

SPICe Briefing

Prisoners (Control of Release) (Scotland) Bill

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The Scottish Government introduced the Prisoners (Control of Release) (Scotland) Bill in the Parliament on 14 August 2014.

It seeks to end automatic early release for some prisoners:

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

A determinate sentence, in contrast to a life sentence, is one for a fixed period of years, months and/or days. It is only determinate sentence prisoners that currently qualify for automatic early release. The release of life sentence prisoners is never automatic.

The Bill would also 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 (eg by allowing for early access to key public services).

This briefing considers the above provisions with a focus on the proposals relating to automatic early release.



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EXECUTIVE SUMMARY

The Prisoners (Control of Release) (Scotland) Bill contains two distinct sets of provisions relating to the release of offenders serving custodial sentences.

Section 1 of the Bill seeks to end automatic early release for some prisoners:

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

Under current provisions, an offender sentenced to a determinate period of four or more years (irrespective of the type of offence) 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 before the two-thirds point is taken by the Parole Board for Scotland, which assesses 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 of the categories set out in section 1 of the Bill would still be eligible for release after serving one-half of the sentence. However, any release before completion of the whole custodial sentence would be at the discretion of the Parole Board.

Prior to the introduction of the Bill, Scottish Government plans in this area received some initial consideration by the Justice Committee when it was originally proposed that relevant changes might be made by way of amendment to the Criminal Justice (Scotland) Bill. In particular, the committee issued a call for evidence which highlighted a number of areas of particular interest. These included:

- whether the scope of the planned reforms was appropriate
- what impact the plans 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 plans would have on prisoner numbers and the work of the Parole Board

Section 2 of the Bill deals with a separate power relating to prisoner release. It contains provisions which would allow the Scottish Prison Service, acting on behalf of the Scottish Ministers, to release sentenced prisoners up to two days early. This would be permitted where it would help facilitate the process of reintegrating the prisoner back into the community (eg by releasing the prisoner on a day of the week which allows for early access to key public services). The policy memorandum published along with the Bill states that the Scottish Government would work with the Scottish Prison Service to produce guidance on the circumstances in which the discretion to release early would be applied.

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. It 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 on automatic early release by way of separate legislation, which it hoped to introduce into the Parliament in August 2014. In light of this, the Justice Committee decided at its meeting on 3 June 2014 to postpone further consideration of evidence on this topic until after the planned legislation had been introduced.

On 14 August 2014, the Scottish Government introduced relevant legislation, the [Prisoners \(Control of Release\) \(Scotland\) Bill](#), together with [explanatory notes](#) (including financial memorandum) and a [policy memorandum](#).

The policy memorandum notes that there has been engagement with some stakeholders but no formal public consultation in relation to the proposals now set out in the Bill.

AUTOMATIC EARLY RELEASE

PROPOSED REFORMS

Section 1 of the Bill seeks to end automatic early release for some long-term prisoners:²

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

The Bill provides for prisoners to be covered by the sex offender rules where at least four years of a custodial sentence is attributable to a conviction by virtue of which the prisoner is subject to the notification requirements commonly referred to as the sex offenders' register.

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 Scottish Government's 2013 letter to the Justice Committee contained some suggestion that the second category might not include all offenders sentenced to ten years or more (eg stating that automatic early release would be ended for "long-term prisoners who are dangerous, such as violent offenders, who have received sentences of ten years or more" (p 2)). However, the Bill does not seek to qualify the coverage of the category. The policy memorandum (at paragraphs 43 to 47) outlines the Scottish Government's reasons for applying the reform to all prisoners receiving a determinate sentence of ten years or more.

The new rules would only apply to offenders sentenced after relevant reforms are brought into force (see paragraph 37 of the policy memorandum).

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.³ Thus, the proposed reforms could affect offenders sentenced in the sheriff courts (where the offender is a sex offender) 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 ensuring that risk is always taken into account in considering the possibility of early release. Thus 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.⁴

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.⁵

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:

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).

- 107 people convicted of sexual crimes
- 24 people convicted of other crimes and offences

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

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 ⁶
	under 4	4 or more to less than 10	10 or more		
sexual crimes					
2008-09	122	69	12	0	204
2009-10	142	74	12	1	229
2010-11	106	56	13	0	175
2011-12	134	70	4	0	209
2012-13	183	92	15	2	292
other crimes and offences					
2008-09	16,162	400	27	58	16,650
2009-10	15,035	362	36	46	15,483
2010-11	14,640	345	37	48	15,081
2011-12	15,171	388	29	52	15,665
2012-13	14,084	293	24	47	14,456

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 before 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 end of the whole sentence

⁶ Includes a small number of cases where sentence length is unknown.

- 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 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 a released prisoner being recalled to custody.

PRE-LEGISLATIVE SCRUTINY

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 was 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 were 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 expressed 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 included Police Scotland and Victim Support Scotland.

However, some submissions argued that the proposed reforms might, by diminishing the supervision of released prisoners in the community, actually increase the risk of harm to the public. Those highlighting this concern included 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 the 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).

Written submissions emphasising the importance of community supervision included:

“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)

The policy memorandum published along with the Bill acknowledges the possibility of such concerns:

“The scenario outlined above of some prisoners now being likely to serve all their sentences in custody may give rise to concern that a prisoner will be released at the end of their sentence without the benefit of licence conditions being in place in order to monitor and supervise the prisoner as they attempt to re-integrate into the community. However, the Scottish Government considers that the absolute priority is to protect the public, which justifies ending the automatic early release of prisoners who have been assessed as posing an unacceptable risk to public safety when considered for parole from the halfway point of sentence onwards.” (para 51)

In addition, other ways in which community supervision might be achieved have been suggested. Some submissions to the Justice Committee's call for evidence indicated 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 Scottish Prison Service, Police Scotland and local authorities in relation to the management of risks posed by registered sex offenders. 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

⁷ Section 210A of the Criminal Procedure (Scotland) Act 1995.

offender is subject to supervision in the community. This extension period may be up to 10 years (five years where sentenced by a sheriff).

The policy memorandum to the Bill considers the use of extended sentences at paragraphs 48 to 56.

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 in the future,⁸ it has sought to justify the narrower application of the current proposals on the basis of focusing on areas which might be expected to bring the greatest returns in terms of improving public protection. For example, the policy memorandum published along with the Bill states that:

“the Scottish Government has focused the reforms to end automatic early release on those prisoners who currently receive automatic early release who are likely to pose the most significant risks to public safety”. (para 72)

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 to the Justice Committee’s call for evidence questioned whether the proposals focus on the right groups of offenders. In particular, whether the focus on sex offenders is justified. A submission from the Law Society of Scotland suggested 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) argued 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)

In relation to such concerns, the policy memorandum notes that:

“The Scottish Parliament has previously made special provision for sex offenders in relation to early release arrangements. (...)

The arrangements in place for sex offenders relate to the long-term and significant impact sex offending has on its victims and communities in general. While data about reoffending rates does not generally show a higher risk of reoffending by sex offenders, it is the very specific devastating impact that sex offending and reoffending behaviour has on victims, their families and wider communities which led to the development of these special arrangements in order to help protect the public and reduce levels of fear and alarm.” (paras 39-40)

⁸ For example, see paragraphs 61 to 73 of the policy memorandum.

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 would not be immediate. For example, the earliest 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 financial memorandum to the Bill provides an analysis of costs based on the provisions coming into force in April 2016. It estimates that the eventual long-term impact would be to increase the average daily prison population by approximately 140. In 2013-14 the average daily prison population was 7,851 (SPS 2014, appendix 2).

In addition to the general costs of housing more prisoners, the financial memorandum identifies costs for the:

- Scottish Prison Service – changes to IT systems, staff training, additional prison-based social work costs and an increased demand for prisoner programmes (eg aimed at addressing the causes of offending behaviour)
- Parole Board – additional casework in relation to prisoners who would otherwise have benefited from automatic early release (although these costs are described at paragraph 38 as “comparatively minimal”)

The anticipated increase in demand for prisoner programmes reflects the fact that any early release for relevant prisoners would be based on an assessment of risk to the public. In relation to the availability of such programmes, a written submission from the Howard League for Penal Reform in Scotland argued 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 (...).” (p 2)

In relation to future funding, the financial memorandum notes that:

“The impact on prisoner numbers of ending automatic early release for certain categories of prisoner will build up over time, with the initial impact relatively limited in the early years, and the SPS will require the Scottish Government to ensure that the overall pressures on the prison estate arising from these reforms, and other legislative reforms, are met through future justice spending review settlements.” (para 14)

⁹ As noted earlier, the proposed new rules would only apply to offenders sentenced after the relevant reforms are brought into force.

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 highlighted 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 stated 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 an 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 (eg 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.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 still presenting serious risks. Given this fact,

¹⁰ The policy memorandum refers to the potential benefits of this link at paragraphs 57 to 60.

and the policy justification for the proposals, it is relevant to ask whether the courts are currently 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.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 offenders¹²

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).¹³

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

¹¹ See section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

¹² OLRs are provided for in section 210F of the Criminal Procedure (Scotland) Act 1995.

¹³ The judge also indicated that he would have imposed an extended sentence (as discussed above).

¹⁴ Section 210E of the Criminal Procedure (Scotland) Act 1995.

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 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)

¹⁵ For example, see response of the Cabinet Secretary for Justice to parliamentary question S4O-00529 (Scottish Parliament 2011, col 5036).

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 noted earlier, the average daily prison population in 2013-14 was 7,851 (SPS 2014, appendix 2).

COMMUNITY REINTEGRATION

Section 2 of the Bill contains provisions which would allow the Scottish Prison Service, acting on behalf of the Scottish Ministers, to release sentenced prisoners up to two days early. This would be permitted where it would help facilitate the process of reintegrating the prisoner back into the community (eg by releasing the prisoner on a day of the week which allows for early access to key public services). The power would not be available in relation to very short custodial sentences (less than 15 days).

The policy memorandum published along with the Bill notes that:

“Evidence indicates that achieving a reduction in reoffending requires the successful reintegration of prisoners back into Scotland’s communities, particularly in the first few days after release from prison. (...) Individuals rely on key public and third sector services to address a range of basic and practical requirements upon release from prison. Failure to do so in a timely and effective manner is likely to hinder a prisoner’s ability to turn their lives around and live free from crime.” (paras 74-75)

It goes on to note that:

“In 2011-12, there were approximately 10,500 liberations of convicted prisoners, of which a large proportion (about 4,000 or 40%) were released on a Friday, or the Thursday preceding a long public holiday weekend. Release on the days preceding weekends and public holidays is consistently raised as a key barrier to plugging the gap between receipt of support in custody and access to wider services in the community.” (para 76)

The provisions in section 2 of the Bill seek to address this issue by, in effect, allowing more prisoners to be released earlier during the working week. However, the policy memorandum states that use of this discretionary power would not become the norm, and that the Scottish Government would work with the Scottish Prison Service to produce guidance on the circumstances in which the discretion to release early would be applied.

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