

Open letter about the Whole Life Custody draft proposal by Liam Kerr MSP

23rd August 2019

We oppose the draft proposal of a Whole Life Custody (Scotland) Bill by Scottish Conservative MSP and party Justice Spokesperson Liam Kerr. In our assessment, it is as regressive and problematic in principle as it would prove to be in practice.

The proposal is that a Whole Life Custody Bill would include ‘a list of examples’ of types of offences (such as murder, rape and child sexual abuse) ‘which would have whole life custody as a starting point’. This implies expectations of sentencing presumptions of the most severe and punitive kind, framing judges’ exercise of their sentencing powers in a highly problematic way.

This new draft proposal is unnecessary. Existing arrangements in Scotland for dealing with those convicted of very serious and harmful crimes are more than adequate. The Parole Board and Scottish Ministers are already empowered to prevent the release (until death, if necessaryⁱ) of life sentence prisoners considered to be a continuing risk to the public, and to recall to custody anyone who has been released under lifelong conditions whose behaviour (or even attitude) causes concern.

In contrast to these arrangements, the proposal unnecessarily constrains the independence of judges and devalues the professionalism of the Parole Board for Scotland in making such complex and sensitive decisions in the public interest. While judges can and do make determinations about what *punishment* every crime requires, judgments about *risk* must be made by the Parole Board because risk is dynamic; it changes over time. To conflate the question of what is (retributively) just with the question of continuing risk (as much of the discussion of the proposed Bill has done) is dangerous and muddle-headed. For example, a judge may decide that, notwithstanding his age, a particularly egregious crime committed by a 21-year-old requires a very long punishment part of say 25 years, to reflect the severity and circumstances of the crime. She cannot and must not, however, be expected to make a determination about whether, 25 years later, that 21-year-old at age 46 (or 76 for that matter) will represent an ongoing risk to the public. That is a task for the Parole Board.

Numbers of cases within the scope of the proposed legislation in Scotland would be small, casting doubt on the need for a new Bill. In England and Wales, with more than ten times the general population and prison population of Scotland, there were 66 whole life sentence prisoners in June 2019.

Whatever the numbers, the human and fiscal costliness of this draft proposal has neither been clearly articulated nor well justified by its proponent. Whole life imprisonment sentences in the United States are estimated to cost, on average, 1 million US dollars per sentenced personⁱⁱ. Costs in the US have been described as ‘extremely expensive’ⁱⁱⁱ, and similar concerns have been raised in England, where numbers of elderly prisoners have increased significantly. Such resources could be better spent in other priority areas, including violence reduction, restorative justice and victim support services. Liam Kerr’s suggestion that this proposed Bill may result in savings to the police, prosecution service, court system and Scottish Prison Service is an entirely unsubstantiated and unconvincing claim, partly because the international evidence suggests that increasing sentence severity does little to deter would-be offenders^{iv}.

Experts in the UK and US categorise whole life custody sentences as equivalent to the death penalty. Leading prisons expert, Professor Alison Liebling^v explains, ‘the whole life sentence is a form of death sentence – a form of dying without death, until the very end.’ She quotes a series of experts and studies that characterise these sentences as ‘life trashing’, economically disastrous, ethically fraught and increasing risks of violence or suicide in prison. Dr Catherine Appleton and Bent Grøver’s^{vi} assessment in the *British Journal of Criminology* concludes that such sentences are ‘untenable in a civilised society.’ Like other forms of killing, sentencing people to die in custody denies and, ultimately, extinguishes human dignity. Upholding the principle of human dignity – for everyone, for all human life – even and especially in the wake of profound wrongs, harms and tragedies, is integral to justice and what it means to be a progressive, rights-respecting nation. It is part of what distinguishes justice from vengeance. Liam Kerr’s Whole Life Custody proposal risks undermining that principle and that distinction.

The worst act of an individual should not bring out the worst in us as a nation. Escalations of vengeance in the wake of distressing crimes with tragic consequences won’t produce fairness nor bring back what was lost. How we punish – and restrain punishment – speaks to who we are. Punitive populist proposals of this sort may seem politically expedient to some, but thankfully they are out-of-step with Scottish justice values.

We also question whether appropriate consideration has been given to how this draft proposal may affect staff and service provision in the Scottish Prison Service and NHS Scotland. Are there sufficient social care and palliative care services as well as hospice facilities for dying prisoners? Are there sufficient (and sufficiently skilled) staff to manage and support prisoners who are denied any hope of release throughout very long sentences? Even for those who regard the harms inflicted on those subject to such sentences as legitimate, consideration should be given the potential impact of these slow and psychologically painful deaths on staff, on other prisoners and on families. The psychological burdens placed on judges passing such sentences must also be considered.

For all of these reasons, as criminologists, as a former criminal justice practitioner (McNeill), and as ordinary citizens, we oppose this draft proposal in the strongest of terms. We urge Liam Kerr MSP to abandon it. If it does proceed to become a Members Bill, we call on Members of Scottish Parliament to reject it.

Dr Hannah Graham and Professor Fergus McNeill
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ⁱ Scottish Sentencing Council (2019) <https://www.scottishsentencingcouncil.org.uk/about-sentencing/mythbuster/>

ⁱⁱ Nellis (2017) <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>

ⁱⁱⁱ Leigey and Shartmueller (2019) <https://journals.sagepub.com/doi/abs/10.1177/0032885519825496>

^{iv} Nagin (2013) <https://www.journals.uchicago.edu/doi/abs/10.1086/670398>

^v Liebling (2017) <https://journals.sagepub.com/doi/abs/10.1177/1078345816685070>

^{vi} Appleton and Grøver (2007) <https://academic.oup.com/bjc/article-abstract/47/4/597/366540?redirectedFrom=PDF>