EXPLANATORY MEMORANDUM TO

THE RELEASE OF PRISONERS (ALTERATION OF RELEVANT PROPORTION OF SENTENCE) ORDER 2020

2020 No. 158

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 Offenders sentenced to standard determinate sentences must be automatically released halfway through their sentence, under the provisions of the Criminal Justice Act 2003 ("the 2003 Act"). This Order moves the automatic release point for relevant offenders from the half-way point of their sentence to the two-thirds point of their sentence.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 Section 237(1B) of the 2003 Act includes persons sentenced before a service court. By virtue of sections 384 and 385 of the Armed Forces Act 2006, the Order will apply to those sentenced outside England and Wales by a service court.

3.3 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.4 The Department has reached this view because the purpose of this instrument is to change the automatic release point for certain offenders sentenced to a standard determinate sentence, which is within the devolved legislative competence of the Scottish Parliament and the Northern Ireland Assembly.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

5.1 The Secretary of State, Robert Buckland QC MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 Chapter 6 of Part 12 of the Criminal Justice Act 2003 ("the 2003 Act") is concerned with the release of prisoners on licence.

6.2 Section 244 of the 2003 Act places a duty upon the Secretary of State to release fixed term offenders (that is, those serving standard determinate sentences) on licence once they have served the requisite custodial period. This is known as automatic release.

6.3 Under the provisions of the 2003 Act, all offenders serving standard determinate sentences are automatically released from custody at the half-way point of their sentence and serve the remaining half of the sentence on licence in the community.

6.4 This Order modifies the operation of section 244(3)(a) by changing the automatic release point from half-way to two-thirds of the custodial period for the following offenders:

- those convicted of a relevant violent or sexual offence, defined within the Order as being listed in Part 1 or 2 of Schedule 15 of the 2003 Act for which the maximum penalty is life; **and**
- where the offender has been sentenced to a standard determinate sentence of 7 years or more.

6.5 The Order also modifies the operation of section 264(6)(d), ensuring that the corresponding two-thirds change will also apply to prisoners serving consecutive terms of imprisonment, for any sentence is for a relevant violent or sexual offence for 7 years or more. The power to amend section 267(6)(d) is found in section 267, where the reference to section 264(6)(a)(ii) is being consequentially amended to 264(6)(d) by the Criminal Justice and courts Act 2015 (Consequential Amendments) Regulation 2020.

6.6 Article 5 provides that the Order does not apply to offenders sentenced before the Order comes into force, those under 18 at the time of sentence, or those who receive a sentence under s.236A of the 2003 Act.

6.7 Section 236A of the 2003 Act relates to special custodial sentences for offenders of particular concern, listed in Schedule 18A of the 2003 Act. These offenders are currently referred to the Parole Board at the one-half point for release pursuant to section 244A. Currently, no-one sentenced under section 236A can receive a standard determinate sentence, as section 236A is a mandatory sentence, if life or an extended determinate sentence are not imposed.

7. Policy background

What is being done and why?

7.1 Offenders serving standard determinate sentences are automatically released half-way through their custodial sentence, including those convicted of very serious offences. The objective of this change is to ensure the most serious of these offenders serving

long sentences spend two-thirds of their sentence in custody, bringing their point of release into line with the release provisions for those serving extended determinate sentences (whose earliest point of release, at the discretion of the Parole Board, is the two-thirds point in their custodial term).

7.2 Automatic release from a fixed-term custodial sentence is a long-standing provision. It was first introduced in the Criminal Justice Act 1991 ("1991 Act").

7.3 The 1991 Act created a release framework, under which there was a duty to release short-term prisoners, that is, those sentenced to less than four years, at the half-way point of their custodial sentence. Those sentenced to less than 12 months were released unconditionally. Those sentenced to 12 months or more were to released on licence and subject to conditions and probation supervision in the community (and liable to recall to prison) until the three-quarter point of their sentence.

7.4 Section 33(2) of the 1991 Act required long-term prisoners, that is, those sentenced to four years or more, to be released automatically at the two-thirds point of the custodial period. The 1991 Act also introduced a power to release long-term determinate sentence prisoners from the half-way point, at the discretion of the Parole Board. Upon release, they also remained on licence until the three-quarter point of the sentence.

7.5 The 2003 Act made further changes to the release and licence framework, removing the distinction between the short and long-term prisoners in respect of their automatic release and requiring all determinate sentence prisoners to be released at the half-way point. It also required offenders to serve the whole of the remainder of their sentence on licence, ensuring that offenders would serve the full term of their sentence under supervision, during which they would be able to undertake rehabilitative activity – and could be recalled to prison if they failed to comply with their licence conditions. There is a discretionary power in the 2003 Act to release eligible short-term offenders (those sentenced to less than four years) ahead of the half-way point, subject to an electronically monitored curfew, under the Home Detention Curfew (HDC) scheme.

7.6 The 2003 Act also created new sentences for public protection, since replaced by the Extended Determinate Sentence (EDS) for offenders deemed 'dangerous', which was introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The court may impose an EDS where an offender has committed a specified sexual or violent offence (as listed in Schedule 15 of the 2003 Act) and is assessed to present a future risk to the public through the commission of further such offences. Under the EDS, an offender must be released at the end of their custodial term, but the Parole Board has the discretion to release from the two-thirds point if satisfied that the offender's detention is no longer necessary for the protection of the public. As part of the EDS the court also imposes an 'extension period' that follows the custodial term – which is an extra period on licence (of up to 5 years for violent offenders and 8 years for sex offenders) to manage the assessed future risk to the public.

7.7 The Criminal Justice and Courts Act 2015 introduced a new Sentence for Offenders of Particular Concern (SOPC), which applies automatically to offenders convicted of a specific sexual or terrorist offence (as listed in Schedule 18A of the 2003 Act), where the courts decide the seriousness threshold for applying a life sentence, and the dangerousness threshold for applying an EDS, have not been met. Under these sentences, an offender must be released at the end of their custodial term, but the Parole Board has the discretion to release from the half-way point if satisfied that the

offender's detention is no longer necessary for the protection of the public. As part of the SOPC, a further 12-month licence period is imposed to follow the custodial term, to manage the assessed future risk the offender poses.

7.8 These robust sentences for dangerous and serious offenders ensure that the time they spend in custody reflects the severity of their crimes and takes account of the risk they pose to the public. The additional extension and 12-month licence periods also ensure the sentence remains in force for a 'longer than normal' period for a fixed term sentence – in recognition of the need for ongoing public protection measures following release. While the public can have confidence in the sentences available for these offenders assessed by the courts to be dangerous or of particular concern, automatically releasing other serious sexual and violent offenders at the half-way point does not align with this more robust approach following the introduction of the EDS and SOPC.

7.9 Offenders not deemed dangerous may be convicted of a serious offence, but still be sentenced to a standard determinate sentence. This means that an offender could be convicted of an offence for which the maximum penalty is life, and receive a lengthy sentence, but because the court has determined that they have not met the threshold for 'dangerousness' and to whom the SOPC does not apply, they will automatically be released half-way through their sentence.

7.10 This may be affecting public confidence in sentencing. A recent report by the Sentencing Council found that that nearly three quarters of the public (70%) surveyed thought sentences are too lenient, and almost half of victims did not have confidence in the fairness of the criminal justice system (49%). The report can be found here: https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf

7.11 For the sake of public confidence in the administration of justice, this Order will extend the period that the most serious offenders sentenced to standard determinate sentences will serve in custody.

7.12 Under this policy, the most serious offenders are defined as those convicted of a relevant violent or sexual offence, listed in Part 1 or 2 of Schedule 15 of the 2003 Act, and for which the maximum penalty is life. This is consistent with the way in which serious offenders are defined in statute, being the most serious types of offence about which the public are most concerned, and they have the most damaging impact on victims.

7.13 Requiring offenders in this category sentenced to 7 years or more to be released after serving two-thirds of their sentence more closely aligns the release provisions with similar serious offenders who receive an EDS. They have been given a lengthy sentence to reflect the seriousness of their offence, and, because these are the most serious types of offences with the gravest of consequences, they should therefore serve a greater proportion of their sentence in custody.

7.14 Holding the most serious determinate sentence prisoners in custody until the two-thirds point will ensure the public are protected for longer, through the offenders' incarceration, and enable victims to feel safe for longer. These offenders will still be subject to stringent licence conditions and liable to be recalled to prison for the remaining third of their sentence following release. As this will be a matter of release at a fixed point, not a discretionary decision, victims will continue to have certainty

and be able to prepare accordingly, including through requesting specific licence conditions for their protection (such as exclusion zones and non-contact conditions).

7.15 Prisoners, too, will have the advantage of knowing they will still be released on a determined date, and will have longer in which to focus on rehabilitative activities, and preparing for release and resettlement. Research into the effects of long-term imprisonment published in 2017 found that, while prisoners at the early stages of their sentence found it difficult to accept their sentence and felt they lacked control over their lives, prisoners who were further into their sentence were able to come to terms with what they had done and focus on making the sentence constructive, for example, by learning new skills. A summary of the research may be found at: https://www.compen.crim.cam.ac.uk/PDFs/SwimmingwiththeTideAdaptingtoLongTermImprisonment.pdf

Commencement of the Instrument

7.16 This instrument will come into force on 1 April 2020. It will apply only to those eligible offenders sentenced on or after the date of commencement.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 None.

10. Consultation outcome

10.1 No consultation exercise was conducted.

11. Guidance

11.1 Changes to release provisions will affect the way in which sentences are calculated in prison, in order to determine the correct release date. Guidance on how sentences should be calculated is contained in a policy instruction. This will be updated and circulated to all prison governors and senior probation managers. It will be published on the GOV.UK website at: https://www.gov.uk/government/collections/prison-probation-policy-frameworks on the date this Order comes into effect.

11.2 The Crown Court Compendium is produced and updated periodically by the Judicial College and provides guidance to judges, including on sentencing matters. We will liaise with the Judicial College on how best to reflect these changes to release arrangements in the guidance given to sentencers.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is a significant impact on the public sector.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website www.legislation.gov.uk.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Order does not include a statutory review clause.

15. Contact

15.1 Miranda Wilkinson at the Ministry of Justice Telephone: 07547 968297 or email: miranda.wilkinson1@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Claire Fielder, Deputy Director for Bail, Sentencing and Release Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.