

# SCOLAG

## Scottish Legal Action Group

The Scottish Legal Action Group works to promote access to justice in Scotland as a fundamental democratic right.

This response sets out the Group's view on the proposed Whole Life Custody (Scotland) Bill (hereinafter, "the bill"), which has been proposed by Liam Kerr MSP.

We have considered the terms of the consultation document and have followed closely the parliamentary and public debate on the bill.

The consultation document itself makes an unimpressive case for its core proposal and, at times, is simply incorrect as to matters of law, such as the assertion that the Crown is able to appeal against a "not proven" verdict or that there is no basis to appeal conviction following the tendering of a guilty plea.<sup>1</sup> Given the magnitude of the proposal advanced and the effect that discourse in this area has on the public's perception and understanding of Scotland's legal system, SCOLAG would urge all politicians to ensure that they articulate carefully and correctly the legal principles underlying the area of debate at all times.

As to the substance of the proposal, SCOLAG does not intend to replicate the arguments advanced against the proposed bill elsewhere. It sympathises with the terms of the open letter by Dr Hannah Graham and Professor Fergus McNeill of the Scottish Centre for Crime and Justice Research.<sup>2</sup>

In particular SCOLAG agrees:

- that the proposal is unnecessary as existing sentencing powers are already adequate to deal with those considered the "worst offenders";
- that the proposal interferes unnecessarily with the existing functions of sentencing judges in the High Court, and the Parole Board;
- that no financial case has been made for the introduction of whole life sentences (although, for what it is worth the Group would oppose the introduction of these sentences even if such a financial case had been made); and,
- that whole life sentences are akin to capital punishment and an affront to human dignity.

We also wonder whether putting someone "beyond the law" - i.e. in a situation which can be made lawfully no worse, for that would be the position in which a true "whole life" prisoner would be in - is in the interests of prison staff, inmates, or visitors.

In addition to these arguments, the Group wishes to draw attention to the terms of the judgment of the European Court of Human Rights in *Hutchinson v the United Kingdom*.<sup>3</sup> This is a judgment prayed in aid by Mr Kerr in the consultation document.

The Strasbourg Court set out the following general principles in relation to life sentencing (the emphasis is our own):

---

<sup>1</sup> Consultation Document, page 19

<sup>2</sup> Accessible here: <https://twitter.com/DrHannahGraham/status/1164792998762180608/photo/1>

<sup>3</sup> App no 57592/08 (ECtHR, 17 January 2017)

42. ...*The Convention does not prohibit the imposition of a life sentence* on those convicted of especially serious crimes, such as murder. Yet to be compatible with Article 3 *such a sentence must be reducible de jure and de facto, meaning that there must be both a prospect of release for the prisoner 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. *The importance of the ground of rehabilitation is underlined*, since it is here that the emphasis of European penal policy now lies, as reflected in the practice of the Contracting States, in the relevant standards adopted by the Council of Europe, and in the relevant international materials (Vinter and Others, cited above, §§ 59-81).

43. As recently stated by the Court, in the context of Article 8 of the Convention, “emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies” (Khoroshenko v. Russia [GC], no. 41418/04, § 121, ECHR 2015; see also the cases referred to in Murray, cited above, § 102). Similar considerations apply under Article 3, given that *respect for human dignity requires prison authorities to strive towards a life sentenced prisoner’s rehabilitation (see Murray, cited above, §§ 103-104). 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).*

We do not accept what is proposed by Mr Kerr subscribes to the spirit of the principles set out by the Strasbourg Court.

We do accept that a system of executive review of so-called “whole life sentences”, interpreted in line with Article 3, may be considered compliant with the Convention.

We do wonder, however if, standing that position, one of Mr Kerr’s key arguments holds up.

He is concerned with “giving the public real confidence in sentencing”.<sup>4</sup> He says that “life should mean life for Scotland’s worst criminals”.<sup>5</sup> But, as Mr Kerr must accept, given the case law in relation to Article 3, even a so-called “whole life” sentence in terms of the bill might eventually see a prisoner released.<sup>6</sup>

We doubt whether the release of someone sentenced to a “whole life sentence” would do anything to boost public confidence in sentencing.

In conclusion, we consider the introduction of this radical change to sentencing unnecessary, unethical and regressive. We feel strongly that politicians should not seek to pander to populist sentiment in the arena of legal reform. We oppose in the strongest possible terms Mr Kerr’s proposed bill.

We are grateful to have had the opportunity to contribute to this important debate.

---

<sup>4</sup> Consultation Document, page 10

<sup>5</sup> Consultation Document, page 2

<sup>6</sup> Any attempt to engineer a sentencing system which did not provide for that possibility would likely be, in our opinion, outwith the legislative competence of the Scottish Parliament.