



OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 12 June 2024

Session 6



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CRIMINAL JUSTICE COMMITTEE

24th Meeting 2024, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)

*Sharon Dowey (South Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

*Pauline McNeill (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Angela Constance (Cabinet Secretary for Justice and Home Affairs)

Jackie Dunbar (Aberdeen Donside) (SNP) (Committee Substitute)

Andy Hodge (Scottish Prison Service)

Liam Kerr (North East Scotland) (Con)

Jamie MacQueen (Scottish Government)

Teresa Medhurst (Scottish Prison Service)

Jennifer Stoddart (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 12 June 2024

[The Convener opened the meeting at 09:30]

Subordinate Legislation

Early Release of Prisoners and Prescribed Victim Supporters (Scotland) Regulations 2024 [Draft]

The Convener (Audrey Nicoll): Good morning, and welcome to the 24th meeting in 2024 of the Criminal Justice Committee. We are joined this morning by Jackie Dunbar, and Fulton MacGregor is joining us online.

Our first item of business is an oral evidence session on an affirmative instrument. We are joined by the Cabinet Secretary for Justice and Home Affairs. I also welcome to the meeting Jennifer Stoddart, who is head of the parole, release and reintegration unit at the Scottish Government, and Jamie McQueen, who is from the Scottish Government legal directorate. We are also joined from the Scottish Prison Service by Teresa Medhurst, chief executive, and Andy Hodge, governor of HMP Perth. Thank you for joining us.

I refer members to paper 1. I intend to allow around 60 minutes for this evidence session. I invite the cabinet secretary to make some opening remarks on the Scottish statutory instrument.

Angela Constance (Cabinet Secretary for Justice and Home Affairs): Good morning. I start by placing on record once again my thanks to the Scottish Prison Service officers and staff for the vital work that they do to support people who are in their care. I know that they do that with compassion and professionalism.

I also know that the committee is well versed in the critical situation that our prisons face. I have endeavoured to keep Parliament updated and informed on the issue. I have now made three statements to Parliament, alongside my most recent statement on 16 May; I have written to the committee and published an associated position paper and information note; and I wrote again to the committee when I laid the draft regulations.

England and Wales also face, and are taking action on, the same situation. The Scottish Prison Service has kept its population management strategy under review to ensure the best use of its estate. We have optimised the use of home detention curfew and have increased investment

in community justice services. Despite those efforts, however, the prison population has increased by 13 per cent since the start of 2023, with a substantial increase since March 2024. As of this morning, 8,294 people are in custody and in the care of the Scottish Prison Service.

It is that sharp and unanticipated rise that is placing enormous pressure on the safe operations of prisons, and urgent action is needed to address that. Emergency release is the only option that is available to me to do that, which is why I have laid the regulations. I did not take that decision lightly. I am clear that the legal test to use emergency release is met, and that it is necessary and proportionate in order to respond to the risk to the security and good order of prisons and the health, safety and welfare of prisoners and staff. Those are the principles that I must protect.

Public protection is a priority in the process, and there are safeguards in place to support the use of emergency release legislation. Those are set out in legislation, and I will quickly summarise them. Only prisoners who are serving less than four years and who are due to be released within 180 days following the date on which the regulations come into force will be eligible for release. Statutory exclusions apply, including prisoners who are subject to the sex offenders register and those who are serving sentences following conviction for domestic abuse offences.

I have added further protections so that individuals who have previously served a sentence following conviction for a domestic abuse offence, provided that that conviction is not spent, will not be released under the powers. Individuals who are subject to non-harassment orders will also not be released.

A governor veto applies, which allows governors to prevent the release of an otherwise eligible prisoner if they consider that that person would pose an immediate risk to a specific individual or group if they were released. Governors will have access to a range of multi-agency information, including from police and social work, to support the application of the veto.

I stress that I recognise victims' concerns about the use of these powers, and I assure the committee that protecting the public remains my absolute priority. We are working with victim support organisations to increase victims' awareness of how they can access information. The regulations name four victim support organisations, so that the victims can receive information about the release of a prisoner if a victim has said that they want that in their case. That is intended to support a more trauma-informed approach.

Emergency release is not the solution to the prison population crisis; it will, however, provide the Prison Service with some time and capacity in the short term. That is critical in order to ensure that prisons can still function safely and focus on those who pose the greatest risk of harm.

I am always happy to answer any questions, convener.

The Convener: Thank you, cabinet secretary. I will bring in Teresa Medhurst, if she would like to make some opening remarks as well.

Teresa Medhurst (Scottish Prison Service): Good morning, committee members, and thank you for the opportunity to outline the current population challenges that are faced by the Scottish Prison Service. The position that I have set out to the cabinet secretary regarding the situation that is facing our prisons is critical, and I fully support the need for these regulations on emergency release.

I am clear that urgent action is needed. As I outlined to the Public Audit Committee recently, we currently have seven of our establishments at a red risk status. Our risk assessment covers bed capacity, but also the ability to separate and protect the prisoners and our staff. In my professional view, the use of emergency release is appropriate and necessary to protect the security and good order of prisons, and the safety and welfare of prisoners and those who work in our prisons.

With the population increasing at such steep rates, I have indicated to the cabinet secretary that we will soon no longer be able to meet the basic rights of prisoners. That is driven not by a single factor, but by the increasing presence of a range of factors. We often speak about the number of people who are being held in our prisons, but I would also like to speak about the complexity of our population. For example, managing prison safely involves the separation of population types, the separation of known enemies and the management of serious and organised crime groups. We also have to ensure safe working and allocation of individuals who are in acute crisis, whether they pose a risk to themselves or to others.

We have an increase in the numbers of those in our care who have advanced social care and health needs. The deployment of resources to manage the increase in population needs to focus on basic entitlements. That, in and of itself, can increase tension within a prison, which leads to the risk of instability and indiscipline.

While that outline is not exhaustive, I hope that it provides the committee with some context. As outlined in the regulations, and as the cabinet secretary rightly said, there are safeguards,

including automatic exclusions and the governor's veto. Should the regulations be approved by Parliament, we are operationally ready to implement the release arrangements.

I am happy to answer any questions that the committee wishes to raise with me.

The Convener: Thank you very much, Ms Medhurst.

I will shortly bring in members to ask questions, but before I do so I will ask an initial technical question. I will come to the cabinet secretary to begin with. As you will be aware, the Delegated Powers and Law Reform Committee recently considered the SSI. One of the points that it raised concerned what appeared to be a discrepancy on dates, but I am sure that there will be an explanation for it. I will repeat what the committee highlighted in its report, which was:

“The Explanatory Note and Policy Note state that the first group of prisoners will be released between 26 and 27 June, but the draft instrument does not provide that 26 June is the earliest permitted release date. Therefore, under regulation 3(2) the first group of prisoners could, in theory, be released at any point from 13 June to 27 June”.

Could you provide some clarification on that, cabinet secretary?

Angela Constance: The situation is as you describe. We have been very clear that the statutory instrument that we introduce will, indeed, be time limited. If it is passed by Parliament, it will apply from tomorrow, 13 June, until mid-July.

To manage the process to best effect, eligible prisoners will be released in four tranches. Again, we have been very explicit about that. The fourth tranche of releases will be made before 16 July. If there are people who miss that tranche, there is the potential for them to be released up to 16 July. However, we wanted to ensure that there was an appropriate lead-in time before the first tranche was released. I will check with Ms Stoddart whether there is any further information to add.

Jennifer Stoddart (Scottish Government): Just to support what the cabinet secretary said, I point out that the first tranche will be on 26 and 27 June. The date for each tranche is set out in the regulations and in the policy notes. On the operational aspect, prisoners will be released on the Wednesday and Thursday of each week, which was a deliberate decision by the Scottish Prison Service to ensure that those prisoners will be able to engage with the services that they need.

The Convener: Thank you for that.

Perhaps I could come to Ms Medhurst on the information-sharing agreement, which was flagged at our evidence session last week. Kate Wallace from Victim Support Scotland said that she was

concerned that the agreement had not yet been shared. Is there any update on that?

Teresa Medhurst: Yes, there is. The information-sharing agreement is in draft form and was shared yesterday with all the victims organisations that are named in the regulations. Proposals for a meeting on Friday have been accepted by two of the four organisations so far. One of them cannot make it on Friday, but we will arrange to meet it separately. We have shared the draft agreement with them, and we will discuss it with them over the next week.

The Convener: It is helpful to have that clarification. Thank you.

I will now bring in other members, starting with Sharon Dowey and then Pauline McNeill.

Sharon Dowey (South Scotland) (Con): Good morning. I will start with a question for Ms Medhurst. Do you feel that the Scottish Prison Service is prepared for the early release of prisoners? When did conversations with the Scottish Government about it start?

09:45

Teresa Medhurst: We are prepared for the early release arrangements that we have been developing, because we have been able to learn lessons from the emergency release that was enacted during the Covid pandemic.

One co-ordination and communication measure that we have put in place is having a single point of contact at each establishment. For example, our headquarters has a team of people who co-ordinate work with our partners and arrange meetings with them. The information flow is in through the single point of contact at each establishment and into local groups there, and it will go back through the single point of contact.

Yesterday, operational guidance went out to establishments to advise them of the arrangements, planning and preparation that they will need to undertake, but working through that process had already begun. For example, each establishment has been identifying lead staff in each place who will undertake preparatory work for the release of individual prisoners. A pre-release planning form will be filled in for each individual. Pre-release packs will be made up and will contain information on, for example, any appointments that they might have, contact details for organisations from which they might need support, and any additional information. Travel passes will be available for prisoners and travel arrangements will be made for them. All that will both inform our partners' planning for receiving people back into their communities and ensure that prisoners who are to be released are as well

informed as they can be about the individual preparations and arrangements that are being made for them.

Sharon Dowey: What information was sent out yesterday? Last week, I spoke to a few stakeholders, who did not know what was happening. This week, the committee received a letter from Victim Support Scotland, which said that, as of yesterday, it still did not have the information that would be available in the information-sharing agreement. Why was it only sent out yesterday? That does not give us much time to have a look at it and raise any issues while we have you here today.

Teresa Medhurst: Essentially, it was because that was when we completed it. The decision to move down the road of having an emergency release was taken only a matter of weeks ago, so we have been working at pace on the operational guidance, and the Scottish Government has been working on the guidance on the governor's veto and the information-sharing agreement guidance. That has all been under development in the past few weeks, since the cabinet secretary made the announcement.

We are also working at full tilt on managing and keeping prisons safe, so we are in a critical situation. A lot of work is going on daily just now to keep our prisons safe. I had to divert resource to work on the release arrangements as well, so we are really stretched across a number of issues. However, I assure Ms Dowey that everything that we can do has been done to expedite matters to ensure that we will be ready. That is why the guidance has gone out this week.

The Convener: Cabinet secretary, would you like to add to that?

Angela Constance: When I met Kate Wallace again last week, she spoke directly to me about the importance of the information-sharing agreement. I have stressed to my officials that both the information and the agreement are of pivotal importance. Our approach to it has been shaped by the law, including the general data protection regulation, and by existing information-sharing arrangements. It is a fairly complex piece of work.

Prior to coming to the committee today, I was clear that it was really important that a package of detailed information was available, both on the guidance for the governor's veto and the accompanying operational standards and on the draft information-sharing agreement. I appreciate that the committee is very busy, and that we are working at pace with regard to emergency release. I appreciate, too, that that causes anxiety for victim support organisations, but the nature of the

terrain that we are currently operating in means that we have to take emergency action.

It might be useful for me to talk about the decision-making process on emergency release. Members will be aware, because some of the correspondence was shared with the committee, that in the first week of May I received correspondence from His Majesty's chief inspector of Prisons for Scotland, the Prison Governors' Association, the SPS advisory board and Ms Medhurst herself. I could not ignore that correspondence. I had further discussions with Ms Medhurst and Cabinet colleagues, and the decision to pursue this course of action with Parliament's consent was approved at Cabinet in the few days before I made my statement to Parliament.

Sharon Dowey: One of my other concerns is planning and preparation, which are on-going. Last week, the emergency release was described as a "breathing space", but medium and long-term plans are needed. When asked about the future plans last week and what discussions were on-going with the Scottish Government, Phil Fairlie of the Prison Officers Association Scotland said:

"that is not being shared with us. It is not a conversation that we are involved in. The conversation might be going on elsewhere but not with us."—[*Official Report, Criminal Justice Committee*, 5 June 2024; c 46.]

Cabinet secretary, you mentioned in your opening statement changing needs and the ageing prison population. We have also heard about the need for halfway houses, supervised bail hostels, GPS monitoring, secure care homes and mental health facilities. However, when asked about that, Wendy Sinclair-Gieben, who is HM chief inspector of prisons, said:

"I would have to echo Phil Fairlie's comments and say that, if the Scottish Government is taking action on those things, I am not aware of it."

She went on to say that she had been raising these issues for some time, but that

"I have not seen any written plans or any action planning".—[*Official Report, Criminal Justice Committee*, 5 June 2024; c 46.]

This is just a breathing space. What are we actually doing? What conversations and actions are taking place so that we do not end up, in another six or nine months, saying that we will have another emergency release of prisoners?

Angela Constance: Thank you very much for that question. I made that point crystal clear in my statement to Parliament on 16 May. This is not a long-term solution. It is not a solution—it is breathing space. It buys us time. That is why I identified in that statement further additional action that I believe is required; we can make further improvements to the home detention curfew

arrangements and bring forward proposals to reconsider the release arrangements for long-term prisoners, so that we can have a discussion with Parliament about the benefits of long-term prisoners spending longer supervised in the community before their sentence expiry date. There is important evidence that demonstrates the value of supervision in the community, as opposed to people spending only a very short time being supervised in the community at the end of a lengthy sentence.

I have also, in my two previous statements, addressed issues in and around the remand population and the work that is going on there. I know that GPS technology is of particular interest to some members, which is why we will pilot GPS technology in the first instance, in phase 1, for those who are released on home detention curfew.

I am exercised about the ageing population in our prisons. The population of over-50s has doubled in a decade. Those over 50 in the prison population will experience health inequalities, although I contend that people who are over 50 are not particularly senior or elderly. If you have long-standing health problems due to the inequality that you have experienced in your life, those factors have to be taken into consideration.

There is an exploration of modular accommodation, and there is an exploration of care arrangements. I would like to see more compassionate release, where that is appropriate.

I have spoken at length to Parliament on the need for a whole-system approach. As a Parliament and as a country, we took that whole-system approach on imprisonment of young people. Incarceration of young people—16 and 17-year-olds—has reduced by 93 per cent over the past year. We need that same approach being taken to the larger adult population.

On your specific question, I meet the chief inspector regularly—indeed, I will meet her tomorrow. When it comes to the Prison Officers Association Scotland, I meet regularly with justice trade unions; however, when I listened to Phil Fairlie's evidence, it struck me that I probably need to write directly to more people to alert them to statements that are made in Parliament. I appreciate that not everybody follows proceedings in great detail, as we do, so I will change some aspects to ensure that people are better informed. However, I have been focused on issues of the prison population since I came into post.

The situation has been exacerbated further by the population increase of 400 in a few months. The rate of increase from March to May was double what it was earlier in the year, when it was high—too high—but stable. We now need to take

this emergency short-term action, which will buy us time for additional measures to kick in.

Sharon Dowey: So—

The Convener: I have to bring in other members, because I am conscious of time. I want every member to be able to come in; then, if we have time, we will bring other members back in. I ask for succinct questions and answers, with a focus on the SSI.

Pauline McNeill (Glasgow) (Lab): Good morning. I thank the cabinet secretary and Teresa Medhurst for keeping the spokespeople informed of the crisis that you face. I appreciate all that you are doing.

The first thing is to understand how we got here. We had some exchanges on that last week, so we are coming to understand what is behind the issue. I am trying to understand what the capacity is. We received figures this morning. I want to put them on the record to make sure that I have understood them. According to the Scottish Parliament information centre, the design capacity is 7,905 prisoners, the extended operating capacity is 8,608, and the target operating capacity is 8,198. In the numbers that you are releasing, are you aiming at that 8,198 figure or at something else?

Teresa Medhurst: We talk about numbers, and we can talk about numbers of cells and numbers of spaces. However, the reality, and the reason why I focused so much on complexity, is that 30 people could come into Barlinnie tonight, for example, and Barlinnie could very well have 30 spaces, but those spaces might not be in single-cell accommodation or they might not be spaces in which we can keep people safe—they might be in the mainstream population although offence protections might apply to the people who come in. That is the degree of complexity: it is not just about what spaces are available but where those spaces are and how we maximise them.

That is completely different from the experience in 2019, because complexity has increased so much in the past five years. Governors' experience is that the pressures come from that complexity in the population. The number of people that we need to keep separate because of factions, gangs and so on, has increased exponentially, and that makes separating people, trying to keep them safe in spaces that will provide for their needs, and managing their risks much harder than ever.

10:00

Pauline McNeill: That is helpful. It is important, for the longer term, to understand the issues about capacity, so thank you for that answer.

I have a similar line of questioning to Sharon Dowey's, because it is of primary concern of the committee. Last week, Professor Sarah Armstrong noted:

"After the emergency releases happened during Covid, the prison population went back up then increased at a faster rate."—[*Official Report, Criminal Justice Committee*, 5 June 2024; c 2-3.]

Wendy Sinclair-Gieben said that emergency release during Covid

"did not reduce the population overall for any significant length of time"—[*Official Report, Criminal Justice Committee*, 5 June 2024; c 47.]

and Kate Wallace from Victim Support Scotland noted the high reoffending rate after the emergency release during Covid and said that there was a risk that this emergency release will not make any difference. It is concerning that her evidence was that there was a higher reoffending rate. Cabinet secretary, given what you have said about buying time, which, I presume, is to find other ways for longer-term sustainability, will you respond to that? Of all my concerns, that is the primary one.

Angela Constance: That is what I seek to avoid. I have been very clear, up front and candid that emergency release is a short-term measure. It gives some breathing space and allows some capacity in the system to support the transition of children, given the passage of the Children (Care and Justice) (Scotland) Act 2024, for example. It gives the capacity to focus on recruitment to the SPS's plans to utilise additional capacity at Low Moss as well as in Cruden hall in Grampian. The committee will also be well aware of the plans at Polmont for more adult male prisoners to go in once the children have been removed. All that requires operational capacity.

However, I contend that we parliamentarians need to be focused on the other measures that we need to take, such as what else we will do to reduce our remand population, which sits today at 2,200, and what we will do to ensure a sustainable reduction in our prison population that protects public safety. Prisons are there to protect and, indeed, to punish, but they are also there to rehabilitate and reintegrate.

That is why, during the summer, I will have a short consultative exercise on the release arrangements for long-term prisoners. We know that, across all groups, people are serving longer sentences, so it is legitimate and justified that we look again at those reintegration processes and supports.

Court catch-up, or the amount of court activity and the number of warrants in the system, is part of the longer-term driver of the prison population.

On reoffending, you will have heard me say that, although short-term sentences are necessary in some circumstances, they are less effective at reducing recidivism than robust community payback orders. When people offend, they should pay back to the community and make amends for the distress they caused.

On the specific point that Ms McNeill raised about the return rate of people who were released under emergency arrangements during Covid, the statistics suggest that that was on a par with what happens in general with those who are released from short-term prison sentences, which are less effective at reducing reoffending than community justice disposals.

Pauline McNeill: You are saying that the reoffending rates during Covid were much the same as in any other period. Obviously, a concern about passing the SSI is that we will get high reoffending rates. I do not know whether I will have time to ask you about this, but I am sure that others will: that is why the prisoner release plan becomes absolutely essential.

I am absolutely sure that everything is being done by the service, but we are being asked to pass an SSI that we know is likely to lead to the same pattern of reoffending, so I want to know what assurance the system can give that every prisoner will be monitored on release and will have a plan that will give the public some confidence.

Angela Constance: The prisoners who will be released under the emergency arrangements will not be prisoners who are subject to compulsory supervision measures, because those prisoners are excluded from the release programme. People who are on extended sentences or are under sex offender notification requirements or supervised release orders—all arrangements that indicate additional risk—are not being released. We are talking about people who would be released within the next few weeks or months and without being subject to any supervision on release.

I will ask Teresa Medhurst to talk about the preparation for that, because extensive work is being done to do all that we can to prepare folk for release. I am not in any way trying to be glib.

Pauline McNeill: You are telling me that the profile of the offenders who could be released in that very short period excludes some of the prisoners who might have led to the high rates of offending. Have I understood that correctly?

Angela Constance: There were statutory exclusions the last time people were released under emergency provisions, which was during Covid. The figures show that around 40 per cent of those people returned to prison. The recidivism rate for people who are serving a sentence of less

than two years is 52 per cent, whereas the figure for those with a community disposal is 29 per cent.

We must remember that the people who could be eligible for release are the short-term prisoners who would be released in a few weeks or months anyway and who would not be subject to any monitoring or supervision.

It might be useful to give some information about who is eligible for release. The numbers vary depending on the prison population and will be determined by tomorrow's population. I can give you some indication of the modelling that has been done. This is an estimate, but it is anticipated that almost 65 per cent of those who will be eligible for release will have 90 days or less left to serve, so the majority would be released in the next few months anyway, without the measures.

Pauline McNeill: The Government has already acknowledged that there is a housing emergency. Are you concerned about that? If we do not house those people, they are more likely to reoffend. It must be a big concern for you if they do not get support in the community, they cannot get to a general practitioner to get their drug supply, or they cannot get housed.

Angela Constance: It is absolutely paramount to identify and address the immediate needs of people who are due to be released from prison. I will ask Teresa Medhurst to talk about operational activities and will ask Mr Hodge to talk about what is currently being done to identify those needs and to liaise with local authorities and services.

I repeat that one reason why people are being released in tranches is so that we can manage the situation. They will be people who are due for release anyway and whose release is being brought forward by a few weeks or months.

Teresa Medhurst: I will address the point that Ms McNeill raised about those who are being released. Since the last time, changes have been made to the governor's veto. On the last occasion, we did not have information on outstanding warrants. I do not know how much that factored into those who returned to custody, but this time, we will have a clearer idea and anyone who has an outstanding warrant will be subject to the governor's veto.

The second area that we have incorporated is that the Risk Management Authority will be involved. Any current information that it has through its level of service and case management inventory—LS/CMI—will be factored into decision making that governors can apply as part of their veto. Those are two additional protections that we did not have previously. From that perspective, we have learnt from last time and we are making improvements to the governor's veto.

Andy Hodge can probably talk more eloquently about the release arrangements than I can, but there will be teams focused on things such as the social welfare fund and there will be access to what the Department for Work and Pensions provides. People normally have about eight weeks to prepare for those things.

Last week, Lynsey Smith from Social Work Scotland said that its community preparedness will be significantly different to how it prepares for release of prisoners in normal cases and, therefore, it will provide more of a gold star service—although I cannot remember how she described it—for this group of individuals who will be leaving custody. Andy, do you want to say anything more about that?

Andy Hodge (Scottish Prison Service): I am happy to do that. The plan will be to have a local team, which will be dedicated to the emergency release programme. They will engage with internal and external partners, including social work, housing and benefits teams, to make sure that everyone is prepared for the release date. We did a similar exercise when we released prisoners during the Covid pandemic, when we joined up with local authorities. That worked very well, so we will replicate a lot of that.

Pauline McNeill: I have other questions, but I will leave it there just now.

The Convener: I will come back to you if there is time.

Katy Clark (West Scotland) (Lab): Overcrowding has been a massive issue in the Scottish prison estate for many years, and prison numbers have been increasing for a number of years. The cabinet secretary said that early release is the only option that is available. The Government is relying on a clause in the Bail and Release from Custody (Scotland) Act 2023. In discussions on that legislation, the focus was very much on situations such as a prison fire at Barlinnie or a possible spread of infection. What consideration has been given to other legislative options?

I understand that the Government is looking at home detention curfew for long-term prisoners, which the cabinet secretary has already referred to. Is the Government looking at remand, for example? Scotland is an outlier with the levels of remand within our prisons and the use of it in our system.

Is the Government also looking at specific cohorts, such as women or those who have been convicted of non-violent offences? Within the cohort of those who are being considered for early release, there are people who have been convicted of serious violent offences, including

culpable homicide. I will put that question to the cabinet secretary.

Angela Constance: I will start with overcrowding. There is a long history of there being a high prison population in Scotland. We saw some progress between 2010-11 and 2018-19, just before the pandemic, which was when the population began to uptick again.

The pandemic was a major disruptor and, post pandemic, as I reported to the Parliament, the population has increased, albeit that it stabilised at a high level at the start of the year. I will not rehearse all the reasons for that, as I have previously provided information and spoken about it at length.

10:15

The work around remand was a particular focus of the 2023 act. The convener is shaking her head so, again, I will not rehearse the debates that we had at that time. However, the implementation of the 2023 act throughout the course of this year and the start of next is important in relation to the new bail test, although the general election has got in the way a little bit.

We have been engaging closely with the United Kingdom Government because a section 104 order is required for the new bail test. I will not go into all the detail, but it concerns extradition. If members want further information, I can supply that, but it is separate to the matters that we are discussing today.

With regard to the modelling, we will not know firm figures until the regulations are passed but, with the statutory exclusions and additional criteria, before a governor's veto, the indicative figure is that around 70 women would be eligible for release. That amounts to 31 per cent of the sentenced female population, or 20 per cent of the total female population. That figure is greater than the proportion of the eligible male population, which would be around 11 per cent of the sentenced male population, or 8 per cent of the total population.

With regard to violence, the governor's veto gives an additional layer of safeguarding and protection. Again, as a result of requests and debate during the passage of the 2023 act, there is guidance for governors and it is supplemented by operational procedures. The veto gives the governor of any establishment the opportunity to exclude anyone who is otherwise eligible for release if they are an immediate threat to an individual or an identifiable group of individuals.

An underlying risk management group will collate the information that flows to the governor from social work—not only justice social work, but

children and families social work, which is crucial. The prison also holds information on its security and the police hold information that will also feed into that.

Katy Clark: I will ask a question and get a very short answer—yes or no. We were told last week that the governor's veto was little used with Covid legislation. Is it correct that there was only a handful of cases? Maybe Andy Hodge could confirm that. We were told that the governor's veto has been little used in the past, and that there were not huge numbers of governor's vetoes. Is that accurate?

Angela Constance: The proportion was 25 per cent.

Teresa Medhurst: On the last occasion, it was around 25 per cent.

Katy Clark: That is actually higher than the indication that we were given.

The cabinet secretary is very clear that she does not see early release as a solution but as a measure that will give the Prison Service time and capacity, but we are trying to understand what it will give the prison service time and capacity to do. The measure is clearly a sticking plaster and will not resolve the issues, so are we not going to be back in this place in, say, three or four months? Does Teresa Medhurst envisage that we will be back here in three or four months?

Teresa Medhurst: There are two elements to the question that you have asked, Ms Clark. One element, which the cabinet secretary alluded to earlier, is that there are other measures that we can take, but we need the time and capacity to do so. For example, six children are still in custody in Polmont at the moment. In order to accommodate them, we have redesignated a hall for adult males so, until those children are removed from Polmont, there are 70 spaces that I cannot realise and achieve. There is capacity that we could use in Grampian and further capacity at Low Moss, but I need the staff to do that. We are on a recruitment drive, but I need the boots on the ground.

That breathing space will give us time to look at where the pressures of population are and do some remodelling if required, but it will also give us more time to realise and achieve greater use of the existing estate. We already had those plans in train because the increase started last year. No one had anticipated that, from the end of March to the beginning of April, the population would rise so considerably, so those plans have had to be put on hold. We are also looking at modular accommodation. It will probably take at least a couple of years to realise that, but that is additional capacity.

The other thing about the breathing space that I need the committee and Parliament to understand is that prison governors such as Andy Hodge, and their teams, are working under pressure on a daily basis. They are on top of that and managing it, but only because they see respite coming down the line, and that respite is the emergency early release arrangements. If that respite is not realised, the population will continue to rise, and the capacity and willingness to step up in the way that the staff are doing just now, which is really admirable and more than we should be asking of them, will start to wane and conditions in prisons will start to deteriorate. When staff and leaders such as Andy Hodge see that they can no longer achieve what they need to achieve by complying with legislation and delivering a service that they consider is appropriate and commensurate with people's needs, morale will dip and conditions will deteriorate quickly.

Katy Clark: Convener, is there time for me to ask a question about victim notification?

The Convener: I will come back to you, Katy. I would like everybody to come in with at least one or two questions, and then we will go back around.

Russell Findlay (West Scotland) (Con): Has the list of prisoners that are going to be released already been drawn up?

Teresa Medhurst: We are modelling lists of prisoners at the moment, but the list is a model and it does change—

Russell Findlay: Sure. Who is allowed to see the list?

Teresa Medhurst: We have already shared the list with the partners who will feed the information into the governor's veto.

Russell Findlay: Who are the partners?

Teresa Medhurst: The partners are Police Scotland, the RMA and justice social work.

Russell Findlay: Therefore, there is a list of prisoners.

Teresa Medhurst: We are working on lists at the moment—yes.

Russell Findlay: If it has been shared, there must be a list.

Teresa Medhurst: Yes.

Russell Findlay: It might change, but there is an existing list.

Teresa Medhurst: Yes.

Russell Findlay: Thank you. The early release will begin on 26 June, which is two weeks from today, but, until yesterday, Victim Support Scotland was telling us that it had not seen the

information-sharing agreement. You have now told us that Victim Support Scotland has finally been given the information at the last minute. Leaving victims in the dark in that way is hardly trauma-informed, is it? That is maybe a question cabinet secretary.

Angela Constance: I understand and take absolutely seriously the legitimate and real concerns that victim support organisations raise. I will not repeat the safety measures or safeguards in the arrangements. Collectively, we will continue to engage with victim support organisations.

However, with regard to being trauma-informed, that is why we implemented the sections in the 2023 act, whereby victims can, if they choose, have the information shared with a victim support organisation, either instead of, or at the same time as, the information being given to the victims.

Russell Findlay: I am conscious of the time.

Angela Constance: I am sure that Mr Findlay is aware of the existing victim notification and information schemes.

Russell Findlay: They have poor take-up rates.

Angela Constance: Actually, Mr Findlay, that is a very fair point, and it was one of the reasons for the independent review of the victim notification scheme last year. We would like to see more victims register for those schemes, but it has to be their choice.

Russell Findlay: The list of prisoners who are going to be released has been shared with the justice agency partners that will deal with it, but victims will find out that up to 550 people are being released early only when they read about it in the media. At that point, they will have to work out that they have to contact one of the four designated organisations, which will then have to ask the SPS to share the information with them, so that they can share it with victims. Am I correct in assuming that, by that time, some of the prisoners will already have been released?

Angela Constance: Ms Medhurst might come in, if I miss out some detail. The situation is that people who are currently registered with the victim notification scheme will receive the information that they are entitled to receive under that scheme in line with legislation. We cannot release information that is not currently legislated for.

Russell Findlay: The VNS generally applies to prisoners who are serving longer sentences.

Angela Constance: The VNS applies to sentences of 18 months or longer and the victim information scheme applies to sentences of less than 18 months.

Russell Findlay: I go back to my question. Under the model that you are proposing, by the

time some victims figure out how to get the information the prisoner will already have been released.

Angela Constance: That is why we will be working as hard as possible to support the victim support organisations.

Russell Findlay: I am not clear on the answer about what I have suggested. Is that the case?

Angela Constance: Could you repeat the question? You asked a few in quick succession.

Russell Findlay: It is the same question, for the third time. In some cases, will the prisoner already have been released by the time a victim is told about the release?

Angela Constance: Teresa Medhurst, would you like to attempt to answer that?

Teresa Medhurst: Some victims are registered with the victim notification scheme, but you are referring to victims who are not registered with that scheme. It is for them to determine whether they want or will seek that information. There will be information on our website and on our partners' websites, which will also be shared with victims organisations to ensure that, where people have concerns and come forward, we can either support them through the victims organisations or provide support to get them registered with the victim notification scheme.

Russell Findlay: The question was about whether there will be some cases in which, by the time a victim asks for the information—because they are not proactively being told anything by the Government or the SPS—the prisoner in question will already have been released.

Angela Constance: The bottom line is that it is not trauma-informed to give people information without knowing that they want that information. That is why work is currently in play, prior to people being released, to raise awareness that there is a process for people who want information—

Russell Findlay: That is fine if it is your view, but I have asked the same question four times.

Angela Constance: We are operating within the existing victim notification scheme—*[Interruption.]* We cannot give people information without knowing that they want it—

Russell Findlay: Putting aside the VNS cohort—

The Convener: I remind members to be respectful in their questioning.

Russell Findlay: Putting aside the VNS cohort, which you keep returning to, I am talking about what might be hundreds of victims, because 550

prisoners could be released. All I am trying to establish is whether, in some cases, by the time some of those people have figured out how to acquire the information to which they are entitled, prisoners will already have been released.

Angela Constance: We are reliant on people coming forward if they are not registered with the victim notification scheme. I hope that, through our work as parliamentarians and with our partners such as SPS, we can raise as much awareness as possible. We will do everything that we can to support the victim support organisations, but I cannot give people information without knowing that they want it.

Russell Findlay: We have so little time and I have a lot more questions. The answers are not good enough. Why cannot you just admit that that will happen?

The Convener: We will move on. You have asked that question several times—

Russell Findlay: It has not been answered, but I think that I have made the point, so can I move on to another question?

The Convener: If you want to ask another question, that is fine. I will then bring in a couple of other members who want to come in.

Russell Findlay: It has been reported that the Lord President has written to sheriffs principal—I think that there are six of them in Scotland—essentially reminding them about the alternatives to custody. I have not seen that letter, and I am not sure whether the clerks have had any success in acquiring it. Cabinet secretary, was that representation in any way connected to the Government talking to the Lord President?

10:30

Angela Constance: I talk to every partner in the justice system about the problems that are associated with the high prison population. That includes the Lord President. He is a defender and protector of the independence of the judiciary—as I am and as we all are, by law. I talk to each and every partner in our justice system about the problems that are associated with a high prison population, because it will ultimately require a whole-system solution. It is beholden on me to raise awareness, increase the visibility of community disposals, discuss with people how they think the implementation of, or response to, the presumption against short-term sentences is going, and articulate the effectiveness of robust community disposals. That does not take away from the independent decision making of partners. In short, I discuss the matter with everybody, Mr Findlay.

Russell Findlay: We were told by Paula Arnold last week that she has used the governor's veto power twice. However, today we are told that it was used on 25 per cent of occasions during the 2020 Covid early release. In the region of 350 prisoners were released early at that time, so does that mean that about 100 others were prevented from being released due to the governor's veto?

The new veto guidelines, which have just been published, are stronger because governors are also being told about outstanding warrants. We have been told that today. Is it the case that, in the previous release, prisoners were being released when they had outstanding warrants? That is my first question.

Given how significant the proportion of governor's vetoes on release was last time—25 per cent—it is likely to be higher now, due to the outstanding warrant information. How many of the 550 prisoners do you anticipate being blocked by governors?

Teresa Medhurst: Thank you for your question, Mr Findlay.

The modelling that we have done and the information that we took from the emergency release provisions that were enacted during Covid was that the figure was around 25 per cent. We have already applied that to the figures that we have provided. Figures vary from day to day and week to week, because of movement in and out of prisons at the moment. The number is likely to be around 500 to 550 prisoners, but that is with the governor's veto.

Russell Findlay: Is that factored in already?

Teresa Medhurst: That is factored in. As I said, there is the additional element of the warrants. Clearly, during Covid we were working in very different times, and one of the lessons that we learned about the way in which the regulations were enacted was that outstanding warrants should be factored into the decision making. That has been taken on board and will be included as part of the governor's veto on this occasion.

Russell Findlay: Thank you. Convener, I think that I have run out of time.

The Convener: I will come back to members who really want to come in, but we are up to time and a couple of members would still like to come in. I ask the witnesses whether they are fine with staying on for a little bit longer.

Witnesses indicated agreement.

The Convener: Okay. There are some important questions that members are very interested to ask. I will bring in Rona Mackay, then Jackie Dunbar.

Rona Mackay (Strathkelvin and Bearsden)

(SNP): Good morning, and thanks, convener. I will keep my questions brief. Teresa Medhurst talked about children being in Polmont and the capacity that that is blocking. Has secure care been explored as an avenue for those children?

Teresa Medhurst: That is a decision for the court: the court decides where a person is sent. As far as we are aware, from an SPS perspective the court has determined that, in those cases, they should go to prison. It is for the court to decide.

Rona Mackay: I understand that. Thank you.

It is expected that 70 women out of the 218 who are currently sentenced will be released. Does that mean that the remainder of the women are serving sentences of four years or more, or was that choice made under different criteria?

Teresa Medhurst: There might, as well as long-term prisoners, be some women among that number who are not being considered because they are statutorily excluded.

Rona Mackay: The next subject that I want to drill into a wee bit is remand prisoners. Obviously, many of them will not be guilty of anything. For clarification, are remand prisoners being included in any of the decisions?

Angela Constance: No. I have looked really closely at the matter. I made an undertaking to do so in response to a question from Mr McArthur following my statement. In short, the legislative basis for remanding prisoners is very different. Scottish ministers have, under legislation, powers on release arrangements for sentenced prisoners, while powers concerning remand prisoners lie with the court. The mechanism for the arrangements to be revisited would be to do that through solicitors, whereby a person could request a review of their being on remand. That is the short answer.

Rona Mackay: I thought that that was the case—that there was a different legal status—but I just wanted to check that. We know that a lot of women are remanded for less serious charges. Without that barrier, it seems that it would be logical to consider the matter.

You talked about community justice disposals being preferable to putting people on remand or sentencing them to a short prison sentence. The justice system and the judiciary are responsible for those decisions. Have they been brought into the scheme? Are they aware of the part that they play in trying to keep our prison population down?

Angela Constance: I have always been clear that there is no magic bullet; there is no single solution that will provide a more sustainable prison population. Scotland, like the rest of the UK, is completely out of kilter with comparable jurisdictions. I have had views on the issue all my

adult working life. It should be addressed, because it is not in the interests of public safety to have a very high prison population, particularly when things get to a critical point at which critical risks are posed by that very high population.

I indicated in my earlier answer to Mr Findlay that I discuss a range of issues with all justice partners. Shifting the balance from use of custody to use of robust community disposals is evidence led, and it is the right thing to do in many instances. However, we need to be focused on remand. There is work going on around a new partnership with the voluntary sector, which is about doing more, particularly for short-term prisoners, through voluntary aftercare.

I have already spoken about my strong desire to pursue different arrangements for long-term prisoners. We will make a Scottish statutory instrument on home detention curfew to enable people to spend longer on home detention curfew, in which people are licensed and tagged under a curfew. We have also spoken about better use of technology—using GPS, for example. We continue to expand supervised bail and electronically monitored bail, both of which are at record high levels. They might be at record-high levels, but we still need to do more.

Rona Mackay: Is international good practice being looked at? I am assuming that it has been. How do other countries deal with problems such as this? We have an extremely high rate, but other countries must be struggling with that, too.

Angela Constance: Every home nation in the UK is struggling with the issue right now, and I have engaged with colleagues across the UK on it; I have had discussions with people in Northern Ireland, in particular. England and Wales have had emergency release provisions for decades, and have had a rolling prisoner release programme since October 2023. Measures have been taken there to utilise police cells, which is not something that we have pursued, and the measures have slowed down the court process. We remain focused on court catch-up.

It is important to consider what is currently available in other jurisdictions for emergency situations, but we can cast our eye further afield to other comparable jurisdictions that have historically always had much lower prison populations than Scotland has. There is not something intrinsic to Scotland—or indeed anywhere else in the UK—

Rona Mackay: That is the point that I was getting at.

Angela Constance: It is not that we are somehow unique and a complete outlier in what we need regarding our prison population.

The Convener: Before I bring in Jackie Dunbar, Fulton MacGregor wishes to ask a supplementary question.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Thank you, convener, and good morning, cabinet secretary and the rest of the panel.

This relates to Rona Mackay's line of questioning on remand. It seems to be an area where some of the pressures on prisons could have been relieved, and it has been really helpful to hear you put on record the reasons why you cannot consider that population.

In your thinking, have you been considering any further legislation in the area that might mean that the remand population could be considered in the future? You said just now that any such consideration would need to be on an individual basis through solicitors and so on, and would be very much in a legal context. Is there anything that could be brought forward by the Government to ensure that the remand population could be considered in the future if such circumstances were to arise again? Is that in any of your thinking?

Angela Constance: Part 1 of the Bail and Release from Custody (Scotland) Act 2023 refocused the bail test so that there is a very sharp focus on public safety, including victim safety, and on those who pose a risk to the administration of justice. The whole purpose of part 1 of the act was to refocus use of remand, so we have already legislated in that regard. We are working with justice partners on implementation of part 1, although that has been held up because we need a section 104 duty, and there are some intricacies around extradition. To be fair, I point out that the UK Government has been working well with us in that regard, but the general election campaign has been something of an interrupter.

The absolute priority, over and above legislation, is alternatives to remand. We currently invest £3.2 million in alternatives to remand. The work that I referenced that involves re-looking at the partnership arrangements with the voluntary sector is being done with that in mind. That can involve voluntary aftercare post-sentence or bespoke support for people through mentoring.

I am crystal clear that we need to do more about the visibility and expansion of alternatives to remand in the community.

Jackie Dunbar (Aberdeen Donside) (SNP): I have a quick question. I notice that the dates that you have set for release are on a Wednesday and Thursday. Is there any reason for choosing those days? What is the thinking on that? Is it purely to ensure that folk have access to the kinds of services that Pauline McNeill mentioned?

10:45

Angela Constance: I will give a quick answer. Yes, the decision to choose days midweek and avoid releasing people on a Friday was deliberate. It is about improving access to services and recognising that some people may have longer travel arrangements.

The Convener: Some members would like to come back in. I will give the justice spokespeople their place and will invite Pauline McNeill to come back in, if she would still like to ask questions. I will then go to Russell Findlay.

Pauline McNeill: Am I right in saying that there has been a reduction in the use of home detention curfew?

Angela Constance: Not recently, but historically, when we look at previous records—I think that this is in an information note—in days gone by, the number of prisoners on home detention curfew would have sat at around 250 or 300. When I first started in this portfolio, in any given week, that number would sit between 50 and 60. The Scottish Prison Service has done positive work on that—I will bring in Ms Medhurst in a moment, if there is anything that she would like to add—and, today, the home detention curfew figures are at 104, so we have been able to improve the process.

Essentially, the processes around it were very cumbersome and Ms Medhurst has taken a centralised approach. People have to opt into it. The short answer is that we have cast the net more widely. Of course, there are statutory exclusions to home detention curfew and people also have to be risk assessed.

Ms Medhurst, have I missed anything on the process?

Teresa Medhurst: Changes were made in 2019, and rightly so, after there was a significant and horrific incident that devastated a family. One of the additional measures that was brought in was that a risk assessment is now part of the process. Over the past six to nine months, we have been working hard to maximise the use of home detention curfew, as the cabinet secretary said. Essentially, the model that existed was that each establishment would operate the HDC process in its own right. However, the problem with that was that that work usually fell to the unit manager, who would be dealing with other operational issues and would not necessarily have the time, so they would just deal with the immediate issues. We have brought the process into the centre.

The decision on an HDC is still undertaken by a governor, but the whole process is managed for them. The case will then go back to the governor

who is in charge of the establishment to make a decision. There has been an increase of between 50 and 60 individuals who are now out on HDC, and we are in a position in which people are waiting until their qualification dates, so we are better able to use what is already in existence.

Pauline McNeill: That is helpful. Last week, when we received the papers, that was one of the factors that was highlighted.

Angela Constance: It is one of many factors. Changes have been made to the release of long-term prisoners, there have been changes to home detention curfew, with the number of prisoners on an HDC dropping, and there has been an average increase in sentences of 14 per cent. HDC is one of the factors.

Pauline McNeill: So, there was a reduction in the use of home detention curfew, but you have done the groundwork so that it can be used more, and there are signs that it is being used more.

Angela Constance: Yes.

Pauline McNeill: My last question relates to the short window for release. It starts on 13 June, and you said that it will end in mid-July. My central question relates to the fact that there is not a long time for you to plan, as I want to ensure that the committee does not have to pass SSIs so quickly in the future.

You said in reply to a committee member—actually, I think that it was me—that you are looking at longer-term prisoners. Is that part of your thinking to avoid any future committee being asked to do this? Are you starting to make changes? I am trying to understand, if we pass the SSI, how to ensure that we are not here again. We have such a short window. I acknowledge all the things that are being done on the use of home detention curfew or by looking at the remand population, but they seem to be a long way off.

Angela Constance: There are a number of factors in that. I will specifically address the issue of long-term prisoners. Although the statutory instrument runs for a short period of time—that window is short—the effect on the prison population will be longer and should get us past the summer and into autumn.

That is why, as I outlined in my statement on 16 May, we will do a short exercise over the summer to consult on release arrangements for long-term prisoners. We will openly discuss the question of what proportion of a long-term sentence should be served under community supervision. For people who are not released on parole, that is currently six months. If sentences are going up and someone has served six, eight, 10, 12, or 14 years, is six months of compulsory supervision at

the end of their sentence long enough to reintegrate them?

We need to have that conversation and look at the evidence. I am not prejudging the specifics, although I am strongly of the view that now, almost 10 years since the Prisoners (Control of Release) (Scotland) Act 2015 was passed, is the time to look at that, because it is one of the underlying factors behind our high prison population.

I also said in my statement that, depending on the response to that consultation, and with the approval of colleagues, I would seek to bring forward expedited legislation. We must do more. Emergency release is absolutely necessary right now, but we cannot take our foot off the gas. We must bring forward additional proposals, over and above what I have already reported to Parliament, and that is one of them.

Russell Findlay: We have heard a lot about how this will be administered, but my question is about how we have reached this particular point. The Scottish Government has often said that far too many people are in prison, but I will read something that was said to us last week by His Majesty's chief inspector of prisons. She said:

“We would have to invest in genuinely robust community alternatives that satisfy the public and also satisfy the sheriffs, and those do not currently exist.”—[*Official Report, Criminal Justice Committee*, 5 June 2024; c 34.]

That seems extraordinary, so my question for the cabinet secretary is why, after 17 years of this Government, those community sentences that will satisfy the public and sheriffs have not been created.

We have also not touched on the issue of the prisons that have not been built and are now overdue. Because of those two factors, there is a risk that the mass early release that we are experiencing now might become a new normal.

Angela Constance: I will do everything in my power to persuade Parliament of the additional measures, one of which I outlined to Ms McNeill, so that we avoid this becoming the new normal, because I do not want it to be the new normal.

I was very pleased that this former prison social worker secured an additional £14 million of investment in community justice for this financial year, bringing the figure up to £148 million. Colleagues will recall reform through legislation on community payback orders. Do we need to improve the visibility of those? Do we need to continue to utilise Community Justice Scotland to convince hearts and minds of what the evidence tells us about the effectiveness of community payback orders? Do we have to continue to expand community justice? My answers are yes, yes and yes.

On the prison building programme, as, I am sure, I have said before to Mr Findlay—again, I will be utterly candid—we cannot build our way out of this. Our prison building programme is a programme to replace old Victorian prisons. I am pleased with the progress that is being made on HMP Highland. We will have more news later this year, in the summer and in the autumn, about the replacement for Barlinnie.

I agree with the chief inspector that, as a country and as a Parliament, we have a choice. We can choose to build more prisons, if we do not think that 17 prisons are enough. If we think that Scotland is so uniquely bad that we need more prisons because we need to continue to lock up more people than any other country in the western world, that is a choice that we can make. However, people will have to come up with the capital resource. The choice that we will have to make is whether to have more prisons, more hospitals or more schools. We can have that discussion and debate.

Russell Findlay: Sure, but you have had 17 years in which to make those choices.

Angela Constance: We have been making substantial choices—

Russell Findlay: But we have record prisoner numbers.

Angela Constance: We have indeed got record prisoner numbers—

Russell Findlay: So those choices have not really been made, have they?

Angela Constance: Well, we have—

Russell Findlay: I do not want to interrupt your speech, but—*[Laughter.]*

Angela Constance: I have become used to it, Mr Findlay.

The Convener: On that note, I will bring things to a close. At least we have ended with some smiles on what is a very serious topic.

Thank you all. We will have a very short suspension, to allow Ms Medhurst and Mr Hodge to step back from the table.

10:57

Meeting suspended.

10:58

On resuming—

The Convener: Our next item of business is consideration of the motion to approve the affirmative SSI on which we have just taken oral evidence. I remind officials—although I am sure

that I do not need to—that only MSPs may speak in a debate on a motion. I invite the cabinet secretary to move motion S6M-13500, which is in her name, and to make any brief additional comments.

Angela Constance: For absolute clarity and for the record, it might be useful for me to confirm that tranche 1 of the release will be on 26 and 27 June, tranche 2 will be on 3 and 4 July, tranche 3 will be on 10 and 11 July and tranche 4 will be on 17 and 18 July, with the latest possible release date being 25 July.

I will keep my remarks brief, convener, because we have had a lengthy session. I appreciated the opportunity to spend that time with committee members focusing on the nature of the regulations. We have also had a wider discussion about the longer-term drivers of the prison population. The only point that I wish to make to the committee here and now is that, while we can critique the past and debate the next steps for the future, we have a decision to make in relation to the evidence from the chief executive of the Scottish Prison Service and from Mr Hodge, a prison governor, and it is a very difficult decision.

11:00

I know what I am asking of the committee and Parliament, but we need to make a decision based on the situation and the critical risk that exists across our prison estate. It is my view that we have no alternative to making this very difficult decision. The Prison Service needs to know that help is on its way and that, ultimately, we have its back. It does a job on our behalf and on behalf of the communities that we all serve. This measure is absolutely a necessary and proportionate course of action, but it has not been taken lightly.

I move,

That the Criminal Justice Committee recommends that the Early Release of Prisoners and Prescribed Victim Supporters (Scotland) Regulations 2024 [draft] be approved.

The Convener: Thank you, cabinet secretary. Do members have any brief additional remarks that they wish to make on the SSI?

Russell Findlay: I will try to be brief. It is good to acknowledge that there is a starting point, which is that each and every one of those prisoners is there after a full independent judicial process and that sentencing is due to judges, who are privy to the full facts, which we as politicians are not. It is a hugely significant decision to release up to 550 prisoners before the end of their sentences.

The reasons why we are here are threefold: there has been a failure to invest properly in community sentencing, there has been a failure to

invest in technology for bail and parole and there has been a failure to build new prisons—no additional prisons, but replacement prisons. I do not buy the apparent surprise when we reach a crisis point, with half the prisons in Scotland at red status.

As we know from Covid, the reality is that, when the mass release takes place, it will result in more crime. There was a 40 per cent reoffending rate within six months the previous time. *[Interruption.]* There is a bit of a noise here somewhere—sorry.

The multiple Victim Support Scotland submissions to the committee are pretty damning. First, victims are not being told proactively; they will have to ask, and they will have to work out how to do so. Today, I attempted to ask a question on several occasions, which was whether, in some circumstances, the person who perpetrated the crime against a victim would already have been released by the time the victim had established that they were going to be released. I did not get an answer—or I certainly felt that I did not get an answer. All that suggests that victims' rights are an afterthought at best, and it makes a bit of a mockery of the Scottish Government's talk of being trauma informed.

The implementation of the measures has been poor. Ultimately—

Rona Mackay: Will the member take an intervention?

Russell Findlay: Is that how the format works, convener?

The Convener: Yes.

Russell Findlay: Right—I will give way, then.

Rona Mackay: Can the member say whether he has any regard at all for the health and safety of prisoners and staff, and for the pressure that prison staff are under?

Russell Findlay: Absolutely.

Rona Mackay: Does he acknowledge that it is an absolutely extraordinary situation that we are in?

Russell Findlay: Yes.

Rona Mackay: I am not sure about the negativity coming from—

Russell Findlay: The member is absolutely correct. It is a damning indictment of the Government, which has allowed prison officers to exist in an environment that has got worse and worse for 17 years. I have raised the difficulties that are faced by prison officers on a number of occasions in the chamber, from the organised crime threat of mass fire bombings of cars and what is being done about that to the inhalation of

drugs and the harm that is being done in that respect. I agree with the member.

On balance, we are not persuaded by the proposal that is before us. It is ill conceived and it is not being properly implemented. The Government has been signposting the intent to do this for the best part of a year and, at the very last minute, victims are being left scrambling about in the dark. That cannot be supported.

Sharon Dowey: On what Rona Mackay said, I totally agree that prison officers do an excellent job and that we need to be concerned for their safety and that of the people in the prisons—we definitely need to look at that. However, this is being presented as an extraordinary measure even though the prospect of emergency release has been present for some time, so it is not really an emergency. There is still a lot more that we need to look at, as I said in my questions. I quoted last week's witnesses, who said that early release creates a "breathing space" but medium and long-term plans are needed. I would like us, as a committee, to see a lot more on what those medium and long-term plans are, to ensure that we are not back here in another few months, and to get timescales for those plans.

We received another update from Victim Support Scotland, which has also had a lot of concerns. It says in its briefing that, on Tuesday 11 June, no draft of the information sharing agreement was available. I am glad to say that that has now been given out, but prior planning should have meant that Victim Support Scotland and other stakeholders got that a lot earlier. Again, I am speaking to people on the ground who are saying that there was no information available to them. I do not know whether the plans and discussions were happening at a higher level, but the information was not getting down to people on the ground.

We have now heard that there is an actual list of prisoners who could be eligible for early release. Again, however, it might have been prudent to have shared that with some of those organisations so that they could get information together and have more time to prepare for any vetoes. Victim Support Scotland said that it is concerned about the emergency release process and that the governor will have a veto but that it is unclear how informed the process will be. One of the questions that I did not manage to ask in the evidence session earlier today was about the governor's veto. The veto is to prevent the release of an otherwise eligible prisoner if the governor thinks that they would, if they were released, pose an immediate risk to a specified individual or group of individuals.

Last week, I asked Paula Arnold about the governor's veto. She said:

“during the last early release, I signed off on only two governor’s vetoes, I think”.

That was that due to concerns outwith criminal justice, such as concerns about housing and so on. She said:

“at that point in time, without the pre-planning that should be in place, the person was not suitable for release so quickly. For example, there might not have been an involvement with third sector or throughcare services, or somewhere for that person to live”.—[*Official Report, Criminal Justice Committee*, 5 June 2024; c 44.]

I am concerned about whether governors are still allowed to use a veto for those reasons or whether they can use it only if the person would cause an immediate risk to a specified individual or group. Again, it is the reoffending aspect that I am concerned about.

The Convener: That may be something that the cabinet secretary could come back in on. Could I ask you to wind up your remarks?

Sharon Dowey: Okay. There are a few other things, but I will leave it there.

Pauline McNeill: First, I thank the cabinet secretary, Teresa Medhurst and Andy Hodge for answering all the questions and for all the work that went into preparing for an intense couple of sessions in which we have tried to understand in two weeks what are long-term issues in the prison system. I was satisfied with the answer on home detention and curfew but, right up to that point, I had thought that there was much less use of that. I am having some difficulty in processing in this short time everything that we have heard.

Like Sharon Dowey, I was alarmed by the letter that we got from Victim Support Scotland yesterday. I do not know what Victim Support Scotland’s attitude will be to what has been said this morning. I tried to contact it during the meeting, but I have not been able to get a response.

Cabinet secretary, all the issues that you said that you will need to look at are absolutely the right ones—I would not disagree with much of what you said—but I wanted a bit more scrutiny of the situation with regard to longer-term prisoners, or a sense that you will get to that. As I said at the beginning, my primary concern is whether, if I vote for the SSI, I can be satisfied that we will not be here again in a few months’ time. That is what I am considering.

Russell Findlay: Will Pauline McNeill take an intervention?

Pauline McNeill: I will.

Russell Findlay: We heard some quite stirring closing remarks from the cabinet secretary about the need to invest in alternatives to custody. That has not been happening for 17 years, which is why

we are at a crisis point. Can Pauline McNeill understand why that has happened?

Pauline McNeill: I agree with the member about the role that the cabinet secretary has played today. I agree with what she has said, and I note that she has been the cabinet secretary for only a short time. I agree with the primary concern. This has been a long time coming and there are limited solutions. We would not want to build our way out of the problem, but it is clear that other things could have been done earlier in the process. That is my primary concern.

I know that there is an information-sharing agreement with Victim Support Scotland. I wanted every victim to be notified and I have had to factor in what the cabinet secretary said about that not being trauma informed. It is not my area of expertise, but I would have thought that every victim would want to be notified about the person who offended against them. I would also like anyone who has a victim in their family to be notified.

Sharon Dowey: Will Pauline McNeill take an intervention?

Pauline McNeill: I will.

Sharon Dowey: On that point, the briefing from Victim Support Scotland says:

“there is an extremely short timescale and there is no mechanism to ensure that every victim is notified in advance and offered a support and safety plan.”

It adds:

“this is extremely disappointing as it was one of the key asks from the previous emergency release programme”.

Is Pauline McNeill concerned that lessons are not being learned and that we will be here again in a few months’ time?

Pauline McNeill: One of my key questions was about what happened during Covid. I appreciate that, in some ways, it might have been slightly easier to organise prisoner release during Covid as things such as general practitioner appointments were easier because the public were not attending. However, we are where we are.

I need more time. We have the governors guidance, but I simply have not had time to read it. I have serious concerns about where we are now. I take Rona Mackay’s point that we are, to some extent, backed into a corner. I really do not want prison staff and governors to have to continue managing a prison system like this but, as a legislator, I have to consider whether I would be doing the right thing by voting for the measure today. At the moment, I am minded not to support it, but I will take time this afternoon to find out what Victim Support Scotland has to say, because we

will vote again this afternoon if the measure passes at committee.

I have spent a lot of time on this. I have spent loads of time analysing the figures, but I still feel at a bit of a disadvantage in trying to process it all on top of everything else, because this is not the only issue that we are dealing with today, although it is probably the most important one. I will leave it there.

Rona Mackay: I confirm my support for the SSI. It is abundantly clear that it is a necessary short-term measure. The members of this committee are not experts on operational matters, but I have faith in the Government and am confident that the Prison Service and its partners are dealing with this in a really professional manner and using all their skills. We can pick up on certain details, but I am perfectly confident that this has to happen and that it is being dealt with professionally. I appreciate the hard work that has gone into it.

Pauline McNeill said that we are where we are. That is absolutely right, so this has to happen, but I think that it will be a catalyst for future change. The judiciary must recognise the responsibility to bring about change through community sentencing.

11:15

Katy Clark: This has been an inadequate scrutiny process of a draft order that is based on a section of an act that was passed by the Parliament last year, following on from emergency legislation that was passed during Covid and which, at the time, everybody accepted to be draconian. That particular section did not get a huge amount of attention during that process, because there were so many other parts to the legislation. I recall questioning the cabinet secretary about it in this committee, and the focus was very much on justifying the section based on an eventuality such as a prison fire at Barlinnie or the spread of infection.

I therefore have concerns about the process itself and about the idea that, basically, this is going to be it. A lot of information has been provided to the committee extremely late, and some of it is contradictory: some of the evidence that we have heard today contradicts what we heard last week. I am saying not that the information that we have heard today is inaccurate but that, simply, we have been given different information over the fortnight.

The committee has been put in an impossible position by being asked to make this decision today. There is absolutely no doubt that we are in this situation because of failures of Government policy. Concerns about overcrowding and the increase in the prison population have been

expressed for very many months—indeed, for very many years—so it is not an emergency in that sense. I fully accept that the situation in the prisons is completely intolerable and unacceptable. However, we are being asked to vote for what has been described as the only option available.

There is no doubt that many prisoners who are now in the prison estate could be safely released. However, we need to be convinced that the cohort that is covered by the order is the cohort that could most safely—and should—be released. That has simply not been addressed through this process. A great deal more thinking and work should have been done over the past days and weeks to identify such a cohort—and, if necessary, to bring emergency legislation to Parliament. The committee has repeatedly discussed who those prisoners might be. We have specifically focused on women and remand prisoners, but there are many prisoners who are in prison for non-violent offences. However, the cohort in the draft order includes many people who have been convicted of violent offences, such as culpable homicide or other offences of a very serious nature.

We have to listen to what Victim Support Scotland has said. It could not have been more forceful in raising its concerns, including a concern that most victims will probably not be notified.

It is appropriate to put all that on the record today and say that the committee has been put in an impossible position. This has been a rushed process. Many members have not been able even to ask questions and, even now, we do not have the information that we need in order to make a decision.

Fulton MacGregor: To follow on from what Katy Clark said, I do not necessarily agree that it is a rushed process—it is emergency legislation, so things must be done and evidence must be taken on an emergency basis.

From what we have heard over the past couple of weeks and from the statements to the Parliament, I believe that, for an emergency situation, the draft order is pretty well thought out, with various safeguards in place, such as the governor's veto; Victim Support Scotland was very positive about that when it met us last week.

It comes down to the fact that those people will be released anyway, at some point. We have to look at it in that context. Prisons need to be safe for our hard-working staff and for the other prisoners. They also need to be places in which rehabilitation can take place. Last week, we heard clearly—this is also common sense—that that will not happen where there is overcrowding. Whatever the reason for more people getting sent to prison in Scotland—and I understand that we

are trying to deal with that through other measures—we have an overcrowding situation right now, which means that rehabilitation is not done to the extent that we would like. That perpetuates the cycle.

I know that it is a tough decision that is being put on us today, and we are being asked to step up to the plate—I get that. Nonetheless, we owe it to the staff in our prisons, to the prisoners and their families and to the victims, who want these people to get help when they go into prison. All those people look to us to do the right thing today, and that is why I will be supporting the motion.

The Convener: I invite the cabinet secretary to wind up and to say whether she wishes to press or withdraw the motion.

Angela Constance: I start by putting on record that, over the past year or so in which I have been Cabinet Secretary for Justice and Home Affairs, I have very much appreciated the cross-party endeavours to support prison staff. I know that, around this table, there are advocates for both those who live and those who work in our custodial estate.

The statutory instrument that is before us today is rooted in section 11 of the Bail and Release from Custody (Scotland) Act 2023. My recollection is a wee bit different from what Ms Clark described; I thought that we had debated it rather extensively. At the time, we were all trying to hypothesise about what would be a likely threat to the good order and the safe running and operations of a prison, and to the health and safety of staff and prisoners.

The reality is that, since we debated and passed the 2023 act, the prison population has increased by more than 700. I have proactively, at every step of the way, sought to engage with members, and I appreciate Ms McNeill's acknowledgement of that. I have made three statements to the Parliament, proactively—nobody asked me to do so. I have proactively been coming to the Parliament to inform members of the challenges and the medium-term and longer-term actions.

Russell Findlay: I remind the cabinet secretary that I wrote to her to suggest that she come to committee in respect of the prison crisis.

Angela Constance: You did.

Russell Findlay: Yes. It is just that you were saying that you had not been asked to come here.

Angela Constance: I had not had any demands to make statements in the Parliament on the prison population. The point that I was making—I am perhaps getting into the weeds here—was that, on three occasions, I proactively went to the chamber to make a statement on the challenges that we face and on the medium-term and longer-

term actions for which people have rightly been calling with regard to the question of what solutions we need to implement.

The reality is that, over a two-month period—I would not have predicted this—the prison population went up by 400. In one day, it went up by 88. That sharp increase was not predictable. There is no doubt, of course, that the issue has been exacerbated by the existing high prison population.

I reassure members that your cabinet secretary for justice is indeed a reformer, in terms of reforming our justice system both so that it becomes more trauma informed and so that it is always focused on public safety. I contend that a high prison population is not in the interest of public safety, because we are not preparing people for release or to be reintegrated into society. We should bear in mind that the vast majority of prisoners will, one day, return to our communities, so what happens in our prisons really matters, and it has a direct bearing on public safety.

I will not restate the lengthy list of statutory exclusions. Members are also aware of the additional exclusions that I have provided, in particular for those with non-harassment orders, and where people have served a previous custodial sentence for domestic violence-related offences—as long as that sentence is not spent, they can be excluded.

The governor's veto was used at a level of 25 per cent across the piece under the Covid emergency release arrangements; Mr Findlay extracted that information from the witnesses today. The guidance is now more expansive—that was a key ask.

In addition, to go back to the point that Ms Dowey made, the guidance for governors includes prisoners who are a risk to an individual or an identifiable group of individuals, but it also covers situations in which an individual could be a risk to themselves, either because of their very poor mental health or because they are so vulnerable. That can be taken into consideration.

I hope that members have taken some solace from the information and evidence that the committee received last week from Lynsey Smith of Social Work Scotland and, today, from Teresa Medhurst. A significant amount of detail has been given around the preparations that have been made.

I accept that the change is being made quickly, as time is of the essence, and that presents its challenges. What happens next will depend on all of us. I am prepared to be courageous and follow the evidence, but I will need to persuade others to follow me on that.

I will make one concluding remark, because I am being eyeballed by the convener. As I said at the start of the meeting, we can critique the past—as I do—and we can debate the future. I assure you that we are going to be debating the future next steps, and we all have a role to play in that. However, the issue in front of us is about what we do right now.

When the Prison Governors Association (Scotland) wrote to me at the end of April or the start of May, it said:

“We are operating with a prevailing sense of ‘only just coping’ and remain concerned that emergency action will only be taken when something goes significantly wrong”.

That is what I seek to avoid. I cannot, in all conscience, as the Cabinet Secretary for Justice and Home Affairs, wait until something goes catastrophically wrong. I have no alternative other than to pursue this action, which is about the here and now.

I press the motion, and I urge members to support it.

The Convener: Thank you, cabinet secretary—I would never eyeball you.

The question is, that motion S6M-13500, in the name of Angela Constance, on the approval of the draft Early Release of Prisoners and Prescribed Victim Supporters (Scotland) Regulations 2024, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Mr MacGregor, I ask you to move your hand slightly towards your head, just for clarity. [*Laughter.*] Thank you.

For

Jackie Dunbar (Aberdeen Donside) (SNP)
Fulton MacGregor (Coatbridge and Chryston) (SNP)
Rona Mackay (Strathkelvin and Bearsden) (SNP)
Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

Against

Katy Clark (West Scotland) (Lab)
Sharon Dowey (South Scotland) (Con)
Russell Findlay (West Scotland) (Con)
Pauline McNeill (Glasgow) (Lab)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0.

We have an equal number of votes for and against the motion. With some reluctance, therefore, I will use my casting vote. I vote to support the motion.

Motion agreed to,

That the Criminal Justice Committee recommends that the Early Release of Prisoners and Prescribed Victim Supporters (Scotland) Regulations 2024 [draft] be approved.

The Convener: Are members content to delegate responsibility to me and the clerks to approve a short factual report to the Parliament on the affirmative instrument?

Members *indicated agreement.*

The Convener: The report will be published shortly.

I thank our witnesses, the cabinet secretary and her officials, for joining us this morning. We move into private session.

11:29

Meeting continued in private until 12:07.

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