

## Justice Committee

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

#### Written submission from the Faculty of Advocates

The Faculty welcomes the opportunity to comment on the Scottish Parliament's Justice Committee call for written evidence on the Prisoners (Control of Release) (Scotland) Bill which was introduced in the Parliament on 14 August 2014.

The Faculty notes that the Bill seeks to end automatic early release for sex offenders sentenced to determinate custodial sentences of four years or more and other offenders sentenced to determinate custodial sentences of 10 years or more. The Faculty notes also that the Bill would allow the Scottish Prison Service, acting on behalf of the Scottish ministers, to release sentenced prisoners up to two days early where this would help facilitate community reintegration.

With regard to the specific issues on which views are sought, the Faculty makes the following observations:

#### **Restriction of Automatic Early Release**

##### *1. Whether the scope of the proposed reforms is appropriate?*

This is a policy matter and the Faculty traditionally does not comment on such matters.

##### *2. What impact the proposals might have on the work of criminal justice social workers and others in trying to ensure that released prisoners are safely reintegrated back into communities?*

The Faculty considers that criminal justice social workers and others currently involved in trying to ensure that released prisoners are safely reintegrated back into communities are better placed to predict the impact the proposals may have.

The Explanatory Notes to the Bill state that there is likely to be an increased demand on prison-based social work services. For the reasons given in the Explanatory Notes, this seems likely.

##### *3. What impact the proposals would have on prisoner numbers and the work of the Parole Board?*

The Faculty considers that others such as the Scottish Prison Service and Parole Board are better placed to predict the impact the proposals may have on prisoner numbers and on the work of the Parole Board.

For the reasons given in the Explanatory Notes, the Faculty agrees that some prisoners no longer eligible for automatic release would be likely to spend longer in prison than at present. The Faculty agrees that the workload of the Parole Board would increase due to the need to schedule additional casework meetings for those

prisoners not released after serving two thirds of their sentences who previously would have been released automatically at that stage.

*4. The appropriate use of determinate sentences as compared to non-mandatory life sentences (e.g. orders for lifelong restriction) in terms of protecting the public from dangerous offenders?*

The appropriate sentence in an individual case is a matter for the sentencing judge, applying any methodology which may be prescribed by Parliament and guided, where appropriate, by relevant case law.

As the Faculty submitted in its written submission dated 27 January 2012 to the Justice Committee on the Criminal Cases (Punishment and Review) (Scotland) Bill the law governing the fixing of punishment parts in non-mandatory life sentences is complex.

The High Court of Justiciary recently considered a number of sentence appeals against the imposition of orders for lifelong restrictions ["OLR"] in the cases of *Ferguson & Others v HM Advocate* 2014 S.L.T. 431. The court held *inter alia*: (i) it was for the sentencing judge to determine whether there was a likelihood that an offender would seriously endanger the public and the answer would depend upon a consideration of the particular offence and any pattern of individual behaviour; (ii) that "likelihood" had been defined as "something that was likely; a probability"; the court required to be satisfied, before making an OLR, not just that there was a substantial or real chance of serious endangerment but that such endangerment was more likely than not to happen or, put another way, that it would occur; (iii) that the time for assessing the likelihood of serious endangerment was, and could only be, at the time of sentencing but **the assessment was looking forward to the point at which the offender would, but for the OLR, be at liberty**; the approach envisaged the court assessing the risk posed at the time of sentencing and an assessment of whether any custodial or post release regime, short of an OLR, would have any material impact on that risk and (iv) that in determining whether there was a likelihood of serious endangerment, there was no alternative question to be posed and answered; it was only if the judge determined there was no such likelihood that he would then go on to consider other sentencing options and, in particular, whether any tests for the imposition of these options had been met.

The Faculty believes that the provisions of the Bill will have a bearing on the sentencing judge's assessment of the likelihood of serious endangerment. As a result of the Bill, a sex offender sentenced to a notional fixed sentence of four years or more would not be released automatically after serving two thirds of his sentence; the offender may not be released until the full sentence had been served. Likewise, a non-sex offender sentenced to 10 years or more would not automatically be released automatically after serving two thirds of his sentence; the offender may not be released until the full sentence had been served. In deciding whether or not to impose an OLR, a sentencing judge dealing with a case to which the provisions of the Bill applied, would have to consider what bearing, if any, the later notional release date of the offender may have on the likelihood of endangerment posed by the offender upon release.

*5. Whether the proposals are consistent with the thus far un-commenced early release provisions set out in the Custodial Sentences and Weapons (Scotland) Act 2007 (as amended by the Criminal Justice and Licensing (Scotland) Act 2010)?*

The Faculty believes that the proposals in the Bill to end automatic release for certain offenders are inconsistent with section 19(1) of the Custodial Sentences and Weapons (Scotland) Act 2007. Section 19(1) provides that the Scottish Ministers must release (on community licence) a custody and community prisoner who has served three quarters of the custody and community sentence. The effect of section 19(1) is to provide for automatic release after three quarters of the sentence.

### **Power of Early Release for Community Reintegration**

*6. Whether the Scottish Prison Service should be given this power (including reasons for this view)?*

The Faculty agrees that the Scottish Prison Service should be given the power to release prisoners one or two working days in advance of their release date to facilitate the person's reintegration into the community. The Policy Memorandum to the Bill sets out the importance of the successful reintegration of prisoners into communities. The ability of persons released from prison to access key public services such as housing, welfare and addiction services on the day they are released can play an important part in helping the person to reintegrate into the community and break the cycle of reoffending.

*7. How tightly the use of such a power should be constrained by guidance which the Scottish government proposes to produce in conjunction with the Scottish Prison Service?*

The Faculty does not believe at this stage that the use of the power of the Scottish Prison Service to release a prisoner one or two days early should be constrained by guidance. The policy aim is to provide a degree of flexibility in order to best manage the reintegration of prisoners into communities. The proposed period of early release of one or two days is, on any view, short. Instead, the Faculty suggests that the frequency of and reasons for the early release of prisoners should be kept under review. If it was felt that the power was being used inappropriately and/or excessively by the Scottish Prison Service then guidance could then be introduced.

Faculty of Advocates  
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