

QUESTIONS

About you

(Note: Information entered in this “About You” section may be published with your response (unless it is “not for publication”), except where indicated in bold.)

1. Are you responding as:

- an individual – in which case go to Q2A
- on behalf of an organisation? – in which case go to Q2B

2A. Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose “Member of the public”.)

- Politician (MSP/MP/peer/MEP/Councillor)
- Professional with experience in a relevant subject
- Academic with expertise in a relevant subject
- Member of the public

Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:

.....
.....

2B. Please select the category which best describes your organisation:

- Public sector body (Scottish/UK Government or agency, local authority, NDPB)
- Commercial organisation (company, business)
- Representative organisation (trade union, professional association))
- Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
- Other (e.g. clubs, local groups, groups of individuals, etc.)

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

.....
.....

3. Please choose one of the following:

- I am content for this response to be published and attributed to me or my organisation
- I would like this response to be published anonymously
- I would like this response to be considered, but not published (“not for publication”)

If you have requested anonymity or asked for your response not to be published, please give a reason. **(Note: your reason will not be published.)**

4. Please provide your name or the name of your organisation. **(Note: The name will not be published if you have asked for the response to be anonymous or “not for publication”.)**

Name: Howard League Scotland

Please provide a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. **(Note: We will not publish these contact details.)**

Contact details: [redacted]

5. Data protection declaration

I confirm that I have read and understood the privacy notice attached to this consultation which explains how my personal data will be used.

Your views on the proposal

Note: All answers to the questions in this section may be published (unless your response is “not for publication”).

Aim and approach

1. Which of the following best expresses your view of giving Scottish courts the power to sentence the worst criminals to custody for the rest of their lives?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response:

Scotland’s existing use of life sentences

In Scotland a conviction of murder carries a mandatory life sentence. A life sentence can also be imposed as a maximum punishment for eight sexual offences.

Scottish courts can currently impose a life sentence which must include the setting of a minimum term. The Prisoners and Criminal Proceedings (Scotland) Act 1993 makes clear that this is the “punishment part” of the sentence. After serving the punishment part, a prisoner can be considered for release by the Parole Board for Scotland. Where imprisonment is no longer necessary for the protection of the public, the prisoner can be released subject to conditions of licence in the community for the rest of their lives. This includes the possibility of a return to custody if they breach their licence conditions. Where imprisonment remains necessary for the protection of the public, the Parole Board for Scotland can order the prisoner’s continued detention.

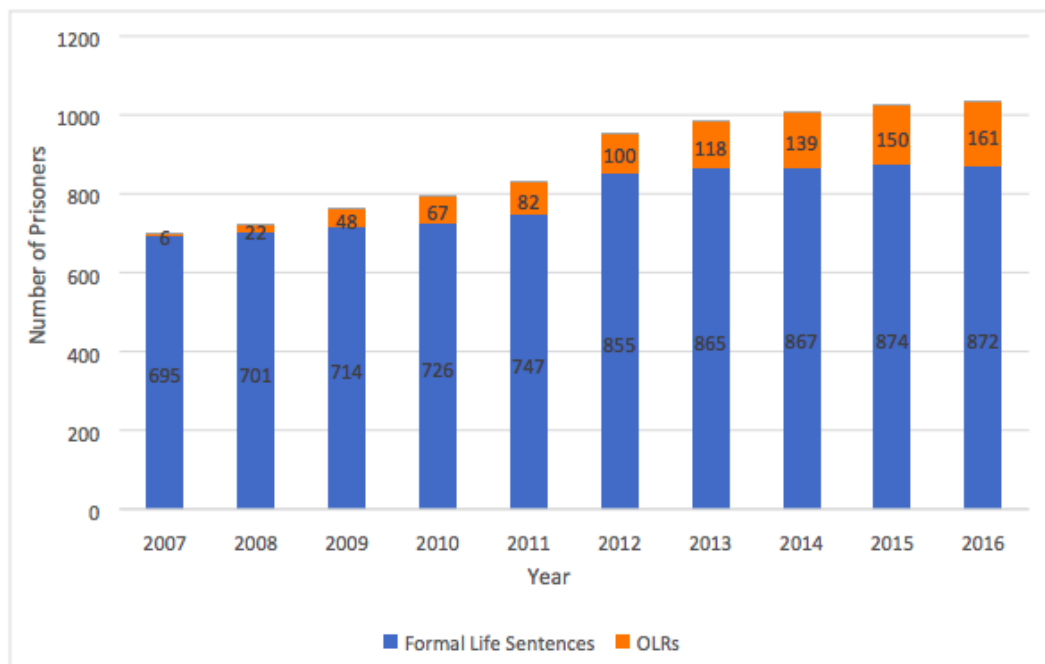
Scottish courts can also impose a life sentence by way of an Order for Lifelong Restriction (OLR), where a convicted person’s sentence for serious violent or sexual offences is based on the likelihood of future high-risk offending, rather than the offence itself. Again, a punishment part of the sentence must be set and the Parole Board for Scotland can take a decision to release a prisoner only when imprisonment is no longer necessary for the protection of the public. Licence conditions upon release include intense community supervision and adherence to a lifelong Risk Management Plan.

The Scottish criminal justice system thus already has the power to ensure that those who are convicted of serious offences and who continue to pose a risk to public safety remain in custody for the whole of their lives. But their continued detention

depends, rightly, not on a judgment made at the time they are sentenced, but on the Parole Board’s judgment that it is necessary for public protection.

Members of the public and media often misunderstand this, and thus it is important not to misrepresent current legislation. Some of the language contained within the consultation might encourage such misunderstanding. For instance, whilst it is true that “an offender who was supposedly sentenced to ‘life’ is automatically considered for release by the Parole Board” (page 3), it is important to make clear that the Board will order release only if it is persuaded that continued detention is not necessary for public safety; nor is it true that “[w]hether an offender is released is largely dependent on their age and health at the time of sentencing” (page 15).

Recent analysis¹ shows that Scotland already sentences a high and increasing number of people to life in prison (see figure (i)). This is at a time when crime rates are falling, including a 39% reduction in rates of homicide since 2008². Scotland’s existing use of the life sentence is already excessive.



Source: Figures for total life sentences (including those recalled to custody from license in the community) from 1st September each year, published in the Annual Council of Europe SPACE I reports 2007 – 2016 (Council of Europe, 2009 - 2018), figures for OLRs from the Risk Management Authority (reporting year March – March) personal communication.

Figure (i).

¹ Van Zyl Smit, D. & Morrison, K. ‘The Paradox of Life Imprisonment in Scotland’. Under Review. See also <https://www.heraldscotland.com/news/16079679.scotland-told-to-scrap-automatic-life-sentences-for-murderers/>

² Scottish Government Homicide Bulletin (2018) <https://www.gov.scot/publications/homicide-scotland-2017-18/pages/2/>

Figures published by the Council of Europe for 2016 also show that at 19.2 prisoners per 100,000 of national population, Scotland has the highest proportion of life sentenced prisoners in Europe. For comparison, the equivalent ratio in Germany is 2.3 and 0.7 in France. The percentage of life prisoners in the national prison population in Scotland is also the highest in Europe. The average length of time actually served under life sentences is also increasing, having risen from 14.6 years in 2007/08 to 19.1 years in 2016/17, an increase of 31% over the period³.

At a time when Scotland's crime rate is falling, then, Scotland is becoming unnecessarily punitive, particularly reflected in our use of imprisonment. The latest figures from Council of Europe, show that Scotland has the highest rate in Europe of people serving sentences in prison⁴. These figures show that Scotland's approach to punishment must be moderated and diminished, not further increased. Whilst recent reforms to short sentences are very much welcome, the proposed reforms to increase the use of imprisonment for more serious crimes, to the extent that a Whole Life Custody Sentence may be 'the starting point' in some cases, will not only add to Scotland's already excessive use of imprisonment but undermine the broader penal reform agenda to which Scotland is committed. Proposals such as the Whole Life Custody (Scotland) Bill further play on an unwarranted fear of crime where the law is already adequate, and in which sentencing practices are, if anything, already needlessly excessive.

Internationally, the direction of travel has been away from mandatory life sentences, an example of which being the case of *DeBoucherville v. The State of Mauritius* ([2008] UKPC 37, para 170) where it was argued before the Privy Council that:

"[i]t permitted no distinction to be drawn between one offence of murder and another, despite the great and well-known disparity between the culpability of different murderers, even where an intention to kill is a necessary ingredient of the offence. It allowed no account to be taken of the youth, age, vulnerability or circumstances of the individual offender".

With the recent notable exception of the Minimum Age of Criminal Responsibility not being raised fully in line with recommendations from the UN and Council of Europe Commissioner for Human Rights, Scotland's approach to criminal justice has largely adhered to the principles of welfarism, social justice and human rights. That approach is seriously under threat from this Bill, which is regressive and underpinned by a kind of penal populism that is far from helpful to Scottish society or politics.

'Making the punishment fit the crime'

The consultation argues that, currently, the punishment 'does not fit the crime', and therefore, that the introduction of 'whole life sentences' is required. Howard League Scotland argues that this phrase has been deployed in a simplistic and populist

³ Van Zyl Smit, D. and Morrison, K. (op cit)

⁴ See Tables 3 and 5 in the SPACE II Council of Europe bulletin http://wp.unil.ch/space/files/2019/05/SPACE-II_report_2018_Final_190520.pdf

fashion, without deeper consideration of what this means, and without reference to evidence. Making the punishment 'fit' is what sentencers already do: they already calibrate sentence type and length based on the nature of the case. Aggravating factors which can increase the length of the initial mandatory custodial element of a life sentence already exist (for example, the murder of a child or a police officer), therefore, the punishment does already 'fit' the crime. If the argument is 'we need longer sentences', we question this since Scottish sentences of imprisonment for life are already longer than our European neighbours⁵. We have not seen any evidence that crimes committed in Scotland are worthy of greater punishment than in our neighbouring countries. If the argument is that we must have punishment which 'fits' the crime in a literal and symbolic way (the 'an eye for an eye' argument), we would argue against this on human rights and moral grounds, in the way we do against capital punishment in cases of homicide. We fear that phrases such as 'the punishment must fit the crime' can function as simplistic dog-whistles in this context, hindering consideration of what they really mean, and capitalising on public misunderstanding of current sentencing practice.

'Life' does already mean 'life' in Scotland

Due to life-long license conditions which remain after release and the risk of being returned to custody for breach which remains in place until death, these sentences are experienced, and should be understood, as a whole life sentence. Those subject to them will continue to be subject to some degree of surveillance for the rest of their lives and will never truly be at liberty⁶. When understood in this context, it will be appreciated that 'release' from custody does not mean 'release' from (or, indeed, 'early release' from) the life sentence itself. The contrary suggestion, that 'life' does not mean 'life', wholly disregards this reality.

'Public protection'

The current law and practice in Scotland means that an individual will remain in custody unless it is assessed, upon detailed examination of the evidence in each case by the Parole Board for Scotland, that the individual no longer poses a risk to the public. Far from being an 'automatic' process at the end of the 'punishment part' as the consultation seems to imply, decisions about life sentence release by the Parole Board are, in fact, conservative, and concerned with the potential risks of both recidivism and serious harm. In their most recent reporting year, out of 342 cases of life sentenced prisoners considered for release, only 35 (10%) were released, 202 (59%) were not released, 99 (29%) were adjourned or postponed, and 6 (2%) were withdrawn⁷. The Parole Board's decision-making is explicitly informed by considerations of public protection, with "the fundamental consideration being

⁵ Van Zyl Smit, D. and Morrison, K. *op cit*.

⁶ See McNeil, F (2018) *Pervasive Punishment* for an account of the enduring and pervasive experience of license conditions in the community.

⁷ Parole Board for Scotland (2019) Annual Report 2017/18

<http://www.scottishparoleboard.gov.uk/pdf/Parole%20Board%202017.pdf>

whether the risk posed by releasing a prisoner into the community is acceptable and safely manageable”.⁸

The consultation commends members of the Parole Board for Scotland on the “difficult job they do” and insists that “no part of [the] proposal should be interpreted as an attack on the individual decisions or competence of the Board”; and yet, the consultation suggests that confidence in sentencing cannot be maintained “as long as the Board has the power to release offenders who the public feel should never leave prison” (page 9). It is not, it never has been, and it never should be, the job of the public to determine who should be released from prison. That is the job of members of the impartial and independent Parole Board who will have access to critical evidence-based information including a home background report, a prison social work report, a trial judge report (if available), and where appropriate a psychological and/or psychiatric report, sentence management reports and prisoner misconduct reports, prior to making a decision on whether or not to release a prisoner. This kind of information is crucial to decisions on whether it is safe to release a prisoner: since sentencing judges do not have, and at the time of sentencing could not have, such information, they are ill placed to judge – as the consultation would have them judge – which crimes are “so vicious that those who commit them will never be fit for release and reintroduction into society” (page 3).

The importance of hope

The prospect of release at some point in the future is an important component of what helps those in custody to comply with the prison regime, thus making it more possible for an orderly custodial environment to be maintained. It is through sentence progression and Integrated Case Management that good behaviour can be incentivised, fostered and internalised, and, more importantly, a positive and pro-social self-identity can emerge. The removal of any prospect of release would remove many of the incentives to comply with prison rules which currently exist. A Whole Life Custody Sentence would have no end date, and thus individuals could continue to commit crime in prison without fear of punishment, since any sentences for new offences – for example, the bringing in of drugs – would run concurrently, not consecutively. Without hope of release, one has nothing left to lose and no incentive to comply, which in turn risks problems of management and prison order.

Rehabilitation would be unlikely to be offered, since existing Scottish Prison Service policy dictates that access to it is determined by sentence end date or punishment part expiry date. The purpose and incentive of rehabilitation towards release would be removed. These (pragmatic) grounds are another reason why Whole Life Custody Sentences must be avoided in Scotland. Research shows the importance of maintaining ‘hope’ for those serving long sentences in prison. Styles (2019) argues that the presence of hope for this population is achieved through a variety of factors including progression through the sentence (through rehabilitation programmes, responsibilities in custody); and continued relationship with family members. Both of

⁸ Parole Board for Scotland (2019) Annual Report 2017/18, Chair’s Foreword; see, also, The Parole Board (Scotland) Rules 2001/315, as amended, rule 8

these factors would be negatively affected by the experience of serving a whole life sentence in custody⁹. The very difficult processes of adjusting to very long sentences¹⁰, would likely be even more difficult for this population, resulting in a fatalism unlikely to support positive behaviours in custody.

The consultation argues that “[t]he application of the system of Whole Life Orders that exists in England and Wales has been held to comply with the ECHR by the European Court of Human Rights” (p25), in the 2017 *Hutchinson v. UK* ruling [¹¹], because a prisoner may be released by the Secretary of State for Justice on compassionate grounds. The consultation goes on to argue that this ruling can be extrapolated to the Scottish context, in line with compliance with the ECHR. In *Hutchinson v UK*, however, the court emphasised (at para 42) that, in order for a life sentence to be human rights compliant, there must be both a prospect of release and a possibility of review:

“The basis of such review must extend to assessing whether there are legitimate penological grounds for the continuing incarceration of the prisoner. These grounds include punishment, deterrence, public protection and rehabilitation. The balance between them is not necessarily static and may shift in the course of a sentence, so that the primary justification for detention at the outset may not be so after a lengthy period of service of sentence...

43... [R]espect for human dignity requires prison authorities to strive towards a life sentenced prisoner’s rehabilitation... It follows that the requisite review must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds (*Vinter and Others*, cited above, §§ 113 – 116). A review limited to compassionate grounds is therefore insufficient (*ibid*, § 127)”.

Thus, the dominant law in this area remains that outlined in the 2013 *Vinter v. UK* ruling¹², which argued that all prisoners must be given hope through the prospect of release, not only those who because of terminal illness are merely “allowed to die at home or in a hospice rather than behind prison walls”.¹³ In *Vinter v. UK*, “the right to hope” was formulated by Judge Power Forde¹⁴ (at 47):

“[H]ope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity

⁹ Styles, W. (2019) ‘A crisis of hope? Long term prisoners’ experiences in Category A environments’ *Prison Service Journal* (243).

¹⁰ Crewe, B., Hulley, S. and Wright, S., 2017. Swimming with the tide: Adapting to long-term imprisonment. *Justice Quarterly*, 34(3), pp.517-541.

¹¹ *Hutchinson v United Kingdom*, App no 57592/08 (ECtHR, 17 January 2017)

¹² *Vinter v United Kingdom* (2016) 63 EHRR 1, ECtHR (Grand Chamber)

¹³ See, eg, *Petukhov v. Ukraine (No. 2)*, App no 41216/13 (ECtHR, 12 March 2019), para 170, citing *Vinter v UK*, para 127 and *Matiošaitis v. Lithuania*, App no 22662/13 (ECtHR, 23 May 2017), para 162

¹⁴ (2016) 63 EHRR 1 at 47

and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.”

This formulation is still good law. From and after the decision in *Hutchinson v. UK*, the European Court of Human rights has continued to rely on *Vinter v. UK*. The Court has declared that legislation in both Lithuania (*Matiošaitis v. Lithuania 2017*¹⁵) and Ukraine (*Petukhov v. Ukraine (No. 2) 2019*¹⁶) infringed against the ECHR, because it did not provide appropriate release possibilities for prisoners with whole life sentences. The European Court of Human Rights may well reconsider its *Hutchinson v. UK* decision in light of the future development of the law with regard to “exceptional circumstances...which justify the prisoner’s release on compassionate grounds”.¹⁷ It would therefore be unwise for Scotland now to seek to reform its law based on the specific and as yet relatively undeveloped English legislative position addressed in the *Hutchinson v. UK* ruling.

In any event, from a point of principle, Howard League Scotland would argue that our benchmark should not be “the minimum prospect of release as required by human rights treaties” (consultation, page 3), but the application of ‘common humanity’.

It is worth noting that even the now abolished Imprisonment for Public Protection (IPP) sentence “does not require the abandonment of all hope for offenders on whom it is imposed. They are not consigned to penal oblivion. To the contrary, common humanity, if nothing else, must allow for the possibility of rehabilitation” (Lord Judge in *R (on the application of Wells) v Parole Board for England and Wales* [2010] 1 AC 553, para. 105.)

“All those involved in the criminal justice process should treat people with whom they come into contact ... with courtesy, dignity and respect [and] seek to preserve a sense of being valued as a human being, and of some hope for the future, even if the person has done something dreadfully wrong” (Faulkner 2004: 162-3)¹⁸.

Lack of judicial call for change

There is no evidence that Whole Life Custody Sentences are sought by the Scottish judiciary. In fact, neither the Sentencing Council, the Lord President, nor any other members of the judiciary have raised any issues or expressed any concern that their existing powers to sentence serious offenders are not sufficient (Ash Denham MSP,

¹⁵ *Matiošaitis v. Lithuania*, App no 22662/13 (ECtHR, 23 May 2017)

¹⁶ *Petukhov v. Ukraine (No. 2)*, App no 41216/13 (ECtHR, 12 March 2019) (request for referral to the Grand Chamber pending)

¹⁷ Crime (Sentences) Act 1997, s 30; see, eg, *Hutchinson v UK*, paras 57, 65 and 70, citing the recent clarification of the scope of domestic law in *Attorney General’s Reference (No 69 of 2013)*, [2014] EWCA Crim 188

¹⁸ Faulkner, D., (2004) ‘Relational justice: a dynamic for reform’ in Burnside, J., and Baker, N. (eds) *Relational justice: Repairing the breach*. Winchester: Waterside Press pp 159-75

Whole Life Custody (Scotland) Bill debate, 4 June 2019). England and Wales may well have a working and legal system of Whole Life Orders, but no-one in the Scottish judiciary is asking “why can’t we?” (consultation, page 9).

2. How would introducing Whole Life Custody Sentences affect your level of confidence in the Scottish justice system?

- Significantly more confident in the justice system
- Slightly more confident in the justice system
- Neither more nor less confident in the justice system
- Slightly less confident in the justice system
- Significantly less confident in the justice system
- Unsure

Please explain the reasons for your response:

The public view of punishment

The law, as it stands, makes an important distinction between the period of incarceration attributed to ‘punishment’ and the period of incarceration attributed to ‘protection of the public’ within each sentence.¹⁹ The proposed Whole Life Custody (Scotland) Bill removes this distinction, narrowing sentencing options down an implicitly punitive path as demonstrated by phrases within the consultation such as “but for the worst murders and sexual offences the sentences should be consistently tougher” and “[t]his Bill will simply hand our courts and judges more power to impose tougher sentences for those that deserve it”. It is therefore at odds with the Scottish Crime and Justice Survey’s finding that 90% of respondents agreed that “prisons should help prisoners change their behaviour rather than just punish them”²⁰.

The current system for ‘life’ sentences in Scotland thus divides responsibility for determining the length of time the offender actually serves between the sentencing judge and the Parole Board. The judge’s decision is guided by the Scottish Sentencing Council’s Sentencing Guideline (effective from 26 November 2018) which states that “all relevant factors of a case must be considered including the seriousness of the offence, the impact on the victim and others affected by the case, and the circumstances of the offender”. The Parole Board’s decision depends on whether, at the time of the parole hearing, continued detention is necessary for public safety.

Confidence in the Scottish justice system thus depends on confidence in the expertise, independence and legitimacy of both the judiciary and the Parole Board for Scotland, not merely on the length of custodial sentences imposed or completed. There is no evidence to support the consultation’s assertion that any lack of

¹⁹ See, eg, Scottish Sentencing Council, Principles and purposes of sentencing, effective from 26 November 2018, para 5

²⁰ Scottish Crime and Justice Survey 2019. Available at: <https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/crime-and-justice-survey>

confidence in our justice system is “[in whole or] part because our sentences are not tough enough”.

As far as initial sentencing is concerned, in the Scottish Crime and Justice Survey (2017/18), 61% of respondents were confident that the operation of the criminal justice system “adequately takes into account the circumstances surrounding a crime when it hands out sentences”, compared to 29% who were not confident. As we stated in our answer to Question 1, there is no evidence to suggest that the Scottish judiciary is calling for more sentencing powers.

Increasing public support for the criminal justice system

We agree it is important that ‘justice is seen to be done’ and that public support for the criminal justice system is important for its legitimacy. Current views held by the Scottish public about punishment must be situated in the context of very little knowledge existing about the criminal justice system or about sentencing practices at all, within the Scottish general population. The Scottish Crime and Justice Survey (2017/18) also shows that 76% of the public did not know very much, or anything at all, about the criminal justice system. Research shows that the more information that is provided to the public about the circumstances of crimes, the less punitive they become. For example, Balvig et al found that:

“When asked simple questions, the public want stiffer sentences. In their assessments of the vignette crimes, the public demands on average lower prison sentences than judges, and this tendency becomes stronger in the focus group study. The propensities towards punitiveness seem to diminish with more information”.²¹

We therefore support measures which increase public confidence in the system through public education about the system, and believe strongly this can be achieved without measures such as these proposed. The efforts of the Scottish Sentencing Council and Community Justice Scotland to better engage the public in their work are exemplars in this regard. These initiatives, not ‘tougher’ sentencing, will provide greater confidence in the system.

3. Which types of murder should have a Whole Life Custody Sentence as the starting point for sentencing? (Choose all that apply)
 - The murder of two or more persons, where each murder involves any of (1) a substantial degree of premeditation or planning, (2) the abduction of the victim, or (3) sexual or sadistic conduct
 - The murder of a child if involving the abduction of the child or sexual or sadistic motivation

²¹ Balvig F. et al (2015), ‘The public sense of justice in Scandinavia: A study of attitudes towards punishments’, *European Journal of Criminology*, 12(3): 342 – 361. Available at: <https://journals.sagepub.com/doi/full/10.1177/1477370815571948>. See also Warner K. et al (2011), *Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study*. Available at: <https://aic.gov.au/publications/tandi/tandi407>

- The murder of a police or prison officer in the course of their duty
- A murder carried out for the purpose of advancing a political, religious, racial or ideological cause
- A murder by an offender previously convicted of murder
- Other (please specify)
- None of the above

Please explain the reasons for your response.

Howard League Scotland does not agree with a Whole Life Custody Sentence being the starting point for sentencing in any circumstances whatsoever.

The Scottish criminal justice system already has the power to ensure that those who are convicted of serious offences and who continue to pose a risk to public safety remain in custody for the whole of their lives.

Scotland already takes a punitive stance towards murder. The current legal requirement that a life sentence must be imposed following a conviction of murder is relatively unusual in Europe, with only Scotland, the other jurisdictions of the United Kingdom and Germany having provision for such a sentence.

In Scotland we have a relatively broad definition of murder, as being committed when there is an intention to kill, or a wilful act so reckless as to show that the person who committed it was utterly regardless of the consequences (Scottish Government, 2019).

In comparison, Germany's definition is more restrictive:

“The murderer ... is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence” (Art 211 of the German Penal Code).

The wide definition of murder in Scotland, and the automatic life sentence mandated for this crime, is part of the reason why Scotland has the highest rate of life sentenced prisoners in Europe²². The current sentencing of those convicted of murder, together with the actions of the Parole Board, means there is absolutely no need to further increase the punitive sentencing already in place for these crimes.

4. Which sexual offences should have a Whole Life Custody Sentence as the starting point for sentencing? (Choose all that apply)
- Rape of two or more persons
 - Rape of a young child
 - Sexual assault on a young child by penetration

²² Van Zyl Smit, D. Morrison, K. *op cit*

- Causing a young child to participate in a sexual activity
- Other (please specify)
- None of the above

Please explain the reasons for your response:

Whilst the Sexual Offences (Scotland) Act 2009 determines that there are eight sexual offences for which the maximum sentence is life, this is discretionary rather than mandatory. The proposal to make a Whole Life Custody Sentence the starting point for the offences listed would therefore constitute significant 'up-tariffing'. It should also be noted that the proposed list of offences which would attract a Whole Life Custody Sentence "would be explicitly non-exhaustive" thus also allowing for net-widening.

This has potentially radical and far-reaching implications and effects on the wider criminal justice system, and would undermine the principles of fairness, proportionality, justice, and respect for human rights, that shape the administration of justice in Scotland. It would threaten both penal legitimacy and penal efficacy by undermining the three core dimensions of justice that shape people's responses to the sentences imposed by the courts: procedural (the extent to which we perceive we have been fairly treated by authorities); distributive (how we perceive we are treated relative to similarly situated others); and substantive (the extent to which we perceive the outcomes of justice processes as fair).

The Scottish Sentencing Council's Sentencing Guideline²³ (effective from 26 November 2018) states that "sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case". Setting such a high 'starting point' for sentencing, as this Bill does, would not appear to be in keeping with this aim and its core principle that "[s]entences in Scotland must be fair and proportionate".

5. Are there any other types of offence (other than murder or certain sexual offences) which should attract a Whole Life Custody Sentence as a 'starting point' for sentencing?

- Yes (please specify)
- No – only murder and certain sexual offences should attract a Whole Life Custody Sentence

²³ <https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf>

- No – no offences (including murder or sexual offences) should attract a Whole Life Custody Sentence
- Unsure

Please explain the reasons for your response:

In keeping with our answers to all other consultation questions, no offences should attract a Whole Life Custody Sentence as a 'starting point' for sentencing. The suggestion that a proposed Whole Life Sentence could apply to other types of offences not covered by the current life sentence option would involve a radical 'up-tariffing' which we cannot support.

6. Which of the following best expresses your view on whether whole life custody should be a sentencing option for younger offenders?

- Whole life custody should be limited to offenders aged 21 or over (at the time the offence was committed)
- Whole life custody should be limited to offenders aged 18 or over (at the time the offence was committed)
- Whole life custody should be limited to offenders aged 16 or over (at the time the offence was committed)
- Whole life custody should be an option of any adult offender (aged 16 or over) or for children over the age of criminal responsibility (at the time the offence was committed)
- Whole life custody should not be an option for any offender, regardless of age
- Unsure

Please explain the reasons for your response.

Howard League Scotland's evidence to the Scottish Parliament on the Age of Criminal Responsibility expressed our strong belief that Scotland should adopt a minimum age of criminal responsibility of at least 16. This would build on the success of the Whole System Approach, recognising the hugely detrimental and destructive impact that contact with the criminal justice system has on children; and that those children who come into contact with the criminal justice system are as troubled as they have been troublesome. Against advice from the UN and the Council of Europe Commissioner for Human Rights that setting the age of criminal responsibility at 14 is an absolute minimum requirement, the Scottish Parliament has recently passed legislation to raise it only to 12.

The idea that a child as young as 13 (ie 'over the age of criminal responsibility') could be subject to a whole life sentence, is entirely incompatible with Scotland's welfare principles and respect for human rights, and should not be countenanced.

As we have stated in previous answers, we do not support whole life custody for any offender or offence in any circumstances.

Financial implications

7. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have?

Please explain the reasons for your response.

As the consultation concedes, this Bill may apply to only six people in Scotland at any one time. Calculating the potential costs incurred by this Bill is understandably difficult given the variables involved, although “[t]he additional cost is not anticipated to be great” (consultation p.28). Howard League Scotland would not disagree with this, however, we strongly reject the contention that “[t]he proposed Bill may also result in savings to the justice system if more potential offenders are deterred from serious crime in the future”. There is no evidence whatsoever, to suggest that a Whole Life Sentence would act as a deterrent and thus prevent future crime (and by implication, save money and reduce harm). The evidence shows that it is the certainty of being caught (by the police), not the severity of the punishment, which has the greatest deterrent effect on future offending.²⁴ Therefore, Whole Life Custody Sentences would be costly to the public purse and would not save money by serving to increase deterrence. It would thus be financially, as well as socially, counter-productive.

As for incapacitation, it is of course true that someone securely detained in prison is incapacitated from committing crimes outside the prison. But the existing Scottish provisions for life sentences and for OLRs already deal with the need to incapacitate the dangerous: those judged to present a continuing danger to the public will remain in prison.

Equalities

8. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation?

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure

Please explain the reasons for your response.

N/A

Sustainability

²⁴ Nagin D. S. (2013) ‘Deterrence in the Twenty-First Century, Crime and Justice 42(1). Available at: <https://www.journals.uchicago.edu/doi/abs/10.1086/670398>

9. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

- Yes
 No
 Unsure

Please explain the reasons for your response.

Given the reasons outlined above in relation to the punishment 'fitting' the crime, public protection, public support, costs, and human rights, this Bill, if implemented, would have negative economic and social impacts.

General

10. Do you have any other comments or suggestions on the proposal?

In summary:

Howard League Scotland does not agree with a Whole Life Custody Sentence being the starting point for sentencing in any circumstances whatsoever.

The Scottish criminal justice system already has the power to ensure that those who are convicted of serious offences and who continue to pose a risk to public safety remain in custody for the whole of their lives. Decisions made by the independent Parole Board for Scotland to release a prisoner are fundamentally informed by considerations of public protection and are based on access to critical evidence-based information. There is no evidence whatsoever to suggest that a Whole Life Custody Sentence would act as a deterrent and thus prevent future crime.

At a time when crime rates are falling, including a 39% reduction in rates of homicide since 2008, Scotland's existing use of the life sentence is already excessive. The Bill plays on an unwarranted fear of crime and would undermine Scotland's broader penal reform agenda.

Confidence in the criminal justice system depends on the expertise, independence and legitimacy of both the judiciary and the Parole Board for Scotland, not merely on the length of sentence imposed or completed. Neither the Scottish Sentencing Council, the Lord President, nor any other members of the judiciary have sought these additional sentencing options.

The prospect of release is an important component of what helps those in custody to comply with the prison regime, thus making it more possible for an orderly custodial environment to be maintained. This element of hope and the application of common humanity in sentencing has been highlighted in rulings from the European Court of Human Rights, which we strongly support.

The use of Whole Life Custody Sentences thus has potentially radical and far reaching implications and effects on the wider criminal justice system, undermining the principles of fairness, proportionality, justice and respect for human rights which are central to Scottish society.