



JUSTICE 2 COMMITTEE

AGENDA

35th Meeting, 2006 (Session 2)

Tuesday 12 December 2006

The Committee will meet at 2.00 pm in Committee Room 6.

1. **Custodial Sentences and Weapons (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

Tracey Hawe
Clerk to the Committee

Papers for the meeting—

Agenda Item 1

Draft report (PRIVATE PAPER) – to follow J2/S2/06/35/1

Written submission from Deputy Minister for Justice [J2/S2/06/35/2](#)

Documents circulated for information—

Appointment of new members to Scottish Police Services Authority – Scottish Executive advertisement

Scottish Consortium on Crime and Criminal Justice – Briefing Paper on Prison Privatisation.

Forthcoming meetings—

- Tuesday 19 December 2006, Committee Room 3, 2pm

SUPPLEMENTARY SUBMISSION FROM DEPUTY MINISTER OF JUSTICE ON CUSTODIAL
SENTENCES AND WEAPONS (SCOTLAND) BILL

I agreed following my appearance at the Committee's session on 28 November to provide further detail on a number of issues raised during what I hope you found to be a helpful exchange.

I want to stress again that the measures in the Custodial Sentences and Weapons (Scotland) Bill are about sentence management, not sentencing itself. They do not affect the range of disposals available currently to the judiciary nor do they change their sentencing powers. The new regime will only apply to those cases where a judge has decided (in the same way as s/he would now), in light of all the circumstances of the offence and the offender that firstly, a term of imprisonment is the most appropriate disposal and, secondly, what the length of that term will be.

However, we are changing the way that sentences are managed. These proposals build upon the measures provided for in the Management of Offenders etc. (Scotland) Act 2005. In doing so, we are aiming to strike the right balance of punishment, rehabilitation and public safety in a way that contributes meaningfully to our work to reduce re-offending and the number of victims of crime. For the first time, all offenders will be under restriction for the full sentence. For those sentenced to 15 days or more, the combination of a period in custody and a period in the community - where the offender will be subject to licence controls - provides the opportunity to work with offenders to address their offending behaviour both during the period in custody and continuing in the community. This is so much more than is done currently with the vast majority of offenders. Under the regime outlined in the Prisoners and Criminal Proceedings (Scotland) Act 1993, all offenders sentenced to less than 4 years simply walk away at the half-way point of their sentence without any control or support. The new measures in the Bill will also provide additional protections for the community against those who present as a high risk of harm. Such offenders can be kept in custody for up to 75% of the sentence and will then be subject to strict controls that would include intense supervision in the community and, where considered appropriate, electronic monitoring.

I believe that this substantial package of reforms will see the end of the current unflexible system of automatic unconditional early release for all offenders, provide clarity in sentencing by making it clear at the time of sentence the minimum period to be spent in prison, take account of public safety by targeting risk and will help tackle re-offending by giving offenders rehabilitative opportunities.

Clarification of section 6 of the Bill

Nothing in the Bill is intended to alter or affect the overall sentence which the judge or sheriff would otherwise have imposed. Section 6 deals with the setting of the custody part of the custody and community sentence once the judge has decided (as he/she would do now) that, having regard to all the information available at the time of conviction about the circumstances of the offence and the offender, imprisonment is the most appropriate disposal. This information can include details about an offender's risk as it presents at that time. Nothing in the Bill prevents the judge from continuing to take account of that information when passing the sentence. Section 6 applies once that sentence is passed.

Section 6(2) provides that the custody part is the period required for "retribution and deterrence" combined. This is the "punishment" element of the sentence. We are content that the term "retribution and deterrence" will be recognised by the judiciary and the public and that it is broad enough to take account of the impact of the crime on the victim and on the public generally. The term has the same meaning for all offenders, including life sentence prisoners.

Section 6(3) prescribes that the custody part must be a minimum of half of the total sentence (eg if the sentence is 6 years, the minimum period that the offender can expect to spend in custody will be 3 years). If the judge is satisfied that the minimum period is adequate for the purposes of "punishment" then he/she will say so. However, if the judge decides that taking into account the factors set out in section 6(4), that half is not enough then that proportion can be extended up to three quarters of the total sentence (using the 6 year example – that would be 4.5 years). The factors at section 6(4) are what we consider to be the central constituents of "retribution and deterrence", or punishment.

Concerns have been raised about the requirement at section 6(5) for the court effectively to “strip out” from the custody part any period that would be necessary for public protection. As we explained when we gave evidence to the Committee, the purpose of the new custody and community structure is to ensure that all sentences of 15 days or more are managed from beginning to end. This approach will enable developments during the entire sentence to be identified and managed – both in custody and the community - in a way that enhances public protection and contributes to reducing re-offending. As noted above, there is nothing in these provisions that will prevent a judge, in so far as this would be the practice at present, from taking into account information available at the time of conviction relevant to an offender’s risk. However, we cannot expect a judge to be able to see into the future and predict risk at the halfway point of what may be a lengthy sentence. That is why there are complementary measures in this package that will enable the ongoing assessment in custody to inform risk as the offender moves through the custody part. If that risk remains high, then the offender will be referred to the Parole Board which can direct that the offender remains in custody for up to 75% of the sentence.

Annex A provides examples of sentences under the current and proposed arrangements which I believe show very well the benefits of the new system.

We appreciate the importance of this section within the package of reforms. We are therefore checking the current provisions carefully against the helpful comments from others who have given or submitted evidence – in particular the Sheriffs’ Association - with a view to deciding whether any clarifying amendments may be required at Stage 2.

Who will refer the cases assessed as risk of serious harm to the Parole Board?

The Committee has sought clarification of who would refer cases to the Parole Board. The Bill and its accompanying documents are clear that the duty to refer cases to the Parole Board remains (as is the case at present) with the Scottish Ministers. This is currently carried out under delegated authority by the Scottish Executive Justice Department. As paragraph 58 of the Policy Memorandum notes, there remains scope for fine tuning of how Scottish Ministers’ functions are split between the Justice Department and SPS. These considerations will be included in the work of the top level planning group to which I referred when I gave evidence. I would stress that, whatever the decision, these are operational issues which flow from the Bill and do not affect the terms of it.

We are conscious, however, of the important role currently played by Scottish Ministers in taking decisions in individual criminal justice cases. It was announced, therefore, when the Bill was published, that there would be an independent review of their role. This review will clarify the precise arrangements which should apply to that decision making process as it is implemented.

The Committee has asked about the information that will inform decisions to refer cases to the Parole Board. Moving away from the current arrangements where cases are referred to the Board based on sentence length as opposed to risk, will allow the Board, under the new arrangements, to better fulfil its core function of assessing whether an offender’s risk is such that he/she should be detained in custody for longer before moving to the community part of the sentence and to set down the conditions under which the offender will serve the community part of the sentence. During the custody part, the risk of serious harm to the public that an offender may pose will be assessed on a regular basis as part of the sentence management process. The Bill makes provision for joint working arrangements between Scottish Ministers (in practice the SPS) and the local authorities to enable appropriate risk assessment and risk management processes to be established. We recognise that the level of this joint working and of the assessments carried out will need to be proportionate to the nature of the offence and to the length of the sentence. This will require the development of new practice. We are already working with the Risk Management Authority, which is also represented on the top level planning group.

It is hoped to build on the Integrated Case Management (ICM) system developed by the SPS which currently applies to offenders subject to post-release supervision, i.e. those sentenced to 4 years or more, sex offenders sentenced to 6 months or more, offenders on extended sentences and offenders serving life sentences (in total about 3000 a year). It provides for the compilation of

information relating to offending, risk and needs of each offender, assessment, initial interviews with each prisoner, social work input and integrated case conferences for each offender. The Bill provides for joined-up arrangements with the appropriate local authority and the SPS working together in assessing an offender's risk, during the custody and community parts of the sentence. Managing an offender's risk from the beginning to the end of the sentence will further enhance public protection. This is a matter of process which will be looked at, amongst other issues, by the Planning Group. The remit and membership of the Planning Group are detailed at Annex C.

Different tests for recall following breach of licence and re-release

It may be helpful to the Committee to explain the difference between the tests for revocation of licence (in section 31) and for re-release following revocation (in section 33). The reasons for wanting the proposed test for recall are at least two-fold: first, Scottish Ministers wish to have the flexibility to recall a prisoner where they have reasonable cause to believe (but do not necessarily have hard evidence) that a licence holder poses a threat to the public; and, secondly, licence-holders must realise that if they do not observe the conditions of their licence then they are liable to continue to serve their sentence in custody. The first of these reasons is the backbone of the "public interest" test in section 31(3) and (5)¹. The second is designed to make it plain, as I think it is entirely right to do, that each of the licence conditions must be taken seriously by an offender and must be observed.

Once an offender has been recalled, the policy intention is that the test for continued detention should be the same as the test for continued detention at the expiry of the custody part or, for a lifer, the punishment part. Where recall is on the basis of, for example, serious charges of assault, the serious harm test will almost certainly be met and continued detention will be appropriate. However, in the situation where someone has for instance failed to live at a particular address in breach of a specific licence condition, the Board will only be able to refuse to direct release if, on investigation, it considers that the offender poses a risk of serious harm. This will involve consideration of the reasons why he/she has failed to live at the address, which could be innocuous or could, for example, be an indication of concern that the offender will try to avoid supervision and return to the behaviours or circumstances which led to the original offence being committed.

We consider that applying different tests for recall and continued detention following recall is an entirely sensible and reasonable approach. It aims to protect the public (where there is risk of serious harm) and to encourage prisoners to observe their licence conditions (where there may be no such risk but the prisoner nonetheless is not complying, meaning that the community part of the sentence is not able to be properly managed).

If, for the sake of argument, we were to make the recall test that of serious harm, it would allow prisoners to disregard any or all of the licence conditions provided that they do not pose a risk of serious harm. For example, if they travel abroad on holiday with their family or friends in breach of a condition not permitting them to leave the UK while on licence, then there would be no sanction for breaching the licence condition. It would also not be possible for Scottish Ministers to recall someone to custody on the basis of early concerns that all may not be well, but rather we would have to wait until the risk of serious harm could be substantiated, possibly resulting in a further offence being committed.

If, on the other hand, the Board were to apply the "public interest" test for re-release then those who were recalled for failure to comply with a condition might not be re-released, even if subsequent investigation revealed that the breach was a relatively minor one and did not, in fact,

¹ The Committee will note that section 31(1) applies to prisoners on licence in the community and section 31(4) to those on licence but who are in jail at the point the licence is revoked (perhaps because they are on remand for another charge). The only difference is that, in the former case, which will be the typical one, the prisoner's licence is revoked and he/she is recalled to prison, whereas in the latter there is no need to recall to prison (as that is where the prisoner already is). However, the test to be applied by Scottish Ministers in considering whether or not to revoke the licence is the exactly the same in each case.

put the public at any risk. As the Bill stands, in such a situation the Board might wish to direct re-release but with tightened licence conditions.

Finally, I might add that we have not seen any other evidence from commentators of how we might balance the rights of both the public and the offender in a better and more effective way than that proposed in the Bill.

Standard licence conditions

The Committee asked if consideration was to be given to including standard licence conditions on the face of the Bill. The current legislation does not set out statutory conditions and we do not intend to prescribe them in this legislation. The reason for this is that conditions will be informed by the individual joint risk assessment which will be carried out for each prisoner. The risk assessment will have regard to a range of factors including the nature of the offence, the offender's response during the custody period and the anticipated circumstances on release, providing flexibility and discretion. Although there may well, in practice, be certain conditions which are typically applied, both by the Parole Board and by Scottish Ministers (as happens at present), we wish to preserve the flexibility to tailor conditions to each prisoner individually. That would, in some cases, be hampered if there were statutory conditions to be applied to all licences.

All offenders serving a sentence of 6 months or longer will receive statutory supervision. So will other categories of prisoner, as set out in section 27(2) of the Bill. (Examples of typical conditions that might apply to an offender subject to supervision are attached at Annex B.) The intensity of that supervision will vary from offender to offender and will be informed by the joint risk assessment. The licence, however, may contain a number of additional conditions requiring anything from drug and alcohol counselling, restrictions on movement and travel, through to closer supervision by social workers or tagging. It will also be competent to include a supervision condition, or a number of additional conditions, in the licence of a person sentenced to under 6 months, if that were considered to be appropriate.

No requirement in the Bill for offenders sentenced to less than 6 months to have conditions attached to licence

The core element of the Bill is that now **all** offenders sentenced to 15 days or more will be subject to a licensing regime that fits their risks and needs, thus enhancing public protection. Sections 24 to 26 of the Bill allow for licence conditions to be attached to the community part of the sentence for all custody and community sentence prisoners and life sentence prisoners. It is a reasonable assumption that most of those sentenced to under 6 months will be assessed as a low risk of 'harm' to public safety and will not require what we currently understand as "supervision". The needs of this group are more about providing opportunities for rehabilitation through access to the range of services that they need – such as drug treatment or accommodation services – to help stabilise their lifestyles and to move them away from offending. The licence conditions may only require conditions that require the offender to be of good behaviour and keep the peace and that he/she does not travel outwith Great Britain. However, there will be cases where supervision based on the assessed level of risk is considered necessary for this group.

Scottish Ministers have said many times before that we must move from a system that is driven by sentence length to one based on risk. That applies equally to offenders sentenced to a short period of custody. The Bill provides a substantial package of reforms that significantly improves the present system.

When will the draft Parole Board rules be available?

As the Committee will be aware, a draft of the rules to be made under section 2 of the Bill will be shared with the Parole Board for Scotland, SPS and ADSW in order to allow them to comment on the proposals. This will be particularly important in relation to the time limits applicable to the various procedures which will need to take place following the reference of a case by Scottish Ministers to the Board. To enable all parties to be fully involved in this process, it is anticipated that a first draft would be ready by February 2007. I would in any event let the Committee see the first

draft once we have consulted all relevant parties and will keep you informed of any changes to this timetable.

I appreciate that the time limits applicable to the various procedures that will need to take place following the reference of a case by Scottish Ministers to the Board have been commented on in the Board's written evidence, particularly in relation to those serving short sentences. I can assure the Committee that there will be no question of Scottish Ministers referring a case in insufficient time for the Board to deal with it. Scottish Ministers have said on more than one occasion that they are committed to ensuring that the Board is legally competent and that it is properly resourced, but resourced in the most efficient and adequate way while at the same time securing best value for money.

I hope you find this helpful. We will gladly provide any further information the Committee may require.

JOHANN LAMONT

ANNEX A

EXAMPLES OF SENTENCE UNDER CURRENT AND NEW ARRANGEMENTS

Example 1 2 year sentence passed by the court taking into account retribution, deterrence and public protection. This happens currently and will not change under the new arrangements.

Current arrangements	New arrangements
No indication given at the time of sentence of period to be served in prison	Indication at the time of sentence that a minimum of 1 year will be spent in prison (custody part) but that the offender could serve a maximum of 18 months. Offender could also be recalled to serve remaining term if licence was breached.
Offender released automatically after 1 year in prison	Offender's risk assessed and released between 12 and 18 months of the total sentence
Not subject to restrictions/ statutory supervision in the community	Subject to licence restrictions and supervision in the community
May only be returned to custody if convicted of an offence committed during the second year of sentence (at discretion of the court)	May be recalled to custody for breach of licence (not necessarily a new offence) and could, subject to review by the Parole Board, remain in prison until the end of sentence

Example 2 12 year sentence passed by the court taking into account retribution, deterrence and public protection. This happens currently and will not change under the new arrangements.

Current arrangements	New arrangements
No indication given at the time of sentence of period to be served in prison	Minimum custody part would be 6 years, however, judge considers that the period in custody should be more than the minimum. Judge indicates at time of sentence that given to the serious nature of offence, history of violence and the fact that the offence was committed when on licence from a previous sentence, a minimum of 8 years will be spent in prison (custody part) but the offender could serve a maximum of 9 years. Offender could also be recalled to serve remaining term if licence was breached.
Parole Board reviews suitability for early release on parole at 6 year stage of sentence	Assessed as presenting a risk of serious harm and referred to the Parole Board at 8 year stage of sentence to decide whether he/she should continue to be defined
Released between 6 and 8 years on supervision and subject to licence conditions	Released between 8 and 9 years on supervision and subject to licence conditions
Subject to restrictions/ statutory supervision in the community	Subject to licence restrictions and supervision in the community
May be recalled to custody for breach of licence (not necessarily a new offence) and could, subject to review by the Parole Board, remain in prison until the end of sentence	May be recalled to custody for breach of licence (not necessarily a new offence) and could, subject to review by the Parole Board, remain in prison until the end of sentence

ANNEX B

EXAMPLE OF LICENCE CONDITIONS WHERE SUPERVISION IS A REQUIREMENT

In accordance with the provisions of section [insert section] of the [insert Act], the Scottish Ministers hereby release you, *[insert Prisoner's Full Name]* (DoB [insert date of birth]), on licence with effect from [insert date of release].

You are required to comply with the following conditions (which may be added to, varied or cancelled at any time before the expiry of the licence):-

1. You shall report forthwith to the officer in charge of the office at

[insert full postal address of the supervising Council]
2. You shall be under the supervision of [insert title and full name of supervising officer] or such other officer to be nominated for this purpose from time to time by the Director of Social Work/Chief Probation Officer of [insert name of Council].
3. You shall comply with such requirements as that officer may specify for the purposes of supervision.
4. You shall keep in touch with your supervising officer in accordance with that officer's instructions.
5. You shall inform your supervising officer if you change your place of residence or gain employment or change or lose your job.
6. You shall be of good behaviour and shall keep the peace.
7. You shall not travel outside Great Britain without the prior permission of your supervising officer.

[insert any additional conditions]

Failure to comply with these conditions may result in the revocation of your licence and your recall to custody.

This licence expires on [insert sentence expiry date] unless previously revoked

ANNEX C

CUSTODIAL SENTENCES PLANNING GROUP**Background**

The Custodial Sentences Planning Group (CSPG) was established in September 2006 to oversee the implementation of those provisions in the Custodial Sentences and Weapons (Scotland) Bill that relate to the sentencing and release of offenders from custody. All criminal justice agencies are represented on the Group as the provisions will impact on all of the main service providers. The Group is chaired by the Justice Department's Head of Criminal Justice Group and supported by a small Secretariat.

Remit

The Group's remit, as agreed by the members at the first meeting is:

"To implement the changes in law covering the release and post custody management of offenders. Specifically to:

- agree and deliver an action plan covering the key implementation tasks
- agree the implementation pathways, timings and interdependencies and identify how the policy will be delivered in practice
- monitor and review progress on a regular basis
- scan the horizon to anticipate, identify and handle upcoming issues that need to be managed
- report to Ministers."

Membership

Membership of the CSPG is as follows:

Name	Organisation
Valerie Macniven (Chair)	SEJD Head of Criminal Justice Group
Jane Richardson	SEJD Parole and Life Sentence Review Division
Elizabeth Carmichael	SEJD Community Justice Division
Colin Mackenzie	Association of Directors of Social Work
Alan Baird	Association of Directors of Social Work
Sheriff Hugh Matthews	Sheriffs' Association
Alison Di Rollo	Crown Office and Procurator Fiscal Service
Rachel Gwyon	Scottish Prison Service
Eric Murch	Scottish Prison Service
David Forrester	Scottish Court Service
Marlyne Parker	District Court Association
ACC Iain Macleod	Association of Chief Police Officers (Scotland)
DS William Manson	Association of Chief Police Officers (Scotland)
Anne Connelly	Community Justice Authorities
Professor Sandy Cameron	Chair, Parole Board for Scotland
Rosin Hall	Chief Executive, Risk Management Authority
Lindsay McGregor	Convention Of Scottish Local Authorities
Neil Paterson	Victim Support Scotland
Sue Matheson	Safeguarding Communities Reducing Offending
Angela Morgan	Families Outside
Ruaraidh Macniven (as observer only)	Lord President's Office
Diane Machin	SEJD - Secretariat
Graeme Waugh	SEJD - Secretariat