

Justice Committee

Prisoners (Control of Release) (Scotland) Bill

Written submission from the Risk Management Authority

Introduction

1. The Risk Management Authority (RMA) is a non-departmental public body (NDPB), established in 2005 by the Criminal Justice (Scotland) Act 2003 to set standards for and promote effective practice in the risk assessment and management of serious violent and sexual offenders. Within this remit, the RMA has specific responsibility to administer and oversee a number of practices and processes relating to the Order for Lifelong Restriction (OLR).

2. Our evidence is on the aspects of the Bill relating to automatic early release.

3. We welcome the opportunity to provide evidence to the Justice Committee and understand the aim of the Bill to promote public protection by focussing attention on those who pose significant risk of serious harm. We recognise that it is difficult to weigh up the relative merits of post-release supervision and continued detention in cases where there is a likelihood of serious harm to others, and such challenges are pertinent to this proposed legislation. We will discuss these challenges and reflect discussions we have had with Scottish Government colleagues on these matters.

The scope of the provisions in relation to automatic early release

4. We hope it will be helpful to an understanding of the scope of the provisions to define the offenders and the circumstances that are being addressed by the Bill. These provisions relate to long term prisoners serving determinate sentences for serious offences, who have failed to satisfy the Parole Board on at least one occasion that they should be released on parole. This means that they have been deemed by the Parole Board to pose an unacceptable level of risk to the public. This decision will have been informed by risk assessment, which will have taken into account the nature, seriousness and pattern of previous offending, and the likelihood, nature and seriousness of future offending. The assessment of the likelihood of re-offending will have been influenced by the presence of factors in the person's character and circumstances that continue to predispose them towards offending, as well as by information about engagement and progress in interventions, conduct, and progression through the regime, while in custody. Under the present legislation (the 1993 Act), they are released automatically at the two-thirds point of the sentence subject to licence conditions and statutory supervision.

5. Therefore, a profile of the typical long term prisoner to which the relevant provisions of the Bill apply is that of an offender who has failed to progress through the prison regime, failed to mediate his or her behaviours sufficiently to be deemed manageable in the community, perhaps due to a lack of response to interventions in prison for whatever reason, and/or resistance to change, and/or intentional efforts to evade post-release supervision. Accordingly, it is reasonable to assume that such a

prisoner would be approaching release having been assessed as posing a continuing risk of serious harm to the public.

6. The aim of the Bill's provisions, to ensure that the release of such prisoners is no longer automatic and that they should remain in custody, thus enabling the risk associated with their release to be further considered by the Parole Board, is sound. However, we consider that the consequence that some may be released without any post release supervision needs to be explored. To understand the implications of this, it is necessary to consider the various types of offender and sentences to which its provisions may be relevant. The policy memorandum usefully highlights the particular relevance of the extended sentence.

7. If the prisoner is serving an extended sentence, a period of post-release supervision will be provided, regardless of whether the full custodial part is served. This provides for supervision and monitoring in the community and recall to custody if appropriate. If the offender is a sex offender subject to notification requirements, a further range of measures, multi-agency arrangements and civil orders is available to monitor risk at the end of the sentence.

8. However, if the prisoner is serving a determinate, but not extended sentence, the impact of the Bill's provisions could be that s/he may be released at the end of the sentence, unconditionally, without a period of statutory post-release supervision. The continued imprisonment may have had a temporary impact on public safety by delaying release, but it would be difficult to argue that it would have mitigated risk other than in the short term. If the prisoner is not subject to notification requirements as a sex offender, there would be no formal means by which to monitor or manage risk.

9. It is this eventuality that we suggest may be an unintended consequence of the Bill, although the frequency with which it would occur is not known. Essentially, a violent or other serious offender, whose risk has been deemed unacceptable by the Parole Board, may be released unconditionally and with no formal authority or powers available to the community agencies to monitor or regulate his/her whereabouts or behaviour.

10. In the case of sexual and violent offenders, the primary means to limit this eventuality lies in the extended sentence, which is available to the Court in cases where, at the point of sentencing, future risk is assessed as requiring additional post release supervision. The exceptions would be cases where awareness of risk emerged during the course of the custodial sentence. This underlines the policy memorandum's assertion that the Bill brings into sharp focus the relevance of the extended sentence, and also highlights the importance of risk assessment.

11. The prospective nature of the Bill should ensure that the implications of its provisions would be known to Courts and those providing risk assessments to sentencers - matters for consideration on future implementation. But we consider that it would be judicious, at this stage, to estimate from current statistics the number and nature of cases in which the unintended consequence of such an offender being released unconditionally at the end of the sentence may occur.

12. We think this is important as, while no framework of measures can eliminate risk, risk can be managed when it is understood. There is a balance to be struck between the advantages of ending automatic release of serious offenders and the disadvantages of releasing some unconditionally at the end of their sentence. The risk that arises from this consideration needs to be fully understood to determine whether it is tolerable, and how it may be managed.

The importance of supervision in the community

13. We note distinctions between the principles of the Custodial Sentences and Weapons (Scotland) Act 2007 (as amended by the Criminal Justice and Licensing (Scotland) Act 2010) and the current Bill. The aim of the Bill to ensure that the risk associated with early release is further considered by the Parole Board while the offender remains in custody is consistent with the earlier legislation, and prioritises those who may pose the greatest risk. However, it is our understanding that the earlier legislation sought to end *unconditional* release, rather than automatic early release, by ensuring that a period of community supervision is the norm during the transition period, which is identified as a time of greatest change and risk of re-offending. As explained above, the current proposals could result in a small number of *serious* offenders being released *unconditionally* and with no form of community supervision during this difficult transition period following release from prison.

14. The rationale underpinning early release on licence is that risk management, support and supervision in the community following a period of imprisonment are vital to reintegration and rehabilitation. This rationale has been upheld by expert committees over the last two decades, and is supported by a wide criminological literature. That literature contains research indicating that certain services and interventions, particularly when delivered in the community, can be effective in reducing re-offending and further research that demonstrates that those who desist from offending identify supportive relationships and opportunities as being most influential in their transition to a prosocial lifestyle.

15. Release from prison following a lengthy sentence is a difficult transition. Even the 'ideal' parolee experiences numerous stresses adapting to life in the community. Successful reintegration is even more challenging when the individual continues to have needs and difficulties that increase his or her potential to further offend and, when that offending is likely to result in serious harm, careful balanced risk management is required to promote safe reintegration. A very significant benefit of post-custodial supervision is that it provides a means to access housing, rehabilitative services, mental health treatment, addiction therapies etc., services from which offenders who are not subject to supervision are often excluded, for a variety of reasons. These services may make the difference between successful reintegration and re-offending.

16. The Prisoners and Criminal Proceedings (Scotland) Act 1993 provides for long term offenders who have failed to secure parole to be released at the two-thirds stage of their sentence on 'non-parole licence'. This release, then, is automatic but *conditional*, with licence conditions, statutory supervision and the potential for recall. At the outset it was recognised that non-parole licensees would form a particularly challenging group for community criminal justice services to manage, given that a

combination of an absence of risk reduction, failure to progress and/or non-compliance would be the likely reasons that the Parole Board considered they posed an unacceptable level of risk for parole. Experience confirms that this group does account for a high proportion of recalls, although this does not negate the value of the provision, as it is clear that a number does successfully complete the licence.

17. While acknowledging that this group presents challenges, we consider that, where a proportionate balance of support, supervision and restriction is provided, it is possible that risk may be managed and reduced. Conversely, if the individual serves the entire sentence in prison and is released without licence conditions, monitoring, supervision and relevant support, it is likely that risk will remain, if not increase. Long term prisoners, who, under the proposed legislation, were not released at the two-thirds point, would remain eligible for consideration of release on parole. However, we believe that, in such cases, the Parole Board would face additional challenges in balancing the risks associated with early release on parole, on the one hand, and release without any form of supervision at the end of the sentence, on the other.

18. Realistically, with the exception of those serving life sentences including the Order for Lifelong Restriction, some prisoners will eventually exhaust the option of conditional release whether due to the presence of persistent behaviours and/or intent. However, if this occurs as the result of the provisions in the new Bill which has the stated aim of promoting public safety, it would be necessary to provide contingency measures to minimise the resulting risk.

19. Unlike other determinate sentences, the extended sentence limits the occurrence of release without conditional post-release supervision when it is appropriate on the basis of risk. Limiting the scope of the current Bill to prisoners serving extended sentences may merit consideration.

The differential approach

20. The proposals detail a phased and differential approach to the end of automatic release. A cautious and considered approach, with a focus on those who pose the greatest risk is a sound starting point. But it is a common misperception that sex offenders pose a particular risk. The provisions of the Bill appear to perpetuate this, in that the removal of the right to early release applies to sex offenders serving 4 years or more, whereas it applies to other offenders who are serving 10 years or more. In reality, the position is more complex and requires some qualifications.

21. The nature of some sexual offending, the characteristics of some sex offenders and the impact on victims may be distinctive. Further, the pattern of offending differs in that sex offenders generally re-offend less frequently and later than others, often with non-sexual offences.¹ While sex offenders are known to often deny or minimise the impact of their behaviours, they are generally more compliant with supervision and motivated to avoid custody. In contrast, violent offenders re-

¹ Hanson, R.K. and K. Morton-Bourgon (2009). The Accuracy of Recidivism Risk for Sexual Offenders: A Meta-analysis of 118 Prediction Studies. *Psychological Assessment*, Vol. 21, No. 1, 1–21

offend more frequently and earlier and often pose greater challenges in relation to compliance with supervision.

22. While evidence might better support an assertion that sex offenders pose a *different kind* of risk rather than a particular risk, it also identifies that they have *particular needs* when attempting to re-integrate into the community. Accommodation issues, isolation, community reaction and media attention can undermine reintegration efforts and make the support and monitoring of statutory supervision invaluable. It is, therefore, preferable to maintain, rather than limit, the occurrence of statutory supervision for sex offenders.

23. Multi-agency public protection arrangements, notification requirements and civil orders provide particular measures to monitor and manage sex offenders during, or in the absence of, statutory supervision.

24. The group whose risk is particularly exposed by the proposed legislation comprises a small number of challenging, non-sexual violent offenders serving determinate sentences of ten years or more who will be released unconditionally at the end of their sentence, and without the MAPPAs and other measures available to support the management of sex offenders.

25. We are aware that the Scottish Government is currently considering the feasibility of extending the scope of the MAPPAs to establish arrangements for certain non-sexual offenders whose risk necessitates collaborative and active management. This important policy development work runs parallel to the current proposals and is clearly highly relevant. It is also being developed in a phased way, beginning with consideration of those subject to statutory supervision.

26. Violent offending whether sexual, domestic, physical or psychological can have a devastating impact on those against whom it is perpetrated. Whilst it is certainly true that sexual abuse has been empirically associated with a number of negative clinical, behavioural and social outcomes there is evidence that on some outcomes psychological/ emotional abuse, physical violence and exposure to domestic violence can be as least as deleterious as sexual abuse²³⁴. This is captured in the currently operational definition of 'risk of serious harm', in that regardless of the nature of the offending it is considered against its potential to cause physical or psychological damage from which recovery could be expected to be impossible or unlikely. We suggest that there may be merit in discussing whether 'risk of serious harm' would better determine the criteria for consideration in the Bill rather than offence type.

² Spinazzola, J., Hodgdon, H., Liang, L. J., Ford, J. D., Layne, C. M., Pynoos, R., ... & Kisiel, C. (2014). Unseen wounds: The contribution of psychological maltreatment to child and adolescent mental health and risk outcomes. *Psychological Trauma: Theory, Research, Practice, and Policy*, 6(S1), S18.

³ Teicher, M. H., Samson, J., Polcari, A., & McGreenery, C. E. (2006). Sticks, stones, and hurtful words: Relative effects of various forms of childhood maltreatment. *The American Journal of Psychiatry*, 163, 993–1000.

⁴ Radford, L., Corral, S., Bradley, C., Fisher, H., Bassett, C., Howat, N., & Collishaw, S. (2011). *Child abuse and neglect in the UK today*, NSPCC: London

27. This would be consistent with the policy development work in respect of MAPPA, and also with one of the stated aims of the current Bill, which is to re-focus our collective resources and efforts on risk.

The relevance of the Extended Sentence and the Order for Lifelong Restriction (OLR)

28. The proposals target a small group of serious violent and sexual offenders serving determinate sentences, who are challenging, who resist or fail to respond to rehabilitative measures, and who present an enduring risk of serious harm to the public. Therefore the proposed legislation brings into focus the relevance of two 'risk' based sentences: the extended sentence and the OLR.

29. The OLR has been available to the High Court since 2006; it is an indeterminate sentence intended to be an "exceptional" provision for "exceptional individuals"⁵, that is individuals who pose an enduring risk of serious harm to the public. The legislation requires that the High Court be informed by a comprehensive expert risk assessment, and that when the High Court considers that the statutory risk criteria have been met, it is to impose an OLR. Thereafter the individual is managed for the remainder of his life whether in custody or the community, by means of a multi-agency risk management plan. That risk management plan is evaluated by the RMA initially to ensure that it meets the required standard⁶ before being approved; and thereafter on an annual basis to ensure that it is being delivered appropriately.

30. The required standard involves risk management that is balanced and proportionate, that provides appropriate levels of restriction and monitoring, *but also* elements of supervision and intervention necessary to promote safe reintegration in the community. From the outset it is required that plans evidence this balance, ensuring attention to public safety and rehabilitation.

31. This level of restriction and resource is only justified by the degree of risk such exceptional individuals pose. For this reason, it is vital that its application is subject to stringent tests and criteria, that its use is not extended and, in particular, that it remains a disposal available to the High Court at the point of sentence. On the last of these points, we welcomed the Scottish Government's response to the recommendations of a Significant Case Review report which were conveyed to the chair of the Justice Committee in a letter by the Cabinet Secretary in July 2012.

32. Since 2006 the High Court has imposed 130 OLRs, this number being within the predicted range of 15-20 per year. In those cases that have been considered by the High Court *not* to have met the 'risk criteria' for imposition of an OLR, an extended sentence is the most common disposal.

33. Given the framework provided by the extended sentence and the OLR for cases in which future risk of serious harm is a concern and the fact that the proposed

⁵ Scottish Executive (2000) *Report of the Committee on Serious Violent & Sexual Offenders*, Edinburgh; Scottish Executive, 2000 (2001) *Serious Violent and Sexual Offenders Edinburgh*

⁶ Risk Management Authority (2013) *Standards and Guidelines for Risk Management*

legislation would be prospective, it may be that the numbers that would be affected by it would be very small.

34. For us, this suggests that further exploration of the number, characteristics and circumstances of the cases that may fall within the proposed changes, with reference to the criteria for the extended sentence and the OLR, would be valuable. Such analysis would identify the scope of the problem is understood, and help to inform our understanding of the roles played by various sentences.

Conclusion

35. We conclude with a summary of our key points:

a) We support a considered approach to the release of prisoners who continue to pose a risk of serious harm to the public.

b) It is advisable that unconditional release without measures to enable supervision or monitoring is the exception, and that post-release statutory supervision is the norm. We believe that this is consistent with existing legislation and evidence on the rehabilitation and reintegration of offenders. It is best considered as a last resort when it cannot be avoided, rather than a contingency measure to mitigate the immediate risk of release. But, if introduced as proposed, it would need to be supplemented by further measures to manage risk on eventual release to have any meaningful effect on public safety.

c) The Scottish Government recognises the role of the extended sentence in promoting post-release supervision of sexual and violent offenders. We tentatively suggest that it may merit consideration that the provisions of the Bill apply only to extended sentence prisoners. It offers greater scope for post release supervision and is focussed on risk.

d) For the relatively few challenging offenders who pose the greatest and most enduring risk, the OLR already provides the means for the management of this group.

e) The Scottish Government recognises that certain categories of offenders other than sex offenders may require the extension of multi-agency public protection arrangements. This policy development is focussing on the assessment and management of those who pose the greatest risk of serious harm and is relevant to the current Bill by beginning to redress the differential approach to sex offenders.

f) We recommend that the Bill could further its stated aims by re-focussing its inclusion categories on risk of serious harm rather than offence type. This would also enhance an evidence based approach by challenging the differential approach to sex offenders.

g) We recommend that further scoping should be undertaken to quantify the risks and benefits that would be created by the provisions of the current Bill.

We offer our full support to the Scottish Parliament and the Cabinet Secretary in this matter.

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