

## Justice Committee

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

#### Written submission from Professor Cyrus Tata, Strathclyde University

#### **Response to the letter from the Cabinet Secretary for Justice – intention to bring forward proposals at Stage 2 of the Bill**

I welcome the invitation to give written and oral evidence about the Scottish Government's response to the evidence provided during January 2015 about the Bill.

According to the Cabinet Secretary's letter (dated 3<sup>rd</sup> February 2015) to the Convenor of the Justice Committee, it is now the Scottish Government's intention to bring forward proposals at Stage 2 of the Bill so as to:

- guarantee that all long-term prisoners, i.e. anyone serving a determinate sentence of 4 years or more for any crime, being released from prison will be subject to a minimum period of compulsory supervision in the community; and
- extend the provisions to end the existing system of automatic early release for all long-term prisoners, i.e. those sentenced in future to sentences of 4 years or more, whether for sexual offences or any other form of offence.

#### **Can a proposed aim to change legislation made in haste make good law?**

To the best of my knowledge at present, there has been no further definitive information about how the Scottish Government intends to achieve these two aims. Little is known about what principles are intended to be used to achieve the bald aims. This makes it difficult to comment in decisive terms.

The two aims put forward above would, at least on its face, be a radical alteration of the current arrangements. While I welcome the chance to discuss reforming the system so as to make it more comprehensible, clear and effective, it is worrying that such proposals that it appears to be proposed at Stage 2 of the Bill and without the benefit of consultation. Release (and sentencing) arrangements are both complex and politically sensitive. So it is for those reasons it would be sensible to 'draw breath' and seek wider consultation about the shape of legislation. Previous legislation in the area was based on the work of undertaken by impartial bodies. In effect, there has been an eight year gap between the last (unimplemented) legislation and the new aims announced on 3<sup>rd</sup> February.

#### **Can the circle be squared between abolition of Automatic Early Release [AER] and a guarantee of mandatory supervision?**

On the one hand, the Scottish Government is now intending to abolish AER for all long-term prisoners. However, it appears now to be acknowledged that abolition of AER will mean that those considered least suitable for parole, (including those deemed pose the greatest threat to public safety), will be released 'cold' after a lengthy period of incarceration. This means that they cannot be subject to mandatory and conditional period of supervision and support. On the other hand, it is the now

also the Scottish Government's aim that all long-term prisoners be subject to a minimum period of compulsory supervision in the community.

How, if at all, can these two aims be achieved?

There appear to be two obvious choices: Compulsory Supervision after the expiration of the custodial sentence OR community supervision within the custodial sentence.

### **Choice A: A mandatory period of supervision on top of the custodial period**

The first is that there would be an extended period of mandatory and conditional community supervision *after* the custodial sentence period has expired. This appears to be the hope that extended sentences would be used far more by judicial sentencers than they currently are. This begs several questions:

#### **Will there be 'recalibration' of sentences at sentencing to take account of the community extended supervision period?**

The Scottish Sentencing Commission's 2005 report *Early Release from Prison and the Supervision of Prisoners on their Release* noted that:

We recognise that, in the absence of measures to improve consistency in sentencing, there is a risk that some sentences will not be properly recalibrated. Such a development is likely to generate an increase in appeals against sentence, and it would therefore be for the appeal court to enforce the statutory requirement to recalibrate sentences. (para 5.8)<sup>1</sup>

It should be recalled that the executive branch of the state has no control over the use of extended sentences, and while this might, (or might not), be a matter on which the new Sentencing Council deliberates, it is contingent. Furthermore, even if there were to be, for example, a Sentencing Guideline judgement about such recalibration there remains the question of its impact on practice, which is far from assured.

***If the use of extended sentences (or something similar) was to become far more widespread, what will be the impact on the custodial population?*** Has the Scottish Government carried out work to calculate the impact? Although the Scottish Government notes that 450 people are sentenced to four years or more of imprisonment<sup>2</sup>, it does *not* follow that the impact of the prison population will only be 450 per year (even if sentencing patterns remained the same). A realistic calculation will need to include for example: the cumulative (year on year) impact of those long-term prisoners denied parole; the impact of recalls for breaches of licence conditions.<sup>3</sup>

<sup>1</sup> In acknowledging the net effect of its proposed changes to the release regime, the Scottish Sentencing Commission (2005) recommended that sentences would need to be 'recalibrated'. When in 2006 the Scottish Government brought forward proposals to change release it did not to include any provision relating to recalibration.

<sup>2</sup> Letter from Cabinet Secretary to the Convenor of the Scottish Parliament Justice Committee, 3<sup>rd</sup> February 2015

<sup>3</sup> It is presumed, (though it is not entirely clear from the Scottish Government's stated aims), that the minimum period of compulsory supervision will be conditional. If so, then the impact of recall has to be considered.

**Are judicial sentencers always best placed to determine the level of risk posed by an individual several years after sentencing?** This is, of course, why we have a Parole Board. However, given that it is intended that AER be abolished for all long-term prisoners, it may be that there will emerge an (understandable) tendency to 'play safe' at the sentencing stage by passing an extended sentence when it may not always turn out to be what was required.

### **Choice B: Community Supervision within the Custodial Sentence**

This choice might in effect be a *re-branding of the current system* of parole. It is true that the current system of AER can be confusing and leads to some sense of 'dishonesty' between the stated custodial sentence and the reality.

But how exactly should such re-branding be done? Would all long-term sentences have a custody and a community part – as in the (otherwise unworkable and unimplemented) 2007 Custodial Sentences and Weapons (S) Act?

What would be the minimum period of community supervision?

What conditions, if any, will apply? How will breach work?

How will the period of community supervision be calculated and by whom? How will it be proportionate to the overall sentence yet also guarantee a sensible minimum period?

The abolition of AER will mean that prisoners denied parole will be more likely to argue that they were not allowed fair opportunity to demonstrate that they do not pose an unacceptable risk to public safety. The most obvious issue will be about the non-availability of programmes in prison – this will need to be costed.

### **Conclusion**

In sum, it would be sensible if, after having waited some seven years to address release arrangements, a little more time is devoted and consultation is facilitated. This will allow careful reflection on the issues of practice and principle in this complex and politically charged area.

Professor Cyrus Tata  
 Professor of Law and Criminal Justice  
 Strathclyde University  
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