

SCOTTISH SENTENCING COUNCIL

VIEWS ON OCTOBER 2024 STATEMENTS TO PARLIAMENT ON AUTOMATIC EARLY RELEASE AND PROSECUTION GUIDANCE IN THE CONTEXT OF THE PRISON POPULATION

The Scottish Sentencing Council is pleased to assist the Criminal Justice Committee in its consideration of the statements made by the Cabinet Secretary for Justice and Home Affairs and by the Lord Advocate to the Scottish Parliament on 10 October 2024.

The Council has statutory objectives to promote consistency in sentencing, assist with the development of sentencing policy and to promote awareness and understanding of sentencing.

The Council takes no position on the subject matter of prisoner release (the reasons for which are provided below); neither does it offer any comment on prosecutorial policy in relation to bail and remand, that being outwith the Council's remit. Some general comments and observations in relation to release are, however, provided in order to assist the parliamentary consideration of this matter.

The following comments reflect those made in the Council's response to the Scottish Government's consultation on the long-term prisoner release process and are offered with the interaction between sentencing and release policy in mind, to the extent that these are connected, and in the spirit of the pursuit of our statutory objectives.

The legislative arrangements for release from prison are a matter of penal policy and as such are for the Scottish Ministers and the Scottish Parliament. In general terms, the selection of an appropriate custodial sentence will not take into account the actual, likely or potential release dates from custody, which are for the Scottish Ministers, the Scottish Prison Service or the Parole Board for Scotland, as the case may be. [The sentencing process](#) guideline sets out a structure for the determination of sentence for all cases in Scotland; release from custody does not relate to the sentencing process and the guideline does not require courts to take into account actual or likely release dates from custody. Were courts to take this into account, it would defeat the purpose of legislation around prisoner release. There would also be a risk that, should legislative arrangements subsequently change, consistency in sentencing would be undermined.

The Council notes that the Scottish Government now intends to bring legislation to Parliament that will change the point of early release for those serving, and sentenced to, imprisonment for a period of less than four years, with the point of release to be at 40% (the current point of release being at 50%).

The Council understands that these proposals form part of a suite of measures to address the current prison population and that the Government considers these measures necessary as an immediate response to a rising prison population. It is

further understood that it is the Government's intention that there should be a sustainable approach to reform in this area.

Given the potential for some or all of these measures to fall within the scope of the forthcoming sentencing and penal policy review, the Council will be interested to learn more about the plans for that review in due course.

The Cabinet Secretary in her statement stated that "community justice must continue to be strengthened". In 2020-21 the Council carried out a programme of research and engagement with sentencers and others examining the use of, and confidence in, community disposals. This work suggested that one of the greatest challenges to judicial confidence in community-based disposals concerns limitations of resources to support their management and delivery. A key conclusion drawn by the Council was that an effective system of community justice for Scotland is dependent upon a consistent approach to the development and funding of community disposals to support their more consistent provision, robust management and successful completion.¹

A natural consequence of bringing forward the point of early release for short-term prisoners might be an increase in the number of prisoners serving sentences of periods which would otherwise have been captured by the presumption against short-term sentences of 12 months or less. Given that the presumption was introduced, among other things, on the basis that sentences of such periods increase the risk of re-offending² the Council will be particularly interested to learn of any further measures to enhance efforts to support rehabilitation and desistance alongside the measures proposed within the forthcoming bill.

The Council also notes the intention to revisit the matter of long-term prisoner release arrangements through the adoption of subordinate legislation powers within the proposed legislation.

The Council considers that criminal justice reform should be coherent and sustainable. This requires a clear understanding of the issues at hand and their causes, which in turn requires rigorous analysis of all available evidence. With no precise cause or causes for this year's sudden rise in the prison population having been identified, the Council suggested in its response to the Scottish Government's consultation on the long-term prisoner release process, that it might be opportune to consider whether the information presently gathered by and available to different agencies across the criminal justice system might be improved in a way which would support fully informed decision-making and policy evaluation.

The Council, which is committed to evidence-based decision-making and to improving the knowledge base in the area more generally, is keen to ensure that sentencing policy and practice are based upon sound and comprehensive knowledge and understanding of a range of information and data relating to

¹ See: [Judicial perspectives of community-based disposals - Issues paper](#) Scottish Sentencing Council (October 2021) and the Council's [report](#) on its March 2022 community sentencing stakeholder event published in June 2023

² [Policy Note to The Presumption Against Short Periods Of Imprisonment \(Scotland\) Order 2019 SSI 2019/236](#)

sentencing. To that end it has carried out and commissioned a considerable amount of research, data collection and analysis in the field. Sentencing is only one component of what is a much broader and very complex picture in relation to what drives incarceration rates. The Council is considering how it may contribute to efforts to improve the information available across the criminal justice system to support sustainable and effective policy in this area.

A credible framework for release, and effective arrangements for its operation in practice, are essential to ensuring public confidence in the criminal justice system. Research carried out on behalf of the Council has found that release arrangements overall, and the reasons for releasing prisoners before the end of their sentence, are opaque to members of the public, as well as to those affected by offending behaviour³. As a final point we therefore suggest that the provision of information to the public generally and to those involved in criminal proceedings specifically, will be of key importance during the consideration of the forthcoming legislation and any implementation of these or other measures.

We hope this response will be of assistance in considering the forthcoming bill and any further parliamentary consideration of sentencing and penal policy more broadly.

Scottish Sentencing Council

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³ See for example: [Public perceptions of sentencing in Scotland, Qualitative research exploring sexual offences](#), Biggs, Reid, Attygalle, Vosnaki, McPherson and Tata (July 2021) which found “Survivors of sexual offences also perceived that even when a perpetrator is given a prison sentence, they are released before the full sentence is served, due to prison overcrowding or insufficient resources, rather than as part of a controlled and supported release in the community which takes into account public safety” (p. 72) and Reid, Biggs, Attygalle, Vosnaki, McPherson and Tata [Public perceptions of sentencing in Scotland Qualitative research exploring causing death by driving offences](#) (September 2020) which found “There was limited knowledge about the reasons why offenders were released before the end of their sentence, an area where providing additional information to the public and specifically to members of the family of victims during the criminal justice process, could be considered.” (p. 71)