

# **Briefing for Scottish Cabinet Secretary for Justice**

## **Update on Prisons and the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020**

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This briefing comes from the Scottish Human Rights Commission, Her Majesty's Inspector of Prisons and The Independent Prison Monitor Advisory Group.

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# Key priorities for discussion

## 1. Prison Population

Both SHRC and HMIPS have written to the Cabinet Secretary for Justice, Humza Yousaf MSP (2 April and 27 March respectively) raising a number of concerns and recommendations that are directly applicable in the current emergency situation. An agreed crucial issue was the urgency of reducing the prison population in the prison estate.

While a number of measures have been adopted by the Scottish Government, the SPS and the Judiciary, including Schedule 4 of the Coronavirus (Scotland) Act 2020, the measures have not yet managed to reduce the prison population to a safe and manageable situation. We recognise that the revised Home Detention Curfew (HDC) guidance has not yet impacted but do not envisage that this will be sufficient.

It is our view that non-custodial measures using existing instruments and the emergency release powers (under exceptional circumstances) need to be implemented rapidly. Particular attention should be paid to detainees with underlying health conditions, remanded population, young people under the age of 18 and those in other vulnerable categories as well as in areas of the detention estate that are already worryingly overcrowded and the conditions are not conducive to social distancing requirements (for example, HMP Barlinnie.)

The Scottish prison population needs urgently to be reduced to around 6,500 prisoners to mitigate the inherent risk of maintaining people in close confinement and spreading the virus in the prison estate and subsequently into the community.

We recognise that all processes must ensure that risk assessments and the impact on other services in the community and the detainee's family are considered. We also respectfully request that the processes should be subject to robust assurance protocols, including human rights impact assessments.

## 2. The Prisons and Young Offenders Institutions (Scotland) Rules 2011

There are a number of concerns emerging from the limited guidance, lack of proportionality and narrow accountability of the provisions. These include:

- Limited consultation with key stakeholders on the amendments, including the Health and Social Care in Prisons Programme Board and SHRC. While we understand the urgency and nature of the legislation, it is crucial that both prison healthcare professional representation and human rights expertise is present.
- Lack of independent review mechanisms for the new measures. The amendments do not mention any type of review or monitoring in relation of legislation. Explicitly the role of HMIPS in relation to this.
- Rule 33A - provision of clothing.
- Rule 35A - provision of food and drink.

Both of these amendments allow ministers to make any number of further directions every month in relation to the clean change of clothing (e.g. socks and underwear) and wholesome and nutritious food and drink on a daily basis. These provisions should be strictly monitored and supervised and used only in defined extremis for a strictly limited period of time.

- Rule 40A - provisions on cellular confinement and participation in specific activities. This amendment allows ministers to extend cellular confinement in the first instance on the recommendation of a healthcare professional for up to 14 days and might be extended for further periods of up to 14 days at a time. We believe advice should be sought from the Scottish Government's Chief Medical Officer in respect of any extension(s) beyond 14 days. Meaningful human contact must still be provided as well as the medical, psychological and social

support to reduce distress. Particular attention has to be paid to those more vulnerable such as young people under 18 or persons with disabilities are placed in total isolation. This provision should be strictly monitored and supervised and used only for a limited period of time. In addition we are concerned that a single health care professional can effectively recommend to a prison governor that the entire prisoner population should be confined to their cells without any discussion with the local NHS Board's Director of Public Health.

- Revised Rule 41 – accommodation in specified conditions. In this provision 72 hours (from the previous rules) is substituted for 14 days. Limiting access to showers, time in the fresh air and access to family for persons suspected of having COVID 19 should be equivalent to the treatment/measures received by people in the community. Current Scottish Prison Service Guidance seems to indicate that they are acting specifically at variance both with the advice given by NHS Inform and the statement of principles in respect of fundamental rights as issued by the CPT on 20 March 2020 . This provision should be reviewed in line with Human Rights standards, strictly monitored and supervised and used only in defined extremis situations for a limited period of time.
- Rule 131A- healthcare assessment prior to transfer. It is imperative that any transfer of prisoners to another prison is considered by a healthcare professional.

We recommend mandatory testing of all new arrivals in custody before allocation to a single cell and temporary social isolation for 14 days. The relationship between the physician or other health-care professionals and the prisoners must be governed by the same ethical and professional standards as those applicable to patients in the community.

### **3. Other related issues:**

- Legal and procedural safeguards, including access to a lawyer, to a doctor, escalation to secondary or tertiary care, and access

to independent complaint mechanisms are crucial to protecting the most vulnerable and should be both stated and guaranteed in this emergency situation.

- The right to information must be especially guaranteed for certain categories of detainees who, for reasons of language, age, illness or intellectual disabilities do not have equal access to information.
- We believe it would be helpful for the Scottish Government to issue a public statement on the emergency release of prisoners under the exceptional circumstances scheme in order to further inform and support efforts to reduce the prisoner population such that all prisoners are accommodated in single cell accommodation and that both prisoners and staff can effect social distancing to reduce the risk of transmission of the virus.