

Justice Committee

Prisoners (Control of Release) (Scotland) Bill

Supplementary 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) previously responded to the Scottish Parliament's Justice Committee's call for written evidence on the Prisoners (Control of Release) (Scotland) Bill¹. The Committee notes that the Cabinet Secretary for Justice has now confirmed that the Scottish Government intends to table amendments at Stage 2 to extend the provisions of the Bill to end the automatic early release for all categories of long term prisoners.

The Committee, having considered the additional proposals, as detailed in the correspondence dated 3 February 2015 from the Secretary to Justice to the Justice Committee, wishes to provide the following additional comments:

Comments

The Committee notes with a degree of concern that what may be the most radical change in custodial sentencing policy for twenty-two years is to be introduced by way of a government amendment to a Bill at present before Parliament, where the Justice Committee has already received both written and oral evidence. It notes that the proposals for an amended system of post-sentence supervision were not contained within the Bill as introduced.

Before addressing the new proposals as announced on 2nd February, the Committee considers it essential that the reason for the inception of the present system be understood. Prior to 1967, there was no formal statutory system of parole, although there had been provision for remission, based upon good conduct in custody, for some fifty or so years. The Criminal Justice Administration Act 1914² provided that by good conduct and industry prisoners may earn modification of their sentences, dependent on the sentence type. Males sentenced to the former sentence of penal servitude could be liberated on licence after serving three-quarters of their sentence, and females after two-thirds. Prisoners sentenced to one month's imprisonment or

¹ <http://www.lawscot.org.uk/media/410030/crim-written-evidence-prisoners-control-of-release-scotland-bill-law-society-of-scotland-response-dec-2014.pdf>

² http://www.legislation.gov.uk/ukpga/1914/58/pdfs/ukpga_19140058_en.pdf

more could earn remission of up to one sixth of the sentence. Youths in Borstal who were of good conduct would generally be released on licence at the two thirds point. Those whose sentences had been remitted in part could not be recalled in the event of reoffending, but those released on licence could have their licence revoked or forfeited, and be ordered to serve the remainder of the sentence consecutive to the new sentence (Penal Servitude Act 1864, s.9).

This system subsisted until after the Second World War. Section 20(1) of the Prisons (Scotland) Act 1952³ provided that rules made under that Act may make provision whereby, in such circumstances as were prescribed by the rules, a person serving a sentence of imprisonment may be granted remission of such part of his sentence as may be so prescribed on the grounds of his "*industry and good conduct*". Central to this system was the notion that certain prisoners might deserve earlier release than others.

Parole was introduced into Scotland by virtue of Part III of the Criminal Justice Act 1967, and the Parole Board for Scotland first sat in 1968, although at this time its function was purely advisory; if a Minister disagreed with a recommendation for parole, it was not granted. That position was changed, gradually and incrementally, and often as a result of adverse court decisions restricting the level of political control over sentencing, until by 2003 the Parole Board's decisions were directive and binding upon Ministers in every case (although it should be noted that Ministers retain a statutory right to revoke an offender's licence in certain circumstances). The Act followed the recommendations contained in Lord Longford's Paper for the Labour Party Study Group entitled "Crime- A Challenge To Us All" which was followed by a Government White Paper in 1967 entitled "The Adult Offender"⁴.

The central theory underpinning the 1967 Act was that prisoners' rehabilitation would be increased if they were released into the community subject to supervision for the latter parts of their sentences. Under s.60 of the 1967 Act (repealed by the Criminal Justice Act 1991⁵), a prisoner serving a determinate sentence was eligible for parole after serving one third of the sentence or twelve months, whichever was the longer. However, under that system, once a prisoner was released, if he was over 21 years old he was not subject to licence conditions and thus there was no statutory basis upon which he could be returned to custody. A person aged under 21 when sentenced was released subject to licence, and could be returned to custody for a maximum period of three months for breach of licence conditions.

At this time it should also be noted that prisoners had no express rights. The Prisons and Young Offenders Institutions (Scotland) Rules 1952 vested rights only in the governor of a prison, and that a governor had the power to delay a prisoner's release into the community by virtue of his power to award a number of days loss of remission for breaches of prison discipline, this being done at hearings within the establishment at which prisoners had no right of representation. This power continued to exist until 2001, although it was significantly limited to one-sixth of the length of sentence after 1993, and could not have withstood scrutiny under the European Convention on Human Rights. A system of release on licence with

³ <http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/52>

⁴ White Paper The Adult Offender (Cmnd 2852, 1966).

⁵ <http://www.legislation.gov.uk/ukpga/1991/53/contents>

possibility of revocation in the event of non-compliance then applied only to life sentence prisoners.

These provisions attracted remarkably little public comment for around twenty years, although the “treatment model”, that held that offenders’ deviation from social norms could be addressed in a quasi-medical manner had fallen out of favour. By the mid-1980s, changes had been made by the UK Government that extended parole to prisoners serving shorter sentences, but restricted parole in respect of long term prisoners. That policy was introduced into Scotland in December 1984. The English policy was upheld by the House of Lords in *Findlay v Secretary of State* [1984] 3 All E.R. 901.

It may not, however, be coincidental that the years 1986-1990 saw some of the worst examples of rioting in Scottish penal history, with Peterhead, Perth, Shotts, Edinburgh and Glenochil seeing major disturbances and a number of incidents involving officers being held hostage. It became clear that there were serious concerns over the whole Scottish prison system.

In December 1987, some months after the creation of the Carlisle Committee to review parole in England and Wales, a committee was set up under the chairmanship of Lord Kincaig, a Senator of the College of Justice⁶. During the same period as the Kincaig Committee was considering parole, the Scottish Prison Service published two consultation documents, *Custody and Care* (March 1988) and *Opportunity and Responsibility* (May 1990). The issue of prison reform was thus the subject of full debate.

The Kincaig Committee reported in February 1989, and the bulk of its recommendations⁷ were incorporated, with some amendments, in the Prisoners and Criminal Proceedings (Scotland) Act 1993⁸. While amended on several occasions, that remains the core statute for determining release of prisoners. The present system as introduced in 1993 thus followed thorough and detailed judicial investigation into the sentencing systems in England and Wales and Scotland. No similar evidence-gathering exercise has taken place in advance of these proposals. There might thus be merit in commissioning research similar to that which resulted in Linda Hutton and Liz Levy’s Report in 2002⁹.

The central plank of the Kincaig report was the recommendation that no part of a prison sentence could be in effect “written off”, as could and often did happen under the previous system. The final part of a long sentence would be served in the community, subject to compulsory supervision, with the sanction of a recall to custody available should the prisoner in the community fail to comply with licence conditions at any time until the final day of the sentence. Those serving shorter sentences were to have their release made conditional upon not reoffending during the remainder of the calendar sentence; further offending offered a court the opportunity to reimpose all or part of the unexpired portion of sentence (1993 Act, s.

⁶ Its terms of reference are set out in full in Professor J. J McManus’ commentary to the Prisoners and Criminal Proceedings (Scotland) Act 1993 in *Current Law Statutes Annotated*

⁷ *Parole and Related Issues in Scotland*, 1989, Cm. 598

⁸ <http://www.legislation.gov.uk/ukpga/1993/9/contents>

⁹ *Parole Board Decisions and Release Outcomes*, Scottish Executive Central Research Unit, 2002

16). 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 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, 2006¹⁰). In addition, the Kincaid Committee expressly had in mind the need to recognise the possibility of change in a prisoner that might render him or her fit to return to the community prior to the expiry of the sentence. The key difference from the pre-1967 system was that release was no longer predicated upon "good behaviour", but upon an assessment of risk.

Given the terms of the current proposals, it might be instructive to note that the Kincaid Committee made clear that it did not consider it necessary for the protection of the public for Ministers to continue to operate the blanket restrictive policy that had been introduced by the Government in 1984 and had precluded early release for most long-term prisoners.

While statutory changes, often following court decisions adverse to previous policy, have resulted in the 1993 Act being widely amended, the core framework for prisoner release remains that in the 1993 Act. The general trend since the coming into force of the Convention Rights (Compliance) (Scotland) Act 2001¹¹ is for proportionately fewer prisoners to be released on parole¹², the percentage having reduced in little over a decade from over 50% to a little over 30%. The most recent (2013-14)¹³ report by the Parole Board for Scotland demonstrates that the figure seems to have stabilised at around the lower level. In sexual offence cases, the Committee understands that fewer than 10% of long-term prisoners are released prior to the date upon which their release is mandatory in terms of the current provisions. The majority of prisoners released early on "parole licence" do not breach licence conditions and remain at liberty to the end of their sentence. In the group of those considered to present an unacceptable risk in terms of parole, who are released on "non-parole licence", the majority remain compliant, although to a lesser statistical extent in terms of numbers having licence revoked than in the former group. It is thus difficult to see a solid empirical basis for the current proposals; if the Parole Board continues to release barely one in three prisoners before their mandatory release date, the majority of those released on licence comply with licence conditions, and risk assessment tools have not reached the level of sophistication that enables them to predict individual risk with a high degree of accuracy, then it appears to follow that the result of this enactment will be that a significant number of offenders will remain in prison when they could safely be released into the community. The existence of a mechanism for review by the Parole Board does answer any question of compliance with Article 5.4 of the European Convention on Human Rights, but there must remain a concern, based upon the statistics, that the Parole Board, when faced with a narrow decision and granted a statutory power not to direct release until the sentence end date, will tend to adopt a risk-averse strategy.

¹⁰ <http://www.scotland.gov.uk/Resource/Doc/925/0116782.pdf>

¹¹ <http://www.legislation.gov.uk/asp/2001/7/contents>

¹² See, for example, *Surprising Trends from the Parole Board's Annual Report*, SCOLAG 413, March 2012

¹³ <http://www.scottishparoleboard.gov.uk/docs/Parole%20Board%202013.pdf>

In looking at cases where licence has been revoked, it might perhaps be helpful to consider the figures contained in the Board's annual reports for 2005 and 2006, the last years in which detailed reasons for revocation of licence were published¹⁴. The Society notes 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. There may thus be some 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. At present it is not clear what form of statutory supervision is proposed, and what sanction might be competent in respect of a prisoner who has served their full sentence.

The impact on prisoner numbers and the work of the Parole Board

The general trend since the coming into force of the 2001 Act is for proportionately fewer prisoners to be released on parole, the percentage having reduced between 2001 and 2012 from over 50% to a little over 30% by 2012¹⁵. In sexual offence cases, as stated above fewer 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 1993¹⁶. From these two trends it may be suggested 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, based upon the projections above it is therefore likely that the prison population will increase noticeably.

The Committee suggests that there may be two impacts upon the work of the Parole Board. If 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 Board, particularly in its need to appoint sufficient legally qualified persons to act as tribunal/hearing chairs. The Committee notes that Ministers and the Board are aware of this and merely observes that it seems essential both that the Board be provided with sufficient additional funding in order to carry out its further responsibilities effectively and efficiently, and that it continues to appoint legally qualified members with experience in the field of parole and risk assessment.

¹⁴ <http://www.scottishparoleboard.gov.uk/pdf/Parole%20Board%202006.pdf>

¹⁵ *Surprising Trends from the Parole Board's Annual Report*, SCOLAG 413, March 2012

¹⁶ <http://www.legislation.gov.uk/ukpga/1993/9/contents>

The Committee further notes that the proposed new provisions may in some cases go substantially further than the maximum custodial part specified within the Custodial Sentences and Weapons (Scotland) Act 2007¹⁷. Section 6 (7) of that 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 dis-apply entirely the automatic early release provisions of Section 1 of the 1993 Act to all long-term prisoners. Thus it must be presumed that Section 6 of the 2007 Act is no longer under consideration. In its previous response, when considering the options of enacting the Bill as then drafted or opting to adopt the unenacted provisions of the 2007 Act, the Committee’s response ended by saying *“That is a matter on which expert evidence is required.”* The Committee’s view on this has not changed.

As stated above, the parole system was introduced following a detailed report and the publication of a Government White Paper. The present provisions contained in the 1993 Act were enacted following two reports, the Scottish one under the chairmanship of a senior judge, which conducted its deliberations over a period of fourteen months. No analogous enquiry has been undertaken in this case, and indeed there was no such proposal contained in the Report of the Scottish Prisons Commission (The “McLeish Report”)¹⁸ in 2008. To propose such a radical change to penal policy without the prior consideration of a large body of expert evidence, and to amend proposals significantly when a Bill is already before the Justice Committee is of concern, and the Committee would further suggest the creation of a body of experts with power to hear evidence from persons with professional knowledge in the field before this Bill progresses.

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Law Reform
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¹⁷<http://www.legislation.gov.uk/asp/2007/17/contents>

¹⁸<http://www.scotland.gov.uk/Publications/2008/06/30162955/0>