2] https://www.gov.scot/publications/consultation-bail-release-custody-arrangements-scotland/
[3] https://consult.gov.scot/justice/bailandreleasefromcustody/#:~:text=The%20consultation%20seeks%20views%20on,custody%20is%20used%20in%20Scotland.

Financial Effects

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

While this release process will bring forward release dates of individuals who would be released within the coming weeks/months, it is recognised that there is likely to be an increase in demand for community services during the period of the emergency release process.

As noted above, releasing prisoners in fortnightly, and then monthly tranches, is intended to alleviate that impact to a degree, and there will be a corresponding reduction in demand due to a reduction in liberations for a period once the emergency release process is complete and the regulations cease to have effect.

The Scottish Government will continue to work closely with delivery partners to understand any resource implications.

Scottish Government
Justice Directorate

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