

THE SYSTEM OF EARLY  
CONDITIONAL RELEASE  
IN THE REPUBLIC OF ARMENIA

MAIN ISSUES AND WAYS OF DEVELOPMENT

Civil Society Institute  
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## PREFACE

In May-December 2011, the Civil Society Institute, with support from the OSCE Office in Yerevan, conducted a study on early conditional release. The main purpose of the study was to help strengthen the early conditional release system in Armenia by developing recommendations, as a result of examining the current system and the relevant international experience, as well as of local needs assessment.

The study made it possible to identify a number of problems in the early conditional release system. The problems are related to the legal norms regulating the early conditional release system, principles and criteria, as well as the composition and activities of the decision-making bodies. Perception of the early conditional release system in Armenia was treated as a separate problem.

CSI's experts examined the legislation that regulates the early conditional release system, which made it possible to identify a number of issues.

During the study, interviews were conducted with officials and specialists dealing with the early conditional release system, including judges, advocates, current and former members of independent commissions. In total, 17 people were interviewed. Interviews were conducted anonymously, on the basis of a special questionnaire.

When preparing the report, various models of early conditional release (parole) in a number of Western countries were examined. Their advantages and disadvantages were assessed from the point of view of feasibility of introducing them in Armenia. The authors of the report also examined the main values and principles that the system is based on. The report contains a number of detailed recommendations, with a view of helping the relevant Armenian policymakers in developing and improving the early conditional release system in the country.

The report consists of seven parts. The first part describes the current early conditional release system in Armenia.

The second part is dedicated to the problems that exist in the early conditional release system in Armenia, including the results of examining the relevant legislation and practice.

The third part contains a description of bodies making decisions on early conditional release in a number of other countries, as well as the procedures they are supposed to follow.

The fourth part contains an analysis of the goals and criteria of early conditional release. In particular, this section presents peculiarities of perception of early conditional release in Armenia, as well as how they are reflected in other countries and international documents. This part also describes the criteria adopted in other countries and enshrined in international documents, as well as mechanisms for assessing the risk of repeat offending. The fourth part concludes with an analysis of the forms and role of making reparation to victims in the early conditional release system.

The fifth part of the report discusses issues related to procedures and principles of the setting of conditions when deciding on early conditional release, as well as amending and removing such conditions.

The sixth part contains CSI's conclusions reached as a result of the study, as well as CSI's views on the future development of the early conditional release system in Armenia.

The last (seventh) part of the report contains recommendations for reforming the early conditional release system in Armenia.

According to CSI's experts, this report will encourage the development and implementation of reforms in the early conditional release system, and serve as a useful source of practical ideas. CSI stands ready to support policymakers with research in every stage of the early conditional release system reforms in Armenia.

# 1. EARLY CONDITIONAL RELEASE IN ARMENIA

The system of early conditional release is regulated by Article 76 of the RA Criminal Code, Article 434 of the RA Criminal Procedure Code, Articles 114 to 116 of the RA Penitentiary Code, as well as the RA President's Decree NH-163-N of July 31, 2006, the RA Government's Decision 1304-N of August 24, 2006, and the RA Minister of Justice Order QH-46-N of September 8, 2005.

According to the first part of Article 115 of the RA Penitentiary Code, when a prisoner has served a specific part of his sentence, as determined by law, the administration of the penitentiary is required to consider, within a month, the possibility of recommending the said prisoner for early conditional release, provided that he had not received any disciplinary sanctions during his time in prison.

If the administration of the penitentiary decides to recommend for early conditional release a prisoner sentenced to a determinate term or to life imprisonment for a medium-gravity, serious or especially serious crime, it sends the decision to an independent commission for approval.

Only when an independent commission approves the aforementioned decision, the administration of the penitentiary sends a motion to a court, requesting early conditional release of a person sentenced to a determinate term or to life imprisonment for a medium-gravity, serious or especially serious crime, or replacement of the remaining part of the sentence with a softer sentence.

Procedures for the administration of the penitentiary to discuss issues related to recommending a prisoner for early conditional release or for replacement of his remaining sentence with a softer sentence are defined in accordance with the RA Government's Decision 1304-N of August 24, 2006.

The process of early conditional release of prisoners is carried out by the penitentiary's administration through commission. An administrative commission, made up of the following individuals, is set up for the purpose of considering the early conditional release of a prisoner:

- 1) commission chairman – head of the penitentiary,
- 2) deputy chairman of the commission – deputy head of the penitentiary (coordinator of social, psychological and legal work),
- 3) commission secretary – head of the penitentiary’s department for registration of detainees and prisoners,
- 4) members:
  - a) deputies of the head of the penitentiary,
  - b) head of the penitentiary’s social, psychological and legal work department,
  - c) head of the penitentiary’s medical services department,
  - d) head of the penitentiary’s security department.

The commission secretary has no voting rights.

The administrative commission may decide to include up to two other employees of the penitentiary in the commission. The administrative commission is required to hold a session within a month. The session is valid, if more than half of the commission members are present. The issue is discussed in the presence of the prisoner in question, if he so wishes. Every member of the administrative commission may express his opinion of the prisoner. The prisoner may provide explanations during the discussion of issues related to him. Decisions are made by an open vote, by a majority of the administrative commission members present at the session. The voting takes place in the absence of the prisoner.

The following conditions are required in order to discuss the issue of early conditional release of a prisoner:

- a) the prisoner is supposed to have served the minimum time required by law;
- b) the prisoner has provided his written consent;
- c) the prisoner has positive characteristics;
- d) the prisoner has not been subjected to sanctions.<sup>1</sup>

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<sup>1</sup> The RA Minister of Justice Order QH-46-N of September 8, 2005, paragraph 5.

Consideration is also given to social, psychological and legal work done with the prisoner and the results of correctional measures.<sup>2</sup>

The group leader writes up a characteristic of every prisoner, taking into consideration the conclusions of various departments (security, material/technical support, medical), and reports to the commission on each prisoner's compliance with legal requirements during the period of incarceration (incentives, penalties, the reasons for imposing the penalties, activities aimed at preventing or reducing disciplinary violations, behavioral changes or the lack thereof, level of risk and correction, availability of housing (shelter) after release, family members' attitude towards the prisoner and other relevant factors). Also reported are the results of social, psychological and legal work conducted with the prisoner, his participation in work, educational, cultural, athletic or other similar activities, and conclusions provided by structural units.<sup>3</sup>

If the administrative commission makes a decision to file a motion requesting early conditional release of a person sentenced to a specific time in prison or to life imprisonment for a medium-gravity, serious or especially serious crime, the commission chairman sends the decision, within three days, to an independent commission for approval.<sup>4</sup>

The RA President's Decree NH-163-N of July 31, 2006 defines procedures for the formation and activities of independent commissions, their composition and financing. Independent commissions include representatives of the relevant agencies and the public. The actual lists of members of independent commissions (by individual penitentiaries they are going to serve) is approved by the RA President.<sup>5</sup> Independent commissions are made up of 8 members, the majority of whom represent various state agencies (the Police, Ministry of Health, National Security Service, President's Administration,

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2 Ibid., paragraph 6.

3 Ibid., paragraph 11.

4 The RA Government's Decision 1304-N of August 24, 2006, paragraph 12.

5 The RA President's Decree of July 31, 2006, "On Establishment of Independent Commissions for Early Conditional Release and Replacement of the Remainder of the Sentence with a Milder Sentence, and Approving the Procedure of Their Operation," paragraph 3.



Department of Penitentiaries of the Ministry of Justice). Also included are representatives of the Public Council, Human Rights Defender's Office and Yerevan State University's Department of Theory and History of Psychology (one from each of these organizations). Commission meetings are considered lawful, if more than half of the commission members are present. Decisions to approve or reject a penitentiary administration's decision to seek early conditional release are adopted by a simple majority of commission members present at the meeting, by means of a secret vote.

Sub-commissions made-up of at least two commission members are established by procedural decisions of the commission. Sub-commissions visit the institution where the sentence is carried out, examine the prisoners' personal files, meet with them one-on-one, and, if necessary, meet with the administration of the penitentiary. Afterwards, sub-commission members report their findings to the commission during the next meeting, after which a discussion follows. The administration of the penitentiary sends its decision on filing a motion for early conditional release to an independent commission (attached to the decision is the characteristic of the prisoner). The independent commission may request additional materials on the subject in question, as well as to send out requests for information. Once the commission makes a decision, it is forwarded to the administration of the penitentiary. Once the commission's approval is received, the administrative commission files a court motion within five days. The motion contains, *inter alia*, information about the prisoner's previous convictions (if any), previous early conditional releases, his behavior during incarceration, as well as information on whether or not he has been corrected.<sup>6</sup>

According to the first part of Article 76 of the RA Criminal Code, a person serving a custodial sentence or being held in a disciplinary battalion may be released early, if a court finds that he does not need to serve the remainder of the sentence in order to be corrected. A prisoner may be granted early conditional release only if he has already served *de facto* a specific portion of the sentence, as required by

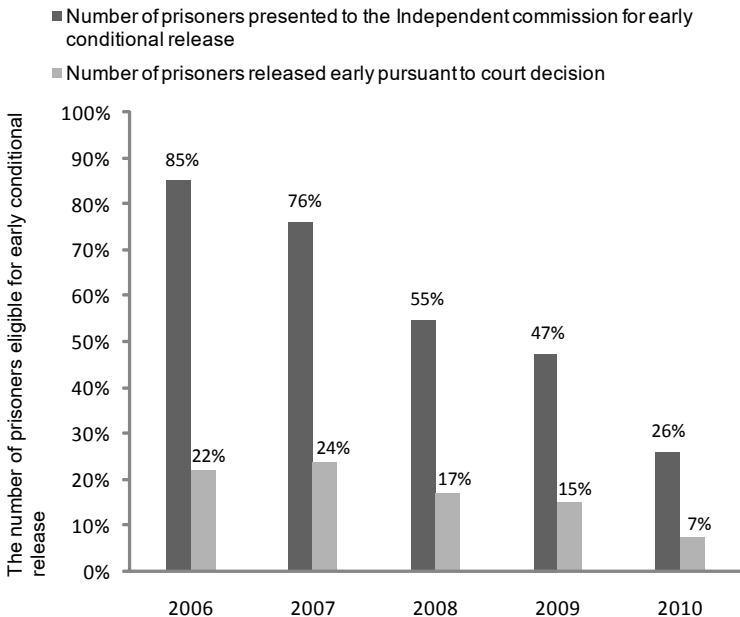
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6 The RA Government Decision 1304-N of August 24, 2006, paragraph 14.

paragraph 3 of Article 76 of the RA Criminal Code. When granting early conditional release, the court also takes into consideration the fact of the prisoner making reparation to the victims of his crime.

The following chart illustrates the dynamics of the percent of prisoners whose early conditional release was recommended by the penitentiary department's administrative commissions and the percent of prisoners actually released by court decisions.<sup>7</sup>

**Chart 1.**

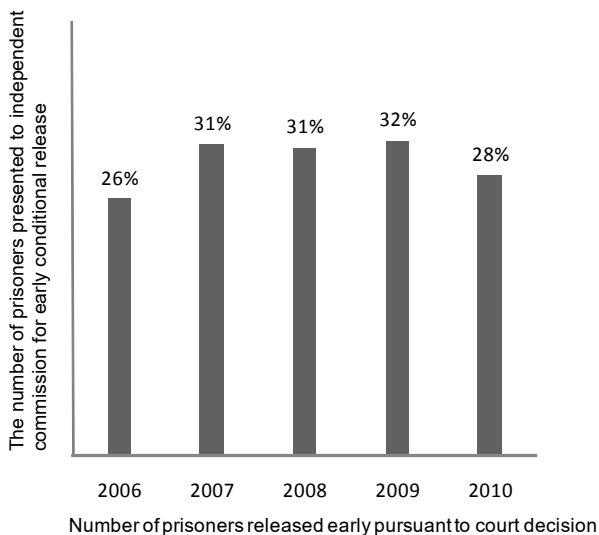


The chart shows clearly that the percentage of prisoners being recommended by the administrative commissions to the independent commissions for early conditional release has been decreasing steadily (from 85 percent to 26 percent) in the recent years. Presumably, the

<sup>7</sup> These charts are based on statistics provided by the RA Ministry of Justice on April 27, 2011.

reason is that the administrative commissions follow the same “standards” as the independent commissions and do not nominate prisoners from categories that the independent commissions would reject, as a rule. Despite such “filtering,” the independent commissions approve about 30 percent of prisoners recommended for early conditional release<sup>8</sup> (see Chart 2). Obviously, the share of those who are released early has been decreasing year after year. In 2006, 22 percent of prisoners eligible for early conditional release were granted such a release. In 2010, this number decreased to a mere 7 percent.

**Chart 2.**



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<sup>8</sup> Rejections by courts are rare, therefore they do not affect these statistics significantly.

## **2. DECISION-MAKING BODIES AND PROCEDURES ON EARLY CONDITIONAL RELEASE**

In the Republic of Armenia, decisions on early conditional release are made with the involvement of the following three public bodies: administration of penitentiaries, independent commissions and courts. This study has demonstrated that the existence of such a three-tier system leads to overlap in activities and procedures, and causes delays in the decision-making process. Therefore, it is necessary to review the functions of decision-making bodies and simplify the system.

### **2.1. THE PENITENTIARY**

According to the first part of paragraph 1, Article 115 of the RA Penitentiary Code, when a certain part of the prisoner's sentence expires, as set by law, the administration of the penitentiary is required to consider, within a month, the possibility of recommending the said prisoner for early conditional release, provided that he had not received any disciplinary sanctions. This wording indicates that, in the three-tier decision-making system, the granting of early conditional release may be denied already on the level of penitentiaries. Penitentiaries play an important role in the early conditional release system, because that is where prisoners are kept, and penitentiaries are required to follow every prisoner's progress, identify his needs and work with him accordingly. Without any doubt, penitentiaries possess information about prisoners that could be important when making decision on granting early conditional release. However, the question is whether it is appropriate, from a policy point of view, that decisions on recommending a prisoner's early conditional release are made by the body where he is kept. The body where the prisoner is kept and the body that evaluates his conduct and decides on early conditional release (even on recommending an early conditional release) need to be separate, in order to prevent abuses and reduce corruption risks. Moreover, when deciding on granting early conditional release, the

decision-makers often need information that a penitentiary cannot obtain, such as forecasting the risk of post-release repeat offending, which is done by probation services in many countries.

## **2.2. INDEPENDENT COMMISSIONS**

The establishment of any body implementing public functions should be determined by a need to achieve certain goals and objectives. What goals and objectives were independent commissions established for? One can assume that independent commissions were created to minimize corruption risks in the system. The study has revealed that independent commissions have achieved that goal, and corruption risks have decreased dramatically. However, the other goals that these commissions are supposed to achieve are not clear. Therefore, independent commissions should be regarded as a temporary solution, the existence of which will have to be reconsidered in the future. As a result of such reconsideration, independent commissions can become a professional public body or cease their existence, giving up their place to other relevant new services.

When asked what reforms should be implemented in the early conditional release system in Armenia and, in particular, in the work of independent commissions, one of the people interviewed for the study said that the decision-making by commissions is not clearly regulated by law, and that their decisions are not substantiated and not understandable. It was also mentioned that commissions should be established by laws, rather than by a presidential decree.

Another opinion was that these independent commissions are not effective, because, in practice, sub-commissions do not always meet with the prisoners in question, and they make decisions as instructed by their superiors or based on their own assessment of the situation.

One of the persons interviewed for the study emphasized that not all the members of independent commissions have the necessary professional knowledge about the early conditional release system, and they follow nothing but their own corporate interests. However, the international experience shows that any early conditional release

system should be staffed exclusively by people with specialized education and training, because the information discussed by them and the decisions they take are extremely specialized.

As was already mentioned in the first part of the report, independent commissions create sub-commissions made up of at least two members. These sub-commissions visit penitentiaries, have one-on-one meetings with prisoners, as well as with the head of the penitentiary or other staff members, if necessary. They also examine the prisoners' personal files. Later on, when casting their votes for their decision, commission members, in fact, rely exclusively on the opinion of the two sub-commission members. In other words, not all independent commission members personally examine the prisoner's file. Given the lack of objective criteria, this underlines the subjective nature of commission decisions, which is unacceptable.

Future reforms should make the role of independent commissions more understandable for the public in general and for penitentiaries, courts and prisoners, in particular. Moreover, even if policymakers decide to keep the independent commissions after probation and other relevant services are established and start working effectively, the commissions should become permanent and professional bodies comprised of specialists with the relevant knowledge.

### 2.3. COURTS

Interviews made it clear that courts rely mainly on information and prisoner's characteristics provided by penitentiaries, because independent commissions provide almost no additional useful information to courts. When making decisions on granting early conditional release, it is important for courts to have clearly defined, published and objective criteria.<sup>9</sup> There are some problems with the current judicial procedures, one of which has to do with courts holding hearings in penitentiaries to examine the question of early conditional release. One of the persons interviewed for the study said: "*The peculiarity of judicial review is that courts hold hearings mainly in*

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9 An analysis of the criteria can be found in Section 3 of this report.

*penitentiaries, in the field, and these are supposed to be open hearings. However, because these hearings take place in penitentiaries, it is clear that the principle of openness does not apply in a wider sense.”*

This is problematic, because members of the public do not have a real opportunity to attend the hearings. Having open public hearings on the issue of early conditional release can help inform the public about the early conditional release system and its standards, which is one of the pre-conditions for increasing its effectiveness, as was already mentioned in this report. Members of the public should know the criteria applied by courts when releasing prisoners who had not completed their sentences. They should also know on what conditions these people are released. If issues related to private/family life or public security are examined during these hearings, the entire hearings or their relevant parts may be closed to the public in cases prescribed by the RA Criminal Procedure Code.

Further reforms in the judicial review of early conditional release should result in laws defining more clearly the criteria of early release, clarifying all the sources of information about prisoners provided to courts and peculiarities of judicial hearings, and ensuring the adversarial nature of judicial review.

### **3. DECISION-MAKING BODIES AND PROCEDURES ON EARLY CONDITIONAL RELEASE: INTERNATIONAL EXPERIENCE**

An examination of the international experience shows that there are two types of bodies making decisions on early conditional release – judicial bodies and commissions/boards. Judicial bodies can be either specialized courts (like in Germany, France, Spain, Italy and Belgium) or general courts (like in Portugal and Austria).

In France, matters related to early conditional release are decided by judges for execution of sentences (Juge de l'Application des Peines,

JAP) and tribunals for execution of sentences (Tribunal de l'Application des Peines, TAP). Judges for execution of sentences are first instance judges who have the right to make decisions on issues arising after a person receives his sentence.<sup>10</sup>

Judges for execution of sentences make decisions if the prisoner in question is sentenced to up to 10 years in prison or has three more years left to complete the sentence. Other cases are reviewed by a tribunal for execution of sentences, made up of the president of the tribunal and two judges for execution of sentences.<sup>11</sup> Decisions may be appealed to a court of appeals, where issues of fact, as well as issues of law may be examined.

In addition to the prisoner's application, the court receives also a report from the prison's rehabilitation and probation service, describing the steps taken by the prisoner during incarceration. The report includes information on whether or not the prisoner is employed, has made reparation to the victims of his crime, received treatment for alcohol or drug addiction, or psychotherapy? The report also talks about how realistic are the prisoner's plans to get a job and a place to stay after his release.

Court hearings take place in the presence of the prosecutor, prison administration (prison director and other officials) and members of the rehabilitation and probation service. The prisoner presents his case, his plans after release and grounds for applying for early conditional release.

In *Germany*, Article 462a of the Criminal Procedure Code stipulates that decisions on early conditional release are made by a court that oversees execution of sentences. The court was established in 1975, with an aim of establishing a chamber of judges in every district court, who would be familiar with the conditions in local prisons. These judges specialized in prison-related issues. Issues of early release of prisoners sentenced to life in prison or prisoners committed to psychiatric hospitals are decided by a group of three specialized judges. In other cases, decisions are made by a single judge.

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<sup>10</sup> The French Criminal Procedure Code, Article 712-1.

<sup>11</sup> *Ibid.*, Article 712-3.



In *Spain*, decisions on early conditional release are made by judges who supervise penitentiaries. Such judges examine prisoners' complaints against disciplinary penalties imposed on them and imprisonment regimes, ensure the rights and fundamental liberties of prisoners, supervise the work of staff in penitentiaries, etc.

Prison administrations play an important role in considering the issue of early conditional release. Prison administrations are required to prepare cases for prisoners who are eligible for early conditional release and send them to a judge. These cases include an assessment of the risk of repeat offending. Wide interpretation of legal provisions allows judges to disagree with recommendations provided by prisons. However, in practice, the outcome of every case is decided mainly by the prison administration. As a rule, judges follow the prison administrations' recommendations in almost every case.

In *Italy*, decisions on early conditional release used to be made by the ministry of justice in the past. Currently, such decisions are made by a court that supervises execution of sentences.

In *Belgium*, in the past, these decisions also used to be made by minister of justice (a representative of the executive branch of power). Then, for a few years, these decisions used to be made by a parole board. Since 2007, for more than 3 years, these decisions are made by a court that supervises execution of sentences. The court makes a substantiated decision after having listened to the prosecutor, the prison director and the prisoner. The prisoner's lawyer may also participate in the hearing. The court listens to the victims as well, provided that they express a desire to speak. However, their opinion may be considered only when deciding on the conditions of early release. The court decision may be appealed. Prisoners sentenced to up to three years in prison can be released by the prison director. This decision is not subject to appeal, but it has to be properly substantiated.

In *Portugal*, there is no specialized court. Prison administration sends its substantiated opinion on the prisoner's early conditional release to a general court.

In *Austria*, Articles 152 and 152a of the Prison Code stipulate that decisions on early conditional release are made by district courts where penitentiaries are located.

The *Netherlands* and *Finland* have a peculiar system.

In the *Netherlands*, decisions on early conditional release are made by prosecutors, who discuss the matter with probation and early conditional release department and prison administration, then apply a risk assessment tool to evaluate the likelihood of repeat offending. If an application for early conditional release is approved, the prosecutor also sets specific conditions. If the prosecutor decides that the final decision should be delayed or that early conditional release should be denied, he takes the case to a court, and the court makes the final decision. Essentially, positive decisions on early conditional release can be made by prosecutors, whereas negative decisions can be made by courts only.

In *Finland*, in accordance with Article 2 of Section 22 of the Prison Act, decisions on early conditional release are made by prison directors. These decisions may be appealed in courts of the first instance, but the court decisions are final and not subject to appeal.

As was already mentioned, final decisions on early conditional release may also be made by boards.

In *Croatia*, for example, decisions on early conditional release are made by a board made up of four members appointed by the minister of justice. One of the members represents the central office of penitentiary department, one is from the public defenders office, two are judges, and one is a sentencing judge who deals with cases from the given penitentiary and who is appointed to the board as a non-permanent member. Procedures for the operation of the board are defined by the minister of justice.<sup>12</sup>

Early conditional release procedures involving boards can be found mainly in common law countries. In particular, in *Canada*, the Parole Board of Canada has exclusive jurisdiction to grant parole.<sup>13</sup> The board is made up of no more than 45 full-time and several part-time members,

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<sup>12</sup> The Croatian Criminal Procedure Code, Article 159.

<sup>13</sup> The Canadian Corrections and Early Release Act, Article 107(1).

appointed by the Governor-in-Council upon recommendation by the minister for a term of 10 years and 3 years, respectively. The appointed members have different educational backgrounds in law, criminology, social work, psychology, etc.<sup>14</sup>

In the *United States of America*, parole commissions are made up of former prison employees or people who served in other institutions (often, prisons). In six states, decisions are made by governors, after consultation with a commission. Commission decisions may be appealed to a national appeals commission within 30 days. As a rule, parole commissions are part of the state executive, and their members are appointed by governors. In making a parole determination, commissions take into consideration the following:

- 1) reports and recommendations made by the staff of the penitentiary where the prisoner serves his sentence,
- 2) official reports on the prisoner's prior criminal record, including on previous paroles and probation,
- 3) recommendations regarding the prisoner's parole made at the time of sentencing by the prosecutor or the sentencing judge,
- 4) reports of physical, mental and psychiatric examination of the prisoner,
- 5) a statement by any victim of the crime for which the prisoner is imprisoned about the financial, social, psychological and emotional harm or loss suffered by such victim.<sup>15</sup>

Commission decisions are criticized for being subjective. An especially criticized fact is that these decisions cannot be appealed.<sup>16</sup>

In April 2005, *Great Britain* enacted the new Criminal Justice Act that introduced a number of novelties. In particular, the release of prisoners with a determinate sentence became mandatory after serving a certain part of the sentence. In such cases, relevant conditions are imposed by the prison administration. In the case of prisoners

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14 Parole Board of Canada, <http://www.pbc-clcc.gc.ca/employ/gicqual-eng.shtml#3>.

15 USPC Rules and Procedures Manual paragraph 2.19.

16 *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, Daniel S. Medwed, 2008.

sentenced for “dangerous” crimes, parole decisions are made by the parole board. As of September 2010, the board had 255 members, including 100 judges and representatives of courts, 30 psychologists, 15 probation officers and other independent members.<sup>17</sup>

The board has several procedures: in some cases, the proceedings are in writing only, in other cases, there are oral hearings with 1 or 3 members, using different rules.

The parole board is currently criticized for not carrying out its duties properly. In particular, it is criticized for being subjective and not independent. In 2003, the Criminal Justice Act, which had established the parole board, stipulated that the Secretary of State for Justice may “provide guidance to the board on what it should take into consideration while exercising its functions.” When making decisions, the board is also required to taken into consideration the “written or oral information” provided by the Secretary of State for Justice.

In the case of *R. (Brooke) v. Parole Board*,<sup>18</sup> the UK court of appeal examined the issue of parole board’s independence from the executive. It looked into a number of issues, including the fact that that parole board is financed by the ministry of justice, which means that it is not fully independent from the ministry.

The relations between parole board and bodies that supervise prisoners also raise certain questions in terms of parole board’s independence and objectiveness of its decisions.

The prison and probation services operate under the national offender supervision service. The prison service provides information to the parole board, based on which the latter makes its decisions. This information includes prisoners’ progress reports, rehabilitation work conducted with them, expert opinions on the risk of repeat offending. According to the court of appeal, the collection of this information is “the most important phase for risk assessment, based on which the prisoner may or may not be released.” Therefore, it is not appropriate for the body with the power of financial supervision of the parole board to have supervision powers over another body that

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<sup>17</sup> <http://www.justice.gov.uk/about/parole-board/parole-board-members/index.htm>.

<sup>18</sup> *R (Brooke) v. Parole Board* [2008] EWCA Civ 29.

prepares prisoners for life after prison, as well as over yet another body that presents an opinion on how the prisoner will live in the community after his release. The parole board makes decisions on the basis of information provided by these bodies. At the same time, the parole board's independence is threatened by the fact that the Secretary of State for Justice may remove board members for failure to carry out their duties properly.

The UK court of appeal also looked into the fact that rehabilitation programs are not implemented. The court decided that the burden of proof that prisoners are safe to release lies with the Secretary of State, because correctional work with dangerous offenders is done under his responsibility. Therefore, it is up to him to provide evidence that the danger is no longer there. A failure to provide such rehabilitation courses leads to prisoners being held behind bars much longer than is necessary to ensure public safety.

The Parole Board tends to become a "public defense court," but it must become "a court that supervises the execution of sentences."<sup>19</sup> A debate is taking place in the UK for the purpose of following the experience of other European countries and let courts makes decisions on early conditional release, because the assumption is that courts are more independent, and they are able to examine the information provided by the prison service in a more objective and comprehensive way.

In the Republic of Armenia, the issue of early conditional release is examined without the prisoner's application, but the prisoner's consent is required. Prisoner's consent is important in a number of countries. In Germany, for example, the requirement to get the prisoner's consent is explained by the fact that a probation term and special conditions are imposed on prisoners after early conditional release. The probation term, which can be from 2 to 5 years, may be longer than the remainder of the sentence. Therefore, the prisoner may prefer to serve the full sentence instead of having to live with conditions and under supervision during probation.

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19 Nicola Padfiel, Parole and early release: the Criminal Justice and Immigration Act 2008 changes in context, *Criminal Law Review*, 2009.

The issue of early conditional release may be examined upon the prisoner's application (like in France, Germany, USA, UK, Canada) or automatically (like in Spain, Netherlands, Portugal, Croatia).

In *France*, the prisoner has to apply to a judge or a court for execution of sentences. He has to provide additional documents, such as a labor contract or a letter from a future employer (if any). The judge or court for execution of sentences hears the opinion of the prison administration, the prosecutor's recommendations, and the views of the prisoner and his lawyer. The hearing can take place in the prison.

In *Germany*, prisoners have to apply to the criminal chamber on execution of sentences in regional courts. Written procedures without oral hearings are used. The prosecutor, the prisoner administration and the prisoner submit their opinions in writing. In addition, the prisoner has the right to make oral statements. However, there may not be an oral hearing if the prosecutor and the prison administration are in favor of granting parole. The court may hear an opinion of an expert regarding the prisoner, if the prisoner in question is sentenced to life in prison or was imprisoned for abuse, torture or sexual abuse of minors, or for causing life-threatening serious bodily harm by dangerous tools/methods (poison, weapons). The expert should provide a detailed opinion on whether the prisoner is still dangerous for the community, given the crime he had committed. The expert testifies in court orally. Other participants of proceedings (the prisoner, the prosecutor and prison administration) can participate in the hearing.

In *Spain*, parole consideration has to start automatically; otherwise the prisoner can file a complaint.

In the *USA*, preliminary hearings are conducted by a single examiner or two examiners, who have to interview the prisoner in prison, in accordance with the relevant timeframe. The interview is recorded. The first interview takes place a month before the end of the minimum sentence to be served before any parole consideration. The prisoner may have an attorney present. The examiner provides his parole recommendations and the reasons behind them to the prisoner within 21 days. Then the parole board holds a hearing. Victims/witnesses or representatives of criminal justice bodies (US attorneys, federal

agents, and others) may attend the hearing and express their opposition to granting early conditional release to the prisoner.

As a rule, these hearings are not open to the public. However, other people may be allowed to attend the hearings, if their presence is properly justified.

In *Croatia*, prison administration submits the prisoner's parole application to the parole board. A copy of this application is sent to the sentencing judge. The court provides its opinion to the board. The board reviews the prisoner's personal file, examines the prison administration's opinion and recommendation, questions the prisoner, and reviews the court's and social service's opinions and questions experts, if necessary.<sup>20</sup>

## **4. GOALS AND CRITERIA OF EARLY CONDITIONAL RELEASE**

### **4.1. GOALS OF EARLY CONDITIONAL RELEASE AND THEIR PERCEPTION IN ARMENIA**

Information collected during our interviews is a good source for understanding the perception of early conditional release in Armenia, among other things. According to the interviewed judges, the goals of early conditional release are:

- Having assessed the level of correction, give the person an opportunity to be free, because it's in the interest of both the state and the person.
- Give the person an opportunity to be free, ease overpopulation of prisons, restore justice, address the issue of releasing an already corrected person.

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<sup>20</sup> The Croatian Criminal Procedure Code, Article 159.

- Assess the level of correction of the prisoner, which has nothing to do with pitying the person.
- Release the person after the punishment achieved its goal, restore social justice, correction.

Defense lawyers and lawyers, who were interviewed, also stressed the issue of correction of prisoners. *“The purpose is to motivate the person to be corrected and to behave in a certain way to ensure his release, being sure that when the proper time comes, he will be released, provided that he had not committed any violations of rules during the time of imprisonment, which shows that he is on the way to being corrected. This is a way to achieve the goals of the punishment.”* One of the defense lawyers also emphasized that the early conditional release system is aimed at motivating the correction of prisoners, and it also helps citizens re-integrate in the community. The same defense lawyer also emphasized the importance of conditions as a way to prevent repeat offending. Other defense lawyers thought that early conditional release can be granted when the person has already been corrected and does not need to continue serving the sentence any longer.

Some independent commission members mentioned that the early conditional release system motivates prisoners to try to be corrected, and it is a manifestation of the state’s humanitarian policy. One of them also emphasized the importance of the correction factor as one of the main goals of the system. Another commission member pointed out that the early conditional release system makes it possible to find out if the person has regrets about the crime he had committed, which would make it clear whether or not he can be released.

The study of materials, collected through 17 interviews, indicates that the common perception of the early conditional release system in Armenia is that the person can be released only when he has already been “corrected” during incarceration. Therefore, it is obvious that, with such a perception, early conditional release is linked to the prisoner being “corrected.” Is this approach acceptable from the point of view of public policy, and is it in tune with the RA Criminal Code? In particular, one of the purposes of a punishment, as specified in Article



48 of the Criminal Code, is correction. According to the first part of Article 76, a prisoner, who is sentenced to imprisonment, may be released early if the court found that there is no need to continue serving the sentence *to be corrected*.

It must be noted that when granted early conditional release, prisoner are released *on conditions*, which means that during this time they has some duties and are placed under supervision. If a person has been released conditionally, it means that the sentence has not yet achieved its goals, including the goal of “correction.” If it were considered that the person has already been corrected, then he would be released unconditionally, because the sentence would be considered to have achieved its goals, in which case it would be unfair and wrong from a policy point of view to keep the person in prison or to release him on conditions. This means that early conditional release should be granted not to prisoners who have already been corrected, but to prisoners whose behavior, progress in the work conducted with them and the low risk of repeat offending indicate that the likelihood of them being law-abiding citizens upon early conditional release is high enough from the point of view of re-integration in the community and public safety.

We think provisions of Article 76 of the RA Criminal Code are in tune with the aforementioned logic, but they are interpreted and applied in a wrong way. The norm that “the court finds that there is no need to continue serving the sentence to be corrected” does not mean that the court should be convinced that the person has already been corrected fully before granting early conditional release. All the court has to do is to find that there is no longer a need to keep the person in a penitentiary (i.e. no need to continue serving the sentence) and that the person can live in the community under certain conditions and under supervision. When considering a person for early conditional release, it may become apparent that there are still risks, but the one and only purpose of conditions and supervision is to neutralize or minimize these risks. If the court finds that the person “has been corrected,” then the setting of conditions or supervision would become an end in itself. Therefore, according to Article 76, the court is supposed to determine two things: 1) is it necessary for the prisoner to continue serving the sentence of

imprisonment, and 2) how “corrected” is the prisoner, after which it can decide whether the prisoner may be released conditionally, given the assessed risk of repeat offending. If the court’s decision is positive, then it must decide on the conditions of release that would help the released prisoner’s integration in the community and ensure public safety.

According to the European Rules on Community Sanctions and Measures,<sup>21</sup> sanctions and measures are two important means to deal with crime and avoid the negative consequences of imprisonment. According to paragraph 3 of another Council of Europe Committee of Ministers Recommendation on Early Release (Parole),<sup>22</sup> “Conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community.”

In Austria, it is also stressed that the two main goals of early conditional release are to reduce the likelihood of repeat offending and to meet public safety needs. In Germany, when deciding on granting early conditional release, courts examine the risk of repeat offending and the interests of public safety.

It is necessary to review the Armenian criminal and penitentiary policy, and define that the purpose of early conditional release is to ensure public safety and reduce the risk of repeat offending, which can be achieved by targeted and effective work with prisoners in penitentiaries, as well as by setting individualized conditions and supervision for those who are granted early conditional release, and having an effective probation service.

Early conditional release should not be determined by whether the person has been corrected or not, which in Armenia is decided on the basis of a subjective opinion. Instead, it should be determined by the level of the prisoner’s readiness to return to the community and live as a law-abiding citizen. Developing the skills required to live as law-

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21 Recommendations Rec(92)16, adopted by Council of Europe Committee of Ministers on 19 October, 1992.

22 Rec(2003)22, 24 September, 2003.

abiding citizens should be one of the main functions of penitentiaries. If it turns out that the prisoner, who has completed the mandatory part of the sentence, is not ready to live as a law-abiding citizen, if there are serious suspicions that he will commit another crime when released, then the conclusion must be that the penitentiary policy has not been implemented effectively and needs to be adjusted.

## 4.2. CRITERIA FOR EARLY CONDITIONAL RELEASE

What are the criteria for early conditional release in Armenia? No such criteria are defined in the RA Criminal Code. In these conditions, how do decision-makers decide when should a prisoner be granted early conditional release?

Information collected during interviews makes it possible to have an idea of how early conditional release decisions are made. One of the interviewees mentioned that independent commissions' decisions are not reasoned at all, therefore it is impossible to know whether or not they are fair and justified. The same person thought that the decisions of penitentiaries are much more substantiated. When asked about the criteria used by independent commissions, another interviewee said that the decisions on granting early conditional release are not substantiated, they are not based on criteria, and are arbitrary. He also mentioned that the normal practice is to use a special form that contains the name of the prisoner, followed by a single line mentioning whether the application is approved or denied.

When asked what criteria are used to decide whether to refer the prisoner to a court or not, one of the interviewees said *"they just wing it,"* thus confirming the lack of any specific criteria. Another interviewee confirmed that there are no criteria and added: *"We know the criteria that are designed for courts, therefore the commission has no right to examine the same criteria, otherwise it would be exercising supervision over courts. We have to find criteria that are outside of these criteria, which is also absurd. Everything here results in a complete absurd. Essentially, it cannot get ahead and said whether the criteria are right or wrong. Other criteria that it is supposed to consider are not*

*mentioned anywhere, therefore they are criteria that are outside of the Criminal Code. If they had defined criteria by their internal procedures, we would have said – stop, you are going against the Criminal Code, and that's why they have not written anything.”*

When asked about the criteria used by independent commission members to make decisions, one of the interviewees said such criteria exist, and they are their internal criteria. He also added that commission members will not “*pardon*” child abusers or murderers, but would behave differently in the case of “*little*” local or economic disputes. He concluded by saying that he has principles that guide him when casting his vote.

When asked about criteria used by commissions, interviewees noted that such criteria do not exist. Therefore, commission members follow the characteristics provided by penitentiaries, and they meet with prisoners. When asked in what cases does he vote against early conditional release, one commission member said he would vote against early conditional release in cases involving rape, drug trafficking and premeditated murder, and he would vote for early conditional release in cases involving “*accidental*” crimes.

It is evident that the officials involved in the early conditional release system and the vast majority of experts think that independent commissions make their decisions on the basis of subjective opinions and values agreed upon internally. Courts consider whether or not the prisoner is “corrected,” even though they failed to point out clearly what methods are used to make that assessment. As will be described below, clarity, openness and objectiveness of criteria for release should be the first precondition of an effective system of early conditional release.

According to paragraph 18 of Rec(2003)22 of the Council of Europe Committee of Ministers, “the criteria that prisoners have to fulfill in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners’ personalities and social and economic circumstances as well as the availability of resettlement programs.” Clear and explicit criteria are needed, first of all, for prisoners to be able to predict and

adjust their own behavior. Secondly, such clarity is needed to reduce abuses and risks of corruption in the system, as well as to increase the level of public trust. It is noteworthy that this provision, while pointing out the criteria of early conditional release, also talks about the importance of the existence of resettlement programs. This means that release criteria should also be looking towards the future, rather than focusing exclusively on things that had happened in the past. The prisoners' and public trust towards the early conditional release system can be considered as one of the most important preconditions for the system's effectiveness. This goal cannot be achieved without clearly defined and predictable criteria that would be understandable by prisoners and the public.

According to Paragraph 3 of Rec(2003)22 of the Committee of Ministers, conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community. This transition should be done through post-release conditions and supervision that contribute to public safety and the reduction of crime in the community. The criteria for granting conditional release should be applied so as to grant conditional release to all prisoners who are considered as meeting the minimum levels of safeguards for becoming law-abiding citizens. It should be incumbent on the authorities to show that a prisoner has not fulfilled the criteria.<sup>23</sup>

An examination of international experience and documents reveals that early conditional release criteria are divided into two groups: 1) evaluation of factors pertaining to prisoner's past and present (behavior while in custody, needs, results of work conducted with them, etc.) and 2) evaluation of factors pertaining to the future (assessment of risk of repeat offending after release).

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<sup>23</sup> Rec(2003)22, paragraph 20.

#### **4.2.1. EVALUATION OF PRISONERS' BEHAVIOR IN CUSTODY**

The RA Criminal Code does not specify any criteria for decisions on granting early conditional release. As was already mentioned, the RA Criminal Code stipulates that a prisoner may be released conditionally if the court finds there is no need to continue serving the rest of the sentence in order for him to get corrected. The court also has to consider the fact of the prisoner making reparation to the victims of his crime. If the court finds that the person does not have to serve the remainder of his sentence, then the court makes a decision to grant early conditional release. The problem is: what factors does the court consider when deciding on whether or not the person needs to continue serving the sentence. The law does not specify what issues have to be considered. However, as was already mentioned, the court focuses on whether or not the person has been corrected while serving the sentence. The law does not specify how the courts determine if the person has been "corrected," which means that the entire process is not predictable for prisoners and for the public.

If the case has been sent to a court, it means that both the administrative commission and the independent commission have made positive decisions on early conditional release of the prisoner. Therefore, one must assume that the court will take into consideration the findings and conclusions presented in the decisions of these bodies, and then draw its own conclusions. As was already mentioned, courts find that information received from penitentiaries are the most complete and useful.

According to paragraph 14 of the RA Government Decision 1304-N, the administrative commission's motion to the court contains, inter alia, information about the prisoner's conduct during incarceration and on his being corrected. Since the information contained in the motion may be examined by the court and become decisive, it is important for that information to be objective and accurate. In this regard, it is important what criteria and methods are used to evaluate the prisoner's conduct in the penitentiary. Most importantly, how does the administrative commission decide if the prisoner has been corrected?

Moreover, if the administrative commission writes in the motion that it thinks the prisoner has been corrected, what criteria should the court apply if it considers that the prisoner has not been corrected?

According to paragraph 19 of the RA Government Decision 1304-N, if the prisoner commits a disciplinary violation before the court hearing, the administration of the penitentiary is required to report it in writing to the court where the penitentiary is located. According to paragraph 5(d) of the RA Minister of Justice Order QH-46-N of 2005, prisoners are required to have had no penalties to be considered for early conditional release or replacement of the unserved portion of the sentence with a milder sentence. According to paragraph 6 of the same document, “results of social, psychological and legal work conducted with the prisoner, and the effects of correctional measures are taken into consideration when recommending the prisoner for early conditional release.”

The work conducted with the prisoner during imprisonment should prepare him for leading a law-abiding life in the community. This work should be developed by specialists, and it has to be individualized, standardized and measurable. If the results of the work are not measurable, it will be impossible to use them when evaluating the prisoner’s conduct.

This leads to a conclusion that policy-makers attach great importance to the prisoner’s conduct during incarceration when deciding on the issue of early conditional release. Depending on their conduct, some prisoners may never be considered for early conditional release. In other words, the circumstances that took place before the issue of early conditional release was considered have bigger importance in Armenia when making decisions on the subject. When evaluating the prisoner’s conduct, consideration is given to the existence or lack of disciplinary penalties, the work conducted with the prisoner and its impact, based on which the penitentiary forms an opinion on whether or not the prisoner has been corrected. The circumstances that took place in the past (the prisoner’s conduct, the work conducted with him and its impact) can serve as a basis for predicting the prisoner’s future behavior. However, when making such predictions, the existence or lack of earlier disciplinary sanctions is insufficient, because

transgressions may be of different gravity and may have different causes.

In other words, having no disciplinary sanctions is a pre-condition for the administration of the penitentiary to even consider the issue of granting early conditional release. It means that the issue of early conditional release will never be considered if the prisoner had ever committed a disciplinary violation, no matter how small. Giving consideration to disciplinary transgressions during incarceration when deciding on the issue of early conditional release may have a preventive impact and encourage good behavior in prison. However, the refusal to consider the issue of early conditional release because of a disciplinary sanction is unjustified. Such a practice contains risks of abuse and corruption. Penitentiaries should refer prisoners to decision-makers in any case and submit their detailed and well-substantiated opinions. Having a disciplinary sanction should not become a separate criterion for considering the issue of early conditional release.

#### **4.2.2. PREDICTING THE FUTURE BEHAVIOR OF PRISONERS CONSIDERED FOR EARLY CONDITIONAL RELEASE**

When considering the possibility of early conditional release, the decision-making officials and specialists may also look into the past, i.e. consider the prisoner's behavior during incarceration, and/or they should also look into the future, i.e. the imposed post-release conditions and supervision, which would integrate the prisoner in the community and ensure public safety. For the latter, effective probation services and individualized post-release conditions and types of supervision are especially important. For the former, the prisoner's conduct during imprisonment is especially important. However, it must be noted that good behavior alone is not enough for predicting the prisoner's future conduct in the community after release. It may be the cleverest and most well-adjusted prisoners who manage to evade the law after their release, it may also be the more troublesome prisoners who resist because of their dissatisfaction with the penitentiary system but who



manage to adjust well once they have returned to society.<sup>24</sup> This means that conduct during incarceration should not be the only or the decisive factor for early conditional release. It is a well-substantiated prediction of the risk of repeat offending after release that may be decisive. Conduct during imprisonment, the results of work conducted with the prisoner, as well as predicting of the risk of repeat offending, based on objective and scientifically proven criteria should be used and evaluated together when making decisions on early conditional release.

In many countries, when deciding on early conditional release, probation services first and foremost carry out a well-substantiated prediction of the prisoner's future conduct. Moreover, they evaluate not only the risk, but also the prisoner's needs, because depending on the needs of a specific prisoner (such as lack of skills, addictions, re-establishment of social and family ties, etc.), the relevant public bodies can develop individualized programs that would be expected to reduce the risk of recidivism.

According to Article 57(1) of Germany's Penal Code,

"The court suspends the remainder of a determinate prison sentence if

1. the prisoner has served two-thirds of the sentence, minimum two months,
2. it can be justified with regards to the interests of public safety, and
3. the prisoner agrees."

When deciding on early release, the court has to consider amongst others the personality of the prisoner, his prior life, the circumstances of the criminal act, the seriousness of the infringement in case of recidivism, the prisoner's behavior in prison, his living conditions and the impact that release would have on him if he were to be released.

In *Germany*, conditional release is granted to prisoners with good prognoses, but the exclusion of all risk is not required – a "justifiable"

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<sup>24</sup> Nicola Padfield, Van van Zyl Smit, Frieder Dünkel, "Release from Prison", William Publishing, 2010, page 308.

degree of risk is accepted.<sup>25</sup> A negative decision has to be based on concrete facts, which result in an assessment that the risk is too great to justify a early release. Even in cases of serious violence a theoretical risk does not justify a refusal of conditional release.<sup>26</sup> It is obvious that the German approach is significantly different from the common perception in Armenia, according to which courts make negative decisions on early conditional release in case of any level of risk.

In the *Netherlands*, the Adult Probation Department assesses the risk of repeat offending for every prisoner and provides the decision makers with Repeat Offending Assessment Scales scores. Thus, risk of repeat offending is assessed on the basis of more objective criteria. At the same time, specialists agree that, even if the validity of the scales is improved in the future, predicting will always be accompanied by uncertainties and errors.<sup>27</sup> Nevertheless, risk prediction based on the previously stated objective criteria should be considered more credible and more suitable from the point of view of ensuring public safety than the strictly subjective assessment by decision-makers based on their intuition and the prisoner's conduct during incarceration.

In *Austria*, early release from prison has to take place once it may reasonably be assumed that the offender will be not less constrained from committing further offenses by conditional release than by serving the remainder of his sentence.<sup>28</sup> In assessing the risk of recidivism, one needs to take into account the change in the circumstances compared with those under which the crime was committed, for which the offender has served part of his sentence. Also, it is necessary to consider the effectiveness of supervision that the prisoner will be placed under once released. Also, it is necessary to take into account the extent to which these measures may compensate for negative factor that may still be present.<sup>29</sup>

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25 Ibid., page 185.

26 Ibid., page 188.

27 Ibid., page 311.

28 Ibid., page 53.

29 Ibid., page 53.

There are two groups of factors identified in literature, which are used to create repeat offending risk assessment tools. These are static and dynamic (changeable) factors. For example, the UK uses the Offender Assessment System (OASys) and the Offender Group Reconviction Scale (OGRS). Like in the Netherlands, these tools are used by probation services to assess the risk of repeat offending in the case of early conditional release. Static factors include the offender's age at the time the crime was committed, his previous convictions, history of drug use, difficulties at a young age, the offender's sex and country of origin (ethnic background). Since these factors are static, they do not require interventions and cannot be influenced. However, the dynamic factors can be influenced. The dynamic factors can be divided into environmental and clinical factors. Environmental factors include little or no support from the social network, poor education and others. Clinical factors include an inability to control impulses, rage and hostility, or a negative attitude to treatment.<sup>30</sup>

Such automated and standardized tools have a number of advantages. They are created by specialists, including statisticians, criminologist and others, and they are based on objective, extensive and properly grouped data. They also prevent subjective and intuitive assessment. However, despite the fact that the use of these tools is justified, they can also produce errors. Two types of errors can be made. The first error is that offenders who are assessed as presenting a low risk of reoffending can, nonetheless, commit another offence. The second error is that offenders, who do not pose a real and serious threat to the public, may be assessed as presenting a danger. One has to remember that risk assessment is extremely important and can play a decisive role. However, final decision on early conditional release is made by the court, after reviewing all available data and listening to the prisoner.

The US Parole Commission's Rules and Procedures Manual details the legal norms related to the assessment of the risk of reoffending by prisoners recommended for parole, and provides guidance as to how these norms are to be implemented. Commission specialists analyze

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30 Ibid., page 310.

the data of every prisoner recommended for parole and score it in accordance with the Salient Factor Score (SFS). SFS contains Items A, B, C, D, E and F. Every item has factors, each with its own score. The manual describes the content of each factor and the scoring procedure.

Following is the Salient Factor Score with a brief description, without comments on the factors and guidelines on how to use it, which make up the bulk of the manual. When similar scores are developed in Armenia in the future, the relevant specialists will have to be provided with similar manuals and guidelines.

**Item A – Prior Convictions/Adjudications (adult/juvenile)**

None = 3; One = 2; Two or three = 1; Four or more = 0.

**Item B – Prior Commitment(s) of more than 30 days (adult/juvenile)**

None = 2; One or two = 1; Three or more = 0.

**Item C – Age at Current Offense/Prior Commitments**

26 years or more                      Three or fewer prior commitments = 3

Four prior commitments = 2

Five or more commitments = 1

22-25 years

Three or fewer prior commitments = 2

Four prior commitments = 1

Five or more commitments = 0

20-21 years

Three or fewer commitments = 1

Four prior commitments = 0

19 years or less

Any number of prior commitments = 0

**Item D – Recent commitment free period (three years)**

No prior commitment of more than 30 days (adult or juvenile) or release to the community from last such commitment at least 3 years prior to the commencement of the current offense = 1; Otherwise = 0.

**Item E – Probation/parole/confinement/escape status violator this time**

Neither on probation, parole, confinement, or escape status at the time of the current offense, nor committed as a probation, parole, confinement, or escape status violator this time = 1; Otherwise = 0.

**Item F – Older Offenders**

If the offender was 41 years of age or more at the commencement of the current offense (and the total score from Items A-E above is 9 or less) = 1; Otherwise = 0.

**Total Score**

An examination of international experience shows that the decision-making bodies predict future behavior of the prisoner recommended for early conditional release and carry out needs assessment. These predictions are done by different methods. In some countries, decision-makers predict the prisoner's post-release conduct by examining and evaluating certain factors prescribed by law. In other countries, predictions are made by means of paper-based or electronic tools. Both methods can work successfully in Armenia, if public bodies staffed with appropriate specialists are established and the relevant tools are created that are necessary to ensure the effectiveness of the early conditional release system. The introduction and use of new tools will require continuous professional training for the specialists who are going to use these tools. Practical manuals or guidelines for practitioners will also be required. In this regard, it is important for the specialists who are going to use these tools to do so as their main occupation, thus preventing the influence of corporate interests on the decision-making process. Experience shows that these functions are carried out effectively by probation services. Therefore, efforts need to be made to establish an effective probation service in Armenia. Once a probation service is established, the need to maintain the current independent commissions will have to be reviewed and justified.

### **4.3. REPARATION TO VICTIMS**

As was already mentioned, according to Article 76 of the RA Criminal Code, the court, when considering the issue of early conditional release, takes into consideration the fact of the prisoner making reparation to the victim of his crime. This provision does not make it clear how should the court consider the fact of the prisoner being "corrected" and tie it to the making of reparation to the victim. It would be logical to assume that the court considers the fact of the prisoner making reparation to the victim only if the court finds that the prisoner no longer needs to continue serving the sentence. Otherwise, if the court finds that the prisoner needs to continue serving his sentence, i.e. "he has not been corrected," it makes no sense to consider the issue of reparation to the victim any more.

Does the court have the right to deny early conditional release because the prisoner did not make reparation to the victim, if the court finds that the prisoner has been “corrected” and can lead a law-abiding life in the community? If the answer is “yes,” then the court will essentially not release a “corrected” or law-abiding citizen for him to be able to carry out his civilian duties. Such a policy is not justified, and it goes against the purposes of early conditional release. Moreover, according to Article 76 of the RA Criminal Code, the court can decide to grant early conditional release to the prisoner, if the court finds that he does not need to serve the remainder of his sentence in order to be corrected. Thus, the RA legislature has tied early conditional release with the person’s being corrected and the assessment of the need to serve the remainder of the sentence, rather than with the restoring of social justice. This shows that the purposes of punishment and early conditional release do not always coincide.

According to Paragraph 8 of Rec(2003)22, in order to reduce the risk of recidivism of conditionally released prisoners, it should be possible to impose on them individualized conditions, such as the payment of compensation or the making of reparation to victims, *inter alia*. This provision makes it possible to conclude that the making of reparation to victims may be one of the conditions of early release, rather than one of the criteria for deciding on whether the prisoner should be released. In other words, all prisoners with a positive forecast of future behavior should be released conditionally, regardless of whether or not they made reparation to victims while serving their sentences in penitentiaries.

The making of reparation to victims is considered as a post-release condition and not a criteria.

The general condition for early conditional release is that the prisoner does not commit another crime. In addition to this general rule that applies to all cases, other additional conditions are imposed on an individualized bases. One of them may be the condition to make reparation to the victim.<sup>31</sup> For example, Articles 535-537 of the French Criminal Procedure Code define the conditions to be imposed on

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31 Peter J.P. Tak, *Concepts of Early Release in Western Europe*, page 9.

paroled prisoners, and one of these conditions is to make reparations to the victim.

Making reparation to the victim may be imposed as one of the conditions when making a decision on granting early conditional release; however, this condition should not be imposed automatically. In other words, when deciding on this condition, the decision-making body has to take into consideration the prisoner's financial and social situation, the availability of resources required for compensation or whether the prisoner has a real possibility to find such resources after his release. However, if it turns out that the amount to be compensated is too great and the prisoner does not have a real possibility of raising such money, and if the assessment of the prisoner's future conduct is positive, then he should be released, because the main purpose of early conditional release is to ensure public safety, which is achieved by helping the prisoner lead a law-abiding life in the community. In other words, the making of reparation to the victim should not be the only or the decisive factor for denying early conditional release.

It is necessary to study and introduce the notion of hearing the victim when deciding on early conditional release. Information provided by victims can help decision-makers to impose more appropriate conditions.

## **5. CHANGES OF THE CONDITIONS OF EARLY CONDITIONAL RELEASE AND REVOCATION**

The main purpose of early conditional release, which is to re-integrate the prisoner in the community in order to ensure public safety, is achieved by means of imposing individualized conditions and types of supervision, devised by specialists after consideration of the prisoner's individual circumstances. In this regard, it is extremely important for the prisoner to know in advance what post-release conditions are going to be imposed and what type of supervision is he going to be under. The imposed conditions and consequences of non-



compliance must be clear and understandable for the prisoner.<sup>32</sup> This enables him to give his consent to early conditional release, as well as to comply with these conditions and understand the consequences of non-compliance. It is important that these conditions be individualized. Also, when deciding on the conditions, it is important to hear and take into consideration the prisoner's opinion. If he does not agree to comply with the proposed conditions that are reasonable for that specific prisoner, or refuses the recommended types of supervision, the court may decide against granting early conditional release.

There needs to be a possibility to adjust the conditions or requirements, depending on the prisoner's progress.<sup>33</sup> This rule requires two things. First, there should be a continuous and effective monitoring of conditions and requirements, so that it is possible to evaluate the prisoner's progress in the community. Second, supervision, the change and adjustment of conditions should be flexible. As a rule, revocation of early conditional release should not be automatic.

The RA Criminal Code provides several grounds for revocation of early conditional release by a court. According to paragraph 6 of Article 76,

"If, during the unserved time of the sentence,

- 1) the prisoner maliciously refuses to comply with the conditions of early release imposed by the court, then, upon a motion by the body that supervises the prisoner, the court shall make a decision to revoke early conditional release and imposing the unserved part of the sentence;
- 2) the prisoner commits a crime by negligence, then the court shall consider the issue of maintaining or revoking early conditional release;
- 3) the prisoner commits a premeditated crime, then the court shall sentence the prisoner in accordance with the rules of Article 67 of the Criminal Code. The same article applies when sentencing a

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<sup>32</sup> Council of Europe Committee of Minister Recommendation R (92) 16 on European Rules on Community Sanctions and Measures, Rule 76, 19 October, 1992.

<sup>33</sup> *Ibid.*, Rule 87.

prisoner for a negligent crime, if the court decided to revoke early conditional release.”

The court’s authority, as described in the second sub-paragraph is, essentially, discretionary, while the powers mentioned in the first and third sub-paragraphs are mandatory, i.e. legislature has already decided how the court should rule under these circumstances.

According to the first sub-paragraph, the court decides to revoke early conditional release and impose the unserved part of the sentence, if the prisoner maliciously refuses to comply with the conditions imposed by the court upon granting him early conditional release. In such cases, the motion is submitted to the court by the body that carries out post-release supervision. Revocation of early conditional release has to be done in accordance with appropriate procedures, and only after hearing the prisoner. As a rule, revocation of release should not be automatic.

According to Council of Europe Committee of Ministers Recommendations R (92) 16, in the case of minor transgression, when there is no need to revoke early conditional release, the supervising body may apply discretionary measures, including the use of administrative procedure, during which it has to hear the prisoner. The information collected during these hearings is then included in the prisoner’s personal file. In the case of a significant failure to comply with post-release conditions, the supervising body must immediately notify in writing the decision-making body. The notice should contain an objective and detailed description of the violation, how and in what circumstances the violation was committed. When deciding on changing the conditions or revoking early conditional release, the court has to make sure that the prisoner is familiar with the content of the documents submitted against him and is able to express his opinion on them.<sup>34</sup>

The RA legislation does not provide a possibility to change or adjust the conditions or requirements, which is a shortcoming of the system, because there may be cases when an adjustment of conditions or requirements is more effective than revocation of early conditional

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<sup>34</sup> Ibid., Chapter X.

release. Therefore, the reforms of the Armenian early conditional release system should include giving the courts the power to set, adjust or remove conditions. The reforms should also result in the further development of post-release conditions and types of supervision.

## 6. CONCLUSIONS

Research conducted as part of this study indicates that the current early conditional release system in Armenia needs serious reforms. Several legal acts need to be amended and new public bodies staffed with professionals need to be established. Certain currently operating public bodies need to be reformed by changing their composition and powers, and providing their new tools. In addition to institutional and legal changes, some serious work needs to be done to change the current perception of early conditional release in Armenia.

CSI thinks that reforming the early conditional release system and making it work effectively will require continuous efforts for at least several years. On the other hand, since reforms of the system cannot stop the operation of the current system, there is a need to improve the day-to-day operation of the early conditional release system while reforms are taking place. This would make it possible to have a smooth transition towards a more developed and modern system. Thus, reforms can be done in three phases.

### ***First Phase***

In the first phase, it is necessary to review certain powers, composition and procedures of decision-making bodies in the current early conditional release system, as well as to develop and introduce some new tools.

In this phase, it is necessary to simplify the three-tier system of decision-making. Penitentiaries should be removed from the list of bodies making decisions on early conditional release. Penitentiaries

are required to provide all relevant documents to an independent commission for every prisoner who has served the mandatory part of his sentence and has applied in writing for early conditional release. These documents should include the penitentiary's assessment of the prisoner's behavior, the work conducted with him and the level of its impact, and the level of his preparedness for life as a law-abiding citizen, all done in accordance with a standardized procedure. Independent commission(s) should include specialists (criminologists, psychologists, social workers and others) to verify and evaluate the data received from penitentiaries. As a result, the commission will come to a substantiated conclusion on granting or denying early conditional release to a prisoner. A negative decision should contain detailed explanation of the reasons, the criteria that were applied, and the requirements that were not met, which led the commission to reach its decision. Within 7 days of receiving the decision, the prisoner has the right to ask the penitentiary in writing to file an early conditional release motion in a court. The issue of release is decided by a court, in an adversarial hearing where all safeguards of a fair trial are maintained. If the court's decision is positive, the court then sets conditions and types of supervision. A negative decision should contain detailed explanations of the grounds that should clearly indicate what should the prisoner do to succeed in the next hearing on early conditional release.

### ***Second Phase***

In this phase, a Republic of Armenia Probation Service is established as an integral part of the early conditional release system. The service is staffed with specially trained professionals and provided with explanatory guidelines on how to apply the relevant legislation and tools. Probation service should be separate and independent from the penitentiary service.

In this phase, penitentiaries only evaluate the prisoners' behavior, work conducted with them and its impact. In this phase, evaluation tools used by penitentiaries are reviewed and improved. Evaluation results are then sent to an independent commission. Risk of repeat offending after release is evaluated by the probation service, which

sends the evaluation results and recommendations on conditions of release to an independent commission. Having examined the received materials, the commission decides on granting or denying early conditional release. Within seven days of receiving this decision, the prisoner has the right to ask the penitentiary in writing to file an early conditional release motion in a court. The issue of release is decided by a court, in an adversarial hearing. If the court's decision is positive, the court then sets conditions and types of supervision. A negative decision should contain detailed explanations of the grounds that should clearly indicate what the prisoner should do to succeed in the next hearing on early conditional release:

### ***Third Phase***

In the last phase, it is necessary to ensure that penitentiaries and the probation service are working effectively, in which case independent commissions may no longer be needed. In this phase, the penitentiary sends the information required by law to the probation service, which carries out a comprehensive analysis of all the data and creates a forecast of the risk of repeat offending, in accordance with the established procedures. If this prediction is positive, it recommends individualized post-release conditions and types of supervision. A conclusion is then provided to the prisoner, regardless of whether it is positive or negative. The conclusion must be substantiated in such a way as to enable the prisoner to decide, alone or with the help of a lawyer, on his future actions. It is up to the prisoner to decide if he wants to apply to the court or not.

In the case of the probation service reaching a positive conclusion, which also contains recommendations on conditions, the prisoner decides himself whether or not he wants to be released on such conditions. If the answer is "yes," he requests the penitentiary to send a motion to a court. If the prisoner does not agree to the recommended conditions or types of supervision, he can request the penitentiary to send the case to a court, where he can question both the conditions and the types of supervision in an adversarial hearing.

In the case of the probation service reaching a negative conclusion, the prisoner decides himself whether or not to question the parts of the

conclusion he disagrees with in a court. If the prisoner decides to go to a court, the final decision is made by the court, and it can be appealed in a court of appeals.

In every phase, preparatory work for the next phase will have to be done. CSI believes that the model described in the third phase is the most acceptable one, and already some steps have to be taken now to get to that model in the future.

The following recommendations refer to the first phase of the aforementioned reforms only. However, many of these recommendations propose the creation of new mechanisms and tools that will be an integral part of the future early conditional release system.

## 7. RECOMMENDATIONS

### *Main Principles of Early Conditional Release*

- When considering the issue of granting early conditional release, the main criteria must be that the prisoner's release does not pose a serious threat to public safety.
- The criteria for granting early conditional release must be clearly defined and open. The requirements that prisoners have to meet for early conditional release have to be understandable and predictable for all prisoners, so that they can make efforts to meet these requirements as they serve their sentence.
- Conditions for granting early conditional release have to be tied to the situation at the time the issue of early conditional release is being considered, the prisoner's future conduct and public safety. The prisoner's crime should not be the only decisive factor for the decision on granting early conditional release.
- The prisoner's behavior and the results of the work conducted with him during incarceration is evaluated by the penitentiary, in accordance with the previously developed system, with the involvement of specialists, such as psychologists, social workers

and others. The penitentiary also assesses (based on the previously developed standards) the level of the prisoner's readiness to lead a law-abiding life.

- Prediction of future behavior and assessment of the risk of repeat offending by the prisoner considered for early conditional release should be done by the probation service.

### ***Making Reparation to Victims***

- Making reparation to victims may be set as one of the conditions for early conditional release; however, when setting such a condition, the prisoner's financial and social situation, as well as the realistic ability to make reparation must be taken into consideration.
- The mere fact that the prisoner has little or no money cannot be a reason for denying early conditional release, if it is predicted that the risk of post-release repeat offending is non-existent or low.

### ***Powers of Penitentiaries***

- An individual sentence plan is developed for every prisoner upon admission to the prison. The plan includes the prisoner's needs assessment, the work conducted with him in the penitentiary, as well as the work to prepare him for early conditional release.
- Before the time for early conditional release is up, penitentiaries carry out special work with every prisoner to prepare him for early release. This work includes helping restore family connections, efforts to find a job and other activities, depending on the prisoner's individual needs that should be constantly evaluated by the penitentiary. This work can involve social workers, staff members from employment centers, psychologists and other specialists.
- Penitentiaries evaluate the impact of all the work conducted with prisoners. The evaluation should be done in a standardized way, i.e. penitentiaries must collect and keep in a systematic way the relevant data about every prisoner, in accordance with procedures developed by specialists. During the evaluation process,

penitentiaries have to answer questions on questionnaires developed by specialists in advance.

- When the time for early conditional release comes, as specified by the law, the penitentiary is required to send the prisoner's cases to an independent commission, provided that the prisoner has given his written consent. The case has to include the standardized evaluation by the penitentiary. It may also contain the penitentiary's special opinion on the prisoner's personality, conduct and level of preparedness to live a law-abiding life in the community. This opinion does not have to be in a specified standardized format, but it has to be well substantiated.
- Once the commission's conclusion and the prisoner's written application is received, the penitentiary sends the motion, with all the relevant documents attached, to a court.

### ***Composition of Independent Commission(s)***

- Independent commission members should be specialists, including psychologists, lawyers, criminologists, social workers and penitentiary specialists.
- Independent commission members do not represent corporate interests. They must be independent, and they must apply the RA legislation, based on their professional knowledge.

### ***Powers of Independent Commission***

- In each case, the commission prepares a conclusion, which includes the commission's observations regarding the information provided by the penitentiary. The conclusion must be well substantiated.
- Before reaching a conclusion, the commission hears the prisoner. It can also invite a representative of the penitentiary, specialists and experts.
- In the case of a negative conclusion, the prisoner can request the penitentiary (within seven days of receiving the negative conclusion) to send his case to a court. The penitentiary is then required to send the case to a court immediately.



- A negative conclusion must contain detailed explanation of why the commission decided that the prisoner should not be released early. This explanation should help the prisoner correct the mistakes pointed out by the commission in order to demonstrate progress next time he is recommended for early conditional release.
- In the case of a positive conclusion, the prisoner can request the penitentiary (within 7 days of receiving the positive conclusion) to send his case to a court.

### ***Court Hearing***

- The hearing has to take place in the presence of the prisoner, who can voice his opinion on any issue related to him, object to the presented materials and evidence, and present materials and evidence. The prisoner can take part in the hearings in person or through a representative.
- Representatives of the relevant penitentiary and the independent commission can also take part in the hearing. The court can invite specialists, experts, and representatives of the penitentiary or independent commissions.
- A prosecutor can also take part in the hearing. The prosecutor is notified by the court. The prosecutor can also submit his position and arguments in writing, without being present at the hearing.
- The court reviews the materials provided by the penitentiary and independent commission, the prosecutor's position and arguments (if any) and materials acquired during the hearing, and then makes substantiated decision on granting or denying early conditional release.
- In the case of a positive decision, the court sets a probation period, individualized conditions and types of supervision that must be understandable for the prisoner.
- The prisoner must have an opportunity to question the proposed conditions before the court makes the final decision.

### ***Changing the Conditions and Revoking Early Conditional Release***

- The law should require continuous evaluation of compliance with conditions of early release, as well as a possibility of reviewing or changing these conditions.
- Revocation of early conditional release must be considered the last resort, when the change of conditions cannot ensure the implementation of the goals of early conditional release.
- Changing the conditions and revoking early conditional release should be done in accordance with the relevant procedures. It should be done on the basis of facts, with consideration given to the released prisoner's opinion and his financial and social situation.