



The Scottish Parliament  
Pàrlamaid na h-Alba

**COVID-19 COMMITTEE**

**AGENDA**

**6th Meeting, 2020 (Session 5)**

**Thursday 21 May 2020**

The Committee will meet at 3.45 pm in a virtual meeting and will be broadcast on [www.scottishparliament.tv](http://www.scottishparliament.tv).

1. **Subordinate legislation:** The Committee will take evidence on the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020 SSI 2020/138 and the Criminal Justice (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 SSI 2020/137 from—

Humza Yousaf, Cabinet Secretary for Justice, Graham Robertson, Bill Manager and Head of Release Leader, Community Justice Division, and Craig McGuffie, Principal Legal Officer, Legal Directorate, Scottish Government.

2. **Subordinate legislation:** Humza Yousaf, Cabinet Secretary for Justice, to move—S5M-21738—That the COVID-19 Committee recommends that the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/138) be approved.

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The papers for this meeting are as follows—

**Agenda item 1**

Cover note

CVD/S5/20/6/1

## Covid-19 Committee

### 6th Meeting, 2020 (Session 5), Thursday 21 May 2020

#### Subordinate Legislation

##### Introduction

1. The purpose of this paper is to provide background and procedural information for the Committee's consideration of the following SSIs—

- [SSI 2020/138: The Release of Prisoners \(Coronavirus\) \(Scotland\) Regulations 2020](#)
- [SSI 2020/137: The Criminal Justice \(Miscellaneous Temporary Modifications\) \(Coronavirus\) \(Scotland\) Regulations 2020](#)

2. The Committee will take evidence from the Cabinet Secretary for Justice on both SSIs at this meeting. Background and procedural information is provided for both SSIs in turn below.

3. Written submissions have been provided by the Criminal Justice Voluntary Sector Forum and Howard League Scotland and both papers are attached as an annexe.

4. SPICe recently [published a blog](#) considering the impact on prisoner numbers of measures taken in response to the coronavirus.

5. The Justice Committee also wrote to the Scottish Prison Service (SPS) in relation to the publication of data on early releases. The [letter](#) and the [SPS' response](#) are available online.

#### **The Release of Prisoners (Coronavirus) (Scotland) Regulations 2020**

6. The [Policy Note](#) states that the Regulations—

“are being made as the Scottish Ministers are satisfied that the release of prisoners authorised by the Regulations is a necessary and proportionate response to the effects coronavirus is having, and is likely to have, on prisons generally, for the purpose of protecting: (a) the security and good order of prisons; and (b) the health, safety and welfare of prisoners and those working in prisons.”

7. The Policy Note explains that the Regulations provide “for a limited number of short-term sentenced prisoners to be considered for release on or after 4 May.” Qualifying prisoners must have been sentenced to 18 months or less and must have fewer than 90 days left in custody as of 4 May 2020.

8. Certain categories of prisoner, including those convicted of sexual or terrorism offences and those imprisoned for life, will not be eligible for early release. Further exclusions in relation to domestic abuse, harassment and Covid-19-related offending will also apply. Prison Governors will have powers to veto the release of anyone whom

they consider poses an immediate risk of harm to an identified individual. Release can also be delayed on medical grounds where prisoners are thought to have Covid-19.

9. The Policy Note states that the Scottish Government and Scottish Prison Service have agreed that “removing around 300-450 short-sentence prisoners will provide a significant improvement to operating conditions whilst still being proportionate to the current situation.”

10. Releases would be phased on the basis of remaining days to be served in order to provide certainty for those being released and to allow a reasonable period for planning so that services can be aligned to avoid an unmanageable impact.

11. The Policy Note confirms that, whilst there has been no formal consultation on the SSI, discussions have taken place with partners including COSLA, Social Work Scotland and Victim Support Scotland. It further states that whilst there will be an additional impact on public services, detailed financial modelling has not been possible during the current emergency situation.

12. An [Equality Impact Assessment \(EQIA\)](#) has been produced. It anticipates “that the regulations will have no differential impact in respect of those prisoners with the listed protected characteristics” and that the overall impact “is deemed likely to be proportionate to the current short-sentence prisoner population.” It further states that “any potential secondary effect on individual households or the wider community is being strongly mitigated by the exclusion of those individuals whose offending history would suggest a heightened risk to the public.”

### **Parliamentary Procedure**

13. The Regulations are subject to the provisional affirmative procedure. The Policy Note states that they are made “in exercise of the powers conferred on the Scottish Ministers by Paragraph 19(1) of Schedule 4 of the Coronavirus (Scotland) Act 2020. This provides that the regulations “cease to have effect at the end of the period of 28 days beginning with the day on which they are made unless, during that period, they are approved by resolution of the Scottish Parliament.”

14. The Regulations were laid on 4 May so the 28-day period expires on 1 June. Once the Committee has considered and reported on the Regulations, the Parliament will be invited to consider a further Scottish Government motion seeking its approval of the Regulations.

15. The Delegated Powers and Law Reform Committee (DPLRC) considered the Regulations on 19 May and had no issues to report.

16. As lead committee for consideration of the Regulations, the Committee will be invited to consider the following motion—

- Motion S5M-21738: That the COVID-19 Committee recommends that the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/138) be approved.

17. The Committee will have an opportunity to take evidence on the Regulations from the Cabinet Secretary before moving to formal consideration of the motion under a separate agenda item.

### **Criminal Justice (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020: SSI 2020/137**

18. The Committee will also have the opportunity to put questions to the Cabinet Secretary on the Criminal Justice (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020: SSI 2020/137.

19. The [Policy Note](#) explains that the Regulations make changes to the Victim Notification Scheme (VNS) to ensure that victims registered with the VNS will receive information about an offender's early release under regulations arising from the Coronavirus (Scotland) Act 2020. This would not be possible under existing legislation and the Regulations seek to remedy this.

20. The Regulations also seek to clarify the definition of a prison governor to ensure that governors of all prison facilities, including contracted-out prisons, would have powers to veto an early release on the grounds of risk as noted above.

21. As above, the Policy Note confirms that, whilst there has been no formal consultation on the SSI, discussions have taken place with partners including COSLA, Social Work Scotland and Victim Support Scotland. It further states that whilst there will be an additional impact on public services, detailed financial modelling has not been possible during the current emergency situation.

22. The DPLRC considered the Regulations on 19 May. As the instrument came into force immediately, DPLRC was required by Standing Orders to report that it did not "respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument."

23. However, DPLRC confirmed that it was "content with the reasons for the breach of the 28-day rule in these circumstances" as set out in a letter to the Presiding Officer dated 4 May. The letter is annexed to [the DPLRC report](#).

### **Parliamentary Procedure**

24. This negative instrument was laid before the Scottish Parliament under section 16(4) of the Coronavirus (Scotland) Act 2020 on 4 May 2020. Negative instruments are subject to annulment within 40 days of being laid and in this case, that period expires on 12 June.

25. Under the negative procedure, an instrument comes into force on the specified date unless a motion to annul it is agreed to by the Parliament.

26. Any MSP may lodge a motion recommending annulment of an SSI at any time during the 40-day period. The Committee is not obliged to report to the Parliament

on negative instruments, except where a motion recommending annulment has been lodged.

**Committee Clerks  
May 2020**

## **SUBMISSION FROM THE CRIMINAL JUSTICE VOLUNTARY SECTOR FORUM (CJVSF)**

The Criminal Justice Voluntary Sector Forum (CJVSF) is a group of over 30 voluntary organisations, all working to support individuals, families and/or communities affected by the justice system. CJVSF welcomes the opportunity to respond to this Call for Evidence and would be happy to provide further information to the Committee on any of the points raised if required.

### **To what extent is this legislation necessary and what are the reasons for our views?**

CJVSF agrees that this legislation is necessary to sufficiently reduce prison numbers.

Although prison numbers have dropped significantly since lockdown began<sup>1</sup>, the rate of decline in numbers is beginning to slow while double cell occupancy and adequate staffing levels within prisons remain concerns. In light of this, we believe that the continued use of early release is necessary.

It may also be necessary to extend the use of the emergency legislation to allow further early releases that include a broader range of people in prison (including those serving longer sentences) and CJVSF would encourage the use of additional measures, such as increasing the use of Home Detention Curfew, that could help to further reduce the prison population.

Furthermore, as noted by the Scottish Prisons Commission (2008, p2)<sup>2</sup>, *“High prison populations do not reduce crime; they are more likely to create pressures that drive reoffending than to reduce it.”* Prior to COVID-19, Scotland had one of the highest rates of imprisonment in Europe<sup>3</sup> and CJVSF members are keen that, post COVID-19, Scotland works to maintain the reduction in our prison population.

### **Will this legislation achieve the proposed outcomes?**

CJVSF members believe the legislation will help to achieve the proposed outcomes of reducing prison numbers in order to protect the:

- security and good order of prisons
- health, safety and welfare of prisoners and those working in prisons.

By itself, however, the legislation will not achieve these policy objectives. Whilst the legislation allows for a reduction in prison numbers, appropriate systems and

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<sup>1</sup> SPS Weekly Prison Population Statistics, Available at:

<https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

<sup>2</sup> Scottish Prisons Commission (2008) *Scotland's Choice, Report of the Scottish Prisons Commission*. Available at:

<https://www.webarchive.org.uk/wayback/archive/20170104102702/https://www2.gov.scot/resource/doc/230180/0062359.pdf>

<sup>3</sup> Walmsley. R. (2018), *World Prison Population List*, twelfth edition. Published by World Prison Brief and the Institute for Criminal Policy Research

[https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf)

practical measures will also need to be put in place to ensure people's health, safety and welfare are protected at this time. Suggestions put forward by CJVSF members include:

- Making alternative arrangements for people in prison to keep in contact with friends and family in order to reduce mental health issues associated with isolation
- Making use of alternative delivery models to support the continuation of education, training and purposeful activity in prisons as much as possible
- Putting clear processes in place to enable people in prison and on release to access relevant services and support.

The policy note accompanying the draft regulations also states that release is provided for in phases in order to:

- provide certainty for those due to be released
- ensure release is put into effect swiftly in recognition of the policy aim of reducing the prison population
- provide a reasonable period for release planning for those involved so that services can be aligned with release and there is not an unmanageable impact of multiple prisoners becoming eligible and having to be released over a very short timeframe.

Further comments on each of these points is provided below.

*Will this legislation provide certainty for those due to be released?*

The legislation offers clear criteria for early release, which members reported had been helpful for explaining to individuals and families they are working with who is and is not likely to be eligible for release and helping them to prepare.

Since early releases began on 4<sup>th</sup> May, CJVSF members have raised concerns about the very short notice being provided to some individuals that they are going to be released (less than 24 hours in some instances). Whilst these are exceptional circumstances, providing as much notice as possible is important for ensuring there is an opportunity to put adequate support in place for people.

*Will this legislation ensure release is put into effect swiftly in recognition of the policy aim of reducing the prison population?*

Whilst official figures have not yet been published, early releases have already commenced in line with the regulations laid on 4<sup>th</sup> May 2020. We welcome the letter from the Justice Committee, encouraging SPS to publish statistics around early release in order to see how effective the legislation has been at reducing the prison population.

*Will this legislation provide a reasonable period for release planning for those involved?*

CJVSF members have identified some strong cross-agency work happening around Scotland and we welcome the guidance that Social Work Scotland has produced,



encouraging Justice Social Work teams to develop multi-agency local area response teams to support early releases.

In a few instances, however, services have only received less than 24 hours' notice of an early release and this can cause challenges for service planning and coordination, particularly where the individuals are not already known to the service. Furthermore, one member reported that in several instances people have been released on a different date from that which the service had originally been advised.

For some services, referral routes have changed and/or have ceased to exist and this is also causing challenges for voluntary sector providers in relation to service planning and delivery.

**Are there any further improvements you would suggest and if so, why?**

Voluntary sector services can play a key role in supporting people at this time. We welcome the engagement and information sharing from Scottish Government, SPS and other statutory partners that is taking place during this time. We are working with statutory partners to increase the level of information that is available to people on release about relevant services available and would encourage all national and local justice partners to consider how best to facilitate access to third sector services at this time.

CJVSF members would also welcome consideration being given to the needs of families in relation to early release, to ensure they are receiving sufficient support at this time. For a small minority of families, the return of a parent from prison is not always a positive experience and, with children not currently attending schools, there is a greater risk that any issues may go unnoticed. Putting steps in place to mitigate against these risks would be welcome.

Similarly, establishing ways of maintaining family contact now that prison visits have stopped will be vital to helping support early releases and releases during the outbreak more generally, both in terms of helping families to prepare for the release and by providing additional support for people being released. Although CJVSF members welcomed the Scottish Government's announcement on 23<sup>rd</sup> April 2020 that they intend to provide mobile phones for use in prisons, we would welcome further clarity on when and how this will happen given that people in prison have now had extremely limited family contact since visits were stopped in March.

In light of the current Scottish Government guidance on wearing facial coverings in enclosed spaces, members have expressed concerns that individuals leaving custody are expected to use public transport to return to their home area but will not have access to any face masks. It would be helpful if this public health issue could also be addressed.

Looking ahead, CJVSF members are keen that the good practice that is currently emerging in relation to early release becomes mainstreamed for everybody leaving prison to return to their community (e.g. the introduction of liberation packs, ensuring that people have accommodation). Learning the lessons from the early releases enabled by these regulations will be critical for identifying future improvements to our justice system.

## SUBMISSION FROM HOWARD LEAGUE SCOTLAND

Howard League Scotland welcomes the opportunity to respond to this call for views on the secondary legislation associated with the Coronavirus (Scotland) Act 2020 by the Scottish Parliament's COVID-19 Committee. As per the request, our submission will provide a response to The Release of Prisoners (Coronavirus) (Scotland) Regulations 2020, using the suggested three questions.

### **To what extent is this legislation necessary and what are the reasons for your views?**

Howard League Scotland believes that this legislation is necessary "in response to the effects coronavirus is having or is likely to have, on a prison or prisons generally"<sup>4</sup>.

Scotland's prison population as at 13 March 2020 was 8,094<sup>5</sup>, and is one of the highest rates in Western Europe<sup>6</sup>. Over-crowding is rife, many single cells are doubled up and there have been instances highlighted by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), of "tripling up" in cells where prisoners are required to sleep on mattresses on the floor under bunk-beds.

The report from the Committee's 2018 visit noted that "prison population numbers in general are not likely to decrease in the near future, and a repetition of a situation like this cannot be excluded"<sup>7</sup>. It also noted that at HMP Barlinnie, some prisoners had less than 3m<sup>2</sup> each of living space.

Richard Coker (Professor of Public Health at the London School of Hygiene and Tropical Medicine), an expert in both the spread of disease within prisons and pandemic preparedness, advised that:

*"Prisons ... are well-recognised 'epidemiological pumps'... The risk of exposure of COVID-19 to prisoners and staff ... is far, far greater than the risk to individuals in the wider community. Social distancing and personal infection control measures are, because of their nature, almost impossible in overcrowded settings with sanitation limitations."*<sup>8</sup>

<sup>4</sup> Schedule 4, Part 8, 19(2) Coronavirus (Scotland) Act 2020

<sup>5</sup> SPS Weekly Prison Population Statistics, Available at: <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

<sup>6</sup>World Prison Brief

[https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=14](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14)

<sup>7</sup> Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 25 October 2018. Available at: <https://rm.coe.int/1680982a3e>

<sup>8</sup> [https://howardleague.org/wp-content/uploads/2020/04/2020\\_04\\_01\\_COKER\\_Report\\_HL\\_PRT.pdf](https://howardleague.org/wp-content/uploads/2020/04/2020_04_01_COKER_Report_HL_PRT.pdf)

Measures to reduce overcrowded prison populations were urged by the Council of Europe's Commissioner for Human Rights; the World Health Organisation; the United Nations; and the Prison Officers Association Scotland, amongst others:

*"Given the heightened risk of contagion between those in custodial and other detention settings, the SPT urges all States to: ... (2) Reduce prison populations ... wherever possible by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so"<sup>9</sup> (United Nations)*

In laying the regulations, the Cabinet Secretary also advised that early release of prisoners was one of the measures designed to support the relaxing of the current restrictive regime and to achieve the Scottish Government's ambition of single-cell occupancy. This has Howard League Scotland's wholehearted support.

People leaving prison often need significant levels of support to ensure a successful transition back into the wider community. In current lockdown conditions access to health, social care, benefits, accommodation, addiction and recovery services are likely to be more challenging. We understand that this is a significant responsibility to be borne by local authority and third sector partners, and thus regulations stipulating that early releases would be managed in three tranches, reflected this well.

### **Will this legislation achieve the proposed outcomes?**

Whilst Howard League Scotland acknowledges the significance of the legislation, it is unlikely that it will result in the reduction in the prison population required to allow both single-cell occupancy and an appropriate relaxation of the restricted regime.

Scotland's prison population has fallen by approximately 12% during the pandemic<sup>10</sup>. This has been driven primarily by the significant reduction in court business, rather than by the maximum of 450 people eligible to be released under the emergency legislation, which could only reduce the prison population by circa 5%.

It is also important to note that "[a]lthough the planned release of prisoners should have a significant short-term impact on prisoner numbers, that impact will quickly start to diminish given that the scheme only applies to those who would have been released anyway by early August"<sup>11</sup>.

The legislation was designed to work alongside changes to Home Detention Curfew (HDC) guidance, announced on 14 April 2020. The removal of the presumption against the granting of HDC, might have been expected to significantly increase its use. However, whilst the current number of people on HDC as at 8 May 2020 at 63 is up from the pre-COVID19 level of 42 on 20 March 2020, it is still far lower than it was immediately before the presumption against was introduced (251 on 26/10/18).

<sup>9</sup> United Nations Advice of the Sub-Committee on Prevention of Torture to State Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic (adopted on 25<sup>th</sup> March 2020) <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>

<sup>10</sup> <https://scottishprisoneradvocacy.com/2020/05/01/prison-population/>

<sup>11</sup> <https://spice-spotlight.scot/2020/05/11/coronavirus-covid-19-prisoner-numbers/>

With the gradual reintroduction of all court business, we are likely to see the prison population increase again, nullifying the reductions made by this legislation.

It should be acknowledged that SPS and their NHS colleagues have worked extremely hard in very challenging conditions over the course of the pandemic. Serious unrest appears to have been largely avoided, and it is to their credit that fatalities and rates of infection have been kept so low. It is important to note, however, that it has been achieved at great physical and psychological cost to prisoners and staff.

A briefing paper ‘Interim Assessment of Impact of Various Population Management Strategies in Prisons in Response to COVID-19 Pandemic in England’ prepared by Dr. Éamonn O’Moore, National Lead for Health & Justice, PHE and Director UK Collaborating Centre, WHO Health in Prisons Programme (European Region), has advised that:

*“[t]he risk of incursion of infection in prisons exists as long as COVID-19 is circulating in the community and we have no vaccine against it. This situation is likely to persist for at least the rest of the financial year”<sup>12</sup>*

We have to assume that this will also be the case in Scotland, and therefore adherence to the currently severely restricted regime would need to be maintained for many months to come. This is not something that can, or should, be asked of those living or working in our prisons. This would not support the human rights obligations set out by the WHO or the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and would not allow for the resumption of any meaningful daily human contact.

The reality of prison life under COVID-19 restrictions is that people are confined to their cells for 23 hours a day. That doesn’t just mean fewer showers and trips to the gym. It means that there are no educational classes, offence-based programmes, work placements, or behavioural programmes available. There’s no rehabilitation being undertaken and therefore nothing in a prison today will prepare anyone for life outside it. People will be released having had no opportunity to have addressed their offending behaviour, which in turn, could make our communities less safe.

### **Are there any further improvements you would suggest and if so, why?**

It is acknowledged that early release provisions need to take into account public safety concerns and therefore it is correct that some prisoners may be excluded.

However, the criteria for early release is not a vulnerability-based human rights one, as advocated by the United Nations and World Health Organisation in their Joint Statement on COVID-19 in Prisons and Other Closed Settings of 13 May 2020:

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882622/covid-19-population-management-strategy-prisons.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882622/covid-19-population-management-strategy-prisons.pdf)

*“... These efforts should encompass release mechanisms for people at particular risk of COVID-19, such as older people and people with pre-existing health conditions, as well as other people who could be released without compromising public safety, such as those sentenced for minor, non-violent offences, with specific consideration given to women and children ...”<sup>13</sup>*

The reality is that we have people in our prisons who require significant levels of social care. Some are bed-bound. Some are in wheelchairs. Some need help to bathe and dress. Some have dementia. Many of them present no risk to public safety and are uniquely vulnerable to COVID-19, yet are excluded from early release provisions.

Our prison population includes around 14% of people on remand, untried and unconvicted of any offence. Those who do not pose a risk to public safety should be considered for release. This especially applies to women, where only 30% of those held on remand go on to be convicted of any offence. We would therefore strongly suggest that the Management of Offenders (Scotland) Act 2019 be augmented by secondary legislation to allow remand prisoners to be released on tag (EM).

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<sup>13</sup> <https://www.who.int/news-room/detail/13-05-2020-unodc-who-un aids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>