Stage 3 proceedings on the Prisoners (Control of Release) (Scotland) Bill are scheduled to take place on 23 June 2015.

This briefing considers the main issues highlighted by the Justice Committee in its stage 1 report, the Scottish Government’s response to those issues and relevant stage 2 amendments.
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EXECUTIVE SUMMARY

In August 2014, the Scottish Government introduced the Prisoners (Control of Release) (Scotland) Bill with provisions relating to the release of offenders serving custodial sentences:

- restriction of automatic early release (section 1) – seeking to end automatic early release for sex offenders receiving determinate custodial sentences of four years or more and other offenders receiving determinate custodial sentences of ten years or more
- early release for community reintegration (section 2) – allowing the Scottish Prison Service to release sentenced prisoners up to two days early where this would help facilitate community reintegration (eg by allowing for prompt access to public services)

The Justice Committee’s stage 1 report noted clear support for the provisions in section 2 and welcomed the flexibility they would give Scottish Prison Service. In relation to section 1, however, it reflected a number of concerns. For example:

- scope of the reforms – the justification for focusing on long-term prisoners, especially sex offenders, was questioned
- supervision of released prisoners – concerns were raised about the possibility of some long-term prisoners being released without a period of community supervision

In light of the issues raised, the Scottish Government lodged a number of stage 2 amendments with the aim of:

- expanding the reform of automatic early release to all long-term prisoners (but still excluding short-term prisoners)
- ensuring that a period of post-release supervision is preserved for all long-term prisoners (for some this would be achieved by retaining a point in the sentence at which automatic early release takes place)

There was continued debate on a number of issues, in particular the appropriate length of compulsory community supervision for long-term prisoners. However, the Government’s amendments were agreed to by the Justice Committee, with other amendments being withdrawn.
INTRODUCTION

In August 2014, the Scottish Government introduced the Prisoners (Control of Release) (Scotland) Bill (the Bill) in the Parliament, with two distinct sets of provisions relating to the release of offenders serving custodial sentences:

- restriction of automatic early release (section 1) – seeking to end automatic early release for sex offenders receiving determinate custodial sentences of four years or more and other offenders receiving determinate custodial sentences of ten years or more
- early release for community reintegration (section 2) – allowing the Scottish Prison Service (SPS) to release sentenced prisoners up to two days early where this would help facilitate community reintegration (eg by allowing for prompt access to key public services)

The Parliament’s Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its stage 1 report was published on 19 March 2015. The Scottish Government provided a written response to the stage 1 report on 1 April, and the Bill completed stage 1 with the stage 1 debate on 2 April 2015.

The provisions on early release for community reintegration were generally welcomed. The Justice Committee’s stage 1 report stated that:

“The Committee notes the clear support for the provisions of section 2 of the Bill and welcomes the flexibility that this provides for the SPS to better manage re-integration into the community.” (para 119)

However, the Justice Committee’s scrutiny of the provisions on automatic early release highlighted a number of issues, including ones relating to:

- the scope of the reforms – the justification for focusing on long-term prisoners, in particular sex offenders, was questioned
- the supervision of released prisoners – concerns were raised about the fact that the proposed reforms could lead to some long-term prisoners serving the whole of their sentence in custody, resulting in release without a period of community supervision under licence conditions (referred to by some witnesses as cold release)

In light of the issues raised, and prior to the Justice Committee publishing its stage 1 report, the Scottish Government undertook to bring forward further proposals at stage 2 with the aim of:

- reforming the existing system of automatic early release for all long-term prisoners (ie all offenders given a determinate sentence of four years or more)
- ensuring that all long-term prisoners are, on release from prison, subject to a minimum period of compulsory supervision in the community

Given the significance of Scottish Government amendments lodged at stage 2, the Justice Committee took additional written and oral evidence. The Government’s amendments were agreed at the Committee’s meeting on 2 June 2015, with other amendments being withdrawn.

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1 A determinate sentence, in contrast to a life sentence, is one for a fixed period of years, months and/or days.
2 The further proposals were set out in a letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee, dated 3 February 2015 (Scottish Government 2015b).
Completion of stage 2 was followed by publication of the Bill as amended at stage 2. The Government also produced revised explanatory notes and a revised financial memorandum.

Stage 3 proceedings (final consideration) are scheduled to take place on 23 June 2015.

Key dates in the Parliament's consideration of the Bill are set out in the following table:

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The rest of this briefing looks at key issues raised during stage 1 and stage 2 consideration of the Bill. An earlier SPICe briefing (McCallum 2014) provides additional information on the Bill as introduced.

**AUTOMATIC EARLY RELEASE**

**Background**

In September 2013, the Scottish Government confirmed an intention to legislate in order to end automatic early release for some categories of prisoner serving determinate custodial sentences. It initially indicated that it would seek to take forward such reforms by amending the Criminal Justice (Scotland) Bill (which had been introduced in June 2013). However, following the announcement that scrutiny of that bill would be suspended pending further work relating to the planned abolition of the general requirement for corroboration, the Government decided to take forward reform on automatic early release through separate legislation.

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 for determinate sentence prisoners:

- 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.
- 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.

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3 All of the Scottish Government’s amendments were agreed to by division (for 8, against 0, abstentions 1).
4 Its plans were outlined in a letter from the then Cabinet Secretary for Justice to the Convener of the Justice Committee, dated 3 September 2013 (Scottish Government 2013). Life/indeterminate sentence prisoners do not qualify for automatic early release.
Board, following an assessment of whether the prisoner is likely to present a risk to the public if released. Long-term prisoners are released on licence, under conditions set by the Parole Board, and subject to supervision by criminal justice social work until the end of the whole sentence. Breach of licence conditions can lead to a released prisoner being recalled to custody.

Section 1 of the Bill as introduced sought to end automatic early release (i.e., mandatory release at the two-thirds point of the sentence) for the following long-term 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

Affected prisoners would still be able to seek 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 Justice Committee’s scrutiny of the proposed reforms highlighted a number of concerns and suggestions for improvement. These led to Scottish Government support for various changes. The main issues are outlined below.

**Scope of the Reforms**

Most custodial sentences imposed by the courts are for less than four years and so would be unaffected by the proposed reforms to automatic early release in the Bill as introduced. This limitation on the scope of the reforms is unaffected by changes made to the Bill at stage 2. The Justice Committee’s stage 1 report noted that:

“Concerns were expressed in evidence that there are no current plans to end automatic early release for short-term prisoners (those serving sentences of less than four years). For example, Howard League Scotland argued that, statistically, short-term prisoners are more likely to [re]offend, a point echoed by Professor Miller from SHRC. Professor Tata described release for short-term prisoners as ‘less justifiable’.” (para 109)

The report went on to say:

“The Committee is aware of ongoing concerns about the operation of automatic early release for short-term prisoners, but notes that the purpose of this Bill is the ending of automatic early release for long-term prisoners.” (para 113)

A stage 2 amendment lodged by Margaret Mitchell MSP sought to ensure that the Bill’s reforms to automatic early release would not come into force before the Parliament concludes its scrutiny of the Criminal Justice (Scotland) Bill. The member explained that the amendment sought to provide Parliament and Government with more time to reflect on matters such as the need to reform short-term prison sentences and the appropriate length of compulsory post-release supervision for long-term prisoners. The amendment was, however, withdrawn following debate.

The Justice Committee’s stage 1 report also noted evidence questioning the focus of the Bill, as introduced, on sex offenders:

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5 For example, the statistical bulletin Criminal Proceedings in Scotland, 2013-14 (Scottish Government 2014, table 10(a)) indicates that 13,576 custodial sentences of less than four years were imposed in 2013-14, as compared with 450 determinate sentences of four years or more.
“The particular focus on sex offenders, and whether offenders posing a greater risk of serious reoffending were being omitted from the proposed reforms, was commented on by a number of witnesses.

For example, the Risk Management Authority highlighted that, based on Parole Board statistics, sex offenders are less likely to reoffend than other offenders, and that the Bill would benefit from re-focussing on risk of serious harm rather than on offence type. This was also a concern of Dr Barry and Howard League Scotland. Scottish Women’s Aid noted that the proposals excluded the vast majority of perpetrators of domestic abuse, who can be considered to pose a high risk of reoffending.” (paras 71-72)

The impact of stage 2 amendments lodged by the Scottish Government, and agreed by the Justice Committee, included extending the scope of the reforms to all long-term prisoners. During stage 2 proceedings, the Cabinet Secretary for Justice explained that the relevant amendment had:

“been lodged in response to comments at stage 1 that it was not clear why the Bill as introduced made a differentiation between sex offenders and non-sex offenders. We consider our amendment to be an appropriate response to the issues that were raised at that time.” (Scottish Parliament 2015b, col 2)

Another effect of amendments agreed at stage 2 is that the Bill, as amended, no longer seeks to fully end automatic early release for all prisoners covered by its reforms. This change flows from a desire to ensure that all long-term prisoners are, upon release, subject to a period of compulsory supervision in the community. The issue is considered further below.

**Supervision of Released Prisoners**

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 custodial 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

A court may impose a longer period of community supervision by use of an extended sentence. This can be used where a person is convicted on indictment (ie under solemn procedure) of a sexual or violent offence, and the court 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”. ⁶

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 sentenced by a sheriff).

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⁶ Section 210A of the Criminal Procedure (Scotland) Act 1995.
Concerns were raised with the Justice Committee about the fact that the reforms set out in the Bill as introduced could lead to some long-term prisoners serving the whole of their sentence in custody, resulting in release without a period of community supervision under licence conditions (referred to by some witnesses as cold release). This would happen where the prisoner is not released on parole and is not subject to an extended sentence.

In light of such concerns, the Scottish Government undertook to bring forward further proposals at stage 2 with the aim of ensuring that all long-term prisoners are, on release from prison, subject to a minimum period of compulsory supervision in the community. The Justice Committee’s stage 1 report included the following comments on the issue:

“The Committee is in favour of all long-term prisoners being subject to a period of compulsory community supervision on release from custody. (…) In relation to the length of any minimum period of compulsory community supervision, the Committee notes that periods ranging from three months to one year have been suggested in evidence, with the Cabinet Secretary suggesting between three and six months. The Committee believes that any guaranteed minimum period should be sufficient to allow effective post-release work with an offender following continuous risk assessment and should be proportionate to the length of the sentence.” (paras 66-67)

As a result of amendments lodged by the Scottish Government, and agreed by the Justice Committee, the Bill as amended at stage 2 now seeks to preserve a period of compulsory community supervision for all long-term prisoners. The Bill as amended seeks to create two categories of long-term prisoner for the purposes of automatic early release. Release provisions would differ depending upon whether the court had imposed an extended sentence.

For long-term prisoners covered by an extended sentence, the Bill as amended would end automatic early release. For such prisoners, the extension period ensures that the prisoner is subject to a period of compulsory community supervision, even if the prisoner is not granted parole and thus serves the whole of the custodial element of the sentence in custody. The minimum period of supervision is effectively determined by the court when it sets the extension period.

In relation to other long-term prisoners, it would retain a point in the sentence at which automatic early release takes place. This, coupled with current legal provisions, would mean that all long-term prisoners are still subject to a period of community supervision upon release from custody. The amended Bill provides for automatic early release once the prisoner has six months of the sentence left to serve. Thus, it effectively provides for a minimum period of compulsory community supervision of six months. A period of six months is significantly shorter than the current minimum period of community supervision created by automatic early release provisions for long-term prisoners (eg prisoners serving four year sentences are currently entitled to automatic early release when they have 16 months of the sentence left to serve).

Although the Scottish Government’s move to preserve a minimum period of compulsory post-release supervision has been generally welcomed, differing views have been expressed about the appropriate length of that period. It may be noted that the minimum period would apply to prisoners who were not released earlier by the Parole Board (eg because it considered that the level and nature of risk posed was not manageable in the community). Thus, one might expect the minimum period to apply to those prisoners generally requiring a more significant degree of

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7 The actual period of community supervision may, as now, be reduced where a released prisoner is recalled to custody following a breach of licence.
community supervision (although not those where the court considered an extended sentence to be appropriate).

The Scottish Government’s written response to the Justice Committee’s stage 1 report argued that linking the length of the guaranteed minimum period of supervision to the length of the sentence was probably unnecessary. It suggested the minimum period of six months which is now provided for in the Bill as amended:

“Any prisoner requiring guaranteed supervision through a mandatory control period will have, as a minimum, spent close to four years in custody. Our view is that the specific necessary period of control over a prisoner in this situation as compared to a prisoner leaving after, say, 10 years in custody is likely to be similar given both are extremely long periods of time to be incarcerated.

It was generally established during the evidence that [it is] the initial weeks and months following release that are often most critical for a mandatory control period to be in place. It is during this period when a prisoner leaving custody is required to re-establish themselves into their communities and when challenges such as accessing housing, employment opportunities etc can be at their most acute.

We are minded to provide for a mandatory control period of six months as a minimum. This period would appear sufficient to have in place both any necessary protective conditions for prisoners leaving custody while also facilitating the work of criminal justice social work in assisting the prisoner with their reintegration and rehabilitation in the community while the period does not extend too far into the future.” (2015a, p 3)

The Cabinet Secretary for Justice reiterated this position in evidence to the Justice Committee during stage 2 consideration of the Bill:

“I am conscious that I have received evidence that the six to 12 weeks after a prisoner is released are the period of risk in relation to ensuring that the prisoner is reintegrated into the community with the right services and support in place and the right connections made with agencies and organisations. I have considered how we can achieve that in a three-month period and how to allow greater scope for prisoners who require a slightly longer period of support in the community and in which any additional issues can be picked up.

After considering the committee’s evidence and the issues that the period is meant to address, we saw six months as a reasonable period in which to address those matters.” (Scottish Parliament 2015c, col 2)

However, other evidence received by the Justice Committee argued for a longer minimum period. For example, Professor McNeill, whilst accepting that the first few months is a critical period, said that longer is required to address more significant risk factors. He noted:

“The cabinet secretary is absolutely right that the first six weeks to three months are the critical period for establishing the basics for successful resettlement, when reintegration must be achieved. The basics are housing; making benefits claims or finding employment; the immediate renegotiation of entry into the family and how that affects family dynamics; and the re-engagement – or not – with friends, neighbours and informal social networks. It is critical to manage all that carefully in the first three months or so.” (Scottish Parliament 2015d, cols 3-4)

But went on to state that:

“There are two basic reasons why a prisoner may not have been released early. One reason could be to do with the prisoner – their engagement with programmes, their participation in rehabilitation, their attitude and whether they have been able to address so-
called risk factors. However, the other reason is to do with their social environment. The Parole Board for Scotland also receives reports from a social worker – who is based in the community – about the prisoner’s proposed address and the suitability of their social context and whether that is going to conduce towards offending or conduce towards desistance from offending.

If the legislation means that, as a social worker, you have just six months to work with that individual so that they address the issues that were not successfully addressed in prison and engage with their social network in such a way as to facilitate their successful re-entry to society and reduce risks, to be honest, I think that you would throw your hands in the air and say, ‘There is no way that I can deal with all those issues in six months. I need longer.’ You would need longer to incentivise the person to engage with you in the community and because the issues are complicated. I think that six months is too short, particularly for prisoners with longer sentences.” (Scottish Parliament 2015d, col 4)

He went on to argue that the minimum period of compulsory supervision should be 25% of the sentence (eg one year of a four year custodial sentence).

A stage 2 amendment lodged by Elaine Murray MSP sought to replace the Scottish Government’s suggested six month minimum period with 12.5% of the sentence. This would have provided for a minimum of six months in a four year sentence, but with that period increasing in line with the length of sentence. The amendment was, however, withdrawn following debate.

Resources

Issues raised in evidence about resources included:

- whether sufficient resources would be available to allow relevant bodies to respond to the proposed reforms (eg whether the Scottish Prison Service (SPS) would be adequately resourced to deal with predicted increases in prisoner numbers and any increase in demand for prison based support for rehabilitation)
- whether any increase in resources associated with the reforms might have been better spent in other areas (eg in the provision of community justice)

For example, in its stage 1 report, the Justice Committee noted that:

“the Policy Memorandum envisages that the provisions of the Bill will incentivise prisoners to engage with prison rehabilitation programmes. However, the Committee has concerns that demand for certain programmes may currently outweigh supply (…).” (para 91)

In relation to this issue, the Scottish Government’s response to the Committee’s report noted that:

“Following on from the Justice Committee 2013 report [of its] inquiry into purposeful activity in prisons, SPS recently concluded a Purposeful Activity review considering the full range of programmes and constructive interactions which promotes citizenship, develops learning and employability skills, builds life skills and resilience and addresses wellbeing and motivates personal engagement with both prison and community based services.

One of the recommendations of this review was that SPS carry out a full assessment of programme and psychology provision to ensure SPS continues to meet prisoners’ needs into the future. SPS are currently putting in place arrangements for this review to be carried by an external subject expert.” (p 5)
In light of the Scottish Government’s plans to amend the Bill, the Committee’s report asked the Government to bring forward a supplementary financial memorandum at stage 2. The Cabinet Secretary for Justice did provide more information in a letter to the Convener of the Justice Committee (Scottish Government 2015c). Following publication of the Bill as amended at stage 2, the Government also produced a revised financial memorandum. It includes the following estimates for the impact of the Bill as amended:

an increase of 370 in the average daily prison population by 2030/31 (compared to 140 for the Bill as introduced)\(^8\)

- Scottish Prison Service –
  - recurring costs for additional prisoner places rising to £15.77m per annum by 2030/31 (compared to £6.0m for the Bill as introduced)
  - recurring costs for additional prison based social work and programmes rising to £841,000 per annum by 2030/31 (compared to £388,000 for the Bill as introduced)

- Parole Board –
  - additional annual caseload rising to 370 by 2030/31 (compared to 230 for the Bill as introduced)\(^9\)
  - recurring costs for additional annual caseload rising to £90,000 – £113,000 per annum by 2030/31 (compared to £30,000 for the Bill as introduced)

- total additional recurring costs rising to £16.724m by 2030/31 (compared to £6.418m for the Bill as introduced)

**EARLY RELEASE FOR COMMUNITY REINTEGRATION**

No stage 2 amendments were lodged in relation to section 2 of the Bill.

The section contains provisions which would allow the Scottish Prison Service (SPS), 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 (e.g. by releasing the prisoner on a day of the week which allows for prompt access to key public services). The power would not be available in relation to very short custodial sentences (less than 15 days).

As noted earlier, the Justice Committee’s stage 1 report stated that:

“The Committee notes the clear support for the provisions of section 2 of the Bill and welcomes the flexibility that this provides for the SPS to better manage re-integration into the community.” (para 119)

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\(^8\) Figures for the Bill as introduced are taken from the original financial memorandum published along with that Bill.

\(^9\) The figure of 230 for the Bill as introduced (see para 37 of the original financial memorandum) appears to have been calculated differently from the updated figure of 370. Only the latter mirrors the predicted increase in the average daily prison population.
SOURCES


RELATED BRIEFINGS

SB 14/60 Prisoners (Control of Release) (Scotland) Bill

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