SPICe Briefing

Criminal Cases (Punishment and Review) (Scotland) Bill: Custodial Sentences

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The Scottish Government introduced the Criminal Cases (Punishment and Review) (Scotland) Bill in the Parliament on 30 November 2011. It contains provisions in relation to two distinct issues:

- Part 1 of the Bill seeks to amend some of the statutory rules used by courts when calculating the "punishment part" of a life sentence (ie the period a life sentence prisoner must serve in custody before being eligible to apply for release on parole). The Scottish Government’s proposals in this area are in response to the decision of the High Court of Justiciary in the case of Petch & Foye v HM Advocate (2011)

- Part 2 of the Bill seeks to establish a framework under which the Scottish Criminal Cases Review Commission may disclose information about cases it has referred to the High Court of Justiciary where the relevant appeal has subsequently been abandoned. The Scottish Government’s proposals in this area were prompted by the case of Abdelbaset Al-Megrahi, who was convicted of murder following the Lockerbie bombing

This briefing considers the provisions in Part 1 of the Bill.

A separate SPICe briefing, dealing with the provisions in Part 2, will be published shortly.
INTRODUCTION

Part 1 of the Criminal Cases (Punishment and Review) (Scotland) Bill (“the Bill”) seeks to amend some of the statutory rules used by the courts when calculating the punishment part of a life sentence or order for lifelong restriction (another form of indeterminate custodial sentence).

The court, when imposing such a sentence, must specify (in years and months) a part of the total sentence which is being imposed in order to satisfy the requirements for retribution and deterrence. This part is known as the punishment part and must be served in custody before the prisoner is eligible to apply for release on parole. The end of the punishment part does not signal the automatic release of a prisoner. Prior to any release, the Parole Board for Scotland must be satisfied that continued confinement is no longer required for the protection of the public. Prisoners, if and when released, are subject to lifelong conditions and supervision.

Thus, the custodial element of any life sentence (including an order for lifelong restriction) is effectively split into two parts:

- a determinate period (the punishment part) which must be served in custody in order to satisfy the requirements for retribution and deterrence
- an additional indeterminate period during which the prisoner remains in custody for the protection of the public

The Scottish Government’s proposals for changes to the punishment part were prompted by the High Court of Justiciary’s interpretation of the current statutory provisions in the appeal case of Petch & Foye v HM Advocate (2011). It dealt with the rules for calculating the punishment part where a court is not legally obliged to impose a life sentence (ie in cases where the offence is something other than murder) – referred to in this briefing as “non-mandatory life sentences”.

The Scottish Government (2011) has stated that:

“The Criminal Cases (Punishment and Review) (Scotland) Bill, if passed, will resolve a technical anomaly which arose following the Appeal Court’s judgement in the case of Petch and Foye v HMA, which meant that prisoners given a discretionary life sentence or Order for Lifelong Restriction (OLR) can apply to become eligible for parole earlier than those serving sentences of a fixed length. Under this new legislation the courts will regain the discretion to set a ‘punishment part’ of those sentences that it considers appropriate in all the circumstances of a particular case.”

The rest of this briefing:

- provides more information on the current provisions for calculating the punishment part of a life sentence (including the interpretation of those provisions in the case of Petch & Foye)
- considers the relevant provisions of the Bill

1 Such sentences are also sometimes referred to as “non-mandatory indeterminate sentences”.
EXISTING STATUTORY PROVISIONS

Prisoners and Criminal Proceedings (Scotland) Act 1993

Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") provides for the possible release from custody of prisoners serving a life sentence or subject to an order for lifelong restriction. Such prisoners are entitled to have their continued detention reviewed by the Parole Board for Scotland once they have served the punishment part of the sentence (as described below).

After considering a case, the Parole Board will either direct the Scottish Ministers to release the prisoner or order the prisoner's continued detention. Any release is on life licence – released prisoners are subject to appropriate licence conditions and supervised by criminal justice social work for the rest of their lives. A breach of licence conditions may result in recall to custody. Where the Parole Board does not direct a prisoner’s release, the case must be reviewed again no later than two years after the date of the last review.

The punishment part of a sentence is described in section 2 of the 1993 Act as the part of the total sentence which:

"the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)".

It is set by the court at the time of passing the sentence and is served wholly in custody. Even following the expiry of the punishment part, an indeterminate/life sentence prisoner will not be released unless the Parole Board is satisfied that continued confinement is no longer necessary for the protection of the public.

The provisions in section 2 of the 1993 Act apply to:

- mandatory life sentences – where the sentence is imposed for an offence in relation to which a life sentence is required by law (ie in relation to murder)
- discretionary life sentences – where the sentence is imposed for an offence in relation to which a life sentence is possible but not required by law
- orders for lifelong restriction – sentences imposing an indeterminate period of custody and lifelong supervision of high risk serious violent and sexual offenders (provided for in section 210F of the Criminal Procedure (Scotland) Act 1995)

As noted in the introduction, the second and third categories are referred to in this briefing as “non-mandatory life sentences”. In relation to the calculation of the punishment part, section 2 of the 1993 Act sets out different provisions for mandatory and non-mandatory life sentences:

- for mandatory life sentences the court is directed to take into account:
  - the seriousness of the offence(s) for which the person is being sentenced
  - any previous convictions
  - any reduction of sentence which might be appropriate (under section 196 of the Criminal Procedure (Scotland) Act 1995) following an early guilty plea
- for non-mandatory life sentences the court is directed to take into account all of the above together with a number of factors which effectively require it to consider the approach it would have taken if imposing a determinate custodial sentence
Further details of how the punishment part for a non-mandatory life sentence is currently calculated are set out below.

**Interpretation in Petch & Foye v HM Advocate**

As noted above, a court when calculating the appropriate length of punishment part for a non-mandatory life sentence is directed to take account of various additional factors which do not apply to mandatory life sentence cases. Section 2 of the 1993 Act provides that these are:

- the length of custodial sentence it would have considered appropriate if imposing a determinate sentence
- the part of that determinate sentence which it considers would have satisfied the requirements for retribution and deterrence (ignoring any period of confinement which may have been necessary for the protection of the public)
- the proportion of the part described in the last bullet point which a determinate sentence prisoner "would or might" serve in custody prior to early release under the provisions in section 1 of the 1993 Act

Section 1 of the 1993 Act provides that:

- short-term prisoners (determinate sentences of less than four years) – must be released after serving half of the sentence
- long-term prisoners (determinate sentences of four or more years) – may be released after serving half of the sentence and must be released after two-thirds. Any decision to release prior to the two-thirds point is taken by the Parole Board

The proper approach to the determination of the punishment part, for non-mandatory life sentences, was considered by the High Court of Justiciary in *Petch & Foye v HM Advocate* (2011). The court delivered its judgement in March 2011, with a majority of the seven judges agreeing with the approach of the Lord Justice General (Lord Hamilton). He stated that a sentencing court should adopt a three step approach using the provisions in section 2 of the 1993 Act which seek to draw comparisons with determinate sentences. This approach is illustrated below using the appeal court's determination of the appropriate punishment part in the case of Petch (sentenced to a discretionary life sentence).

- first step – identify the determinate sentence which notionally might have been imposed if not imposing an indeterminate sentence. In relation to Petch, the appeal court (whilst commenting that the exercise involved an element of unreality) judged that a determinate sentence of 20 years was appropriate for this first stage
- second step – strip out of that determinate sentence any element imposed for public protection, leaving just the part required for retribution and deterrence. In relation to Petch the appeal court deducted a period of four years, leaving a figure of 16 years
- third step – apply the early release provisions in section 1 of the 1993 Act to the stripped down notional determinate sentence identified in the second step. In general this should involve reducing it by half (given that short-term prisoners must and long-term prisoners may be released after serving half of the sentence). In relation to Petch the appeal court reduced the above mentioned 16 years by half, leaving a punishment part of eight years

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2 Following the ruling in Petch & Foye, a bench of three High Court judges determined the appropriate punishment part for the first named appellant in the case of *Petch v HM Advocate* (2011).
The Lord Justice General went on to consider whether the other provisions in section 2 of the 1993 Act (those which also apply to mandatory life sentences) would allow a court to depart from the punishment part identified by the application of the above three step process. He concluded that the proper interpretation of the section did not allow such an adjustment.

The interpretation adopted by the majority of judges in the case of Petch & Foye produces what might be seen as an anomaly. For example, in the case of Petch the appeal court determined that the appropriate punishment part was eight years. Thus, once he has served eight years he is entitled to have his further detention reviewed by the Parole Board. However, if he had actually been given a determinate sentence of 20 years (the notional starting point identified by the court using the first step of the above three step process) he would have to serve 10 years before such a review (ie an additional two years). It should, of course, be remembered that a long-term determinate sentence prisoner is guaranteed release at the two-thirds point of the sentence whilst an indeterminate sentence prisoner has no such guaranteed release point. However, even the possibility of a non-mandatory life sentence prisoner such as Petch being released earlier than would have been the case had he been given a determinate sentence has raised concerns. The opinion of the Lord Justice General in Petch & Foye reflects this:

“I have accordingly come, with regret, to the view that, however unsatisfactory it may appear as a matter of comparative justice, Parliament has given statutory effect to an arrangement under which an indeterminate prisoner will, or at least may, become first eligible for consideration for parole at an earlier stage in his sentence than an equivalent determinate prisoner. If this situation is to be remedied, it is for Parliament to remedy it. The divisions of opinion expressed judicially in these appeals would suggest that a clear, well-considered legislative solution is called for.” (para 53)

**Custodial Sentences and Weapons (Scotland) Act 2007**

As discussed above, section 2 of the 1993 Act determines when a prisoner serving a life sentence (including an order for lifelong restriction) may be released following review by the Parole Board. As things currently stand, those provisions are due to be replaced by section 20 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“the 2007 Act”) when the relevant provisions of that statute are brought into force.3

Section 20 of the 2007 Act would still require the sentencing court to set a punishment part, which is still described as that part of the total sentence which the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring any period of confinement which may be necessary for the protection of the public). However, there are differences in how the factors are described which the court is directed to take into account when determining the punishment part of a non-mandatory life sentence. The factors are:

- the length of custodial sentence it would have considered appropriate if imposing a determinate sentence
- the part of that determinate sentence which, by virtue of section 6 of the 2007 Act, it would have specified as the “custody part”

Under section 6 of the 2007 Act the court, when imposing a relevant determinate sentence, would specify part of the sentence as the custody part, being that part of the sentence which:

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3 Various provisions in the 2007 Act dealing with prisoners will be amended by section 18 of the Criminal Justice and Licensing (Scotland) Act 2010 when it is brought into force. Such changes will not, however, directly affect the provisions in section 20 of the 2007 Act.
“represents an appropriate period to satisfy the requirements for retribution and deterrence (ignoring any period of confinement which may be necessary for the protection of the public).”

The custody part could range between half and three-quarters of the total and would be served wholly in custody. The prisoner might (subject to an assessment of risk) be released on completion of the custody part and would, if not already free, be released at the three-quarters point of the total sentence.4

The provisions of the 2007 Act were not considered in the case of Petch & Foye. Thus, the proper interpretation of the provisions on the setting of the punishment part in section 20 may be open to debate (eg in relation to whether or not they could give rise to a similar anomaly as highlighted in the case of Petch & Foye). Nevertheless, the Bill seeks to amend relevant provisions of the 2007 Act as well as those in the 1993 Act, with the aim of providing a similar approach to the calculation of the punishment part under the provisions of both statutes.

**PROPOSALS IN THE BILL**

**General Approach**

The policy memorandum published along with the Bill indicates that:

“There has been no formal consultation on the content of the Bill. Provisions in part 1 of the Bill are intended, in broad terms, to put back in place policy that existed prior to the Petch and Foye judgement being made in March 2011. As such, the provisions do not implement new policy, but rather respond very specifically to the terms of a judgement.” (para 66)

In seeking to amend the statutory rules used by the courts to determine the punishment part of a life sentence (including orders for lifelong restriction), the Bill would:

- make some changes to the wording of provisions relating to mandatory life sentences without seeking to alter how those provisions operate in practice5
- retain the current distinction under which the punishment part of a non-mandatory life sentence, but not that of a mandatory life sentence, is calculated with reference to a notional determinate sentence
- make changes to the provisions relating to non-mandatory life sentences with the intention of ensuring that “courts have the sentencing powers they need to make sure that punishment is always appropriate to the offender’s crime” (Scottish Government 2011)

In relation to the final bullet point, the way in which the Bill seeks to achieve this aim is considered below in relation to the two statutes which would be amended – the Prisoners and Criminal Proceedings (Scotland) Act 1993 and the Custodial Sentences and Weapons (Scotland) Act 2007.

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4 It may be noted that some of the appeal court judges in the case of Petch & Foye, in dealing with the 1993 Act, questioned the general appropriateness of judges imposing determinate sentences which include a separately identified period for public protection (eg see the opinion of Lord Eassie). However, the majority opinion proceeded on the basis that this could be done and such a step would clearly be a part of the process for determinate sentences under the provisions of the 2007 Act.

5 Confirmed in discussions between the author and Scottish Government officials (December 2011).
In relation to the second of the above bullet points, it might be argued that the approach used in calculating the punishment part of a mandatory life sentence is more straightforward and might, therefore, be usefully extended to non-mandatory life sentences. However, the Scottish Government has indicated that it considers the continuance of an approach, under which the punishment part of a non-mandatory life sentence is determined with reference to a notional determinate sentence, is appropriate because:

- the court imposing a non-mandatory life sentence had the option of imposing a determinate sentence (an option which does not exist when imposing a mandatory life sentence)
- given that a determinate sentence could have been imposed in a case where the court actually imposes a non-mandatory life sentence, relevant European Convention on Human Rights (“ECHR”) case law requires that the approach for a non-mandatory life sentence should, as a matter of comparative justice, be linked to what would have happened if the offender had received a determinate sentence.

It should be noted that the proposed legislation is not retrospective and cannot, therefore, have an impact on cases determined before the Bill is passed and brought into force.

**Changes to the Prisoners and Criminal Proceedings (Scotland) Act 1993**

In relation to determining the punishment part of a non-mandatory life sentence, the Bill seeks to retain an approach which is similar to the stepped approach set out in the case of Petch & Foye, whilst allowing the courts greater discretion in selecting the appropriate length of punishment part. Two new sections, to be inserted into the 1993 Act by section 1(3) of the Bill, appear to envisage the following steps being taken by a court:

- first step – identify the notional determinate sentence which might have been imposed if not imposing an indeterminate sentence. The Bill provides that this should exclude any period of confinement which the court may have included in that determinate sentence for the protection of the public. The Bill also provides that, in identifying the notional determinate sentence, the court is not to apply any reduction which might be appropriate following an early guilty plea (this is to be taken into account later in the process)
- second step – identify the part of the above notional determinate sentence which would (as part of a life sentence) represent an appropriate period to satisfy the requirements of retribution and deterrence. The Bill goes on to effectively provide that this period may range between one-half and the whole of the notional determinate sentence identified under the first step
- third step – apply any reduction for an early guilty plea to the figure arrived at following the second step. The resulting figure is the punishment part

Unlike the current provisions of the 1993 Act, the amended approach would not expressly direct the court to have regard to the early release provisions for determinate sentence prisoners – under which short-term prisoners must and long-term prisoners may be released after serving half of the sentence (section 1 of the 1993 Act). However, it would appear that the second step (as described in the above bullet points) is intended to reflect the fact that determinate sentence prisoners do benefit from early release provisions, whilst not restricting courts to generally using just half of the notional determinate sentence as the basis for the punishment part.

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6 Discussions between the author and Scottish Government officials (December 2011).
7 For example, see the judgement of the European Court of Human Rights in Clift v The United Kingdom (2010).
The following provides an illustration of how the proposed provisions might be used to determine the length of time a non-mandatory life sentence prisoner must remain in custody before being eligible to seek release on parole. Comparative information is also provided for both determinate sentence prisoners and non-mandatory life sentence prisoners under the current provisions of the 1993 Act.\(^8\)

- **determinate sentence of 20 years:**
  - eligible to seek parole after 10 years (half of the sentence)
- **non-mandatory life sentences – current provisions of the 1993 Act:**\(^9\)
  - first step – notional determinate sentence (including any period required for public protection) of 20 years
  - second step – strip out any element imposed for public protection (say four years) leaving 16 years
  - third step – take into account the early release provisions for determinate sentence prisoners (generally reducing the last figure by one-half) resulting in a punishment part of eight years
- **non-mandatory life sentences – provisions of the 1993 Act as amended by the Bill:**
  - first step – notional determinate sentence (excluding any period required for public protection) of 16 years (ie 20 years minus four years)
  - second step – the appropriate length of punishment part may range between one-half and the whole of the figure identified under the first step (ie between eight and 16 years)

Under the provisions of the Bill, the court (in applying the second step) may set a punishment part which is greater than half of the notional determinate sentence on the basis of various factors including the seriousness of the offence and any previous convictions. This exercise may not be wholly straightforward in practice given that such factors can also play a part in a court’s view of:

- what sentence is required for public protection (including whether a non-mandatory life sentence is justified)
- the appropriate length of notional determinate sentence for the purpose of the first step

Factors such as the seriousness of an offence and previous convictions may, in relevant cases, be expected to have an impact on a court’s assessment of the requirements of both: (a) public protection; and (b) retribution and deterrence. These are different elements of a sentence and thus the first of the bullet points set out immediately above may not present practical difficulties provided that the court, when setting the punishment part, is clear as to how those factors specifically impact on the requirements of retribution and deterrence (the only element relevant to the length of a punishment part).

The issues raised by the second bullet point are different in that it appears that a court could take into account the same factor twice when assessing that part of the sentence which is appropriate for the purposes of retribution and deterrence. For example, using the seriousness of the particular offence to justify a longer notional determinate sentence (as part of the first step)\(^10\) and then to justify setting the punishment part of the life sentence at more than one-half of the already longer notional determinate sentence (as part of the second step). The Scottish

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\(^8\) The illustration does not include any reduction for an early guilty plea.
\(^9\) This part of the illustration is based on the approach of the appeal court in the case of Petch (see above).
\(^10\) With that notional determinate sentence excluding any period required for public protection.
Government has noted that it is satisfied that this does not create a problem. It has indicated that a factor such as the seriousness of the offence can be relevant in determining both the initial starting figure and also the proportion to be served, without there being any element of inappropriate double counting, on the basis that the factor is being considered for a different purpose within each step.

As noted above, relevant ECHR case law suggests that the determination of the punishment part of a non-mandatory life sentence should, as a matter of comparative justice, be linked to the period a determinate sentence prisoner would have to serve in custody before being eligible to seek parole. This does not necessarily mean that treatment must be identical. For example, the European Court of Justice stated in Clift v The United Kingdom (2010) that:

“A difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment”. (para 73)

Life sentence prisoners are always treated differently from determinate sentence prisoners in that they are only released if the Parole Board is satisfied that continued confinement is no longer necessary for the protection of the public. This contrasts with determinate sentence prisoners who must be released at either the half-way or two-thirds point of the sentence (depending on whether they are short-term or long-term prisoners) irrespective of any assessment of the requirements of public protection. There is no suggestion that this difference in treatment cannot be justified (eg on the basis that non-mandatory life sentence prisoners generally present a greater threat to public safety).

The issues are somewhat different when considering the period which must be served before a prisoner can seek parole. For example, factors such as the seriousness of the offence and previous convictions may convince a court that a non-mandatory life sentence is appropriate to ensure that a dangerous offender is not released until it is considered safe to do so. However, can they also justify making a non-mandatory life sentence prisoner wait longer, as compared with an equivalent determinate sentence prisoner, before being eligible to seek such an assessment? The Scottish Government’s position is that it may well be appropriate for a court to conclude that a non-mandatory life sentence prisoner should serve a different period in custody before being eligible to seek parole. In advancing this position, it has emphasised that the notional determinate sentence is notional – there is no actual equivalent determinate sentence prisoner. The notional starting point is only used to try and achieve a level of parity within the margin of appreciation allowed by ECHR case law.

Changes to the Custodial Sentences and Weapons (Scotland) Act 2007

As indicated above, the Bill seeks to amend the 2007 Act as well as the 1993 Act, with the aim of providing a similar approach to the calculation of the punishment part under the provisions of both statutes – so that there is no change in approach when relevant provisions of 2007 Act are brought into force replacing those in the 1993 Act. Thus the Bill appears to envisage a court using the same three steps, as described under the previous heading, when determining the punishment part of a non-mandatory life sentence.

11 Discussions between the author and Scottish Government officials (January 2012).
12 In the illustration set out above, the prisoner sentenced to a determinate period of 20 years was able to seek parole after 10 years, whilst the non-mandatory life sentence prisoner could (using the provisions in the Bill) be required to wait 16 years.
With regard to questions of comparative justice, it is worth noting that under the provisions of the 2007 Act (not yet in force), determinate sentence prisoners may be required to serve more than half of the sentence in custody before being eligible to seek release. In relation to what are referred to as “custody and community prisoners”, section 6 of the 2007 Act requires the court to set a custody part – that part of the total sentence which represents an appropriate period to satisfy the requirements for retribution and deterrence. The custody part would be between one-half and three-quarters of the total sentence and would, as the name suggests, be served in custody. Following the expiry of the custody part, the prisoner could seek release but would only have a guarantee of release at the three-quarters point of the sentence. For example:

- in relation to a custody and community sentence of 20 years:
  - it would include a custody part of between 10 and 15 years (between one-half and three-quarters of the total sentence)
  - the prisoner would be eligible to seek release at the end of the custody part and entitled to release after 15 years

**SOURCES**


RELATED BRIEFINGS

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