Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

Written submission from James Chalmers

1. I wish to comment only on Part 1 of the Bill, as follows.

2. In principle, a life sentence is logical and simple to understand. A “punishment part” is set, which is the minimum period a prisoner must serve before they can be considered for parole. The punishment part is based on considerations of retribution and deterrence. Once eligible for parole, they will be released if the Parole Board is satisfied that they no longer present a risk to the public.

3. The matter is complicated slightly by the fact that the test which the Parole Board should apply in deciding on release is not clearly set out in legislation, but the High Court’s decision in *Petch and Foye* proceeds on the basis that the Board is concerned with risk and risk alone. The law now assumes – if perhaps more implicitly than explicitly – that prisoners should spend a period of time in jail appropriate to satisfy the requirements of retribution and deterrence, and then be eligible for parole based on whether they present a risk to the public.

4. This framework is logical and coherent. The problem which this Bill seeks to address is not a problem with life sentences. The problem is with “determinate” sentences.

5. Determinate sentences do not operate on the same principled model as life sentences. Instead, a sentence is imposed of a fixed number of years. This sentence does not differentiate between any part imposed for the purposes of retribution and deterrence and any part imposed for the protection of the public. The baseline for determining such a sentence is the requirements of retribution and deterrence in a given case, but it may be necessary to impose a higher sentence than those requirements would suggest because of the risk presented to the public by the offender.

6. A determinate sentence does not, in any sense, mean what it says. “Short-term” prisoners (those sentenced to less than four years) are automatically entitled to release halfway through their sentence. “Long-term” prisoners (four years or more) are eligible to apply for parole halfway through their sentence and are entitled to release two-thirds of the way through.

7. In contrast to life sentences, therefore, the framework governing determinate sentences is unprincipled and incoherent. In turn, this causes a problem for life sentences, because it may in some cases be appropriate to draw comparisons between prisoners sentenced to a life sentence and a determinate sentence. In principle, two prisoners might commit exactly the same crime, but one might receive a determinate sentence and the other might receive a life sentence because of the risk they present to the public. The courts have struggled for some time with the difficulty of ensuring that these two prisoners should be eligible for parole at the same time, so as not to create comparative injustice.
8. The problem is that this task is an impossible one. This impossibility may be demonstrated by comparing three hypothetical prisoners who have all committed identical crimes, as follows:

- Prisoner A: the court is convinced that A presents no risk to the public. A sentence of 14 years is imposed.
- Prisoner B: because of the risk to the public which B poses, the court imposes a sentence of 18 years.
- Prisoner C: because of the very high risk to the public which C poses, the court imposes a life sentence.

9. Such neat comparisons are not, of course, found in reality. But this exercise illustrates the impossibility of the task faced by the court. If we believe that prisoners should spend a period of time in jail appropriate to satisfy the requirements of retribution and deterrence, and then be eligible for parole based on risk to the public, it follows that the period which A, B and C should spend in prison before being eligible for parole is identical. There is, however, no means of achieving this within the current sentencing framework. A will be eligible for parole after 7 years, B after 9. No matter what punishment part the court imposes in C’s case, it cannot be consistent with both of these cases.

10. No-one should be proud of Part 1 of the Bill. That is not to question the ability of the civil servants who designed the policy, nor of the counsel who drafted the Bill on the basis of their instructions. But the Bill seeks to create a tortuous system which is barely intelligible to lawyers, let alone to the general public, in order to try once more to achieve the impossible and make a coherent system (life sentencing) align with an incoherent one (determinate sentencing). One might at least question why it is the coherent system that has to change. The Bill is, I think, tolerable as an interim means of addressing the difficulty identified in *Petch and Foye*. But it is embarrassing, and serves as powerful evidence of a sentencing system in need of much more far reaching review and reform.

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