

Chapter 36

Scotland

Katrina Morrison and Hannah Graham

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Abstract

The COVID-19 pandemic has been disruptive and halting in its impact on Scottish justice. This chapter offers an overview of how the pandemic has affected Scottish prisons and how authorities and decision-makers have responded. In giving an emerging account, we bear witness to the experiences of people in prison and their families, alongside the voices and decisions of people in positions of power. Long-standing issues and inequalities in Scottish justice have been exacerbated in the pressured circumstances of the pandemic. Proposals that had previously been discussed for years, with little or no action, have been progressed as compensatory measures in weeks or months, for compelling reasons. However, other more intractable problems have remained or become more severe. The pandemic provides an opportunity to, and a reason for, a profound penal reconsideration. However, at the time of writing, we are yet to see evidence whether this will materialise in practice, though it could still be too early to tell.

1. Introduction – general situation of the prison system

1.1 *The Scottish Penal Policy Context*

Scottish penalty is beset with contradictions. Despite some penal practices which could be said to be based in welfarism and parsimony (see McAra, 2005; Scottish Government, 2019), Scotland has an astonishing appetite for punishment. Scotland had the highest rate of imprisonment in all of Western Europe (Frazer, 2019), and within this overall figure, the highest number of life-sentences in all of Europe (van Zyl Smit and Morrison, 2020). Scotland also has very high rates of community punishment, the highest in all of Europe, behind only Lithuania, Georgia and Turkey (Aebi and Hashimoto, 2019). Taking imprisonment and community rates together, it has been argued that Scotland has one of the highest *correctional rates* in all of Europe (Graham and McNeill, 2019). Towards the end of 2019, Scottish prisons were operating at 9% over their maximum operational capacity (SPS, 2021a). While many in Scotland believe our approach to

punishment to be ‘progressive’ (certainly in comparison with England and Wales), it has recently been argued that reforms of imprisonment over recent decades have merely ‘civilized’ punishment, rather making it ‘humanitarian’ by reducing the penal power exercised by the state (Brangan, 2019).

While there have been moments of political courage with penal reform over recent decades (Graham, 2020a), within the bigger picture, these appear tokenistic or preliminary. Nonetheless, the Scottish Government (led by the Scottish National Party (SNP) for the past 14 years), have long spoken about the need to reduce the prison population (Frazer, 2019), but measures to achieve this have been limited. The prison population fluctuated in 2020, for reasons which are identified in this chapter. On 13 March 2020, at the very beginning of the pandemic, the prison population was 8,094 people, then it decreased to 6,869 on 29 May 2020, increased gradually to 7,176 on 16 April 2021 (Scottish Prison Service, 2020, 2021).

1.2 The Prison System

There are 15 prisons in Scotland, 13 public and 2 private, though there has recently been a commitment to take the private prisons back into public ownership at the end of their contracts. Scotland’s prisons are located primarily in and around the ‘central belt’ (the more densely populated region encompassing the cities of Glasgow, Edinburgh and Stirling), with some outliers including two prisons in the Highlands. Prisons vary in size from a capacity of just under 1,000 to just over 100, though recent available data indicates that 9 out of 15 prisons held more than their maximum capacity (Scottish Parliament, 2020).

Prior to the pandemic, prisons in Scotland were not in a good position to safely respond to this public health emergency. Prisons were overcrowded with many cells designed for single prisoners holding two or more people. Parts of the prison estate had already been judged ‘not fit for service’, particularly for the growing numbers of older prisoners and prisoners with disabilities and health conditions (HMIPS, 2020). Healthcare in prisons (offered by the public National Health Service (NHS) and local health boards) has been subject to critique for years and these concerns have not yet been substantively addressed.

2. Prison and penal policy concerning the execution of prison sentences

The rest of this chapter focuses on the impact of and responses to the COVID-19 pandemic in 2020 and early 2021. In the Scottish Parliament, the Coronavirus (Scotland) Act 2020¹ was introduced, debated and passed in a matter of days, with cross-party consensus, from 1 April 2020. It included emergency powers enabling the Scottish Government to change the Prison Rules and to authorise early release of prisoners during the COVID-19 pandemic. These reforms were administered using secondary legislation under the auspices of the Act: the Prison and Young Offenders Institutions

¹ <https://www.legislation.gov.uk/asp/2020/7/contents>.

(Scotland) Amended Rules 2020,² Prison and Young Offenders Institutions (Scotland) Amended Rules 2021,³ and the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020.⁴ A bounded overview of the implementation and impact of these regulations is discussed in the following sections.

Early release of prisoners was considered by the Scottish Government in the early part of the pandemic and then approved by Scottish Parliament with the passing of the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020 on 4 May 2020. The policy note accompanying these regulations justifies early release on the policy grounds of “a necessary and proportionate response to the effects coronavirus is having, and is likely to have, on prisons generally, for the purpose of protecting (a) the security and good order of prisons; and (b) the health, safety and welfare of prisoners and those working in prisons” (Scottish Government, 2020a: 1). It also emphasises increasing single-cell occupancy rates and cites issues of prison workforce capacity.

In waiting for news of the executive early release scheme, families wrote to Scottish Government Ministers and MSPs “begging” for information, help and the early release of loved ones, expressing feelings of anguish and “constantly worrying”, “not being told enough”, being “in limbo”, raising concerns over prison conditions and difficulties with physical distancing, making impassioned pleas that “everyone has the right to live”, and stories of separation (in Scottish Government, 2020b: 17, 23, 46).

After being discussed for weeks, the early release scheme was implemented wholly in May 2020. People serving a short sentence of less than 18 months, who have three months (90 days) or less until their release date were eligible for early release. There were exclusions from eligibility for people who have committed certain offences (sexual, terrorism, COVID-19-related, domestic abuse) or subject to a non-harassment order. Notably absent from policy rationalisations of release eligibility was any consideration of the health vulnerabilities of each individual or if they were a child.

Those approved for this scheme were released from prison unconditionally (not out on licence), without an electronic monitoring tag. Release was risk assessed and fell within the victim notification scheme. Charities and social enterprises in justice, health and welfare collaborated with justice social work and community justice (i.e., probation) agencies to support the liberation and resettlement of those released.

According to the Scottish Prison Service, of the 445 people who met the eligibility criteria, a total of 348 people were released from prison early during May 2020. That is 314 men and 34 women, the vast majority of whom are aged under 47 years old. A discretionary veto by prison governors prevented the early release of 63 people. Of those released through this scheme, the types of crimes for which they had been sentenced and imprisoned were varied. These included: shoplifting, housebreaking and other thefts, drugs, breach of the peace (a low-level public order offence),

² <https://www.legislation.gov.uk/ssi/2020/122/contents/made>.

³ <https://www.legislation.gov.uk/ssi/2021/80/contents/made>.

⁴ <https://www.legislation.gov.uk/ssi/2020/138/contents/made>.

common assault, dangerous and careless driving, handling offensive weapons, attempted murder and serious assault (Scottish Government, 2020c). Importantly, around 10% of all of those who were released were immediately rearrested by Police Scotland on outstanding warrants pre-dating their imprisonment, suggesting a ‘joined up’ approach across the justice system was found wanting. This was the only executive release of prisoners in Scotland in 2020 and early 2021.

Concurrent to the early release scheme, normal liberations continued with an estimated 100-150 people released per week (Graham, 2020c). Critical analysis of the Scottish prison population over the course of 2020 indicates that the ‘front door’ and decision-making of the courts and Crown Office and Procurator Fiscal Service (COPFS, the Scottish prosecution service) have much more influence on prison populations than ‘back door’ measures such as this early release scheme (Graham, 2020c).

3./4. Restrictions of contact with the outside world and inside prisons

The Prison and Young Offenders Institutions (Scotland) Amended Rules 2020 (which were further extended till September 2021 in the Prison and Young Offenders Institutions (Scotland) Amended Rules 2021) changed the Prison Rules, as they are out in law, enabling far greater discretion for each prison governor to take decisions to keep prisoners safe from the virus and to manage staffing issues (e.g., workforce absence). In May to June 2020, reports from two prisons stated that prisoners were kept locked in cells for 23 hours a day, with 30 minutes for outdoor exercise and 30 minutes to shower and use the phone. Furthermore, those held in isolation because they were suspected to be symptomatic were not, at this stage, getting access to either fresh air or phones. Other prisons managed 22 hours or more a day inside cells, with 30 to 45 minutes outside. Furthermore, if two people are sharing a cell and one becomes symptomatic, then they must both be held in isolation for 14 days (SPS, 2020b).

Efforts were made to occupy prisoners when locked in cells for so long, including fitness and mental health mindfulness courses on cell TVs, expanded television and gaming options, and the education provider, Fife College, provided in-cell education packs for prisoners. HMP Perth was commended by the Inspectorate for efforts to promote prisoner voice and participation with the ‘quality and regular occurrence of Prisoner Information Action Committees’ (HMIPS, 2020b: 2).

As the pandemic progressed, prisons had learned how to manage infections and regimes differently than in the early days, by, for example, organising prisoners into larger groups of ‘households’, enabling a greater number to be able to take exercise outside or engage in purposeful activity, at any one time. By late 2020 / early 2021, most prisoners were able to take one hour of exercise a day, as well as restricted activities in education, gym, and recreation (Scottish Parliament, 2020).

Family visits were halted for the first time from 23 March 2020, and there was a significant delay before alternatives were made available (see further, below, in section 5). Family visits were reintroduced again (albeit with mask wearing and social distancing measures in place) on the 3 August 2020 in line with an easing in restrictions in the community round the same time. Visits were halted again on Christmas Day 2020, and commenced again on 26 April 2021. Although in-

person visits with lawyers were still possible throughout the whole pandemic, most have taken advantage of video-conferencing facilities made available by the Legal Aid Board Scotland.

The Scottish Human Rights Commission (2020) raised substantive concerns with the Scottish Government about prisoners being kept in isolation tantamount to solitary confinement for extended periods during the earlier part of the pandemic, concerns which the Scottish Parliament Justice Committee (2021) further scrutinised in their questions and correspondence with the Scottish Prison Service.

Throughout the pandemic, reports on the numbers of prisoners in self-isolation has fluctuated considerably on a week-by-week basis, though these statistics were only published after a degree of public pressure following stories in the press. In March 2020, 125 people were self-isolating, this reduced to 7 at one point in June, and as high as 1,285 people self-isolating in February 2021 (SPS, 2021b). Clear figures of numbers of confirmed infections have been difficult to ascertain but, at one point in February 2021, there were outbreaks in some prisons, including one in which 230 people had tested positive - just under half of the entire population in that prison (STV, 2021). Prison staff have been affected too: in April 2020, the Prison Officers' Association said that a quarter of the 4,000+ prison workforce were reported to be absent from work, and staffing shift changes had to be rapidly implemented to help cope with absences (Fairlie in BBC News, 2020).

Finally, the Scottish Prison Service has given different figures for deaths, stating, in different forums, either five or six deaths of people in prison have been COVID-related, alongside the death of one prison officer. Tragically, there have been a series of other non-COVID-related deaths in custody while prisons have been in lockdown or restricted regime during 2020, all men, mostly aged in their 20s-40s, including self-inflicted deaths.

One of the pronounced consequences of the pandemic and prison regime changes has been the effect on access to purposeful activity (broadly, relating to employability, skills acquisition, education, rehabilitation programmes and wellbeing). These group-based activities were significantly affected during prison lockdown, with the number of hours spent in them reducing from half to a third across the prison estate. The cessation of regular human engagement and the opportunity to 'improve themselves' through these activities would have implications not only for prisoners' mental health and wellbeing, but it would also have important and negative consequences for prisoners' ability to progress through their sentence, either to the 'top end' (open conditions), or to gain parole. This is particularly true for access to 'programmes', the prescribed rehabilitation and 'offending behaviour' risk reduction programmes which may significantly influence how a prisoner's application for release on parole is perceived. In November 2020, it was revealed that it could take over *five years* to clear the backlog on some key programmes (SPS, 2020c), having clear implications for those individuals who would otherwise be eligible to progress or to be released on parole. Following sustained pressure from penal reform organisations and from the Parliamentary Justice Committee, the Scottish Prison Service advised that it was working to ensure that progression and parole would not be adversely affected by the pandemic (Scottish Parliament Justice Committee, 2021).

Across the estate, prisoner accounts of lockdown and restricted regimes brim with human concerns: feelings of boredom and emptiness, anger and frustration, loneliness and longing for human connection, worry about hygiene and prison conditions, fears for loved ones and an uncertain future, and clapping and cheers of thanks for the National Health Service (NHS) and key workers during the first lockdown. An interdisciplinary team of researchers from the University of Glasgow investigated the impact of lockdown in Scotland through a mixed methods study, including people with convictions and their family members, and practitioners involved in the Scottish Justice system (see Armstrong and Pickering, 2020; Gormley et al., 2020). Their qualitative and quantitative findings offer salient insights:

“We are forgotten people of the COVID-19 pandemic [...] there has been no compassion shown to us human beings. We are locked up 23 hours a day. How is this good for anyone’s mental health, on top of that we are stressed out to the max worrying about our families, praying our loved ones manage to get through this” (prisoner quoted in Gormley et al., 2020: 58).

“Locked down 23 ½ hours a day, put weight on, feel depressed, don’t get gym enough... prison cells are really bad for cleanliness, all this puts people into a bad state and depressions. This prison is not fit and lockdown has made it 100% worse” (prisoner quoted in Gormley et al., 2020: 58).

The researchers found a common thread of participants with convictions ‘being in limbo’, affecting access to services, frustrating opportunities for progression, and majorly affecting the severity, intensity and time/prolongation of punishment (Gormley et al., 2020).

The effects of the pandemic have exacerbated existing problems within the Scottish Justice system, one of which is the high numbers of people held in pre-trial, or pre-sentencing detention. Prior to the pandemic, the remand population was around 20% of the overall prison population, a figure, which had been the focus of political attention in the preceding years (Scottish Parliament Justice Committee, 2018). Courts continued to operate during the pandemic, processing “essential and critical business”, including making decisions around remand and bail for certain cases. Crucially, however, jury trials were halted between March and June 2020, and when they did resume again, had to do so at a reduced capacity. The effects on the remand population have been dramatic, and by April 2021, 27% of the overall prison population (n = 1,995) were on remand (Scottish Prison Service, 2021). Of the 1,995 people on remand, 1,783 were untried, and 212 were convicted, awaiting sentence. In an interview about prisons during the COVID-19 pandemic, the Cabinet Secretary for Justice Humza Yousaf spoke of the “punitiveness” of the Scottish judiciary, saying “there are far too many people spending time on remand”, and he also spoke of efforts underway to introduce electronic monitoring tagging with bail to try to help reduce remand numbers (in Leapman, 2021).

Perhaps most concerning of all, out of the small number of 16- and 17-year-olds in custody by April 2021 (n = 17), 16 (94%) of them were on remand, all of them yet to appear in court for trial. Out of the 184 18-and 19-year-olds in custody, 89 (48%) of them had yet to stand trial or receive sentence (SPS, 2021a). Equivalent figures from previous recent years are around 35% under 21 on

remand. Despite the statement from the UNCRC “*to release children in all forms of detention, whenever possible*” throughout the pandemic, it is clear that this has not occurred in Scotland (Lightowler and Adamson, 2020). In November 2020, the Children and Young People’s Commissioner and the Children and Young People’s Centre for Justice sharply criticised authorities for these issues and called for urgent action to meet human rights obligations to avoid young people being in extended periods of isolation emulating that of solitary confinement (Lightowler and Adamson, 2020; Nolan, 2020).

The lengthy time spent on remand for adults during conditions of prison lockdown was tested in the Appeal Court in *HM Advocate v JD and BK* [2020] HCJAC 15 (HCJAC, 2020). Despite finding against the appeal, the court also concluded that “the length of time during which a person is likely to remain on remand is a factor in deciding whether to grant bail. This factor must be given greater weight than hitherto”. One way of reducing the numbers on remand in custody is the imminent implementation of secondary legislation, passed by Scottish Parliament in late 2020, enabling the introduction of electronic monitoring tagging to be used with bail.

Despite prevention and de-escalation efforts, some critical incidents have occurred in Scottish prisons. Being locked in cells approximately 23 hours a day and being unable to have in-person family visits over a period of months have been reported as influential factors (Gillies, 2020). In March 2020, in HMP Addiewell, several male prisoners destroyed property, injured two prison officers, and lit fires in disturbances attributed to COVID-19-related tensions (McGivern, 2020). In November 2020, a violent incident occurred in Polmont, a young offenders’ institution (for ages 16-20 years old), when a football match intended to ease tension and boost morale instead ended in fighting, with prison officers among the injured (Hind, 2020).

5. Compensatory Measures

The Scottish Prison Service announced the suspension of all family visits for the first time on 23 March 2020, with immediate effect. On 24 March, the Government announced they were looking into alternative means of visiting, and in mid-April, they announced in Parliament that all prisoners⁵ would be provided with a security restricted mobile phone to facilitate family contact, in lieu of visits. It later emerged that the funds to do this had already been earmarked for the provision of landline phones in cells at the Young Offenders Institution Polmont, following an inquiry into mental health support for young people in custody. However, the roll-out of mobiles was significantly delayed with the first mobiles only being provided to prisoners on 15 June 2020, nine weeks after they had been announced, and twelve weeks after visits had been suspended. This delay was due to technical difficulties both with the handsets, and with existing phone-blocking technology in some prisons which had to be dismantled for the mobiles to work.

Between the 24 March and 17 June 2020, there were only two other means of contact between prisoners and their families. Firstly, the pre-existing email-a-prisoner scheme, whereby messages

⁵ This is with the exception of one of the private prisons, HMP Kilmarnock, where hard-wired in-cell telephone services were introduced, not mobile phones.

can be emailed to the prison and printed out for the prisoner to read. Secondly, from 20 May 2020, voicemails could be retrieved by prisoners through the communal phone in prisons alongside the provision of £ 2.50 (€ 2.80) free credit to access them. However, there have been reports of prisoners being reluctant to use these communal phones during this time out of fear of infection in light of inadequate cleaning provision in between users (Maycock and Dixon, 2021). In any case, on 16 June 2020, a day before the first mobiles were introduced to prisons, ‘virtual visits’ (similar to a video conferencing call) also began to be rolled out across prisons, although they were limited with the ability to book only one 30 minute ‘visit’ per month. Both mobile phones, and virtual visits, remain in place at the time of writing (April 2021).

In total, around 7,500 mobiles were distributed to prisoners across Scotland. These are ‘dumb’, (i.e. not internet enabled ‘smart’ phones) Nokia handsets which had been programmed to only allow calls to pre-agreed, and pre-vetted, numbers, as well as the Independent Prison Monitors (part of the national prisons inspectorate), and Samaritans (a mental health and suicide prevention charity). According to the Scottish Government, prisoners called the Samaritans approximately 5,284 times using these mobiles in the second half of 2020. These restrictions are equivalent to those in place for phones on the prison landings. No incoming calls are allowed, and usage is restricted to 300 minutes per month.

Despite some criticisms of the cost of these phones from those on the political right in Scotland (Musson, 2020), the introduction of mobiles has also been praised by the prisons inspectorate, saying “this is a step forward in Scotland’s enlightened approach to penology and will be welcome even after the current crisis” (HMIPS, 2020: 35).

6. Legal basis for restrictions of the prison regime

As pointed out under sections 2-4., measures taken during the pandemic were based on substantive legislation, with prison-related regulations enabled by underpinning legislation, the Coronavirus (Scotland) Act 2020, and the Coronavirus (Scotland) Act 2021.

7. Returning to normalisation

In considering Scotland’s future after the COVID-19 crisis, journalist and lawyer Michael Gray (2020: 88, 93) contends that real progress can be made in the midst of adversity and uncertainty, yet whether progress *will* be realised is far from given: “in times of crisis, all kinds of change seem possible... [this] experience demonstrates that we can rapidly change the priorities of our democracy with intense political will. All engaged in this type of work understand that it can be frustratingly incremental.” While some of the measures which were taken are temporary or unlikely to be repeated, other measures look as though they are here to stay (such as mobile phones for prisoners). There may be some reasons for cautious hope; some measures (such as using electronic monitoring to try to reduce use of remand) have the potential for enduring and positive effects, added to which the Scottish Government are on record as saying “[w]e certainly cannot go

back to [prison population] levels where we were pre-pandemic” (McQuillan, 2020). However, Scottish penal history is replete with such good intentions, with little, or no, longer-term decarceration effect.

The account we offer in this chapter is not an entirely dispassionate one. In 2020, a constellation of voices, including our own, have called for Scottish justice to change, centring on diversion, decarceration and social justice (Graham, 2020a, 2020b; Howard League Scotland, 2020; Scottish Prisoner Advocacy and Research Collective (SPARC); 2020; Scottish Human Rights Commission, 2020; Lightowler and Adamson, 2020). Realising such change will take some consensus and cooperation as well as courage, from politicians, to practitioners and the judiciary, through to civic society, local communities and citizens. The impact of the COVID-19 pandemic in exacerbating existing problems should not be under-estimated. Its legacy will be apparent for some time to come. What could not be more apparent is that the status quo is no longer sustainable and, in seeking change, we need more deeds, not just words.

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