

Chapter 4: Tariff Setting for Murder

- 4.1. In Northern Ireland, the Judge has no option but to impose a life sentence once an offender is convicted of murder. The Judge must then decide on the minimum amount of time the offender must remain in prison before being considered for release on life-long licence.
- 4.2. This minimum period of custody is referred to as the tariff, the term adopted throughout this consultation. It should be noted that there is no fixed tariff for murder in legislation in Northern Ireland or in the rest of the UK.
- 4.3. No release date is given for a life sentence prisoner. The tariff establishes the minimum amount of time the offender must be held in prison before being considered for release by the Parole Commissioners for Northern Ireland. There is no guarantee the offender will be released once the tariff set by the judge has passed. A life sentence prisoner remains in custody unless or until they can demonstrate to the satisfaction of independent Parole Commissioners that they can be released safely into the community.
- 4.4. Parole Commissioners make decisions on release based on reports from those working with offenders while in custody. Commissioners describe their task as releasing the offender where risk to public is minimal but refusing release where there is doubt on that risk.¹
- 4.5. Life sentence prisoners who are released are subject to licence conditions which will remain in place for the rest of their lives. Licence conditions are set to manage and reduce any risk of reoffending² and may be added, varied or cancelled in consultation with the Parole Commission for Northern Ireland.
- 4.6. Any breach of licence conditions assessed by the Commissioners to have significantly increased the risk to the public leaves the offender vulnerable to being returned to prison (recall). An offender recalled to prison will remain in custody until the Commissioners are satisfied of their suitability for re-release into the community.
- 4.7. Public and political concerns expressed on the sentences imposed for the killing of a serving police officer in 2012 (reviewed by the Northern Ireland Court of

¹<http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2013-2014/november-2013/parole-commissioners-for-northern-ireland-role-and-responsibilities/>

² The conditions are related to any factors identified as playing a role in the offender's risk of reoffending. Conditions regularly include curfew, ban on alcohol with monitoring for compliance, restricted use of drugs to those prescribed, geographical bans where relevant to victim or potential victims (sex offenders), attendance of any identified relevant rehabilitative courses, supervision by Probation or multi agency group, restriction of association with named persons or groups.

Appeal in 2014) resulted in a ministerial commitment to conduct this review of the law on the determination of tariffs for mandatory life sentences.

- 4.8. This is the type of issue which might be considered by a Sentencing Council in other parts of the UK (see Chapter 3).
- 4.9. The Review has looked into the position in neighbouring jurisdictions³ and further afield⁴ reflecting the contrasting legislation referred to during an earlier Assembly debate.⁵ While the United Kingdom has been observed as having the highest rate of life sentencing in Europe, the question of abolishing mandatory life sentences for murder is not part of this Review.
- 4.10. The Review is considering whether:
 - the process for determining tariffs should remain unchanged; or
 - there is benefit to introducing, in legislation, a more regulated approach to tariff setting than currently exists; and, if so,
 - the potential content of any legislation.

Types of Tariffs and Application

- 4.11. The introduction of the tariff⁶ accompanied the abolition of the death penalty for murder.⁷ In the United Kingdom judges determine the tariff by following relevant legislation and sentencing guidance. Elsewhere, legislation can set a fixed tariff which the judge must impose, with no or very limited power to vary this.

UK Approach

- 4.12. Across the United Kingdom, the judge conducts a detailed sentencing exercise to determine the appropriate tariff. The judge will identify a starting point in terms of years of imprisonment for the calculation of the tariff by referring to sentencing guidance.
- 4.13. Such guidance is generally provided either in earlier cases determined by a Court of Appeal⁸ or in legislation.⁹ The judge sets the tariff by increasing or

³ England and Wales, Scotland and Republic of Ireland.

⁴ Canada and Australia.

⁵ <https://www.theyworkforyou.com/ni/?id=2012-06-11.11.1>

⁶ A 'tariff' is the minimum period which in the court's view should elapse before the offender may be considered for release on licence.

⁷ The death penalty was abolished in England, Scotland and Wales by the Murder (Abolition of Death Penalty) Act 1965, followed in Northern Ireland, in July 1973, by the Northern Ireland (Emergency Provisions) Act 1973.

⁸ Northern Ireland and Scotland

⁹ England and Wales

decreasing the number of years to take account of aggravating or mitigating factors¹⁰ which relate to either the offence or the offender in the particular case.

4.14. This flexibility is to ensure that the tariff reflects the circumstances of the individual offender and the offending conduct.

Other Jurisdictions

4.15. Legislation in jurisdictions like Ireland and Canada provides a set tariff for certain types of murders. In Ireland there is a 40 year tariff for the murder of members of the police, armed forces, and politicians amongst others. In Canada 25 years must be imposed where murder is premeditated, planned or involves the killing of a police officer.¹¹ The judge does not have any discretion to change these periods.

4.16. In Canada remission is not available; whereas in Ireland standard remission applies so that a person ordered to serve a tariff of 40 years can serve 30 years.¹²

4.17. Set tariffs are also found in Australia. In at least one State a range of set tariffs exist, ranging from twenty years for single murders to thirty years for multiple murders.¹³ Other States have tariffs ranging from 10,¹⁴ to 20¹⁵ to 25¹⁶ years for murder.

4.18. Most Australian States also allow judicial discretion to impose a shorter tariff, restricted to exceptional circumstances, and a longer tariff can also be imposed. The Australian system lays emphasis on sentencing judges individualising justice.¹⁷

4.19. The Northern Ireland Assembly has not signalled a strong demand for tariffs to be set in legislation.¹⁸ Periodic public concerns over sentencing for particular

¹⁰ Aggravating factors include planned or premeditated murder, use of weapons, concealment of crime or having relevant previous convictions or failure to respond to earlier sentences. Mitigating factors are few and generally other than lack of intent to kill or premeditation, they relate to offender's age, plea or sorrow for offending.

¹¹ Canada sets the fixed tariff of 25 years for what is termed First Degree Murder- Criminal Code of Canada, section 745; <http://www.criminal-code.ca/criminal-code-of-canada-section-745-sentence-of-life-imprisonment/index.html>

¹² Criminal Justice Act 1990, section 5 (2).

¹³ Queensland

¹⁴ In Western Australia, the court must set a standard non-parole period of 10 years where the offender has been sentenced to life imprisonment for murder.

¹⁵ In South Australia, the court must set a standard non-parole period of 20 years when it imposes a life sentence for murder.

¹⁶ Northern Territory, the court must set a standard non-parole period of 20 years when it imposes a life sentence for murder, or 25 years where certain factors are present in the case.

¹⁷ Law Library of Congress Australia; Sentencing Guidelines

¹⁸ Northern Ireland Assembly Debate 29th November 2011

<http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2011/111129.pdf>

offences or individual cases usually arise from a perception of leniency or inconsistencies in specific sentencing decisions. Another reported concern is that sentencing is perceived to be overly preoccupied with mitigating factors concerning the offender.

- 4.20. Any sentence must be just, proportionate and accord with relevant legislative schemes and the broader principles of common law. Judicial discretion is an essential element of the sentencing process. The Review considers that statutory set tariffs would unduly fetter judicial discretion, making judges less able to take account of the individual circumstances in complex cases. Consequently, a more detailed consideration of this option has been excluded from this consultation.

Northern Ireland Legal Framework

- 4.21. In Northern Ireland legislation requires the judge to set a tariff 'to satisfy the requirements of retribution and deterrence'.¹⁹ In setting the tariff, the judge is guided by specific case law issued by the Northern Ireland Court of Appeal,²⁰ which incorporates the 2002 Practice Statement issued by Lord Chief Justice Woolf.²¹
- 4.22. This sets out a number of starting points for the calculation of the tariff and the circumstances in which they apply. In summary the 'normal' starting point for a life sentence tariff is 12 years for an adult. There is a 'higher' starting point of 15 to 16 years for 'exceptionally high culpability or a particularly vulnerable victim'. Examples of such include professional or contract killings, politically motivated killing, a victim providing public service, a child or multiple murders.
- 4.23. The Practice Statement describes factors which, if present, will tend to aggravate or mitigate the duration of the final tariff.²² The normal or higher starting points move up or down in response to aggravating or mitigating factors.²³
- 4.24. There is also a category of 'very serious' murders, which can result in a tariff of up to 30 years.²⁴ Those include multiple murders or a murder which includes a number of the factors mentioned as falling within the higher starting point range.

¹⁹ Life Sentences (Northern Ireland) Order 2001, Article 5 (2):
<http://www.legislation.gov.uk/nisi/2001/2564/article/5>

²⁰ R v McCandless, Johnston, Johnston, Anderson and Scott [2004] NICA 1.

²¹ Practice Statement (Crime: Life Sentences) [2002] 3 All ER 412 at 413-415.

²² Practice Statement (Crime: Life Sentences) [2002] 3 All ER 412 at 413-415, paragraphs 10 to 19.

²³ Aggravating factors include planned or premeditated murder, use of weapons, concealment of crime or having relevant previous convictions or failure to respond to earlier sentences. Mitigating factors are few and generally other than lack of intent to kill or premeditation, they relate to offender's age, plea or sorrow for offending.

²⁴ Practice Statement (Crime: Life Sentences) [2002] 3 All ER 412 at 413-415, paragraph 18.

Whole Life Tariffs

- 4.25. The only time a tariff will not be set by the judge is where the offence is considered particularly serious.²⁵ 'Particularly serious' murder is not defined in the legislation but the court may order that no tariff is specified when sentencing for such an offence. Instead the offender is ordered to be subject to a 'whole life tariff'.
- 4.26. This means the offender can be detained for the remainder of his or her natural life. Instances of a whole life tariff are rare. Only one has ever been imposed by a Crown Court Judge in Northern Ireland and, on appeal, this was changed to a 35 year tariff.²⁶
- 4.27. In that case, the Northern Ireland Court of Appeal endorsed the view of the England and Wales Court of Appeal²⁷ that the imposition of a whole life tariff should be confined to those instances where *"the facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life"*.²⁸

Setting the Tariff

- 4.28. Guidance has been given to judges by the Northern Ireland Court of Appeal on how to approach the task of setting the tariff.²⁹ It is not a mechanical exercise but rather an avenue to reach a conclusion appropriate in all the circumstances of the case:
- First the appropriate starting point is selected;
 - next the aggravating and mitigating factors should be identified and applied;
 - the third step is to check no 'double counting' of any relevant factors;
 - the final stage, and most importantly where the aggravating factors result in the tariff equalling or exceeding the higher starting point, is for judges to consider whether the figure reached properly represents the tariff for which that offender should be detained. This should allow for variations between offenders.

²⁵ Life Sentences (Northern Ireland) Order 2001, Article 5(3):

<http://www.legislation.gov.uk/nisi/2001/2564/part/III/crossheading/determination-of-tariffs>

²⁶ R v Hamilton [2008] NICA 27; <https://judiciaryni.uk/judicial-decisions/2008-nica-27>

²⁷ Lord Phillips CJ in R v Jones and others [2005] EWCA Crim 3115

²⁸ R v Hamilton [2008] NICA 27; paragraph 38, <https://judiciaryni.uk/judicial-decisions/2008-nica-27>

²⁹ R v PJ Morin [2011] NICA 24.

4.29. Guidance has also been provided by the Northern Ireland Court of Appeal where a guilty plea is made to murder.³⁰ The Court considered it inappropriate to be too prescriptive in guidance, but recommended that the judge should carefully set out the factors which justify any discount of greater than one-sixth for a plea in a murder case.

Approach in Scotland, England and Wales

Scotland

4.30. Scottish legislation similarly requires the judge to give a life sentence for murder and to set a tariff to 'satisfy the requirements of retribution and deterrence'.³¹ However, there is no legislative provision for a whole life tariff.

4.31. The leading guideline case of the Scottish Court of Appeal³² reinforces the legislation,³³ confirming that the tariff may be any period of years and months even if it is likely that the period will exceed the remainder of the prisoner's life.

4.32. To date, the longest tariff given in Scotland is 37 years. The same case rejected the suggestion that the norm in most murder cases would be a 12 years starting point.³⁴

4.33. The Scottish Court of Appeal considered a starting point of 16 years generally appropriate where the offender was armed with a sharp weapon;³⁵ or where the victim was a child. In a case where a police officer was acting in the course of his or her duty or where a firearm was used the tariff should be approximately 20 years;³⁶ and multiple murders by terrorists could warrant a tariff of more than 30 years. In relation to a guilty plea, the Scottish Court of Appeal ruled murder was a special case and "*the maximum discount should be about one-sixth, with a maximum of five years*".

³⁰ R v William and James Henry Turner [2017] NICA 52; In summary very few cases are capable of attracting a discount close to one-third. Each case must be considered on its own facts but a not guilty plea at the first arraignment is unlikely to receive a discount for a plea on re-arraignment greater than one-sixth. A discount for a plea in excess of 5 years would be wholly exceptional even in the case of a substantial tariff.

³¹ Prisoners and Criminal Proceedings (Scotland) Act 1993, sections 2 (1) and 2 (2): <http://www.legislation.gov.uk/ukpga/1993/9/section/2>

³² HM Advocate v Boyle and Others [2009] HCJAC 89; <https://www.scottishsentencingcouncil.org.uk/about-sentencing/hm-advocate-v-boyle-and-others-opinion/>

³³ Prisoners and Criminal Proceedings (Scotland) Act 1993, section 2 (3A): <http://www.legislation.gov.uk/ukpga/1993/9/section/2>

³⁴ HM Advocate v Boyle and Others [2009] HCJAC 89, paragraph 14.

³⁵ HM Advocate v Boyle and Others [2009] HCJAC 89, paragraph 17.

³⁶ Boyle and Walker v HM Advocate 2002 SCCR 1036.

England and Wales

- 4.34. England and Wales introduced a range of statutory starting points which vary depending on the age of the offender and the circumstances of the murder.³⁷ These starting points have been applied by judges for offenders convicted of murder since the 18 December 2003. The legislation replaced the 2002 Practice Statement which still applies in Northern Ireland. The normal statutory starting point for an adult is 15 years.³⁸
- 4.35. Higher statutory starting points apply where the murder falls within one of three categories of seriousness,³⁹ ranging from 25 years, where a knife or weapon is involved; to 30 years for murders such as killing a police officer or the use of a firearm.
- 4.36. Once the correct statutory starting point is identified, the judge takes account of any aggravating or mitigating factors, which are set out in the legislation.⁴⁰ Unless the case warrants a whole life order, the judge will reduce the tariff to take account of a guilty plea. The final tariff is expected to take into account all the factors of the case and can be of any length, either above or below the statutory starting point.
- 4.37. The whole life order⁴¹ equates to the Northern Ireland whole life tariff, but applies only to adults over 21 when a specific category of murder is committed. The murders within this category include: premeditated murders with multiple victims; those where there is evidence of sexual or sadistic motivation; where the offender has previously murdered; or murders to advance a political or ideology cause. Offenders aged between 18 and 20 years for those murders will have a starting point of 30 years.
- 4.38. Table 5 summarises the position existing in the United Kingdom.

³⁷ Criminal Justice Act 2003, section 269 Schedule 21: <http://www.legislation.gov.uk/ukpga/2003/44/contents>

³⁸ For an offender under 18 the starting point is 12 years.

³⁹ The categories are 'exceptionally high', 'particularly high' and 'where knife or other weapon used in the murder'.

⁴⁰ Criminal Justice Act 2003 sections 145 and 126 and Schedule 21 paragraphs 10 and 11, <http://www.legislation.gov.uk/ukpga/2003/44/contents>

⁴¹ Criminal Justice Act 2003 Schedule 21, paragraph 4: <http://www.legislation.gov.uk/ukpga/2003/44/schedule/21>

Table 5: Tariff Starting Points or Outcomes Established in UK Case Law or Legislation

Tariff/Start Point	Northern Ireland	Scotland	England and Wales
Whole Life	Rare – and only if no doubt offender must be kept in prison for the rest of his or her life	Not Available	For offender aged 21 +: premeditated multiple murder; victim abducted; adult/child sexual or sadistic motivation; for political religious or ideological cause, or has previously murdered
30 years	Not available unless it is in 15/16 year starting point and has multiple aggravating factors	Multiple murders	Whole Life category for offender aged 18 to 20; murder of police or prison officer on duty or 2+ persons; use of firearm/ explosive;; involving sexual or sadistic conduct; aggravated by race, religion, sexual orientation, disability transgender identity.
25 years			Offender aged 18 + who took knife or other weapon taken to scene to commit an offence and used it when committing the murder
20 years	Murder with firearm but not directly involved in the shooting. ⁴²	victim child, police officer on duty or where a firearm was used	
15/16 years Starting Point	Exceptionally high culpability, victim particularly vulnerable, professional killing (planned); political motive or motivated by victim’s religion or sexual orientation. ⁴³	General starting point where offender armed with sharp weapon	Default starting point if not covered by higher starting points
12 years Starting Point	Default starting point if not covered by higher starting point		

⁴² R v Peter Greer [2017] NICA 4

<https://judiciaryni.uk/sites/judiciary/files/decisions/R%20v%20Greer%20%5B2017%5D%20NICA%204.pdf>

⁴³ Other factors taking a murder into the higher starting point in Northern Ireland include where: the victim was providing a public service; the victim was a child; the murder was racially aggravated; there was evidence of sadism or sexual motive; multiple murders.

Analysis

- 4.39. It is clear from Table 5 that the starting points in Northern Ireland and Scotland are fairly similar. The main difference from England and Wales arises from the fact that starting points are set out in legislation, potentially making the tariff process more transparent. However, some academics are concerned about the interrelationship between the various categories. They question including multiple victim murders (with no additional aggravating factors⁴⁴) in the same category as murder of a single police officer.⁴⁵
- 4.40. Others comment that it is difficult to understand why a murder perpetrated for an ideological cause points to a whole life order unlike the murder of two or more people. A possible inconsistency of approach may also be reflected in cases decided by the England and Wales Court of Appeal, particularly as to when a whole life order or a 30 year plus tariff is appropriate.⁴⁶
- 4.41. Recent England and Wales statistics indicate that of the 7,088 life sentenced prisoners over half (52%) had a tariff of 10-20 years, a quarter had over 20 years and one in five (20%) had 10 years or less.⁴⁷
- 4.42. It is reported the average tariff imposed for murder in England and Wales has risen from 12.5 years in 2003 to 21.3 years in 2016.⁴⁸ This increase has been identified as driven by the legislation introduced in 2003.⁴⁹
- 4.43. This is not dissimilar to the mix of tariffs set by judges when sentencing for murder in Northern Ireland. In the last six years 48 offenders in Northern Ireland have been convicted of murder. However, this small number of cases means that figures for average tariffs imposed should be taken as indicative and are not statistically robust; the low volume of cases means a small number of sentences or even an individual case could skew any analysis.
- 4.44. In Northern Ireland, over the period 2013 to 2018, 19.6% (9) offenders received a tariff of less than 10 years, 78.3% (36) received a sentence of 10 - 20 years

⁴⁴ Criminal Justice Act 2003, Schedule 21 paragraph 5 (2):

<http://www.legislation.gov.uk/ukpga/2003/44/schedule/21>

⁴⁵ B. Mitchell, 'Multiple-victim Murder, Multiple Murders and Schedule 21 to the Criminal Justice Act 2003', (2011) 75 (2) *Journal of Criminal Law* 122.

⁴⁶ R v Bieber [2009] 1 WLR 223; R v Muhammadi [2014] EWCA Crim 817; R v Heggarty [2014] EWCA Crim 2531.

⁴⁷ Ministry of Justice (2018) *Offender management statistics quarterly: April to June 2018*, London: Ministry of Justice.

⁴⁸ Ministry of Justice (2014) Freedom of Information request 89346, London: Ministry of Justice and House of Lords written question HL2315, 6 November 2017 and Criminal Justice Act 2003, sections 224–226: <http://www.legislation.gov.uk/ukpga/2003/44/part/12/chapter/5/crossheading/life-sentences>

⁴⁹ Dirk van Zyl Smit and Catherine Appleton, 'Life Imprisonment: A Global Human Rights Analysis' Harvard University Press highlighted in Prison Reform Trust's Bromley Briefing Prison Factfile Autumn 2018, pages 6-7.

and 2.1% (1) received a sentence of over 20 years. More noteworthy perhaps is that 39.1% (18) received a tariff of 15 to 20 years.⁵⁰

4.45. Table 6 provides a summary of Northern Ireland disposals between 2013 and 2018.

Table 6: Northern Ireland Convictions (Defendant Based) at Court for Murder

Year	Cases	Average tariff (years)	Range of tariff years
2013	13	15	8 - 21
2014	7	10.6	4 - 16
2015	5	13.2	10 - 18
2016	8	14.4	9 - 17
2017	6	13.6	9 - 16
2018	9	12.1	3 - 20

4.46. The Northern Ireland Court of Appeal in 2004 expressed the view that the *“levels laid down in the Practice Statement have been adopted for many years in this jurisdiction and continue to be appropriate for our society”*.⁵¹

4.47. In the 2014 case mentioned above, the Court considered that the guidance required no modification and stated that the statutory starting points introduced in 2003 for England and Wales, were likely to be of limited value in Northern Ireland where the type of murder for which the sentence was being imposed was sufficiently covered by the Practice Statement.⁵²

4.48. Against that background, legislation would be required if the current Northern Ireland starting points were to change.

Please see Consultation Questions: No. 20 - 23

⁵⁰ Two out of the 48 received Hospital Orders so these are excluded from the analysis.

⁵¹ R v McCandless and others [2004] NICA paragraph 10.

⁵² R v Wooton and McConville, [2014] NICA 69 paragraph 20.

Tariff Setting for Specific Victims or Murders

- 4.49. The Assembly debate following sentencing for the murder of a police officer in 2012 focused mainly on police victims. In England and Wales the murder of a police officer carries a statutory starting point of 30 years with potential to be increased upwards or downwards by the judge in accordance with case law.
- 4.50. The sentencing guidance in Northern Ireland indicates that 25 to 30 years can be the appropriate tariff for death of a police officer, prison officer or soldiers. This is because judges recognise the obligations and risks which those occupations carry for the benefit of the community.
- 4.51. The Northern Ireland Court of Appeal has indicated that no material distinction is required for deterrence between prison and police officers.⁵³
- 4.52. Amongst the jurisdictions reviewed many provide a statutory starting point or set tariff for certain types of murder or victims. While this Review has discounted any proposal to introduce statutory set tariffs, it may be useful to reflect on those found in other jurisdictions in any consideration of possible statutory starting points.
- 4.53. Earlier reference was made to the range of tariffs provided in Canada, Ireland and Australia for multiple murders or the murders of a police officer or child.
- 4.54. The range of statutory set tariffs for murders of police officers or a child generally run from 20 years,⁵⁴ to 25 years,⁵⁵ to 30 years⁵⁶ or above.⁵⁷ For multiple murders, the range runs from 30 years⁵⁸ to a whole life tariff.⁵⁹ These align with some of the identified starting points or tariffs established in case law by the Northern Ireland Court of Appeal and its Scottish equivalent.
- 4.55. Tariff setting is a complex process in which the judge must consider many factors to determine the just and appropriate sentence for the offender. The Review seeks views on statutory starting points for specific victims or types of murder.

Please see Consultation Questions: No. 24 - 27

⁵³ Expressed view of Northern Ireland Court of Appeal in R v Wooton and McConville [2014] NICA 69, paragraphs 23-24.

⁵⁴ Scotland, South Australia, Northern Territory.

⁵⁵ Northern Ireland (if not directly involved in shooting), Canada Queensland, New South Wales.

⁵⁶ While legislation was passed in Westminster in 2015 to give effect to a British government commitment, that compulsory whole life sentences would be introduced in England and Wales for criminals convicted of killing a police officer, the legislative provision has never been commenced.

⁵⁷ England and Wales, Republic of Ireland and New South Wales.

⁵⁸ Northern Ireland, Scotland and Queensland.

⁵⁹ England and Wales.

Retention of Whole Life Tariffs or Longer Tariff Starting Points

- 4.56. A whole life tariff sentence has been described as a particularly draconian feature of life imprisonment in England and Wales, and in Northern Ireland.⁶⁰
- 4.57. Since the introduction of the whole life tariff the courts have emphasized that such sentences should be reserved for the few exceptionally serious or rare offenders who require to be kept in prison for life.⁶¹
- 4.58. This has been the case in Northern Ireland. As highlighted earlier in this chapter, the single such order made in Northern Ireland was changed on appeal to a tariff of 35 years.
- 4.59. A criticism of whole life tariffs is that they can undermine the relevance of rehabilitation⁶² to an offender. The only prospect of release arises under domestic legislation either where there are exceptional circumstances justifying release on compassionate grounds⁶³ (England and Wales) or where release is directed as being appropriate (Northern Ireland).⁶⁴ A discretionary power is vested in a Minister, in both jurisdictions, to permit release in such cases.
- 4.60. The fact that release from a whole life tariff in the United Kingdom rests with a Minister is an exception to the general rule (following a number of ECtHR decisions⁶⁵) that decisions on release of offenders should be made by an independent and impartial body.
- 4.61. In conducting the review, the Minister will be guided by case law to focus on significant changes in the life prisoner and their progress towards rehabilitation⁶⁶ to determine whether detention can be justified on legitimate penological grounds.⁶⁷
- 4.62. The imposition in principle of a whole life tariff is supported by case law from the domestic courts⁶⁸ and European Court of Human Rights (ECtHR) where, in summary the Court has expressed the view that:

⁶⁰ Prison Reform Trust Autumn 2018 Factfile.

⁶¹ R v Oakes and others [2012] EWCA Crim 2435; [2013] QB 979; para 29.

⁶² Andrew Ashworth, 'R v Newell (Lee William): Commentary' [2014] Criminal Law Review 471, 473.

⁶³ Crime (Sentences) Act 1997, section 30: <http://www.legislation.gov.uk/ukpga/1997/43/section/30>

⁶⁴ Life Sentences (NI) Order 2001, Article 5 (4) and 5 (5):

<http://www.legislation.gov.uk/ukpga/1997/43/section/30>

⁶⁵ The European Court for Human Rights decisions culminated in *Stafford v UK* 2002-IV; 35 EHRR 32.

⁶⁶ *Vintner and others v UK* [GC] Nos 66069/09, 130/10 and 3896/10, [2013] ECHR 645.

⁶⁷ R v Newell, R v McLoughlin [2014] EWCA Crim 188; *Vintner v UK* [GC] [2013] ECHR 645, paras 108 and 109; legitimate penological grounds 'include punishment, deterrence, public protection and rehabilitation'.

⁶⁸ R v Secretary of State for the Home Department, ex parte Hindley [1998] 2 WLR 505, On Appeal at House of Lords [2000] Q.B. 152; R v Oakes and others [2012] EWCA Crim 2435.

“the mere fact that a prisoner has already served a long term of imprisonment does not weaken the State’s positive obligation to protect the public,” and that *“no Convention⁶⁹ issue could arise if a life prisoner continues to pose a danger to society”⁷⁰.*

- 4.63. When a life sentence is imposed for murder, the ECtHR requires there to be both a prospect of release for the prisoner and a possibility of review of their sentence by an independent body.⁷¹ The grounds for review include punishment, deterrence, public protection and rehabilitation. The balance between them may shift in the course of a sentence.⁷²
- 4.64. The ECtHR position is not static. Commentators observe that recent decisions seem to leave behind some of the earlier case law. In 2011, the European Court of Human Rights declared inadmissible challenges to life sentences which allowed no eligibility for parole before 40 years.⁷³ Yet in October 2016 and 2017 the court made findings that making a prisoner wait 40 years before they could be considered for clemency for the first time was too long.⁷⁴
- 4.65. A number of challenges to UK legislation from offenders sentenced to whole life tariffs in England were decided, from 2013 to 2017, by the ECtHR.
- 4.66. In 2013 the ECtHR was concerned that sentenced offenders should have a review which considered significant changes in the prisoner and whether continued detention was justified on legitimate penological grounds.⁷⁵ The ECtHR was not satisfied that domestic legislation complied with the Convention.
- 4.67. Clarification was provided by the England and Wales Court of Appeal, in 2014, on the legal requirements applying to the exercise of the ministerial discretion. This clarification was referred to by the ECtHR, in 2017, when it concluded that the domestic legislation, if fleshed out in practice or through legal challenge, could satisfy the Convention requirements: While a prisoner must know from the outset what they must do in order to be considered for release,⁷⁶ the domestic legislation met the need for objective, pre-established criteria of which the prisoner had knowledge at the time of sentencing. Most academics identify

⁶⁹ Article 3 of the European Convention on Human Rights (ECHR) prevents a prisoner being subjected to torture, inhumane or degrading treatment while detained by the state.

⁷⁰ *Vinter and others v UK* [GC] Nos 66069/09, 130/10 and 3896/10, [2013] ECHR 645, paras 87, 108 and 131.

⁷¹ *Vinter and others v UK* [GC] Nos 66069/09, 130/10 and 3896/10, [2013] ECHR 645, paras 119 to 121.

⁷² *Hutchinson v UK* [GC] No 57592/08, [2017] ECHR 65, para 42.

⁷³ *Kafkaris V Cyprus* (Application No 9644/09) Admissibility decision June 2011

⁷⁴ *TP and AT v Hungary* (37871/14 and 73986/14) and *Matiosaitis v Lithuania* [2017] ECHR 471 (23 May 2017).

⁷⁵ *Vintner and others v UK* [GC] [2013] ECHR 645

⁷⁶ *Hutchinson v UK* [GC] No 57592/08, [2017] ECHR 65, paragraph 44.

this 2017 decision⁷⁷ as being out of alignment with earlier decisions⁷⁸ in this area of law.⁷⁹

- 4.68. Questions have also arisen concerning potential for inequality between defendants where there is a disparity of age between offenders and a whole life tariff is imposed.⁸⁰ It is clear a whole life tariff for a relatively elderly defendant could be substantially less than for a much younger co-defendant.
- 4.69. Both the Northern Ireland Court of Appeal and England and Wales Court of Appeal have endorsed the view that the imposition of a whole life tariff should be confined to those instances where *“the facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life”*.⁸¹
- 4.70. The whole life tariff has been little utilised within Northern Ireland. No equivalent provision exists in Scottish law and attempts to introduce such a provision have been resisted.⁸²
- 4.71. Against this background and the concerns expressed where there is a disparity of age between offenders, the Review seeks views on retaining the option of a whole life tariff or, alternatively, the introduction of lengthy tariff periods for specific categories of murder.
- 4.72. The Review considers that a specific tariff, even a lengthy one (in excess of 30 years) while not an exact indication of time to be spent in prison, could provide an alternative to the whole life tariff. Such an approach would permit the tariff to be compared against other tariffs imposed for murder. This could provide a clearer reflection of the relative severity of each crime.

Please see Consultation Question: No. 28

⁷⁷ Hutchinson v UK [GC] No 57592/08, [2017] ECHR 65

⁷⁸ See Matisaitis V Lithuania [2017] ECHR 471 (23 May 2017) and Murray V Netherlands [GC] [2016] ECHR 408 (26 April 2016)

⁷⁹ D Van Zyl Smit, P Weatherby and S Creighton; ‘Whole Life Sentences and the Tide of European Human Rights jurisprudence’(2014) 14 HRLR 59; Steve Foster, ‘Review and Release of Whole Life Sentences: The Final Word from the Grand Chamber’, Issue 6, (2017) 181 JPN 92.

⁸⁰ R v Secretary of State for the Home Department, ex parte Hindley [1998] 2 WLR 505; [2000] Q.B. 152.

⁸¹ R v Jones and others [2005] EWCA Crim 3115.

⁸²<http://www.scottishconservatives.com/2017/02/time-for-whole-life-sentences-to-bring-justice-for-murder-victims/> ; <http://www.scottishconservatives.com/2013/05/new-life-sentences-for-police-killers-puts-more-pressure-on-snp-to-toughen-law-in-scotland/>