



8 April 2020

Rt Hon Robert Buckland QC MP
Secretary of State and Lord Chancellor
Ministry of Justice
Queen Anne's Gate
London SW1H 9AJ

Cc: Lucy Frazer QC MP

Dear Robert Buckland,

Covid19 and prisons: the need for urgent further action

We write further to our letter of 1 April 2020, enclosing Professor Coker's report and your announcement on Saturday of the end of custody temporary release scheme.

It is very welcome that the decision was taken to progress the early release of some prisoners and we do not underestimate the importance of the government admitting the need to reduce the prison population in response to Covid19.

However, it has rapidly become apparent as the detail of the scheme has emerged that it represents a small step, likely to produce a reduction in prison numbers far below the figure of 4000 eligible prisoners which has been made public, and wholly inadequate in the context of the 15000 reduction which the Prison Governors' Association has made clear represents the advice you have received from public health experts.

There is a real danger that having crossed the Rubicon, timorous action and feeble delivery will seriously weaken the government's management of the infection in prisons. We therefore call on you to go further if an intolerable human cost in terms of the lives of both staff and prisoners is to be avoided.

In addition to this urgent call to further action, we seek more information about the process, practicalities, progress and principles underpinning your response to the pandemic.

Due to our increasing concern, we are publishing this letter straight away.

Increasing risk and insufficient progress

Since our last letter, the rate of infection has increased substantially, as has the death toll among both prisoners and staff. At the same time, we understand from your evidence

yesterday to the Justice Committee that only six women have been released following your announcement on 31 March 2020 that some 70 women would be considered for release in response to the evidence of the risk posed to pregnant women and mothers by the virus in prisons.

Professor Coker's report cites research that estimates of up to 12 per cent fatality rates have been reported, probably associated with early rapid spread and the breakdown of, or lack of access to, health care services (paragraph 2.9 of his report). As the rest of his report shows, prisons are likely to facilitate the rapid spread of the disease and will struggle to provide access to health care facilities. The slow rate of releases to date and the fact that the pace is not anticipated to quicken until after Easter is therefore alarming. On top of that, your evidence suggests that the number of releases anticipated as a result of your announcement on Saturday falls short of the 15000 releases that advisers say is required to keep prisoners and staff safe from the effect of the virus. We note that you have said you are satisfied that you have the powers you need to ensure the safety of prisoners and staff and we are therefore concerned about the absence of any concrete plan to use them.

We set out below the steps that we consider necessary, both morally and legally in light of the evidence.

Process

In your evidence, you stated that the policy documents governing releases had been signed off. However, they have not yet been published and those affected are not clear as to how the policies will be applied. As we set out in our last letter, there must be clear, transparent systems in place to ensure fairness. The policy must be published so that prisoners and those supporting them can understand what to expect.

Please confirm when the policies will be published.

In line with your legal obligations to treat children differently from adults, and the enhanced duty to ensure that children should spend the shortest appropriate period of time in custody in accordance with Article 37 of the UN Convention on the Rights of the Child, we expect to see a different, enhanced policy for children. We were alarmed that in evidence, it was stated that "fewer" children would be eligible and trust that alternative arrangements will be put in place.

Progress

The progress to date has been too slow and the framework too restrictive to save lives. We ask that you agree to provide us with regular updates on your progress, with the numbers of daily releases and receptions. As the leading penal reform organisations in the country, we consider it important that we can monitor progress.

As far as we can see, as presently drawn the temporary release arrangements will only affect a small number of those who would not be eligible for home detention curfew in any event. At present it would appear that only those serving less than four months¹ would be able to gain any real benefit from the temporary release provisions that would not be available under the existing home detention curfew scheme, and then only for very short periods of time.

¹ In 2018 almost 30,000 prisoners received sentences of three months or under

As you said in your evidence to the Justice Committee yesterday, you have a range of existing powers that would enable you to release other people beyond the two categories announced. In your letter of 31 March 2020, you stated you were seeking to identify “other groups most vulnerable to COVID-19 on health grounds as identified by the NHS”. It is unclear whether anyone in these categories has yet been released and how prisoners can identify themselves to your officials as falling under the categories.

The principles underpinning your response

It appears that so far you have identified three categories of prisoner who may be released based on the risk they pose or their particular vulnerabilities.

There are a host of other prisoners in the system who could be safely managed in the community who appear not to have been considered, including category D prisoners who have already been robustly risk assessed for being in the community, those with mental health as opposed to physical health issues who will be particularly vulnerable at this time and children, all of whom could be better supported in the community. It is essential that you set out the principles underpinning your approach to enable a rational and consistent response to the virus to be implemented throughout the estate.

Practicalities

We understand that unless you change your approach to releases dramatically, your main energies will be focused on managing the infection in prison, along with the huge risks that poses to staff and prisoners in terms of their health and potentially loss of life on an unprecedented scale.

At present, we understand that "cohorting" prisoners into three groups defined by their level of health or at risk of succumbing to the virus is taking place. We refer you to Professor Coker's report and his concerns about this practice as insufficient to safeguard people from the virus in prison environments. You are already aware that in some prisons, there is insufficient sanitation and food provisions for prisoners at a time when these things are paramount to keep prisoners healthy.

For those who are to be released, much clearer information is required as to how they will be supported in terms of:

- **Finances** – you mentioned in your evidence an additional allowance of £80 and that you are working with the DWP on access to universal credit. Given the savings that will be made by releasing people early and that prisoners will remain under prison service supervision, could urgent consideration be given to an enhanced weekly allowance until benefits kick in?
- **Housing and Approved Premises** – many Approved Premises have closed their doors or reduced their occupancy and lots of housing providers are turning away referrals due to the impact of the pandemic in the community. What additional steps are being taken to secure safe and suitable housing for people being released from prison? How are you ensuring that these accommodation challenges do not unnecessarily delay the release of people from prison?
- **Electronic monitoring** – in your evidence you appeared to be of the view that this will be used in every single case of temporary release, even where release is taking place very shortly before it would otherwise happen without a tag. It is inevitable that this will cause unnecessary delay. It is noted that in your evidence you refer repeatedly to

the proposals to scale up the use of electronic monitoring generally. It is important that the response to the pandemic is not perceived as an excuse to expedite this existing plan, especially if it delays essential releases. We note that the Prison Governors' Association has expressed concerns about the necessity for it and the lack of current capacity. There is nothing in the Statutory Instrument that requires temporary releases to be on electronic tag and those who have committed the most serious offences will almost always spend periods of temporary release in the community without being tagged.

Other measures that should be considered urgently

There are a number of other measures that we urge you to take to ease the pressure on the system.

- **Remands:** In your evidence yesterday, you noted that Courts and listing officers are on standby to deal with matters expeditiously. However, it is essential that as Lord Chancellor you show leadership at this time and send a clear message from the top that anxious scrutiny should be applied to all decisions to remand a person to prison and that even greater consideration should be given to all possible alternatives. The increased tagging resource may be better applied here. While we appreciate the independence of the judiciary, it is essential that judges and magistrates are fully informed about the conditions into which they are remanding people and the approach they should take in applying the robust provisions of the Bail Act.
- **Short sentences:** We note in your evidence to the Justice Committee that you do not consider that the use of short sentences should be abandoned at this time. The temporary release provisions in their current form mean low risk short sentenced prisoners may be imprisoned for even shorter periods than usual, begging the question as to whether or not they should be imposed at all at time when others pending trials for serious offences may be appropriately bailed for long periods due to the pause on jury trials.

As with remands, judges need to think about the impact of the sentences they impose at this time. The statutory purposes of sentencing for adults includes “reform and rehabilitation”, something that with the best will in the world cannot be achieved in custody at this time. Sentencers need to be made aware of that and to consider the use of alternative sentences, including suspended sentences. In respect of children where the purpose of the criminal justice system is a combination of welfare and prevention of reoffending, and not punishment, particularly anxious scrutiny should be applied at this time. These are appropriate messages to send to sentencers to assist them in their independent decision-making.

We note the approach taken in the Chelsea Football Club Ltd case, handed down on 6 April 2020.² In discharging the sentence of imprisonment, Mr Justice Chamberlain stated: “The two factors of greatest weight in this application are the fact that Mr Nichols has two health conditions which increase the risk to his health if he were to contract Covid-19 and the MOJ's announcement in relation to convicted prisoners. Taken together, these factors mean that, given that Mr Nichols has already served 5

² <https://www.bailii.org/ew/cases/EWHC/QB/2020/827.html>

weeks' imprisonment in circumstances more onerous than anticipated, the state's interest in upholding the rule of law is outweighed by another important interest – that of removing a prisoner at increased risk of suffering serious health complications should he contract Covid-19 from the prison estate. The latter is both a private interest of Mr Nichols's and also, more significantly for present purposes, a public interest, because it serves to avoid increased strain on the NHS at a time when it is already under great strain. It also serves to lessen pressure on those responsible for running the prisons when they too are under considerable strain caused by manpower shortages connected with Covid-19” (para 27).

- **Recalls:** The guidance is clear that recall to custody should be a last resort and only once alternative measures have been attempted and warnings given. However, in the current crisis, it should be made clear that intensified efforts need to be made to avoid recall to custody where people can continue to be safely managed on licence. A recall to custody is not just that but a recall to solitary confinement and increased risk of infection. Enhanced scrutiny should be required before recall requests are confirmed.
- **Parole:** The parole board has already introduced adapted policies and procedures in response to the crisis. However, the Parole Board is only able to consider what is put before it. It is essential that risk management plans are provided expeditiously and that all who have been directed for release are released safely.
- **Compassionate release and mercy:** As noted in your evidence to the Committee, you have the authority to grant early release on compassionate grounds under s248 Criminal Justice Act 2003 which provides that you “may at any time release a fixed term prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner’s release on compassionate grounds.” It is clear that the virus has given rise to exceptional circumstances and we trust you will be accepting applications that fall beyond the scope set out in the current policy. You may also release anyone under the royal prerogative of mercy and consider that you ought to do this where necessary and appropriate.
- **Executive release:** We hope that recalls will continue to reduce in number but note that there are many prisoners who have been recalled and who are eligible for executive release. Enhanced resources should be put into considering applications for executive release at this time.
- **Remissions of additional days:** In the last four years, the number of additional days imposed on people in prisons for breaches of prison discipline in England and Wales has more than doubled to 380,169. All independent adjudications are currently suspended. Prison governors have the discretion to remit additional days. Some prisoners are only in prison due to serving these extra days and have not been considered for remission. Remission should be considered in all such cases and governors should be directed to remit additional days imposed on all prisoners where it is safe to do so.
- **Extending release of category D prisoners already approved for temporary release:** extending the current licences for this group, where the risk assessment has already been done and tested, makes sense and will free up much needed space and staffing within the estate.

- **Additional support to progress home detention curfew and early release applications:** Many prisoners are eligible for early release but have not received it because it has not been processed or there is no accommodation available. It is essential that the Ministry of Justice puts resources into progressing these applications and working with local authorities to ensure accommodation and support is made available where needed. A clear message should be sent out to reinforce what the presumption in favour of early release means on the ground in present circumstances.

The duty to take decisive action

We have set out in previous correspondence your legal duty to take action and we do not doubt that the combination of the dire risks posed by the virus, the lack of progress and the limitations of your response to date will give rise to legal challenges brought on behalf of individuals if decisive action is not taken soon. We hope that will not become necessary and ask that serious consideration is now given to expanding and enhancing your response. We hope that this letter will assist with that exercise.

We look forward to hearing from you with your plans for action.

*Yours sincerely
Frances*

Frances Crook
The Howard League for Penal Reform



Peter Dawson
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