

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.

on behalf of an organisation

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".)

No Response

Please select the category which best describes your organisation

Other (e.g. clubs, local groups, groups of individuals, etc.)

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

I am submitting this response on behalf of SPARC. SPARC stands for the Scottish Prisoner Advocacy and Research Collective, a group of researchers, many prison-experienced. More information about our group is here: <https://scottishprisoneradvocacy.wordpress.com/about/>

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).

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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.

As a collective who have spent many years bearing witness to and researching the harms which imprisonment causes to individuals, families and communities, we are strongly opposed to the introduction of the proposed whole life sentence on legal, moral, ethical, political and social policy grounds. There is no evidence presented that this sentence would improve the safety of individuals or communities, and there is strong evidence to suggest that it would be both inhumane and challenging to implement. We would also strongly argue that there is no need for this proposed sentence, as it adds nothing to existing law. For the reasons set out in more depth in our further comments, and as the current research evidence demonstrates, the proposed changes are unnecessary, inhumane, and fail to recognise that people can and do change. At a time where Scotland has the highest imprisonment rate in western Europe (World Prison Brief, 2019; and see, Acebi and Tiago, 2018), there is a real risk that the provisions of the bill will potential fuel populist punitiveness, and undermine how we might reduce our reliance on this form of punishment.

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

Significantly less confident in the justice system

Please explain the reasons for your response

As noted above and in our further comments, these proposals go against the current research as to how to develop a criminal justice system which is just, humane and evidence led. Indeed, in reviewing the research evidence in support of and against whole life sentences, Catherine Appleton and Brent Grøver note that it is the certainty of punishment, rather than the severity, which has any deterrent effect (2007). They go on to conclude that "the reviewable life sentence is a very effective penal measure, with lower

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reconviction rates for lifers released under supervision in the community than any other sanction" (Appleton and Grøver, 2007: 604). Moreover the proposal is contrary to core values of Scottish people and policy which recognise the potential for change and human growth. Consequently, were they to be enacted, our confidence that the justice system in Scotland is based on the best evidence available, and that it does its utmost to respect human rights, would be significantly damaged.

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

Please explain the reasons for your response

The list of criteria above appears more calculated to rile up the passions of those drawn to tabloid headlines of monstrous and evil behaviour, than to respond to evidence about what is known about the causes of murder or the profile and potential of those who kill, and what works to support their rehabilitation. The option of 'other' is inviting the public to give a wish list of their favourite monster of the moment – this is not the means of developing rational and just legislation. The killing of another person is the most serious harm that one person can do. Each killing represents an incommensurable loss; each murder has particular circumstances that require the expert review of a judge and the community review of a jury to consider in assessing a punishment which is of appropriate size to communicate the gravity of the offence and make the most of rehabilitative opportunities. This is why it is within the power of the courts to determine the punishment part of a sentence – including one of natural life. Setting a whole life sentence 'as a starting point' is wholly inappropriate, as a violation of judicial discretion and expertise, and as a violation of democratic states with a rule of law where evidence recognises and documents the unique circumstances of a given crime.

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

Please explain the reasons for this response.

We recognise that these are also amongst the most emotive, harmful and serious offences. Nevertheless, the courts have extensive powers of sentencing, and in Scotland make use of these (see general comment) which afford for both punishment and public protection, in these cases. The consideration of whole life sentences for such crimes further goes against the foundation of human rights principles and jurisprudence of Europe and the UK. The countries making most use of whole life sentences for crimes other than murder are China, the Philippines and the US in its southern states. These are not comparators which Scotland should be embracing.

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

Please explain the reason for your response.

As noted, there are grave concerns about the utility and humanity of this proposed sentence, and therefore we cannot not support its use in any circumstances. We recognise that these are amongst the most

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serious offences, but our judiciary already have, and make extensive use of, extensive powers of sentencing to respond to these cases.

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

Please explain the reasons for your response.

An increasing weight of evidence shows that brain development including of important capacities related to impulse, judgment and morality, continues through a person's early 20s. This evidence, generated through numerous studies in the neurobiological, psychological and sociological sciences, has led leading think tanks and bodies to urge recognition of this period of development and to adapt justice processes accordingly (see for example the Transition 2 Adulthood alliance, and its body of evidence collected here: <https://www.t2a.org.uk/t2a-evidence/research-reports/>). The framing of the age bands (into 16, 18 and 21 years) in this consultation shows deep ignorance of any contemporary debate or research on this issue, providing the same arbitrary numbers that have come under increasing, and increasingly evidenced, criticism. In addition to scientific challenge, there are also important legal, rights-based and moral objections to extreme sentences for young people, and is explicitly prohibited for offences committed by children under the age of 18 by the UN Convention on the Rights of the Child (CRC)" (Appleton and Grøver, 2007: 608). Notably, the UN Special Rapporteur on torture has condemned this punishment in even more stark terms, stating that it imposes 'physical and psychological harm that amounts to cruel, inhuman or degrading punishment', and is therefore incompatible with the human rights of a child (Penal Reform International, 2018: 5). The US experimented with whole life sentences in the 1990s for juveniles based on moral panic driven campaigns about 'super predatory' youth (Boghani, 2017). The false accusation of five teenagers in the rape of a woman in New York was one high profile example that led to substantial increases in prosecutions of juveniles as adults and use of whole life sentences for young people. Despite the fact that such practices have since been held to violate the US constitution, and that the premises of many 'get tough' initiatives were based on faulty or missing science (Vera Institute of Justice, 2017), the legacy of these sentences continues in the impact on expanding prison populations and damage to lives of individuals, families and communities.

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.

The Bill, if enacted, would have significant financial impact, raising the costs of the justice system.

The consultation document provides no evidence and faulty logic for the bald assertion that the introduction of life without parole may lead to financial savings across the criminal justice system.

In contrast, one should model the increased costs of implementing this Bill based on:

- The added costs for prosecution and defence/legal aid for investigating or defending cases and securing the necessary evidence to support meeting criteria, and presenting evidence in mitigation, of a whole life sentence.
- The substantially increased costs of caring for prisoners for many more years than is currently the case; on average those convicted of murder now serve 15-16 years in custody, but this would increase to something nearer 20-25 years.
- The increased costs including not only the pressure on prison space, staffing and basic needs of prisoners but additionally the intensifying needs and costs of caring for older prisoners and their greater physical health needs. Indeed, HM Inspector of Prisons for Scotland's (2017) report on older prisoners

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highlighted the challenge of meeting the complex care needs of older prisoners and the people in prison that they interviewed reported substantial variations in the care they had received including in some cases a lack of decent and humane treatment.

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?

Unsure

Please explain the reasons for your response.

Much of the scholarship on punishment in the UK and the US has highlighted the discriminatory impact of sentences. For the same crimes, people who are poorer, less literate, of a minority ethnic or religious background, statistically are more likely to be given longer, more harsh and more prison-based sentences than their counterparts. This is the case with the death penalty and the LWOP sentence in the US. The work of Lammy Review documented considerable harsher treatment and outcomes of those from BAME backgrounds at all stages of criminal justice (Lammy, 2017). There is no reason to believe that a whole life sentence would somehow not reproduce the forms of bias present at other stages of criminal justice. In terms of gender, this proposal is likely to be damaging to both men and women in highly gendered ways. Men make up the majority of the prison population, and it is very likely they would make up the majority (if not all) of the disposals of this type, were it to be introduced. Consequently, the damaging effects of this cruel and inhumane punishment would disproportionately be felt by men. If women were to receive such a whole life sentence, there is evidence to suggest that this group find it particularly difficult to maintain family contact (Jardine, 2019). Research with women serving life without parole in California found that this separation and uncertainty could be extremely painful for mothers and their children (Vannier, 2016); with this group of prisoners reporting particularly low levels of social support and extreme emotional distress (Prison Reform International, 2018). It must be recognised that the harms of this form of punishment will also inevitably extend beyond the imprisoned individual, also impacting upon their family. Research with men serving sentences of life without parole in the US found that the barriers to family contact, faced by all prisoners, can be particularly acute for this group (Leigey and Ryder, 2015). Of particular concern is that research with families in England and Wales who were supporting a person serving a (now abolished) indeterminate sentence of Imprisonment for Public Protection found that the stigma and uncertainty inherent in these sentences was damaging to the mental health and wellbeing of both adults and children, therefore potentially infringing the rights guaranteed under the UNCRC (McConnell and Raikes, 2018).

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.

Similar to the question relating to equalities, this sentence is highly likely to contribute to the disproportionate impact of punishment on those with the least secure economic and social positions, undermining equal societies as a whole. The fact that it will apply to a relatively small number as compared to the thousands who receive other punishments, is no defence. If a sentence, any sentence, is likely to be

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discriminatory in its application, it is both unjust and antidemocratic. We also have extremely serious concerns about the feasibility of implementing the proposed policy in a way that does not compromise existing prison conditions, potentially exacerbating harms for both prisoners and staff. The Chief Inspector of Prisons for Scotland recently noted the numerous challenges facing our overcrowded prison estate, including: "staff having less time to deal with individuals, two people sharing cells that have been designed for single occupancy, prisoners being located further away from home, and an inevitable increase in the waiting list for offender behaviour programmes" (HMCIPS, 2019). Prisons and the people within them remain part of our society. Any sustainability assessment of this policy must take these issues, and the likelihood that this policy would increase the prison population, very seriously indeed.

General

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

SPARC OVERALL STATEMENT ON THE PROPOSED SENTENCE

Scotland's extensive powers of "whole life" punishment

The judiciary in Scotland already have the powers to impose a sentence which will keep a person in custody for the remainder of their lives. Perhaps most obviously, a judge can impose a sentence that is likely to extend beyond the life expectancy of a given individual. Indeed, the Scottish courts have done so, handing down a "punishment part" of a life sentence of 37 years, when the individual in question was 69 (*HMA v Angus Sinclair*). In circumstances where the punishment part of a life sentence does not exceed a person's life expectancy, the life sentence is an indeterminate sentence, which will keep a person in custody until they can demonstrate they can be released without undue risk to the public. Even then, the person can be immediately recalled to prison if there are any concerns this risk has returned.

Further, Scotland has an additional sentence, the Order of Lifelong Restriction, expressly designed for instances where the court feels there is a substantial risk to public safety.

In effect, OLRs operate as a discretionary life sentence for those lesser crimes (like some of those listed above), where there is considered to be a serious ongoing risk to the public. Indeed, concerns have been raised about the lack of transparency and evidence surrounding them. A number of research projects are beginning to gather evidence on OLRs, and it would be premature to enact another major detention law without better understanding the implications and long-term consequences of ones already on the books.

In addition, the Whole Life Sentence as envisaged in this consultation likely faces significant barriers to compliance with Human Rights law. As the consultation document itself notes, the European Court of Human Rights ruled in 2017 that as the Secretary of State retained the right to release any prisoner serving a whole life sentence on compassionate grounds, the Whole Life Order (available to judges in England and Wales) did not contravene Article 3. Thus, this sentence is compliant with Article 3 because domestic law allows for an individual to apply at any time for their case to be reviewed by the Secretary of State (*Hutchinson V. The United Kingdom*). Consequently, any similar Scottish provision would have to include a regular right to review, in order to avoid becoming inhumane or degrading punishment, and thus in contravention of Article 3.

Resurrecting the death penalty by another name

Whole life sentences, without the possibility of parole, have been described as sentencing a person to "death by incarceration" (*Johnson & McGunigall-Smith, 2008, p. 328*). This wording is important, as it forces is to confront the true nature of this proposed form of punishment. Ashley Nellis compellingly argues that by imposing this sentence, the State is exercising control over the nature of that person's death:

"Life without parole (LWOP) is effectively a death sentence; to consider it as anything less severe is a mistake. Even though one's death may not occur for a few decades or more does not mean that the government has not decided how and where the individual will die. When looked at from this view, LWOP is not so different from the death penalty." (*Nellis, 2013: 457*)

Further, as there is no fixed end to the punishment, other than death, this creates both uncertainty and psychological pain (*Leigey and Ryder, 2015*). It can be impossible to imagine or understand the potential length of this sentence, and those subject to it may

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feel hopeless, futile, powerless and that they are simply "waiting to die" (Vannier, 2016: 332; Prison Reform International, 2017). One French Minister of Justice, Robert Badinter argued "one does not replace torture by another form of torture" (Vannier, 2016). Life without possibility of parole must therefore be seen as unacceptable and untenable as the death penalty in any civilised society (Appleton and Grøver, 2007).

Central to the inhumane nature of this form of punishment is the absence of hope they provide for a better life, or that the individual can work to improve their circumstances. Indeed, in the case of *Vintner and others v the United Kingdom* (2013) Judge Power Forde commented that hope, and that therefore the hope of release, is central to construction of both a sense of self and also human dignity (Penal Reform International, 2018; McConnell and Raikes, 2018). They concluded that denying a person the possibility to reintegrate is incompatible with human dignity (Vannier, 2016). A sentence of this type has no place in Scottish society.

A damaging direction for penal policy

Since the McLeish Commission comprehensively reviewed the evidence surrounding Scotland's use of imprisonment, the Scottish Government has recognised that limiting our use of imprisonment was key to a just Scotland. Prison populations disproportionately contain and harm particular groups often vulnerable and marginalised people and their families and communities; just as important, large prison populations are inherently damaging at the national level (McLeish, 2008).

In the intervening decade, Scottish penal policy has taken a number of meaningful steps towards attempting to reduce the prison population. These efforts are increasingly urgent, as Scotland has the highest imprisonment rate of all the countries in western Europe (Prison Reform Trust, 2019).

The proposed reform would move Scotland even further out of step with our European neighbours and closer to a US model of 'perpetual punishment' as the norm. Not only has this "particularly harsh" form of punishment been abolished in the majority of European countries (Penal Reform International, 2018), Scotland has the highest percentage of life prisoners in its prison population in Europe, a higher percentage of its prison population serving a life sentence (13.6 %) than the USA (10.5%) (van Zyl Smith, 2018).

The proposed changes also risk undermining progress towards a socially just Scotland outside of the criminal justice system. The Scottish Government is currently consulting on the incorporation the UNCRC into domestic law, and it is highly questionable whether the effects of this proposed sentence on families and children are in line with this aspiration to embed children's rights within Scottish law. As discussed above, any legislation introducing a sentence of this nature in Scotland must contain provision for these sentences to be reviewed, in order to remain compliant with the European Convention on Human Rights. Therefore, the families of any individuals receiving these sentences would be subject to the same damaging uncertainty, over and above the harms imprisonment already imposes on families supporting a person in custody (Jardine, 2019). Notably, the consultation document is silent on the harms that this new sentence would inflict upon family members, were it to be used, and also their legality from a child's rights perspective.

Knock on effects of longer sentences and a growing prison population

The consultation reflects an unacceptable level of ignorance about the upward drift in sentence lengths in Scotland trends and their effects. Those sentenced to prison are spending longer periods in custody and this has knock on effects for the overall size of prison populations and the problems related to this. Even a handful of whole life sentences will have a powerful impact on intensifying crowding and prison management for all in detention. Every person given a punishment part of 20 years – an increasingly common punishment part threshold for murder – takes the same space as 20 people in custody for one year. Every single long-term prisoner creates space and management problems because of this effect; the solution cannot be to invest in further prison expansion

Thus, the introduction of whole life sentences would have negative implications for all of those who come into the criminal justice system, not only those convicted of the most serious crimes. Given that the courts already have the powers to imprison and supervise a person for the remainder of their life, this "rebranding" exercise mainly acts to increase a rhetoric of 'othering' those in the criminal justice system.

People can and do change; sentences without hope or end undermine this

Those serving long sentences, even for the most serious and horrific kinds of harm, can and do change; many of those serving life sentences without parole continue their education and actively finding ways to contribute to their communities, despite their imprisonment (Leigey and Ryder. However, it is particularly challenging to devise a prison regime that is both constructive and

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

safe for those serving a sentence of life without parole (and those working with them), because this group of prisoners have no incentive of progression and "nothing left to lose" (Appleton and Grøver, 2007: 604). Moreover, research conducted in the US suggests the people serving sentences of life without parole may be considered low priority for employment or other opportunities within the prison, leaving their efforts to change poorly supported and often unacknowledged (Vannier, 2016).

This suggests that lengthening sentences, with a whole life term being the extreme case, may actually reduce the chances that the sentence will be spent productively and constructively.

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