

EXPLANATORY MEMORANDUM TO
THE PRISON AND YOUNG OFFENDER INSTITUTION (CORONAVIRUS)
(AMENDMENT) RULES 2020

2020 No 400

AND

THE OFFENDER MANAGEMENT ACT 2007 (CORONAVIRUS) (APPROVED
PREMISES) (AMENDMENT) REGULATIONS 2020

2020 No 401

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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instruments

- 2.1 The purpose of the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 (“the first instrument”) and the Offender Management Act 2007 (Coronavirus) (Approved Premises) (Amendment) Regulations 2020 (“the second instrument”) (collectively “the instruments”) is to allow prison governors, on behalf of the Secretary of State, to release certain prisoners temporarily to help manage the incidence or transmission of coronavirus and to facilitate the effective running of prisons and young offender institutions for this purpose.
- 2.2 The first instrument gives the Secretary of State the power to direct temporary releases, specifies which prisoners may be released and which prisoners may not be released, and specifies the purposes for which releases may be directed. It also gives the power to add conditions to the release.
- 2.3 The second instrument provides that prisoners released under the new Rules created by the first instrument may be accommodated in Approved Premises.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instruments are both subject to negative resolution procedure and will breach the 21-day rule for laying in Parliament. They will come into force on 6th April 2020. This is emergency legislation in response to the coronavirus crisis where policy has had to be developed at fast pace to respond to an emergent situation within the prison estate. The changes required in the instruments could not have been predicted to lay in time to meet the 21-day rule. The instruments need to come into force the day after making to allow for urgent temporary release of prisoners, where necessary, to allow for the safe running of the prison estate. The immediate need which the instrument will be required to address will likely arise over the coming weeks, so a delay of three

weeks to meet the 21-day rule may contribute to the Department being unable to run safe and decent prisons.

- 3.2 While the Ministry acknowledges the general desirability of observing the 21-day convention, in the current fast-moving circumstances of the spreading coronavirus and the urgent need to ensure prisons can continue to operate safely and protect prisoners and staff, the Ministry's view is that this power needs to be made available the day after the SI is made and cannot be delayed for 21 days.

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)

- 3.3 The instruments do not have any minor or consequential effects outside England and Wales.
- 3.4 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 these instruments 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.
- 3.5 The Department has reached this view because the purpose of these instruments is to allow for the temporary release of prisoners, 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 the instruments is England and Wales.
- 4.2 The territorial application of the instruments is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

6. Legislative Context

Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020

- 6.1 Rule 9 of the Prison Rules 1999 gives the Secretary of State discretionary power to release prisoners temporarily on licence for specified purposes. Rule 5 of the Young Offender Institution (YOI) Rules 2000 makes similar provision for young offenders. This form of release is known as release on temporary licence (ROTL).
- 6.2 The discretionary power is exercised by prison/YOI governors or directors of private prisons on behalf of the Secretary of State.
- 6.3 The specified purposes for ROTL are set out in Prison Rule 9(3) and YOI Rule 5(3). The purposes include, work, training and other activities linked to resettlement, compassionate reasons or accessing medical treatment, and purposes linked to the operation of the criminal justice process.
- 6.4 No changes are being made to Prison Rule 9 or YOI Rule 5.

- 6.5 Section 47(1) of the Prison Act 1952 allows the Secretary of State to make Rules for the regulation and management of prisons and YOIs, and section 47(5) provides that these Rules may allow for the temporary release of those held in prisons and YOIs, other than persons committed in custody for trial or to be sentenced or otherwise dealt with before or by any Crown Court, or remanded in custody by any court.
- 6.6 The first instrument adds a new Prison Rule 9A and a new YOI Rule 5A.
- 6.7 Prison Rule 9A(1) authorises the Secretary of State to make a direction describing specified prisoners, or classes of prisoners, in accordance with the provisions of the new rule, and then to subsequently release those prisoners on coronavirus restricted temporary release (CRTR). YOI Rule 5A(1) makes the same provision for young offenders.
- 6.8 Rules 9A(1) and (2) restrict the making of a direction, and the release of prisoners under such a direction, to periods when a ‘transmission control period’ is in effect. ‘Transmission control period’ is defined in rule 9A(8), via paragraph 5 of Schedule 21 to the Coronavirus 2020 Act – that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health in England, and the Secretary of State for Health and Social Care has made a declaration of risk to that effect. This restricts the validity of the direction to the duration of the coronavirus pandemic.
- 6.9 Prison Rule 9A(2), specifies which prisoners may be released, which is: those serving a standard determinate sentence, with an automatic release date and no Parole Board involvement; and, those committed to custody in default of payment of a sum adjudged to be paid by a conviction, or for contempt of court. Those whose initial release is subject to Parole Board discretion must not be released under this Rule. The following are therefore excluded: those serving indeterminate sentences, extended sentences or sentences for offenders of particular concern; and, offenders serving sentences for terrorist and terrorist related offences listed in Schedule 19ZA to the Criminal Justice Act 2003. New YOI Rule 5A(2), inserted by rule 3(2), makes the same provision for young offenders with the addition that those serving a Detention and Training Order may also be released under this rule.
- 6.10 Prison Rule 9A(2) also specifies the purposes for which eligible prisoners may be released, which are to help control the incidence or transmission of coronavirus, or to facilitate the effective running of prisons and young offender institutions for this purpose. YOI Rule 5A(2) makes the same provision for young offenders.
- 6.11 Prison Rule 9A(3) lists further classes of prisoner excluded from release under the direction. This includes categories of prisoner who are excluded from ROTL under rule 9: those committed to custody for trial or remanded by the courts; those who have committed offences whilst at large following temporary release (unless the Secretary of State determines that to grant release would not undermine the administration of justice); and, those who are being removed from the United Kingdom and who have exhausted their “in-country” rights of appeal against removal. Those who will be subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 (“registered sex offenders”) are also excluded, as are prisoners whose security classification is Category A (males) or Restricted (females and young adults). YOI Rule 5A(3) creates a similar list of exclusions. Young offenders classified as Restricted are not automatically excluded from release but will be subject to case by case assessment.

- 6.12 Prison Rule 9A(4) provides that the Secretary of State's direction under Rule 9A(1) may be made by reference to whatever matters deemed appropriate. This could include, but is not restricted to, named prisons, named prisoners, or a group of prisoners within a specified description. YOI Rule 5A(4) makes the same provision for young offenders.
- 6.13 Prison Rule 9A(5) and (6) provide for setting of release periods and conditions. Rule 9A(7) provides that the prisoner may be recalled at any time, whether or not any conditions of release have been breached. YOI Rules 5A(5), 5A(6) and 5A(7) make corresponding provisions for young offenders.
- 6.14 Rule 2(3), 2(4), 3(3) and 3(4) make consequential amendment to Prison Rule 51 and YOI Rule 55 to ensure breaches committed on temporary release under the direction are classified as offences against discipline.

Offender Management Act 2007 (Coronavirus) (Approved Premises) (Amendment) Regulations 2020

- 6.15 Section 13(2) of the Offender Management Act 2007 allows the Secretary of State to make regulations for the regulation, management and inspection of Approved Premises.
- 6.16 The second instrument makes a consequential change to regulation 4 of the Offender Management Act 2007 (Approved Premises) Regulations 2014, by referring to the temporary release provision created by the first instrument, to allow those released under that provision to be housed in Approved Premises, if required.

7. Policy background

What is being done and why?

- 7.1 Her Majesty's Prison and Probation Service (HMPPS) has taken advice from Public Health England (PHE) on reducing the risks associated with outbreaks of COVID-19 (hereafter referred to as coronavirus) in prisons and the clinical risks to vulnerable prisoners.
- 7.2 Following this advice, the Government has determined that there is a need to put in place mechanisms to allow HMPPS to release prisoners within clearly prescribed limits in order to allow for the safe running of the prison estate during the coronavirus transmission control period. This is part of a package of measures that HMPPS has put in place for managing the prison population which balances the need to protect the public and maintain law and order, with protecting the health and safety of those working and detained in prison. The measures are necessary in order to: delay the spread of coronavirus within the prison system; protect the welfare of staff and prisoners; isolate and manage any prisoners infected; enhance social distancing protocols; reduce the risk of explosive outbreaks associated with closed settings; and, protect those in custody who are within vulnerable groups.
- 7.3 There are existing release provisions which may be used for those in vulnerable groups and others for whom there is a compelling compassionate case to release, including the current ROTL provisions in Prison Rule 9 and YOI Rule 5, but this does not allow for release to meet the current need arising from the coronavirus pandemic.
- 7.4 The new Rules exclude certain classes offenders from release under the direction. Offenders excluded from ROTL owing to their deportation status, or who have

offended whilst previously granted ROTL, are excluded. All offenders whose initial release is subject to a Parole Board decision (which includes those serving life and other indeterminate sentences, serious sexual and violent offenders serving extended sentences or sentences for offenders of particular concern, and those convicted of terrorist or terrorist related offences); and registered sex offenders, are excluded. These offenders remain eligible to apply for ROTL, provided they meet all the relevant eligibility and suitability criteria but, by virtue of the nature of their offending, they are not considered eligible for release under the direction.

- 7.5 The new Rules also exclude offenders who are classed as “Category A”, or ‘Restricted’, unless they are children under 18 years of age. This is because the youth justice system is distinct to the adult system, and a more flexible and tailored approach is needed in determining which children are suitable for release.
- 7.6 The rigorous but lengthy ROTL assessment process will remain in place for ROTL. HMPPS is developing a new assessment process specifically for release under the direction.

Commencement of the instruments

- 7.7 The instruments will come into force on 6th April 2020. This does not mean that releases will commence immediately on that date but means that the power to make directions to begin release will be available as soon as it is needed.

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

- 8.1 The instruments do 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 Guidance on the application and process governing release under the direction will be circulated to all prison governors.

12. Impact

- 12.1 There is no significant impact on business outside of private prisons who are required to process prisoners who are subject to a direction for release on temporary licence; and this will reduce the numbers held in custody. There may be some impact on charities and the voluntary sector who are involved with the release of prisoners.
- 12.2 There is an impact on the public sector as prisons and young offender institutions are required to process prisoners who are subject to a direction for release on temporary licence; and this will reduce the numbers held in custody. Arrangements and support will need to be established in the community for those on temporary licence during the emergency period which may have resource implications for probation services; and

some offenders may require financial or housing assistance or access to other services in the community.

- 12.3 A full impact assessment will be published 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 application and use of release under the direction will be kept under review.

- 14.2 The instruments do not include a statutory review clause.

15. Contact

- 15.1 Chris Potter at the Ministry of Justice Telephone: 0203 334 3112 or email: release.policy@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Amy Randall, 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 Minister of State Lucy Frazer QC MP can confirm that this Explanatory Memorandum meets the required standard.