

## Justice Committee

### Prisoners (Control of Release) (Scotland) Bill

#### Written submission from the Law Society of Scotland

##### Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interest of solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Criminal Law Committee of the Society (the Committee) welcomes the opportunity to consider the Scottish Parliament's Justice Committee's call for written evidence on the Prisoners (Control of Release) (Scotland) Bill.

The Committee previously responded<sup>1</sup> to the call for written evidence from the Scottish Parliament's Justice Committee on the Scottish Government's proposals to end automatic early release of some categories of prisoners which were set out in the letter from the then Cabinet Secretary for Justice, Kenny MacAskill to the Justice Committee Convener, Christine Grahame, dated 3 September 2013.

The Committee has the following comments to put forward in relation to the Prisoners (Control of Release) (Scotland) Bill.

##### Comments

###### Q.1 Whether the scope of the proposed reforms is appropriate

The present system as introduced in 1993 followed a thorough and detailed investigation into the sentencing system in England and Wales (Report of the Carlisle Committee) and Scotland (Kincaig Committee<sup>2</sup>). No similar evidence-gathering exercise has taken place in advance of these proposals. The Committee therefore suggests that there may be merit in commissioning research similar to that which resulted in Linda Hutton and Liz Levy's Report in 2002<sup>3</sup>.

The most coherent reason for the existence of a system of mandatory release on licence prior to the expiry of the entire sentence is that it allows a degree of testing in the community while offenders are subject to conditions, breach of which can result

---

1

[http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Inquiries/AER8.\\_Law\\_Society\\_of\\_Scotland.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/AER8._Law_Society_of_Scotland.pdf)

<sup>2</sup> *Parole and Related Issues in Scotland*, 1989, Cm. 598

<sup>3</sup> *Parole Board Decisions and Release Outcomes*, Scottish Executive Central Research Unit, 2002

in a return to custody (see, for example, the responses to Q.11 of the Sentencing Commission for Scotland's Report on Early Release and Supervision, 2006)<sup>4</sup>.

It is not immediately clear to the Committee why the current proposals should only apply to certain categories of long-term prisoner. In our view, there is no conclusive evidence that the nature of the offence committed, or the sentence imposed, is in itself a reliable indicator of future risk. Indeed, there is some evidence that those serving the longest sentences are proportionately less likely to reoffend in a serious manner than those convicted of lesser offences. For example, the Society understands that since the coming into force of Convention Rights (Compliance) (Scotland) Act 2001, only one life prisoner released on licence has been convicted of a subsequent murder. The However, it is recognised that there is a small percentage of serious offenders who are wholly non-compliant with sentence planning, and further prisoners who are involved in misconduct or drug misuse throughout their sentences. As the Committee understands, a significant percentage of that group has their licence revoked.

It is expressly stated that "*Sex offenders pose a particular risk to the public*", as is already reflected in the special arrangements that apply for sexual offenders sentenced to short-term sentences who, when released, are released on licence (in contrast with other short-term prisoners).

However, it is far from clear that this is correct. While the most recent Parole Board Annual Reports do not specify details of the reasons for revocation of licence, figures in the 2005 and 2006 annual reports<sup>5</sup> disclose that over these two years 48 offenders granted early release on parole and 246 offenders granted statutory release at the two-thirds point of their sentence were recalled to custody. Of these 294 recalled prisoners, only four were facing fresh charges of sexual nature, one of whom was initially sentenced for a drugs offence.

Of these licensees, 21 were on licence for sexual offending. Fourteen (66.7%) were recalled for non-compliance with supervision, three for offences of dishonesty, one for drugs offences, and three (14.2%) for further allegations of a sexual nature. Thus the evidence from less than ten years ago does not seem to support the proposition that sexual offenders pose a greater than average risk. This seems to bear out the findings<sup>6</sup> of Hood and Shute et al.

In addition, Dr David Thornton's Scoring Guide for Risk Matrix 2000<sup>7</sup> indicates that "*there is a trend for older men to have lower sexual recidivism rates than younger men*". Research studies indicate that, within the group of offenders aged over 60 years, at some point risk becomes materially lower than would be expected in terms of the RM2000 risk bands. As a significant number of those convicted and sentenced to over four years will be convicted of offences many years, perhaps decades, previously, a percentage of this group will be statistically amongst the least likely to reoffend. In terms of managing the risk posed by sexual offenders in particular, the

<sup>4</sup> <http://www.scotland.gov.uk/resource/doc/925/0116782.pdf>

<sup>5</sup> <http://www.scottishparoleboard.gov.uk/pdf/Parole%20Board%202006.pdf>

<sup>6</sup> *Sex Offenders Emerging from Long-Term Imprisonment* (2002) Brit. J. Criminal. **42** 371-394

<sup>7</sup> February 2007 version

Society also understands that MAPPA (Multi-Agency Public Protection Arrangements) have been in place in every local authority since 2008.

In contrast, it might perhaps be noted that of the 184 violent offenders recalled, 65 (35.3%) were facing charges of violence, 32 (17.3%) were facing “other charges”, a category that includes possession of weapons, and 27 (14.6%) were facing theft charges or similar. Therefore, there may be some greater merit in requiring the Parole Board to scrutinise the risk factors of serious violent offenders, and in certain circumstances for them to have a statutory power not to direct release. However, given the importance of licence conditions in allowing for supervision of offenders in the community, and in enabling those who require them to access community supports in areas such as accommodation, addictions counselling and job search, the default position should be for there to be a period of community-based supervision (with the sanction of recall) for all but the most dangerous offenders, who need not necessarily be those who have committed the most serious offences.

## **Q.2 What impact the proposals would have on the work of CJSWs and others**

This is not a topic on which the Committee has a particular opinion. The Committee do note, however, that there will certainly be an increase in the work undertaken by both prison-based and community based social workers in respect of preparation or reports for the Parole Board. However, if as expected the effect of this is to reduce the number of long-term prisoners released on “non-parole licence”, the increased cost in preparing reports will be offset to some extent by the reduced workload in supervising offenders within the community.

## **Q.3 The impact on prisoner numbers and the work of the Parole Board**

The general trend since the coming into force of the Convention Rights Act in October 2001 is for proportionately fewer prisoners to be released on parole<sup>8</sup>, the percentage having reduced from over 50% to a little over 30%. In sexual offence cases, the Committee understands that less than 10% of long-term prisoners are released prior to the date upon which their release is mandatory in terms of the Prisoners and Criminal Proceedings (Scotland) Act 1993. From these two trends it seems certain that there will be an increase in the number of long-term prisoners in custody. Unless there is a marked decline in the number of short-term prisoners, it is therefore likely that the prison population will increase slightly.

The Committee suggests that there will be two impacts upon the work of the Parole Board. If, as seems likely, a significant proportion of long term prisoners whose release is affected by the Bill are not released at the two-thirds point of their sentence, their cases will require further review by the Board on a periodical basis until their ultimate release. In addition, it seems almost certain that many of those who either do not now engage in the parole process or are happy to do so by way of “paper review” will now elect to have their cases dealt with by an oral hearing, at which evidence will be led. This may result in an increase in the workload of the

---

<sup>8</sup> See, for example, *Surprising Trends from the Parole Board’s Annual Report*, SCOLAG 413, March 2012

Board, particularly in its need to appoint sufficient legally qualified persons to act as tribunal/hearing chairs.

#### **Q.4 The appropriate use of determinate sentences as opposed to life sentences/OLRs**

This question relates to sentencing practice, which is a judicial function. It is not the role of the Committee to offer guidance to the judiciary on sentencing matters, nor, given that sentencing must in every case be based solely upon the circumstances of the offence and the offender, can the Committee express a view on the appropriateness of particular sentences in protecting the public. Those passing sentence in solemn proceedings are aware of their sentencing powers, and of the reports necessary before an extended sentence or an OLR can be passed.

#### **Q.5 Whether the proposals are consistent with the provisions of the Custodial Sentences and Weapons (S) Act 2007**

The Committee observes that the parts of that Act relating to sentencing have not yet come into force, seven years after the Act was passed. It is of course a matter for the government whether and when to bring the Act into force, and that is not a matter on which the Committee can comment.

The Committee notes, however, that the law still in force is that contained within the Prisoners and Criminal Proceedings (Scotland) Act 1993, and that the proposed amendments are to that statute rather than the 2007 Act. Section 6 (7) of the latter Act provides that –

*“The court may not make an order specifying a custody part which is greater than three-quarters of the sentence.”*

The Committee understands that the rationale behind that provision was that it is generally preferable for all persons released from custody after serving a significant period of imprisonment or detention should spend a period subject to compulsory supervision within the community, with the sanction of a recall to custody in the event of non-compliance with that supervision. The provisions in Section 1 of the Bill simply propose to disapply entirely the automatic early release provisions of Section 1 of the 1993 Act in certain limited circumstances. Obviously were Section 6 of the 2007 Act to be brought into force in its current form, the two sections would be contradictory. It is not for the Committee to seek to persuade the Parliament which section would better protect the public from the risk of reoffending. That is a matter on which expert evidence is required.

#### **Q. 6 & 7 Power of early release for community integration**

Given that the proposed statutory maximum period for such early release is two days (proposed Section 26C), and that the practice will largely be an administrative one, the Committee has little to add. It does seem more logical, though, for the decision upon release expressly designed to benefit reintegration and thus to protect the public, to be made by the Scottish Government rather than the Scottish Prison

Service. The Committee has no comment upon the guidance which the Scottish Government and Scottish Prison Service propose to produce.

The Law Society of Scotland  
9 December 2014