

Proposed Whole Life Custody (Scotland) Bill – Comments on consultation.

This is a response to Liam Kerr MSP's consultation on Whole life Tariffs. I am completely opposed to this proposal being taken forward into legislation. It is a regressive step that does not meet with the current culture of Justice within Scotland. It is clearly intended to promote a certain knee jerk reactionary populism that will find favour with elements of the Conservative Party and will allow their representatives to try to taint every other party with being soft on justice.

This response is best read in conjunction with the actual consultation document. Read a section of the consultation and then read the rebuttals listed below. I have tried to follow the so-called logic of the proposal and present arguments against each section. I finish with some research that I conducted for a Dissertation that I was writing that relates directly to this proposal.

Overall aims

“worst criminals” – no definition of what constitutes the worst criminals. General vague ideas persist but no specific criteria or decision-making guidelines. This will allow for sentence creep, the wider and more general application of a whole life tariff, to become a reality without proper parameter production. (Consultation pg. 2).

Foreword

Opening line of foreword “In Scotland, courts cannot ensure that the worst criminals are never released from prison.” It is not the job of courts to do this – the Parole Board is the vehicle for assessing and ensuring that people who are being released back into the community are not a continuing threat to the public. (Consultation, pg. 3)

Using the argument that “counterparts down south” have this capacity is not relevant. Justices in other parts of the world can impose physical torture or the death penalty – is this the ultimate objective of this comparison process? Justice and sentencing should be within the context of what is appropriate for Scotland. This proposal sends out the wrong message, politically and culturally, that Scotland is more concerned with punishment, rather than rehabilitation. (Consultation pg.3)

“Most serious of murders and sexual offences” – there is no explanation of this distinction – all murders and sexual assaults are serious. If Mr. Kerr was serious about victims then he would not be seeking to implement a process where some families of victims might feel even more let down by the Justice system. How would a family feel if the accused who had harmed them or a family member did not receive the lifelong term? At the moment, life sentences are equivalent at sentencing. (Consultation pg.3)

“Prison serves the joint purposes of public safety, deterrence, punishment and rehabilitation, but some crimes are so vicious that those who commit them will never be fit for release and reintroduction into society. In these circumstances,

offenders should only be offered the minimum prospect of release as required by human rights treaties.” (Consultation, pg.3).

In setting punishment parts for life sentences, Judges are required by law to set a punishment part that reflects punishment and deterrence. Public safety is an issue for the Parole Board for Scotland. Rehabilitation should be the main focus within the prison system but a whole life tariff will completely remove this purpose for some.

Offering the minimum prospect completely undermines the terminology of “whole life sentence”. A whole life sentence without a review process is incompatible with human rights. Therefore it is a misnomer to label them whole life sentences. It appears as if this whole proposal is there to satisfy a penal populist agenda.

Sentencing guidelines bear no relation as to when an offender should be released. As they suggest, they are a guideline for the sentencer to set an appropriate sentence. The punishment part is what they will serve in prison and for life sentences this does not include any time for the protection of the public. The parole board is becoming less prepared to release people on licence. I dispute the claim that “it is not acceptable to victims’ families or the wider public for such a person to have the option at all of walking our streets again.” (Consultation pg.4) The Scottish Crime and Justice Survey suggests that 90% of the Scottish public support the view that prisons should help prisoners change their behaviour rather than just punish them whilst 92% think that prisons should provide support in order to prevent people committing more crime. (Scottish Government Crime and Justice Survey, 2017-2018). These figures suggest that the wider public has an understanding of prison that underpins the attitude that reform and rehabilitation are crucial aspects and that this is a positive element. There is no source given to the claim made in the consultation document.

In the past ten years, sentence length, in terms of the punishment part, for mandatory life sentences has ranged from 6 years to 37 years, with the overall average being calculated to be 17 years 5 months for this time period. These figures were obtained under a Freedom of Information request to the Scottish Courts and Tribunal Service. It is difficult to see how and why this system could be described as “arbitrary” (consultation, pg.4).

The Case for Permitting Whole Life Custody Sentences

I fully reject the premise in the first paragraph. I believe that the current sentencing regime does administer proper punishment, does guarantee public safety, helps to bolster public confidence in criminal justice, protect those who keep us safe, or trust Scotland’s judges. Whole Life Custody Sentences cannot achieve any or all of these things.

Stating that this should not be interpreted as an attack on the parole board is redefining the concept of consultation. It is my view, and one that I am happy to share, that this is nothing more than attack on the board, the work that it does and against the very principle of rehabilitation and parole. If you have faith in this system, then why would you be seeking to restrict its operation? Even for the most serious

and heinous cases, the parole board makes an assessment based upon what the current risk is for the person being released back into the community, not what it was when they were sentenced a long time ago. This is the proper way to administer this system and it has been generally working well over the years. There will always be cases where someone who has been assessed as being “safe” is returned to the community and reoffends. However, this is not necessarily as a result of wrong or improper use of risk assessments.

Paragraph three in this section is just wrong. The parole board operates with the latest research and guidance in relation to risk assessment. The public has a very limited understanding of this process and will often condemn a decision that they perceive to be wrong. Such is the nature of reporting on criminal justice. However, it would be wrong to suggest that our system is currently run without reference to public opinion. On a more general point, should we have a justice system, or elements within that, being run by a “public” whom 76% admit to knowing little about the system?

Introducing what other jurisdictions do is not the way to run our justice system. It is right that we should study these elements and where there is evidence of good practice then adopt and amend these actions to fit in with the Scottish position. However, the criminal justice system is different in England and Wales. The evidence shows that harsher sentencing does not work as a deterrent. This proposal is trying to project the image that the Conservatives are more tough on crime. It is a political proposal that should be rejected.

The last paragraph could be used as justification for introducing torture or the death penalty. It is a logical extension if we want to give our Judges the full range of judicial powers. However, what we need is proposals that fit in with the culture of Scotland and with progressive and smart justice. Unfortunately, this proposal is neither.

Making the Punishment Fit the Crime

Whole life custody orders would deliver a disproportionate sentence for the worst of offenders and would fundamentally change the progressive nature of justice from one that is based upon evidence and what works, to one that focuses solely on retribution, vengeance and punishment.

Inherently, part of the problem here is that prison is regarded by the public as a soft option. It is not. It is hard to imagine what prison would be like for people serving sentences over 10 years never mind any of the more recent disposals.

Guidelines are just that. In the past 10 years, there have been 117 sentences of 20 years or more passed for mandatory life sentences, or a rate of 1 in 4 (26.5%) (Source Scottish Courts and Tribunal, FOI request 2019). It seems to be disingenuous to suggest that 20 years is the maximum punishment available. It should also be noted that if a lifelong term was given, then this would also be open to be appealed.

An examination of parole board annual reports will show that the majority of referrals are refused. Parole is not automatic, and it is based upon the current risk posed as

assessed by a number of professionals and the parole board. It is becoming increasingly harder to be granted parole. To properly assess the retributive element then you would need to add in this time as well to get a more rounded view of how the system works. Focusing just on punishment parts will skew the figures.

Making Scotland Safer

“Whole Life Custody Sentences would help keep the worst offenders off our streets forever.” This sentence is incorrect. Whole Life sentences would still be required to allow compassionate release, and this is more than just being terminally ill. It is just wrong to classify them as being for their whole life. This is how it works in other jurisdictions. The compassionate release would be at a time when the person would be unlikely to be in a fit state to reoffend but they would still get out. Therefore the term whole life sentences is a misnomer designed to appeal to the retributivist arm of the Conservative Party.

If the prison service is working to rehabilitate prisoners then it makes sense to have release back into the community as the ultimate objective. Putting someone in prison does not reduce the chance of reoffending. 2% of homicides in Scotland in 2017-18 were committed in prison (Scottish government, 2019). It also ignores the opportunity for other illegal activity such as drug use and violence. Prison is a microcosm of society and crime is a normative process, probably more so given the greater restrictions in this environment.

If you remove the hope that rehabilitation works and that eventual release is possible, then what incentive do you have for that individual to “behave” themselves within a prison? It is easily argued that removing the hope of parole actually makes the environment worse for officers and other prisoners. The lifelong prisoners literally have nothing left to lose and would be difficult to control, engage with or to address their offending behaviour. Prisons are powder-kegs and it does not take a lot to start major disorder. If implemented, the fear is that we would regress to the disorder of the eighties where riots were commonplace in the Scottish system.

I reject the notion that “...for the most despicable cases this is a fruitless effort.” I do not believe that rehabilitation is beyond anyone irrespective of how despicable their original crime. This has been backed up by various studies on life cycles such as Sampson and Laub’s ground-breaking work on life course theories. I also reject the notion that we should just give up before even trying. I have faith in the parole board to ensure that in cases where the individual has yet to achieve a status that would then allow their safe return to the community, then they will not be released.

Giving the public Real Confidence in Sentencing

Whole life custody sentences would not build trust that our system delivers justice for victims. They are a politically motivated option that seeks to build populist support for a policy that does not work.

It is interesting that the Scottish Crime and Justice Survey should be hailed as “Authoritative” and then it is only cherry picked for the statistics that seem to justify the imposition of whole life custody sentences.

Firstly, 76% of those interviewed for the survey stated that they did not know very much or anything at all about the criminal justice system. Whilst acknowledging that “they cannot be attributed entirely to a lack of knowledge” it would have been more transparent to have quoted the figure for this so that readers of the consultation would better understand the context of other statistics used.

The conclusion that the consultation tells us to accept regarding toughness of sentences is fundamentally flawed in its logic and statistical accuracy. The actual question in the survey asks: -

Confidence that the Scottish Criminal Justice System gives sentences which fit the crime

The options for answers are: -

Very Confident

Fairly Confident

Not very confident

Not at all confident

Don't know

The point to note here is that the question asks directly your opinion on sentences which fit the crime. It is an indication of participants understanding and awareness of current sentencing. There is an asymmetry in the question in that complete opposites could opt for the same answer. If I think that sentencing is ‘too soft’ then I would opt for “Not at all Confident”. Equally, if I thought that sentencing was ‘too harsh’ then I could also opt for “Not at all Confident”. Both responses from different perspectives would be honest and accurate. Therefore, no other conclusion can be garnered from this statistic other than 38% agree with current sentencing. Any inferences as to the attitude of other responses is entirely without foundation.

Claiming that this indicates that the public perception is that sentences are not tough enough also goes against other non-quoted statistics from the “Authoritative” survey.

“The public generally thought that prisons should provide support to help prisoners address problem behaviours and integrate with the community. For example, 90% agreed that prisons should help prisoners change their behaviour rather than just punish them.”

The above finding is directly at odds with whole life custody sentences. It shows that 90% believe that people are capable of rehabilitation, it shows that 90% think that prison should not just be about punishment and there is a tacit understanding that we do not lock many people up for their whole remaining life.

“Making sure the very worst offenders are kept behind bars will help us build confidence in sentencing.” This again is a misguided premise. Sentencing is not what currently dictates how long someone spends behind bars – that is the role, function and purpose of the Parole Board. They decide when it is safe for someone to be released back into our community. If and when they get this wrong this does not detract from the original sentencing process. In a risk-based system run by humans who are not infallible, we can expect that some decisions will not be regarded as successful, even when the correct assessments, procedures and policies have been followed. This is the shared collective risk that the previous section supported.

Standing Up for Police and Prison Officers

Removing the possibility of release will not help with the current situation within prisons. They already are a tense environment where the slightest little incident has the potential to be blown up into the next full-scale riot. Inmates who already have lost the hope of release will then have nothing to stop them committing further crime within the prison environment. This is the real risk of whole life custody sentences. It will actually make it more difficult for prison officers to do their jobs properly. It sends the clear message that you do not understand the risks that prison officers undertake on a daily basis and that you are prepared to subject them to even greater risk in the pursuit of a political policy predicated on punishment.

Putting our Trust in Scotland’s Judges

The power to put someone behind bars for the rest of their life already exists and operates in a practical and non-theoretical manner. As stated earlier, there have been examples of people who have surpassed their punishment part and who have died in prison. There are also examples of where sentences were passed that will clearly go beyond the natural lifetime of the person concerned. The parole board is the mechanism for ensuring public safety as a long-term sentence finishes its punishment part as imposed by the court. The parole board can keep someone inside who they consider to be a continued risk. Equally, if someone is released on licence then they are subject to conditions that can get them recalled if they break the rules. Sentences are getting consistently tougher. It is also getting tougher to be released on parole as a simple examination of the data will show: -

The figures for the life tribunal as it affects those sentenced to life can give an indication as to how risk averse the parole board is. The following figures have been calculated from Parole Board annual reports.

Parole Decisions	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
release directed	17.77%	17.24%	15.60%	21.25%	12.02%	12.27%	10.23%
further review	64.46%	63.79%	52.09%	49.69%	53.28%	55.20%	59.06%
postponed/adjourned	17.77%	13.36%	18.66%	17.50%	31.15%	28.27%	28.95%
Withdrawn	0.00%	5.60%	13.65%	11.56%	3.55%	4.27%	1.75%

100.00% 100.00% 100.00% 100.00% 100.00% 100.00% 100.00%

It can be clearly observed that the trend for those achieving their parole and being released is on a downward trend.

Current Law in Scotland

The so-called 'life sentence'.

Clearly Mr Kerr does not believe that a life sentence is for life. However, it is right to offer the chance of parole to those who have earned it and who present little or no risk being released back into society. It is also right that people are allowed to visit the community before their punishment part is up. You cannot take someone out of their community and expect them to be released back into that community without testing how they will react again to the pressures of normal life as well as the stigma attached to those who have served long sentences.

The figure relating to the parole board are wrong. Whoever wrote the consultation did not take into account the 92 cases that were being carried over from previous years. Using totals over the last five years is another accounting trick that hides actual trends. As shown above, the proportion who are being released from life tribunals is on a downward trend. The parole board seems to be releasing less and less people. This is not something that you can infer from the figure of "14% overall".

The 'Punishment Part' and 'Security Part'

The use of quotation marks around the term life sentence clearly indicate a certain reluctance on the part of the consultation to accept that life does in fact mean life. A life licence affects every action and decision that those who are subject to it takes in the community.

The Court does not ignore the public protection element. In any sentencing statement that I have read, the court fully acknowledges that this part of the process has been allocated elsewhere and that this is the right and proper place for it.

This section also chooses to ignore the fact that people who are paroled are on life licence and subject to recall if they reoffend or if their behaviour is causing concern to their supervisor. During 2017-18, the Board considered the cases of 58 licensees who had allegedly breached the conditions of their licence or whose behaviour in the community was giving cause for concern. The Board recommended that 37 licensees be recalled to custody. The Board subsequently released 14 of these individuals and 16 were not re-released. There were 7 cases withdrawn because of additional sentences. In addition, the Scottish Ministers referred to the Board 19 cases of life prisoners where they had revoked the licences. Of these, 1 was re-released. Warning letters were issued to 15 licensees and 6 were deferred. The Board was also required to convene Tribunals to consider the cases of 41 life prisoners who had been recalled to custody in previous years. In 6 cases the Tribunals directed re-release on licence and in 35 cases the Tribunals of the Board did not direct re-release on life licence. (Parole Board for Scotland, 2017-18 Annual report)

Order for Lifelong restriction

An Order for Lifelong Restriction (OLR) is an indeterminate life sentence. Once again, the consultation is more remarkable for the picture it tries to paint rather than the facts.

The OLR was introduced in the Criminal Justice (Scotland) Bill 2003. This bill set up the Risk Management Authority (RMA) who were tasked with the management of people subject to an OLR. The actual disposal became available in 2006.

The consultation does not really examine the functioning of this disposal. Currently there are 180 active cases as at 31/3/2019 (RMA website, 2019). The original projections for OLRs were about 5 or 6 per year. This means that we would have expected 65 to 78 cases in total. Clearly care has to be taken when projecting how many whole life sentences will be used. The experience of the IPP in England and Wales is a cautionary tale.

Earlier this year I did some desk research on OLRs. I submitted FOI requests to the RMA and the SPS. From the RMA I was interested in the length of time that people had served over and above their punishment part. The following data, asking about figures from the previous year's annual report, was provided: -

What is the greatest current period that someone has been detained beyond their punishment part?

9 years.

If you are able to and it is within your remit, an actual breakdown of the 64% who are beyond their punishment part?

114 of 177 past punishment part expiry date, or 64%	
less than 1 year past punishment date	13
less than 2 years past punishment date	16
less than 3 years past punishment date	13
less than 4 years past punishment date	21
less than 5 years past punishment date	15
less than 6 years past punishment date	15
less than 7 years past punishment date	8
less than 8 years past punishment date	5
less than 9 years past punishment date	5
less than 10 years past punishment date	3
	114

This means that those who are 9 years over their punishment part would have received an original sentence with a maximum of 4 years being the punishment part.

Given the way that punishment parts are calculated for an OLR, it is extremely unlikely that they would be given parole at first time of asking. The consultation states that only two people serving an OLR have been released in the past 5 years. This is incorrect – there have only been two released since the sentence was first introduced.

In reply to an FOI request the following data was provided by the Scottish Prison Service. Figures are correct as of 1/3/2019: -

There are currently 163 OLR Prisoners under SPS care.

Establishment	Total OLR Prisoners
Addiewell	03
Barlinnie	12
Edinburgh	36
Glenochil	70
Grampian	02
Greenock	03
Kilmarnock	05
Low Moss	10
Open Estate	07
Perth	03
Shotts	12
Totals	163

Glenochil is regarded as being the national centre for dealing with sex offenders. Therefore, it is no surprise to find almost 43% of OLR prisoners being cared for in that prison. I would posit that this distribution would be repeated with whole life custody orders given the serious and heinous nature of the crimes committed. If this clustering did occur, then it would exacerbate the problems identified for prisons dealing with a higher number of people with nothing to lose.

It is also curious to suggest that if they breach their conditions then they “may be subject to recall”. I would imagine that the recall process will be tougher for OLR people since the conditions imposed on them are more intense. They will be treated like other life sentence prisoners in that their recall will be subject to the same processes as applies to life prisoners. This is right and proper to ensure fairness. However, we have yet to see a recall for an OLR since only two have been paroled since its introduction.

I think it is also wrong to suggest the people are “released” by the parole board. It suggests a freedom that is not present. All life prisoners face the rest of their lives on license and are therefore still subjected to control by the state.

Murder

The opening paragraph is a distortion of the actual process that happens. It is more accurate to state that some murderers will be kept in jail for life. Some will die, and

have died, in jail and some are still serving sentences. Some may eventually be released on parole under a life license.

Figures produced by the Scottish Prison Service show that since 2009, there have been 251 deaths in custody.

Of these, there were 24 deaths for people who had served more than ten years in jail. Of the 24 deaths, 4 were expected sudden deaths; 10 were sudden natural deaths; 2 were suicides and 8 are still awaiting a determination from a fatal accident enquiry.

The longest period in jail ending in a death was for 43 years, 9 months and 26 days. There were five other deaths where the inmate had served more than 30 years. This clearly shows that there are times when firstly, the parole board will refuse to grant parole to someone they consider a risk to the public and secondly, for some they will end their days in jail.

In terms of current prisoners, this was the result of another FOI request to the SPS: -

Can you provide the number of people who have currently served 25 years or more in custody? I do not need any information on prisoners who have already passed on as I lifted this from your spreadsheets available on your website. I would be grateful if you could provide the numbers against each year thus far served for 25 years and over. This would be up to and including the longest serving person in your care.

FOI1 response: .

42 Years	1
36 Years	1
33 Years	1
31 Years	2
30 Years	1
29 Years	1
28 Years	1
27 Years	4
26 Years	4
25 Years	3

That is a total of 19 people who have currently been in jail for 25 years plus. It seems to indicate that the current parole process is working as it should.

The consultation arrives at the following conclusion: - *“that most murders would attract less than 20 years”*.

The section finishes with reference to six recent sentencing statements that are available from the Scottish Judiciary website. There were 10 individuals involved in these six cases. A very cursory count of the sentences shows that 50% of these received more than 20 years as a punishment part, thus completely negating the conclusion outlined above.

Whilst tempted to let Mr Kerr explain this inherent contradiction, I submitted another FOI to the Scottish Courts and Tribunal System. I was looking for information on punishment parts for mandatory sentences for the period 1/1/2008 to 31/12/2018.

The analysis showed that the following applies to punishment parts for mandatory life sentences: -

12 years or less	9.7%
13-15 years	26.3%
16-19 years	38.6%
20 years +	25.4%

Therefore the conclusion posited by the consultation looks better when examining the overall global position rather than the actual examples quoted by the consultation.

Entering a guilty plea is a mitigating factor. The public often misinterprets this as people "playing the system". However, it should be pointed out explicitly why this is a mitigation. If an offender pleads guilty, a judge can discount (cut down) a sentence. This recognises the fact that when an offender pleads guilty there is no need for a trial to be held. This means witnesses do not need to give evidence and court time is freed up for other cases. A judge must take into account how early in the court proceedings offenders make it known that they will plead guilty.

It is a matter for the judge to decide whether to give a discount in a sentence, and how much a discount should be. When judges decrease a sentence because of a guilty plea, they will tell the offender by how much it was discounted.

Reductions are not normally more than one-third of what a sentence would have been otherwise and are often less than that.

Rape and other Sexual Offences

The three cases in this section are OLRs. Unless you are directly involved in this process or have studied it in any way, the punishment parts here look criminally short for the crimes committed. However, it should be pointed out that the equivalent determinate sentence, as outlined in the sentencing statements, in each of these cases was as follows: - 20 years; 15 years; and 18 years. This seems more appropriate than the stated punishment parts of 8 years; 7.5 years and 9 years. The law dictates how the punishment part for OLRs are calculated and it is half of the determinate sentence that would otherwise have been imposed once the amount for the protection of the public has been stripped out. So in the first case, the protection of the public period was four years, subtracted from twenty leaving sixteen years, half of which is 8 years.

I make no judgement on whether this was deliberate deceit or innocently ignorant but it is clear that the wrong picture is created if the whole facts surrounding OLRs and how their punishment parts are calculated are not presented fully.

In terms of the determinate sentence examples, it should be noted that HMA v Norma Nicholl was an extended sentence. Therefore the period served will be the whole amount with no automatic early release. For older sexual offences, it is the law that was in force at the time of the offence that applies so the maximum sentence available was less than today. Three of the cases predate the introduction of the OLR. Each of the cases are also subject to the reporting requirements of the Sex Offenders Register and all that that entails. Three of these cases are for an indefinite period.

Compassionate Release

The consultation outlines the current understanding of compassionate release.

The term compassionate release also appeared in the quoted European Case of *Hutchinson v the United Kingdom* App no 57592/08 (ECtHR, 17 January 2017). These grounds need to be extended so that the possible release of a life sentenced prisoner is based upon whether or not continued detention is justified for penological reasons. This expands the law in relation to what is defined as “compassionate” but as acknowledged, Scottish Ministers are free to interpret the term widely. Note that a dissenting opinion on this judgement calls into question whether release with only months left to live is actually a release at all – an interesting viewpoint.

Criminal Appeals

The consultation states that the appeals process acts as a safeguard against wrongful conviction, and overly harsh or unduly lenient sentencing. I would argue that every imposition of a whole life tariff will be appealed as being too harsh, irrespective of the original crime. This will involve court time to consider the appeals being lodged.

Scottish Criminal Cases Review Commission

As per previous paragraph, I would expect almost all whole life tariff sentences to try the SCCRC route to overturn this imposition – what else does the person sentenced to this have to lose. This will require more resources to address these appeals.

Current Law in England and Wales

I reject the notion that the process for life sentences is similar in Scotland and England and Wales. It is a mandatory life sentence for the crime of murder but how the guilty verdict is arrived at is different. The Scottish Criminal Justice system has been separate from our southern neighbours and this was guaranteed to continue under the Act of Union, along with a separate education system and a separate Church.

Mr Kerr puts great store by the fact that this sentence in England and Wales is compatible with the European Convention on Human Rights (ECHR). However, recent cases have stipulated that this is not the case. In order for a life sentence not to be regarded as cruel and inhumane, there needs to be a review process and the possibility of release if there are no penological reasons for continued detention. The review process is now also able to be carried out by the High Court who can direct release by the Secretary of State if the continued detention cannot be justified. It is these changes that make the whole life term compatible with the ECHR. Hence the revision to the lifer manual in England and Wales. Prisoners must know in advance what they have to do to meet the release criteria.

Therefore it is misleading to state this sentence is Article 3 compliant without examining the review processes and the criteria for release that are now available to people sentenced to life. It might also be the case that the above is a misunderstanding on my part. I am not a lawyer but have read the judgment very carefully and recognise that the consultation is not giving the full picture.

European Convention on Human Rights

The consultation states that “The Scottish Parliament is prohibited from passing legislation which is incompatible with any of the rights set out in the European Convention of Human Rights (ECHR).” It should be noted that this is a requirement of the Scotland Act 1988 and as such is open to amendment by the Westminster Parliament. The Conservatives make no secret of wishing to abolish the Human Rights Act 1997 and introduce what they term a “British Bill of Rights”. Part of this process could tie the Scottish Parliament into ensuring compatibility of legislation adhering to the British Bill of Rights rather than the ECHR. Therefore this prohibition is not a fixed component incapable of being changed.

It is oxymoronic to link “avoidance of doubt” with “Brexit”. At this instance, there are fears that not only Westminster will be prorogued but that the Scottish parliament itself is under threat. It is my belief that this has been one of the drivers behind the Brexit campaign. The attack on Human Rights has been endemic within the Conservative and other alt-right parties but is hidden in the language of “taking back control”. The European Court of Justice is a particular target for the Brexiteers. It is the relationship between Westminster and Holyrood that dictates what will happen, and not necessarily that between the UK and EU.

The Whole Life Orders that exist in England and Wales are compatible because they now incorporate regular reviews, there is the opportunity for release on compassionate grounds and when there is no longer any penological reasons to continue detention. The European Court of Human Rights also ruled that the Judiciary can order release is an important aspect but one that has never actually been used. This is an independent counterbalance on executive power.

Given the above, the term “Whole life Order” is a misnomer that is employed for political purposes. The reality is different.

Content of the Proposed Bill

What the Bill Will Do

The proposed bill will not allow for a sentence that lasts the length of an offenders life. Every life sentence has to be reducible and in this sense the title of the proposal is misleading and can lead to public expectations that clearly cannot be met.

The danger of sentence creep, where the proposal starts to be used on less serious cases, begins with using the sentence as a starting point. Judges will be under increased pressure to ensure that the sentence is used. Having a list that is non-exhaustive will increase the likelihood of this sentence creep.

The list proposed are particularly heinous crimes but sentencing options currently available are more than adequate to deal with those. This proposal is predicated on vengeance and at this point in time it will do nothing to add to the options available for Judges.

Safeguards against Miscarriages of Justice

The system of review and the term “exceptional circumstances” are not limited to the illness of the person subjected to the whole life term. If there are no real penological reasons for their continued detention then they must be set free. This completely is at odds with the notion of a whole life tariff. There also needs to be a clearly stated process of how this can be achieved for people serving this sentence as well as an indication of when the person can apply for such a review.

If the other protections are allowed then I think they will be used numerous times and this will add to the pressures on the appellate system.

Financial Implications of the Bill

Adopting a pro rata approach to calculating costs is questionable. There is already a difference on the numbers being incarcerated, the amount of life sentences handed out between the jurisdictions and the costs involved in providing prison places and Criminal Justice Social Work Services. The average annual cost does not include the support services for long term prisoners and the programmes that they undertake. The costs here are likely to be higher.

There is also no estimate given the likely increase in appeals and for the review processes that would need to be set up and implemented. The estimate given falls far short of what will actually be required.

There is also no costs associated with potential upset created by prisoners who have nothing left to lose. This amount could be substantial.

Research has shown that sentence length is not a consideration for people who commit crimes. The whole deterrence argument is put forward by people who believe that prison needs to be tougher so that people are less likely to return. Not everyone who commits the serious crimes in the proposal acts in a manner that is rational and considers the effect of punishment.

Claiming that the bill could help prevent violent crime and creating more victims is not supported by any evidence. Like most of the bill, this is an assertion that

indicates a certain approach to punishment that is predicated on vengeance and retribution. It will not achieve these lofty aims.

Equalities

I would argue that this sentence will only be used on people over a certain age. Judges will be hesitant to use on younger people.

Sustainable Development

The consultation tacitly acknowledges that some sentenced to a whole life tariff will be released. The likelihood of seeing the offender again would be zero otherwise, not close to zero.

Surely the best option for Justice is to ensure that the system is fair for both victims and offenders. This proposal is not neutral in this respect and therefore should not be allowed to progress to legislation.

Penal Populism

Penal Populism is defined as being: -

“The pursuit of a set of penal policies to win votes rather than to reduce crime rates or promote justice” (Roberts et al, 2003)

Curiously, Roberts et al argue that the Conservative Government post 1979 pursued liberal orientated policies in respect to criminal justice. It was only after the widely reported murder of toddler James Bulger that the media led a campaign to get tough on sentencing. They had ample other evidence to share about “crazy sentencing decisions” which then created an image of a service in crisis (Roberts et al, 2003).

Pratt (2006) argues that populism represents in various guises the moods, sentiments and voices of significant and distinct segments of the public: not public opinion in general, but instead those segments which feel that they would have been ignored by governments, unlike more favoured but less deserving groups; those segments which feel they have been disenfranchised in some way or other by the trajectory of government policy which seems to benefit less worthy others but not them.

‘It speaks specifically for this group who feel they have been left out and is thus a reflection of their sense of alienation and dissatisfaction’ (Pratt, 2006:9).

Penal Populism therefore speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general (Pratt, 2006:12).

Gerber and Jackson (2016) investigate three claims as to why people are becoming more punitive. They argue that people are concerned about becoming a victim of crime and they look to punishment to reduce future potential harm. People are also concerned about community breakdown and they support punishment to restore

moral boundaries. The third claim is based upon a psychological model based on ideological preferences: people desire conformity and authority within society, and they look to institutions to punish transgressions that threaten collective security. They conclude that popular punitive sentiment is grounded in an uncritical submission to authorities, an adherence to conservative moral values and concerns about collective security and cohesion. Political outlook of individuals is important.

Media influence cannot be underestimated in relation to criminal justice. In research on media attitudes to criminal Justice, Callanan and Rosenberger (2012) found that consumption of tv news and crime-based reality programmes increased the odds of selecting punishment as the most important goal of criminal sentencing as opposed to rehabilitation. The more hours of tv watched, irrespective of genre, the more likely the respondents were to support punishment, deterrence, or incapacitation rather than rehabilitation.

Roberts et al. (2003) argue that perhaps the most important way the media can influence public opinion is through shaping beliefs about the volume of crime. They contend that the media regularly cover the most dramatic and vicious of crimes and that influences their readership. This creates a false impression of crime irrespective of what the actual position is in relation to police reporting and victimization surveys.

All of the above factors can be seen in this proposal. It uses pejorative language to create the impression that serious offenders are being freed to walk the streets unsupervised and they are a threat to everyone. As stated previously, it is my belief that this proposal is there to appeal to a specific cohort of Conservative voters who think that harsher punishment is what works and that harsher punishment is the way to deter people. This is inherently wrong.

Harsher Sentences

Tom Gash (2016), a former advisor to Tony Blair, wrote the book *Criminal: The truth about why people do bad things*. It is his interpretation of various 'myths' that exist within criminal justice circles. Myth 9 examines the notion that tougher sentences deter crime. He highlights the similarities between Finland and Scotland. Both countries are of a similar size. Both have very similar rates of crime. However, prison rates in Finland have been on a downward trajectory in Finland since 1950 whilst in Scotland they have been going in an upward trajectory.

PRISON RATES AND CRIME RATES Finland and Scotland 1950-2006

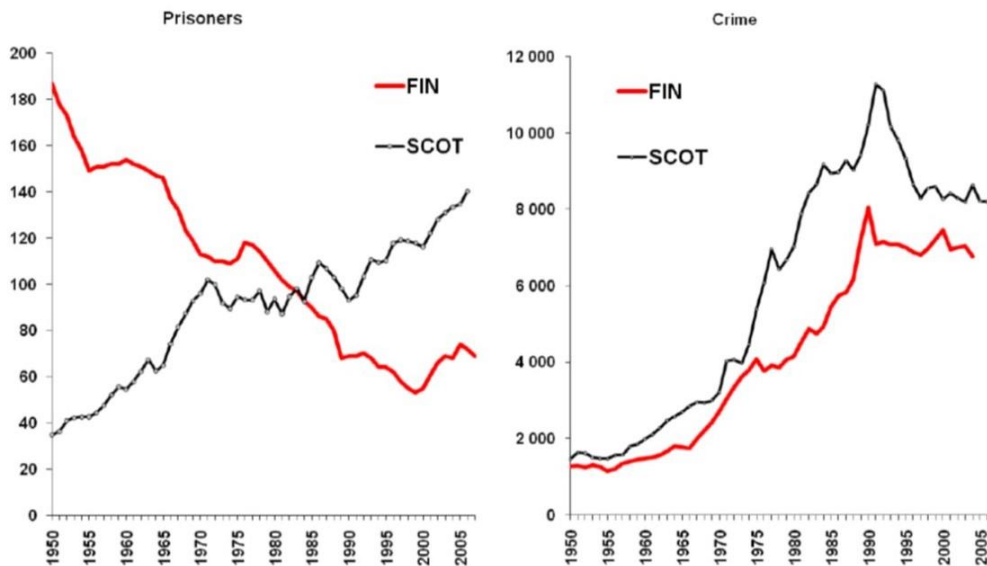


Figure 2.4 Comparison of Finland and Scotland for crime rates and imprisonment rates (Gash, 2016:227)

Gash (2016) cites the reasons behind the difference: -

- Finland had a clear policy intention of decarceration
- Finland relied upon an expert panel to guide policy development
- Finland had buy-in from the main actors in the criminal justice system
- Finland lacks tabloid media and reporting of crime is measured and not dramatic

The conclusion is that more punitive sentencing has little or no effect on crime rates, the effect of deterrence is very much over-stated and that a responsible media is part of this process to reduce the prison population.

In 2018 the Howard League Scotland invited Professor Dirk Van Zyl Smit to address them. Research carried out by the Professor showed that Scotland sentences more people to life than England and Wales and double the amount of people on life sentences than France. Van Zyl Smit (2018) argues that not all murderers are the same and that a mandatory sentence of life is unnecessarily retributive.

Leask (2018) covered the speech for the Herald paper. Other jurisdictions were covered in this speech. Germany has an automatic life sentence for murder but defines the act more narrowly. The Netherlands has whole life sentences but only 30 life prisoners. Scotland has 1,000. Leask concludes his article with the following: -

“Scotland likes to pitch itself as progressive. The SNP has made baby steps towards cutting our prison population, among the highest in western Europe, by ending short-term sentences. Do they have the political confidence to do the same for longer ones?” (Leask, 2018)

This is, in my opinion, the direction that we should be thinking about travelling in Scotland. We should be less retributive, less vengeful and more progressive in our thinking on criminal justice. This proposal fails to address any of these points.

Survey Research

As stated in the opening paragraph, I have recently undertaken some research in this area. I conducted an online survey of the general public, MSPs, journalists, Academics and Criminal Justice Workers. I asked them for their thoughts on the sentencing of ten cases and how they would sentence the perpetrator. There was very limited information provided but people still tried to complete it to the best of their ability. However, before this section I asked people their view on the lifelong tariff. A full breakdown is in the following table: -

Lifelong	Public		Journalists		MSPs		Academics		CJS Workers		Totals	
	Nos.	%	Nos.	%	Nos.	%	Nos.	%	Nos.	%	Nos.	%
Yes	311	42%	4	40%	2	13%	0	0%	1	5%	318	40%
No	76	10%	1	10%	6	38%	9	100%	13	68%	105	13%
Only unsure	352	47%	5	50%	2	13%	0	0%	4	21%	363	45%
	8	1%	0	0%	6	38%	0	0%	1	5%	15	2%
	747	100%	10	100%	16	100%	9	100%	19	100%	801	100%

After the consideration of the cases, survey participants were asked to identify which of the ten cases they thought a lifelong tariff should have been used.

Of the cases mentioned previously and based upon your own opinion and judgment, are there any that you consider should have been subjected to a lifelong tariff?

- None - do not support lifelong tariffs
- All of them
- Case 1 (Drug robbery wrong victim)
- Case 2 (Three defendants, blunt force trauma, no remorse)
- Case 3 (first time offender robs and kills elderly man in his own home)
- Case 4 (Grandfather uses six types of weapon to kill friend)
- Case 5 (Drug dealer responsible for setting fire that kills 3 members of a family)
- Case 6 (Passer by intervenes to stop harassment of two women and is murdered)

- Case 7 (Grandmother, with alcohol and drug problems, kills older man and tries to get his money)
- Case 8 (Male uses van to kill another male)
- Case 9 (Man dismembers victim. Only torso found)
- Case 10 (Man convicted of strangling woman, DNA convicts him 22 years after the actual killing)

The breakdown of each case is as follows: -

Lifelong options	Case 1	Case 2	Case 3	Case 4	Case 5	Case 6	Case 7	Case 8	Case 9	Case 10	totals
Public	277	504	316	404	502	343	334	247	569	350	3846
Journalists	1	4	1	2	5	0	1	0	5	2	21
MSPs	0	3	0	0	4	0	0	1	5	1	14
Academics	0	0	0	0	0	0	0	0	0	0	0
CJS Workers	1	3	2	1	3	1	1	1	6	3	22
Total ticked	279	514	319	407	514	344	336	249	585	356	3903
Survey totals	801	801	801	801	801	801	801	801	801	801	8010
	35%	64%	40%	51%	64%	43%	42%	31%	73%	44%	49%
	9	2	8	4	2	6	7	10	1	5	

The obvious things to note are as follows: -

1. 40% of respondents would support this proposal.
2. 45% of respondents would support this only for certain cases.
3. There is no clearly defined pattern as to which cases would be supported.
4. Not all non-tory MSPs are against the idea with 2 of those supporting it for certain cases and 6 unsure, even though when this was debated only the Tories supported it in the vote.

The argument is now about why, if the apparent popularity of this proposal is as shown above based upon 801 survey replies, this measure should not be introduced. I would urge those who indicated support to read over the arguments above and then reassess how they view it. What is also clearly evident is that sentence creep is a real potential problem. Respondents clearly wanted this to be applied to all cases irrespective of the criteria that has been laid down in this proposal. I think this is the biggest danger if this proposal ever becomes law. The real question is about leadership. If the public want this then it is caused in part by poor political leadership from certain parties who feed upon fear and ignorance of the criminal justice system, who use emotion as a substitute for what is rational and works and who are out to taint their opponents as being soft on crime. This proposal is clearly populist in this sense.

If there are any further questions on any of the above then I am more than happy to respond in writing, in person or via email.

James D. Watson M.Sc. MBA.,

August 2019

References

Callanan V.J., and Rosenberger J.S., *The Influence of Media on Penal Attitudes* *Criminal Justice Review* 36(4) 435-455

Gash T., 2016 *Criminal: The truth about why people do bad things* Penguin Random House: Milton Keynes

Gerber M., & Jackson J., 2016 *Authority and Punishment: On the Ideological Basis of Punitive Attitudes towards Criminals* *Psychiatry, Psychology and Law*, 23:1, 113-134

Kerr L., 2019 *Proposed Whole Life Custody (Scotland) Bill* Consultation Document published by Liam Kerr MSP

Leask D., 2018 *David Leask on the meaning of life for murderers* Article in *The Herald* 12th March 2018

Parole Board 2018 *Parole Board for Scotland Annual Report 2017-2018* Parole Board: Edinburgh

Pratt J., 2006 *Penal Populism* Routledge. ProQuest Ebook Central, [<https://ebookcentral.proquest.com/lib/strath/detail.action?docID=292861>] last accessed 1/8/2019]

Roberts J., Stalans L., Indermaur D., Hough M., 2003 *Populism and Public Opinion: Lessons from Five Countries* Oxford University Press: Oxford

Scottish Judiciary, 2019 *Sentencing Statements* [available from <http://www.scotland-judiciary.org.uk/8/0/Sentencing-Statements>] last accessed 29/08/2019]

Van Zyl Smit D., 2018 *Guest Lecture to Howard League* Scotland 12th March 2018