

THE AUTOMATIC EARLY RELEASE AND SUPERVISION OF PRISONERS IN SCOTLAND

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A. THE PRISONERS (CONTROL OF RELEASE) (SCOTLAND) ACT 2015

The Prisoners and Criminal Proceedings (Scotland) Act 1993 allowed for long-term prisoners – those subject to determinate sentences of four years or more (including life sentences) – to apply for release on parole at the half way stage or to be ‘automatically’ released on non-parole licence at the two-thirds stage of their sentence. Any decision to release prisoners before the two-thirds stage was taken by the Parole Board for Scotland and all licence conditions were set by the Parole Board for Scotland, including statutory supervision in the community until the end of the sentence, unless otherwise revoked. Released prisoners who breached their licence conditions could be recalled to prison to serve the remaining period of their sentence, but otherwise the aim was for a period of monitoring and supervision in the community prior to sentence completion.

However, the Scottish Parliament has recently enacted the Prisoners (Control of Release) (Scotland) Act 2015 in order to end the right of certain long-term prisoners to automatic early release at the two thirds stage of their custodial sentence, in the event that any parole hearing is unsuccessful. The Scottish Government’s rationale for the reform was to ensure that those deemed ineligible for parole would remain in custody for the full term, thereby enhancing public safety. To inform its deliberations on the Bill, the Scottish Parliament’s Justice Committee took written and oral evidence from government, academics, and voluntary, private and public sector agencies during early 2015. The author was one of those asked to give evidence, during which she drew on her and colleagues’ recent research into compliance with licence conditions and supervision requirements on release¹. This two year study (2013-2015) (hereafter Barry et al) included interviews with 125 professionals and 250 offenders (69 of the latter being men on parole or non-parole licence, extended sentences² or life licence).

As originally drafted, the Bill sought to end automatic early release for sex offenders serving determinate sentences of four years or more and other offenders serving determinate sentences of 10 years or more³. Such prisoners would then be released ‘cold’ into the community (without supervision). However, pressure from expert witnesses appearing before the Justice Committee prompted a somewhat hurried U-turn by the Government. To avoid the accusation of unjustifiable discrimination against sex offenders, the Government brought forward amendments at Stage Two to widen the net to cover *all* prisoners serving sentences of four years or more. In addition, as a result of criticism during Stage One deliberations that the Government was denying such prisoners constructive supervision on release, it was agreed that a statutory six month period of supervision would be mandatory on release for

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¹ M Barry et al, *Regulating Justice: The Dynamics of Compliance and Breach in Criminal Justice Social Work in Scotland* (2015), ESRC grant no. ES/J02340X/1.

² The Crime and Disorder Act 1998 s 86 allowed courts to impose extended sentences of statutory supervision in the community in cases where the courts deem that the standard period on parole or non-parole licence would be insufficient to protect the public from certain high risk offenders.

³ Scottish Government, *Prisoners (Control of Release) (Scotland) Bill: Policy Memorandum* (2014).

those not given extended sentences. Those on extended sentences would remain in prison for the whole of their sentence and then serve the extended part in the community. However, whilst the Scottish Government promotes the reforms as *ending* automatic early release for all long-term prisoners, various commentators have pointed out that this is misleading, since all but those prisoners on extended sentences will be given automatic early release six months prior to the end of their sentence, if not previously deemed eligible for parole.

More importantly, the evidence given by the author and other witnesses highlighted some serious flaws in the rationale for and feasibility of the Act in respect of public protection, supervision and potential for breach and recall. This note discusses each of these in turn.

B. PUBLIC PROTECTION

The Government's main impetus for ending automatic early release was to enhance public protection by ensuring that potentially high risk or dangerous offenders are kept in custody for the duration of their custodial sentence, unless otherwise deemed by the Parole Board for Scotland to be eligible for parole. There was an inference, no doubt led by populist rhetoric, that keeping prisoners in prison for longer would reduce the risk to the public. Sex offenders in particular are singled out by the Government and the Parole Board for Scotland as one of the greatest threats to public protection, and hence only 12% of sex offenders currently receive parole compared to 41% of other long term prisoners⁴. The Act therefore primarily targets this small but potentially high risk category of prisoner despite sex offenders being *less* rather than *more* likely to reoffend compared with other violent offenders.⁵ Barry et al found that sex offenders are more compliant *because* they experience greater paranoid about breaching their licence conditions, prompted by vigilantism and potentially false allegations of misconduct in the community, and about being recalled to custody as a result.

C. SUPERVISION IN THE COMMUNITY

The expert witnesses who gave evidence to the Justice Committee consistently argued that keeping people in prison for longer, at the expense of proportionate supervision in the community, would exacerbate not ameliorate the risk of reoffending. Prisoners expect supervision to be meaningful and proactive and often see it as tokenistic if it lacks any constructive support towards reintegration, but such support often requires longer than six months. The vast majority of people to whom Barry et al spoke suggested that being on licence *per se* had few constructive features: it was like 'walking on ice' all the time and it prevented licensees from sharing problems with their supervising officers, telling them about potential risk factors and being up front about any adverse change of circumstances - a form of openness that many suggested should be a positive aspect of supervision.

You're forever looking over your shoulder, you're forever thinking... and watching what you say. You think well if I say this, will they breach me... I know they did

⁴ Scottish Government, *Financial Implications of Scottish Government Stage 2 Amendments, Annex A of Cabinet Secretary's Letter to the Justice Committee* (2015).

⁵ R Hood *et al*, "Sex Offenders Emerging from Long-Term Imprisonment: A Study of Their Long-term Reconviction Rates and of Parole Board Members' Judgements of Their Risk", (2002) 42 *British Journal of Criminology* 371.

everything they could but yeah, you're always thinking, well if I told them that, would that breach me, if I told them I was feeling like this, would that breach me. So you don't say anything and then that builds up. For me it built up more pressures on me to the extent where I felt, forget it, I'm better off in prison (49 year old breacher).

I was scared to tell them the truth in case I got recalled... I was telling the truth at first and then I started lying. As I said, that time I said I couldn't cope, [the social worker] sorta went 'what do you mean you can't cope???' It's the way she said it and I thought if I say the wrong thing here, I might end up... getting recalled (50 year old breacher).

If supervision is limited to a statutory six month period, this increases pressure on supervising social workers to address issues such as benefit claims, housing and employment. It may also induce sheriffs to impose extended sentences in order to ensure that supervision remains in place for longer, and also to ensure that ex-prisoners have the time in the community to undertake cognitive behavioural or other groupwork programmes that were unavailable to them in prison. An increase in extended sentences will not only have financial implications but may also be experienced by ex-prisoners as an *additional* sentence that many find to be both arbitrary and illegitimate.

D. BREACH AND RECALL

Breach and subsequent recall were not given serious consideration by the Government in its proposals for the Bill, or indeed in its financial calculations of the costs involved, and yet both are highly likely to increase as a direct result of the reforms. Barry et al found that breaches of licence conditions were more likely to be a result of so-called 'technical breaches' (failing to attend appointments or to disclose new relationships, for example) rather than further offending. Yet such breaches more often than not resulted in recall because of the 'potential' harm caused by withholding information from one's supervisor; what some describe as 'back door sentencing'⁶. Few respondents in the Barry et al study perceived recall to be a legitimate response to often unproven allegations against them. What good work had been undertaken during their prison sentence and latterly on supervision in the community could be lost as a result of recall – one's job, home, family, motivation and responsibilities – resulting in recalled prisoners having to start again from scratch, in order to be both incentivised and eligible for future release.

Many respondents spoke of the requirement to do yet more groupwork programmes in prison once recalled, irrespective of their relevance and effectiveness, and of the requirement to spend time in an open prison⁷ before being eligible for further parole consideration. However, they also described a waiting list for both programmes and open prison availability, thus limiting the likelihood of getting out on parole. Despite the Cabinet Secretary in his evidence to the Justice Committee suggesting that the Scottish Prison Service was keen to tailor programmes to individual needs, this was not the case currently, according to many prisoners in the Barry et al study, as the following respondent illustrates:

⁶ B Weaver *et al*, "The Failure of Recall in Scotland: Front and Back Door Sentencing and the Revolving Prison Door Syndrome" (2012) 4 *European Journal of Probation* 85.

⁷ Castle Huntly is Scotland's only open prison, with the capacity for nearly 300 low supervision adult male offenders leaving closed conditions. The emphasis is on preparation for release, through enhanced personal responsibility, employability and citizenship.

The prison officer told me, he said they won't let you out without doing a course and even the life liaison officer said to me you have to do a course. If you don't need to do them, you don't need to do them, but the way the system is, we *have* to make you do something, we're covering our own arses... there were guys that were in there that had done anger management three times and I was like that... well why are you doing it then? You should give it to somebody who wants to do it. He said, cos my PO told me if I don't do it, I won't get my parole (32 year old breacher).

In preparing this legislation, the Government failed to seriously consider and address the issue of availability of the open estate and the costs incurred in increasing access to, or financing of, the open estate for an increasing number of would-be parolees.

Some witnesses who gave evidence to the Justice Committee anticipated an increase in prisoner appeals against not only recall but also subsequent rejections of parole applications *because* the prisoner had not had access to programmes or to an open prison. Without the wherewithal to seek parole, many recalled prisoners may view continued detention as arbitrary and potentially in breach of Article 5 of the European Convention on Human Rights. Although, to date, Article 5 breaches have only been found in relation to indeterminate sentences⁸, it is arguable that such breaches might also be found in future in respect of determinate sentences following recall, where re-release may be forestalled merely because of inadequate provision and opportunity for groupwork programmes and open prison places. However, the Scottish Government itself considers that the Act will not breach prisoners' human rights⁹.

E. CONCLUDING COMMENTS

This Act, in the Government's eyes, offers greater clarity in sentencing not only to the public but also to prisoners; for instance, five years will mean five years. Ironically, however, it has the potential to demonstrate a *lack of clarity* in sentencing, because 'automatic early release' has not been abolished, supervision on release is now minimal and there remains uncertainty about the legal and financial implications of the proposed reforms¹⁰.

The Parole Board for Scotland may need to review its attitude to risk and public protection in the light of these reforms to allow a greater number of prisoners to apply for parole prior to the end of their sentence. If only 12% of sex offenders are released on parole at the halfway point of their sentence, keeping the remaining 88% in for longer than the two thirds point (assuming they never succeed in getting parole) and up until six months prior to release on statutory supervision will yet further inflate the prison population and applications for parole, despite the Scottish Government admitting to having limited estimates of the implications of recall once the Act comes into force.¹¹

⁸ See, eg, *Wells v. Secretary of State for Justice* (2010) 1 AC 553; *James v. United Kingdom* (2013) 56 EHRR 12.

⁹ Scottish Government, *Policy Explanation of Scottish Government Stage 2 Amendments, Annex B of Cabinet Secretary's letter to the Justice Committee* (2015) at para 55.

¹⁰ See, eg, Barry et al, *Prisoners (Control of Release) (Scotland) Bill – Stage 3 Briefing and Analysis* (2015) <http://www.howardleaguescotland.org.uk/news/2015/june/prisoners-control-release-bill-stage-3-briefing>.

¹¹ Scottish Government, *Financial Implications*, above n 4.

The Scottish Prison Service will need to review its capacity to provide groupwork programmes and open estate availability to those seeking parole. Its annual expenditure on programmes for long term prisoners is currently approximately £1.5 million, but it estimates that the extra cost of additional programmes following greater demand from prisoners for parole eligibility will reach £171,000 annually by 2022/23¹².

Social Work Departments across Scotland, faced not only with yet another restructuring in 2016/17, and the potential inclusion of violent offenders under Multi Agency Public Protection Arrangements (MAPPA), will inevitably have to tighten their engagement with ex-prisoners so as to be able to fit into six months all the necessary work required post release for reintegration, namely, securing benefits, accommodation, paid or unpaid work and any additional interventions within the community which are requirements of non-parole licence conditions.

Only time will tell what impact these reforms will have on the process of reintegration, but the consensus amongst expert witnesses, despite the government's claims to the contrary, is that these reforms will hinder rather than help that process.

¹² Scottish Government, *Financial Implications*, above n 4.