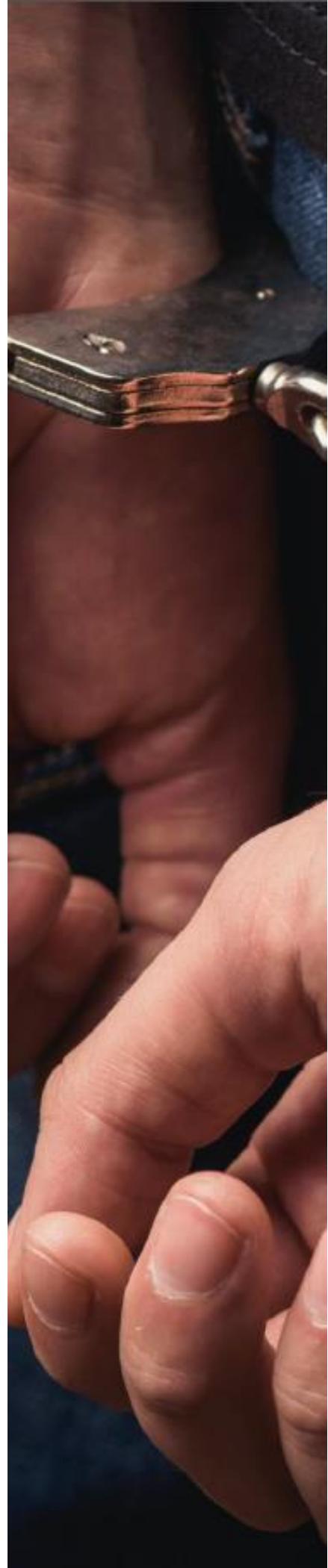


# PROPOSED WHOLE LIFE CUSTODY (SCOTLAND) BILL

**Consultation by Liam Kerr**  
*Scottish Conservative Member for  
North East Scotland*

May 2019



*A proposal for a Bill to give  
Scottish courts the power to  
sentence the worst criminals to  
custody for the rest of their lives.*

# FOREWORD

*By Liam Kerr MSP*

In Scotland, courts cannot ensure that the worst criminals are never released from prison.

After serving the minimum number of years fixed by the court, an offender who was supposedly sentenced to 'life' is automatically considered for release by the Parole Board.

It is my ambition to give Scottish judges the same power that is afforded to their counterparts south of the border – the ability to put the worst criminals behind bars for the rest of their lives.

This isn't about interfering in individual cases. A court should always have the discretion to impose the appropriate sentence based on all the facts of each case.

But the worst offenders should be in no doubt that they face the severest consequences for their actions, with a Whole Life Custody Sentence being the starting point for the most serious murders and sexual offences. This doesn't mean that the perpetrators of a particular crime will always receive a Whole Life Custody Sentence, but rather that courts will have the power to impose one where there is sufficient justification.

Prison serves the joint purposes of public safety, deterrence, punishment and rehabilitation, but some crimes are so vicious that those who commit them will never be fit for release and reintroduction into society. In these circumstances, offenders should only be offered the minimum prospect of release as required by human rights treaties.

Presently, Scotland's justice system fails to provide this penalty. For instance, current sentencing guidelines state that someone who murders a child, or a police officer acting in



the course of their duty will be eligible for release after around 20 years, subject to aggravating or mitigating factors specific to their case. Whilst the actual point at which they are released after that period is up to the Parole Board, it is not acceptable to victims' families or the wider public for such a person to have the option at all of walking our streets again.

And it is no response that imprisonment may happen to last the rest of an offender's life because they are either elderly or sick. This is not a guarantee. It is an arbitrary system that turns on the individual characteristics of the offender rather than the seriousness of the crime they have committed.

Put simply, the system cannot deliver. If a trial judge hands down a minimum number of years of imprisonment which is deliberately long, with a view to outlasting a criminal's natural life, that sentence is liable to be overturned on appeal according to current case law.

The judiciary are bound to apply the law as it stands; it is our job as parliamentarians to change the law if we think it isn't right.

In the following pages, I make the case for why life should mean life for Scotland's worst criminals. I set out the current law in Scotland, why it is inadequate to achieve this and detail the system of Whole Life Orders used in other parts of the UK to show that this proposal is eminently workable.

I look forward to hearing your views on my proposal.

Yours faithfully,



*Liam Kerr MSP  
May 2019*

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# HOW THE CONSULTATION PROCESS WORKS



This consultation relates to a draft proposal I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at: <http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

At the end of the consultation period, all the responses will be analysed. I then expect to lodge a final proposal in the Parliament along with a summary of those responses. If that final proposal secures the support of at least 18 other MSPs from at least half of the political parties or groups represented in the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A number of months may be required to finalise the Bill and related documentation. Once introduced, a Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, suggesting improvements, and generally refining and developing the policy. Consultation, when done well, can play an important part in ensuring that legislation is fit for purpose.

The consultation process is being supported by the Scottish Parliament's Non-Government Bills Unit (NGBU) and will therefore comply with the Unit's good practice criteria. NGBU will also analyse and provide an impartial summary of the responses received.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at Liam Kerr MSP, Room M3.16, The Scottish Parliament, Edinburgh, EH99 1SP or [liam.kerr.msp@parliament.scot](mailto:liam.kerr.msp@parliament.scot), Tel: 0131 348 6973.

Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An online copy is available on the Scottish Parliament's website ([www.parliament.scot](http://www.parliament.scot)) under Parliamentary Business/Bills/Proposals for Members' Bills/Session 5 Proposals.

# THE CASE FOR PERMITTING WHOLE LIFE CUSTODY SENTENCES



For the worst offences, the current sentencing regime does not administer proper punishment, guarantee public safety, bolster public confidence in criminal justice, protect those who keep us safe, or trust Scotland's judges. Whole Life Custody Sentences can achieve all of these things.

The Parole Board for Scotland and its members should be commended for the difficult job they do. The vast majority of that work will continue should this Bill become law, and no part of this proposal should be interpreted as an attack on the individual decisions or competence of the Board.

However, as long as the Board has the power to release offenders who the public feel should never leave prison, our system cannot ensure proper punishment or public safety. It also cannot maintain the confidence in sentencing that flows from these.

England and Wales have a working and legal system of whole life orders, which raises the question: why can't we? Scotland's legal system is proudly independent from the rest of the UK and long may that be preserved, but that shouldn't prevent judges in Scottish courts being as empowered as those sitting south of the border when it comes to sentencing.

We should trust in those who have heard the facts of the case first hand to be able to exercise a discretion, for specific offences, to decide whether a Whole Life Custody Sentence should be imposed. Our judiciary counts among it some of the most learned and accomplished legal minds in Scotland, the UK and the world; and it is right that they are handed a full range of tools to discharge the sentencing duties of their office.

## **MAKING THE PUNISHMENT FIT THE CRIME**

Whole Life Custody Sentences would deliver an appropriate punishment for the worst murderers and sexual offenders.

Although it is not the only reason we send people to prison, we cannot ignore the legitimate requirements of retribution when approaching sentencing. The length of time for which society removes someone's liberty must measure up to the appalling consequences of their actions. Otherwise, our justice system is failing to discharge one of its core functions.

The minimum time behind bars set by a judge (called the 'punishment part') of a so-called 'life sentence' deals with this requirement.

For the worst crimes, the constraints which exist in Scots law do not allow a punishment part to be set that is long enough to constitute an adequate punishment. While it is often cited that there is no maximum punishment part for murder, the guidelines are clear that the benchmark is around 20 years for murdering a police officer.<sup>1</sup> Sentences set by a trial judge which are substantially longer are likely to be reduced by the appeal courts in order to ensure consistency in the application of the law.

The law is clear that the minimum term of the sentence, as set by the judge, is explicitly for punishment.<sup>2</sup> That is why judges are bound to strip out any considerations of public safety from

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<sup>1</sup> *HM Advocate v Boyle and others* [2009] HCJAC 89, [13], [link](#)

<sup>2</sup> Prisoners and Criminal Proceedings (Scotland) Act 1993, S2(2), [link](#)

their reasoning when setting a punishment part. Any time spent in prison *after* this time has expired is entirely for reasons of public safety as determined by the Parole Board for Scotland. This makes it fair to assess the minimum term only when deciding whether 'life sentences' satisfy the requirements of retribution. It is after this time has expired that our system considers adequate punishment to have been dispensed.

## MAKING SCOTLAND SAFER

Whole Life Custody Sentences would help keep the worst offenders off our streets forever.

The current law prohibits a trial judge from taking the requirements of public safety into account when setting the minimum jail time of a 'life sentence'.<sup>3</sup> Instead, the period of time spent in prison beyond this (sometimes referred to as the 'security part') is decided by the Parole Board for Scotland once the 'punishment part' has expired.

For the clear majority of prisoners, the prison service should work to rehabilitate and prepare them for a law-abiding life once they are released. But some offenders commit crimes which are so appalling that the risk of reoffending should be reduced as much as possible by never releasing them.

There is an understandable public outcry when a prisoner is released on parole and goes on to reoffend, inflicting devastation on more lives. There is an inherent risk in releasing any prisoner and it is right that our society takes that collective risk for most offenders, as we strive to rehabilitate them. But for the most despicable cases this is a fruitless effort. We should protect Scotland's communities by removing the worst criminals from them.

## GIVING THE PUBLIC REAL CONFIDENCE IN SENTENCING

Whole Life Custody Sentences would build trust that our system delivers justice for victims.

According to the authoritative Scottish Crime and Justice Survey, only 38 per cent of Scottish adults are confident that the criminal justice system gives sentences that fit the crime. A clear majority of us (56 per cent) do not think the punishments handed down by Scottish courts fit the crime that has been committed.<sup>4</sup>

While 62 per cent think the system is effective in bringing people who commit crime to justice, a sizeable third of the Scottish population (33 per cent) do not have such confidence in our justice system.

These figures should worry those in public life. They cannot be attributed entirely to lack of knowledge about the criminal justice system (a problem that also requires attention). We must accept that part of it is because our sentences are not tough enough.

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<sup>3</sup> Prisoners and Criminal Proceedings (Scotland) Act 1993, S2(2), [link](#)

<sup>4</sup> Scottish Government, *Scottish Crime and Justice Survey 2017-18*, 26 March 2019, [link](#)

Our justice system must command the confidence of the public. The more serious the crime, the more important it is that justice is done but also that it is *seen to be done*. Making sure the very worst offenders are kept behind bars will help us build confidence in sentencing.

## STANDING UP FOR POLICE AND PRISON OFFICERS

Whole Life Custody Sentences would support those who protect us from danger.

Police officers are among the most selfless in our communities, putting themselves in harm's way every day for our safety. Prison officers manage difficult and dangerous offenders in an environment which is increasingly high-risk due to the presence of unauthorised substances and weapons.

Tragically, some officers' lives are taken while carrying out these duties on our behalf. This is an especially appalling crime as it is an attack not just on an individual but on ordered society. It is therefore paramount that the full weight of the justice system is behind those professionals as they perform their jobs.

These officers can be distinguished from other public servants by the role they perform and their routine contact with dangerous offenders. Their daily duties and the risks they face mean that they stand apart from others. That unique status should be recognised, and those who murder police and prison officers on duty should know that they face the most severe sentence possible.

It is already recognised that a tougher sentence should follow the murder of a police officer in the course of their duty, but the recommended minimum jail term is only 20 years.<sup>5</sup>

This is not good enough. The starting point for murder of a police or prison officer should be a Whole Life Custody Sentence. This means the offender in such a case will normally receive that sentence and if a court decides otherwise, it will have to give good reason for its deviation.

Changing the starting point for those who murder a police or prison officer to a Whole Life Custody Sentence will send a powerful message of support for the work of these vital public servants. It will show that we place the highest value on their safety and we recognise the dangerous job they perform for all of us.

## PUTTING OUR TRUST IN SCOTLAND'S JUDGES

Whole Life Custody Sentences would strengthen the power of judges by giving them a wider range of sentencing options.

Ultimate discretion will always remain with a court as to what to do with an individual brought before it. This Bill will simply hand our courts and judges more power to impose tougher sentences for those that deserve it. There will never be a situation where a judge is compelled to impose a Whole Life Custody Sentence when they have good reason to do otherwise.

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<sup>5</sup> *HM Advocate v Boyle and others* [2009] HCJAC 89, [13], [link](#)

This Bill will fortify the capabilities of our courts and judiciary – by handing them the power to put the worst criminals behind bars for the rest of their lives. This power may theoretically already be available but it is not exercisable in practice because of the case law and precedent as it stands.<sup>6</sup>

For the most heinous crimes, courts cannot ensure the offender is never released. We must have consistency, but for the worst murders and sexual offences the sentences should be consistently tougher.

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<sup>6</sup> *HM Advocate v Boyle and others* [2009] HCJAC 89, [link](#)

# CURRENT LAW IN SCOTLAND



## The so-called ‘life sentence’

If someone is convicted of murder, they will always receive what is called a ‘life sentence’. The court has no choice but to impose it in those circumstances.<sup>7</sup> This sentence is not mandatory for any other offence, but courts do have the option of imposing it for other crimes including rape and seven other sexual offences.<sup>8</sup> This is called a *discretionary* or *non-mandatory* ‘life sentence’ because a court chooses to give it.

Despite its name, a ‘life sentence’ does not mean that all (or indeed most) of those handed it will spend the rest of their lives in jail.

The law says that those sentenced to ‘life’ can be considered for release on parole once they have served a minimum number of years as set by the judge.<sup>9</sup> In addition, prisoners are routinely granted short periods of time out of prison even before this minimum time is up, to assess the risk they pose and prepare them for full release.<sup>10</sup>

After considering a case, the Parole Board can either release the prisoner or order the prisoner’s continued detention. Any release is on ‘life licence’, with released prisoners subject to conditions and supervised by criminal justice social workers for the rest of their lives. The intensity of this supervision varies. A breach of the conditions of their release may result in recall to custody. Where the Parole Board does not direct a prisoner’s release, the case must be reviewed again no later than two years after the date of the last review.<sup>11</sup>

Parole Board figures indicate the length of time served by ‘life’ prisoners in prison prior to their first full release.<sup>12</sup> They show that out of 1,104 ‘life sentence’ prisoners released for the first time since 1971, over 70 per cent (801) spent 14 years or less in prison. Over the last 5 years the Board convened 1,670 times to consider the release of a ‘life’ prisoner, resulting in 249 offenders being freed - a rate of 14.9 per cent.<sup>13</sup>

### The ‘punishment part’ and the ‘security part’

The ‘punishment part’ of a ‘life’ sentence is the minimum time set by the court that the offender must spend in prison before being considered for release on parole. This is the part of the total sentence which the court considers appropriate to satisfy the requirements for retribution (punishment) and deterrence, taking into account the seriousness of the offence(s) for which the person is convicted, any previous convictions and any sentence discount justified on the basis of a guilty plea. The court must ignore the consideration of public protection when setting the punishment part.<sup>14</sup>

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<sup>7</sup> Scottish Sentencing Council, *Prison Sentences*, [link](#)

<sup>8</sup> Sexual Offences (Scotland) Act 2009, Sch2, [link](#)

<sup>9</sup> Prisoners and Criminal Proceedings (Scotland) Act 1993, S2, [link](#)

<sup>10</sup> Scottish Prison Service, *Frequently Asked Questions: What is a Temporary Release?*, [link](#)

<sup>11</sup> Scottish Government, *Parole and release on licence*, 6 June 2016, [link](#); Parole Board for Scotland, *Sentence Type*, [link](#)

<sup>12</sup> Parole Board for Scotland, *Annual Report 2017-2018*, March 2019, Appendix A, [link](#)

<sup>13</sup> Parole Board for Scotland, *Annual Report 2017-2018*, March 2019, p19, [link](#)

<sup>14</sup> Prisoners and Criminal Proceedings (Scotland) Act 1993, S2, [link](#)

Following the expiry of the punishment part, a ‘life sentence’ prisoner can be released when the Parole Board decides that continued confinement is no longer necessary for the protection of the public. Where the Board denies parole, the extra period of time spent in prison can be referred to as the ‘security part’.

The law provides that the court, in setting the punishment part, “may specify any such period of years and months notwithstanding the likelihood that such a period will exceed the remainder of the prisoner’s natural life.”<sup>15</sup>

Thus, a court can set a punishment part which may require a person to spend the rest of their life in custody, but cannot guarantee or deliberately engineer this. The court must set a definite period in years and months based on the criteria of punishment and deterrence, and with due regard to case law. Whether an offender is released is largely dependent on their age and health at the time of sentencing.

## Orders for Lifelong Restriction

An Order for Lifelong Restriction (OLR) is given to criminals who if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large. This is assessed by looking at the nature and the circumstances of the offence they committed.<sup>16</sup>

OLRs are not imposed for specific crimes, but for the risk that the individual is assessed to present to the public. A judge can only impose an OLR following conviction, and after the preparation of a Risk Assessment Report.<sup>17</sup>

An offender given an OLR will be subject to a “Risk Management Plan” for the rest of their life. This will set out the measures to be taken for the minimisation of risk, and includes analysis of factors that may increase or prevent re-offending.<sup>18</sup> This can later be amended in response to events.

Like the so-called ‘life sentence’, an OLR has a minimum number of years set by the court that the offender must spend in prison, after which they may be released by the Parole Board for Scotland. However the Board must have regard to the Risk Management Plan in making its decision.<sup>19</sup> If the offender is released, they will be under more intensive supervision than normal. A breach of the conditions of their release may result in recall to custody.<sup>20</sup>

An OLR does not guarantee that a criminal will never be released from prison. Although no OLR prisoners were released in 2017-18,<sup>21</sup> two have been released in the last five years.<sup>22 23</sup>

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<sup>15</sup> Prisoners and Criminal Proceedings (Scotland) Act 1993, S2(3A)(b), [link](#)

<sup>16</sup> Criminal Justice (Scotland) Act 2003, S1 (S210E), [link](#)

<sup>17</sup> Risk Management Authority, *Order for Lifelong Restriction*, [link](#)

<sup>18</sup> Risk Management Authority, *Risk Management Planning*, [link](#)

<sup>19</sup> Parole Board for Scotland, *Sentence Type*, [link](#)

<sup>20</sup> Scottish Sentencing Council, *Order for Lifelong Restriction*, [link](#)

<sup>21</sup> Parole Board for Scotland, *Annual Report 2017-18*, March 2019, Page 15 [link](#)

<sup>22</sup> Parole Board for Scotland, *Annual Report 2013-14*, January 2015, Page 10, [link](#)

<sup>23</sup> Parole Board for Scotland, *Annual Report 2014-15*, June 2016, Page 10, [link](#)

## Murder

As noted above, the so-called ‘life sentence’ is mandatory for murder, but this doesn’t mean murderers are kept in jail for life. Instead, the court sets a minimum period they must spend in jail. In setting the length of this period, a court will follow the rules set out below.

When judges in the most senior Scottish courts make decisions they can decide to give guidance to other judges about the appropriate sentence to use in similar types of cases.<sup>24</sup> These decisions are known as ‘guideline judgments’ and help tell us what the law is.

The most recent guideline judgment on sentencing for murder was handed down in 2009.<sup>25</sup> This case sets out how long the ‘punishment part’ should be in a murder case - that is the minimum period the guilty person must serve in prison before they can be paroled. Because some murders are judged to be worse than others and therefore deserving of more years in jail, there is not a set number of years but rather an approximate range. These are not hard limits because a court retains the freedom to set whatever sentence it thinks appropriate for an individual set of facts.

First of all, the court was clear that ‘there was no minimum or maximum period for a punishment part in murder cases’, which suggests there is no guidance at all. However, the judgment also said ‘a punishment part of 12 years would not be appropriate unless there were strong mitigatory circumstances’, in other words signalling that 12 years would be too low for most murders, and the court would need to have strong reasons for reducing a sentence to that level. The court added that ‘exceptional circumstances’ would be required to hand a murderer *less* than 12 years.

So we can be reasonably sure that in normal circumstances, a murder will attract a punishment part of 12 years or more. But what about the upper limit?

In the same guideline judgement, the court said that ‘in cases, for example, where the victim was a child or a police officer acting in the course of his duty, or where a firearm was used, a punishment part in the region of 20 years may be appropriate’. Because these are among the worst types of murders, we can draw the conclusion that most murders would attract less than 20 years.

Emphasising that 20 years is by no means a limit, the case said a punishment part of ‘more than 30 years’ could be given in exceptional cases such as ‘mass murders by terrorist action’.

In-between the two extremes, the court said murders committed with a knife would normally get at least 16 years or more, with the judgment saying that ‘in cases in which a knife or other sharp instrument, with which the offender had deliberately armed himself, was used, a punishment part of at least 16 years, other than in exceptional circumstances, would be expected.’

All these are ‘starting points’ – the number of years handed down may increase or decrease depending on aggravating or mitigating factors specific to the case. For example, a sentence can be reduced if the offender enters a guilty plea or increased if he or she has committed previous offences.

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<sup>24</sup> Scottish Sentencing Council, *Guideline Judgments*, [link](#)

<sup>25</sup> *HM Advocate v Boyle and others* [2009] HCJAC 89, [link](#)

The Scottish judiciary also publish ‘sentencing statements’ for cases where there is public interest or where the sentence may be complicated or controversial.<sup>26</sup> These are quotes from the judge who handed down the sentence. Recent statements following conviction for murder include:

- *HMA v Muhammed Rauf, Shahida Abid and Saima Hayat* – punishment parts of 24 years, 25 years & 6 months, and 25 years & 6 months respectively.<sup>27</sup>
- *HMA v Steven Sidebottom* – punishment part of 21 years.<sup>28</sup>
- *HMA v Ronald Stone* – punishment part of 15 years.<sup>29</sup>
- *HMA v Daniel McCafferty* – punishment part of 18 years.<sup>30</sup>
- *HMA v Paul Green, Lee Noonan and Robbie Brown* – punishment parts of 18 years, 21 years and 18 years & 5 months respectively.<sup>31</sup>
- *HMA v Sharyn Stewart* – punishment part of 15 years.<sup>32</sup>

## Rape and other sexual offences

The so-called ‘life sentence’ is available as a maximum punishment for eight sexual offences.<sup>33</sup> These are:

- Rape,
- Sexual assault by penetration,
- Sexual assault,
- Sexual coercion,
- Rape of a young child,
- Sexual assault on a young child by penetration,
- Sexual assault on a young child, and
- Causing a young child to participate in a sexual activity.

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<sup>26</sup> Judiciary of Scotland, *Sentencing Statements*, [link](#)

<sup>27</sup> Judiciary of Scotland, *HMA v Muhammed Rauf, Shahida Abid and Saima Hayat*, March 2019, [link](#)

<sup>28</sup> Judiciary of Scotland, *HMA v Steven Sidebottom*, March 2019, [link](#)

<sup>29</sup> Judiciary of Scotland, *HMA v Ronald Stone*, February 2019, [link](#)

<sup>30</sup> Judiciary of Scotland, *HMA v Daniel McCafferty*, February 2019, [link](#)

<sup>31</sup> Judiciary of Scotland, *HMA v Paul Green, Lee Noonan and Robbie Brown*, January 2019, [link](#)

<sup>32</sup> Judiciary of Scotland, *HMA v Sharyn Stewart*, January 2019, [link](#)

<sup>33</sup> Sexual Offences (Scotland) Act 2009, Sch2, [link](#)

Recent sentencing statements where a ‘life sentence’ or OLR was given following convictions for sexual offences include:

- *HMA v Stuart Young* – punishment part of 8 years for raping two young children and sexually assaulting a third.<sup>34</sup>
- *HMA v Andrew David Peters* – punishment part of 7 years & 6 months for two charges of rape.<sup>35</sup>
- *HMA v Ian David Thomson* – punishment part of 9 years for raping four women.<sup>36</sup>

Because a ‘life sentence’ or OLR is not mandatory for these sexual offences, ‘determinate sentences’ (for a fixed length of time) can be given instead. Offenders given these sentences will be eligible for release by the Parole Board at the halfway point of their sentence.<sup>37</sup> If early release is not directed at the first opportunity then the Board will reconsider the offender's case at 12 month intervals. The number of years in these cases is therefore the maximum time the offender will spend in prison rather than a minimum.

Recent sentencing statements where a determinate sentence was given following conviction for sexual offences include:

- *HMA v David James Cruickshank* – 8 years and 9 months for three charges of rape.<sup>38</sup>
- *HMA v James Smith* – 10 years for repeated rape of two children aged 13 to 16 years old.<sup>39</sup>
- *HMA v Norman Wesley Nicholl* – 7 years followed by six years supervision in the community for rape of a child aged 11 years old.<sup>40</sup>
- *HMA v Robert Bonnar* – 8 years for rape of a child and sexual assault of another.<sup>41</sup>
- *HMA v Joshua Hunter* – 4 years and 4 months for causing a child to participate in sexual activity online, the taking of and possession of indecent photographs of children, and charges of extortion.<sup>42</sup>

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<sup>34</sup> Judiciary of Scotland, *HMA v Stuart Young*, June 2015, [link](#)

<sup>35</sup> Judiciary of Scotland, *HMA v Andrew David Peters*, 2013, [link](#)

<sup>36</sup> Judiciary of Scotland, *HMA v Ian David Thomson*, December 2014, [link](#)

<sup>37</sup> Parole Board for Scotland, *Sentence Type*, [link](#)

<sup>38</sup> Judiciary of Scotland, *HMA v David James Cruickshank*, September 2014, [link](#)

<sup>39</sup> Judiciary of Scotland, *HMA v James Smith*, May 2013, [link](#)

<sup>40</sup> Judiciary of Scotland, *HMA v Norman Wesley Nicholl*, February 2018, [link](#)

<sup>41</sup> Judiciary of Scotland, *HMA v Robert Bonnar*, October 2018, [link](#)

<sup>42</sup> Judiciary of Scotland, *HMA v Joshua Hunter*, September 2018, [link](#)

## Compassionate release

The law says that Scottish Government Ministers may at any time release any prisoner on ‘compassionate grounds’. This release is on licence, so involves conditions and monitoring. Ministers are required to consult the Parole Board before making the decision unless this would be impracticable.<sup>43</sup> In practice, this power is exercised by the Scottish Cabinet Secretary for Justice.

In answer to a Parliamentary Question, the Scottish Government confirmed that “release on compassionate grounds generally applies where individuals have a terminal illness and death is likely to occur soon, where the prisoner is severely incapacitated or where continued imprisonment would endanger or shorten his or her life expectancy. Release may also be considered where tragic family circumstances are a factor.”<sup>44</sup>

Advice to Ministers regarding the release of Al-Megrahi from Scottish Government officials notes that: “These criteria do not preclude Ministers recognising another set of circumstances that may not fall within those criteria and being satisfied that those circumstances justify release on compassionate grounds.”<sup>45</sup>

On the subject of death being ‘likely to occur soon’, the Scottish Government has said: “There are no fixed time limits but life expectancy of less than three months may be considered an appropriate period”.<sup>46</sup>

## Criminal Appeals

If a person thinks that they should not have been convicted of a crime, or that their sentence is too harsh, they can appeal either (or both) of these decisions to a higher court.<sup>47</sup> However, they can only appeal a conviction by a jury on a point of law. If the convicted person pled guilty, they can only appeal against their sentence.<sup>48</sup> In some circumstances, the convicted person may need permission to appeal, either from the original court or from the appeal court.

The Crown can also appeal against acquittal (a verdict of not guilty or not proven) or against the sentence on the grounds that it was unduly lenient.

The criminal appeals process acts as a safeguard against wrongful conviction, and overly harsh or unduly lenient sentencing.

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<sup>43</sup> Prisoners and Criminal Proceedings (Scotland) Act 1993, S3, [link](#)

<sup>44</sup> Scottish Parliament, *Question by Liam Kerr MSP*, 20 February 2019, [link](#)

<sup>45</sup> Scottish Government, *advice on Mr Al-Megrahi’s application for compassionate release*, 14 August 2009, [link](#)

<sup>46</sup> Scottish Government, *Compassionate Release Process*, [link](#)

<sup>47</sup> Scottish Sentencing Council, *Sentences and Appeals*, [link](#)

<sup>48</sup> Scottish Government, *The Appeals Process*, 20 March 2019, [link](#)

## Scottish Criminal Cases Review Commission

The Scottish Criminal Cases Review Commission was established in 1999.<sup>49</sup> <sup>50</sup> The Commission's role is to review and investigate criminal cases where it is alleged that a miscarriage of justice may have occurred in relation to a conviction, a sentence or both.<sup>51</sup> Where it concludes that there has been a miscarriage of justice, it must also determine whether or not it is in the interests of justice that a reference should be made to the High Court for the purposes of a possible appeal.

Where the Commission makes a reference to the High Court, it is required to give the court a statement of reasons for making the reference and to send a copy of the statement to every person who appears likely to be a party to the appeal.

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<sup>49</sup> Criminal Procedure (Scotland) Act 1995, Part XA, [link](#)

<sup>50</sup> Scottish Criminal Cases Review Commission, *Legislative Framework*, [link](#)

<sup>51</sup> Scottish Criminal Cases Review Commission, *Role of the SCCRC*, [link](#)

# CURRENT LAW IN ENGLAND & WALES



The approach in England & Wales is similar to that in Scotland because a conviction for murder carries a mandatory so-called 'life sentence', with the court setting a minimum term which must be served in custody before the offender can be considered for release on licence.<sup>52</sup>

Discretionary 'life sentences' are also available as the maximum sentence for other offences such as rape or robbery, and where the offender poses a significant risk to the public.<sup>53</sup>

However, the crucial difference is that English and Welsh courts have the power to impose 'Whole Life Orders' in certain circumstances, which do not allow the offender the chance to ever be released from prison.<sup>54</sup>

The law south of the border says that a whole life order must be the 'starting point' if the offender was over 21 at the time of committing the offence and 'the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high'.<sup>55</sup> Because it is just a 'starting point', the eventual sentence given may not be a whole life order after mitigation is taken into account. To help the court decide if the offence is serious enough, the statute lays down examples of circumstances which would be. These are:

- 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.

Factors which may mitigate the sentence include (among others) an intention to cause serious harm rather than kill, a lack of premeditation, the offender suffering from a mental disorder or mental disability, and the offender being provoked.<sup>56</sup>

## Compassionate release

The law in England & Wales gives the Secretary of State for Justice the power to release a prisoner serving a whole life order on compassionate grounds.<sup>57</sup> It stipulates that he or she must consult the Parole Board for England and Wales before doing so, unless that is impracticable.

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<sup>52</sup> Sentencing Council, *Life Sentences*, [link](#)

<sup>53</sup> Sentencing Council, *Life Sentences*, [link](#)

<sup>54</sup> Sentencing Council, *Life Sentences*, [link](#)

<sup>55</sup> Criminal Justice Act 2003, Sch21, Para 4, [link](#)

<sup>56</sup> Criminal Justice Act 2003, Sch21, Para 11, [link](#)

<sup>57</sup> Crime (Sentences) Act 1997, S30, [link](#)

The current criteria for release on compassionate grounds, which are set out in the ‘Lifer Manual’, include that the prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, three months is suggested as an appropriate period), or the prisoner is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stroke. Additional conditions are that ‘the risk of re-offending is minimal’, that ‘further imprisonment would reduce the prisoner’s life expectancy’, that ‘there are adequate arrangements for the prisoner’s care and treatment outside prison’, and that ‘early release will bring some significant benefit to the prisoner or his/her family’.<sup>58</sup>

The European Court of Human Rights has held that ‘compassionate grounds’ must be read in a manner compatible with Article 3 of the European Convention on Human Rights and could not be restricted to only the above criteria as set out in the Lifer Manual.<sup>59</sup> The UK Government is therefore expected to revise the Lifer Manual in due course.

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<sup>58</sup> HM Prison & Probation Service, *Prison Service Order 4700: Indeterminate Sentence Manual*, Chapter 12, [link](#)

<sup>59</sup> *Hutchinson v the United Kingdom* App no 57592/08 (ECtHR, 17 January 2017),[70]-[73], [link](#)

# EUROPEAN CONVENTION ON HUMAN RIGHTS



The Scottish Parliament is prohibited from passing legislation which is incompatible with any of the rights set out in the European Convention of Human Rights (ECHR).<sup>60</sup>

For the avoidance of doubt, this requirement is not impacted by Brexit and will continue to apply regardless of the future relationship between the United Kingdom and the EU.

The application of the system of Whole Life Orders that exists in England and Wales has been held to comply with the ECHR by the European Court of Human Rights – the highest possible court which can decide on these matters. In January 2017, the Court ruled that because the Secretary of State for Justice has the power to release a whole life prisoner on compassionate grounds, the Whole Life Order was in keeping with the Convention and did not constitute ‘inhuman or degrading treatment or punishment’.<sup>61</sup>

Extrapolating this decision to Scotland, any proposed Bill must ensure that measures remained in place allowing for the prospect of release for the prisoner on compassionate grounds by the Scottish Ministers in order to ensure compliance with the ECHR.

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<sup>60</sup> Scotland Act 1998, S29(2)(d), [link](#)

<sup>61</sup> *Hutchinson v the United Kingdom* App no 57592/08 (ECtHR, 17 January 2017),[70]-[73], [link](#)

# CONTENT OF THE PROPOSED BILL



## What the Bill will do

The proposed Bill will give Scottish courts the power to impose a prison sentence which lasts the length of an offender's life.

This will only be available where the offence is considered to be exceptionally serious – such as the most serious murders and sexual offences.

The circumstances which should attract a Whole Life Custody Sentence are something I am seeking views on as part of this consultation. However, it is envisaged that the Bill would include a list of examples which would have a Whole Life Custody Sentence as a starting point. This list would be explicitly non-exhaustive so that judges' powers were not constrained in unusually serious cases.

My initial proposal is that the list should include the circumstances set out in England and Wales:<sup>62</sup>

- 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.

Additionally, I am seeking views on whether Whole Life Custody Sentences should be the starting point for:

- The rape of two or more persons.
- Rape of a young child.
- Sexual assault on a young child by penetration.
- Causing a young child to participate in a sexual activity.

The Bill will not lay down that a Whole Life Custody Sentence *must* apply for specific crimes, rather that it is the 'starting point' when sentencing those who have been found guilty of those specific crimes, before factors that may reduce the length of sentence have been taken into account by the judge. These 'mitigating' factors may also be listed on the face of the Bill.

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<sup>62</sup> Criminal Justice Act 2003, Sch 21, [link](#)

Mirroring the law in England & Wales, I propose that a Whole Life Custody Sentence is only available for offenders aged 21 or older, though I am seeking views on this too.

## Safeguards against miscarriages of justice

The Bill will include a meaningful system of review for those given a Whole Life Custody Sentence. This is required by the European Convention on Human Rights,<sup>63</sup> and it is proper that there is a mechanism for a sentence to be overturned in exceptional circumstances.

Therefore, a section of the Bill will place the Scottish Ministers under a duty to regularly review the cases of those prisoners who are given Whole Life Custody Sentences to assess whether there are compassionate grounds for release.

This is in addition to the protections against miscarriages of justice that already exist in Scotland, which would still apply. These include a convicted person's power to appeal their conviction and/or sentence, and the power of the Scottish Criminal Cases Review Commission to refer cases to the High Court.

## Financial implications of the Bill

The proposed Bill may bring costs by way of lengthier imprisonment for the most serious criminals in society.

The additional cost is not anticipated to be great. The latest figures from the Ministry of Justice indicate there were only 63 whole-life prisoners in England and Wales at the end of December 2018.<sup>64</sup> The latest population estimate for England and Wales is 58,744,600 while Scotland's population is estimated at 5,424,800,<sup>65</sup> 10.8 times less. This may suggest there will be around six whole life prisoners in Scotland at any one time, assuming that the list of offences that will attract a Whole Life Custody Sentence remains broadly similar to the scheme south of the border.

The Scottish Prison Service calculated the annual average cost per prisoner place for the year 2017-18 to be £35,293.<sup>66</sup> Therefore six prisoners in Scotland would cost the taxpayer £211,758 a year. However, this does not deduct the cost of the time these prisoners would already spend behind bars under the current system. This includes both the minimum 'punishment part' they would have served plus the additional time spent in jail at the decision of the Parole Board.

Furthermore, the cost of keeping these criminals under criminal justice social work supervision for the rest of their lives after they are released must be factored in, as this cost would not need to be met if they were still behind bars. The type and level of supervision that such an offender might have to undergo will fluctuate during their period on licence, depending on whether they are adhering to the conditions of their licence, and the ongoing assessments being undertaken by social work staff and others.

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<sup>63</sup> *Hutchinson v the United Kingdom* App no 57592/08 (ECtHR, 17 January 2017), [link](#)

<sup>64</sup> Ministry of Justice, *Offender Management Statistics Bulletin, England and Wales*, 31 January 2019, [link](#)

<sup>65</sup> ONS, *Population estimates for UK, England and Wales, Scotland and Northern Ireland: mid-2017*, 28 June 2018, [link](#)

<sup>66</sup> Scottish Prison Service, *Annual Report and Accounts 2017-18*, July 2018, [link](#)

The proposed Bill may also result in savings to the justice system if more potential offenders are deterred from serious crime in the future and if existing serious offenders can no longer re-offend. These savings would be felt across the police, prosecution service, courts system and prison service.

Finally, for the same reasons, the Bill could save potential victims from suffering violent crime, as well as saving their families from anguish and grief. These ‘savings’ are potentially enormous, even if they cannot be quantified in financial terms.

## Equalities

I note that, as with current sentencing practices, there is a wider debate regarding how best to accommodate transgender inmates.

Otherwise, there have been no particular positive and/or negative impacts of the proposal identified on any of the protected groups (under the Equality Act 2010) at this stage.

This proposal will continue to allow the judiciary to take into account any equalities issues, and mitigating factors, when deciding on a sentence.

## Sustainable development

The outcome of an initial sustainable development impact assessment suggests that the proposed Bill is unlikely to have any significant environmental impacts.

The proposed Bill can support sustainable development issues by increasing the wellbeing of victims and their families. It will result in a positive change in the local communities of victims and their families, as they will know that the likelihood of having to see the offender living in their community in the future is almost zero. It may also allow victims, and murder victims’ friends and families, to have a greater sense of fairness, that justice has been served, and a greater sense of security by knowing that the offender is unlikely to ever be released and given the opportunity to reoffend.

The Bill would impact upon offenders’ families who may have to incur increased financial costs to visit family members in prison, and transfer money to the prisoner’s bank account, for the rest of the offender’s life. The Bill would also impact children whose parents receive a Whole Life Custody Sentence.

The negative impacts on offenders and their families have been considered. The benefits that the proposed Bill will bring to victims, their families and to wider society by ensuring that these violent offenders cannot reoffend will outweigh these impacts.

# QUESTIONS

## About you

(Note: Information entered in this “About You” section may be published with your response (unless it is “not for publication”), except where indicated in **bold**.)

1. Are you responding as:
- an individual – in which case go to Q2A
  - on behalf of an organisation? – in which case go to Q2B
- 2A. 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”.)
- Politician (MSP/MP/peer/MEP/Councillor)
  - Professional with experience in a relevant subject
  - Academic with expertise in a relevant subject
  - Member of the public

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

- 2B. Please select the category which best describes your organisation:
- Public sector body (Scottish/UK Government or agency, local authority, NDPB)
  - Commercial organisation (company, business)
  - Representative organisation (trade union, professional association)
  - Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
  - 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).

3. Please choose one of the following:
- I am content for this response to be published and attributed to me or my organisation
  - I would like this response to be published anonymously
  - I would like this response to be considered, but not published (“not for publication”)

If you have requested anonymity or asked for your response not to be published, please give a reason. (**Note: your reason will not be published.**)

4. 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”.)**

Name:

Please provide 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. **(Note: We will not publish these contact details.)**

Contact details:

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.

## Your views on the proposal

Note: All answers to the questions in this section may be published (unless your response is “not for publication”).

### Aim and approach

- 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?**

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

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

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

- Significantly more confident in the justice system

- Slightly more confident in the justice system
- Neither more nor less confident in the justice system
- Slightly less confident in the justice system
- Significantly less confident in the justice system
- Unsure

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

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

- 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
- Other (please specify)
- None of the above

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

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

- Rape of two or more persons
- Rape of a young child
- Sexual assault on a young child by penetration
- Causing a young child to participate in a sexual activity
- Other (please specify)

- None of the above

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

**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?**

- Yes (please specify)
- No – only murder and certain sexual offences should attract a Whole Life Custody Sentence
- No - no offences (including murder or sexual offences) should attract a Whole Life Custody Sentence
- Unsure

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

**6. 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 be limited to offenders aged 21 or over (at the time the offence was committed)
- Whole life custody should be limited to offenders aged 18 or over (at the time the offence was committed)
- Whole life custody should be limited to offenders aged 16 or over (at the time the offence was committed)
- Whole life custody should be an option for any adult offender (aged 16 or over) or for children over the age of criminal responsibility (at the time the offence was committed)
- Whole life custody should not be an option for any offender, regardless of age
- Unsure

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

**Financial implications**

**7. 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.**

**Equalities**

**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?**

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure

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

**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?**

- Yes
- No
- Unsure

Please explain the reasons for your response.

**General**

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

# HOW TO RESPOND TO THIS CONSULTATION



You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

### **Format of responses**

You are encouraged to submit your response via an online survey (Smart Survey) if possible, as this is quicker and more efficient both for you and the Parliament. However, if you do not have online access, or prefer not to use Smart Survey, you may also respond by e-mail or in hard copy.

#### *Online survey*

To respond via online survey, please follow this link:

<https://www.smartsurvey.co.uk/s/WholeLifeCustody/>

The platform for the online survey is Smart Survey, a third party online survey system enabling the SPCB to collect responses to MSP consultations. Smart Survey is based in the UK and is subject to the requirements of the General Data Protection Regulation (GDPR) and any other applicable data protection legislation. Any information you send in response to this consultation (including personal data) will be seen by the MSP progressing the Bill and by staff in NGBU.

Further information on the handling of your data can be found in the Privacy Notice, which is available either via the Smart Survey link above, or at the end of this document.

Smart Survey's privacy policy is available here:

<https://www.smartsurvey.co.uk/privacy-policy>

#### *Electronic or hard copy submissions*

Responses not made via Smart Survey should, if possible, be prepared electronically (preferably in MS Word). Please keep formatting of this document to a minimum. Please send the document by e-mail (as an attachment, rather than in the body of the e-mail) to:

[liam.kerr.msp@parliament.scot](mailto:liam.kerr.msp@parliament.scot)

Responses prepared in hard copy should either be scanned and sent as an attachment to the above e-mail address or sent by post to:

Liam Kerr MSP  
Room 3.16  
Scottish Parliament  
Edinburgh EH99 1SP

Responses submitted by e-mail or hard copy may be entered into Smart Survey by my office or by NGBU.

If submitting a response by e-mail or hard copy, please include written confirmation that you have read and understood the Privacy Notice (set out below).

You may also contact my office by telephone on (0131) 348 6973.

### **Deadline for responses**

All responses should be received no later than **30 August 2019**. Please let me know in advance of this deadline if you anticipate difficulties meeting it. Responses received after the consultation has closed will not be included in any summary of responses that is prepared.

### **How responses are handled**

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that I would normally expect to publish all responses received (other than “not for publication” responses) on my website <https://www.liamkerr.org.uk/>

Published responses (other than anonymous responses) will include the name of the respondent, but other personal data sent with the response (including signatures, addresses and contact details) will not be published.

Where responses include content considered to be offensive, defamatory or irrelevant, my office may contact you to agree changes to the content, or may edit the content itself and publish a redacted version.

Copies of all responses will be provided to the Scottish Parliament’s Non-Government Bills Unit (NGBU), so it can prepare a summary that I may then lodge with a final proposal (the next stage in the process of securing the right to introduce a Member’s Bill). The Privacy Notice (below) explains more about how the Parliament will handle your response.

If I lodge a final proposal, I will be obliged to provide copies of responses (other than “not for publication” responses) to the Scottish Parliament’s Information Centre (SPICe). SPICe may make responses available to MSPs or staff on request.

### **Requests for anonymity or for responses not to be published**

If you wish your response to be treated as anonymous or “not for publication”, please indicate this clearly. The Privacy Notice (below) explains how such responses will be handled.

### **Other exceptions to publication**

Where a large number of submissions is received, particularly if they are in very similar terms, it may not be practical or appropriate to publish them all individually. One option may be to publish the text only once, together with a list of the names of those making that response.

There may also be legal reasons for not publishing some or all of a response – for example, if it contains irrelevant, offensive or defamatory content. If I think your response contains such content, it may be returned to you with an invitation to provide a justification for the content or to edit or remove it. Alternatively, I may publish it with the content edited or removed, or I may disregard the response and destroy it.

### **Data Protection**

As an MSP, I must comply with the requirements of the General Data Protection Regulation (GDPR) and other data protection legislation which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with

your name, unless you request anonymity or ask for it not to be published. I will not publish your signature or personal contact information. The Privacy Notice (below) sets out in more detail what this means.

I may also edit any part of your response which I think could identify a third party, unless that person has provided consent for me to publish it. If you wish me to publish information that could identify a third party, you should obtain that person's consent in writing and include it with your submission.

If you consider that your response may raise any other issues under the GDPR or other data protection legislation and wish to discuss this further, please contact me before you submit your response. Further information about data protection can be found at: [www.ico.gov.uk](http://www.ico.gov.uk).

### **Freedom of Information (Scotland) Act 2002**

As indicated above, NGBU may have access to information included in, or provided with, your response that I would not normally publish (such as confidential content, or your contact details). Any such information held by the Parliament is subject to the requirements of the FOISA. So if the information is requested by third parties the Scottish Parliament must consider the request and may have to provide the information unless the information falls within one of the exemptions set out in the Act. I cannot therefore guarantee that any such information you send me will not be made public should it be requested under FOISA.

Further information about Freedom of Information can be found at:

[www.itspublicknowledge.info](http://www.itspublicknowledge.info).

### **Privacy Notice**

This privacy notice explains how the personal data which may be included in, or is provided with, your response to a MSP's consultation on a proposal for a Member's Bill will be processed. This data will include any personal data including special categories of personal data (formerly referred to as sensitive personal data) that is included in responses to consultation questions, and will also include your name and your contact details provided with the response. Names and contact details fall into normal category data.

### **Collecting and holding Personal Data**

The Scottish Parliamentary Corporate Body (the SPCB) processes any personal data you send to it, or that the MSP whose consultation you respond to shares with it (under a data-sharing agreement) according to the requirements of the General Data Protection Regulation (EU) 2016/679 (the GDPR) and the Data Protection Act 2018 (the DPA)

Personal data consists of data from which a living individual may be identified. The SPCB will hold any personal data securely, will use it only for the purposes it was collected for and will only pass it to any third parties (other than the MSP whose consultation you respond to) with your consent or according to a legal obligation. Further information about the data protection legislation and your rights is available here:

<https://ico.org.uk/for-the-public/is-my-information-being-handled-correctly/>

## Sharing Personal Data

The data collected and generated by Smart Survey will be held by the Non-Government Bills Unit (NGBU), a team in the Scottish Parliament which supports MSPs progressing Members' Bills, and shared with the MSP who is progressing the Bill and staff in the MSP's office. Data submitted by other means (e.g. by email or hard copy) will be held by the MSP's office and shared with NGBU for the purpose of producing a summary of responses to the consultation. The MSP and NGBU are joint data controllers of the data. Under a data-sharing agreement between the MSP and the Scottish Parliament, access to the data is normally limited to NGBU staff working on the Member's Bill/proposal, the MSP and staff in the MSP's office working on the Member's Bill/proposal; but data may also be shared by NGBU with the Scottish Parliament's solicitors in the context of obtaining legal advice.

## Publishing Personal Data

"Not for publication" responses will not be published and will only be referred to in the summary of consultation responses in the context of a reference to the number of "not for publication" responses received and, in some cases, in the context of a general reference that is considered by you to be consistent with the reasons for choosing "not for publication" status for your response. Anonymous responses will be published without your name attached, your name will not be mentioned in the summary of consultation responses, and any quote from or reference to any of your answers or comments will not be attributed to you by name.

Other responses may be published, together with your name; and quotes from or references to any of your answers or comments, together with your name, may also be published in the summary of consultation responses.

Contact details (e.g. your e-mail address) provided with your response will not be published, but may be used by either the MSP's office or by NGBU to contact you about your response or to provide you with further information about progress with the proposed Bill.

Where personal data, whether relating to you or to anyone else, is included in that part of your response that is intended for publication, the MSP's office or NGBU may edit or remove it, or invite you to do so; but in certain circumstances the response may be published with the personal data still included.

Please note, however, that references in the foregoing paragraphs to circumstances in which responses or information will not be published are subject to the Parliament's legal obligations under the Freedom of Information (Scotland) Act 2002. Under that Act, the Parliament may be obliged to release to a requester information that it holds, which may include personal data in your response (including if the response is "not for publication" or anonymous).

## Use of Smart Survey software

The Scottish Parliament is licensed to use Smart Survey which is a third party online survey system enabling the Scottish Parliament to collect responses to MSP consultations, to extract and collate data from those responses, and to generate statistical information about those responses. Smart Survey is based in the UK and is subject to the requirements of data protection legislation. Any information you send by email or in hard copy in response to a consultation on a proposal for a Member's Bill may be added manually to Smart Survey by the MSP's office or by NGBU.

The privacy policy for Smart Survey is available here:

<https://www.smartsurvey.co.uk/privacy-policy>

While the collected data is held on Smart Survey, access to it is password protected. Where the data is transferred to our own servers at the Scottish Parliament, access will be restricted to NGBU staff through the application of security caveats to all folders holding consultation data.

### **Access to, retention and deletion of personal data**

As soon as possible after a summary of consultation responses has been published, or three months after the consultation period has ended, whichever is earlier, all of your data will be deleted from Smart Survey. If, three months after the consultation period has ended, a summary has not been published, then responses may be downloaded from Smart Survey and saved (with all the information that would normally not be published – including contact details – removed) to SPCB servers and retained until the end of the session of the Parliament in which the consultation took place. If the MSP lodges a final proposal, he/she is required to provide a copy of your response (unless it was “not for publication”), together with your name (unless you requested anonymity), but not your contact details, to the Scottish Parliament Information Centre (SPICe), where it may be retained indefinitely and may be archived.

### **Purpose of the data processing**

The purpose of collecting, storing and sharing personal data contained in consultation responses is to enable Members to consider the views of respondents to inform the development of the Bill, with the support of NGBU. Personal data contained in consultation responses will not be used for any other purpose without the express consent of the data subject.

### **The legal basis**

The legal basis for collecting, holding, sharing and publishing your personal data is that the processing is necessary for the performance of a task carried out in the public interest, or in the substantial public interest, in accordance with Art 6(1)(e) GDPR, s8(d) DPA, or Art 9(1)(g) GDPR, s10 of and paragraph 6 of Schedule 1 of the DPA. The task is the support of Members seeking to introduce Members’ Bills to the Parliament. This is a core task of the SPCB and therefore a Crown function. The adequate support of the Members Bill process and the ability to seek, use and temporarily store personal data including special category data is in the substantial public interest.

If the person responding to the consultation is under the age of 12 then consent from the parent or guardian of the young person will be required to allow the young person to participate in the consultation process (however, the legal basis for the processing of the personal data submitted remains as the public interest task basis identified above).

### **Your rights**

Data protection legislation sets out the rights which individuals have in relation to personal data held about them by data controllers. Applicable rights are listed below, although whether you will be able to exercise data subject rights in a particular case may depend on the purpose for which the data controller is processing the data and the legal basis upon which the processing takes place. For example, the rights allowing for erasure of personal data (right to be forgotten) and data portability do not apply in cases where personal data is processed for the purpose of the performance of a task carried out in the public interest. The right to object to the processing of personal data for the purpose of a public interest task is restricted if there are legitimate grounds for the processing which override the interest of the data subject. This would be considered on a

case by case basis and depends on what personal data is involved and the risks further processing of that data would pose to you. As described above, the collection, storage, sharing and publishing of personal data contained in consultation responses is a task carried out in the public interest, which means that these three data subject rights do not apply here or only in a restricted scope.

**Access to your information** – You have the right to request a copy of the personal information about you that we hold.

**Correcting your information** – We want to make sure that your personal information is accurate, complete and up to date and you may ask us to correct any personal information about you that you believe does not meet these standards.

**Objecting to how we may use your information** – Where we use your personal information to perform tasks carried out in the public interest then, if you ask us to, we will stop using that personal information unless there are overriding legitimate grounds to continue.

**Restricting how we may use your information** – in some cases, you may ask us to restrict how we use your personal information. This right might apply, for example, where we are checking the accuracy of personal information about you that we hold or assessing the validity of any objection you have made to our use of your information. The right might also apply where this is no longer a basis for using your personal information but you don't want us to delete the data. Where this right is validly exercised, we may only use the relevant personal information with your consent, for legal claims or where there are other public interest grounds to do so. Please contact us in any of the ways set out in the *Contact information and further advice* section if you wish to exercise any of these rights.

### **Changes to our privacy notice**

We keep this privacy notice under regular review and will place any updates on this website. Paper copies of the privacy notice may also be obtained using the contact information below. This privacy notice was last updated on 22 May 2019 (version 3).

### **Contact information and further advice**

If you have any further questions about the way in which we process personal data, or about how to exercise your rights, please contact:

Head of Information Governance  
The Scottish Parliament  
Edinburgh  
EH99 1SP  
Telephone: 0131 348 6913 (Text Relay calls welcome)  
Textphone: 0800 092 7100  
Email: [dataprotection@parliament.scot](mailto:dataprotection@parliament.scot)

### **Complaints**

We seek to resolve directly all complaints about how we handle personal information but you also have the right to lodge a complaint with the Information Commissioner's Office:

- Online: <https://ico.org.uk/global/contact-us/email/>
- By phone: 0303 123 1113