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Response to Consultation on the Proposed Whole Life Custody (Scotland) Bill

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The current Scottish justice system portions sentencing so that it first assigns a punishment phase of the sentence, a minimum of time to be spent incarcerated. In a life sentence, after the punishment phase, the continuation or cessation of imprisonment is delegated to a process of specialist intervention comprising of SPS educational and therapeutic courses, counselling groups and social work assessments (etc), and culminating in the expert decision of the Parole Board. The necessity of positioning this assessment phase alongside and towards the end of an inmate's serving of the punitive portion of his or her imprisonment, should be evident. Rehabilitation is a process that confronts a kaleidoscope of emotional, personal and social factors, and is aimed at restructuring the individual's unknown and intangible core self so as to align it with common social values. Response to rehabilitation efforts, including the punishment element itself, is not formulaic and cannot be predicted at the outset of imprisonment. However, for a select few, the WLC(S) Bill implies otherwise.

The WLC(S) Bill, in essence, makes two fundamental assessments:

- 1) that an individual can be assessed to be permanently beyond rehabilitation at sentencing, based on actions that constitute the worst of their (known) behaviour (**a practical claim**)
- 2) that there are certain actions (crimes) that inherently surrender the individual's *right* to ever rejoin society (**a moral claim; retributive**)

(1)

life sentences effectively already exist in parole procedure. For the former assertion, it is not necessary to debate whether or not there is such a thing as a criminal beyond rehabilitation. Allowing for the possibility of such an individual, the issue is: at what point can it and should it

be concluded that the individual *is* beyond rehabilitation? Parole Boards are (theoretically) equipped to contend with the complexities of all types of offences, and function with the specific purpose of assessing the individual's fitness to rejoin society. Parole Boards are also charged with safeguarding the interests of the victims of such offences, with victim impact statements participating in their deliberations. It is perfectly plausible that the expertise of a Parole Board will conclude time and time again that parole is not an option for individual perpetrators of the relevant serious crimes, as it is not only within their remit, but their obligation, to do so as necessary. Thus, the justice system already provides the means for permanently retaining a prisoner in custody on the basis of threat to society. The WLC(S) Bill is therefore either an indirect means of undermining the Parole Board's competence, or it is purely concerned with maximising retribution, and with immediate impact.

The seriousness of the crime warrants a more - not less - sophisticated assessment. The WLC(S) Bill is designed to be applied to the most serious of crimes which involve, arguably, the most incomprehensible and rare behaviour. It is incorrect to present the extremeness of the individual's behaviour as an indication of their likelihood to reoffend. In fact, it is petty crimes that have some of the highest recidivism rates. The rareness of such serious crimes should give rise to concern over our ability to immediately assess the individual's potential for rehabilitation, given the relatively limited case studies. The severity of such crimes should give pause for thought regarding the complexity of the factors that brought them about, and this should recommend a nuanced and tentative approach to the potential for rehabilitation. It would be a clear betrayal of justice to cap the potential for rehabilitation based on our revulsion at, or inexperience of, the enormity of certain crimes.

(2)

The symbolism of a justice that compromises its own principles. Within the proposed Bill there is reference made to the symbolism of justice, "the more serious the crime, the more important it is that justice [...] is *seen to be done*." This concept invokes the spectacle of justice: that the responsibility towards justice heightens as the emotions and/or numbers of its audience increase. It inherently implies that the consistency of justice can or should be tiered. We must be concerned with the symbolism of allowing a core tenet of our criminal justice system - rehabilitation - to be erased as a prospect for those whom are perceived to present its greatest challenge. If rehabilitation (as a prospect) is fundamental to our implementation of justice, then we should be worried that justice is not *seen to be done* by eliminating this principle. In a sense, this Bill admits defeat regarding the rehabilitative function of our justice system, at the point when this function is most challenged. It is a mistake to frame this as an approach from the position of strength, whilst viewing engagement with the complexity of rehabilitating such offenders as a weakness.

It is impossible to summarise the symbolic nature of justice and to make a concise argument for the reasons why a system of *retribution alone* erodes a society's integrity, cohesion and, ultimately, character. Suffice to say that rehabilitation with the prospect of release has been agreed upon as a fundamental feature of a justice system that holds human dignity at its core. When confronted by a hideous crime, as a society we should be unwavering in our commitment to our principles of justice. If we are not, we are allowing justice to be warped and reconfigured, not due to a moral evolution, but to frailty in the face of its greatest tests. We end up allowing criminality to compromise our own judicial fibre.

Pure retribution symbolically precludes a society from confronting the truth about humanity and from moving on. The WLC(S) Bill is presented as a means of total social condemnation, and as satisfying a 'legitimate requirement of retribution'. These are far more sophisticated concepts than they are presented as being, and it is counter-productive to simplify them. Punishment serves to express social outrage at the harm caused, it bears witness to and upholds the moral code of the society, and it is some consolation for the grief that victims and society have had inflicted upon them. It is also, however, a means of conditioning the offender to respect society's moral code. The efforts made by a justice system to re-condition the individual in this way must not be overlooked for its role in addressing the damage that crime causes, and expressing the integrity and humanity of the society. It is not surprising that many wish for certain offenders to be locked up forever given their offences, however in moments of great pain and suffering, victims of crime have also sought to forgive the offenders as a means of creating closure and releasing the burden of their anger. Punishment in certain forms has been characterised as a means of perpetuating an 'us' and 'them'- those who observe morality and those who neglect it. Serious crime lends itself well to this framework, and it often times allows for rhetoric such as 'monster', 'sub-human', and 'pure evil' to be applied in earnest. However, we must be critical of this disavowal of extreme criminal behaviour as this encourages the pretence that it occurs in some sort of social vacuum. Abandoning efforts to rehabilitate an offender, therefore, is in many instances a means of dehumanising the darkest aspects of human behaviour - this is socially dishonest, irresponsible and functions as blinders that create vulnerability.

"The judge can serve the needs of the people better than the parole board can ...when crime is most serious". Once again, this proposal allows for a tiered system whereby it can be claimed that the Parole Board's distance from 'the facts' of the case disadvantages its ability to deliver justice in some cases but not others. Whereas distance from the emotions of a trial should be seen to assist a careful and measured assessment (for rehabilitation), this proposal encourages vicinity to the trial as well as intimacy with the case details as a more appropriate perspective specifically when such content is most likely to be emotionally disturbing. Note that earlier on there was an appeal made to the spectacle of justice, which in effect argued that justice should

be tailored to assuage the emotions of the public - a public which is less intimate with the facts of the trial than the Parole Board would be. Alongside this argument re: a responsibility to heed public outcry, the proposal states: "There will never be a situation where a judge is compelled to impose a WLCS when they have good reason to do otherwise." Public outcry has already been included as a foundation of this proposal, with its introduction referring to the public's confidence deficit regarding the justice system. Public outcry is therefore, by the proposal's own assertion, a 'good reason'. Upholding the standard life sentence protects judges from the extreme burden of deciding upon a WLCS under public scrutiny, however it also protects the justice system from descending into an increasingly reactionary and politicised version of a system that is dependent on impartiality.

Exceptions to the rehabilitation principle are a contradiction of the consistency that must be demanded of our justice system. Rehabilitation as a principle does not only preserve the dignity and humanity of the justice system's wards, but it is insurance of the quality of the justice that we impose. ('The quality of justice' is, of course, an enormous concept). To put it simply, rehabilitation protects 'justice' from becoming a euphemism for the disposal of human beings. When an individual appears to have been rehabilitated, society has serious considerations to face about the purpose of further punishment. When the prospect of rehabilitation (release) is no longer factored into the justice that we deliver, justice exempts itself from this self-reflection. Besides an ideal, rehabilitation is a systemic check. The justice system attempts to systemize an incredibly intricate, difficult and messy aspect of our human exchanges. Punishment in the form of sentencing is a quantifiable element, but as previously discussed, rehabilitation is an unknown for individual cases; it is the element that most sincerely admits human variability and systemic non-omniscience. It is therefore inconsistent with the concept of rehabilitation to assert that we know of and understand its limitations. It is contradictory to adopt a principle as fundamental, only to caveat its application to the extent that it can be entirely erased. As mentioned earlier, this proposal describes a justice system that should be susceptible to influence by public outrage - if we restrict rehabilitation on this basis, we cannot fix the boundaries of such restriction, and therefore the principles of our justice end up being practically inconsistent because they are philosophically inconsistent.

Conclusions

It is our considered view that the legislative intent of this proposed Bill is inconsistent with a reasoned approach to the sentencing of offenders. It represents a significant departure from the established principles of our jurisprudence and, to the extent that it does so, it is retrograde in its intended effect. More practically, these proposals represent, in our view, a solution looking for a problem. We much prefer the existing arrangements. In simple terms, we believe

that the appropriate forum for the consideration of an offender's suitability for supervised release is an independent body at some remove from the events giving rise to conviction. This is particularly so when one considers that this body already has, and exercises, the power to refuse release in appropriate cases.