Criminal Law Revision Committee

TWELFTH REPORT
Penalty for Murder

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CRIMINAL LAW REVISION COMMITTEE

GENERAL TERMS OF REFERENCE

The Criminal Law Revision Committee was set up on 2nd February 1959 by the then Home Secretary, Lord Butler, "to be a standing committee to examine such aspects of the criminal law of England and Wales as the Home Secretary may from time to time refer to the committee, to consider whether the law requires revision and to make recommendations".

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NOTES

Sir Frederic Sellers was a member of the committee when the subject of offences against the person was referred to them and took part in their consideration of it until he retired from the committee in July 1972.

The late Judge Malcolm Morris, QC, was a member of the committee when the subject of offences against the person was referred to them and took part in their consideration of it until his death in October 1972.

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CRIMINAL LAW REVISION COMMITTEE

TWELFTH REPORT

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To the Right Honourable ROBERT CARR, MP, *Her Majesty's Principal Secretary of State for the Home Department.*

INTRODUCTION

1. On 4th March 1970 the then Home Secretary, the Right Honourable James Callaghan, asked us:

> "To review the law relating to, and the penalties for, offences against the person, including homicide, in the light of, and subject to, the recent decision of Parliament to make permanent the statutory provision abolishing the death penalty for murder."

We must stress therefore at the outset that any question relating to the restoration of the death penalty for murder is outside our terms of reference.

2. We are concerned only with the criminal law of England and Wales. In September 1970 the Secretary of State for Scotland announced that, in consultation with the Lord Advocate, he had decided to set up a committee, under the chairmanship of Lord Emslie, to enquire into the penalties for homicide in Scotland. As will be seen from the report of that committee which has now been published(1) the terms of reference of the Scottish Committee were considerably narrower than our terms of reference. The two committees kept in touch with each other by exchanging papers and by meetings between the two chairmen from time to time.

3. This report relates solely to the question of the penalty for murder and differs from our previous reports in that the views we express in it are provisional. We did consider at an early stage of our work on this reference whether we should produce an interim report on homicide because of the widespread public concern about the penalty for murder, and because of the expectation that the Scottish Committee might well be in a position to report earlier than we could in view of their much narrower terms of reference. As a result of debates in the House of Commons on the Criminal Justice Bill(2), we again considered whether we should make an interim report. At both stages in considering this question we have felt that it was important that we should present our conclusions on offences against the person as a balanced whole and that conclusions on homicide should be considered in the light of our conclusions about the law relating to other offences against the person. As was said on the report stage of

(1) Cmnd. 5137. The terms of reference were "To review the law relating to the penalties for homicide in the light of the statutory abolition of capital punishment for murder and to report on the considerations that should govern any proposal for a change in that law".

(2) Now the Criminal Justice Act 1972 (c. 71).

the Criminal Justice Bill, all the subjects we are considering on this reference are very much interlocked and to make a change in one area is difficult without affecting other areas.

4. Our preference would still be to make one final report covering the whole field of our review of the law relating to offences against the person. But the report of the Scottish Committee has now been published(1). In view of the public discussion which there will be about the recommendations contained in that report, we feel that we should make our present views known so that the arguments for and against any changes as they appear to both committees can be considered together. The views we express in this report on the penalty for murder are provisional and if, when we have completed our survey of the law relating to offences against the person and have taken into account any observations that may be made on the provisional views now expressed, we reach any different conclusions, we shall not hesitate to say so in our final report.

5. When we were asked to review the law relating to offences against the person we began by consulting a number of persons and bodies concerned with the administration or teaching of the law about the matters within our terms of reference. In addition, the Chairman sought the views of all the Lords of Appeal and judges of the Supreme Court, the judges of the Central Criminal Court and a number of recorders and chairmen of what were then quarter sessions. The views we received were of great help and interest to us. The committee has had the assistance of Professor J. C. Smith, Professor of Law in the University of Nottingham, who was co-opted as a member of the committee for this reference. The report of the Home Office Statistical Division "Murder 1957 to 1968" was also of particular interest and help.

6. We first considered whether there should continue to be a separate offence of murder and, if so, whether the existing definition of murder at common law was satisfactory. It is sufficient for present purposes to say that, although it might be argued that by reason of the abolition of the death penalty for murder there was no longer the same need to draw a distinction in cases of homicide between murder and manslaughter, we are of the opinion that there should be a separate offence of murder. We believe that the stigma which, in the public's mind, attaches to a conviction of murder rightly emphasises the seriousness of the offence and may have a significant deterrent value. We do not propose to discuss in this report our views on what the definition of murder should be; this is a matter which will be dealt with in our final report.

PRESENT PENALTY FOR MURDER

7. Since the abolition of the death penalty for murder, a person so convicted (unless under 18 at the time the offence was committed) must be sentenced to imprisonment for life under section 1 (1) of the Murder (Abolition of Death Penalty) Act 1965 (c. 71). On imposing such a sentence the court may declare the period which it recommends to the

(1) On 29 November, 1972, the Penalties for Murder Bill, introduced by Mr. Edward Taylor, was read the first time. That Bill seeks to implement the recommendations of the Scottish Committee.

Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person on licence (section 1 (2) of the 1965 Act). Under section 61 of the Criminal Justice Act 1967 (c. 80) the Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life but shall not do so except after consultation with the Lord Chief Justice and, if available, the trial judge. The Secretary of State may revoke the licence of any person released under section 61 of the 1967 Act and recall him to prison when recommended to do so by the Parole Board. Where this is expedient in the public interest and it is not practicable to consult the Parole Board, he may do so without consulting the Board although they will consider the case subsequently. A person convicted of murder committed when he was under 18 is sentenced to be detained during Her Majesty's Pleasure and is then liable to be detained in such place and under such conditions as the Secretary of State may direct (section 53 (1) of the Children and Young Persons Act 1933 (c. 12) as substituted by section 1 (5) of the Murder (Abolition of Death Penalty) Act 1965). The procedure for releasing a person on licence under the Criminal Justice Act 1967 described above applies equally to those sentenced to be detained during Her Majesty's Pleasure.

8. The procedure governing the release on licence of life sentence prisoners is as follows. Each case is carefully considered at an early stage and a date is fixed for review, normally after 4 years, though in appropriate cases a review may be held earlier. Reports are called for from the prison, including reports by the Governor, the Assistant Governor, the Medical Officer and the Chaplain, and in some cases where there is an element of mental instability there will also be further psychiatric reports. This review at 4 years is carried out by the Home Office, its main purpose being to decide whether exceptionally the local review committee should be asked to review the case before the prisoner has served 7 years. There is a local review committee for every prison. These were set up under the Local Review Committee Rules 1967(1) made under section 59 (6) of the Criminal Justice Act 1967. The practice has been to seek the views of the local review committee after an offender has served 7 years, whether or not it appears likely that a provisional release date can reasonably be fixed. The reports from the prison and the local review committee's recommendation are then considered in the Home Office and, if it is thought that there is a possibility of a provisional release date being fixed, the views of the Lord Chief Justice and the trial judge, if he is available, are obtained. All cases, whether a release date is proposed or not, are then considered by the Parole Board. The Board either recommend a provisional release date (usually 12 months ahead) or, if release is not recommended, the time of the next review. Supervision by a probation officer is usually a condition of the licence and other conditions may be added (*e.g.* a condition of psychiatric supervision) where appropriate. The conditions may be cancelled when the licensee has shown that he has settled down satisfactorily in the community, but the licence remains in force for life and the licensee may be recalled to prison at any time should his conduct give cause for concern. A person who

(1) S.I. 1967/1462.

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has been recalled may make representations to the Parole Board, who may, if they think fit, order his release. In 1970, 160 life sentence cases(1) were considered by the Parole Board and 44 were recommended as suitable for release on licence at a date about a year ahead, subject to good behaviour in the meantime. The Secretary of State accepted the Parole Board's recommendation in 38 cases. Four of these were recall cases(2), two of whom were released immediately after their recall on the consideration of their representations by the Parole Board. In the other two recall cases both had previously served 9 years before release; one had served 1 year and the other 2 years since recall. The remaining 34 cases served the following periods before release:

Number of complete years served	3	4	8	9	10	11	12	14	16
Number of cases	2	1	4	11	7	1	3	4	1

In 1971, 124 life sentence cases were referred to the Parole Board and of these 41 were recommended for release. Since 12 months' notice of release is given it is not yet possible to say how many of these will be released in consequence of these recommendations.

9. The approach of the Parole Board to life sentence cases is described in their report for 1970 in the following way:

> "While the Board will always have in mind the gravity of the offence in dealing with determinate sentences, this is only of major importance where to grant parole would defeat the purpose of the sentence or would endanger the confidence of the public. In determinate sentences consideration by the Board is not a sentencing operation because the sentence has been fixed by the court. With life sentences, however, the sentence is indeterminate and our function assumes a sentencing character, because there is no fixed term. The question is not simply whether the conditions, bearing in mind the nature of the offence, are such as to justify granting parole. The primary question is whether the time served is appropriate to the crime. Before parole was introduced, the sole responsibility for releasing life prisoners rested upon the shoulders of the Secretary of State after consultation with the Lord Chief Justice and the trial judge if available. Now the Act not only provides for this consultation but also provides that the Secretary of State cannot release without a favourable recommendation from the Parole Board.
>
> When the Board considers the possible release of a life prisoner, therefore, it is provided with the views of the Lord Chief Justice and the trial judge. Furthermore, whenever life cases are being considered one of the judicial members of the Board who is a High Court Judge always attends the panel meeting so that the sentencing aspect may be fully represented.

(1) The majority of which were cases of murder. Further details relating to the consideration by the Parole Board of life sentence cases and to the length of detention of murderers released from prison are set out in Tables A and B in the Appendix.

(2) That is cases where a life sentence prisoner had been released on licence, recalled and then considered for release again.

> The problems involved in releasing life prisoners are different from most of those in determinate sentence cases because of the length of time which has been spent in prison and away from everyday life. After 10 or more years in prison it is not sufficient for us to be satisfied that the time served is appropriate to the crime and that the risk of repetition is absent and that there is no reason to expect any misbehaviour after release. It is necessary also to prepare the man for release by a process of relaxation of the conditions of imprisonment. Accordingly, when we recommend release we normally do so by proposing a provisional date 12 months in advance, and sometimes by way of the pre-release employment scheme. One result of this is that the Board frequently does not have a clear plan of residence and work for the man's release and these have to be left to the Welfare Department of the prison and the probation service to arrange as the day for release draws nearer." (1)

CRITICISMS OF THE MANDATORY LIFE SENTENCE

10. Since a number of criticisms have been made of the present mandatory life sentence, it seemed that the first matter for us to consider was what, if anything, was wrong with it. It is said that persons sentenced to life imprisonment seldom serve more than 9 years and that, therefore, criminals may believe that they have nothing to lose in committing murder in order to avoid identification for some other serious offence, *e.g.* robbery, for which, if convicted, they may well serve a sentence at least as long as 9 years. If criminals do believe this they do so under a misapprehension and we feel that it is important that they, and the public, should realise that it is wrong to assume that a person sentenced to life imprisonment for murder will be released after serving only 9 years. This misunderstanding has its origin in the practice prevailing before the passing of the Homicide Act 1957 (c.11). Until then murderers were executed unless there were mitigating circumstances justifying clemency. If a reprieved murderer made good progress in prison, and there were reasonable grounds for thinking that he would not resort again to serious violence, it was often thought right to let him out after 9 years, a period which, allowing for remission, is the equivalent of a fixed term sentence of over 12 years—and it was exceptional for longer fixed terms to be imposed for any offence.

11. The 1957 Act changed the situation. It provided that there should be two classes of murder. One was capital murder, where the offence was one of a group considered particularly serious. This continued to attract the death penalty. Other murders ceased to be capital, although those convicted of such murders would, in the absence of mitigating circumstances justifying a reprieve, have been executed before the passing of the Act. Thus there began to grow in our prisons a nucleus of murderers very different from those found there before the 1957 Act. The passing of the Murder (Abolition of Death Penalty) Act in 1965 greatly expanded the process started by the 1957 Act, with the result that there grew up a very

(1) Report of the Parole Board for 1970, paragraphs 47–49.

considerable population of murderers of the more brutal and hardened type. Whereas in 1957 there were about 120 murderers in prison who had been reprieved, in August this year there were 665, many of whom would not have been reprieved but executed if the law had not been changed. Government policy regarding the release of life sentence prisoners has had to take account of this change. When these cases are considered, each one is carefully scrutinized, the nature of the crime and the safety of the public being the two principal considerations taken into account. Of the 869 life-sentence prisoners (including 665 murderers) in August 1972, 96 had already served more than 9 years. Table C in the Appendix shows the periods served by these prisoners up to that date. Many of these prisoners may be expected to serve a good deal longer, as will many of their fellows who have not so far served so long. Successive Home Secretaries have time and again made it clear that, where the circumstances so require, persons sentenced to life imprisonment will have to serve very long terms indeed and in some cases the offender may have to be detained for the rest of his natural life.

12. Another criticism made about the mandatory life sentence is that it obliges a judge to sentence a person to life imprisonment despite the judge's knowledge that, whatever the period the offender may serve in prison, it is unlikely that he will in fact be detained for the rest of his life. This does not seem to us to be a valid criticism (except perhaps in relation to certain tragic cases which we discuss later in paragraph 42 of this report). The essence of the life sentence is the *liability* to be detained for life; however long or short a period a life sentence prisoner has actually served before he is released on licence, he remains subject to recall for the rest of his life. In the case of a determinate sentence of, say, 30 years, the liability is to detention for 30 years, but the prisoner could be released on parole after serving 10 years and, in any event, because of the effect of remission, would be unlikely to serve more than 20 years. The liability to recall would in the ordinary case cease after 20 years and could not in any case continue beyond the end of the 30 years.

13. Some are against the life sentence for murder because they are opposed in principle to a mandatory sentence, since the judge is thereby deprived of the power, which he possesses in all other cases, to distinguish between murders of different gravity by the sentences he imposes and since he cannot take into account any matters of mitigation. Professor Glanville Williams is against the mandatory life sentence for murder for this reason. The other members of the committee do not share his view for the following reasons. Apart from the trial judge's power to make a recommendation under the 1965 Act, the judiciary is involved in the determination of the length of sentence served by those convicted of murder. It is well represented on the Parole Board by three High Court Judges and two circuit judges and, as stated in paragraph 7, the Lord Chief Justice is consulted in every case before a murderer is released on licence, as is the trial judge, if available. Without a recommendation from the Parole Board, the Home Secretary cannot release a person on licence under section 61 of the Criminal Justice Act 1967. Thus it will be seen that, particularly since 1967, the judiciary do play an important part in determining the length of sentence

to be served by those convicted of murder and that this is no longer a matter entirely in the hands of the executive. As is said in the extract from the report of the Parole Board for 1970 quoted above(1), a High Court Judge always attends the panel meeting of the Parole Board when a life sentence case is being considered.

DETERMINATE SENTENCE AS AN ALTERNATIVE TO THE MANDATORY LIFE SENTENCE

14. These criticisms of the mandatory life sentence have led some to suggest that instead of the mandatory life sentence for murder there should be power in the court to impose a determinate sentence within a maximum of life imprisonment as in the case of manslaughter and certain other offences. It is said that a determinate sentence would meet the criticisms of the mandatory life sentence to which we have referred above in paragraph 13 and allow the judge to ensure that, by imposing a long determinate sentence, a murderer was not released from prison after serving only nine years.

15. Another argument that is sometimes advanced is that a determinate sentence would act as a greater deterrent than the indeterminate life sentence on the ground that, the more severe a penalty is, the greater is its deterrent value. In our opinion the argument that a determinate sentence for murder would have greater deterrent effect is put forward on a mistaken assumption as to the length of time actually served by a life sentence prisoner. We have shown above that the belief that a life sentence prisoner is released after a period of nine years is erroneous. A sentence of life imprisonment is potentially more severe than any determinate sentence likely to be imposed. The effect of remission and parole must not be forgotten. In the case of, say, a 30 year sentence, the prisoner knows that if he behaves himself in prison he must be released after 20 years and may be released on licence at any time after 10 years (although release on licence is unlikely if there is the risk of further violence). We are confident that, when it is seen that some life sentence prisoners remain, as we feel sure they will, in prison for extremely long periods and some, it may be, for the rest of their lives, the severity of the life sentence will become apparent to the public. In our view the life sentence can have a greater deterrent effect than a determinate sentence because it is potentially more severe and we hope that everything possible will be done to make clear to the public the reality of the situation.

16. Another fundamental objection to the suggestion that there should be a determinate sentence for murder in place of the present mandatory life sentence is the difficulty that the trial judge would have in sentencing a person convicted of murder to a fixed term of years. Although it is said that the trial judge is in the best position to know what length of sentence the murderer should serve, we do not agree that the judge is in the best position to safeguard the interests of the public by imposing a determinate sentence. It is particularly difficult in cases of murder to predict at the time of sentence whether the murderer in question will have to be detained indefinitely or not, or at what stage of his sentence he will become unlikely to

(1) Paragraph 9.

kill again. A murderer who has to be detained for a long period for the protection of the public may not necessarily have committed the most heinous murder nor have a record of violence.

17. A further most important objection to a determinate sentence for murder is that when a prisoner has completed the whole of his sentence, he *must* be released, even though it may not be safe to do so from the public's point of view. Even if the prisoner has been transferred to a hospital under section 72 of the Mental Health Act 1959 (c. 72) the special restrictions on discharge will end when his sentence expires. If a person serving a determinate sentence is detained in prison until the expiry of his sentence, he is not subject to any compulsory supervision on release. After a person has been convicted of murder, the public has a right to expect to be protected from him in the future; this can be so only if a sentence has been passed which does not of necessity come to an end at a particular time. There is no power of recall once a determinate sentence has expired. In order that a person convicted of murder may be recalled to prison at any time during the rest of his life, it is necessary that he should be liable, under his original sentence for murder, to be imprisoned for the whole of his life.

18. If a determinate sentence were to be given for murder, this would put the offence, as regards sentence, on a par with manslaughter and other offences which at present carry a maximum of life imprisonment. If it is thought (and this is our view, as stated above[1]) that murder should remain a separate offence distinct from manslaughter, we feel that this should be reflected by a wholly different and more serious penalty. At the moment murder is singled out from all other offences by attaching to it a mandatory sentence of life imprisonment; and this serves to emphasise the gravity of the crime.

19. It will be seen from the foregoing paragraphs that we are in substantial agreement with what is said by the Scottish Committee in paragraph 50 of their report where they reject the argument that the trial judge should determine when the offender ought to be released.

OTHER ALTERNATIVES TO THE MANDATORY LIFE SENTENCE

20. It was suggested during a debate on the Criminal Justice Bill in 1972 that the court should, in effect, be given a discretion in cases of murder to impose either a life sentence or a sentence for a fixed number of years and to order in the latter case that the offender should not be released except on licence for life; and that the Secretary of State should be able to apply to the court to substitute a life sentence for the fixed sentence if necessary for the safety of the public. We considered this and two alternatives. The first of these was a suggestion that the court should be able to impose a determinate sentence with a maximum of 20 years, with a power reserved to the Court of Appeal, on application by the review authorities, to extend the sentence originally imposed. The second of these was a proposal under

(1) Paragraph 6.

which a judge would impose a sentence of life imprisonment together with, if he thought fit, a sentence for a fixed number of years on the expiry of which the prisoner would have to be released. The determinate part of the sentence would be subject to remission and parole but the prisoner would be liable to recall for the rest of his life.

21. The difficulty with all these proposals is that the "determinate sentence" proposed is of an artificial nature. The problem is what is to happen when a prisoner sentenced to fifteen years for murder has served ten years and has been a model prisoner earning one-third remission. In these circumstances the question is whether he must be released even though all the reports suggest that he would be likely to kill again. Under one of the proposals the Court of Appeal would consider the case and would extend the sentence but it seems to us unlikely that that Court, and indeed the general public, would regard it as a proper function of the judiciary to increase a sentence ten years after it was originally pronounced. We think that this would be rightly criticised as an attempt to retain life sentences while disguising them as determinate sentences. The solution adopted in another proposal is to couple the determinate sentence with a life sentence so that, although the prisoner has to be released on the expiry of the determinate sentence, he can be recalled to prison at any time thereafter. We do not think it would be generally regarded as acceptable for a person convicted of murder and released after serving a fixed number of years imposed by the trial judge to be recalled to prison by administrative action and detained there perhaps for the rest of his life. There is a significant difference between recalling a person to prison after his release by the Home Secretary on the recommendation of the Parole Board and recalling a person to prison during the currency of his sentence after his automatic release on the expiry of a fixed number of years imposed at his trial. The person who has received a life sentence has no justifiable grounds for complaint if he is released and then recalled to prison since his release is a benefit which is not guaranteed by his sentence. A person who is recalled to prison after his determinate sentence has expired, however, might well have a grievance over his recall and his consequent liability to be detained for the rest of his life and we feel that his grievance would have some justification.

ADVANTAGES OF THE MANDATORY LIFE SENTENCE

22. We believe that there are overwhelming advantages in the mandatory life sentence for murder. The flexibility of the life sentence enables those concerned with the release of the offender to take into account both the interests of the public and of the offender himself. Indeed, it seems to us that the imposition of the life sentence is the only practicable way of safeguarding the public against the compulsory release of one who may still remain a menace to society. It is also a merciful way of enabling offenders in less heinous cases to be released after serving appropriate periods when it is apparent, after a period of observation, that there is little or no element of public danger. The life sentence also enables account to be taken of any deterioration after the prisoner has been released on licence since he is subject to recall to prison for the rest of his life. There has been a particularly striking illustration recently of the use of this power of recall in the case of a

person sentenced to death for murder in 1948, whose sentence was commuted to life imprisonment. After his release on licence from the life sentence, and 23 years after the sentence was imposed, he committed offences, which, although not in themselves particularly serious, showed that the proclivities which had led to the murder still motivated him and the Home Secretary accordingly revoked his licence. We contrast this with what the position would have been if the original sentence had been one of 30 years and the prisoner had earned full remission; then he would have been free of the sentence after 20 years and it would not have been possible to take this action for the protection of the public. The mandatory sentence does demonstrate, as no other sentence does, that a person, by murdering another, surrenders his own life to the extent that he will *always* be subject to detention, supervision or liability to recall.

23. We are thus fully in agreement with the Scottish Committee in concluding that the mandatory life sentence for murder should be retained and for substantially the same reasons as those set out in their report. When we come to deal in our final report with offences involving violence other than murder one of the matters we shall have to consider is whether the courts should not as a matter of policy impose an indeterminate sentence in cases where the offence is of such a kind as to indicate that the offender may pose a continuing threat to society.

RECOMMENDATIONS UNDER SECTION 1 (2) OF THE 1965 ACT

24. As we have mentioned in paragraph 7, under section 1(2) of the Murder (Abolition of Death Penalty) Act 1965 the judge may, in sentencing a person convicted of murder to imprisonment for life, recommend the minimum period which in his view should elapse before the offender is released on licence, although such recommendation is not binding. This provision was introduced as an amendment moved by the then Lord Chief Justice, Lord Parker, during the passage of the 1965 Act and it made statutory the then existing position under which a judge could make his view known informally by writing to the Home Secretary. This provision, in Lord Parker's words "preserves the right, for which I have been striving so long, of the trial judge to mark the gravity of the offence, the revulsion of public feeling, in a proper case by giving what appears to be a very long sentence, which it is hoped will deter others and afford some protection to the police, in particular".[1]

25. In recent years the effective control by the judiciary has increased in two ways. First, since 1965 there has been a statutory requirement to consult the Lord Chief Justice and the trial judge, if available, before a life sentence prisoner is released on licence. More than 250 life sentence cases have been referred to the Lord Chief Justice in the period from April 1968 to October 1972. In only 7 of these cases has the Home Secretary accepted a recommendation to release by the Parole Board against the views of the Lord Chief Justice. Second, since 1967 the judiciary has taken part in the review of life sentence cases by serving on the Parole Board. The power

[1] Official Report, vol. 269, col. 419, 5 August 1965.

given to the court to recommend a minimum period under section 1 (2) of the 1965 Act has been exercised comparatively rarely in practice and, when the court has exercised it, it has done so to emphasise its view that the case calls for a very long period of imprisonment. From the coming into force of the 1965 Act until the end of July 1972, life imprisonment has been imposed for murder in England and Wales in 503 cases (excluding cases in which persons under 18 convicted of murder are sentenced to detention during Her Majesty's Pleasure) and recommendations have been made in 42 (or about 8 per cent) of these cases. The length of the recommended periods has varied from 10 years to life. The number of recommendations made and the length of the periods are as follows:—

1 recommendation for 10 years
2 recommendations for 12 years
13 recommendations for 15 years
1 recommendation for 17 years
13 recommendations for 20 years
4 recommendations for 24 years[1]
7 recommendations for 30 years
1 recommendation for life[2]

26. The Scottish Committee have stated their view that it would be advantageous if section 1 (2) of the 1965 Act were amended so as to *require* the court, in sentencing any person convicted of murder to life imprisonment, to make a recommendation in *every* case except in (undefined) exceptional circumstances[3]. In their view such an amendment would increase the deterrent effect of the penalty for murder and ensure that the judiciary played a greater part in implementing the penalty. In our view a judge should not be required to make a recommendation in virtually every case. This is also the unanimous view of the Lord Chief Justice and the Queen's Bench Judges.

27 We agree with the Scottish Committee that the deterrent effect of the penalty for murder is most important. But, as we explain in paragraph 31, we are not convinced that a recommended minimum period in almost every case would have the desired result of sharpening the deterrent effect. They also said that the making of a recommendation in almost every case would enable a judge to say what custodial element was necessary for the purpose of deterrence and prevention, whereas at the present time he plays virtually no part at all in determining the length of time a murderer is detained in prison. This is not the position in England and Wales in view of the fact that, as mentioned above—and in addition to the necessity to consult the Lord Chief Justice and the trial judge, if available, before release—three High Court Judges serve on the Parole Board. This has not been the position in Scotland although the Scottish Committee suggested that a High Court Judge should be appointed as a member of the Scottish Parole Board[4]. In addition to this, there do seem to us to be a number of objections to this suggested amendment of section 1 (2).

[1] In one of these cases the offender was transferred to Rampton Hospital under section 72 of the Mental Health Act after serving one year in prison.
[2] See paragraph 30 post.
[3] Cmnd. 5137, paragraphs 92–95.
[4] Cmnd. 5137, paragraph 101. Lord Wheatley was appointed a member of the Scottish Parole Board in November 1972.

28. As we have said before in considering the possibility of replacing the indeterminate life sentence by a determinate one, the trial judge may well not have sufficient information available to him at the time of trial to enable him to know what minimum period to recommend. If the trial judge were required to fix a minimum period in every case, he might be put in a position of great difficulty in having to do so in circumstances in which he did not really feel able to determine the appropriate period. This might be so particularly in a case in which there was evidence or suspicion of mental instability.

29. As we have already seen(1), at present recommendations are made in few cases and where they are made they are for substantial periods. Although in some of these cases a prisoner will, no doubt, have to be detained beyond the minimum period recommended, such cases are likely, with the present use of recommendations, to constitute only a small proportion of the total number of those serving life sentences for murder. But if a judge were required to make a recommendation in almost every case, there would inevitably be recommendations of short minimum periods and it might very well be that in a substantial number of cases a prisoner would have to be detained for a very long time beyond the recommended minimum period on public safety grounds. The detention of a prisoner in these circumstances might well create difficulties for the prison staff for the prisoner would regard the period specified by the judge as some indication of how long he should be detained and might become motivated by a sense of injustice if detained substantially longer.

30. In the most serious type of case, the trial judge may be inclined to doubt whether the prisoner can ever safely be released. In our view it would be undesirable in these circumstances for a judge to recommend that the prisoner should be detained for the rest of his natural life. The effect of such a recommendation on the prisoner himself must be borne in mind. Considerations of humanity suggest that it would be wrong to deprive a prisoner of all hope, and there are also practical considerations which point to the same conclusion. He has nothing to gain from good behaviour in prison and there is no factor such as loss of opportunity of eventual release on licence which might deter him from a violent attack on a prison officer. Nor would it be right for a judge to recommend a period of, say, 20 years in a case in which he takes the view that it is unlikely that the prisoner can ever be released. In our view, it is preferable in such a case for the judge, instead of making a recommendation, to explain that in a case of such gravity there is no minimum period which he feels he can reasonably recommend and that consideration of the likely date of release on licence is best left to the authorities concerned. In these cases a *requirement* to make a recommendation would in our view be quite inappropriate.

31. We do not feel that in the less heinous cases the making of a recommendation serves any useful purpose. If the intention in requiring recommendations to be made in almost all cases is thereby to increase the deterrent effect of the penalty for murder, it is difficult to see how this is achieved by a recommendation of a short period. Indeed such a

(1) Paragraph 25.

recommendation may diminish the deterrent effect and undermine public confidence in the administration of justice if it appears on the face of it, to those who do not know all the facts of the case, and who perhaps rely on headlines in the press, that, for example, four years is recommended as the period to be served by a murderer. It seems to us that if the power to make recommendations is exercised sparingly and only in the most serious cases, in which it is in the nature of things unlikely that the accused would be released before serving the length of the minimum period recommended (assuming that the judge feels able to specify a period, which may not be so even in the most serious case), the deterrent effect is greater than if recommendations are made in almost all cases. At present recommendations receive great publicity and the impact would, we feel, be diminished if they became so usual that little or no publicity were given to them. In our view the value of recommendations at the present time depends upon the fact that they are made only exceptionally and not as a matter of routine.

32. Of all offences, the circumstances in cases of murder vary so considerably that if a recommendation had to be made in almost every case there would probably be a considerable disparity in the length of the recommendations made and such a disparity would not necessarily be satisfactorily corrected even if, as we suggest later in this report(1), a recommendation is appealable.

33. In our view the power to make a recommendation does serve a useful purpose, utilised as it is at present in those comparatively few cases in which the court feels it appropriate to recommend a minimum period. We feel, however, that when the severity of the life sentence becomes apparent to the public and they no longer believe that a person convicted of murder seldom serves more than nine years, the justification for recommendations may well disappear. Our provisional view is that, for the time being, section 1 (2) of the 1965 Act should remain in its present form, so that the making of a recommendation is entirely a matter of discretion for the trial judge. If he is of opinion that some useful purpose would be served by taking that course in a particular case, then he can do so.

34. We must point out that we have had in mind in considering all these matters that the 1965 Act has been in force for only seven years. We feel sure that the Parole Board together with the Home Secretary and the Lord Chief Justice will attach great weight to any recommendation; but no case in which a recommendation has been made has yet been considered by the Parole Board. We feel that the system under the 1965 Act, together with the changes made by the Criminal Justice Act 1967, must be allowed to operate for a longer period in order to see how it really works in practice and whether any deficiencies are revealed. Seven years are not long enough for this, and we are not convinced that any serious deficiencies in this system have yet come to light. This is an additional reason why we do not agree with the Scottish Committee's view that the law should now be changed to require recommendations to be

(1) Paragraph 36.

made in virtually every case. Although we have expressed the view that the time may well come when the justification for recommendations will disappear, our provisional view is that at present the existing position with regard to recommendations should remain.

35. We also considered (as did the Scottish Committee[1]) whether the power of a judge to recommend a minimum term under section 1 (2) of the 1965 Act should be amended so that the minimum period is not just recommended but is a *binding* stipulation which must be followed. The arguments in favour of such a proposal are that a stipulated minimum period would have a high deterrent value because the judiciary would be seen to exercise control over periods served by life sentence prisoners in prison and that it would give the public confidence in the most severe sentence available. For the reasons which we have given for opposing the suggestion that a determinate sentence for murder should replace the present indeterminate life sentence, we are against this proposal too. Briefly, a stipulated (as opposed to a recommended) minimum period would not permit the earlier release of a prisoner who had responded well to treatment. Thus a stipulated minimum period would diminish the flexibility of the indeterminate sentence. Secondly, an indeterminate sentence with a long stipulated minimum period before the expiration of which there was no hope of release, might well have a harmful effect on the prisoner's response to treatment and cause considerable problems for the prison authorities. In any event, we feel sure that great weight will be attached by the Parole Board and by the Home Secretary to any minimum period recommended by the trial judge and that it would be over-ridden only in exceptional circumstances; but there is the flexibility with a recommended, as opposed to a stipulated, minimum period which would enable this to be done where necessary. We are not, therefore, in favour of a system of stipulating minimum periods replacing the existing power to recommend minimum periods.

36. There is at present no right of appeal against a recommendation made under section 1 (2) of the Murder (Abolition of Death Penalty) Act 1965. This was decided in *Aitken* [*1966*] *1 W.L.R. 1076; 50 Cr. App. R. 204*, where it was said that any representation should be made to the Home Secretary[2]. The Scottish Committee think it desirable that the appeal provisions which apply in Scotland to determinate sentences (which include powers to increase as well as reduce sentences) should be available in the case of recommendations[3]. It is our view, too, that recommendations should be appealable in England and Wales. Here the Court of Appeal cannot pass a sentence of greater severity than that imposed on the appellant by the court below. We think that recommendations should be treated as part of the sentence and the provisions applying to appeals against sentence in the case of determinate sentences should apply equally to recommendations. This would have the effect that the Court of Appeal would have no power to increase the length of a recommendation; in our view this is right.

(1) Cmnd. 5137, paragraph 97.

(2) An application for leave to appeal against a recommendation of 30 years was dismissed by the Court of Appeal in *Sewell* (*The Times, 6 December 1972*).

(3) Cmnd. 5137, paragraph 98.

37. Because the sentence for murder is mandatory, there is no plea in mitigation of sentence. In *Todd* [*1966*] *Crim. L.R. 557*, the Court of Criminal Appeal declined to lay down rules of practice as to what a trial judge should do before making a recommendation under section 1 (2) of the 1965 Act, saying that it must be left to the discretion of the judge in every case to make sure that he gave counsel for the prosecution an opportunity of mitigating and that he had before him any information which would be of value. It seems to us that if the trial judge is minded to make a recommendation, it is right that he should so indicate and invite the defence to make any representations they considered desirable as to whether a recommendation should be made at all and, if so, as to its nature.

38. The Scottish Committee also think that the trial judge should state publicly the factors on which he bases his recommendation or his reasons in the exceptional case for making no recommendation[1]. But in our view he should have a complete discretion to state or not, as he wishes, the factors he takes into account in making a recommendation.

39. In the Scottish Committee's view it would be advantageous if the court sentenced a person convicted of murder " to imprisonment and to remain liable to imprisonment for the rest of [his] life ".[2] We agree that such a form of sentence, which stresses the liability to imprisonment for life, is preferable to the present position under which a person over 18 is sentenced " to life imprisonment ".

PENALTY ON THOSE UNDER 18 CONVICTED OF MURDER

40. There remains to be considered the position of a person under 18 convicted of murder. At present, a person so convicted who appears to have been under 18 at the time he committed the offence is sentenced to be detained during Her Majesty's Pleasure and is then liable to be detained in such place and under such conditions as the Secretary of State may direct (section 53 of the Children and Young Persons Act 1933 as substituted by section 1 (5) of the Murder (Abolition of Death Penalty) Act 1965). The provisions of the Criminal Justice Act 1967 relating to release on licence in the case of adults sentenced to life imprisonment apply equally in the case of those sentenced to be detained during Her Majesty's Pleasure. In our view there is something objectionable about the reference to a person being detained " during Her Majesty's Pleasure " and our provisional view is that a person under 18 convicted of murder should instead be sentenced to detention " in such place and for such period and subject to such conditions as to release as the Secretary of State may direct ".

41. At present the power of a judge to recommend a minimum period under section 1 (2) of the 1965 Act does not apply in the case of a person under 18 convicted of murder. In the Scottish Committee's view the trial judge should be *required* to make a recommendation in these cases as in the case of adults. We respectfully disagree. For the reasons we have already given we dissent from the view that the judge should be required

(1) Cmnd. 5137, paragraph 94.

(2) Cmnd. 5137, paragraph 96.

to make a recommendation in such cases; indeed we think that recommendations of a minimum period in the case of persons under 18 should never be made. It seems to us that it will be particularly difficult for a judge to decide on the appropriate period where the youth of the offender is a factor to be taken into consideration and that there is an even greater need in such cases for the flexibility achieved by the imposition of an indeterminate sentence and this would be diminished by any recommendation as to a minimum period. Our provisional view is that the existing law under which a judge cannot recommend a minimum period in such cases should be retained. We are also opposed to the Scottish Committee's proposal that, in sentencing a person under 18 convicted of murder, the court should state publicly that he remains liable to detention for the rest of his life. It seems to us preferable in such cases that the full import of the sentence should be made known to the offender privately rather than in court.

RELAXATION OF MANDATORY LIFE SENTENCE

42. We mention earlier in this report[1] that there are certain tragic cases of murder to which special considerations apply. Examples we have in mind are those in which a killing was done deliberately from motives of compassion but there was insufficient evidence under the present law to justify a verdict of manslaughter on the ground of diminished responsibility—for example, where a mother killed her deformed child or a husband terminated the agonies of his dying wife. We can see the force of the argument that the mandatory imposition of life imprisonment is odious in such cases and indeed that no sentence of imprisonment is appropriate. We should like it to be possible for a judge to be able to make a hospital order under section 60 of the Mental Health Act 1959 or a probation order with or without conditions under section 4 of the Criminal Justice Act 1948 (c. 58) or for him to order a conditional discharge where he is satisfied that it would be contrary to the interests of justice for the accused to serve any sentence of imprisonment. But to achieve this result involves difficulties which we shall try to resolve, our provisional view being that special provision should be made for these cases. We shall return to this matter in our final report.

SUMMARY OF PROVISIONAL CONCLUSIONS

43. To sum up, our main provisional conclusions on the penalty for murder are:

(1) that the mandatory life sentence for murder should be retained (subject to (4) below) (paragraph 23);

(2) that the power of the court to make a recommendation as to the minimum period under section 1 (2) of the Murder (Abolition of Death Penalty) Act 1965 should be retained and that the law should be changed so that a recommendation becomes appealable (paragraphs 33 and 36);

[1] Paragraph 12.

(3) that a person under 18 convicted of murder should be sentenced to detention in such place and for such period and subject to such conditions as to release as the Secretary of State may direct; and that *no* recommendation as to the minimum term should be made in such cases (paragraphs 40 and 41);

(4) that we should give further consideration to the proposal that, in certain tragic cases of murder, a judge should be able to make a hospital order or a probation order or order a conditional discharge where he is satisfied that it would be contrary to the interests of justice for the accused to serve any sentence of imprisonment (paragraph 42).[1]

Edmund DAVIES, *Chairman*

Frederick LAWTON

Donald FINNEMORE

Arthur Evan JAMES

Mervyn GRIFFITH-JONES

Rupert CROSS

John HAZAN

Kenneth JONES

Frank MILTON

David NAPLEY

William SCOTT

Norman J. SKELHORN

John SMITH

Glanville WILLIAMS

J. NURSAW, *Secretary*

B. R. PUGH, *Assistant Secretary*

15 December 1972

Note: Professor D. R. Seaborne Davies has not thought it right to sign this report because he was obliged by other duties to be absent from most of the meetings when the committee considered the subjects dealt with in it.

[1] As indicated in paragraph 13, Professor Williams does not concur in provisional conclusions (1) and (2).

APPENDIX

TABLE A

RELEASE ON LICENCE OF LIFE SENTENCE PRISONERS

Life sentence cases considered by the Parole Board, May 1968–December 1971

Cases referred to Parole Board			451
Cases recommended for release			145
Cases not recommended for release			243
Recalls: licence based on Parole Board's recommendation ...			4
licensed before Parole Board became operative ...			22
released immediately on consideration of prisoner's representations			2
Cases referred for variation and cancellation of conditions, review of release date, etc.			35

Life sentence cases considered by the Parole Board 1971

Cases referred to the Parole Board			124
Cases recommended for release:			
Murder	34		
Manslaughter	7		
Other	Nil		
		—	41
Recommendations accepted by the Secretary of State			37
Cases not recommended for release			68
Recalls: licence based on Parole Board's recommendation ...			1
licensed before Parole Board became operative ...			4
released immediately on consideration of prisoner's representations...			2
Cases referred for variation and cancellation of conditions, review of release date, etc.			8

TABLE B

LENGTH OF DETENTION OF MURDERERS RELEASED FROM PRISON OVER THE PAST 10 YEARS

Year of release	Served 1 year	Served 2 years	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	Served 20 years or more	Total
1962	—	—	—	—	—	—	—	3	2	—	—	—	—	1	—	—	—	—	—	—	6
1963	—	—	—	1	—	—	—	3	3	1	—	—	—	—	—	—	—	—	—	—	8
1964	—	—	1	—	—	1	1	5	7	1	—	—	—	—	1	—	—	—	—	—	17
1965	—	—	—	—	1	—	3	11	4	1	—	—	—	—	—	—	—	—	—	2 (1 at 20 years 1 at 21 years)	22
1966	—	—	—	—	—	—	1	4	14	2	1	—	—	—	—	—	—	—	—	—	22
1967	1	—	—	—	1	—	5	4	7	2	—	—	—	—	—	—	—	—	—	—	20
1968	1*	—	—	—	—	—	2	5	12	—	3	2	—	—	—	—	—	—	—	—	25
1969	—	—	—	—	—	—	1	7	13	4	1	1	—	—	—	—	—	—	—	—	27
1970	—	—	—	1	—	—	1	3	12	6	—	1	—	—	—	—	—	—	—	—	24
1971	—	—	—	—	—	—	1	2	4	5	1	2	—	4	—	1	—	—	—	1 (at 24 years)	21
1972 ... ... (to 18 August 1972)	—	—	—	1	—	1	1	4	7	1	2	1	1	—	1	—	—	—	—	—	20
Total ...	2	—	1	3	2	2	16	51	85	23	8	7	1	5	2	1	—	—	—	3	212

* Served 6 months—mercy killing.

TABLE C

BREAKDOWN OF 96 LIFE SENTENCE PRISONERS WHO, ON 18 AUGUST, 1972, HAD SERVED NINE YEARS OR MORE

Years served	Murder	Manslaughter	Other offences	Total
20–21 ...	1	—	—	1
19–20 ...	—	—	—	—
18–19 ...	—	—	—	—
17–18 ...	—	—	—	—
16–17 ...	—	—	1	1
15–16 ...	4	—	1	5
14–15 ...	4	1	—	5
13–14 ...	7	1	2	10
12–13 ...	3	3	—	6
11–12 ...	11	3	—	14
10–11 ...	10	5	2	17
9–10 ...	32*	5	—	37
	72	18	6	96

* Includes 1 woman.

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