



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

**Criminal Justice (Northern Ireland) Order 2008:
Commencement of Articles 19 and 20**

3 May 2012

NORTHERN IRELAND ASSEMBLY

Committee for Justice

Criminal Justice (Northern Ireland) Order 2008: Commencement of Articles 19 and 20

3 May 2012

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Seán Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Patsy McGlone
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Max Murray	Northern Ireland Prison Service
Mr Alan Smyth	Northern Ireland Prison Service

The Chairperson: We now move into our evidence session on articles 19 and 20 of the Criminal Justice (Northern Ireland) Order 2008. On 22 February, the Department wrote to the Committee to advise it that the Minister is minded to commence articles 19 and 20 of the 2008 Order, but is keen to have the Committee's views on his proposal. Article 19 provides for the early release on licence of certain categories of low risk prisoners. Article 20 would allow the Department of Justice to release prisoners on compassionate grounds in exceptional circumstances. The Committee requested an oral briefing on the issue, and officials are here. The session will be reported by Hansard. I invite you to outline the provisions in articles 19 and 20.

Mr Max Murray (Northern Ireland Prison Service): Thank you, Chairman. As you rightly said; on 21 March you considered our paper on the commencement of articles 19 and 20 and you decided that you wished to receive an oral briefing on the matter. I will begin with article 19. When the article was originally drafted in 2007, the Department saw it as a prospective power that could be introduced at a later date, if circumstances changed.

At that time, factors that were thought might influence its commencement were as follows: a refocusing on those who need to be worked with in custody to address offending behaviour; in parallel, the early release on licence of model low risk prisoners who did not need such interventions; the

freeing up of pressurised accommodation, caused by an ever-rising prisoner population that was encountered as the new public protection sentences began to bed in, and the availability of additional capacity for post-release supervision on licence by the Probation Board. Our carefully considered view is that all three conditions are now being met.

Prison population figures have risen by almost 25% since 2007 — up from 1,450 then to yesterday's total of 1,802. That has created real and growing pressure on accommodation across the estate, particularly at Maghaberry. A mechanism to release small numbers of low risk offenders early and on licence would play a part in reducing this pressure. There has also been a change of emphasis in the Northern Ireland Prison Service (NIPS), which means that sentence managers are now more focused on helping prisoners to address their offending behaviours through programmes, interventions and mentoring. Model low risk prisoners do not require such intervention work and it could be argued that they would be better served by being allocated earlier opportunities to resettle in the community on licence. Finally, since the roll-out of the new sentencing framework in 2009, the Probation Board for Northern Ireland (PBNI) has had additional capacity to supervise those types of low risk offenders on licence in the community.

Article 19 of the 2008 Order provides for the Department to release certain categories of low risk prisoners on licence. The legislation is prescriptive. If introduced, it would allow qualifying prisoners to be released up to 135 days before their current earliest release date. It will apply to fixed-term prisoners who are serving a sentence of at least six weeks, have already served at least four weeks and have reached at least the half-way point of the custodial part of their sentence. I must emphasise that the legislation specifically excludes those prisoners given life sentences, indeterminate custodial sentences (ICS) or extended custodial sentences (ECS), latterly known as public protection sentences. It also excludes sex offenders, those who are subject to a hospital order or transfer direction under the Mental Health (Northern Ireland) Order 1986, those liable to removal from the UK at the end of their sentence and those recalled to prison having been released early under this article or article 20.

Prisoners who meet the criteria will be subject to a robust risk assessment, which will determine their level of risk and whether they are suitable for early release on licence. If article 19 comes into play, it is estimated that we could reduce the capacity of the total daily prison population by 50, and when cell sharing is taken into account, it could potentially free up an additional 25 cells. Given the current and foreseeable pressures on our finances and accommodation, that would represent a significant efficiency.

I must emphasise that if article 19 is commenced, the Department would not usurp the role of the parole commissioners. At present, the commissioners recommend licence conditions for life sentence, ECS and ICS prisoners, and those prisoners who are recalled on determinate custodial sentence licences who are released, whereas the Department of Justice, with help from the Probation Board, sets licence conditions for other categories of prisoners. As I said earlier, those categories of prisoners for whom there is parole commissioner involvement in licence setting would not qualify for release under article 19.

Qualifying prisoners fall into two groups. The first group comprises those prisoners who would ordinarily leave prison at the time-served point without any kind of licence. They would mainly be people who are serving sentences of less than one year. The second group comprises those prisoners who have received determinate custodial sentences and who currently leave custody with a licence that is drawn up on behalf of the Department by the Prison Service with input from the Probation Board. If released early, both categories of prisoners would leave prisons with a licence. Licence holders would be liable to immediate recall if licence terms were breached.

At present, the only prisoners who the Department has the power to release early on compassionate grounds are those serving life sentences, and that power is contained in article 7 of the Life Sentences (Northern Ireland) Order 2001. Commencement of article 20 of the Criminal Justice (Northern Ireland) Order 2008 will extend a similar power to all other categories of prisoners. Like article 7, there is a requirement in article 20 to consult with the parole commissioners if the prisoner considered for release is serving an ECS or ICS; that is, public protection sentences. Under both articles, prisoners are required to be released on licence. In addition, the Northern Ireland Act 1998 (Transfer of Policing and Criminal Justice Functions) Order 2010 amended article 20 to allow the Secretary of State to notify

the Department of Justice that a prisoner is not to be released under that article without his consent if his decision to give such a notification is arrived at wholly or partly on the basis of "protected information".

Like article 7 of the Life Sentences (Northern Ireland) Order 2001, article 20 of the Criminal Justice (Northern Ireland) Order 2008 makes it clear that release on compassionate grounds can be considered only when the Department is satisfied that exceptional circumstances exist. Case law means that the test for article 7 is very high, and, given the similar wording of article 20, the test for it will also be very high.

The power under article 7 has only been exercised twice since 2001. In the first case in 2005, the prisoner concerned suffered from Huntington's chorea, a degenerative and, ultimately, fatal brain disease. That individual required lifelong, 24-hour, intensive specialist health and nursing care, which in-house medics advised could not be provided in a prison setting. He was released on licence with six supervisory conditions, as recommended by the then Life Sentence Review Commission. He remains in a specialist facility that cares for people with severe brain trauma injuries. The second case in 2008 was that of a rapidly deteriorating patient who was terminally ill with renal cancer. Although he was already in hospital, under the terms of prison rule 27(2), he was released on licence, with seven supervisory conditions as recommended by the life sentence review commissioners. He died within several days of his release.

At present, article 7 of the Life Sentences (Northern Ireland) Order 2001 aside, the Prison Service uses prison rule 27(2) to facilitate the release of prisoners to hospital when medical advice suggests they are in the late stages of life. It is done in order to let them pass away with dignity or in an environment that is free of security and where there is no restriction on family visits. However, the provision is used to release prisoners on only a temporary basis. In law, they remain in custody. Article 20, like article 7, would allow us to go one step further and release individuals on a permanent basis, albeit on licence, thus allowing them to spend their last days as a free person. We see that as a being wholly empathetic move and one that would be based firmly on compassionate grounds.

Mr Smyth and I are happy to take questions.

The Chairperson: Thank you. Will you confirm that this is a commencement order in the 2008 legislation, so David Ford can do this regardless of what the Committee and Assembly think?

Mr Murray: I do not think that David Ford would ignore the Committee's views. If it expresses strong views, I think that David Ford would take those into consideration.

The Chairperson: It is just so that we are sure that this is not something to which the Committee will have to propose amendments that will ultimately come to the Assembly. The Minister can do it if he wants to, and our hands will be bound by that. There is nothing that we can do to stop it, because it was introduced under direct rule.

Mr Murray: Yes.

The Chairperson: OK. Having said all that, I have concerns about the implementation of these articles. The basis of their implementation appears to be premised on the fact that you are struggling to deal with the size of the prison population because, since the Order was introduced, it is up by 23%. If that is the real reason for it, my concern is that you need to do something to make sure that prisoners can be accommodated in the estate.

Mr Murray: We are doing both. You heard the discussion on the estate strategy the other day. We will open a new 120-bed block before the end of June, and a new 20-bed special unit is available for handover now. So, additional accommodation will be available. We are also bringing forward plans to build another 240-bed block on the Maghaberry site as quickly as we can, but the reality is that it will be 2015 before that facility will be available. It is also a reality that we have around 550 prisoners doubling in Maghaberry's square houses, in cells that were only ever designed for one prisoner. We

are looking downstream; if the population keeps rising at this rate, accommodating all the prisoners will be a challenge for us.

The Chairperson: So, someone is charged, put before a court and — shockingly — manages to get a custodial sentence. Yet, we now want to introduce a licence to ameliorate that sentence. In the balance between what the community wants to see and what is being proposed, is this not a further shift from where the public think that the prison and justice systems should be?

Mr Murray: I guess that the vast majority of the public would say that this is far from ideal. In managing the situation at this point, we are trying to be pragmatic and anticipate difficulties and problems. We do not expect that we will be rushing to use article 19 at every turn. However, at least it will be a facility that is available to us. We could draw on existing legislation, such as article 16 of the Prison Act (Northern Ireland) 1953 or prison rule 27(2), but neither is as tidy as having a specific provision in article 19.

Mr Alan Smyth (Northern Ireland Prison Service): It would also require them to be released on licence, which the powers that Max referred to would not.

The Chairperson: From a prison management point of view, I accept that if you are struggling to deal with the number of people, then the fewer you have, the less of a problem you will have in trying to house them. However, this needs to be considered against the wider policy context of the justice system. Furthermore, life sentence prisoners have pressed very hard to be released on compassionate grounds, yet they are still alive. The DUP is concerned about the introduction of these articles. However, it is not in our gift and it is up to the Minister.

Mr McCartney: I have a couple of questions. Will the introduction of article 19 be led by the fact that prisons are overcrowded or do you see it becoming policy?

Mr Murray: There is no doubt that the article's inception in 2007 was led by the issues around overcrowding. However, there will be an exploration of how it can be used in potentially resettling prisoners and getting them jobs. On the odd occasion, prisoners may also be offered third-level education courses and will need access to those courses at a specific time. There are other opportunities, and we would have another tool in our armoury to draw on to help prisoners to resettle in the community. It could be used for a number of purposes.

Mr McCartney: This might sound a bit strange, but how will it be initiated? Will prisoners apply or will you literally tell them that they are getting out tomorrow?

Mr Murray: I will leave that to my colleague to answer.

Mr Smyth: The finer details have yet to be worked out, and it could be a mixture of those things. A case, or sentence, manager could decide that they had done what they can with a prisoner inside, that he should be tested in the community and that he should be tested a little early. We would then release that prisoner on licence and do that testing. If it does not work, that prisoner would be brought back to serve the rest of his time inside. It is probably a combination of things.

Mr McCartney: It could create management problems. If one person on a wing feels that he is suitable and is overlooked yet another person gets it, that could create a problem for management.

Mr Murray: You are moving into the territory of judicial reviews.

Mr McCartney: Aside from that, I am talking about keeping good order in prisons. There will be issues of public perception, but, for the purposes of good management, it must be carried out in a way that individuals do not feel aggrieved.

Mr Murray: I agree. However, it should all be based on evidence-based decision-making on the back of the risk assessment. It should be done in the same way as the process that allows prisoners to access Foylview or what was the prisoner assessment unit on the Crumlin Road.

Mr McCartney: My understanding is that there is current provision for compassionate release for indeterminate sentences but none for determinate sentences.

Mr Murray: That is correct.

Mr Smyth: That is correct for life sentence prisoners but not for any other category of prisoner.

Mr McCartney: If someone is serving a four-year sentence, there is no statutory provision and it has to be dealt with under prison rules.

Mr Murray: Yes; that would be dealt with under rule 27(2).

Mr McCartney: Thank you.

Mr Wells: So, this is entirely based on the fact that you are overcrowded, rather than any sense of fairness in sentencing.

Mr Murray: When the article was originally incepted in 2007, that was the reason.

Mr Wells: The trend in prisoner numbers is clear. It did not suddenly come and bite you, and you could have seen it coming. Surely, rather than devising cunning plans to get people out early, you should have been seeking to provide more accommodation. Why have you resorted to this measure rather than providing more accommodation?

Mr Murray: When we carried out the initial review of the adult male estate in 2007, the increase in prisoner population projected by NISRA was on a 3%, 5% or 7% basis. At that time, it was recommended that we should plan on the basis of an increase of between 3% and 5%. I do not think that anyone foresaw the accelerated rate of imprisonment that we are experiencing. For example, at one stage this year, compared with last year, we were 23% higher, which was never anticipated. We now have 1,800 prisoners, which was the expected prison population in 2020. We have had an unprecedented acceleration in the prisoner population.

Mr Wells: You said that to meet that issue that you have doubled up in Maghaberry.

Mr Murray: Yes.

Mr Wells: Is that 250 cells or 500 prisoners? I am not sure.

Mr Murray: It is 250 cells.

Mr Wells: Presumably, you have the capacity to go further and double up in other wings of Maghaberry?

Mr Murray: We have capacity, but we would have to look at the implications of doubling up, say, long-term life-sentence prisoners and vulnerable prisoners. There are categories of prisoner that you would not necessarily double up. We operate a cell-sharing risk assessment. We will consider doubling up anyone who is approved for cell-sharing.

Mr Wells: You still have capacity of the appropriate prisoners to double up. Doubling up was the norm in prisons until the 1970s. Doubling and even trebling was the norm. So what is the issue here? If you have that capacity, rather than let them out, you could just make life a bit more difficult for them for a few more months.

Mr Murray: There are safety issues for both prisoners and staff. You have to take cognisance of the fact that, in a facility originally designed for 460 prisoners, we are currently accommodating over 1,000. That will increase with the 120 new prisoners coming on. There has to be a limit to what you can accommodate in the facility.

Mr Wells: It is perfectly acceptable, for instance, to double up in a school dorm situation — but not for prisoners?

Mr Murray: As I said, there are 550 prisoners who are doubled up. We use doubling. Personally, I do not favour doubling. People deserve to have a cell to themselves. Cells with in-cell toilets are not designed for doubling. I do not think it reasonable to double up, but it is the situation that we are in and we use it.

Mr Wells: There is a victim to all these crimes. How do you think the victims will feel when people are let out, not because you feel that it is particularly appropriate to let them out or they have mended their ways, but because you simply have not got room for them?

Mr Smyth: I think there is a danger here of putting too much emphasis on our applying article 19 because we have just too many prisoners inside. There are other reasons for considering letting people out early. We may have done the intervention work that we need to do, or we think that it would be better to do intervention work in the community, rather than in a prison environment. I would not put as much emphasis as you put on overcrowding as being the driver behind this.

Mr Wells: That is the difference between us. I see prison as remedial action and punishment. Therefore, you could have someone who is ready to go out and have a high-powered job five days a week, but I think he should still do his time because that is his punishment. That is what he has to pay society for what he or she did. This is wrong. People will feel that it is unfair that folk are being let out early simply because, at the end of the day, you have not projected forward sufficiently to provide accommodation to keep them, or you are not prepared to have the poor souls sharing two to a cell. Frankly, an awful lot of people out there would not be remotely concerned about that.

Mr Smyth: Again, you put too much emphasis on overcrowding. We are talking about reducing by a maximum of 50 people. Article 19 will not make a massive difference to overcrowding.

Mr Wells: Yes, but as the trend continues you will have to invoke article 19 again and again. The new accommodation will take a fair bit of time to come on line. If you go down this route, you will continually use article 19 to relieve overcrowding.

Mr Murray: That is certainly not the intention, but I cannot anticipate what the situation will be. If the current level of imprisonment continues, yes, it will be a significant challenge for us to accommodate such numbers.

Mr Wells: I am also slightly concerned about the mechanism being used. It is a piece of legislation which was passed at a time when we did not have control over policing and justice. Am I right in thinking that it does not even have to go before the Executive for approval?

Mr Smyth: I do not think it does. It is on the statute book already. We are just seeking a commencement Order for it.

Mr Wells: It is a major change of practice and we, the elected representatives, have simply no power over whether we can amend or stop it. It is laid before us on a take-it-or-leave-it basis. Indeed, we do not even have the option of leaving it. Is that right?

Mr Murray: As the Chairman articulated, it is the case that we are here consulting. David Ford will take account of your views but, if he chooses to move ahead with it, a commencement Order can be laid. That is my understanding.

Mr Wells: That is not very satisfactory. Thank you.

Mr A Maginness: What is the reason for the substantial increase in imprisonment? Have you analysed it?

Mr Murray: We have attempted to get a comprehensive analysis of what is going on. We have not been able to bottom it out. It is happening in the remand, sentenced and female populations — all offender populations. It is happening across the board.

Mr A Maginness: Is it nothing to do with the indeterminate or extended custodial sentences?

Mr Murray: Yes, there is an element of that. At the moment, a third of licensed prisoners are being recalled into custody by the executive recall unit. I think that the figure involved is about 130 or 140.

Mr A Maginness: The prison authorities should have some flexibility on this matter, but it does have a resource consequence for the Probation Board, in particular, and for other services. Do you know if the Probation Board is in a position to meet that consequence if this commencement Order is implemented?

Mr Murray: I have not discussed this specific order —

Mr Smyth: I have discussed it with colleagues in the Probation Board, and they are onside with our proposals. They have the capacity to do what is required of them by article 19.

Mr A Maginness: OK. On a final point, I find it extraordinary that there are early release powers on compassionate grounds only for those serving life sentences. It seems extraordinary that a person serving a non-life sentence cannot be released on compassionate grounds. But that is the law, is it not?

Mr Murray: It is.

Mr A Maginness: The only release for them is de facto, through hospitalisation.

Mr Murray: Under section 16 of the 1953 Act?

Mr A Maginness: Yes.

Mr Murray: Yes.

Mr A Maginness: However, at that point, they are still, at least notionally, prisoners.

Mr Murray: Yes.

Mr Dickson: I genuinely share the concern that article 19 will be used as an opportunity to relieve pressure in terms of cell usage and the number of prisoners and the facilities that are available to them. Nevertheless, the other side of that coin that has to be welcomed and seen clearly is the opportunity for the Prison Service to better manage prisoners, particularly those approaching the end of their sentences who are identified as genuinely benefiting from early release and working with the Probation Board. Apart from the building programme, can you envisage other areas of relief for the estate? I am thinking about those who, in my view, are probably inappropriately imprisoned for fine default. Would addressing that area differently provide further accommodation?

I share some of my colleagues' concerns that release will come about because you have accommodation concerns, but I believe and am cognisant of the fact that prison is about rehabilitation, and when someone has reached that point, a judgement call on releasing, with appropriate supervision, someone into the community has to be made by the appropriate authorities, in conjunction with the Probation Board. With regard to the point about article 20, I entirely share Mr Maginness's concern that that is not available. As you said, a very high threshold is set for someone to have that conferred on them, and I am very supportive of that.

The Chairperson: My issue with article 20 is that it might be easier to defend it being applied to everybody bar life sentence prisoners. With a recent case in mind, the confidence that can be placed in that system causes me concern. It is difficult to argue against some form of compassionate release for someone who is terminally ill, but confidence in that article is damaged when people released on compassionate grounds remain alive after a significant time out of prison.

Mr Smyth: But the person that we are talking about who is still alive after being released under article 7 is in a permanent vegetative state. He is living in a facility in greater Belfast; with all the will in the world, he could not be looked after by the Prison Service.

Mr Murray: I know the case that you refer to, but that was not a decision of the Prison Service.

The Chairperson: No; I appreciate that.

Mr McGlone: Coincidentally, my colleague touched on an interesting point. This is not what I was going to raise. Thank you very much for your information. The prison population has risen substantially since 2007. In our communities, we witness a rise in petty theft and minor crimes. There are two elements to that. How much of it is associated with the dip, the recession that we are going through? There is an increase in petty theft and that type of stuff that people wind up in prison for. That is one observation, but you guys are the experts, and you will know why people are there.

The second thing is this. Mr Wells is quite right. There is usually a victim in most crimes. Can you talk me through the process of how the assessment might work for each individual and how much, or in what way, consideration is given to the effects on the victim? If someone has had their house broken into or whatever it might be, clearly their views would have to be factored into it, however it is done. The second bit is in regard to this. Last night, I was reading the bit on article 20 and the complete anomaly example was given, of someone, potentially in the last stages of their life, released on a temporary basis. I do not factor the logic of that at all, because if it is their last days of life, they are not going to be out temporarily.

Mr Smyth: But that is the only mechanism that we have at the minute.

Mr McGlone: Yes, that is what you have; but it is a tidying-up exercise there to face the reality of the situations that you are meeting. I am interested in your views and professional opinions on those points from the earlier question, please.

Mr Murray: I will talk about the process first of all, and then Alan will talk about the victims end of it, because that falls within his remit. As Alan has said, and just to make it clear, we have not yet put operational guidance out as to how these articles would be implemented. That would be rather presumptuous. We have not really given it thought. However, the issue would fall to the offender management units, as they do in so many areas of work, whether it is to do with compassionate temporary release, resettlement leave or temporary release through the home leave board. There are processes and procedures in place for risk-assessing prisoners. We will look at a prisoner's criminal history, history in custody, background and circumstances and what we call his assessment, case management and evaluation (ACE) risk assessment score, which is the risk assessment tool that we use in relation to the dangers of reoffending or dangerousness. We take all those into account. You are right in saying that one other factor is the victim, particularly registered victims.

Mr Smyth: For the vast majority of victims registered with our scheme, the perpetrators of crimes against them are those who have received an ICS, ECS or life sentences, and they would not fall under the terms of article 19 in any case. However, we do take victims' reps into account when we are looking at licensing conditions, and the impact on the victim is a factor in coming to a decision on whether to release someone. If concerns are such that the person has to be seen to be serving out their time, it may mean that we do not apply article 19.

Mr McGlone: The other point is about the types of crimes for which people have been convicted. Have you noticed a change in that? You know, the point that I was making there about the recession.

Mr Smyth: This is not scientific, but I spend a lot of my time at panel hearings which set licensing conditions. A lot of them are for drug offences, violence against the person and domestic violence. The drug-related crimes are purely for profiteering purposes. It is not using, it is pushing and selling.

Mr McGlone: Thank you very much for that.

Mr McCartney: This is just an observation. It can assist with good behaviour and it has a wider impact, but it can be undermined a bit. At present, how many people are in the system for fine default for TV licences?

Mr Murray: It is usually about 20 to 25 in any one day.

Mr McCartney: So you have been through all this, maybe like in inverted commas, "pain", yet we have people in the system, clogging up cells for something like that. I do not say that no victim is involved, because it is obviously —

Mr Murray: The Committee is aware that a pilot study is ongoing in Newry at the moment on supervised activity hours in the community. So our intention is to work to a position where fine defaulters do not come into custody.

Mr McCartney: You can see where the argument leads. We are overcrowded, yet the system with TV licences is nearly —

Mr Murray: We are working at a pace to try to deal with that. We are the first to say that fine defaulters should not be in custody if there is a reasonable alternative.

The Chairperson: Thank you very much.

Mr Murray: Thank you.