

# Proposed Whole Life Custody (Scotland) Bill

## Introduction

A proposal for a Bill to give Scottish courts the power to sentence the worst criminals to custody for the rest of their lives. The consultation runs from 29 May 2019 to 30 August 2019. All those wishing to respond to the consultation are strongly encouraged to enter their responses electronically through this survey. This makes collation of responses much simpler and quicker. However, the option also exists of sending in a separate response (in hard copy or by other electronic means such as e-mail), and details of how to do so are included in the member's consultation document. Questions marked with an asterisk (\*) require an answer. All responses must include a name and contact details. Names will only be published if you give us permission, and contact details are never published – but we may use them to contact you if there is a query about your response. If you do not include a name and/or contact details, we may have to disregard your response. Please note that you must complete the survey in order for your response to be accepted. If you don't wish to complete the survey in a single session, you can choose "Save and Continue later" at any point. Whilst you have the option to skip particular questions, you must continue to the end of the survey and press "Submit" to have your response fully recorded. Please ensure you have read the consultation document before responding to any of the questions that follow. In particular, you should read the information contained in the document about how your response will be handled. The consultation document is available here: [Consultation document](#) [Privacy Notice](#)

I confirm that I have read and understood the Privacy Notice attached to this consultation which explains how my personal data will be used

## About you

Please choose whether you are responding as an individual or on behalf of an organisation. Note: If you choose "individual" and consent to have the response published, it will appear under your own name. If you choose "on behalf of an organisation" and consent to have the response published, it will be published under the organisation's name.

an individual

Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)

Academic with expertise in a relevant subject

**Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:**

I am a Lecturer in Criminology, and have carried out research on criminal justice and penal policy in Scotland.

Please select the category which best describes your organisation

*No Response*

Please choose one of the following:

I am content for this response to be published and attributed to me or my organisation

Please provide your name or the name of your organisation. (Note: the name will not be published if you have asked for the response to be anonymous or "not for publication". Otherwise this is the name that will be published with your response).

Dr Jamie Buchan, Edinburgh Napier University

Please provide details of a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. We will not publish these details.

## Aim and approach

Q1. 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?

Fully opposed

### **Please explain the reasons for your response.**

I do not believe the proposed new sentence will make the Scottish public any safer, or bring justice for victims. Scottish sentencing already provides for the Order for Lifelong Restriction, which (unlike the proposed whole life sentence) is premised on a rigorous assessment of the risk posed by the offender. Mr Kerr's own proposal admits that only two people have been released from OLRs in the last five years. Serious and violent crime in Scotland has undergone a major and welcome decline; rates of reported sexual offences have risen but this is likely to be due to victims' increased willingness to report.

The proposal, extrapolating from England and Wales, suggests there would only be around six whole life prisoners in Scotland at any given time. If implemented as Mr Kerr claims, the policy then would have an extremely limited effect. Certainly there are very few cases serious enough to truly merit a 'whole life' sentence (and those that are would be covered by OLRs). However, I am troubled by Mr Kerr's suggestion that it be enshrined as a presumptive 'starting point' for any offence. This is an interference upon which the Scottish judiciary are not likely to look kindly. Among other things, judicial discretion creates the likelihood of further variation and inconsistency between sentencers - some would probably decline to impose the whole-life tariff wherever possible. It is also necessary to consider longer-term effects - if passed, the proposed Bill would have effects well beyond the current Parliamentary term. One possible outcome: definitions of what is 'serious enough' to merit the sentence may become broader over time, particularly if there is political pressure to make use of this sentencing option.

The prison system of England and Wales is in a catastrophic state, largely due to staffing cuts coupled with prison overcrowding as a result of lengthening sentences. It is questionable to say that their system of whole life sentences is in any sense 'working'. Although the proposal is technically correct in noting that whole life tariffs in England and Wales have been found not to infringe the ECHR, they are clearly contrary to European human rights norms and arguably to the spirit of these laws, including the right to rehabilitation and hope in prison. If this proposal were adopted, Scotland could soon find itself 'out of step' with Europe. Mr Kerr and his team may find it helpful to consult the work of Dr Dirk van zyl Smit on life sentencing, such as this open access article: <https://academic.oup.com/hrlr/article/14/1/59/667050>.

The stated intention of 'protecting' police and prison officers cannot be met by this sentence, which can only be applied in the thankfully very rare cases of their being murdered. A more sustainable way of making prisons safer - albeit not such a 'quick fix' - would be to reduce the overcrowding in Scottish prisons. The right of rehabilitation is also relevant for prison safety - prisoners who have no hope of being

Q1. 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?

released may pose a major risk to the themselves, other prisoners, prison officers and the order of the prison.

None of this is to downplay the harms associated with serious violent and sexual crime and the immense harm and trauma it causes for those left behind. I agree with Mr Kerr that retribution is one of the valid purposes of punishment. A related social function of punishment is 'denunciation' - sending a message about society's condemnation of a crime - which again may be particularly relevant in the most heinous cases. But inflicting further harm on these (admittedly unsympathetic) offenders is not going to undo the harm they did, or help their victims.

The issue of public confidence in sentencing is a real one, but Mr Kerr would be well-advised to consider the limitations of public opinion surveys. These surveys have their uses but the format contributes towards what criminologists call 'the myth of the punitive public' which has been used to justify a great deal of penal excess by populist governments of all parties. However, when citizens are better informed about the facts of each case, and about what sentences actually are imposed by judges, they often favour similar or more lenient sentences and have more confidence in the judiciary (see research by the Esmee Fairbairn Foundation and Mike Hough in England and Wales). There is no evidence to suggest that imposing harsher sentences will improve public confidence.

Overall, it is hard not to see this proposal as party-political 'tough on crime' posturing of the kind recently endorsed by Mr Kerr's boss south of the border - it certainly is not a serious solution to any of the real problems in our justice system, and indeed may be taking time and energy away from dealing with them.

Q2. How would introducing Whole Life Custody Sentences affect your level of confidence in the Scottish justice system?

Slightly less confident in the justice system

**Please explain the reasons for your response**

Although there are robust safeguards against miscarriages of justice, it cannot be denied that the Bill does create more opportunities for these to arise.

Q3. Which types of murder should have a Whole Life Custody Sentence as the starting point for sentencing? (Choose all that apply)

None of the above

Q4. Which sexual offences should have a Whole Life Custody Sentence as the starting point for sentencing? (Choose all that apply)

None of the above

Q5. 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?

No- no offences (including murder or sexual offences) should attract a Whole Life Custody Sentence

Q6. Which of the following best expresses your view on whether whole life custody should be a sentencing option for younger offenders?

Whole life custody should not be an option for any offender, regardless of age

## Financial Implications

Q7. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have? Please explain the reasons for your response.

If passed, the Bill's would have a financial impact on prisons. The cost of housing these for the duration of their lives would be significant - tens of thousands per prisoner, per year. The proposal uses the figure from the SPS for the 'average' prisoner, but housing the (presumably) very high-risk and high-security offenders to whom this sentence would apply would be more expensive than housing the average prisoner - potentially as much as £50,000/year. There would be further resource implications in terms of ensuring prisons and prison officers were prepared to accommodate this new (although small) category of prisoner. It is very doubtful that this would be a good use of the SPS budget, when there are pressing issues of overcrowding and safety across the Scottish prison estate.

It would be essential to ensure proper training, and provision, for appeals and reviews as well, which would be a significant additional cost not considered anywhere in this proposal. Also not considered are the significant financial losses that would ensue if a prisoner successfully challenged a whole-life sentence in court and was awarded damages.

There is no evidence that life sentencing has any more of a deterrent effect than other prison sentences. In deterrence, certainty of punishment trumps severity. It is therefore very doubtful that any saving at all will accrue as a result of deterrence; even if it did, it is almost impossible to measure on a counterfactual basis the money saved by a crime that doesn't happen.

## Equalities

Q8. 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, maternity and pregnancy, marriage and civil partnership, race, religion or belief, sex, sexual orientation?

Neutral (neither positive nor negative)

## Sustainability

Q9. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

No

**Please explain the reasons for your response.**

I will use this space to discuss the 'sustainable development' section of the proposal. While these things are difficult to quantify, I do not agree with the claim that the benefits to victims and their families will outweigh the harms to offenders and theirs. Research by Dr Cara Jardine, Dr Beth Weaver, the Centre for Youth and Criminal Justice and Families Outside has shown us the immense harm caused to the families

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of prisoners, including the financial and time costs, effort and emotional impact associated with having family members in prison. This research has also highlighted the very real social stigma that attaches to family members of prisoners, particularly children, who are innocent of any crime. The proposed whole life sentence would create new problems for the family members of prisoners on whole life sentences, who would be stigmatised by association with the 'worst' cases. Set against this are the possible benefits to victims and their local communities. The needs of both should be considered in making policy around criminal justice. However, there is no evidence to show that whole life sentences actually do make people feel safer, or enhance the well-being of crime victims. Mr Kerr should note that crime victims are not a homogeneous group - they do not all think the same way about their experiences. For crime victims, seeing 'their' offender again in public can be a very unpleasant and sometimes retraumatising experience - but this is an argument for better communication with and services for victims, not creating a new sentence for use in a single-digit number of cases.

## General

Q10. Do you have any other comments or suggestions on the proposal?

I hope this is the last we hear of it.