

Justice Committee

Proposals to end the automatic early release of certain categories of prisoner

Written submission from Professor Fergus McNeill, University of Glasgow

I write in response to your request for comments on the Cabinet Secretary's proposals for reforms to early release arrangements for long term prisoners. Although the tone of my comments below is somewhat critical, I should make clear my support both for the Cabinet Secretary's broader attempts to reduce the prison population and his cautious and measured approach to reforming early release provisions. If the system is to be reformed, I very much support limiting the changes to those serving very long sentences.

I begin with an attempt to clarify the issues, and then move on to offer some comments on the proposals themselves.

Definitions and clarifications

With respect to the current legislative position, it is important to clarify the terms '**automatic**', '**conditional**' (or 'unconditional') and '**supervised**'.

The 'automatic' part is clear enough; it refers to cases where no person or quasi-judicial body need make any decision about release – the date is effectively set by the nature of the sentence itself.

The question of the 'conditionality' is much more complex. In my view, it is not helpful to refer to early release of short sentence prisoners as 'unconditional' (though that is the term used in the legislation). It is true that their release is *unsupervised* – they have no obligation to submit to supervision by a criminal justice social worker. However, their release *is* conditional in the sense that, after release and until the expiry of the full term of their sentence, they remain liable to return to custody to serve the remainder of their sentence if they commit a further imprisonable offence (Prisoners and Criminal Proceedings Act, 2003, section 16). While it might be argued that this condition is meaningless (since it is a duty of all citizens not to offend), it is worth noting that the effect of the law is that ex-prisoners remain liable to *additional* penalties that do *not* apply to ordinary citizens if they offend. In essence, the remainder of the unexpired part of their sentence can be *added* to any penalty imposed for a new offence committed before the original sentence expires – and indeed the sentence for the new offence may be aggravated by the fact that they are on licence. In other words, ex-prisoners live under the threat of more severe sanctions than would apply to others for similar conduct. In my view, this is best understood as a condition of their early release.

This last point may seem to be a minor one to those who have not lived under a 'sword of Damocles', but for many of those subject to this sort of conditionality (in many different jurisdictions), it can and does represent a significant penal burden and a sanction in its own right (e.g. Durnescu, 2009). It is one of the reasons why many prisoners and probationers say that they prefer determinate prison sentences

even to community-based sanctions that involve not just supervision but also this form of conditionality (e.g. May and Wood, 2010).

I stress this point because the ‘common sense’ view of early release as a violation of ‘truth in sentencing’ or (worse) as ‘getting away with it’ is based on a failure to grasp the meaning and effect of the whole prison sentence. In legal principle and in practice (at least for most prisoners), the days spent under this threat count as part of the sanction as much as the days spent in a cell. Although how we should weigh the different pains of these different parts of the sentence is a difficult question, contrary to the intuitions of those who have never had the experience, the days spent in prison may be the ‘easier’ part of the sentence, at least for some prisoners (Armstrong and Weaver, 2011).

The proposals

With respect to the reform proposals themselves, my first observation is that I am not sure that it is accurate to say that automatic early release takes place ‘regardless of the risk to public safety’. The Cabinet Secretary is right that no *new* consideration of risk takes place in these circumstances, but it is worth remembering that public protection will have been a consideration in the judge’s or sheriff’s deliberation at the point of sentencing; and it is worth remembering that a range of sentencing options which affect release provisions are available to allow judges to address any concerns about an ongoing threat to public safety.

By way of example, a judge may have decided *against* the use of these sorts of risk-related provisions (like extended sentences) because while she regards a very long sentence as necessary for the purposes of punishment and denunciation of a serious offence, nonetheless she has determined that the future risk to public safety is low because the circumstances of the offence were unusual and are highly unlikely to recur and/or because there is no evidence of an enduring disposition in the offender.

Secondly, since *all* of the prisoners whose release dates might be put back by this proposal would be subject to post-release supervision if released early, the issue is not one about whether public safety concerns *will* be addressed (since that would be an explicit duty of the supervising officer whenever release comes) – rather it is about *how* those concerns should be addressed.

By way of example, imagine John is serving a 12 year sentence. Under the current arrangements, if he is not granted parole between years 6 and 8, he will be released automatically at 8 years and will serve 4 years in the community under supervision. In Scotland, we have a well-developed and internationally respected system for delivering this supervision and there is evidence from inspections if not from research that our management of high-risk offenders (especially sex offenders) has been improving in recent years. However, under the reform proposals, the Parole Board might delay John’s release until the expiry of his full sentence. In the latter case, unless I misunderstand the proposals, John will be released after 12 years, free from *any* supervision and deprived of any statutory support in resettling successfully in the community.

If my understanding of the proposals is correct, I would have serious concerns about this mode of release, given a wide swathe of criminological evidence about post-release experiences and about desistance from crime (on which see: <http://blogs.iriss.org.uk/discoveringdesistance/>).

It would make for an exceptionally abrupt transition for people in John's position, and would leave them highly vulnerable (and in some cases perhaps potentially dangerous) in the period immediately after release.

Indeed, it is precisely this sort of concern that underlies early release schemes in most jurisdictions; they are partly about incentivizing good conduct and effective engagement with rehabilitation in prisons, and partly about easing the transition to life after release in order to moderate risks to ex-prisoners and risks which he or she *might* pose to the public. In this sense, early release is very much in the public interest and in the prisoners' interests, even if this is poorly understood by the public and the media.

I should make clear that I am *not* arguing that someone in John's position should be subject to supervision after serving the full 12 years. In my view, that would be a violation of the principles of proportionality and parsimony in sentencing; rather, once the judge sets the maximum sanction deserved, it is the job of the penal system to work out how best to pursue the public interest within those parameters; it is *not* proper to extend them, except in the most unusual of cases (and we have the Order for Lifelong Restriction available for precisely those few cases).

A third observation is that, in the long term, even if the incapacitating effects of lengthening periods in custody does serve to protect the public (and I regard that as highly unlikely), the effect is surely temporary. Once the implementation of the new scheme has run for a few years, the total number of those long-term prisoners being released in any given year will be unaffected by the fact that they have served longer. To put it crudely, simply 'storing the risky' for a little bit longer doesn't in fact serve to reduce it – the key issue for public safety is the condition in and conditions under which people are detained and then released, not how long they serve. How long they serve is principally a matter of 'just deserts' or proportionality of punishment to the offence.

This brings me to my final point. The pressure over the last few years to reform release arrangements has not really been driven by public safety concerns or engagement with criminological evidence. If I may be bold here, and at the risk of offending the Committee, I think Parliamentarians of all parties need to face up to this. This issue is a political one: Ministers (from different parties) have been placed under political pressure to respond to media misrepresentation and public misunderstandings of these issues not by addressing the misrepresentations and misunderstandings, but by caving in to them. As the Scottish Prisons Commission (2008) noted, the same underlying political pressures underlie the gradual sentence inflation that has seen our prison population grow while crime has fallen.

My plea therefore to the Committee is to play its part in lifting the quality of public debate about and understanding of these issues, and to help the Cabinet Secretary in working towards sensible reform proposals and in communicating their rationale to

the wider public. More broadly, if we can secure the sensible objectives laid out in the Prison Commission's report and reduce the prison population significantly – and fulfil the conditions to which the Cabinet Secretary alludes in his letter – then perhaps we'll be better placed to discuss both prison regimes and release arrangements that can actually reduce risks, as opposed to storing them up for later.
Yours sincerely,

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9 May 2014