PROPOSED WHOLE LIFE CUSTODY (SCOTLAND) BILL – CONSULTATION RESPONSE BY THE SCOTTISH SENTENCING COUNCIL

RESPONDENT INFORMATION QUESTIONS

1) Nature of respondent
I am responding on behalf of an organisation.

2B) Category of organisation
The Scottish Sentencing Council is a public sector body. Brief information about the Scottish Sentencing Council is included in the response below. The response has been approved by the membership of the Council.

3) Publication of response
I am content for this response to be published and attributed to my organisation.

4) Name and contact details
Name: Scottish Sentencing Council
Contact: [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.

RESPONSE TO CONSULTATION

Introduction

The Scottish Sentencing Council ("the Council") was established in 2015 under the Criminal Justice and Licensing (Scotland) Act 2010. The Council is an independent, advisory body. The 2010 Act provides that the Council's objectives are to promote consistency in sentencing practice; assist the development of policy in relation to sentencing; and promote greater awareness and understanding of sentencing policy and practice.

The Council appreciates being invited to respond to this consultation, and it has carefully considered the terms of the consultation document. Its position, in summary, is that it considers existing sentencing powers to be sufficient to serve the purposes of both adequate punishment and protection of the public; and it is, therefore, not persuaded that the case has been made for the legislative change proposed. This is explored further below, with particular reference to the purposes which a sentence with a whole life term might be intended to achieve.

The Council also notes the concerns raised in the consultation document with regard to public views on sentencing (with reference to the Scottish Crime and Justice Survey), and the suggestion that the proposal would "build confidence in sentencing". The Council agrees that

such findings are a matter of concern, but would suggest that further exploration of public views may be necessary in order to determine what underlying issues may contribute to this. For its part, given that one of the Council's statutory objectives is to promote greater awareness and understanding of sentencing policy and practice, the Council hopes that this response will help inform the public debate about sentencing in Scotland.

The purposes of sentencing

The Council's guideline on the principles and purposes of sentencing[1], which came into force in November 2018, identified a number of possible purposes of a sentence: protection of the public, punishment, rehabilitation of offenders, giving the offender the opportunity to make amends, and expressing disapproval of offending behaviour. It is the Council's view that while sentences, including life sentences, are generally intended to achieve more than one purpose, care needs to be taken to distinguish between the different purposes of a sentence, and how the selected sentence is intended to address those purposes.

With that in mind, the Council considers that two of the purposes which are referred to in the consultation document – protection of the public (expressed as "public safety") and punishment – raise several discrete issues which may be worthy of further examination.

Protection of the public

As the consultation document correctly identifies, judges will generally not take the requirements of public safety into account when setting the punishment part of a life sentence. However, the level of risk involved in releasing someone after the expiry of the punishment part may not be something which courts can accurately assess at the point of sentence.

There will of course be many cases in which the Parole Board, on consideration of an application for release on licence, takes the view that the information available to it requires that the application should be refused. And it may be that, in a limited number of cases, the need to ensure public protection requires that someone be kept in prison for the whole of their life.

This, though, is something which the Parole Board is best placed to assess, as the information available to it will inevitably be more up-to-date – and, therefore, more accurate and more relevant – than the information available to the court at the time of sentence. To adopt, as a matter of law, the proposition that some offenders will always represent a risk to the public is to give legislative force to a decision which it may not be possible to make at the time of sentence, and which unconditionally rejects the possibility of rehabilitation in even the most difficult of cases.

It is worth bearing in mind that an offender released on licence after serving the punishment part of a life sentence remains on licence for the rest of their life, and if they offend or otherwise breach the terms of that licence can be recalled to prison. And, as the consultation document also recognises, the court has the option in certain cases of imposing an order for lifelong

[1] https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf

restriction (OLR). This gives the court further powers where it is of the view that the offender represents an ongoing risk to the public.

Punishment

The question of whether a sentence represents an adequate *punishment* for an offence is, in the Council's view, a distinct one. The Council agrees with the proposition that, ultimately, it is of course for Parliament to put in place a legislative framework for sentencing; and for the judiciary to operate within that framework. However, the Council questions whether it has been established that it is necessary to legislate to give courts the specific power to impose a whole life term.

In the first place, it is presently open to the courts to select a punishment part which will extend beyond the anticipated lifespan of the offender. It is accepted that this is rare, and that it will in all probability continue to be so. It is, however, already an option. The consultation document acknowledges this, but states that "(t)his power may theoretically already be available but it is not exercisable in practice because of the case law and precedent as it stands" (page 12).

The Council's view is that this does not accurately represent the current position. There is presently nothing in legislation or precedent to prevent judges imposing, should it be appropriate, punishment parts which will effectively amount to whole life terms. The Court of Appeal, in fact, specifically referred to this issue when considering an appeal in the case of *Sinclair*[2], in which a punishment part of 37 years was imposed on a 69-year-old man. In refusing the appeal, the court noted that there is "no mandatory upper or lower limit set by either statute or case-law", and referred to what had been said in the case of *Boyle*[3]:

> "While (the Prisoners and Criminal Proceedings (Scotland) Act 1993) does not empower the judge to specify a 'whole life' period, **in an appropriate case a prisoner in Scotland may be sentenced to a period which in practical terms will extend until his or her death.**" (emphasis added)

It is submitted, therefore, that it is clear the courts presently regard themselves as having adequate powers to impose a sufficient punishment; including, where appropriate, what would effectively be a whole life term.

Moreover, although the consultation document suggests that a punishment part of "substantially longer" than 20 years is "likely to be reduced by the appeal courts" (page 9), this is a misinterpretation of the case of *Boyle*. In a number of recent cases courts have imposed much longer punishment parts. As well as the case of *Sinclair*, referred to above, the Court of Appeal has imposed or upheld a punishment part of 25 years or more in, for example, the cases of *Andonov* (27 years)[4], *Smith* (32 years)[5], *Tanveer Ahmed* (27 years)[6], and *Wade* and *Coats* (30 and 33 years respectively)[7].

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[2] Sinclair v HMA [2016] HCJAC 24
[3] HMA v Boyle and others [2009] HCJAC 89
[4] Andonov and others v HMA [2013] HCJAC 27
[5] Smith v HMA [2010] HCJAC 118

The Council further notes that one aspect of the proposals is that, for certain crimes, the imposition of a whole life term would be a “starting point”, to be adjusted by the court as appropriate having regard to the circumstances of the case and the offender. Although it is accepted that the consultation paper does not propose the introduction of mandatory whole life terms for any specific offences, any statutory provision which directs courts towards a particular sentencing outcome represents an erosion of judicial discretion, and it is the Council’s view that there needs to be a clear justification for any such provision.

In addition, the consultation document describes the present system as “arbitrary” (page 4), suggesting that whether or not a person spends the rest of their life in prison depends on their own characteristics – such as being elderly or sick – rather than the seriousness of the crime. The Council does not agree with this description; the seriousness of the offence is at the forefront of the sentencing process and, as noted earlier, there is no upper limit on the sentence which can be imposed. The Council also wonders whether the introduction of whole life terms would itself result in an arbitrary system: if, for example, a 30-year-old and a 50-year-old receive whole life terms, the likelihood is that the 30-year-old will serve a significantly longer period in custody for an offence which may be no more serious, or which might actually be less serious.

Conclusion

For the reasons set out above, the Council considers that it is clear that the courts regard their present powers as adequate; that current sentencing practices suggest that there is no need for any additional powers; and that the present system enables those who are assessed as posing a risk to public safety to be kept in custody.

Moreover, the Council considers that we should continue to trust in the experience and expertise of our judiciary and Parole Board in taking decisions about punishment and suitability for release. The question of what is an adequate punishment in any given case is something which should be determined by the judge, who has all of the details of the case available to them. And the question of whether someone who, having been adequately punished, should be released on parole, is something which the Parole Board is best placed to determine. Beyond that, the Council’s position is that someone who has been adequately punished, and assessed by the Parole Board as suitable for release, should not be kept unnecessarily in custody.

Introducing whole life terms in the manner suggested by this consultation document would reduce the discretion presently afforded to both the judiciary and the Parole Board in these most difficult of cases, and the Council is not persuaded that the case has been made that this legislative change is necessary.

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[6] Tanveer Ahmed v HMA [2016] HCJAC 125
[7] Wade and Coats v HMA [2014] HCJAC 88