In May 2014 the Scottish Government announced plans to introduce a Bill later this year taking forward its plans to end automatic early release for some categories of prisoner.

This briefing considers the Scottish Government’s proposals for reform in this area, as outlined in a letter to the Justice Committee in September 2013, together with evidence which the Justice Committee has received in relation to those proposals.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>3</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>4</td>
</tr>
<tr>
<td>SCOTTISH GOVERNMENT’S PROPOSED REFORMS</td>
<td>4</td>
</tr>
<tr>
<td>CURRENT STATUTORY PROVISIONS</td>
<td>6</td>
</tr>
<tr>
<td>JUSTICE COMMITTEE’S CALL FOR EVIDENCE</td>
<td>7</td>
</tr>
<tr>
<td>Public Protection</td>
<td>7</td>
</tr>
<tr>
<td>Supervision of Released Prisoners</td>
<td>8</td>
</tr>
<tr>
<td>Focus of Proposed Reforms</td>
<td>9</td>
</tr>
<tr>
<td>Resource Implications</td>
<td>10</td>
</tr>
<tr>
<td>Clarity in Sentencing</td>
<td>11</td>
</tr>
<tr>
<td>Life Sentences</td>
<td>12</td>
</tr>
<tr>
<td>Custodial Sentences and Weapons (Scotland) Act 2007</td>
<td>13</td>
</tr>
<tr>
<td>SOURCES</td>
<td>15</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

In September 2013 the Scottish Government outlined proposals to end automatic early release for some categories of prisoner. In May 2014 it indicated that it would seek to take forward its plans in this area by way of a Bill which it hoped to introduce in August 2014.

The proposals, as outlined by the Scottish Government in September 2013, seek to end automatic early release for the following long-term determinate sentence prisoners:

- sex offenders sentenced to custodial sentences of four years or more
- other dangerous offenders sentenced to custodial sentences of ten years or more

In April 2014 the Justice Committee issued a call for evidence based on the outline which the Scottish Government had given of its plans the previous year. The call for evidence highlighted a number of issues in relation to which the committee welcomed responses:

- whether the scope of the proposed reforms is appropriate
- what impact the proposals would have on the work of criminal justice social workers and others in trying to ensure that released prisoners are safely reintegrated back into communities
- what impact the proposals would have on prisoner numbers and the work of the Parole Board
- the appropriate use of determinate sentences as compared with non-mandatory life sentences (eg orders for lifelong restriction) in terms of protecting the public from dangerous offenders
- 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)

Submissions received by the Justice Committee are available on its website.
INTRODUCTION

In September 2013 the Scottish Government confirmed an intention to legislate in order to end automatic early release for some offenders serving determinate custodial sentences.¹ It outlined its plans in a letter to the Justice Committee (Scottish Government 2013). The Scottish Government initially indicated that it would seek to make such reforms by way of amendments adding new provisions to the Criminal Justice (Scotland) Bill (which had been introduced in June 2013).

In April 2014 the Justice Committee issued a call for evidence in relation to automatic early release, with written responses sought by early May. Relevant submissions are available on its website. The call for evidence was based on the outline the Scottish Government had given of its plans in September 2013 and was made in anticipation of the Scottish Government lodging relevant stage 2 amendments to the Criminal Justice (Scotland) Bill. However, later in April, the Scottish Government announced that stage 2 of the Criminal Justice (Scotland) Bill would be suspended until a review headed by Lord Bonomy (considering potential further reforms in light of the proposed abolition of the requirement for corroboration) had reported in spring 2015. The Scottish Government took this decision prior to lodging any amendments on automatic early release.

In May 2014 the Scottish Government wrote to the Justice Committee advising that it now intended to take forward legislative reform in this area by way of a separate Bill which it hoped to introduce into the Parliament in August 2014.

In light of the latest indication of the Scottish Government’s intentions, the Justice Committee decided at its meeting on 3 June 2014 to postpone further consideration of evidence on this topic until after the planned Bill has been introduced.

SCOTTISH GOVERNMENT’S PROPOSED REFORMS

The proposals, as outlined by the Scottish Government in September 2013, seek to end automatic early release for some long-term prisoners:²

- sex offenders sentenced to determinate custodial sentences of four years or more
- other dangerous offenders sentenced to determinate custodial sentences of ten years or more

They appear to suggest that the second category may not include all offenders sentenced to ten years or more (eg hinting at a possible difference in treatment between those convicted of crimes of violence and some other crimes). However, the information published to date does not provide any detail on this point.

The new rules would only apply to offenders sentenced after relevant reforms were brought into force.

---

¹ A determinate sentence, in contrast to a life sentence, is one for a fixed period of years, months and/or days.
² A long-term prisoner is one serving a determinate sentence of four years or more.
The general sentencing powers of a sheriff dealing with a case under solemn procedure include the imposition of a custodial sentence of up to five years. Thus, the proposed reforms could affect offenders sentenced in the sheriff courts as well as in the High Court.

Under current provisions, an offender (irrespective of the type of offence) sentenced to a determinate period of four or more years may be released on licence after serving at least one-half of the sentence. If not already released, the prisoner must be released (on licence) after serving two-thirds of the sentence. Any decision to release prior to the two-thirds point is taken by the Parole Board for Scotland, which will seek to assess whether the prisoner is likely to present a risk to the public if released on licence.

The Scottish Government’s proposals relate to the ‘automatic’ element of early release. An offender falling within either category would still be eligible for release after serving one-half of the sentence. However, any release prior to completion of the whole custodial sentence would be at the discretion of the Parole Board. The Scottish Government has indicated that its proposals in this area are intended to enhance public protection by allowing prisoners who are assessed as presenting an unacceptable risk to be kept in custody for longer.

The proposed reforms are directed at determinate rather than life sentences (which include orders for lifelong restriction). Under existing arrangements, life prisoners may be released after serving the punishment part of the sentence, but this only occurs if the Parole Board considers that continued incarceration is not required for the protection of the public.

Scottish Government statistics on people receiving custodial sentences, broken down by main crime/offence and length of sentence, provide some indication of the numbers of prisoners who might be affected by the reforms. The table on the next page reproduces figures, for the five years 2008-09 to 2012-13, in relation to ‘sexual crimes’ and ‘other crimes and offences’.

As can be seen from the figures, it is likely that the largest group of offenders affected by the Scottish Government’s proposals would be sex offenders given determinate custodial sentences of four years or more. For example, if the reforms had applied to all relevant offenders sentenced in 2012-13, they would have affected:

- 107 people convicted of ‘sexual crimes’
- 24 people convicted of ‘other crimes and offences’ (assuming all offenders receiving such sentences are considered to be ‘dangerous’)

The total figure of 131 offenders would have represented less than 1% of all people receiving a determinate custodial sentence in 2012-13.

---

3 Section 3(3) of the Criminal Procedure (Scotland) Act 1995.
4 Further information about life sentences is set out later in this briefing. It may be noted that judges do in practice have regard to the early release arrangements for determinate sentence prisoners when considering the appropriate length of the punishment part for a non-mandatory life sentence.
5 The description ‘sexual crimes’ is used in this briefing to cover the crime/offence category of the same name used in the 2012-13 criminal proceedings bulletin (including offences such as rape and sexual assault) and the equivalent category of ‘crimes of indecency’ used in earlier bulletins. The description ‘other crimes and offences’ is used to cover all other crime/offence categories (ie excluding sexual crimes/crimes of indecency).
People receiving a custodial sentence by main crime/offence and length of sentence

| Length of sentence | Determinate sentences (years) | Life / indeterminate sentences | All custodial sentences
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>under 4</td>
<td>4 or more to less than 10</td>
<td>10 or more</td>
</tr>
<tr>
<td>sexual crimes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008-09</td>
<td>122</td>
<td>69</td>
<td>12</td>
</tr>
<tr>
<td>2009-10</td>
<td>142</td>
<td>74</td>
<td>12</td>
</tr>
<tr>
<td>2010-11</td>
<td>106</td>
<td>56</td>
<td>13</td>
</tr>
<tr>
<td>2011-12</td>
<td>134</td>
<td>70</td>
<td>4</td>
</tr>
<tr>
<td>2012-13</td>
<td>183</td>
<td>92</td>
<td>15</td>
</tr>
<tr>
<td>other crimes and offences</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008-09</td>
<td>16,162</td>
<td>400</td>
<td>27</td>
</tr>
<tr>
<td>2009-10</td>
<td>15,035</td>
<td>362</td>
<td>36</td>
</tr>
<tr>
<td>2010-11</td>
<td>14,640</td>
<td>345</td>
<td>37</td>
</tr>
<tr>
<td>2011-12</td>
<td>15,171</td>
<td>388</td>
<td>29</td>
</tr>
<tr>
<td>2012-13</td>
<td>14,084</td>
<td>293</td>
<td>24</td>
</tr>
</tbody>
</table>

Source: Scottish Government criminal proceedings bulletins plus additional information from officials

**CURRENT STATUTORY PROVISIONS**

The current rules on early release from a custodial sentence are set out in the Prisoners and Criminal Proceedings (Scotland) Act 1993. They include the following:

- **short-term prisoners** – an offender sentenced to a period of less than four years must be released after serving one-half of the sentence. For most prisoners, this release is not subject to licence conditions and thus not subject to supervision by criminal justice social work. However, sex offenders receiving sentences of between six months and four years are released on licence

- **long-term prisoners** – an offender sentenced to a determinate period of four or more years may be released after having served at least one-half of the sentence. If not already released, a long-term prisoner must be released after serving two-thirds of the sentence. Any decision to release prior to the two-thirds point is taken by the Parole Board, following an assessment of whether the prisoner is likely to present a risk to the public if released. Long-term prisoners are, irrespective of the proportion of sentence served in custody, released on licence (under conditions set by the Parole Board) and subject to supervision by criminal justice social work. The licence, unless previously revoked, continues until the expiry of the whole sentence

- **life sentence prisoners** (including those subject to orders for lifelong restriction) – when sentencing an offender to a life sentence, the court sets a ‘punishment part’. This is the period that the court considers appropriate to satisfy the requirements of retribution and deterrence, but ignoring any period of confinement necessary for the protection of the public. The prisoner serves the whole of the punishment part in custody. Such a

---

6 Includes a small number of cases where sentence length is unknown.
prisoner may be released after this point if the Parole Board considers that continued incarceration is not required for the protection of the public. The possibility of release is considered again periodically where the Parole Board does not initially order the release of the prisoner. Prisoners are released on licence, continuing until the person’s death, under the supervision of criminal justice social work.

Breach of licence conditions can lead to the released prisoner being recalled to custody.

**JUSTICE COMMITTEE’S CALL FOR EVIDENCE**

The Justice Committee’s call for evidence (issued in April 2014) highlighted a number of issues in relation to which the committee welcomed responses:

- whether the scope of the proposed reforms is appropriate
- what impact the proposals would have on the work of criminal justice social workers and others in trying to ensure that released prisoners are safely reintegrated back into communities
- what impact the proposals would have on prisoner numbers and the work of the Parole Board
- the appropriate use of determinate sentences as compared with non-mandatory life sentences (e.g., orders for lifelong restriction) in terms of protecting the public from dangerous offenders
- 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)

Written submissions are available on the Justice Committee’s website. This section of the briefing considers the issues covered by those submissions, as well as providing further background information.

**Public Protection**

The Scottish Government has indicated that its proposed reforms are intended to enhance public protection by allowing some prisoners who are assessed as presenting an unacceptable risk to be kept in custody for longer.

A number of submissions express support (or qualified support) for the proposals on the basis that they may improve public protection by: encouraging relevant prisoners to engage with prison rehabilitation programmes (so as to improve their chances of early release); and/or ensuring that those prisoners assessed as still posing a high risk do not benefit from early release. Those taking this stance include Police Scotland and Victim Support Scotland.

However, some submissions argue that the proposed reforms may, by diminishing the supervision of prisoners in the community, actually increase the risk of harm to the public. Those highlighting this concern include the Howard League for Penal Reform in Scotland, Dr Monica Barry, Professor Fergus McNeill, Dr Beth Weaver and Professor Cyrus Tata. Community supervision of released prisoners is considered further below.
Supervision of Released Prisoners

As indicated above, current legislative provisions mean that determinate custodial sentences of four years or more consist of two elements:

- a period during which the offender is held in custody (between half and two-thirds of the whole sentence)
- the remainder of the total sentence during which the offender is (unless recalled to custody) subject to supervision in the community in line with appropriate licence conditions

Both elements of the sentence are relevant when considering protection of the public.

The Scottish Government’s proposed reforms focus on the protection provided by the period the offender is held in custody – allowing for the possibility of a relevant offender serving a greater proportion of the whole sentence in custody (up to 100%). A consequence of this is that the period of supervision in the community under licence conditions could be reduced (potentially to zero). It should, however, be noted that the letter which the Scottish Government sent to the Justice Committee in May 2014 states that:

“It is likely the Bill will also include provision on release dates relating to helping ensure appropriate access to support services can take place for prisoners leaving custody.”

Written submissions emphasising the importance of community supervision include:

“The current proposal fails to recognise the strong evidence that support and supervision in the community is more effective in reducing re-offending rates than time spent in custody. (...) An abrupt and unsupported transition of a prisoner from the structured environment of prison to non-parole release may, in many instances, result in a reversion to pre-sentence behaviour.” (Howard League for Penal Reform in Scotland, p 2)

“The proposals are said to be motivated by a desire to ‘help ensure public safety is at the forefront of early release’. It is difficult to understand the logic of these proposals, at least on the grounds of public safety, unless one chooses to abandon the widely-acknowledged need to resettle long term prisoners while on licence because it helps to reduce the chances of reoffending.” (Professor Tata, p 1)

However, some submissions suggest that appropriate supervision of relevant offenders might still be provided under Multi Agency Public Protection Arrangements (MAPPA). For example:

“One of the effects of the proposals is that the target groups would no longer be subject to compulsory supervision on non-parole licence prior to sentence expiry. The Scottish Government is currently engaged in an exercise to extend the scope of MAPPA to include violent offenders. Taking these two things together, the effect could be that responsibility for managing these groups after sentence expiry would switch to MAPPA, and may have to be supplemented by civil orders (SOPOs and equivalent civil orders for violent behaviour, etc) to manage the residual risk presented to the community and support the safe re-settlement of these groups.” (Scottish Prison Service, p 1)

MAPPA places duties on the prison service, the police, local authorities and the NHS in relation to the management of risks posed by registered sex offenders and mentally disordered restricted patients. It is not limited to offenders receiving a custodial sentence. Existing legislation provides for the extension of MAPPA to violent offenders, but relevant provisions
have not yet been commenced. The Scottish Government’s website notes, under the heading of Sex Offenders’ Management, that:

“The agencies involved in MAPPA use a range of methods to manage offenders and reduce the risk of them committing further offences. The management arrangements include:

- police visits and interviews
- regular multi-agency meetings to share information, take action and reduce the risk of harm
- ongoing reviews of the level of risk each offender poses
- surveillance of high-risk offenders
- treatment to reduce re-offending
- recalling offenders to prison for any serious breach of the conditions of their release
- providing supervised accommodation where offenders can be closely watched, tagged or put under an appropriate curfew
- controlling how information about specific offenders is shared with the public or key community representatives”

Further information on MAPPA is set out in Multi Agency Public Protection Arrangements (MAPPA) National Guidance (Scottish Government 2012).

Another way of ensuring that there is a period of supervision in the community might be through an increased use of extended sentences. A court may currently impose an extended sentence on a person convicted on indictment (ie under solemn procedure) of a sexual or violent offence, where it considers that:

“the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender”.7

In relation to violent offences only, this power is further restricted to cases where the determinate custodial sentence which the court is intending to impose is of at least four years.

The imposition of an extended sentence does not alter the custodial element of the whole sentence. What it does is to add a further period (the ‘extension period’) during which the offender is subject to supervision in the community. This extension period may be up to 10 years (five years where sentence by a sheriff).

Focus of Proposed Reforms

As indicated by the figures contained within the table set out above, the proposed reforms would affect a very small proportion of all offenders receiving custodial sentences. Although the Scottish Government has stated that it remains committed to implementing wider reforms to early release provisions,8 it has sought to justify the narrower focus of the current proposals on the basis of enhancing public protection. For example, its 2013 letter to the Justice Committee noted that:

7 Section 210A of the Criminal Procedure (Scotland) Act 1995.
8 For example, see response of the Cabinet Secretary for Justice to parliamentary question S4O-00529 (Scottish Parliament 2011, col 5036).
“Our announcement today is designed to help bring the focus back firmly on consideration of risks to public safety and public harm when our most serious fixed length sentence prisoners are being considered for early release.” (p 2)

In addition to the issue of whether the possibility of longer incarceration is likely to enhance public protection (considered above), some of the written submissions question whether the proposals focus on the right groups of offenders. In particular, whether the focus on sex offenders is justified. The Scottish Government’s 2013 letter to the Justice Committee stated that:

“Sex offenders pose a particular risk to the public. This is already reflected in the special arrangements that apply for sexual offenders sentenced to six months to four years in prison who, when released early, are released on licence (in contrast with other short-term prisoners who, when released, are not released with licence conditions).” (p 3)

However, a submission from the Law Society of Scotland suggests that available evidence:

“does not appear to support the proposition that sex offenders pose a greater than average risk to the community than other offenders”. (p 3)

And a submission from Dr Weaver and Dr Barry (University of Strathclyde) argues that:

“Having a different approach for sex offenders is not justified, not least because it further excludes them from their local communities and of all offender groups, sex offenders probably have the greatest need for support towards reintegration.” (p 1)

Resource Implications

The proposals may be expected to have some resource implications for criminal justice bodies, including the Scottish Prison Service and the Parole Board. However, as already noted, they would affect only a small proportion of all offenders receiving custodial sentences. In addition, their potential impact on prisoner numbers and the work of the Parole Board would not be immediate. For example, the soonest point at which they might have a direct impact on the release date of a prisoner would be two-thirds of the way through the sentence (ie the point at which automatic early release provisions currently apply to all long-term prisoners) of a sex offender who is given a custodial sentence of four years on the date on which the new rules come into force (ie at least two years and eight months after commencement).9

The written submission from the Scottish Prison Service outlines the anticipated impact of the proposals on the average daily prison population:

“The estimated projected increase due to the impact of the proposals is an additional 120 offenders (90 sex offenders, 30 violent offenders) after 12 years following the implementation of the legislation. It is estimated that there will be no impact on the prisoner population until three years after the Act comes into force. (…) The proposals as they stand would therefore have a marginal impact on total population given current numbers and estate capacity.” (p 1-2)

In addition to potential increases in prisoner numbers and the work of the Parole Board, the ending of automatic early release for some categories of prisoner may be expected to lead to an increase in demand, from affected prisoners, for rehabilitation services – given that any early

9 Under the Scottish Government’s proposals the new rules would only apply to offenders sentenced after the relevant reforms are brought into force.
release would be based on an assessment of risk to the public. The written submission from the Howard League for Penal Reform in Scotland argues that:

"Where release of prisoners is dependent on their risk assessment, it is necessary for the Scottish Prison Service to provide sufficient rehabilitation services to allow prisoners to reduce their risk of reoffending and harm. Where such services are not available, continued detention may become arbitrary and in breach of Article 5 of the European Convention on Human Rights (...). Unless the proposed legislation is accompanied by substantially increased investment in prison-based rehabilitation, it is likely there will be an increase in applications for judicial review of decisions by the Parole Board for Scotland."

(p 2-3)

Clarity in Sentencing

One of the criticisms sometimes levelled at early release provisions is that they can mislead members of the public in relation to the consequences for offenders receiving custodial sentences. The written submission from Victim Support Scotland highlights the desirability of improving clarity in sentencing as one reason for seeking wider reform of early release provisions than set out in the Scottish Government’s proposals. It also states that:

"ending automatic early release for only some categories of prisoners would work to further complicate an already confusing system; the proposals would in fact create another rule that needs to be taken into account when calculating the release date of an offender".

(p 2)

Certainly, the proposed reforms would add more rules which need to be taken into account in order to fully understand all possible consequences for offenders receiving custodial sentences. This is not to say that they would necessarily make it harder for the court to explain the consequences of a particular sentence. For example, in relation to a ‘dangerous’ offender receiving a custodial sentence of 12 years, any explanation of the sentence might include the following:

- current early release provisions – the prisoner may be released from custody, at the discretion of the Parole Board, after serving at least six years and must be released after serving eight years; the prisoner once released will be subject to supervision under licence conditions until the expiry of the whole 12 year sentence

- proposed early release provisions – the prisoner may be released from custody, at the discretion of the Parole Board, after serving at least six years; the prisoner if released early will be subject to supervision under licence conditions until the expiry of the whole 12 year sentence

Options aimed at improving clarity in sentencing could include completely removing the possibility of early release from custody – automatic or otherwise – for determinate sentence prisoners. This might be coupled with some form of recalibration of sentencing to limit the impact on the period offenders spend in custody. Courts could also be given the power to impose (where considered appropriate) a separate period of community supervision commencing upon release of the prisoner. One of the arguments against this approach would be that it eliminates any period during which release of a determinate sentence prisoner is at the discretion of a body (such as the Parole Board) which can take into account factors such as engagement by the prisoner in programmes aimed at addressing offending behaviour. This
potential link may, at least in some cases, provide a useful incentive for positive engagement by the prisoner.\textsuperscript{10}

**Life Sentences**

In addition to providing a punishment for the most serious of crimes, life sentences (including orders for lifelong restriction) can provide an option for managing the risks presented by particularly dangerous offenders.

As noted above, the proposed reforms to determinate sentences are intended to improve public protection by ensuring that those prisoners assessed as still posing a high risk do not benefit from early release. However, determinate sentence prisoners would still have to be released at the end of their sentences – even if assessed as presenting serious risks. Given this fact, and the policy justification for the proposals, one might ask whether the courts are able to impose life sentences in appropriate cases.

Life sentences are only available to the High Court. Prisoners serving such sentences are not given a fixed period of time after which they must be released from custody. Instead, they are entitled to have their continued detention reviewed by the Parole Board once they have served the ‘punishment part’ of the sentence. This is the part of the total sentence which the court considers appropriate to satisfy the requirements for retribution and deterrence, whilst ignoring any period of confinement which may be necessary for the protection of the public.\textsuperscript{11}

After considering a case, the Parole Board will either direct the Scottish Ministers to release the prisoner or order the prisoner’s continued detention. The Parole Board will not direct release unless satisfied that confinement is no longer necessary for the protection of the public. Where a prisoner's release is not directed, continued detention is subject to periodic review by the Parole Board. 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.

Non-mandatory life sentences may take the form of:

- 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 (thus excluding murder where a life sentence is mandatory)
- orders for lifelong restriction (OLRs) – sentences imposing an indeterminate period of custody and lifelong supervision on dangerous offenders\textsuperscript{12}

The OLR is probably most relevant for current purposes. Its use in practice includes some cases where the court might otherwise have imposed a significant determinate sentence, but still one of a length which is used in relation to reasonably large numbers of offenders. For example, recent sentencing statements published on the Judiciary of Scotland website include one in relation to the case of HM Advocate v Ogilvie (10 March 2014). Here, the judge in sentencing the offender for a number of sexual offences indicated that the comparator determinate custodial sentence (if the risk criteria for imposing an OLR had not be met) would have been one of four years and six months (after discounting for the offender’s guilty plea).\textsuperscript{13}

\textsuperscript{10}For example, a written submission from the Parole Board refers to the potential benefits of this link.
\textsuperscript{11}See section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993.
\textsuperscript{12}OLRs are provided for in section 210F of the Criminal Procedure (Scotland) Act 1995.
\textsuperscript{13}The judge also indicated that he would have imposed an extended sentence (as discussed above).
A judge may only impose an OLR where satisfied, on the basis of relevant reports, that the ‘risk criteria’ are met. These are:

“that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large”.¹⁴

Custodial Sentences and Weapons (Scotland) Act 2007

Provisions in the Custodial Sentences and Weapons (Scotland) Act 2007, as amended by the Criminal Justice and Licensing (Scotland) Act 2010, set out significant reforms to the current rules on early release. However, the relevant provisions have, as yet, not been brought into force. If and when they are commenced, the above mentioned categories of short-term and long-term prisoner would be replaced by:

- short-term custody and community prisoners – an offender sentenced to a period of less than that set by the Scottish Ministers in subordinate legislation would be released after serving one-half of the sentence
- custody and community prisoners – an offender sentenced to a determinate period equal to, or greater than, that set by the Scottish Ministers would have a ‘custody part’ set by the court (the part of the sentence that the court considers appropriate to satisfy the requirements of retribution and deterrence whilst ignoring any period of confinement necessary for the protection of the public). The custody part would be between one-half and three-quarters of the total sentence and would be served in custody. Prior to the expiry of the custody part, an assessment would be undertaken to determine whether the prisoner is likely to cause serious harm to members of the public if released at the end of the custody part. If the assessment was that serious harm is not likely, the prisoner would be released at that point. If the assessment was that it is likely, the case would be referred to the Parole Board for consideration of when the prisoner should be released. The Parole Board could decide to release the prisoner at the end of the custody part or, following a further review, at some later point. All of this would be subject to a requirement that the prisoner must be released after serving three-quarters of the total sentence

The provisions in the 2007 Act (as amended) do not seek to end automatic early release. However, all released prisoners would be subject to licence conditions for the remainder of the total sentence – irrespective of which of the above categories they fell within.

In relation to commencement of the provisions in the 2007 Act, the Scottish Government has in the past indicated that implementation of measures for reforming early release is dependent upon a number of criteria identified in the 2008 report of the Scottish Prisons Commission being met, including a reduction in prisoner numbers.¹⁵ The Commission, chaired by the former First Minister Henry McLeish, was convened in 2007 to examine the use of imprisonment, including assessing the impact for the courts, prisons and community justice services of the early release provisions contained in the 2007 Act. It stated that implementation of those provisions (in their

¹⁴ Section 210E of the Criminal Procedure (Scotland) Act 1995.
¹⁵ For example, see response of the Cabinet Secretary for Justice to parliamentary question S4O-00529 (Scottish Parliament 2011, col 5036).
original form) could lead to greater pressures on available resources for criminal justice bodies. The report’s recommendations included:

- that any implementation of the early release provisions in the 2007 Act “must follow the implementation of this Commission’s other recommendations and the achievement of a reduction in the short sentence prison population” (p 51)

- “that the Government pursue a target of reducing the prison population to an average daily population of 5,000, guiding and supporting the efforts of relevant statutory bodies in achieving it” (p 57)

The development of the (not yet in force) provisions set out in the Criminal Justice and Licensing (Scotland) Act 2010, amending the early release provisions contained in the 2007 Act, was informed by the recommendations of the Scottish Prisons Commission.

As at 30 May 2014, Scottish Prison Service figures indicate that the prison population was 7,812 (not including 368 prisoners on home detention curfew).
SOURCES


Scottish Parliament Information Centre (SPICe) briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should, in relation to this briefing, contact Frazer McCallum on extension 85189 or email frazer.mccallum@scottish.parliament.uk.

Members of the public or external organisations may comment on this and other briefings by emailing us at SPICe@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe briefing papers. If you have any general questions about the work of the Parliament you can email the Parliament’s Public Information Service at sp.info@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Published by the Scottish Parliament Information Centre (SPICe), The Scottish Parliament, Edinburgh, EH99 1SP

www.scottish.parliament.uk