



Law Society
of Scotland



Consultation Response

Proposed Whole Custody (Scotland) Bill

30 August 2019



Introduction

The Law Society of Scotland is the professional body for over 12, 000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the consultation by Liam Kerr on the Proposed Whole Custody (Scotland) Bill (the Bill). The committee has the following comments to put forward for consideration.

Aim and approach

Question 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?

Neutral

Ongoing work: There is a need to factor in the outcomes of various workstream involving the Scottish criminal justice system which are highly relevant to consideration of the principles on which the Bill is based. These include:

1. Scottish Law Commission's current project on Homicide¹ that is examining "the principles underlying and the boundaries between the crimes of murder and culpable homicide and the mental element required for the commission of each of these offences." In looking at the mental element for the various types of homicide, it is considering how differing degrees of culpability should be reflected in the law. Their work

¹ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>

includes “the nature, scope and definitions of the main defences that arise in cases of homicide; these include self-defence; provocation; and diminished responsibility.” When their Report² is published, its scope seems central to how such crimes of homicide are assessed, and the decisions made as to prosecution and upon what charge. Where conviction follows, each of the relevant defences are highly relevant to the conviction that is obtained but also to mitigation which will affect the question of sentence.

2. The Scottish Government has recently consulted on the Parole Board³ in “Transforming Parole in Scotland.” That consultation closed in March 2019 where we responded.⁴ The Scottish Government has not yet brought forward any reforms arising from that consultation that it may wish to implement. As the Parole Board for Scotland makes decisions on parole for those convicted of murder and sentenced to life imprisonment, were this proposal on “whole life custody” to go forward, it would impact significantly on the role of the Parole Board.

Part of the scope of the consultation included “how to ensure transparency and improving support for decision-making” as well as seeking to promote public confidence in its functions. That work appears highly pertinent to this Bill if the argument is being made that those convicted of the most serious crimes should not be eligible for parole.

3. The Scottish Sentencing Council⁵ are consulting on “The Sentencing Process.”⁶ In its consultation, it is intended that the guidelines are produced to promote consistency in approach and help to explain to the public how sentencing decisions are made. The publication of guidelines would deal with the points

Sentencing: It must be remembered at the outset that the choice of any sentence to be imposed is for the judge alone. Having heard the facts and circumstances of the relevant case, whether sentencing as a result of a conviction following a trial or a plea of guilty that has been tendered, the judge is in the best place to sentence. The judge will have heard the plea in mitigation which is crucial in sentencing and upon which our system of justice is based. Though the name of the actual crime/offence may be the same, it is important to recognise that the facts and circumstances of each case and of the actual offender vary enormously. Having a range of sentencing options allows judges the flexibility to decide and deliver a sentence appropriate for the offence and that offender.

When pressing for legislative change, the reasons why the changes are necessary or would be beneficial, and how the proposed changes would be workable need to be clearly explained.

² Described as a medium-term project over 5 years

³ <https://consult.gov.scot/justice/transforming-parole-in-scotland/>

⁴ <https://www.lawsocot.org.uk/media/362472/crim-transforming-parole-in-scotland-27-03-2019.pdf>

⁵ <https://consultations.scottishsentencingcouncil.org.uk/ssc/the-sentencing-process/>

⁶ The consultation closes on 6 September 2019.

The courts already have mandatory and discretionary life sentences and Orders for Lifelong Restrictions (OLR) at their disposal. They can and do in effect sentence offenders to life.

The courts make it clear when passing sentence that even if the punishment part has expired that it will be matter for the Parole Board as indicated above to decide whether and if ever (our emphasis) the convicted offender can safely be released. It may be never in effect.

In the Bill, the reasons suggested for making this change appear to reflect the views that:

- currently some sentences are not sufficiently punitive, either because judges are too lenient, or they do not have the statutory powers to be as tough in sentencing as they might wish to be or
- the public feel that some offenders should never be released and believe the courts are lenient.

The Bill does not provide any examples of relevant cases arising from Scotland which would tend to provide support or evidence requiring this change to “whole life custody” to be made. This would have supported the statement that indicated that “for the worst offences, the current sentencing regime does not administer proper punishment.”⁷ Furthermore, though we agree that the murder of a police or prison officer is extremely serious⁸ and thankfully, these cases are rare, we have not seen any issues highlighting the sentence in such a case in Scotland to have been inadequate.

There is protection in sentencing in any event as where judges have been considered to have been too lenient in sentencing, the Crown acting in the public interest has the right to appeal any such sentence. That allows the Appeal Court to consider the sentence and the circumstances of the case again.

Furthermore, the role of the Scottish Sentencing Council⁹ too is important to note. Its work includes the promotion of awareness and understanding of sentencing. We certainly agree as mentioned in the Bill that much more could be done to make the public aware of the range of sentences that may be passed in relation to the commission of any offence. Unrealistic expectations and understanding of the sentencing process significantly affect the public’s perception of the sentence that is passed. This would help to deal with the comments that “as long as the [Parole] Board has the power to release offenders who the public feel should never leave prison”¹⁰ as that illustrates a lack of understanding both of the sentencing process coupled with the functions and operations of the Parole Board.

The Bill seems silent as to how the Parole Board would function thereafter because the current role of the Parole Board would be removed in relation to “whole life sentences” as the public protection element would

⁷ Page 9 of the Bill

⁸ Page 11 of the Bill

⁹ <https://www.scottishsentencingcouncil.org.uk/>

¹⁰ Page 9 of the Bill

be subsumed into the automatic term of imprisonment. Public protection would now seem to be irrelevant where the offence falls into one of the categories set out in the Bill because the decision to impose the “whole life sentence” would now over-ride any sentence taking account of the protection of the public.

The role of the Judicial Institute of Scotland¹¹ also must be borne in mind as it is the organisation responsible for training of the judiciary. If there is a view that sentencing practices are too lenient, it would be appropriate for this to be discussed to see how judicial training could be reviewed, if required.

What is the primary motivating factor in seeking such a “whole life sentence”? Is it retribution in that the offender has committed such a heinous act that they deserve to be locked up with no prospect of release other than on exceptional compassionate grounds? Is it related to deterrence so that while the offender is in prison, they cannot commit other crimes?

The role of sentencing and rehabilitation needs to be understood fully before introducing “whole life custody” as it could in fact worsen the position in relation to various factors:

- Offenders having committed the most serious crimes may have nothing to lose if they commit multiple murders or serious crimes.
- There is better understanding today of factors in the commission of offending such as Adverse Childhood Experience¹² that includes “stressful or traumatic experiences that can have a huge impact on children and young people throughout their lives”; our understanding of what makes people offend may well improve in years to come. Would it be a fair system for Scotland if there was no opportunity to review such a sentence in the light of enhanced understanding?
- The offenders may be much harder to manage in the prison environment as there is no opportunity for rehabilitation or parole. It would be interesting to see any research in countries where such a sentence exists to ascertain how that affects behaviour when imprisoned.

Conclusion: We would query what is meant by the terms “worst criminals.” We assume that this means those that have committed the most serious crimes.

We consider that a sentence of “whole life custody” could only be appropriate to consider in relation to a murder conviction. What “whole life custody” means is sentencing the convicted offender to life imprisonment as permitted now but now there would be the provision for life in effect meaning life. This follows the logical argument that life imprisonment was the sentence that replaced the death penalty, following its abolition by the Murder (Abolition of Death Penalty) Act 1965. Life should not apply in other circumstances than murder. We would not agree that these types of murders should attract a “whole life sentence” automatically as the nature of the occupation of the victim would be treated as an aggravation in any sentence to be passed in any assessment of the punishment part.

¹¹ <http://www.scotland-judiciary.org.uk/59/0/Judicial-Training>

¹² <https://www.gov.scot/publications/adverse-childhood-experiences/>

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

We refer to our answer to Question 1.

The consultation is concerned with promoting public confidence in the justice system. The aspect of sentencing in the most serious of criminal cases does not seem to be the most concerning. We consider that it would be helpful if the consultation had provided examples of where the public did not have confidence in the current sentences as highlighted above in our answer to Question 1.

We would need to be persuaded that providing the courts with the power to impose such sentences would affect the level of public confidence, if the courts were then not, in the eyes of the public, to go on to make sufficiently frequent use of it. There may be a general perception that “our sentences are not tough enough.”¹³ That may be correct but looking at the processes outlined in our answer to Question 1 regarding the appeal mechanisms, judicial and public education, that would seem to be the best way to address this and not by creating additional powers which may not be justified, utilised effectively if at all.

In *Boyle v HMA*,¹⁴ the court considered how long the “punishment part” should be in a murder case where the “punishment part” is the minimum period that the convicted offender must serve in prison before they can be allowed out on licence. That case highlights several points of significance to the Bill:

- There is no minimum or maximum period for a “punishment part” in murder cases
- There is no 30-year maximum period. Certain types of case that kill many people, could mean that a “punishment part” of more than 30 years was appropriate.
- Where a child or a police officer acting in the course of duty, was murdered, a “punishment part” in the region of 20 years may be appropriate.

What this means is that judges do already have significant sentences at their disposal following interpretation of the guidelines set out in this case. These guidelines may well be enacted in due course by the Scottish Sentencing Council who have power to make such guidelines but at present the case of *Boyle* remains the authority. In the notorious case of *Angus Sinclair v HMA*,¹⁵ his appeal against a “punishment part” of 37 years was indeed refused.

¹³ Page 10 of the Bill

¹⁴ [2009] HCJAC 89 Five judge decision

¹⁵ [2016] HCJAC 24

Question 3: Which types of murder should have a Whole Life Custody Sentence as the starting point for sentencing? [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 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]

The list that is provided above is taken from the Criminal Justice Act 2003. If Scotland is to introduce the power to pass “whole life sentences”, then it would be best to avoid listing the types of murder to which it would apply, even if the list is to be non-exhaustive.

We are not persuaded by the idea of a ‘starting point’ of a “whole life sentence”. It is quite difficult to see what else the court would be able to do if a “whole life sentence” is the starting or headline sentence, unless it is envisaged that the court will have discretion to depart from the default position for stated reasons such as discount for an early plea as they currently have.¹⁶ There would then be less scope for unusual cases to be dealt with on their merits even where a non- exhaustive list is provided.

If a persuasive case were ultimately to be made out for introducing “whole life sentences”, then a possible suggested approach might be to permit or provide the court with that sentencing option in murder cases if a set of risk criteria were met, similar to the procedures set currently out where the court is considering making an OLR. The risk criteria are:

“the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.”¹⁷

Question 4: Which sexual offences should have a Whole Life Custody Sentence as the starting point for sentencing? (Choose all that apply)

We would consider that no reasons have been given to justify the need for imposing whole life sentences in any sexual offences. For multiple or serious sexual offending, the judges already have this power through the application of discretionary life sentencing.

¹⁶ Sections 196 and 204 of the Criminal Procedure (Scotland) Act 1995

¹⁷ Section 210E of the Criminal Procedure (Scotland) Act 1995

Question 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?

Sexual offences have been included though other very serious crimes such as terrorism were not.¹⁸ The Bill does not explore the reasons for not including other types of offence.

Our view is that if whole life sentences were to be introduced at all, they should be permitted in very limited circumstances, and only on cause shown. That cause would need to be the satisfaction of certain clear and rigorous risk criteria as outlined above. We are not persuaded that a case for these has been made out for their introduction in addition to the existing powers of sentencing which judges have.

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

In England and Wales, the provisions are applicable to offenders aged 21 and over. In Scotland, the age of the offender is considered and has an impact on other aspects of the sentencing process included where the offender is subject to the notification requirements under the Sexual Offences Act 2003.

Our comments in relation to our answer in Question 1 apply regarding assessment of factors such as ACE.

However, if one of those ‘worst’ cases was committed by someone aged 20 years and 10 months at the date of the offence, there would likely be a public outcry that the law was not fit for purpose if a “whole life sentence” could not be imposed.

This is significant when considering the recent case of Aaron Campbell, who was aged 16 at the time of the crime. He was sentenced to a punishment part of 27 years for the murder of 6-year-old, Alesha McPhail in March 2019. This could on any view be described as one of the “so called worst” cases. On a purely retributive view, could a significant distinction be drawn between a crime serious enough a merit a “whole life sentence” when committed by an offender aged, 16, 18 or 20?

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

¹⁸ Though that may be reserved, it might need to be explained.

We have no comment to make.

Question 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?

For the Bill to be compliant with the Article 3 of the European Convention on Human Rights¹⁹, it would need to empower someone to release the prisoner in question if there were legitimate grounds to do so. The circumstances of *Hutchinson v United Kingdom*²⁰ may be relevant to note with regard the operation of any whole life sentence legislation, were the Scottish Parliament to legislate to ensure that account was taken, and such legislation was not ultra vires.

Sustainability

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?

We have no comment to make.

General

¹⁹ Article 3 prohibits torture, and "inhuman or degrading treatment or punishment."

²⁰ <https://lovdata.no/static/EMDN/emd-2008-057592-2.pdf>

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

We refer to our answer to Question 1. We have no further comment to add.

For further information, please contact:

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