

## Justice Committee

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

Written submission from Dr Monica Barry, University of Strathclyde and  
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#### Response to the letter from the Cabinet Secretary for Justice on bringing forward proposals designed for Stage 2 of the proposed Bill

We welcome the opportunity to comment on the Government's reaction (in the Cabinet Secretary's letter dated 3<sup>rd</sup> February 2015) to the evidence provided during January to the Justice Committee on the abolition of automatic early release for certain categories of prisoner.

As we understand it, the Government now proposes to bring forward plans for Stage 2 of the Bill: namely to amend the legislation so as to widen the categories of prisoner affected by the proposed abolition of automatic early release to *all* long-term prisoners (i.e. those serving a custodial sentence of 4+ years); and to subject these long-term prisoners to a compulsory period of supervision in the community post-release.

This additional change to the proposed Bill may be a response to criticism from some commentators that a) sex offenders are the most compliant of licensees with the lowest risk of further offending; and that b) there is no justification for singling out sex offenders for longer periods of incarceration. However, by widening the net to *all* purportedly high risk offenders (i.e., those serving longer prison sentences because of the severity of their crimes), the new proposal fails to acknowledge that public protection is *currently* being addressed through the compulsory supervision of *all* long term prisoners on release, either through parole or non-parole licences and through the compulsory post-release supervision of all sex offenders serving 6 months or more (via Short Term Sex Offender Licences).

Thus the targeted population of prisoners for compulsory supervision post-release is already on the statute. What is *new* about the proposed changes is at what point in the sentence these long-term prisoners are released into the community. If they receive parole, it could be at the half way stage, but if they are not considered eligible for parole (for reasons relating as much to family circumstances as to propensity for harm), the Government is seeking to keep these 'parole-ineligible' individuals in prison for as long as the sentence allows. What is not clear in the Cabinet Secretary's letter is whether the intention is (A) to add on compulsory supervision to sentences already completed in custody, or (B) to provide for compulsory supervision in the community for a fixed period within the existing custodial sentence.

If **option A** is the intention, we would have several serious reservations about the proposal:

- First, and crucially, the period of compulsory supervision would amount to a *de facto* increase in the punishments imposed by the courts. In this regard, we

have sought but not yet received any indication of whether the judiciary has been consulted about these proposed changes and what their views are on the matter – this might well help rather than hinder future policy making. The views of prisoners are also important in this regard. Under option A, prisoners would be very likely to question the legitimacy of the additional supervision/punishment; there is good evidence that when the perceived legitimacy of supervisory sanctions is lower, the supervisor's job is made much more difficult.

- Second, this might risk litigation by prisoners or ex-prisoners under the Human Rights Act/the European Convention on Human Rights. This is because it is not clear to us that the Parole Board has the authority to increase the punitive effects of a court-imposed sentence; and that would be the effect of the Parole Board's decision not to release early. We suspect prisoners could then litigate successfully in respect of various due process issues related to the conduct of Parole Board decision-making (e.g. rights to legal representation, legal aid, etc.).
- Third, option A would increase the prison population by delaying release for a proportion of long-term prisoners. We are not able to estimate the proportion involved, but any increase in our high prison population is problematic in our assessment, and would require to be well justified in terms of its effectiveness, given the high expense to the public purse. We see no credible evidence that Option A would increase the effectiveness of the existing early release provisions. Indeed, recent research undertaken by Dr Barry and colleagues in Scotland suggests that people on parole licence are more likely to comply with such supervision (including not to reoffend and to keep to the conditions of their licence) (89% compliance rate) than those people on non-parole licence (87% compliance rate) or those on extended sentences or short-term sex offender licences (85% compliance rate); however the differences are small and the overall rate of compliance is currently encouraging in respect of public protection. Any delays in when compulsory supervision 'kicks in' may well be counterproductive in terms of public protection.
- Fourth, a legal problem arises if compulsory supervision is over and above the sentence laid down by the court, since there will be no 'capacity' for recall to prison in the event of breach of supervision requirements if the sentence has already been served in full. Therefore, breach of conditions of the compulsory supervision would have to become a new offence. This would also very likely increase the prison population, since a number of those subject to supervision following the changes would likely breach the conditions (given the disincentives mentioned above) and thus face further custodial sentences as a result.
- Fifth, the proposal will increase the work (and therefore) costs of the Parole Board since some long term prisoners who are denied early release will have to be considered and reconsidered for early release several more times before the eventual expiry of their sentences.

For all of these reasons, we very much hope that the Government's intention is better captured in **option B** above (i.e. a period of compulsory supervision *within* the period of the custodial sentence).

With respect to the Committee's questions about the appropriate length of such a period of supervision, and *assuming this is within and not in addition to the existing sentence*, we would argue that it is important that, in principle, the period of supervision is proportionate to the length of the original sentence. It is inevitable that the longer one serves in prison, the longer one needs support in the community to readjust. But since it is also true that anyone who has served 4 years or over will have significant resettlement needs, we also see the case for a fixed *minimum* period of supervision of one year (within the existing sentence). So, we would suggest that the Parole Board continues to commence consideration of eligibility for release on compulsory supervision at 50% of the sentence (as presently) and that prisoners are released no later than a year before the expiry of their sentence on compulsory supervision. In policy, practice and public debate, this compulsory supervision should be described not as 'automatic early release' but rather as an important part of the whole 'package' of the sentence (with custodial and community parts), as per the Custodial Sentences and Weapons Bill 2007.

Finally, although it is reasonable to focus on the merits and demerits of these proposals in relation to public protection, it is also important to stress that the state owes a duty to those who are punished; a duty to support their reintegration. This flows not so much from a commitment to rehabilitation, but from retributive principles that insist that the punishment must not extend beyond the parsimonious and proportionate penalty imposed by the court. The weight of criminological evidence (including recent Scottish evidence reported in Dr Marguerite Schinkel's (2014) book 'Being Imprisoned')) is that in myriad ways, the pains of imprisonment *and of release* extend far beyond those intended and foreseen in the imposition of the punishment.

For these reasons – and with public safety in mind – some jurisdictions complement post-release supervision with certain legal guarantees in relation to reintegration. For example, we suggest that the Committee and the Government would benefit from examining the example of Norway where such a 'reintegration guarantee' exists, and assists in securing decent housing and immediate state benefits for prisoners on release. In essence, it expresses the duty of public bodies to support the reintegration of former prisoners. In the report of the Scottish Prisons Commission, 'Scotland's Choice' (2008), similar measures were proposed:

"18. To ensure progress in developing services that are available nationwide to address the social and health related needs of many offenders, the Commission recommends that the Government promote recognition across all Government departments, all public services, all sectors and all communities of a duty to reintegrate both those who have paid back in the community and those who have served their time in prison" (Scottish Prisons Commission, 2008, Scotland's Choice, p5).

In our assessment, and based on criminological evidence about reintegration, reoffending and desistance from crime, we suggest that this sort of measure would

do much more to protect the public and to support effective and just reintegration than altering the timing of early release arrangements.

Dr Monica Barry and Professor Fergus McNeill  
16 February 2015

**Additional research evidence to the Justice Committee in relation to the proposed abolition of early release from Dr Monica Barry, Law School, University of Strathclyde**

This evidence is based on a recent (but as yet unpublished) research project across Scotland which explored, *inter alia*, prisoners' and ex-prisoners' views and experiences of compulsory supervision in the community post-release. Although the sub-sample of licensees was limited to 69 individuals, the findings support other research on offenders' views and experiences of supervision, albeit in different jurisdictions.

Three issues relevant to the proposed Bill that have arisen from the interviews with offenders are briefly summarised below. These are:

- 1) reasons for breach of licence conditions;
- 2) experiences of recall resulting from breach of licence conditions; and
- 3) lack of programmes and open estate availability.

**1. Reasons for breach of licence conditions**

Younger offenders and those with mental health or drug problems are more likely to breach licence conditions<sup>1</sup>, not because of further offending but because of so-called 'technical' breaches – failing to attend appointments or inform their social worker of a change of address, failing a drugs test, etc. Only a minority of breaches result from further offending and rarely is that further offending a repeat of the original offence. In other words, both violent and sexual offenders tended, in this research, to be breached not for committing violent or sexual crimes but for road traffic offences, breach of the peace and theft. Such technical breaches included not telling one's social worker that a) the licensee had been questioned by the police but not charged; b) the licensee had developed a friendship with a female; c) the licensee had visited a friend's house where an under-17 year old lived; and d) the licensee had slept at his girlfriend's house overnight:

The only thing I never really complied with was telling the social worker that I was staying at my girlfriend's house which I wasn't really allowed to cos you're not allowed to stay overnight unless you tell them. But I wasn't really wanting to drag my girlfriend into that side of the police coming out to her house and searching her house and stuff like that just to see if it's suitable for me. I didn't think I had to put my girlfriend through that, do you know what I'm saying, because she's never been in crime ever (24 year old breacher).

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<sup>1</sup> Steen, S., Opsal, T., Lovegrove, P. and McKinzezy, S. (2013) 'Putting Parolees Back in Prison: Discretion and the Parole Revocation Process', *Criminal Justice Review* Vol. 38, No. 70

The relationship with the social worker is crucial to the cooperation of licensees with the conditions of their licences, and yet many respondents suggested that they did not trust their social worker, or lacked any confidence in the legitimacy of the criminal justice system more widely. Offenders know that supervising social workers, and indeed the Parole Board, tend to be risk averse when dealing with longer term prisoners on licence and they are naturally paranoid about 'walking on ice' whilst on licence, when all too often a breach of conditions results in recall to prison. Recently in Scotland, there has been a significant reduction in numbers of prisoners being granted parole and a significant increase in the numbers of released prisoners being recalled to prison because of breaching licence conditions (Scottish Government, 2012<sup>2</sup>). In 2012-13, of those who had been breached post-release, the Parole Board for Scotland recalled 69 per cent on parole licence; 63 per cent on non-parole licence; 71 per cent on extended sentences; and 62 per cent on life licence (Parole Board for Scotland, 2013). In the last 10 years, there has been a 300 per cent increase in the adult daily recalled prison population and a 600 per cent increase in the young offender daily recalled prison population (Scottish Government, 2012).

## 2) Experiences of recall

The main issue with recall, for these respondents, was the fact that it could happen very easily, very quickly, unintentionally and on the basis of anecdotal, third party 'evidence', and that recall not only meant losing one's job, family and home, responsibilities which are crucial to desistance, but also meant that many of these people languish in prison for a further few years without any right of appeal or finding of guilt. Once recalled to prison, many respondents felt that they were then forgotten and not given priority for further parole or tribunal procedures. One 41 year old respondent described it as the 'warehousing' of recalled prisoners. Several respondents who had been recalled described their difficulties in getting their voices heard about technical breaches, or of getting released following a 'not guilty' verdict on the offence for which they were recalled. It would seem from such accounts that the Parole Board may consider somebody a renewed risk if new information comes to light as a result of a technical breach and will therefore keep that person in prison for the remainder of their full sentence, irrespective of the relevance of the technical breach. For example, one man said that he was staying with his girlfriend following his eviction from his flat because of the owner wanting to sell. He had been offence free since his release two plus years ago, and had been working full-time for the last two years. He was afraid to tell his social worker that he was temporarily staying with his girlfriend, in case she reacted against his potential risk from homelessness:

Technically that's me homeless and if I'm homeless, the parole board will say well, you're serving a sentence, still serving a 7 year term; if you're homeless.... Recall him back to prison... he's been serving a sentence for a violent offence, he's nowhere to go, we can't keep tabs on him, put him back to jail (39 year old breacher).

Another man in his forties on life licence was recalled for road traffic offences; the procurator fiscal apparently dropped the charges because of a lack of evidence, but

<sup>2</sup> Scottish Government (2012), *Prison Statistics and Population Projections Scotland 2011-12*, Statistical Bulletin, Edinburgh: Scottish Government.

he was still recalled and had been back inside for nearly 3 years at the time of interview (see below).

### **3) Lack of programmes and open estate availability**

A recalled prisoner will not be eligible for parole again unless s/he complies with programme interventions in prison, and invariably there is a waiting list for such programmes. Equally, a period of stay in an open prison is often required for parole eligibility, but spaces are limited. The Scottish Prison Service's current inability to offer enough programmes and enough places in the open estate – on which parole is dependent – will undoubtedly mean an increase in judicial reviews.

The respondent mentioned in 2) above was recalled from life licence and therefore had to apply for parole again, but the lack of open estate availability was a barrier to his parole eligibility:

I've been up here [in prison on recall] for that's nearly 3 years now, waiting to go to an open [prison]... [the risk management team in prison] will say, this guy needs to do some offence focused work, we'll put him on a group works course, cognitive skills or some stupid thing, Constructs or something like that... I done it. This was about 2 years ago I done Constructs and the guy said at the time, you don't even flag up for us, you're not suitable for it but since you're here, since you've been recalled, since you're here, we'll make you do it anyway and then at least you'll have something, you'll have done something while you're here... [The Scottish Prison Service has] been given a mandate to say, right you've got to test these cases and see if they need any offence focused work, see if they need tested in an open [prison]. But they just – they're let loose to do it in their own time... Maybe there's some other form of offence work that he could maybe undertake apart from the Constructs... and [SPS] would like 12 months to look into this. The Parole Board went, aye, alright, here, we'll give you 15 months... They shouldn't put folk in jail... for things that they wouldn't put other people in jail for. I'm on parole for a violent offence but they recalled me for a driving offence. I can understand if it was violence, if I had offended somebody, but it wasn't violence... If they spent half the money trying to help me outside than what they did. It's some amount of money they must have spent keeping me in the jail over the [last 3 years on recall] (Life licensee).

Although SPS apparently does not keep a record of who is back in prison on recall, since when and potentially for how long, there seem to be many people waiting to be re-released pending either programme or open estate availability, and yet they are dependent on the SPS and the Parole Board, whose administrative procedures seem to be both cumbersome and time consuming and could add months if not years onto a recalled prisoner's sentence.

In conclusion, this research supports other findings which suggest that offenders on supervision are less likely to reoffend than those who are not. However, the supervising social worker's attitude is crucial in ensuring a trusting and respectful working relationship with the offender. If an offender perceives that relationship or the legal requirements of an order or licence to lack legitimacy, then they are less

likely to be open and share information with the social worker which might be deemed risky if recall is seen as the likely reaction. If the proposed Bill increases the number of people on supervision and over prolonged periods, the criteria for breaching licensees needs to be relaxed, so that people are not recalled for minor technicalities. The Parole Board and Scottish Prison Service also need to tighten and speed up their procedures for recalling and re-releasing, as well as to make programmes available and the open estate more accessible to those who most need them. As suggested also in my joint evidence with Professor McNeill, more constructive and proactive support in the community for people on release from prison is needed if the public is to be protected and offenders are to be encouraged to desist from crime.

Dr Monica Barry  
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