

F/T: 0300 244 4000  
E: [scottish.ministers@gov.scot](mailto:scottish.ministers@gov.scot)

Audrey Nicol, MSP  
Convener, Criminal Justice Committee  
By email

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16 May 2024

Dear Convener,

I am writing to you in your capacity as Convener of the Criminal Justice Committee. Please circulate this to all members.

I have enclosed a copy of my the statement which I made to Parliament this afternoon as well as a briefing to ensure all members have the relevant background information.

Over the past two months, there has been a sharp rise in the prison population of around 400. This has exacerbated the longer-term upward trend, which has been a significant concern for some time, and created unprecedented pressure on the prison estate.

This afternoon, I set out to Parliament that there is now a critical risk to the continued safe and effective operation of the prison estate, and that urgent action is needed.

Section 11 of the Bail and Release from Custody (Scotland) Act 2023, which enables Scottish Ministers to release certain groups of prisoners in an emergency situation, is due to come into force on 26 May. I announced this afternoon that should the legal test be met at that point – as I expect to be the case - my intention is to bring forward a proposal for the emergency release of prisoners as soon as possible after this provision comes into force.

This is not a decision I have taken lightly. However, I consider that this is a step that must be taken in order to ensure the security and good order of prisons, as well as the health and safety of those living and working within the prison estate.

The safeguards built into the 2023 Act will apply. These include limiting release to those within 180 days of their scheduled release date, certain statutory exclusions - including in relation to those serving sentences for sexual offences or domestic abuse – and a Governor veto.

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I recognise that while the use of emergency release will ease the immediate pressures on the estate, should Parliament approve my proposal in due course, work must continue in the medium to long-term in order to achieve a more sustainable position with regard to the prison population. For that reason, I announced that we will carry out a short consultative exercise over the summer, with the intention of informing a Bill to change how long term prisoners are released. We also intend to bring forward secondary legislation to amend the eligibility criteria for HDC, increasing the period of time individuals can spend on release under licence conditions.

I look forward to engaging with the Committee as we work together to respond to this challenging situation. I will be engaging with all members would be happy to speak to Committee, if that would be useful.

Yours sincerely,



**ANGELA CONSTANCE**

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## CHECK AGAINST DELIVERY - EMBARGOED UNTIL 1425

I last updated Parliament on the prison population in late February. While population levels were still concerning at that point, we had seen a period of limited overall growth over the preceding 4 months.

Unfortunately, that has now changed.

Over the past 2 months, the population has risen sharply, from 7,948 on 18 March to 8,348 this morning. Given this sudden increase I felt it critical to keep Parliament updated, to outline what action is being taken in response, and to highlight some stark and challenging decisions on which Parliamentary approval will be sought over the coming weeks and months.

The immediate cause of the sudden increase is unclear and this rate of growth may not continue. However, with the population having increased by around 13% since the start of 2023, there is extremely limited capacity to absorb even temporary increases.

The 8,348 individuals in custody this morning represent one of the highest prison populations ever recorded in Scotland. There is now a critical risk to the continued safe and effective operation of the estate, with multiple prisons essentially full.

The Scottish Prison Service's ability to deliver rehabilitative regimes has been severely curtailed; visits to prisoners are becoming difficult to maintain; and there are increasing challenges to the effective delivery of NHS services.

It's worth noting that we're not alone in this – both England and Wales and Northern Ireland are facing similar challenges. The UK Government has announced a number of measures in response, including legislating for a presumption against short sentences; expanding provision facilitating the early removal of foreign nationals; and continuing to extend their early release scheme – with recent reports suggesting that some prisoners may be released up to 70 days early, up from 18 days last year.

Significant work is already underway to address this issue. Since the population began rising again last year, SPS has been at the forefront of managing the situation and I'd like to thank all those working in our prisons in increasingly challenging circumstances.

SPS has kept its population management strategy under review to ensure the best use of the estate, including introducing a centralised and more strategic process for prisoner transfers.

SPS is also exploring the feasibility of adding temporary accommodation, as has been seen in England and Wales. This is not a quick fix but may become necessary if numbers continue to rise.

Excellent progress is being made to optimise the use of Home Detention Curfew, which is informed by risk assessment with individuals released subject to licence conditions. There are currently 97 people on HDC, an increase from around 50-60 previously.

And SPS's ongoing work will benefit from a 10% increase in its resource budget in 2024-25.

Looking beyond SPS, we're taking action in a number of areas.

## CHECK AGAINST DELIVERY - EMBARGOED UNTIL 1425

We've increased funding for community justice by £14m in 2024-25, to £148m in total.

To address the high remand population, we've introduced electronically monitored bail and supported the expansion of bail supervision to all areas. The latest official statistics show that bail supervision is at record levels.

We're preparing for the implementation in early July of measures enabling courts to take into account time spent on electronically monitored bail when sentencing, as part of the Bail and Release from Custody (Scotland) Act 2023.

And later this year, commencement of provisions from the Children (Care and Justice) (Scotland) Bill, recently approved by Parliament, will end the imprisonment of under 18s, creating further capacity at HMP Polmont.

We're also considering whether compassionate release could be used more broadly in appropriate cases, taking into account the ageing population and prevalence of complex health and social care needs.

In all of this, we're working across the justice system and beyond, including with health and social care colleagues in particular, to identify potential solutions.

Despite all the steps underway, however, it's increasingly clear that further action is required. The measures I've described will simply not have as large an impact as is necessary to avert a crisis.

And be in no doubt, that is what we are facing. If our prisons are to remain functional and able to house the most dangerous offenders, we have no choice but to take urgent action to reduce pressure on the estate.

For that reason, I will be seeking Parliament's input on, and consent for, three measures which I consider are now necessary.

The first is emergency release.

On 26 May, we will bring into force section 11 of the Bail and Release from Custody (Scotland) Act 2023, which was scrutinised by Parliament last year and provides Ministers with a power to release prisoners in emergency situations.

My hope was that this would never need to be used. However, as things stand today, my view is that we have reached the threshold for taking emergency action.

The sudden and sharp rise over recent weeks, combined with an already high population, has significantly increased the risk to the health, safety and welfare of both prisoners and SPS staff, as well as to the security and good order of the prison estate. Serious concerns have been formally raised to me by the Chief Executive of SPS, His Majesty's Chief Inspector of Prisons, and the Prison Governors Association.

If the legal test for use of emergency release is satisfied when the provisions come into force on 26 May, I intend to bring forward a proposal for Parliament's consideration as soon as possible within the following two weeks.

## CHECK AGAINST DELIVERY - EMBARGOED UNTIL 1425

Members will have the opportunity to scrutinise and debate the approach and, in this instance, we will not release a single prisoner without Parliament's consent. I also want to work with Parliament to expedite that process.

My intention is that those released would be serving sentences of under 4 years. Public safety will always be my priority, and I can reassure Parliament that there are protections in place so that no one serving a sentence for sexual offences or domestic abuse will be released, with a governor veto also available.

We will, of course, be engaging with victims organisations, local authorities, and other key partners in preparing for any release, and initial meetings are underway.

This is not a decision I take lightly and I appreciate the concerns it will raise. But we must ensure the safety and wellbeing of SPS staff and those in their care, and that our prisons continue to function effectively to accommodate those who pose the greatest risk of harm.

Emergency release, however, will not solve this problem in the longer term. Without more sustainable solutions, there is a risk of being faced with the same decision in a few months' time.

The second measure, therefore, is to look again at how we manage the release of long term prisoners, which was last examined in detail almost a decade ago when Parliament passed the Prisoners (Control of Release) (Scotland) Act 2015.

That Act effectively abolished automatic early release for long term prisoners. The rationale for doing so, to move towards a more individualised assessment of readiness for release, is still valid today.

But we also need to take into account the growing population, increasing average sentence lengths, and the potential benefits of increasing the time offenders spend on supervised release before the end of their sentence.

My intention is to carry out a short consultative exercise over the summer, and to return after recess with a proposal for a Bill for Parliament's consideration to change how long term prisoners are released.

And finally, I intend to bring forward secondary legislation to amend the eligibility criteria for HDC, increasing the period of time individuals can spend on release under licence conditions. As these are affirmative regulations requiring Parliament's active agreement, I look forward to discussing this in detail with the Criminal Justice Committee in due course.

In taking this approach and combining emergency release with longer term measures, my hope is that we can both mitigate the immediate crisis and start to address the trends which have brought us to this point.

**CHECK AGAINST DELIVERY - EMBARGOED UNTIL 1425**

I fully appreciate the challenges in what I have set out, and working towards cross-party agreement on any measures to be taken will be critical – as I have said, we will not proceed with any of these measures without parliamentary approval. I have written to justice spokespeople inviting them to meet with me and with the SPS Chief Executive, as how we respond to this situation goes beyond the Scottish Government and is rightly a matter for the whole of Parliament. We will also be publishing a briefing paper to ensure all members have the relevant background information.

I am genuinely open to discussing with opposition parties what options are available and how best to proceed, but I consider that we have no choice but to act if we are to avoid an unprecedented crisis developing.

I welcome views from members this afternoon, and would emphasise once again the need for this Parliament to consider in detail the critical situation we're facing, and to come to an agreed suitable response.

# **Actions to Address the Rising Prison Population May 2024**

This paper sets out information on the drivers of the rising prison population and the actions the Scottish government is taking to address it.

## **Summary**

Due to a rapid rise in the prison population, creating an unprecedented situation, similar to challenges faced across the UK, immediate action is needed to ensure the safety and wellbeing of SPS staff.

We need to ensure prisons can function effectively, focus on those who pose the greatest risk of harm, and provide programmes that help reduce reoffending. Protecting victims and public safety remains an absolute priority, that is why our proposal for emergency early release has specific safeguards built in. It will only be available to those who are serving short sentences under 4 years and are due to be released within the coming months. In addition no one serving a sentence for sexual offences or domestic abuse will be released, and a veto can be applied by governors for anyone deemed a risk to a specific individual or group.

## **Recent rise in the prison population**

On Thursday 16 May the prison population was 8,348 – a rise of around 400 over the last two months. That rate of increase is significant and could not have been anticipated. It comes in the context of a rise of around 10% since this time last year. A continued rise in the immediate term is plausible.

The prison population had been relatively stable between October 2023 and March 2024, but it was already high (around 7,950). The longer term drivers of the prison population are discussed in more detail below, but one of the most notable is an increase in average sentence lengths. This is compounded by a high population of those on remand (untried and awaiting sentence), due in large part to the post-pandemic court backlog.

Short terms spikes are generally more difficult to predict. Our most recent projections for the prison population were published in February 2024. At that time our expectation was that the prison population would either remain stable or increase slightly. The specific reasons for the sharp rise over the last two months are not clear.

SPS reports that six prisons – over a third of the estate – currently has a red risk rating, up from one just six weeks ago. This takes into account a number of factors, including the daily population compared to design capacity, the prevalence of double occupancy in cells, the protection of individuals, staffing levels and other factors affecting the overall safe running of the prison. This reflects the scale and breadth of the challenge the SPS is facing in terms of maintaining safety and security, as well

as delivering rehabilitative regimes. The SPS also points to a number of factors that suggest the population is more complex than it ever has been, namely the burden of keeping serious crime groups apart, an ageing prison population, illegal drug use and demands on healthcare and other critical services, including mental health and social care support which adds to pressures in the system.

Taken together, we are now dealing with an unprecedented situation. Action is required to ensure the safety and wellbeing of SPS staff and those in their care, to ensure that programmes that contribute to reducing reoffending and rehabilitation can take place, and to ensure prisons continue to function effectively and can accommodate those who pose the greatest risk of harm.

### **Trends in the prison population**

It is worth noting that crime has fallen in Scotland and that from 2011-12 to 2022-23 the number of people entering prison each year has fallen substantially, from around 14,900 in 2011-12, to 10,950 in 2019-20 and then 8,400 in 2022-23. Yet we have a rising prison population. And whilst many countries across Europe have also recently experienced substantial annual increases in their prison populations, Scotland already had one of the highest populations in Europe along with the rest of the UK.

The annual statistics for the average daily prison population, from 2011 to date, are included at Annex A. The overall change between 2011-12 and 2022-23 was a nine percent reduction. Between 1 January 2023 and 16 May 2024 the overall population increased from 7,303 to 8,348; in the past year there has been an increase of 795 or 10.5% (7,553 to 8,348). Today the number in remand are 2,326 this is an increase of 12% since 1 January 2023.

The response to the Covid pandemic had a substantial impact on the prison population. Between March 2020 and May 2020, the population fell from just over 8,000 to just under 6,900, as a result of justice system responses, including emergency release of 348 prisoners.

### **Longer terms drivers of the prison population**

The drivers of the prison population are multifaceted, as are the numerous societal and socioeconomic factors that drive criminal behaviour. Outcomes in individual cases depend on a range of factors and independent decision making is, rightly, at the heart of the Justice system and that makes it difficult to model and predict what the future prison population will be.

We know some of the key longer term drivers that have contributed to the recent rise in the prison population, some of which are positive and show success within the justice and policing system, namely:

- An increase in average sentence lengths;
- While there has been a longer term trend away from shorter sentences, these still make up a notable proportion of the sentences given.



- The ending of automatic early release at the two thirds point for long term prisoners (sentences of 4 years or more) in 2016. Release now takes place six months before the end of the sentence for those not already granted parole;
- Previously under reported crime types such as domestic abuse and sexual offences have been reported and resulted in convictions and can attract lengthy custodial sentences.
- The use of home detention curfew (HDC) decreased from a high point of around 420 in August 2010 to around 50 to 60 in late 2023. HDC allows certain risk assessed individuals to spend part of their sentence in the community, subject to licence conditions and curfew.
- The post-pandemic court recovery programme has been resulting in an increased sentenced population, but is also helping to reduce the population of prisoners awaiting trial.

### **Comparisons with other countries**

Other countries are also dealing with rising prison populations. The latest statistics show that the prison population in England and Wales is rising. On 31 March 2024 it was 87,869, around 4,900 higher – 6 percent higher than it was on 31 March 2020. The remand population has reached a record high of 16,458, which represents 19 percent of the total prison population, and an increase of 13 percent from 31 March 2023.

In response the UK Government is taking a number of actions for England and Wales, including legislating for a presumption against short sentences, continuing to significantly extend the use of compassionate release, and expanding provision facilitating the early removal of foreign nationals (this is a reserved matter and will apply across the UK). The UK Government have used their powers on early release to release individuals 18 days early from October, which increased to around 35 in march and is reported to rise to 70 days from this month. It has also been reported that police cells are being use (Operation Safeguarding), as well as delaying certain Court appearances (Operation Early Dawn).

According to the latest full report on Prison Populations (2022) by the Council of Europe's Annual Penal Statistics, sixteen countries recently experienced substantial annual increases in their prison populations (percentage increase): Slovenia (23), Finland (15), France (15), Northern Ireland (13), Montenegro (12), Croatia (10), Turkey (9.2), Sweden (8.2), Albania (8.2), Hungary (7.9), Armenia (7.9), Latvia (7.3), Romania (6.5), Poland (6.1), North Macedonia (5.8), and Denmark (5.5). Scotland saw a 1.1 percent increase over the same period.

### **Action the Scottish Government is taking**

The Scottish Government has and is taking a range of actions to address and mitigate the rising prison population, including:

- Extending the presumption against short sentences to those of 12 months or less in 2019. As above, there is still a notable proportion of short sentences

being given. Those decisions are rightly a matter for the independent judiciary, but we have seen a slight uptick recently.

- Introducing electronic monitoring of bail in 2022, with those being monitored this year now reaching around 400.
- Making express provision enabling time spent on electronically monitored bail to be taken into account at sentencing (due to come into force in July 2024).
- Optimisation of home detention curfew across the prison estate, which has resulted in an increase of around 30 to 40, to 97 as of 16 May.
- SPS has and continues to take action to optimise the prison estate, creating 138 additional spaces for adult male prisoners at HMP & YOI Polmont, with scope to increase that to 210 once under eighteens have been transferred into secure care accommodation.
- SPS is also working towards creating around 100 additional spaces at HMP Low Moss, which will take time to achieve, and to maximise the space available at HMP Grampian.

Given the recent sharp rise in the prison population and the difficulty in ascertaining the drivers, further action is now necessary.

That action will seek to ensure SPS staff and prisoners can be kept safe and secure. It will also seek to ensure that rehabilitative activities – which are key in reducing re-offending behaviour and victimisation in the longer term – can be properly managed and delivered. In short, allowing the situation to worsen would not serve the interests of the public, nor public safety.

The Scottish Government is therefore proposing the following actions in the immediate to short term:

- **Emergency release:** under section 11 of the Bail and Release from Custody (Scotland) Act 2023, which enables the release of certain prisoners up to 180 days early for a specific period of time. Parliament's agreement will be sought through secondary legislation, engaging with a wide range of stakeholders and partners.
  - Victim safety is a key priority and only those on short sentences (under four years) would be eligible.
  - The Victim Notification Scheme would apply as it would otherwise
  - The following prisoners will not be eligible:
    - life sentence prisoners;
    - terrorist prisoners;
    - those serving sentences for domestic abuse;
    - those serving sentences for sexual offences;
    - those subject to the sex offender notification requirements.
  - Those that would be eligible would be due to be released in the time period defined, i.e. within a maximum 6 months.
  - A Governor's veto would also apply so where a prisoner was considered to pose an immediate risk of harm to an identified person, or group, would not be released.

- **Automatic early release:** a consultative exercise to inform a proposal for changes to how long term prisoners are released, recognising the rationale for the reforms to automatic early release that took place in 2016, and taking account of the aforementioned increases in average sentence length and other relevant evidence.
- **Home detention curfew (HDC):** bringing forward secondary legislation to amend the eligibility criteria for HDC, increasing the period of time individuals can spend on release under licence conditions.

## Scottish Government

Justice Directorate

16 May 2024

### Annex A: Average Daily Population (All) by Financial Year

Financial Year	Average Daily Population	Percentage Change	Overall volume change
2011-12	8,133		
2012-13	8,014	-1.5%	-120
2013-14	7,851	-2.0%	-163
2014-15	7,731	-1.5%	-120
2015-16	7,676	-0.7%	-55
2016-17	7,551	-1.6%	-125
2017-18	7,464	-1.2%	-88
2018-19	7,789	4.4%	325
2019-20	8,197	5.2%	408
2020-21	7,339	-10.5%	-858
2021-22	7,506	2.3%	167
2022-23	7,426	-1.1%	-80

# **Action to reduce the prison population: information sheet**

## **May 2024**

### **HEADLINES**

Due to a rapid rise in the prison population, creating an unprecedented situation, similar to challenges faced across the UK, immediate action is needed to ensure the safety and wellbeing of SPS staff. We need to ensure prisons can function effectively, focus on those who pose the greatest risk of harm, and provide programmes that help reduce reoffending. Protecting victims and public safety remains an absolute priority, that is why our proposal for emergency early release has specific safeguards built in. It will only be available to those who are serving short sentences under 4 years and are due to be released within the coming months. In addition no one serving a sentence for sexual offences or domestic abuse will be released, and a veto can be applied by governors for anyone deemed a risk to a specific individual or group.

### **Key points**

- The prison population has risen by around 400 over the last two months and around 13% since the beginning of 2023.
- This could not have been anticipated and it places us in an unprecedented situation.
- Action is required to ensure the safety and wellbeing of SPS staff and those in their care, to ensure that programmes that contribute to reducing reoffending and rehabilitation can take place, and to ensure prisons continue to function effectively and can accommodate those who pose the greatest risk of harm.
- Given the recent rate of increase and the associated risks, emergency early release must be considered in the immediate term.
- Ministers have the power to release prisoners in emergency situations under section 11 of the Bail and Release from Custody (Scotland) Act 2023. In this instance, Parliament's consent will be sought before a single prisoner is released.
- Protecting victims and public safety remains an absolute priority – that is why our proposal for emergency release has specific safeguards built in, including victim notification, exclusions for life sentence prisoners, those serving sentences for sexual offences or domestic abuse, and a veto that can be applied by the governor in charge.

### **EMERGENCY RELEASE**

#### **What does emergency release mean**

Using powers in legislation, some prisoners serving sentences of less than four years with 180 days or less left to serve could be considered for emergency release.

Parliament would need to agree to use this power and specify for how long the emergency release powers would be in place and agree the start and end date for

the release process. No long-term prisoners - those serving over 4 years – will be part of this scheme.

### **Who will be released under emergency release powers**

Protecting victims remains a key priority. No prisoner serving sentences for domestic abuse offences or sexual offences will be released.

A governor veto will also apply which will allow a governor to refuse the release of an otherwise eligible person if they consider they will pose an immediate risk to a specific individual or group of individuals. Governors will consider all relevant, available information to inform their application of the veto.

### **Notifying victims**

Victims registered with the Victim Notification Scheme (where the prisoner in their case is sentenced to more than 18 months in prison) and the scheme of information for victims where the prisoner in their case is sentenced to under 18 months will apply to release under the emergency release scheme – as it does with other forms of release.

That means that victims registered with either scheme will be notified if the prisoner in their case is to be released under the emergency release scheme.

### **How many people will be released in this way?**

There would be around 300-500 prisoners that may be released under these measures – less than 5% of the prison population and only people that were already due to be released within the next 6 months.

Prisoners would be released over a phased period of time to ensure effective release planning is in place, meaning there would be no large number of releases at one time. As the individuals would be released within the next 6 months, this is manageable for those involved in planning for prisoner release, for example local authorities, health boards and housing services.

The release process will be the same as it would have been had they been released at the scheduled date for their sentence within the next 6 months. For those sentenced to less than 4 years, that means they will not be subject to licence conditions or supervision on release. They will be able to access throughcare support - services available to all prisoners during and after serving sentences to assist prisoners to prepare for release and to help reintegration in community - from their local authority or third sector providers.

If an individual reoffends in the period between being released from custody and their sentence end date, they can be returned to prison.

## **How this compares to actions in the rest of the UK**

Scotland's emergency release power matches existing powers in England and Wales

The UK Government have had an emergency release power in law since the early 1980s. That power is broader than the power Scottish Ministers have in the 2023 Act and provides that the Secretary of State can order the release of certain prisoners up to 6 months earlier if 'he is satisfied that it is necessary to do so in order to make best use of the places available for detention'.

The UK Government are using release mechanisms to manage their prison population. The UK government having been using their End of Custody Supervision Licence scheme to release certain prisoners early in England and Wales since October 2023. This allowed prisoners to be released 18 days early from October, and this was extended to 60 days in March 2024 and it is reported that it is due to be extended to 70 days.

## **AUTOMATIC EARLY RELEASE**

Prior to 2016, all long-term prisoners – sentences of more than four years – were released automatically after serving two thirds of their sentence in custody unless released earlier by the Parole Board. The final third of their sentence was served in the community subject to supervision and licence conditions. A breach of those conditions could result in them being returned to custody for the remainder of their sentence.

The law was changed in 2015 which meant that most long-term prisoners sentenced after 1 February 2016 were released with 6 months left to serve unless released earlier by the Parole Board. The previous position still applies to prisoners sentenced before that change took effect. Individuals can still be returned to custody for the remainder of their sentence if they breach conditions imposed.

Structured testing and monitoring under community justice arrangements whilst serving subject to supervision and licence conditions can support successful reintegration into the community and reduce the risk of reoffending. For many people 6 months of supervision is too short to allow them to successfully resettle into communities.

In England and Wales some long term prisoners are automatically release at the half way point, others are automatically released at the two thirds point, which was the position in Scotland pre-2016.

## **What changes will be consulted on?**

The Scottish Government plans to consult on changes to AER and how the release of long-term prisoners is managed. This was last examined in detail almost a decade ago when Parliament passed the Prisoners (Control of Release) (Scotland) act 2015.