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Official Report

JUSTICE COMMITTEE

Wednesday 27 May 2015

Session 4

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JUSTICE COMMITTEE
18th Meeting 2015, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
Margaret Mitchell (Central Scotland) (Con)
Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Fergus McNeill (University of Glasgow)
Professor Cyrus Tata (University of Strathclyde)

CLERK TO THE COMMITTEE

Tracey White

LOCATION

The Sir Alexander Fleming Room (CR3)

Scottish Parliament

Justice Committee

Wednesday 27 May 2015

[The Convener opened the meeting at 10:30]

Prisoners (Control of Release) (Scotland) Bill: Stage 2

The Convener (Christine Grahame): I welcome everyone to the Justice Committee's 18th meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices as they interfere with broadcasting even when switched to silent. Apologies have been received from Margaret Mitchell and Gil Paterson.

We have just one item today, which is a further evidence session on the Prisoners (Control of Release) (Scotland) Bill and, in particular, the amendments that we heard about from the cabinet secretary yesterday. Members should have copies of the *Official Report* of that session in front of them. I thank the official report for getting that to us so swiftly—there is no pay rise for that; just thanks. I also put on record the committee's thanks to those who have provided written submissions on the amendments, in a tight timescale. They have been really useful in assisting our scrutiny.

I welcome to the meeting Professor Fergus McNeill, professor of criminology and social work at the University of Glasgow, and Professor Cyrus Tata, professor of law and criminal justice at the University of Strathclyde. I thank you both for coming at relatively short notice. I hope you have had an opportunity to consider yesterday's evidence from the cabinet secretary.

I will go straight to questions from members.

Elaine Murray (Dumfriesshire) (Lab): As you will be aware, the amendments concern a period that is served in custody, and then a period of six months to be served in the community. That applies to anyone who has been sentenced to more than four years, irrespective of the length of the sentence. Do you agree that, if automatic early release is got rid of altogether, that is the best way of addressing the issue of cold release, or do you think that a more proportionate response to the type of crime and length of sentence would have been more appropriate?

Professor Cyrus Tata (University of Strathclyde): I think the simple answer to the first part of your question is, unfortunately, no. You will be aware that we argued for, and the committee rightly saw the merit in having, a period of mandatory supervised release to get away from the problem of so-called cold release—that would be sensible, given what was initially a rather foolish proposal. Is the proposed approach the best way forward? No. Should the response be proportionate? Yes. It should be proportionate for a number of reasons, because it changes the dynamic in terms of sentencing decisions and how long someone serves.

The Convener: Will you elaborate on that point about changing the dynamic? I think that it was touched on yesterday by Roderick Campbell, but not really followed through. Can you explain for the public what you mean by changing the dynamic?

Professor Tata: I mean that someone serving a period of four years, for example, will have to be released after three years and six months, whereas someone serving a period of 12 years will end up serving 11 and a half years, so the percentages—I have not quite managed to work them out—are clearly hugely different.

The Convener: That is all right—it is early in the morning.

Professor Tata: A Government paper that came out just last week basically said, "Well, we don't see any problem with human rights in terms of the provision of programmes."

We have talked about the issue before. A clear principle that has been evolving in case law derived from the European convention on human rights states that someone must have a fair opportunity to show that they are not a risk to the public. When we change the proportions and squeeze the length of conditional release—so far, just to six months—that means that someone serving 12 years, who might previously have been released after, say, eight years, may be held for up to 11 years and six months. They may argue—indeed, some will argue—that they have not been given a fair opportunity to demonstrate that they are not a risk. The case law admittedly initially relates to indeterminate sentence cases, but it has been suggested that we can expect that principle to be extrapolated to determinate sentence cases, too.

I think that the approach should be proportionate. I am not sure that I understand why the Government has said that it should not be proportionate or why one would go for a blanket six-month approach. I have not heard a reason for that. I know that the Justice Committee said that it wanted to know why that period has been proposed. All I am aware of in response to that is the Government saying that it just feels about right.

As I say, the approach should be proportionate; indeed, it makes sense for it to be proportionate.

The Convener: In fairness to the Cabinet Secretary for Justice, he said:

> "I am conscious that I have received evidence that the six to 12 weeks after a prisoner is released are the period of risk".—[*Official Report*, *Justice Committee*, 26 May 2015; c 2.]

Therefore, I think that he was basing the period on a risk assessment. By making the period six months, the prisoner would be given the opportunity to move from rehabilitation in the prison to rehab in the community for a period that covers the risk period, which would, I hope, prevent reoffending or risk to the public. I am reading what you say in your submission, and that is what the cabinet secretary said.

Professor Tata: In a sense, it is logical that of course the level of risk is highest in the first few days and weeks—generally speaking, given that every individual is different. However, that does not mean that one should not also be looking at the risks months down the line.

We need evidence from criminal justice social work on the issue. My colleague Professor McNeill has immense knowledge about the level of risk. Can social workers do the work that is needed in a six-month period? I am sceptical about that.

Professor Fergus McNeill (University of Glasgow): There are two problems with having a fixed period, and those problems would apply to varying degrees no matter how long the fixed period was. Just to do the maths and to make clear the proportionality point, the proposal means that if a person is sentenced to five years, 90 per cent of their custodial sentence would be in prison. However, if a person is sentenced to 10 years, that increases to 95 per cent—and so on. Therefore, the disproportionate shrinkage of the supervisory part becomes more aggravated as the sentence length growths. That makes sentencing less transparent. It changes the meaning of a custodial sentence, depending on its length, if you follow my logic. How much of it is custodial and how much of it is supervisory would change with sentence length rather than being fixed proportionately. That is a problem for proportionality in relation to justice.

I will confine myself to the issues that I know better, which are to do with the practicalities of safely supervising people after release. 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.

However, imagine that you were coming out of prison having served 10 years. You can think your way into that scenario without having been a prisoner by thinking about working overseas or moving house. How long does it take you to belong to and feel safe in the community that you have come into? How long does it take before you feel that you are a part of its everyday life, so that you are relaxed and confident in how you navigate your routines? It seems obvious that if you have spent 10 years in prison, six months is a very short period, not least because of the accumulated effects of the institutionalisation that a long sentence brings.

Now flip your perspective and put yourself in the seat of the social worker who is supervising that person. Let us say that the prisoner has done nine and half years out of a 10-year sentence, because they were not deemed eligible for parole.

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.

Professor Tata: These are people who have been denied discretionary release. For whatever reason, it was deemed to be too risky—rightly or wrongly—to release them earlier. Therefore, we are dealing with those who are assumed to be of greatest risk to the public. Why would we want to squeeze that compulsory supervision period right down to six months?

Elaine Murray: Given that the bill does not end automatic early release any more—it just changes when early release happens—would it have been preferable, in your view, to have had the period defined as a percentage of the sentence? For example, 10 per cent of the sentence or whatever could be served in the community, rather than setting the period at six months.

Professor Tata: Without doubt, it would be sensible to define the period as a percentage of the sentence—definitely.

As you rightly say, the bill does not end automatic early release. I am genuinely puzzled. What is the bill trying to achieve? What problem is it trying to solve? Is it an electoral, political, manifesto problem? The Scottish National Party's 2011 manifesto states:

"We remain committed to ending automatic early release".

As you say, the bill is not now ending automatic early release, so the SNP is left with the same problem. However, the manifesto adds the caveat

"once the criteria set by the McLeish Commission are met."

Those criteria are about lowering prison numbers, so it was not a manifesto commitment.

I am therefore genuinely puzzled as to what problem the bill is seeking to solve. The bill seems to be attacking the very bit of the release system that works the best. As you have heard from the Risk Management Authority and others, the long-term end works pretty well. It is the short-term end where there is much more to criticise—where people are released nominally on supervision but do not get supervision or the kind of support that they need. I am puzzled as to why the bill is going for the long-term end—the part that works the best. Why would we tackle that?

Presumably, the bill does not solve any political problem to do with a manifesto commitment because it does not achieve the first part of that statement in the manifesto and, in any case, the manifesto allows latitude around that commitment, so what problem is the bill trying to address? Is it public safety?

We have been here before; we know that conditional, supervised mandatory release is necessary. You have rightly said as a committee that we have to have that in the bill, and the Government has relented on that. However, we are talking about the long-term prisoners who are deemed too risky to release at the discretionary point. Why would we want to squeeze the mandatory period of supervision and support right down to six months? I do not get it.

Professor McNeill: A proportional system makes more sense. I think that we could have that system and abolish automatic early release, but to do so we would need to change what the sentence is—what the sentence means.

The device that would be required is something like a custodial and supervisory sentence, which has two elements. We could have a sliding-scale part in the middle, where the Parole Board would still exercise a measure of discretion in light of judgments about risk and progress. However, then—this is somewhat arbitrary—no later than three quarters of the way through the sentence, the prisoner would have to be released under mandatory supervision so that they continue to address risks and needs, and continue to be supported on their reintegration journey, post-release.

Elaine Murray: Have we not already been here with the Custodial Sentences and Weapons (Scotland) Act 2007 and its amendment?

10:45

Professor McNeill: Without getting into the technicalities, the 2007 act has many other flaws and cannot be implemented in the form in which it was passed. It is not a case of going back to that act. The principle that a custodial sentence must have two parts, which need to be made explicit when the sentence is passed, can deal with the problem of automatic release and the underlying problem of transparency in sentencing.

The Convener: Have we not done that already under other legislation? Was that to do with life sentences? There was an odd formula where the offender was detained for the safety of the public but part of the sentence had to be for rehabilitation. What was that?

Professor Tata: It is the tariff part, which relates to indeterminate sentences and lifers.

The Convener: We have already been there.

Professor Tata: But with lifers.

The Convener: That is right. Part of the reason for that to was meet ECHR requirements. The bill is sort of along the same lines.

Professor McNeill: Yes.

Professor Tata: Yes. I suggest that part of the motivation for the bill is the concern that people feel that sentences do not mean what they say. They are right: sentences do not mean what they say, they are not clear and the system is not transparent. We need to be clear that, if that is the problem that we are trying to tackle, the bill will not address it. The way to address it is to describe up front and explicitly what the sentence is.

All custodial sentences are rightly a combination of custody and a mandatory—it might be part

discretionary—period of supervision. As the committee said in its stage 1 report, they should be that combination, which we could call a custodial and supervised sentence or whatever. If we just say what the thing is, we could get out of the bind that we are in. In that way, we could combine the virtue of public safety—namely, ensuring that, on release, people, particularly those whom we deem to be the greatest risk, get the supervision and support that they need and which the public needs them to have—and being able to say what the sentence is.

It is about time that we were up-front with the public about that. In the 1960s and 1970s, when parole came in, people did not really know that prisoners were getting out early, but now everybody knows. In fact, the public is very cynical, and the research suggests that, sometimes, they imagine that prisoners are let out earlier than they are. We need to be clear, and it is a matter of describing more clearly what sentences are.

The Convener: Of course, they are not getting out as such; it is a change of sentence.

Professor Tata: Absolutely.

The Convener: It is a continuing sentence.

Professor Tata: They are getting out of prison. I do not mean that they are getting off.

The Convener: No, but people think that getting out means that they are getting off with part of their sentence.

Professor Tata: Absolutely. That is why we need to say exactly what the sentence is.

Roderick Campbell (North East Fife) (SNP): We have established that the bill is not about clarity in sentencing. It does not purport to be about clarity. I take on board your point about proportionality, but on 13 January we heard evidence from Victim Support Scotland that it agreed with Sacro that a three-month period at the end of the sentence would be required. I think that that was also accepted by Pete White of Positive Prisons? Positive Futures. They were happy with taking a non-proportionate view. You obviously take a different view, but there are other ways of looking at the matter.

Professor Tata: If I am not mistaken, in his evidence, Pete White briefly says that it is better than nothing, and not as bad as before. I am not sure that he says that—

Roderick Campbell: I have it in front of me.

Professor Tata: You go ahead. I might be wrong.

Roderick Campbell: Sarah Crombie from Victim Support said:

> "Sacro's submission comments that it would be good to see a reduction of automatic early release to the last three months of the sentence. I know that Dr Barry talked about the average three-month planning time within the prison. Victim Support thinks that putting in place that three-month period, to allow compulsory supervision to take place, is something to look at."

Then the convener asked:

> "Does anyone else wish to comment?",

and Pete White replied:

> "I would agree with that."—[*Official Report*, *Justice Committee*, 13 January 2015; c 20.]

Professor Tata: I think that Pete White has written evidence—

John Finnie (Highlands and Islands) (Ind): On a point of order, convener.

The Convener: Slow down a minute, please. There are no points of order in committee.

John Finnie: Thank you for that clarification.

Professor Tata was alluding to Mr White's more recent evidence, which is in our papers. In it, he says what Professor Tata said.

The Convener: That is a point of information.

John Finnie: I beg your pardon.

The Convener: I love the fact that there are no points of order here. It gives me some control.

The two main points that are being made relate to why the period should be six months and proportionality. It is not fit for purpose, because people doing four years would serve three and a half and people doing 10 years would serve nine and a half.

If we are trying to fix the bill and not just throw it out completely, what do we look at? How do we do it? We cannot deal with sentencing policy here.

Professor Tata: We first need to decide what problem we are trying to solve.

The Convener: We have solved one for you: we agreed that there should be no cold release. That was a move forward at least. We would all support that: cold release was not a good idea.

It was also not good that the provision applied only to sex offenders, and it has now been extended to all offenders. We have made some progress with the Government.

Professor Tata: I understand that the main complaint of victims' groups is that sentences are not transparent or clear. There is a way to deal with that, which is to describe the sentence as it really is. In that way, there can be a sufficient period of mandatory supervision without people being told that someone is getting one sentence when they are getting another. It is telling it as it is.

The Convener: Right. Okay. I do not know whether we can do that in the bill.

We will now have questions from other members.

Christian Allard (North East Scotland) (SNP): Good morning, professors. I have very much enjoyed the conversation that we have had so far, but one point may be missing. We have talked about cold release and have dealt with that, but there may be another point. We have heard a lot about prisoners opting for max out. I thought that the changes that the Government had made were to deal with that. I do not know whether you remember, but I talked about the idea of a mandatory pre-release supervision period. Sacro suggested that the period should be three months, which is fine. We did not talk about proportionality, but Sacro seems to understand that better than others.

On prisoners opting for max out, we did not realise that some offenders will not want to engage. We need that short period of time for the ones who will not work with the Parole Board on a discretionary basis beforehand, to force them to engage. It is not about everybody; it is just about that small number who are more difficult to engage.

That point is made in your written submission, Professor McNeill. You make several points, all of which now appear to have been addressed—even those on costs, because the provisions will not kick in before 2019. You said that the bill should be abandoned because of the points that you listed. Where do you stand on that now?

Professor McNeill: I still think that the bill is not fit for purpose in its current form. Whether I understand the bill as being principally concerned with public safety, which is what it says that it is concerned with, or whether I consider it important for the bill to deal with the issue of transparency, even if that is not its formal purpose, it is not achieving either aim.

For the reasons that I gave earlier, when I worked through the example of someone serving a long sentence, I do not think that holding someone longer and then releasing them six months before the end of their sentence is the best way of securing public safety in the long term. That is the dilemma that the Parole Board continually faces. If the offender is released earlier, there is a longer period of supervision and therefore a longer period of support to navigate the re-entry challenges and reduce risk. When the criminal justice system then lets the person go, they are being let go in a safer condition. That is better for them because they are better reintegrated, and it is better for the public because they are less likely to reoffend.

Christian Allard: Are you of the view that automatic early release at the two-thirds point was a good thing?

Professor McNeill: I am.

Christian Allard: The aim of that was to make sure that nobody maxed out. That brings us back to the issue of cold release. How can we balance the two things—someone spending longer in prison and their not having cold release?

Professor McNeill: This is where reading extracts of the earlier evidence on the supervisory period, at stage 1, could potentially be misleading. If you had said to me, "It's either cold release or three months' supervision," I would have chosen the three months' supervision. If you had said, "It's either cold release or six months' supervision," I would have chosen the six months' supervision. If you had said, "It's either cold release or 12 months' supervision," I would have wanted the 12 months' supervision. In the framework of the total custodial sentence, I want the longest possible period of supervision and support in the community, to mitigate the effects of imprisonment and to secure public safety.

The Parole Board's dilemma is that, the longer it waits to make the release decision, the more likely it is that desistance from crime is going to be frustrated. The earlier that you can release a prisoner, the better you can support their re-entry into the community. Of course, if you are not confident that you can safely release a prisoner, you must hold them.

I would set the discretionary period at between 50 per cent and 75 per cent of the sentence. That is, potentially, a long period in which to incentivise a long-term prisoner to engage with the Parole Board. If the prisoner does not do enough and still has to be released at the 75 per cent point, there will still be a long period of supervision during which the social worker can work to secure engagement and reduce risks as well as to support reintegration.

My honest feeling about the current proposal is that it is better than the first draft. It improves the situation, as it deals with cold release up to a point. To a certain extent, six months' supervision will help a significant proportion of those whom the bill will affect. However, will it secure their reintegration? I doubt it, and as long as their reintegration is not secured, public safety is, ultimately, not served.

We do not live in a perfect world. There are some people for whom no amount of supervision will secure reintegration, and there will always be risk after the criminal justice system steps back and says that it no longer has the authority to interfere in a prisoner's life. My belief is that a longer period of supervision, particularly for long-

term prisoners, is more likely, rather than less likely, to support their desistance from crime.

Professor Tata: We come back to the question, if I may—

Christian Allard: If I can—

The Convener: Mr Allard, let Professor Tata speak and then you can come back in.

Professor Tata: It is important that we focus on the question of what problem the bill is trying to solve.

Christian Allard: Professor McNeill answered that part—the bill is about public safety. That is exactly what it is about.

Professor McNeill: That is what it is strives to ensure.

Christian Allard: That is what it says.

Professor McNeill: I am not at all convinced that, in comparison with the current system, the proposal would make the public any more safe. I can only hypothesise on the basis of my understanding of people's progression towards desistance from crime, but my hypothesis is that being released after a longer period of imprisonment—with all the disruption and problems that that causes—to a short period of support during which the prisoner knows that the social worker will disappear after six months will not heavily incentivise the prisoner to engage seriously with the social worker. Prisoners might formally comply, showing up for the appointments and getting through the process in order to get the social worker off their backs and out of their lives, but they may then carry on as before. I do not think that that is the best way to secure public safety.

Christian Allard: There could be an explanation as to why so many people suggested a three-month period, perhaps regarding the cost or the better quality of a shorter programme. We have said that things are going to change and that there is going to be progress in prisons, first and foremost. Could we have a very good, year-long programme? Would that be sustainable? Would a six-month supervision period in prison provide a good balance?

Professor McNeill: We know from the evidence base that programmes to reduce reoffending generally work better in the community than in prison. There is an obvious reason for that. When someone is trying to learn skills that they are going to use in the community, it easier for them to learn them in the community because they can be practised between sessions. In a prison-based programme, prisoners can learn skills for tackling the problems that they will face outside but they cannot really rehearse and embed the learning. It is a bit like the challenges that students on vocational courses face when they try to take classroom learning out to placements—it is the same sort of transfer.

In my assessment, a longer period of supervision during which more programme and individual work can be undertaken to support rehabilitation in the context and the environment in which the learning needs to be applied stands a better prospect of securing reductions in risk than a prison-based programme. From a scientific point of view, I can support that because it is based on evidence as opposed to hypothesising.

That is not to say that we should not do lots of work in prisons to prepare people for release and to address the issues that we can address while they are inside. Nevertheless, the key thing is to get the money out of the jail and into the community so that the support programmes—not just in the narrow classroom sense—can be properly resourced and delivered by trained professionals who are supported by third sector and community organisations doing advocacy, building bridges, making connections and securing a sense of belonging to a community, which is what ultimately sustains people's desistance from crime.

Christian Allard: I put it to you that it will be easier for people to build bridges if they are released earlier in the discretionary period, when there is no issue for the Parole Board, and that some prisoners will be quite happy to engage. The problem is that the prisoners that we really want to deal with are the ones who want to max out.

11:00

Professor McNeill: I accept that the ones who want to max out are the ones who will be difficult to engage in any context. However, that does not mean that it makes sense to hold them longer.

The Convener: People keep calling it "release", but, as we know, it is a continuing sentence. I understand from the cabinet secretary that different conditions would be attached to the period in the community—we did not go into details on that, but perhaps we should have gone further into what conditions we are talking about.

Professor McNeill: It would be much more helpful if we thought of "release" as being release from the order or sentence. We think of someone walking out of a prison gate as the end of the sentence, but it is clearly not and nor should it be.

The Convener: There is also recall. We did not go into whether someone would be tagged or what things would be required, but some of those things could be quite onerous.

Professor McNeill: That point is being driven home to me by research that I am currently conducting on people who are subject to supervision in several European countries. We grossly underestimate the pain of being subject to that suspension of punishment. The prospect of being recalled at the discretion of another person leaves the released person exceptionally vulnerable and insecure.

From a justice point of view, one could say that that is fair enough and is part of the sentence—that a person has conducted himself or herself in such a way that the state has the right to exercise that power over them and does so to protect others. However, we should not underestimate what it feels like to be not quite at liberty. Having the sword of Damocles dangling over your head continuously is no small suffering.

Professor Tata: It would be helpful to describe it as such, publicly. The system is very poor at explaining itself.

The Convener: Shall we call it the sword of Damocles? I know that that is not what you mean.

Christian Allard: Wording is very important. If the bill is passed, will we have removed automatic early release as we know it? Do you think that the word "automatic" will, slowly and surely, be removed from the language of the discussion?

Professor McNeill: I doubt that the Government's political opponents will let it get away with that. With the bill, we are changing the regime of automatic early release but we are not abolishing automatic early release—it will continue, but it will be fixed at six months.

Christian Allard: That will be the case only for a small number of people, and especially the max-out ones.

Professor McNeill: The number of people who will be affected by the proposal will depend on the judgments that the Parole Board makes and how conservatively it applies the risk criteria. We do not really know the numbers because we do not know how the board will weigh the two risks. There is the risk of releasing someone now and the risk of not releasing them now, which is that we are storing up a bigger problem later. It is not a case of risk versus no risk; rather, it is about risk now or risk later. We cannot predict exactly how the Parole Board's decision making will be influenced by the change in the timing of early release.

John Finnie: Professor McNeill, I do not know whether you have had the opportunity to read Dr Monica Barry's evidence to the committee, but she touches on many of the points that you have alluded to, including the pressures on people who are under supervision. There seem to be a number of issues in play. We are told that the Government wants to reduce the prison population, so more resources would require to be transferred to the community. On parole licences, she concludes by saying:

> "the longer the period on supervision (and the greater the perception that such supervision is merely monitoring risk rather than proactive support), the more likelihood of breach."

However, you are arguing for a longer supervision period. Can you explain that?

Professor McNeill: If I am reading Dr Barry's submission correctly, she is not arguing against supervision; she is talking about the character of supervision. I had the benefit of hearing about her current research last week at a conference at the University of Strathclyde. She is expressing concern, based on her findings, about the fact that released prisoners experience supervision as nothing more than monitoring and control when, in fact, they have significant needs for support with reintegration that, in their view, are not being met. They are being asked to comply with a regime of control, but they are not being incentivised by being offered support that they find meaningful.

John Finnie: Dr Barry talks about proactive support. Do you understand what that might involve?

Professor McNeill: This is where Pete White's voice would be useful. In essence, proactive support would involve going to the person before they were released and having a thorough discussion about their post-release plans, who was important to them, what resources and support they had in the community and what personal resources and assets they had in terms of their skills, abilities, ambitions and education. It would also involve trying to work creatively and constructively with the person to develop a shared release plan that was based on navigating what was going to be a difficult transition. That is not the same thing as going to the person and saying, "My tool tells me that you have five risk factors that must be addressed in order for you to be released. After release, we will seek to manage your risk factors by controlling your access to certain things, by putting a tag on you or by making you submit to restrictions."

One approach is educative, facilitative and proactive and involves an attempt to identify resources and needs and to work with the person to provide the best possible resettlement package—which I think is a human right, as I have explained to you previously. The other approach is a system of control that is designed purely to protect the public and not to address the prisoner's needs. However, unwittingly, it fails to protect the public, because the two things are symbiotically related.

John Finnie: You seem to be describing what might be an individual risk assessment. Does that not suggest the need for an individual disposal rather than one that looks just at the length of time for which someone has been in prison?

Professor McNeill: The current system involves individualised assessment of risk and need, although it might not look as closely as it should at the strengths, resources and other positive assets of a person. The organisational review of the Scottish Prison Service is trying to move in that direction, partly informed by the sort of research that I have been involved in.

The issue involves more than risk assessment. Risk assessment identifies problems and needs, and it gives some guidance on where the social worker, the prison psychologist or whoever is involved might best target their efforts. However, the problem with the way in which risk assessment is used is that the professional is often under the pressure of public scrutiny with regard to the management of risk, and they complete the assessment to identify what the risks are and then develop a plan to manage the risks, which is not the same as reducing them.

John Finnie: I am talking about individual risk assessments—with a small "r" and a small "a"—that would consider all the positive factors.

Professor McNeill: They clearly should.

John Finnie: The Parole Board might come to the conclusion that five months' supervision was suitable for one person and seven months' supervision was suitable for another. I wonder whether the tariff scheme ignores the individual.

Professor McNeill: Any threshold that is set, whether it is set proportionally or uses a fixed time period, runs that risk. It is a question of balance. The danger with a system that is entirely discretionary is that it leaves a lot of power in the hands of professionals who make subjective judgments that, under the pressure of public scrutiny, can become more precautionary and defensive, with the result that release can be subject to delay after delay. That leads us back to the maxing-out problem.

I would still support proportional thresholds that let us say, "We've held this risk as long as we can hold it; now our job is to get out in the community and reduce it."

John Finnie: Could you or Professor Tata comment further on the view that professionals in the field are risk averse for the reasons that have just been outlined?

Professor McNeill: I will answer that question briefly and then my colleague can give his opinion.

The impression that I gained from the evidence that was presented at the conference at the University of Strathclyde last week tends to suggest that there is a need to take risks in order to reduce risk, through a kind of proactive attempt to engage in strategies that give us confidence that skills are being acquired and used. It is just like child rearing. People get to a stage with their kids when they have to let the rope out a bit to see whether they have learned. Similarly, in this context, if we hold on too tight and overprotect, we run the risk of diminishing a person's capacity to manage himself or herself effectively.

Evidence from the study by Dr Barry and Dr Weaver at the University of Strathclyde suggests that the system has begun to move a little too far in the precautionary direction. That is my impression, but as a social scientist I should be careful to separate that from what I can evidence empirically, and I am not sure that I can evidence that empirically. Certainly, recall rates have gone through the roof—the McLeish report is very clear on that. There was a massive increase in the number of people being recalled to custody even before 2008, and I think the numbers have continued to rise. It seems as though something has changed, but it is not obvious that the conduct of the people who are subject to supervision has changed—let me put it that way.

The Convener: There has been no respite from the press, and that is the real court of law, is it not? If, as you rightly say, it is a question of a minor risk being taken by those who manage the system and those within it who are under supervision—one little slip and there is no escape—then I understand why people such as social workers have to cover their backs so much.

Professor McNeill: When I was a practising social worker, I was in the position of having to make those calls. It is extremely demanding work that deserves to be much better respected and supported. We all—including me, in my current job, elected members and all aspects of civil society—have a collective responsibility to contribute to that debate rather than hide from it. To a certain extent, the social work profession needs to advocate for itself and be more confident and assertive in its engagement with public debate. Some of the Government's other reforms—the new community justice measures, for example—will help to provide national leadership that can enhance the quality of the debate.

The Convener: That is coming to us as well.

Professor McNeill: In due course, yes.

The Convener: We volunteered to take it, even though it will be our sixth bill.

Professor McNeill: You are clearly gluttons for punishment.

Professor Tata: I do not have a lot to add—Professor McNeill has explained the situation eloquently. To put it bluntly, having a system of mandatory release saves parole boards from the dilemma that he outlined. It allows them to say, "Okay, we're not going to get the blame for that." Someone has to be released, and there is a good reason why they have to be released at a certain point: because it serves public safety.

The Convener: I thought that Professor McNeill was saying something different. I thought that he was talking about the fact that, if we proceeded with a mandatory community part of a sentence, there would have to be a different way of managing the individual who was released.

Professor McNeill: Both things are true.

The Convener: This is not just to do with "Risk Assessment" with capital letters—John Finnie rightly made that point. That is part of it, but the issue is also the need for more engagement with what would cure or help the individual along the way, and that sometimes involves social workers. I do not want to use the word "risk", but social workers must feel free to make a judgment call in those circumstances—perhaps I can put it like that. Is that correct?

Professor McNeill: That is a summary of what I said. That is correct, but I also agree with what my colleague has said.

The Convener: I did not want to cause division—you are doing so well together.

John Finnie: Professor Tata, may I take you back briefly to your comment about the human rights aspects? The Government seems relaxed about that, as you suggested, but that relaxed position is not shared by the Scottish Human Rights Commission or the Howard League. Will you comment a bit more on that? Just because something has not yet been subject to challenge does not necessarily mean that it ticks all the boxes.

11:15

Professor Tata: John Finnie makes an excellent point. At the end of the Scottish Government's note from last week, there is a brief paragraph that says something about there being no case law about determinate sentence prisoners—the Government chose the word "determinate"—that would cause a problem in terms of prisoners having fair opportunity to access programmes in prison to show that they are not a risk. Of course, the case law that exists is about indeterminate sentences, but I think it is unlikely that, and I can see no reason of principle why, if the courts have said that there has to be fair opportunity for those who are serving indeterminate sentences—I am thinking of the case of James, and others—that principle could not be extrapolated to determinate sentence cases.

There will, understandably, be the desire and the will to challenge what is proposed among people sentenced to lengthy periods. If they were sentenced to a period of 12 years, they would have been getting automatic release after about eight years. Now, if they cannot access programmes and they feel that they have not been given fair opportunity to show that they are not a risk, they will not get out until they have served 11 and a half years. That is three and a half years extra, and for those three and a half years they will say that it is unfair and have a burning sense of injustice. Who would not? I would, too, if it was the case that prisoners did not have fair opportunity to access programmes and show that they are not a risk.

The note from the Government is a little too relaxed on that point, and I think that lawyers who work in the area would confirm that to you. We have sometimes been here before with human rights legislation. Governments have said, "Oh, it's not a problem" and have stuck their heads in the sand only for the problem to come up later. The note is not quite enough; we need to think more carefully about it.

The principle is a really simple one. People need a fair opportunity to make their case. If they are not given fair opportunity, there will be a sense of injustice. That will come.

Professor McNeill: I would like to make an obvious arithmetical point. At present, one of the reasons why a determinate sentence prisoner might not seek to litigate is that we are talking only about the difference between 50 per cent and 66 per cent. Under the new measures, we would be talking about the difference between 50 per cent and something approaching 100 per cent as sentences become very long. If I was a prisoner serving a very long sentence who was unhappy about access to rehabilitative support—and not just programmes in the custodial context—and I had got past my halfway point and did not feel that I was being supported to make progress, I would be consulting my lawyer, and so I should.

Professor Tata: It is bound to have some effect on the ability to manage prisoners who feel upset and angry and feel that they have been treated unjustly.

The Convener: Mr Campbell has a supplementary question or a response to make to that.

Roderick Campbell: I would have thought that the Scottish Prison Service would be acutely aware of those issues and anxious to avoid a position in which it ends up on the wrong end of litigation in the courts.

Professor Tata: I am sure that it will be, but it is not really the Scottish Prison Service's responsibility. It is the Government's responsibility.

Alison McInnes (North East Scotland) (LD): Professor McNeill, do you think that it would be feasible to put into the bill a description of what licence conditions there would be for time served under supervision in the community?

Professor McNeill: I do not know the answer to that because I am not an expert on the parliamentary process. I am not sure how far amendments to a bill can go towards altering its focus or purpose, but it is probably not very far. That is why, in earlier evidence, I said that my instinct is to start again. I am afraid that I cannot really be clearer than that.

The Convener: I do not know either. That is something that we are looking at. There is an amendment to the long title, to

"leave out from <end> to <sentences> in line 2 and insert <amend the rules as to automatic early release of long-term prisoners from prison on licence>",

but I do not know whether that would change the purposes of the bill. That is an issue for the committee to raise with the Government.

Professor McNeill: I presume that anybody could lodge an amendment proposing that, as well as having the current system, where 50 per cent is the point at which prisoners become eligible for consideration for parole, we should also have mandatory release at 75 per cent. An amendment to that effect could be drafted, but it would not address the problem of transparency.

The Convener: We understand that. The period could be changed from six months to something else, but I do not know whether such an amendment would be competent.

Professor McNeill: Perhaps we could insert something saying that a custodial sentence is now to be called a custodial and supervision sentence, for example. I am not sure.

The Convener: We have exhausted our questions. Is there anything else that the witnesses would like to raise? I see Professor Tata taking a deep breath as if something is coming.

Professor Tata: I suppose that I have to ask why we are doing this.

The Convener: We have had that message loud and clear.

Professor Tata: The very bit of the system that works best is going to be squeezed back and the cost will take the majority of the current community justice budget. The Government says that it wants to work towards penal reduction and there seems to be a degree of cross-party consensus on that, yet the concrete measure that we are considering is to do quite the opposite.

The cabinet secretary might have mentioned the tomorrow's women project in Glasgow, which is a great project that came out of the Angiolini commission's report. Its budget, as far as I know, remains incredibly precarious. We are praising the work that is done there, but it has no long-term funding, and the one bit of the system for which we are going to guarantee greatly increased funding is the Scottish Prison Service. That is not a criticism of the work that is being done in prisons.

The Convener: It might be even worse after we hear what is announced in the budget for the Scottish Parliament. Bear with me on that.

Professor Tata: Why spend so much more—£30 million—on a bill that the evidence suggests will reduce public safety and that will not abolish automatic early release?

Elaine Murray: If we were going to remove the six-month period and substitute a percentage of the sentence, what would be your advice on what that percentage should be?

Professor Tata: I think it should be a minimum of 25 per cent.

The Convener: I think that 25 per cent is reasonable as a minimum; 50 per cent sounded a bit big.

I thank our witnesses. As usual, their evidence has been stimulating and interesting. It was almost like a legal seminar. Mr Campbell was about to jump into the debate rather than asking questions, but that is fine.

Our next meeting will take place on 2 June, when we will have an informal briefing on the Community Justice (Scotland) Bill and consider witnesses for that bill. Stage 2 of the Prisoners (Control of Release) (Scotland) Bill will also take place that day, and John Finnie will give us an update on the latest developments with the Scottish national action plan on human rights.

Meeting closed at 11:22.

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