

**The Prison and Young Offender Institution (Coronavirus)
(Amendment) Rules 2020
&
The Offender Management Act 2007 (Coronavirus) (Approved Premises)
(Amendment) Regulations 2020**

Equality Statement

Purpose of this Document

1. This equality analysis has been undertaken in relation to the End of Custody Temporary Release (ECTR) scheme, which is operating under the Coronavirus Restricted Temporary Release Directions made on 7 April 2020 and 24 April 2020 pursuant to Rules 9A and 5A of the Prison Rules 1999. Rules 9A and 5A were inserted by the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 which came into force on 6 April 2020. The Offender Management Act 2007 (Coronavirus) (Approved Premises) (Amendment) Regulations 2020 ensure that those released on ECTR may be housed in Approved Premises.
2. At the time of making the amendments to the Prison Rules there was a pressing need to provide for a release scheme and the Department considered the likeliest area of possible indirect discrimination, which is in the exclusion from ECTR of the most serious sexual and violent offenders, and those in the highest security risk categories. The assessment then was that this exclusion is not directly discriminatory, as it applies in the same way to all individuals regardless of their protected characteristics. It is the nature of the offence and the seriousness of their offending, and current assessment of risk that determine whether the exclusion applies. The assessment further concluded that, whilst male, minority ethnic and older prisoners might be over-represented in the excluded groups, this would not be likely to result in indirect discrimination as the exclusion is considered to be a proportionate means of achieving the legitimate aim of protecting the public and maintaining confidence in the administration of justice during the management of the impacted of Covid-19.
3. This assessment was offered at the time to support the Secretary of State in fulfilling his duty under the Public Sector Equality Duty (PSED) by having due regard to the equality impact of implementing the Orders.
4. This further analysis assesses the equality impact taking into account the scope of the scheme established under the Directions issued pursuant to the changes to Prison Rules. It assesses the potential equalities benefits and risks that have been identified. It considers the justification for the change and any necessary mitigating actions which have been proposed to reduce the likelihood of the risks, and includes an assessment of any equalities benefits.

Policy Summary

5. The Ministry of Justice and Her Majesty's Prison and Probation Service are implementing measures to limit the spread and impact of Covid-19 in the prison estate, protect the health of staff and prisoners, maintain safety and order, and minimise the impact of the pandemic on the NHS.
6. ECTR is one of these measures, intended to allow more space in prisons to shield and isolate vulnerable individuals by releasing some prisoners where this can be done without

putting the public at risk of harm or undermining their confidence in the criminal justice system.

7. To achieve this objective detailed eligibility criteria have been drawn up based on the Statutory requirements set out in the Orders and Directions, and the policy, which was published on 24 April¹. To be eligible for ECTR:

Prisoners must:

- be serving a standard determinate sentence with an automatic release point or have been committed to custody for fine default or contempt (*such prisoners also have an automatic release point*); and
- be within 61 days of their automatic release point; and
- have already served at least half the custodial term they were sentenced to; and
- have a low or medium assessed Risk of Serious Harm level; and
- have suitable accommodation where the property owner agrees to the installation, charging and maintenance of any devices to support electronic monitoring (those released on ECTR are subject to electronic monitoring); and
- have healthcare needs, including any Covid-19 considerations, that can be safely managed post-release

Prisoners must not be:

- subject to initial Parole Board release (which includes Indeterminate Sentenced Prisoners (life and IPP), extended sentence prisoners, those sentenced for serious offences of particular concern (SOPCs), and terrorist offenders who will be released under section 247A of the Criminal Justice Act 2003); or
- registered sex offenders (including those who are currently on the register, and those who will be subject to the notification requirements and signing the register on release); or
- adults who are category A prisoners and Restricted Status prisoners (*these are the highest security levels for prisoners*); or
- children or young people serving a sentence for one of the offences listed in Annex D to the published policy (*these extra exclusions for serious drug offences are because children and young people are subject to a different system of security categorisation*); or
- remand prisoners and those committed to custody for trial or sentencing or to be otherwise dealt with by a Court (*i.e. those whose liberty is a matter for the court*); or
- those being deported who have exhausted in- country appeal rights; or
- those who have committed an offence whilst unlawfully at large from release on temporary licence (*other than in exceptional circumstances*); or
- eligible for multi-agency public protection arrangement (MAPPA) management on release; or

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881061/end-custody-temporary-release.pdf

- serving a sentence of any length for any of the violent or sexual offences specified in Schedule 15 of the Criminal Justice Act 2003, or one on the list of further violent and sexual offences set out in Annex A to the published policy; or
 - serving a sentence of four or more years' imprisonment for an offence on the 'Possession of weapon offences' list set out at Annex B to the published policy; or
 - serving a fixed term, standard or HDC recall; or
 - identified as posing a risk of domestic abuse or a concern related to child safeguarding; or
 - assessed as posing a risk to national security if released; or
 - serving a sentence for a Covid-19-related offence, for example an offence under the Coronavirus Act 2020 or a conviction for theft of medical supplies intended to tackle Covid-19; or
 - subject to any outstanding charges, or have been referred to the police or the Independent Adjudicator
8. There is no right or presumption to release or to be considered for release under ECTR. The purpose of the scheme is solely to create headroom as described above for a time limited period linked to Covid-19, it is not for the prisoner's benefit or welfare. There are existing temporary release provisions in Prison Rule 9 and YOI Rule 5 which may be used for those in vulnerable groups and others for whom there is a compelling compassionate case to release.
9. Prisoners released on ECTR can be recalled at any time. Given the proximity to their automatic release date, it is not expected that those released on ECTR will be recalled unless this is necessary to protect the public. It is expected that they will move from ECTR to a period of supervision on licence at the automatic release date, just as they would on release from prison.

Ministry of Justice and the Public Sector Equality Duty

10. Section 149 of the Equality Act 2010 ("the EA") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:
- Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the EA;
 - Advance equality of opportunity between individuals (those who share a relevant protected characteristic and those who do not); and
 - Foster good relations between individuals (those who share a relevant protected characteristic and those who do not).
11. The 'due regard' duty relates to the nine protected characteristics specified in the EA:
- Race (ethnicity)
 - Sexual Orientation
 - Marriage/Civil Partnership
 - Gender Reassignment
 - Disability
 - Age

- Gender (sex)
- Religion or Belief
- Pregnancy/Maternity

Sources of Information

12. This analysis is based only on published data sources. The available data does not permit the analysis of all protected characteristics and there are no published data that allow an exact assessment of which individuals in the prison estate will and will not be affected by this policy; eligibility criteria include characteristics that are not captured in published data and ultimately releases will be determined on a case-by-case basis, albeit against clearly laid out, strict criteria.
13. The main sources of information used for this analysis are: data on CJS outcomes (specifically sentencing) by age, sex and ethnicity in the annual *Criminal Justice Statistics Quarterly*² covering the 2018 calendar year, which is published every May; and, data on prison population by age, sex and ethnicity in the prison population annual snapshot (as at June 2019), which is published in the January to March 2019 quarterly publication by in the *Offender Management Statistics*³.
14. Although both schemes differ from ECTR in their purpose, eligibility criteria and operation; because they are also discretionary prisoner release schemes, we have considered quarterly data on releases on temporary licence (ROTL) and home detention curfew (HDC), which are also published in the October to December *Offender Management Statistics* publication.

Affected Groups

15. Given the broad range and type of eligibility and exclusion criteria for ECTR it is not possible accurately to draw one picture of the cohorts of prisoners who will be eligible or excluded from the scheme using published data.
16. To establish a suitable proxy to measure “eligibility”, the most recent annual published sentencing data can give a reasonable assessment of any disproportionality that may exist between eligible and non-eligible groups as represented in those that were sentenced to immediate custody in 2018. This is imperfect as the available data does not reflect all the eligibility criteria, nor does it focus directly and solely on those who might be eligible, i.e. at the appropriate point in sentence. It does, however, allow us to consider the potential impact of some key eligibility criteria, such as sentence type (e.g. determinate sentences), offence group, sentence length and offence.
17. Published data on those released on ROTL or eligible for release and released on HDC are also considered by protected characteristics, where possible and available, although this data is more limited in terms of how it can be broken down to match the ECTR criteria.
18. Appropriate published data is not available on other aspects of the eligibility criteria; such as those whether the offender has a safe and verifiable place to go, or presents a specific

² <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2018>

³ <https://www.gov.uk/government/collections/offender-management-statistics-quarterly>

level of risk of serious harm, though these are also relevant criteria in both HDC and ROTL.

Criminal Justice Statistics

19. To get a reasonable comparable population for the affected group, the number of adult offenders sentenced to immediate custody in 2018 was used (77,485), then where the data allowed, the exclusion criteria (or near enough proxy) was applied to establish an “affected group” (which would have been a cohort of people who may have been eligible for ECTR, and a group of people who would have possibly been excluded. Any sentence type other than fixed-term sentences (e.g. extended determinate, SOPC and indeterminate sentences), anybody sentenced for an offence in the *sexual offences* offence group, or the *Possession of Weapons* offence group *where the person is sentenced to 4 years or more*, and any offence listed in the Schedule 15, 15A and 18 were not considered eligible. Further criteria, such as some additional drug offences, are included in the youth cohort. Given the complexities of the ECTR criteria and the difficulty therefore in precisely identifying the affected group using published data for the calendar year of 2018, numbers are rounded to the nearest 100 to provide an approximation.
20. This gave a representative sample of approximately 54,000 adults who may have met the eligibility criteria under the policy at any point in time, albeit with the caveats set out at para 15 to 18 above.
21. The same approach was taken for children sentenced to immediate custody. In 2018, 1,391 children received immediate custodial sentences. With the application of the exclusion criteria discussed above, this gives a representative sample of approximately 600 children who may meet the eligibility under the policy at any point in time, albeit with the caveats set out at para 15 to 18 above.

Sex

Adult sentences:

	Potentially eligible for ECTR	Probably Excluded from ECTR	Total Sentenced to Immediate Custody
Male	90%	94%	92%
Female	10%	6%	8%
Total	53,500	23,400	76,900

Youth sentences:

	Potentially eligible for ECTR	Probably Excluded from ECTR	Total Sentenced to Immediate Custody
Male	96%	96%	96%
Female	4%	4%	4%
Total	600	800	1,400

22. For the adult sentenced cohort, the data in these tables indicates that males are proportionately more likely to be excluded and less likely to be eligible than females. This is probably due to the type of offences that females typically commit (less violent and sexual) than males. Males and females are equally represented in the potentially eligible and probably excluded cohorts of youth sentences.

Age

Adult Sentences:

	Potentially eligible for ECTR	Probably Excluded from ECTR	Total Sentenced to Immediate Custody
18-20	7%	8%	7%
21-24	13%	13%	13%
25-29	19%	19%	19%
30-39	36%	32%	35%
40-49	18%	16%	17%
50-59	6%	7%	7%
60+	2%	4%	2%
Total	54,000	23,500	77,500

Youth Sentences:

	Potentially eligible for ECTR	Probably Excluded from ECTR	Total Sentenced to Immediate Custody
12-14	4%	7%	5%
15-17	96%	93%	95%
Total	600	800	1,400

23. In most of the age ranges for adult sentences, there is little deviation from the total sentenced to immediate custody in either the eligible or excluded cohorts, except in the 30-39 group (the most common age-range for those sentenced to custody in 2018) and the 60+ group. Those aged 30 to 39 appear to be disproportionately represented in the potentially eligible group. It is not clear why this should be although the deviation is slight and slight deviations the other way in other groups (i.e.18-20, 50 to 59 and 60+) necessarily impacts. Those aged 60 years old or more show the greatest deviation and are disproportionately represented in the probably excluded group which might reflect the high number of older prisoners serving sentences for sexual offences. As noted above, there are existing temporary release mechanisms available for offenders extremely vulnerable to Covid-19, some of whom will be elderly.

24. The vast majority of custodial youth sentences are given to children aged 15-17 years old, 12-14 year olds are slightly underrepresented in the potentially eligible cohort compared to the probably excluded cohort.

25. Overall, the data on the numbers serving adult and youth sentences suggest that the latter are considerably more likely to be excluded from ECT (i.e. around 70% of adult sentences to immediate custody have been judged as potentially eligible compared to only 43% of youth sentences to immediate custody). This disproportionality is likely driven by the

differing composition of offences that individuals in the youth and adult estate have been sentenced for. For example, 18% of youth custodial sentences in 2018 were for robbery compared to just 3% of adult custodial sentences. It may also reflect the slight variation in one aspect of the eligibility criteria. Those in the adult estate given the security classification of “Category A” or “Restricted” are excluded from ECTR. This classification system does not operate in the youth estate and specified drugs convictions are used as an eligibility criterion instead.

Ethnicity (where known)

Adult Sentencing:

	Potentially eligible for ECTR	Probably Excluded from ECTR	Total Sentenced to Immediate Custody
White	79%	80%	79%
Black	10%	10%	10%
Asian	6%	6%	6%
Mixed	3%	3%	3%
Chinese and other	1%	1%	1%
Total	36,200	13,200	49,400

Youth Sentencing:

	Potentially eligible for ECTR	Probably Excluded from ECTR	Total Sentenced to Immediate Custody
White	62%	54%	57%
Black	27%	29%	28%
Asian	6%	7%	6%
Mixed	6%	8%	7%
Chinese and other	0%	2%	1%
Total	400	500	900

The adult sentencing data shows almost no deviation from the proportion sentenced to immediate custody by ethnic group in either the potentially eligible or probably excluded cohorts. This suggests that it is unlikely that the ECTR exclusion criteria exclude any ethnic group disproportionately. For youth sentences, white children appear to be overrepresented in the potentially eligible group whilst children in the Black, Mixed, Chinese and Other ethnic groups are slightly underrepresented, though numbers are small and so should be interpreted with caution.

Offender Management Statistics: releases on ROTL and HDC

Release on temporary Licence (ROTL) is overwhelmingly used as a resettlement tool, to allow prisoners to take part in activities to prepare for release, for example to work or maintain family ties. Home Detention Curfew (HDC) allows for the early release of certain prisoners serving sentences of less than 4 years in order to facilitate the transition from

custody to community whilst subject to an electronically monitored curfew. The purpose, criteria and operation of HDC and particularly ROTL differ from ECTR but each is a discretionary release scheme and so relevant data has been reviewed in order to offer some, limited indication of how release decisions might be made on ECTR. This is to attempt to compensate for the fact that the sentencing data cannot take any account of some of the ECTR criteria, for example, availability of suitable accommodation and assessed risk, whilst such factors are taken into account in HDC and ROTL decisions.

ROTL releases by Sex

A higher proportion (9%) of females are released on ROTL than their representation in the prison population serving determinate sentences (5%), resulting in males representing a lower proportion than in the same population (91% compared to 95%). ROTL is subject to rigorous risk assessment and this may therefore reflect offence mix.

ROTL releases by Ethnicity

Individuals released on temporary license, all sentence types, by Ethnicity, 2019		Ethnicity of prison population as at 30 June 2019	
Asian	11%	Asian	8%
Black	12%	Black	13%
Mixed	4%	Mixed	5%
Other	1%	Other	2%
White	72%	White	73%
Total	8,695	Total	82,185

Includes all sentence types

The proportion of prisoners released on ROTL is broadly similar to their representation in the full prison population, however the proportion of Asian prisoners (11%) released on ROTL is slightly higher than the proportion declared as Asian in the prison population (8%).

HDC by Sex

Between October and December 2019⁴, the proportion of females eligible for HDC (8%) is higher than the 5% proportion of females in custody serving determinate sentences. This, in turn, drives the proportion of males down to 92%, compared to the 95% representation they typically show amongst those serving determinate sentences in prison. People serving 4 years or more, sexual offenders and certain violent offenders are excluded from HDC. In addition, release is subject to availability of an address where the offender can be safely managed, so the deviation could be due to the offence mix that males and females typically commit.

The proportion of prisoners actually released on Home Detention Curfew by sex shows that the proportion of males decreases further, to 90%, as 10% of females are actually released.

⁴ Table 3.4i

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882180/Releases_Q42019.ods

HDC by ethnicity

Individuals potentially eligible for HDC release, by Ethnicity, October – December 2019		Individuals released on HDC, by Ethnicity, October – December 2019	
Asian	7%	Asian	9%
Black	9%	Black	9%
Mixed	4%	Mixed	4%
Other	2%	Other	1%
White	78%	White	77%
Total	12,142	Total	3,136

The proportion of Black, Mixed and Other prisoners who were released on HDC between October and December 2019 is broadly similar to the proportion of those that were potentially eligible for release. The proportion of White prisoners is slightly lower (78% were eligible but 77% released), and Asian prisoners released on HDC between October and December 2019 (9%) is higher than those that were eligible (7%).

Eliminating Unlawful Discrimination

Direct Discrimination

26. Direct discrimination occurs when a policy would result in people being treated less favourably because of a protected characteristic. Our assessment is that this change is not directly discriminatory within the meaning of the 2010 Act, as it applies in the same way to all individuals regardless of their protected characteristics. It is the nature of the offence, assessed risk and behaviour in custody or under supervision that determines whether they are excluded. No offender will be treated less favourably in relation to any protected characteristic.

Indirect Discrimination

27. Indirect discrimination occurs when a policy applies equally to all individuals but would put those sharing a protected characteristic at a particular disadvantage compared to those who do not. Our assessment is that the change is not indirectly discriminatory within the meaning of the EA as explained below.

28. In the application of ECTR, governors will need to remain aware of how to consider and discharge their PSED duties fairly where local ECTR decisions are taken to avoid exercising discretion in a potentially discriminatory fashion. This can include providing guidance and minimum mandatory requirements that prisons must follow fairly, and HMPPS has issued detailed guidance to practitioners on the operation of the scheme. It will also be important that prisoner choice remains an important aspect of ECTR decisions.”

29. By virtue of their overrepresentation in the cohort of offenders excluded from ECTR, we acknowledge that any adverse impacts arising from this change will be more likely to affect male prisoners, those in the youth estate generally and possibly BAME children in particular, plus older (60+) prisoners. It should be noted that “adverse impact” for the purpose of this analysis is taken to be exclusion from the scheme, as that may be considered an unfavourable outcome by those excluded. However, it must be borne in

mind that the purpose of the scheme is not to benefit the prisoner. The purpose is to provide HMPPS with an additional tool to help combat Covid-19 within prisons.

30. In any event, we do not consider that the overrepresentation of these offenders in the excluded cohort will likely result in any unlawful indirect discrimination. Our assessment is that the eligibility criteria for ECTR, designed to limit release to low risk non-sexual and non-violent offenders nearing automatic release, are a proportionate means of achieving the legitimate aims of ensuring that the scheme does not put the public at risk nor undermine their confidence in the administration of justice.

Discrimination arising from disability and duty to make reasonable adjustments

31. In so far as this change extends to disabled offenders, we believe that the policy is proportionate, having regard to its aim. It would not be reasonable to make an adjustment for disabled offenders so that they are eligible for the scheme despite not meeting the criteria. Where necessary, however, we will make reasonable adjustments for offenders with disabilities in the operation of the ECTR Scheme

Harassment and victimisation

32. We do not consider there to be a risk of harassment or victimisation within the meaning of the EA a result of this change.

Advancing Equality of Opportunity

33. We have had regard to this aspect of the equality duty but do not consider that this change will affect the advancement of equality of opportunity.

Fostering Good Relations

34. Our assessment is that the ECTR scheme is unlikely to impact on fostering good relations between groups with different protected characteristics.

Continuing Analysis

35. The ECTR scheme is limited to the current Coronavirus pandemic. Once the Transmission Control Period (as defined in the Coronavirus Act 2020) has ended, so too will releases under the scheme and the release provisions in Prison Rule 5A and YOI Rule 9A will automatically expire on 25th March 2022, when the Coronavirus Act expires. We will, however, update the equality statement if new evidence comes to light on the equalities impacts of the ECTR Scheme during its time in force, and we will continue to review our equalities data in the light of any new evidence and include this in our equalities' analysis where necessary.

22 May 2020