



## **Life imprisonment and the Parole Act 2019: Assessing the impact of legislative reform**

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# LIFE IMPRISONMENT AND THE PAROLE ACT 2019: ASSESSING THE POTENTIAL IMPACT ON PAROLE DECISION-MAKING.

*Abstract: This article examines the Parole Act 2019 and its likely impact on decision-making surrounding the release of life sentence prisoners in Ireland. The informal and political nature of the release process for life sentence prisoners has been the subject of considerable criticism. The Act will transition the release decision from the Minister for Justice and Equality to a statutory Parole Board. Drawing from national and supra-national sources as well as empirical data, the article analyses key provisions in the legislative framework including the independence of the Parole Board, the procedural standards and the criteria to be applied in individual cases.*

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## Introduction

Life imprisonment exists as the ultimate penalty in the majority of countries across the world although legislative differences in relation to the imposition and administration of these sentences impacts greatly on the life sentence prisoner population in each jurisdiction.<sup>2</sup> Legislative frameworks and the actions of decision-makers, such as parole authorities, have the potential to produce large variations in penal outcomes.<sup>3</sup> Cross-jurisdictional differences in relation to the mandatory or discretionary nature of the life sentence for murder and the range of offences for which a life sentence may be imposed has resulted in significant variety in the number of life sentence prisoners in custody. Similarly, the wide array of parole procedures and the discretion available to decision-makers has had similar effects. In Ireland, one in every nine sentenced prisoner is now serving a life sentence.<sup>4</sup> In addition to the size of the life sentence prisoner population in custody, there are a number of long-standing concerns surrounding life imprisonment and parole in Ireland. These include: the mandatory nature of the life sentence for murder; the increase in time served by life sentence prisoners; the political nature of the decision-making process; and the lack of procedural fairness afforded those subject to the process. The Parole Act 2019 (the ‘Act’) formalises the parole process through the creation of a statutory Parole Board that is to make decisions on release independent of the Minister for Justice and Equality (the ‘Minister’). This legislation indicates a shift towards a more human rights-based framework that is more consistent with other European jurisdictions. Research on the parole process in Ireland revealed that the discretionary and political nature of the process rendered decision-making particularly vulnerable to punitive tendencies, as evidenced by the increase in time served by life sentence prisoners in recent decades.<sup>5</sup> Will the new framework contained in the Act enhance the quality of decision-making and produce more consistent parole outcomes? This article examines the potential

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<sup>1</sup> This work was supported by the Royal Irish Academy’s Charlemont Grants Scheme.

<sup>2</sup> Life imprisonment is the most severe penalty in 149 of 216 countries and territories and it is a statutory penalty in 183 of 216 countries and territories: van Zyl Smit D and Appleton C, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press 2019) 87.

<sup>3</sup> David Garland ‘Penalty and the penal state’, (2013) 51(3) *Criminology* 475, 484.

<sup>4</sup> Irish Prison Service. ‘Annual report’ (Irish Prison Service 2016), 24.

<sup>5</sup> Diarmuid Griffin *Killing Time: Life Imprisonment and Parole in Ireland* (Springer International Publishing 2018).

impact of the new legislation on life imprisonment and parole. At the time of writing (August 2019) the Act had not been commenced.

## Life imprisonment and parole

Ireland's life sentence prisoner population is high when compared with other European countries.<sup>6</sup> It places fifth when analysing life sentence prisoners per 100,000 of national populations across the United States and Europe (following the United States, United Kingdom, Greece and Turkey in this order).<sup>7</sup> The life sentence prisoner population in Ireland increased by 158% between 2001 and 2017 (from 139 to 359).<sup>8</sup> The overall prison population increased by 18.25% during the same period.<sup>9</sup> Ireland is among the few European countries with a mandatory life sentence for murder, the impact of which has seen Ireland's population increase significantly.<sup>10</sup> The Supreme Court has upheld the constitutionality of the mandatory life sentence, noting that murder as an offence is 'unique in nature' thus validating the uniform penalty for murder.<sup>11</sup> In terms of the life sentence prisoner population, 95 per cent are serving a life sentence for murder, with the remaining serving discretionary life sentences for sexual offences, manslaughter and attempted murder.<sup>12</sup>

Ireland's parole process has also contributed to the increase in the life sentence prisoner population in custody. Life does not ordinarily mean life in prison and there must be a process in place whereby life sentence prisoners can be released back into the community having served a period of time in prison.<sup>13</sup> Data available since 2001 indicates that the number of life sentence prisoners committed to prison has not been met with a similar number of releases. There has been an average (mean) of 19 life sentence prisoners committed annually over the last 16 years with an average (mean) of 4 life sentence prisoners being released.<sup>14</sup> The lack of parity between committal and release has had a cumulative effect on the life sentence prisoner population resulting in an increase in the population, year-on-year. There has been an increase in the number of releases recently with 14 life sentence prisoners released in 2017 and 7 in 2018.<sup>15</sup> The average time a life sentence prisoner serves in prison prior to being released back into the community has increased over the last number of decades, from 7.5 years between 1975-1984 to 19 years from 2008-2017.<sup>16</sup> These figures only provide the average time served of those released. Many life sentence prisoners serve time in prison beyond this average. In 2019, five per cent of those in custody serving life sentences for homicide had spent 30 years or more inside.<sup>17</sup>

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<sup>6</sup> Council of Europe, 'Annual penal statistics: SPACE 1-Prison populations, survey 2015' (Council of Europe 2017), 92–93.

<sup>7</sup> van Zyl Smit and Appleton (n 1) 87.

<sup>8</sup> Griffin (n 4) 5.

<sup>9</sup> See Annual Reports 2001-2017 of Irish Prison Service at Irish Prison Service, 'Annual report' (Irish Prison Service).

<sup>10</sup> Other countries include: England and Wales, Germany, Cyprus and the US.

<sup>11</sup> *Lynch and Whelan v Minister for Justice* [2012] 1 IR 1, 10; Law Reform Commission, *Report on Mandatory Sentences* (LRC 108 – 2013) 17.

<sup>12</sup> Griffin (n 4) 48.

<sup>13</sup> van Zyl Smit, D., Weatherby, P. and Crieighton, S, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?' (2014) *Human Rights Law Review* 1.

<sup>14</sup> Griffin (n 4) 5.

<sup>15</sup> Parole Board, 'Annual Report' (Parole Board 2002) 2.

<sup>16</sup> Griffin (n 4) 5.

<sup>17</sup> *People (DPP) v Mabon* [2019] IESC 24.

While the time that a life sentence prisoner is expected to serve prior to release has changed significantly over the last number of decades, there have been few legal changes to parole from 1960 up until the passing of the Parole Act 2019. The decision as to whether a life sentence prisoner is released rests with the Minister. This decision is a function of the Minister's power of temporary release contained in the Criminal Justice Act 1960.<sup>18</sup> The executive power of temporary release is a privilege, not a right<sup>19</sup> and the Minister has wide discretion in exercising the power of release.<sup>20</sup> Temporary release is a statutory power and common examples of its use include: releasing a prisoner to receive medical attention at a hospital; allowing a prisoner attend a family occasion; or release over the Christmas period. A practice developed of releasing life sentence prisoners back into the community on what is described as 'full temporary release' although, legally, this is no different to temporary release.<sup>21</sup> The process that leads to a decision by the Minister to release a life sentence prisoner on 'full temporary release' is largely a creature of policy and practice and not akin to a legal procedure. That process could change at any time if the Minister so decided. Up until the passing of the Act, 'parole' was not a legal concept despite the word being used to describe the practice of releasing life sentence prisoners. A non-statutory, advisory Parole Board was established in 2001 to make recommendations to the Minister on the release of long-term and life sentence prisoners.<sup>22</sup>

Under the current decision-making process, a life sentence prisoner is required to serve seven years in prison before becoming eligible for release. This is not reflective of time served over the last few decades and it is more accurate to state that a life sentence prisoner becomes eligible for review at seven years but not release, which comes much later in the process. If release is not recommended, the life sentence prisoner will be reviewed no more than three years after the last review. Since its inception, the Parole Board comprised of approximately 12 to 14 members and all members meet once a month to discuss offenders under review and make recommendations to the Minister regarding release or further detention in individual cases. The recommendations of the Parole Board are primarily based on reports provided by various criminal justice agencies (including risk-based assessments from the Probation Service and Prison Psychology Service) and an interview conducted by two members of the Parole Board with the life sentence prisoner at their place of detention. The interview is 'informal' in nature and legal representation is not permitted.<sup>23</sup> The Parole Board also receives letters from victims and victims' families.<sup>24</sup> The recommendations by the Parole Board to the Minister are almost always accepted in full (85% from 2002 to 2015).<sup>25</sup> The Minister, when deliberating on release, is to have regard to a number of factors set out in statute including: the threat to the safety and security of the public; the seriousness of the offence; previous convictions; and the length of time served.<sup>26</sup> The Parole Board also adopted these legislative criteria as the 'main factors taken

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<sup>18</sup> s. 2 (as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003). Temporary release is a statutory power and does not constitute an exercise of remission or commutation of sentence (as provided for by Article 13.6 of the Constitution and conferred on the government under s. 23 of the Criminal Justice Act 1951).

<sup>19</sup> *Ryan v Governor of Limerick Prison* [1988] IR 198, 200.

<sup>20</sup> *Murray v. Ireland* [1991] ILRM 465, 472.

<sup>21</sup> *Dáil Question* No. 513: Alan Shatter, 26 November 2013.

<sup>22</sup> Prior to this, the Sentence Review Group, which replaced the 'prison review' system in 1989, advised the Minister on the release of life sentence prisoners.

<sup>23</sup> Parole Board, 'Annual Report' (Parole Board 2002) 9.

<sup>24</sup> Parole Board, 'Annual Report' (Parole Board 2013) 6.

<sup>25</sup> The remainder of cases constituted: recommendations accepted in part (5 per cent); recommendations not accepted (2.3 per cent); cases referred back to the Parole Board for further consideration (1.2 per cent); a Ministerial decision is pending (6.1 per cent); or an offender released prior to a decision (0.2 per cent). See Annual Reports of the Parole Board 2002-2015 at Parole Board, 'Annual Reports' (Parole Board).

<sup>26</sup> Criminal Justice Act 1960, s.2 (as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003)

into account in each individual case',<sup>27</sup> although public protection is consistently cited as the key factor in their decision-making.<sup>28</sup> On release, a life sentence prisoner is supervised by the Probation Service in the community for the remainder of his or her life but 'full temporary release' can be revoked following a breach of a condition.

## The problem with parole

The non-statutory, unstructured and political nature of parole decision-making had been the subject of criticism for some time and the process was described as 'arbitrary and unsatisfactory'.<sup>29</sup> Concern regarding the process dates back to the report of the Committee of Inquiry into the Penal System (Whitaker Committee) in 1985.<sup>30</sup> More recently, findings from empirical research indicated that while decision-makers were keen to emphasise that public protection was the key factor in their deliberations, there were additional factors influencing parole outcomes. Decision-makers were acutely aware of trends external to the process, such as the general increase in lethal violence, and there appeared to be a view that an appropriate method of responding to this was through increasing time served in individual cases under review.<sup>31</sup> The discretion afforded the Parole Board permitted it to adapt its recommendations to account for the politics of the Minister of the day: 'Inevitably the Board is going to tailor its recommendations to what it views as the Minister's likely-to-accept recommendations'.<sup>32</sup> This raised concerns regarding the meaning of the high rates of acceptance by the Minister of Parole Board recommendations and whether it was partly reflective of the Parole Board's ability to anticipate ministerial preferences.<sup>33</sup> Decision-makers cited offenders with high media profiles as causing particular problems due to the potential political fallout arising from a recommendation and/or decision to release: 'If you have a high-profile media case and you recommend X, Y and Z, but you know the Minister is not going to sanction that, well then, you take a more conservative view'.<sup>34</sup> The research indicated that the informal and discretionary nature of the process permitted individual decision-makers to exert considerable influence over both the process and the time served by life sentence prisoners, with little constraint.

Reforms relating to the life sentence and its administration in Ireland had been proposed by state bodies,<sup>35</sup> human rights organisations<sup>36</sup> and academic commentators.<sup>37</sup> The Law Reform Commission recommended the establishment of an independent statutory Parole Board stating that it would address the questions as to the system's compliance with the provisions of the European Convention on Human Rights (ECHR) as well as having the benefit of 'enhancing the consistency and transparency of sentencing outcomes in murder

<sup>27</sup> Parole Board, 'Annual Report' (Parole Board 2012) 7–8.

<sup>28</sup> Parole Board, 'Annual Report' (Parole Board 2004); Parole Board, 'Annual Report' (Parole Board 2015) 5.

<sup>29</sup> Thomas O'Malley *Sentencing: Towards a Coherent System* (Round Hall 2011) 223.

<sup>30</sup> Whitaker Committee (Committee of Inquiry into the Penal System), *Report* (1985) paras. 6.9 and 7.12.

<sup>31</sup> Griffin (n 4) 147-186.

<sup>32</sup> *ibid* 25.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid* 26

<sup>35</sup> Joint Committee on Justice, Defence and Equality, *Report on Penal Reform* (2013); Law Reform Commission, *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008); Law Reform Commission, *Report on Mandatory Sentences* (LRC 108 – 2013); Expert Group on the Prison Service, *Towards an Independent Prison Agency* (1997)..

<sup>36</sup> Irish Penal Reform Trust, 'Reform of Remission, Temporary Release and Parole - Position Paper Nine' (Irish Penal Reform Trust 2012); Gerard Coffey and Paul J. McCutcheon 'Report into Determination of Life Sentences' (Irish Human Rights Commission 2006).

<sup>37</sup> Diarmuid Griffin 'The release and recall of life sentence prisoners: Policy, practice and politics' (2015) *Irish Jurist* 1; O'Malley (n 28); Sophie More O'Ferrall (2010) 'Mandatory Life for Murder and the Sentencing Process' (2010) 17(1) *Dublin University Law Journal* 213.

cases'.<sup>38</sup> The Irish Human Rights Commission concluded that the decision to release should be determined by a court or court-like body.<sup>39</sup> Even the Supreme Court, despite its tendency not to scrutinise release processes due to separation of powers arguments, gave some indication that a statutory and independent parole board might be a preferable method of administering these sentences.<sup>40</sup> In 2014, the Strategic Review of Penal Policy recommended that the release decision should be independent of the Minister and should be vested in a parole authority.<sup>41</sup>

Despite a number of legal challenges, there has been little progress in securing procedural rights in the courts for those subject to the parole process.<sup>42</sup> The Minister enjoys 'considerable discretion' when deciding on the temporary release of an offender, including life sentence prisoners and the only means of challenging the decision is through the narrow scope of judicial review, which is concerned with fairness of procedure rather than examining the merits of the decision itself.<sup>43</sup> The decisions in *Lynch and W'belan*<sup>44</sup> dealt with the concerns regarding the compatibility of the mandatory life sentence and its release process with Ireland's European human rights obligations and the fundamental rights provisions contained in the Irish Constitution. The Supreme Court determined the mandatory life sentence and its administration to be compatible with the provisions of the Irish Constitution and the ECHR.<sup>45</sup> A subsequent application to the European Court of Human Rights (ECtHR) was found to be inadmissible on both substantive and procedural grounds.<sup>46</sup> The Supreme Court rejected the contentions of the applicants that the system of release in place affected the punitive nature of the sentence in any manner, resulted in executive resentencing or an inconsistent approach in the sentencing of life sentence prisoners. At the ECtHR the applicants argued that, in practice, the Minister had regard to the risk of reoffending in deliberating on release and that further detention based on risk was a form of preventive detention. An assessment that the life sentence is in some manner preventive is significant in Ireland as the incorporation of preventive detention or an incapacitative measure into any aspect of criminal justice decision-making creates issues of compatibility with the Constitution.<sup>47</sup> This argument was not accepted by the ECtHR, which largely endorsed the interpretation of the life sentence by the Supreme Court as 'wholly punitive'. This came as somewhat of a blow to those advocating for the reform of the process.

Many countries have adopted a more formalised approach to parole over the latter half of the twentieth century.<sup>48</sup> The transition to judicial and independent decision-making in the European context has often been as a result of local factors combined with a need to comply with the countries supranational obligations.<sup>49</sup> The European Committee for the

<sup>38</sup> Law Reform Commission, *Report on Mandatory Sentences* (LRC 108 – 2013) 124–5.

<sup>39</sup> McCutcheon and Coffey (n 35).

<sup>40</sup> *People (DPP) v. Finn* [2001] 2 IR 25, 46.

<sup>41</sup> Strategic Review of Penal Policy, *Final report* (2014).

<sup>42</sup> *Barry v Sentence Review Group* [2001] 4 IR 167; *Grogan v Parole Board* [2008] IEHC 204.

<sup>43</sup> O'Malley, T., *Sentencing Law and Practice* (2nd edn, Thomson Round Hall 2006) 435.

<sup>44</sup> *Lynch and W'belan v Minister for Justice* [2012] 1 IR 1; *Lynch and W'belan v Ireland* App no. 70495/10 and 74565/10 (ECHR 18 June 2013); *Lynch and W'belan v Ireland* App no 70495/10 and 74565/10 (ECHR, 8 July 2014).

<sup>45</sup> *Lynch and W'belan v Minister for Justice* (n 43).

<sup>46</sup> *Lynch and W'belan v Ireland* App no 70495/10 and 74565/10 (ECHR, 18 June 2013); *Lynch and W'belan v Ireland* App no 70495/10 and 74565/10 (ECHR, 8 July 2014).

<sup>47</sup> *People (Attorney General) v O'Callaghan* [1966] IR 501.

<sup>48</sup> Keith A. Bottomley 'Parole in transition: A comparative study of origins, developments, and prospects for the 1990s' (1990) 12 Crime and Justice 319.

<sup>49</sup> Stephen Livingstone 'Prisoner's rights in the context of the European Convention on Human Rights' (2000) 2(3) Punishment and Society 309.



Prevention of Torture (CPT) has emphasised the importance of establishing an appropriate procedure for release.<sup>50</sup> Notwithstanding the decision of the ECtHR in *Lynch and Behan*, the jurisprudence of the Court has been instrumental in creating a framework for the review of indeterminate sentences and has emphasised the importance of due process in decisions on the release of life sentence prisoners.<sup>51</sup> In *Murray v The Netherlands*,<sup>52</sup> the Grand Chamber of the ECtHR articulated the principles that should govern the release process for life imprisonment and van Zyl Smit and Appleton summarised them as follows.<sup>53</sup> The process should comply with the principle of legality (that rules should be clear and have certainty in domestic law). The principle of assessment on penological grounds for continued incarceration should be based on objective and pre-established criteria. There should be an assessment regarding release within an established time frame and this time frame should not be later than 25 years after the sentence was imposed. There should be procedural guarantees which should include reasons for a decision not to release or to recall a life sentence prisoner. Further, judicial review should be in place to review decision-making. There are a number of different mechanisms for releasing life sentence prisoners and they include release through: a court;<sup>54</sup> a parole authority;<sup>55</sup> the executive branch of government;<sup>56</sup> the power of clemency or ministerial, presidential or royal pardon.<sup>57</sup> Decisions to release through the executive or clemency/pardon are widely viewed as problematic with decisions by a court or court-like body being the preferred mechanism from a human rights-based perspective. The Act transitions the Irish parole process from an executive-based decision-making process to a decision by a parole authority. Key issues when scrutinising decision-making by parole authorities relate to whether they are sufficiently independent to apply criteria in individual cases, the level and standard of procedures applicable and whether membership of the authority is independent from the executive.<sup>58</sup>

## The Parole Act 2019

There had been occasional political interest in the reform of parole over the years but this was accompanied by a consistent lack of follow-through. The advisory Parole Board was established in 2001 with a view to it being placed on a statutory footing shortly thereafter but no statutory framework emerged.<sup>59</sup> Reform of the process had been 'kept under review' by successive governments.<sup>60</sup> In 2015, empirical research findings attracted public

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<sup>50</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 'Report on Switzerland' (CPT 2012) <<http://www.cpt.coe.int/documents/che/2012-26-inf-fra.htm>> accessed 22 January 2020, 26; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), '25th general report of the CPT' <https://rm.coe.int/1680696a9d> accessed 20 February 2020.

<sup>51</sup> *Boulois v Luxembourg* App no 37575/04 (ECHR, 3 April 2012), para. 2; *Vinter and Others v United Kingdom* App no 66069/09, 3896/10,130/10 (ECHR, 9 July 2013).

<sup>52</sup> *Murray v The Netherlands* App no 10511/10 (ECHR, 26 April 2016), partly concurring opinion of Judge Pinto de Albuquerque.

<sup>53</sup> van Zyl Smit and Appleton (n 1) 237-238

<sup>54</sup> For example: Sentence Implementation Court (Belgium), the Supervision Tribunal (Italy), the Court of Appeal (Finland) and the District Court (Sweden).

<sup>55</sup> Canada, United Kingdom, Australia, Cyprus.

<sup>56</sup> Formerly the position in Ireland and the process in place in a number of African countries with connections in the French and Belgian administrative traditions. van Zyl Smit and Appleton (n 1) 256.

<sup>57</sup> Iceland, Lithuania, Malta, the Netherlands and Ukraine.

<sup>58</sup> van Zyl Smit and Appleton (n 1) 248.

<sup>59</sup> Dáil Debate 12 December 2000, vol 528, col 311 (John O'Donoghue); Dáil Debate 07 February 2001, vol 530, cols. 199-200 (John O'Donoghue).

<sup>60</sup> Dáil Debate 22 February 2007, vol 632, col 529 (Michael McDowell); Department of Justice and Law Reform, *Parole Board Membership* (Department of Justice and Law Reform 2013) <[http://www.justice.ie/en/JELR/Pages/Parole\\_Board](http://www.justice.ie/en/JELR/Pages/Parole_Board)> accessed 30 August 2019.

attention<sup>61</sup> highlighting the political nature of the parole process and pinpointed ‘serious deficiencies in how the parole system operates... [setting] out how it can be improved’.<sup>62</sup> Writing in *The Irish Times* following this, Jim O’Callaghan TD stated that it was ‘a timely opportunity for the Government to take appropriate action to improve the integrity of our criminal justice system.’<sup>63</sup> In the absence of governmental action, O’Callaghan TD introduced a private members bill on parole. Private members’ bills rarely progress through the *Houses of the Oireachtas*, particularly when a bill has a financial cost, as was the case in this instance. However, this Bill received governmental and cross-party support and passed Committee Stage in *Dáil Éireann* the following year.<sup>64</sup> It then appeared to fall off the agenda only to re-emerge on the schedule two years later, in July 2019. The Department of Justice proposed a raft of amendments to the Bill, all of which were passed at Report Stage. Although some sections of the Bill were simply being redrafted through these amendments, there were also amendments of significant substance. The following week, the Bill passed through *Seanad Éireann* at what can be considered lightning speed by parliamentary standards. The debates for all stages in the *Seanad* took a total of 3 hours and 43 minutes. With stagnation dominating the reform movement for so long, the speed with which the Bill was passed following the government’s amendments left little time for scrutiny.

The Act is primarily focused on creating an independent Parole Board, conferring powers on the Parole Board and providing procedural rights to those subject to the process. The Act states that the Parole Board is to be independent in the performance of its functions, which largely relate to directing that a person be released on parole.<sup>65</sup> The Parole Board rather than the Minister will determine issues of release and revocation and the intention is that the Parole Board will operate in a quasi-judicial capacity.<sup>66</sup> The Act governs the release process for life sentence prisoners although the Minister may also prescribe that determinate sentence prisoners serving sentences of no less than eight years may be released through the provisions of this legislation.<sup>67</sup> This is at the Minister’s discretion and the portion of the term to be served prior to the person becoming eligible for parole is not specified in the legislation. It may be subsequently prescribed by the Minister in a statutory instrument.<sup>68</sup> Determinate sentence prisoners may also be released through standard remission, which is not applicable to those serving life sentences.<sup>69</sup> As such, the parole process continues to be the primary mechanism of release for life sentence prisoners and, once commenced, the Act will have the most significant impact on this population of offenders. Therefore, the focus of the analysis will be on the parole process as it applies to life sentence prisoners.

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<sup>61</sup> Diarmuid Griffin ‘The release and recall of life sentence prisoners: Policy, practice and politics’ (2015) *Irish Jurist* 1; Lally, C, ‘Sharp rise in number of prisoners serving life terms’ *Irish Times* (Dublin, 10 February 2015); Conor Lally ‘Informal system decides fate of those serving life’ *Irish Times* (Dublin, 10 February 2015); Conor Lally ‘Freedom revoked for significant number of released ‘lifers’’ *Irish Times* (Dublin, 10 February 2015).

<sup>62</sup> *Irish Times* ‘Life gets longer in Irish prisons: Research on sentencing shows up inconsistencies’ *Irish Times* (Dublin, 11 February 2015).

<sup>63</sup> Jim O’Callaghan, ‘Parole Board and jail sentences’ *Irish Times* (Dublin, 11 February 2015).

<sup>64</sup> The confidence and supply arrangement whereby *Fianna Fáil* supplied votes to *Fine Gael* as they did not have a majority facilitated the progression of this *Fianna Fáil* sponsored Bill.

<sup>65</sup> s.9(2).

<sup>66</sup> Jim O’Callaghan, Select Committee on Justice and Equality, 24 May 2017.

<sup>67</sup> This power is at the Minister’s discretion and the portion of the term to be served prior to the person becoming eligible for parole may be prescribed by the Minister in a statutory instrument (s.24(3) and (4)). Previously, the Parole Board dealt with both life sentence prisoners and those serving lengthy determinate sentences.

<sup>68</sup> s.24(3) and (4).

<sup>69</sup> The practice is usually 25 per cent (Rule 59, Prison Rules 2007, SI No 2007/25; Prisons Act 2007, s. 35)



### The minimum term

The new legislation increases the minimum term at which a life sentence prisoner will become eligible for parole from seven to twelve years.<sup>70</sup> Twelve years was adopted as it was believed a lower term would give a life sentence prisoner ‘false hope’ leading them to believe that they can be released at an earlier stage.<sup>71</sup> At a European level, temporal limits vary considerably in relation to minimum terms for life sentences, with Denmark and Finland also imposing a minimum term of 12 years while Poland, Russia and the International Criminal Court opt for 25 years.<sup>72</sup> In practice, and as evidenced through the average time served by life sentence prisoners, the seven-year minimum term ceased to act as a meaningful base for release since the 1980s. Parole decision-makers often noted that life sentence prisoners did not engage in rehabilitative or therapeutic services until their first review and that, in many cases, sentence management only began once the life sentence prisoner had reached the seven-year point.<sup>73</sup> It is important, given the increase in minimum term, that sentence management does not now begin at the twelve-year point. Difficulties in relation to sentence management for life sentence prisoners have been identified by a range of stakeholders.<sup>74</sup> The Irish Prison Service established a committee to examine sentence management for life sentence prisoners which concluded that sentence management had ‘not progressed as well as was expected’ due to staff shortages and a lack of staff training.<sup>75</sup> Improvements in sentence management have been made since the committee’s report with a new system, established in April 2017, emphasising the importance of sentence management from the beginning of the sentence.<sup>76</sup> Assessments are now conducted at the start of an individual’s sentence and a meeting with the Probation Service and the Prison Psychology Service occurs to provide information on services. These agencies also meet with the Prison Governor to create individual plans. Of course, these efforts are contingent on the available resources.

With improvements in sentence management, will it be possible for the Parole Board to release a life sentence prisoner that has reached the minimum term and has met the statutory criteria? Twelve years remains considerably shorter than the average time served by life sentence prisoners released over the last decade (19 years from 2008 to 2017).<sup>77</sup> There are generally two types of practices that can be employed when interpreting a minimum term and it can have a significant impact on time served by life sentence prisoners. A minimum term can operate as the default point of release for a life sentence prisoner unless a parole authority can demonstrate that there are clear reasons for further detention. Alternatively, the minimum term may be treated as the beginning of the review process with the potential for multiple reviews being conducted prior to a decision to release. Time served of those released in 2018 ranged from 14 to 22 years, while in 2017

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<sup>70</sup> s. 24(1)(a).

<sup>71</sup> Jim O’Callaghan, Select Committee on Justice and Equality, 24 May 2017. The Act does not refer to children sentenced to life imprisonment and the application of the minimum term to children.

<sup>72</sup> Frieder Dünkel, Dirk van Zyl Smit and Nicola Padfield ‘Concluding Thoughts’ in Nicola Padfield, Dirk van Zyl Smit and Frieder Dünkel (eds), *Release from Prison: European Policy and Practice* (Willan 2010) 408-20

<sup>73</sup> Diarmuid Griffin ‘The Politics of Parole: Discretion and the Life Sentence Prisoner’ (PhD thesis, University College Dublin 2014). 152.

<sup>74</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ‘Report to the Government of Ireland on the Visit to Ireland Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)’ (ECPT 2011), 32; Diarmuid Griffin and Deirdre Healy ‘The Pains of Parole for Life Sentence Prisoners in Ireland: Risk, Rehabilitation and Re-entry’ (2019) *European Probation Journal* 11(3), 124-138.

<sup>75</sup> Irish Prison Service, ‘Examination of the Sentence Management of People Serving Life Sentences’ (Irish Prison Service, 2017), 19.

<sup>76</sup> Midlands Prison, ‘Lifer Information Pack’ (Irish Prison Service 2019).

<sup>77</sup> Griffin (n 4) 5.

time served ranged from 13 to 29 years.<sup>78</sup> If this approach to time served continues, it is likely that there will be a minimum of two reviews prior to a decision to release. It is also clear that legislators envisaged multiple reviews as the Act makes provision for a role for the Parole Board in sentence management where the Board refuses an application for parole,<sup>79</sup> with the then Minister stating that the Parole Board's 'sentence management function should continue'.<sup>80</sup> It will be important to monitor the impact of the increased minimum term on sentence management and the average time served by life sentence prisoners.

### Parole decision-making

The pre-decision-making process provided for in the legislation is reflective of the practice that has existed since the establishment of the advisory Parole Board in 2001, with some modification. The Parole Board is to notify a person eligible for parole and that person may then notify the Parole Board that they wish to apply for parole.<sup>81</sup> In advance of the Parole Board's decision-making, the Board may direct that a report be prepared on the parole applicant by a person or agency where it is deemed appropriate. This may include a report from: the Prison Service; Probation Service; the person in charge of their place of detention (e.g. the Prison Governor); *an Garda Síochána*; a psychologist; a psychiatrist; and a medical practitioner.<sup>82</sup> The Parole Board may specify what is to be contained in the report and the report may include information on: the sentence imposed and the manner by which it has been served; the conduct of the applicant; the risk of reoffending on release; the likelihood of the applicant failing to comply with the conditions of release; whether the applicant presents an undue risk to society; and if release is appropriate.<sup>83</sup> The Parole Board may also request a copy of the transcript of a court hearing relating to the applicant.<sup>84</sup> The legislation makes provision for the input of parole applicants as well as victims in the process.<sup>85</sup> Decision-making under the legislation is to occur at a meeting of the Parole Board and each Parole Board member shall have a vote. Where there is equal division, the Chairperson will have a second and casting vote.<sup>86</sup> This is a departure from existing practice whereby decision-making operates on a consensus-based approach.<sup>87</sup> The Act sets out the criteria to be applied by the Parole Board in the making of a decision to release a parole applicant *via* a parole order. The Parole Board may refuse an application for parole and when this happens, the decision must be communicated in writing to the applicant.<sup>88</sup> Importantly, the Parole Board shall give reasons for the decision when refusing an application.<sup>89</sup> Reasons are currently given, although they tend to provide little insight into decision-making and often follow a standard format.<sup>90</sup> It is important that the reasons provided are meaningful as they can assist the offender in terms of future sentence management and engagement with the parole process. A parole candidate will become

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<sup>78</sup> Parole Board, 'Annual Report' (Parole Board 2018), 12.

<sup>79</sup> s.30(2).

<sup>80</sup> Minister for Justice, Charles Flanagan, Parole Bill 2016, Report Stage.

<sup>81</sup> s.26.

<sup>82</sup> s.13(2).

<sup>83</sup> s.13(3).

<sup>84</sup> s.13(5).

<sup>85</sup> See sections on *Offender Input* and *Victim Input* below.

<sup>86</sup> s.15(5).

<sup>87</sup> Griffin (n 4) 86.

<sup>88</sup> s.30(1)(a).

<sup>89</sup> s.30(1)(c).

<sup>90</sup> Meeting with the Department of Justice (30 May 2012); Griffin, 'The Politics of Parole: Discretion and the Life Sentence Prisoner' (n 72).

eligible for parole two years following the date of the decision to refuse the application. A copy of this decision will be communicated to the parole applicant, the Prison Service and the Prison Governor. Following from the current practice of sentence management identified by parole decision-makers, the Parole Board may specify measures that they believe would assist in a successful application in the future.<sup>91</sup> Significantly, these measures in relation to sentence management will not be binding on the Prison Service, which will retain discretion in terms of sentence management.<sup>92</sup> The Parole Board may determine its own procedures in the exercising of its functions and the Minister may also create regulations in relation to any provisions in the legislation.<sup>93</sup>

The Act does not provide for an appeal process following a refusal. The Parole Bill 2016, as initiated, included provisions that would have entitled a parole candidate to apply for a parole hearing if the applicant was dissatisfied following the outcome of a review but this decision-making structure was removed following amendments at Report Stage in the *Dáil*. Decisions will continue to be subject to judicial review but the scope of judicial review is narrow as it is ordinarily concerned with process rather than outcome. Nonetheless, an important aspect of formalising the process means that life sentence prisoners will have a prescribed decision-making process that can be subject to legal scrutiny. The informal nature of release in some ways protected the process from adverse decisions in the courts, with a life sentence prisoner having no more rights than a prisoner requesting short-term release through the provisions of temporary release. The process of releasing life sentence prisoners will now derive from a distinct statutory framework rather than the discretionary practice of temporary release by the Minister. This should mean that the decision-making process will require higher standards of procedural fairness and be subject to greater judicial oversight.

### Parole decision-makers

With the Parole Board empowered to make decisions on release, it is important to examine the appointment process of members to the Parole Board and the constituent members charged with decision-making. The composition of a parole authority is central in generating balanced decision-making and the potential for bias can be checked through its make-up.<sup>94</sup> Being a member of a parole authority requires the ability to assess, analyse and synthesise information from a range of sources in order to effectively discharge the responsibility of decision-making in a fair and equitable manner. The ability to do this is in some way dependent on the calibre of the candidate appointed.<sup>95</sup> The new Parole Board will not be a major departure from the current composition in terms of numbers. The Act effectively replicates the practice of having a Parole Board with 12 to 15 members.<sup>96</sup> The method of appointing members and the make-up of the Parole Board will change. Various bodies will be required to nominate a member who shall then be appointed by the Minister.<sup>97</sup> The Chairperson will be a judge, barrister, solicitor or academic and is to be nominated by the Chief Justice.<sup>98</sup> Two additional members are to be drawn from the legal

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<sup>91</sup> s.30(2).

<sup>92</sup> s.30(3).

<sup>93</sup> s.14(1) and s.4(1).

<sup>94</sup> Nicola Padfield, Dirk van Zyl Smit Frieder Dünkel (eds.), *Release from Prison: European Policy and Practice* (Willan 2010).

<sup>95</sup> Mario A. Paparozzi and Joel M. Caplan 'A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism' (2009) 89(4) *The Prison Journal* 401; Paul Gendreau, Claire Goggin, Francis T.

Cullen and Mario Paparozzi 'The Common-Sense Revolution and Correctional Policy' in James McGuire (ed), *Offender Rehabilitation and Treatment* (Wiley 2002).

<sup>96</sup> s.10(1).

<sup>97</sup> s.10(2).

<sup>98</sup> ss.10(3)(a) and s.10(4).

world and appointed by their respective bodies.<sup>99</sup> There will be two psychiatrists,<sup>100</sup> two psychologists<sup>101</sup> and three members will be drawn from criminal justice state agencies (Prison Service, *an Garda Síochána* and Probation Service).<sup>102</sup> The Act also makes provision for a member to be nominated by a non-governmental organisation that advocates for the rights of those serving prison sentences.<sup>103</sup> The remaining members are to be appointed by the Minister. These members should have sufficient expertise and experience to assist in the function of the Parole Board.<sup>104</sup> The Act also states that when making an appointment, the Minister is to be satisfied that the nominated candidate has knowledge and understanding of the criminal justice system and the ability to make a reasonable and balanced assessment regarding release, based on the key criteria.<sup>105</sup>

The rationale for maintaining Ministerial control over the appointment process related to the need to ‘...have some political involvement in it’ so as to hold politicians to account at some level.<sup>106</sup> Suggestions that Parole Board members be appointed through the Public Appointments Process were noted by the then Minister, Charles Flanagan TD, but he articulated a concern that this might confine the selection process to those who apply, particularly in the early years of the Parole Board.<sup>107</sup> The Minister did state that this matter could be kept under review and be re-examined at a later stage, based on the experiences and workings of the Parole Board.<sup>108</sup> Nonetheless, it does raise a concern regarding the continuation of political involvement *via* the appointment of Parole Board members.<sup>109</sup> The legislation maintains the policy of including officials from agencies within the Department of Justice in decision-making although the previous practice of including a representative for the Minister from the Department on the Parole Board is no longer provided for. O’Callaghan TD noted at Report Stage in the *Dáil* that some may be concerned regarding the appointment of Department officials that may be interpreted as the Department having ‘indirect control’ over the Parole Board but that ‘the days of a Minister trying to influence the appointment of individuals to boards...are long gone’.<sup>110</sup> This statement refers to the approach to public appointments to State boards, which have been criticised for their politicised nature.<sup>111</sup> It is important that the nomination and appointment process is conducted in as transparent and independent a manner as possible, ensuring the highest calibre of candidate is selected in practice. This will enhance the confidence of the stakeholders in the process as well as ensuring high quality and consistent decision-making.

The legislation states that the *quorum* for a Parole Board meeting where a decision is being made is eight of the 15 members.<sup>112</sup> The high number of individuals that will be involved in the decision-making process is somewhat out-of-step with parole authorities in other

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<sup>99</sup> One member (a judge, barrister, solicitor or academic) will be nominated by the Chief Justice (s.10(3)(a)). A barrister nominated by the General Council of the Bar of Ireland and a solicitor nominated by the Law Society of Ireland (s.10(3)(b) and (c)).

<sup>100</sup> Nominated by the College of Psychiatrists of Ireland (s.10(3)(d)).

<sup>101</sup> Nominated by the Psychological Society of Ireland (s.10(3)(e)).

<sup>102</sup> s.10(3)(g).

<sup>103</sup> s.10(3)(i).

<sup>104</sup> s.10(3)(j).

<sup>105</sup> s.10(5)(a) and (b).

<sup>106</sup> Jim O’Callaghan, Select Committee on Justice and Equality, *Dáil Eireann*, 24 May 2017.

<sup>107</sup> Report Stage, 3 July 2019.

<sup>108</sup> Report Stage, 3 July 2019.

<sup>109</sup> IPRT, ‘IPRT Submission on Parole Bill 2016’ (IPRT 2018), 2.

<sup>110</sup> Jim O’Callaghan, Report Stage, *Dáil Eireann*, 3 July 2019

<sup>111</sup> TASC ‘Public Appointments: Options for Reform’ (TASC 2011)

<<http://issuu.com/tascpublications/docs/publicappointments180711#download>> accessed 30 August 2019; Institute of Directors in Ireland, ‘State Boards in Ireland 2012 – Challenges for the Future’ (Institute of Directors in Ireland 2012)

<sup>112</sup> s.15(2).

jurisdictions. In jurisdictions where decision-making is governed by a judicial process one to three judges are ordinarily responsible for decision-making.<sup>113</sup> In the United States, the average number of members of parole authorities across 48 states was 7.<sup>114</sup> Oral parole hearings in England and Wales are ordinarily heard by three parole members or less.<sup>115</sup> The rationale for maintaining a high number of decision-makers for each decision was not detailed in the parliamentary debates. The Bill, as initiated, made provision for parole panels and parole hearings, which were to be conducted by three or five members drawn from the membership of the Parole Board.<sup>116</sup> The creation of parole panels based on three or five members was more consistent with parole authorities in other jurisdictions but this part of the Bill was overhauled by government amendments at Report Stage in the *Dáil*. At a practical level, the potential for disagreement and protracted proceedings may be higher with a large number of members inputting into deliberations. The issue of delay has been acknowledged by the Parole Board and the Prison Service<sup>117</sup> and resources to support the administrative operation of the Board will be key to ensuring its effectiveness in creating an efficient decision-making process.<sup>118</sup>

### Offender input

The reforms that relate to offender input and the provision of legal representation are a significant advancement. The level of offender input varies significantly across jurisdictions. The Council of Europe states that offenders under consideration for the granting of release should have ‘the right to be heard in person and to be assisted according to the law’.<sup>119</sup> Where a court is determining the issue of release, as is the case in many European countries, an offender is often entitled to provide input orally, in writing or both and can be represented legally. Where the decision is by a parole authority, as is the case in England and Wales, prisoners serving indeterminate sentences may be afforded a hearing before the parole authority when release is being considered.<sup>120</sup> Offender input in Ireland is limited primarily to an ‘informal’ interview conducted by two members of the Parole Board at the institution at which the offender is serving his sentence.<sup>121</sup> Legal representation is not permitted at the interview and the purpose of the interview is not well defined.<sup>122</sup> The new legislation makes significant inroads in terms of the input of the offender into the parole process. Section 14 provides for a parole applicant and parolee to be provided with legal representation through a legal aid scheme.<sup>123</sup> The applicant and their legal representative will be furnished with the documents available to the Parole Board.<sup>124</sup> The Act permits the offender and/or his or her legal representative to meet with the Parole Board (no less than two members) prior to their decision-making meeting.<sup>125</sup> This is similar to the informal

<sup>113</sup> For example, in Italy a ‘Supervision Tribunal’ consisting of four members make the decision: Alessandra Gualazzi and Chiara Mancuso (2010) ‘Italy’ in Nicola Padfield, Dirk van Zyl Smit, and Frieder Dünkel (eds) *Release from Prison: European Policy and Practice* (Willan 2010) 272 and 282.

<sup>114</sup> Paparozzi and Caplan (n 93), 411.

<sup>115</sup> Nicola Padfield ‘England and Wales’. In Nicola Padfield, Dirk van Zyl Smit and Frieder Dünkel (eds), *Release from Prison: European Policy and Practice* (Willan 2010) 125.

<sup>116</sup> s.13 Parole Bill 2016 (*Dáil Éireann*: Committee Stage).

<sup>117</sup> Irish Prison Service, ‘Examination of the Sentence Management of People Serving Life Sentences’ (Irish Prison Service 2017).

<sup>118</sup> ss.17 and 18 make provision for the staff and chief executive of the Parole Board.

<sup>119</sup> Council Recommendation (2003)23 on Management by Prison Administrations of Life-Sentence and Other Long-Term Prisoners., s. 32.

<sup>120</sup> *Osborn v Parole Board* [2013] UKSC 61.

<sup>121</sup> Parole Board, ‘Annual Report’ (Parole Board 2002) 9.

<sup>122</sup> Griffin (n 4) 74-76.

<sup>123</sup> s.14(1)(a).

<sup>124</sup> s.14(1)(b). There may be exceptional circumstances whereby the Parole Board determines certain documents should not be disclosed.

<sup>125</sup> s.13(7).



meetings that the Parole Board conduct at the place of detention of the offender however, the offender may now have a legal representative present. Further, the legislation provides for the offender and/or his or her representative to present his or her case before the Parole Board.<sup>126</sup> These provisions remedy the difficulty raised by many in relation to the lack of legal representation and an oral hearing, although the legislation does not go into much detail surrounding the procedure for this input and its role in determining parole outcomes. The Act does state that the Parole Board is empowered to create its own procedures and the procedure for offender input may fall within this, but as yet it is not fully clear what this process will look like in practice.<sup>127</sup>

## Victim input

Parole processes have become more inclusive of victims when making a determination about release. This is in line with the development of a victims' rights discourse and the greater facilitation of victim participation in, and support by criminal justice systems over the last number of decades. There is little by way of settled practice in terms of victim involvement in parole decision-making. Victims' rights can include the right to information, the right to be heard and the right to be present at parole hearings.<sup>128</sup> The provision of information to victims or their families is common, but the type of information made available varies.<sup>129</sup> Victim input, in the form of a written or oral statement presented to the decision-making body, is a developing theme.<sup>130</sup> It appears more frequently in common than civil law jurisdictions and is associated by some with the vulnerability of the political process to the victim movement and the potential for politicians to harness victims' needs and concerns in the pursuit of punitivism.<sup>131</sup> Research on the impact of written and oral submissions by victims on the parole decision-making process is limited but there does appear to be some evidence of a correlation between victim participation and parole denials.<sup>132</sup> The approach to victim input is more cautious in Europe, with the 'Victims' Directive' simply stating that a victim has a right to be notified of the release of an offender upon request.<sup>133</sup> Many countries do not permit victim involvement when deliberating on the release of life sentence prisoners.<sup>134</sup>

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<sup>126</sup> s.14(1)(d).

<sup>127</sup> s.14(1).

<sup>128</sup> Susan Herman and Cressida Wasserman 'A role for victims in offender reentry' (2001) 47(3) *Crime and Delinquency* 428, 433.

<sup>129</sup> Some countries limit disclosure to the release date while others provide personal information on the offender, details of the parole hearing and reasons for the decision: Julian Roberts 'Listening to the crime victim: Evaluating victim input at sentencing and parole' (2009) 38(1) *Crime and Justice* 347.

<sup>130</sup> Nicola Padfield and Julian Roberts 'Victim input at parole: Probative and prejudicial?' in Anthony Bottoms and Julian Roberts (eds), *Hearing the victim: Adversarial justice, crime victims and the state* (Willan 2010) 255-285.

<sup>131</sup> Andrew Ashworth 'Victims' rights, defendants' rights and criminal procedure' in A Adam Crawford and Jo Goodey (eds), *Integrating a victim perspective within criminal justice* (Ashgate 2000) 185-204.

<sup>132</sup> Kathryn D. Morgan and Brent L. Smith 'Victims, punishment and parole: The effect of victim participation on parole hearings' (2005) 4(2) *Criminology and Public Policy* 333; William H. Parsonage, Frances P. Bernat and Jacqueline Helfgott 'Victim impact testimony and Pennsylvania's parole decision-making process: A pilot study' (1994) 6(3) *Criminal Justice Policy Review* 187; Kim Polowek 'Victim participatory rights in parole: Their role and the dynamics of victim influence as seen by board members' (PhD Thesis, Simon Fraser University 2005).

<sup>133</sup> Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing council framework decision 2001/220/JHA [2012] L 315, Article 6.5 and 6.6

<sup>134</sup> Doris Schartmueller 'Too dangerous to get out? The use of individualized release mechanisms for lifetime incarcerated offenders in Sweden' (2014) 25(4) *Criminal Justice Policy Review* 407; Sampo Tapio Lappi-Seppälä 'Parole and release from prison in Finland. Parole in Ireland – The way forward, experience from other jurisdictions' (Law Society of Ireland, Dublin October 2013); Sonja

Snacken, Kristel Beyens, and Marie-Aude Beernaert 'Belgium' in Nicola Padfield, Dirk van Zyl Smit, and Frieder Düinkel (eds), *Release from prison: European policy and practice* (Devon 2010) 70-103.

To date, the approach to victim input in the Irish parole process has been fairly minimal and informal. In practice, the Victim Liaison Officer of the Prison Service informs the victim of the release of a prisoner, where a victim or family member requests such information.<sup>135</sup> In terms of victim input in decision-making, the Parole Board receive letters from victims and victims' families. From 2011 to 2013, 11 per cent of cases had victim representations included in the information available to Parole Board members.<sup>136</sup> The Parole Board stated that these letters were 'seriously considered' when making a decision.<sup>137</sup> In a study on parole decision-making, Parole Board members had mixed views on victim input: 'You have to understand the feelings of victims but personally it wouldn't sway me in terms of how I'd view a case, and I think legal precedent would say that, you know, we shouldn't be unduly influenced by actually what the victim has to say'.<sup>138</sup> The Criminal Justice (Victims of Crime) Act 2017,<sup>139</sup> which gives effect to the Victims' Directive, states that a victim may request information on the release of the offender as well as any conditions pertaining to the victim that are relevant to release.

The Act makes major changes in terms of victim input in parole decision-making. A victim is defined as a person who 'has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by an offence'.<sup>140</sup> The Act provides that where the death of the victim has been caused by the offence, the term 'victim' shall be construed in reference to a family member of the deceased.<sup>141</sup> This is appropriate given that the vast majority of life sentence prisoners are serving their sentence for murder. A function of the Parole Board will be to provide information to victims and this may include information on a parole applicant's eligibility for parole as well as the revocation and changing of a parole order.<sup>142</sup> Where an application for parole is made, the Parole Board must notify the victim and this notification must include an explanation of the process by which a person is considered for parole and how the victim may participate in the process.<sup>143</sup> Where a parole order is made, the Parole Board may, where it considers appropriate, notify the victim of the order and the conditions relating to the victim.<sup>144</sup> The order shall not include information that identifies the victim or their place of residence.<sup>145</sup>

A further role of the Parole Board will be to facilitate victim input into the decision-making process. The Parole Board may assign a legal representative to the victim where the victim wishes to make a submission to the Parole Board.<sup>146</sup> In this respect, the Parole Board may receive written and oral submissions from a victim or their legal representative.<sup>147</sup> In addition, the Parole Board may meet with the victim, or their legal representative prior to

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<sup>135</sup> Department of Justice and Equality, 'Victims charter and guide to the criminal justice system' (Department of Justice and Law Reform 2010).

<sup>136</sup> Parole Board, 'Annual Report' (Parole Board 2013), 6.

<sup>137</sup> Diarmuid Griffin 'The release and recall of life sentence prisoners: Policy, practice and politics' (2015) *Irish Jurist* 1,4.

<sup>138</sup> Griffin (n 4) 78.

<sup>139</sup> s. 8(2)(m)(i) and (ii).

<sup>140</sup> s.2(1).

<sup>141</sup> s.2(2).

<sup>142</sup> s.9(1)(a).

<sup>143</sup> s.14(1)(e).

<sup>144</sup> s.28(6)(c). In the making of a parole order, the order shall not include information that identifies the victim or their place of residence s.28(2). The same applies to a refusal to grant a parole order or the variation of a condition in a parole order in terms of identifying the victim or their place of residence. s.30(4)(b)

<sup>145</sup> s.28(2). Similarly, the same applies to a refusal to grant a parole order or the variation of a condition in a parole order in terms of identifying the victim or their place of residence. s.30(4)(b) and s.31(3)(c).

<sup>146</sup> s.13(1)(e) and s.14(1)(a)(iii). The Act also makes provision for the victim or their legal representative to make submissions to the Parole Board where they are considering the revocation of a parole order and, where the Parole Board considers it appropriate, the variation of the condition attaching a parole order.

<sup>147</sup> s.13(1)(g).

their decision-making meeting for the purpose of receiving oral submissions from the victim or their legal representative.<sup>148</sup> Oral submissions may also be permitted at the subsequent Parole Board meeting. This means that the victim could, where the Parole Board permits, have as many opportunities to input into the decision-making process as the parole applicant. In determining whether to make a parole order, the Board must consider whether there is an undue risk to society and the risk to the victim is explicitly included in this provision.<sup>149</sup> The legislation provides that the Parole Board is to have regard to any submissions made by victims in deciding whether to make a parole order.<sup>150</sup>

The benefits in facilitating victim input in parole relate to its potential therapeutic effects for the victim and its ability to facilitate victim empowerment. It allows the justice system to give a voice to victims.<sup>151</sup> Opponents to victim input argue that it is inconsistent with the rehabilitative and reintegrative purpose of parole and the participation of victims in parole proceedings may be punitively oriented.<sup>152</sup> It is difficult to determine the likely impact of these victim input reforms on parole outcomes but a conflict when balancing victim input with the criteria for decision-making is certainly conceivable. For example, how will the Parole Board deal with a life sentence prisoner who has served significant time beyond the minimum term, has met the criteria and is at a low risk of reoffending yet the victim has made very strong representations against release? Research on victim input indicates significant disparity evident in how victim information is interpreted and incorporated by individual parole decision-makers.<sup>153</sup> van Zyl Smit and Appleton state that the role of victims is 'less important at the release stage than at sentencing, as the seriousness of the initial offense, as revealed in information of its impact on the victim, should not be in dispute anymore'.<sup>154</sup> They note that there is a 'real danger' that parole boards 'will be heavily influenced by emotional accounts of the harm to the victim and that this 'may undermine their ability to evaluate whether the prisoner has been rehabilitated and still poses a risk to society'.<sup>155</sup> Providing significant victim input has the potential to unrealistically raise expectations for victims in terms of the likely impact of their input on parole outcomes.

### Criteria for decision-making

The criteria employed in terms of decision-making are of critical importance as they can operate to constrain decision makers in terms of outcomes. The Council of Europe emphasise that in the context of structuring the release process, 'the most important decision to be made is which criteria will be used to determine whether a prisoner can or cannot be granted release'.<sup>156</sup> There is a broad spectrum of approaches across jurisdictions. Public protection is often cited as the overarching or key criterion (see for example,

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<sup>148</sup> s.13(1)(f). A meeting with the victim may occur at an appropriate venue and should be with no less than two Parole Board members (s.13(8)).

<sup>149</sup> s.27(1)(a)(i).

<sup>150</sup> s.27(2)(l). The Act also makes provision for the Parole Board to have regard, where it considers appropriate, any submissions by the victim, where it is considering whether to revoke a parole order. s.33(3)(e).

<sup>151</sup> Polowek (n 131), 51-56.

<sup>152</sup> William H. Parsonage, Frances P. Bernat, and Jacqueline Helfgott 'Victim impact testimony and Pennsylvania's parole decision-making process: A pilot study' (1992) 3 Criminal Justice Policy Review 192. Edwin Villmoare and Virginia V. Neto Villmoare, E and Neto, V.V, 'Victim appearances at sentencing hearings under the California Bill of Rights' (US Department of Justice 1987).

<sup>153</sup> Polowek (n 131).

<sup>154</sup> van Zyl Smit and Appleton (n 1) .272.

<sup>155</sup> *ibid.*

<sup>156</sup> Council Recommendation (2003) 22 on conditional release (parole), Explanatory Memorandum para. 18.

Canada, England and Wales, Scotland and Northern Ireland) although many countries include considerations of risk as part of a range of different applicable criteria. For example, Sweden determines release on the basis of: overall behaviour and development; rehabilitative efforts; risk of reoffending; offence type; and time in custody.<sup>157</sup> At the broader European level, there has been a focus on rehabilitation as a key component of prison policy and this has been emphasised in the context of life sentences both in the jurisprudence of the ECtHR and the European Prison Rules.<sup>158</sup> Irrespective of the type of criteria applied, the Council of Europe recommends that offenders are made aware of the date at which they become eligible for release and that the assessment criteria are 'clear and explicit'.<sup>159</sup> Despite criteria being in place in many jurisdictions, their articulation and application can raise concerns, particularly in relation to the reliability of assessments upon which the likelihood of reoffending is determined.<sup>160</sup>

In Ireland, the Minister, in the exercising of his or her power of temporary release is to have regard to criteria prior to directing release. These criteria have been described as 'vague' and allow for considerable discretion.<sup>161</sup> Research on parole decision-making indicated that they did little to constrain decision-makers in their deliberations in individual cases. For example, a former Minister stated, in reference to the application of the criteria: 'I have to say, I didn't, to be honest, pay much attention to [the statutory criteria]. I have to say it was on my gut feeling'.<sup>162</sup> While the Parole Board was not required to apply any specific criteria when it was established, it largely adopted these legislative criteria as the 'main factors taken into account in each individual case'.<sup>163</sup> In practice, a wide range of factors were being incorporated into the decision-making process, some of which were poorly related to any criteria.<sup>164</sup> Under the new legislation, the Parole Board may make a parole order for release where such a parole applicant does not present 'an undue risk to the safety and security of members of the public',<sup>165</sup> has been rehabilitated, is capable of reintegrating into society on release and it is appropriate in all circumstances to do so.<sup>166</sup> While these criteria are set out as the primary basis upon which a parole order may be granted, the Act also lists a range of criteria that the Parole Board shall have regard when deliberating upon the release of a life sentence prisoner. The Parole Board shall have regard to: the nature and gravity of the offence; the sentence imposed and any recommendation of the court at sentencing; the period of sentence served; other offences of which the applicant was convicted; the conduct of the applicant while in prison; and previous conduct while released on a parole order or on temporary release.<sup>167</sup> The Parole Board shall also take into consideration: the risk of the applicant reoffending on release; the likelihood of the applicant failing to comply with their conditions of release; and evidence of the applicant engaging in education and training while in prison. In deliberating, the Parole Board will take account of any report furnished to it, the meeting with the parole applicant and any submissions made by or on behalf of the parole applicant and the victim. Further,

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<sup>157</sup> Doris Schartmueller 'Too dangerous to get out? The use of individualized release mechanisms for lifetime incarcerated offenders in Sweden' (2014) 25(4) Criminal Justice Policy Review 407-431 418.

<sup>158</sup> *Vinter and Others v United Kingdom* App no 66069/09, 3896/10, 130/10 (ECHR, 9 July 2013), para 115; Council Recommendation (2006) 2 of the committee of ministers to member states on the European prison rules, rules 103.8 and 107.

<sup>159</sup> Council Recommendation (2003) 22 on conditional release (parole), Explanatory Memorandum para 18.

<sup>160</sup> *Léger v France* App no 19324/02 (ECHR, 11 April 2006).

<sup>161</sup> Griffin (n 4) 173.

<sup>162</sup> *ibid.*

<sup>163</sup> Parole Board, Annual Report (Parole Board 2012), 7-8; Parole Board, 'Annual Report' (Parole Board 2012) 3-4.

<sup>164</sup> Griffin (n 4) 147-186.

<sup>165</sup> s.27(1)(a)(i).

<sup>166</sup> s.27(1).

<sup>167</sup> s.27(2).

the Act states that the Parole Board can take into consideration any matter the Board considers appropriate.<sup>168</sup>

Much of the criteria are the same or similar to the pre-existing Ministerial criteria. They are broad in nature and look both to the past and the future. The Parole Board will take into consideration the punitive or retributive aspects of the offence including its seriousness, the length of sentence imposed and served by the prisoner up to the point of review. At Committee Stage the nature and gravity of the offence was viewed as critically important due to the different degrees of murder and the need to differentiate between ‘... somebody who is convicted of killing a group of children, as [o]pposed to somebody who is convicted of murder committed on the spur of the moment one night with drink taken’.<sup>169</sup> Qualitative research indicated that Parole Board members viewed the nature and gravity of the offence as key in their assessment.<sup>170</sup> With all murderers sentenced to a mandatory life sentence, members employed the discretion afforded them within the parole process to draw distinctions between different types of murders and murderers.<sup>171</sup> Incorporating considerations such as the nature and gravity of the offence may be viewed as a concern as such a consideration is ordinarily a function of a trial judge at sentencing. In 2013, the Law Reform Commission warned that formalising the parole process through statute should address the danger of the Parole Board taking into consideration factors ordinarily associated with sentencing such as the nature and gravity of the offence.<sup>172</sup> There is also a strong focus on the future behaviour of the offender, the likelihood of the offender reintegrating successfully into the community on release and the level of risk he or she presents if release were to be granted. This is reflective of the existing focus on public protection, as articulated by parole decision-makers. Jurisdictions that focus on risk often provide decision-makers with guidelines and frameworks to enhance the consistency and quality of decision-making.<sup>173</sup> Research found that some Parole Board members had a limited understanding of risk terminology and struggled with comprehending the risk assessments provided by the Probation Service and Prison Psychology Service.<sup>174</sup> It is crucial that the newly constituted Parole Board is empowered to understand and apply risk information effectively and accurately. Guidelines on risk-based decision-making as well as training would be beneficial to decision-makers. Overall, the criteria continue to be broad in nature thus affording decision-makers considerable discretion. As a result, it is important that decision-making is carefully monitored to ensure that outcomes are arrived at in a fair and consistent manner and that some of the problematic approaches previously identified in the decision-making process do not re-emerge.

## Release and revocation

Aside from its advisory role to the Minister, the non-statutory Parole Board does not have any direct involvement in the release or recall of offenders and the Prison Service manages temporary release, and the revocation thereof. On release, a life sentence prisoner is supervised by the Probation Service in the community for the remainder of his or her life. Similar to any other offender on temporary release, a life sentence prisoner is required: to

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<sup>168</sup> s.27(2)(m).

<sup>169</sup> Jim O’Callaghan, Select Committee on Justice and Equality, 24 May 2017.

<sup>170</sup> Griffin (n 4).123.

<sup>171</sup> *ibid.*

<sup>172</sup> Law Reform Commission, *Report on Mandatory Sentences* (LRC 108 – 2013), 124.

<sup>173</sup> Ralph Serin ‘Parole Board Canada: Pre-reading material (ATRA and decision framework)’ (Parole Board Canada 2011). <<http://www.ct.gov/bopp/lib/bopp/SDM.pdf>> accessed 23 January 2020.

<sup>174</sup> Griffin (n 4) 111-114.



keep the peace; be of good behaviour; and be of sober habits.<sup>175</sup> Breach of these conditions renders an offender ‘unlawfully at large’<sup>176</sup> and that individual will be returned to their previous place of detention.<sup>177</sup> Where a condition of release may have been breached, an inquiry is to be instituted allowing the offender an opportunity to be heard<sup>178</sup> although the hearing does ‘not require anything of a judicial nature’ as the granting and termination of temporary release ‘are clearly acts which are administrative in nature’.<sup>179</sup> This hearing is to be carried out by the Minister, or his designate (most likely the prison governor of the institution from which temporary release was originally granted). Keeping the peace, being of good behaviour and of sober habits are phrases that ‘lack a precise and settled meaning’<sup>180</sup> and there have been instances where life sentence prisoners have been returned to custody for what might be considered trivial breaches of conditions.<sup>181</sup> These examples reinforce the precariousness and uncertainty of ‘full temporary release’ for life sentence prisoners living in the community and the difficulty of employing legal provisions designed for short-term release to those that remain under supervision in the community for the remainder of their lives.

The Act reforms the release and revocation process, placing the Parole Board rather than the Minister and the Prison Service at the centre of the process. The Act will confer upon the Parole Board the power to issue a parole order, which effectively releases the life sentence prisoner back into the community. A parole order directs the date upon which the offender shall be released<sup>182</sup> and it may specify conditions that must be adhered to.<sup>183</sup> The condition that a life sentence prisoner be of sober habits is not specified however the Act is fairly permissive in terms of the conditions that the Parole Board can ascribe to the parolee. The Act states that a person is released on a parole order on condition that they do not commit another offence<sup>184</sup> and any other conditions set by the Parole Board.<sup>185</sup> For a life sentence prisoner, a parole order will continue indefinitely unless or until it is revoked.<sup>186</sup> While the discretion is broad in terms of the conditions to be set by the Parole Board, the Act does specify that these conditions may include that the parolee: be supervised by the Probation Service; reside in a specified area of the country; is not permitted to attend at certain premises; and does not have contact with persons specified in the order. The parole order will be provided to the relevant criminal justice agencies and the Minister is to be notified of the making of the order.<sup>187</sup> The Parole Board may also

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<sup>175</sup> Prisoners (Temporary Release) Rules 2004, SI 2004/680. The offender was required to comply with any additional directions set by the Minister or on his behalf by the Prison Service Criminal Justice (Temporary Release of Prisoners) Act 2003, s. 1. O’Malley notes that given the consequences of a breach of a condition ‘it is important that any special release conditions should be realistic and capable of being fulfilled, having regard to the circumstances and characteristics of the person being released’: Thomas O’Malley *Sentencing law and practice* (Thomson Round Hall 2016) 637.

<sup>176</sup> Criminal Justice Act 1960, s. 6(1) and (2). Being ‘unlawfully at large is an offence with a penalty of imprisonment of up to six months

<sup>177</sup> Criminal Justice Act 1960, s. 7.

<sup>178</sup> *State (Murphy) v Kielt* [1984] ILRM 141.

<sup>179</sup> *State (Murphy) v Kielt* [1984] ILRM 141, 472. In practice, the inquiry as to a breach of a condition was often carried out by the prison governor of the institution from which temporary release was originally granted, on behalf of the Minister.

<sup>180</sup> Thomas O’Malley *Sentencing law and practice* (Thomson Round Hall 2016) 637.

<sup>181</sup> For example, three life sentence prisoners were recalled to prison for failing to be of ‘sober habits’: *Dáil Question No. 513*: Alan Shatter, 26 November 2013.

<sup>182</sup> s.28(1)(c).

<sup>183</sup> s.28(1)(d).

<sup>184</sup> s.28(1)(d)(iii).

<sup>185</sup> s.28(1)(d)(i) and (ii).

<sup>186</sup> s.28(3)(d).

<sup>187</sup> s.28(6)

communicate to the victim that an order has been made and communicate any relevant conditions to the victim where appropriate.<sup>188</sup>

The Parole Board may vary or revoke a parole order of its own volition or on the application of the Minister, the *Gardaí*, the person subject to the order or other parties.<sup>189</sup> The grounds for revocation of a parole order are that the person poses an undue risk to society or has breached their conditions of release<sup>190</sup> and that the revocation is justified on the basis of the gravity of the risk or the condition breached.<sup>191</sup> When considering whether the Parole Board revokes a parole order, it shall consider the circumstances giving rise to the consideration for revocation, any submissions of the parolee or victim and any report furnished to the Parole Board.<sup>192</sup> A decision to revoke the parole order shall be done in writing and shall provide reasons for so doing.<sup>193</sup> The Parole Board must specify a date within two years from making the decision to revoke the parole order whereby the parolee will become eligible for parole again.<sup>194</sup> The process for revocation is to follow the procedure governing the Parole Board in making a parole order.<sup>195</sup> Under the legislation, a person is deemed to be unlawfully at large if they breach a condition of their release or fail to return to a specified place where the persons parole order has been revoked.<sup>196</sup>

While many of these provisions are broadly reflective of the current practice, there are improvements here, relating primarily to the certainty of the process and the removal of the political component to revocation. The removal of the conditions of being of ‘good behaviour’ and ‘sober habits’ is positive given their potential for subjective interpretation. Nonetheless, the Act does provide parole decision-makers with considerable levels of discretion in terms of setting the conditions of release and the decision to revoke. The process for the recall of offenders has been the cause of controversy in other jurisdictions where there have been significant increases in the numbers being recalled to prison. A more stringent approach to the enforcement of conditions is credited as being a key factor in this increase, rather than dramatic changes in the behaviour of those released.<sup>197</sup> Life sentence prisoners are a unique category of offender that remain under supervision for their lifetime and as such, the conditions and the stringency with which they are enforced is of particular importance. Revocation will continue to be a matter of discretion, although that discretion will shift from within the control of the Minister to the Parole Board.

## Conclusion

There are three key issues identifiable in relation to life imprisonment in Ireland: the informal and political nature of the parole process; the growth in the life sentence prisoner population; and the increase in time served by life sentence prisoners. The Parole Act 2019 addresses the first issue through placing parole in a formal legal structure as well as enhancing the rights of life sentence prisoners and victims. The Act locates decision-making within a process that will no longer be dependent on Ministerial discretion. These

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<sup>188</sup> s.28(6)(c).

<sup>189</sup> s.31(1) and (2).

<sup>190</sup> s.33(1)(a)(i) and (ii).

<sup>191</sup> s.33(1)(b).

<sup>192</sup> s.33(3).

<sup>193</sup> s.33(5)(a) and (c).

<sup>194</sup> s.33(5)(b)(iii).

<sup>195</sup> s.33(3)(c) and (d).

<sup>196</sup> s.34(1)(a) and (b).

<sup>197</sup> Nicola Padfield and Shadd Maruna ‘The Revolving Door at the Prison Gate: Exploring the Dramatic Increase in Recalls to Prison’ (2006) 6(3) *Criminology and Criminal Justice* 329.

advances in enhanced procedural justice and due process are important. This should bring greater certainty in terms of the rights of the stakeholders and the parameters of the process. Yet, there remains considerable discretion in terms of the procedure of the Parole Board, particularly in relation to the criteria to be applied in individual cases and the potential impact on parole outcomes. The increased role for victims and offenders and the continued, albeit more remote, role of the Minister needs to be monitored closely when the Act is commenced and the Parole Board is operational.

Reform of the parole process may not have a transformative impact on the number of life sentence prisoners in custody or the length of time served prior to release. Appleton and van Zyl Smit note that the human rights weakness in the system in England and Wales lies not in the procedure but ‘the growing frequency with which life sentences are imposed and the increasing time that life prisoners have to serve before they are released’.<sup>198</sup> There is an obvious importance in improving procedural justice and providing greater certainty to those subject to the process but the potential of these reforms to also regulate or reduce the life sentence prisoner population or bring greater consistency in terms of time served cannot be assumed. It is unlikely the media and public interest in murders and life sentence prisoners is going anywhere for now, meaning that parole decision-makers will continue to be subject to public scrutiny, media stories of alleged leniency and political pressure. The structure of a parole authority needs to be robust enough to resist such social forces when making decisions in individual cases. The issue of consistency in terms of time served by life sentence prisoners is difficult to predict as it remains largely within the discretion of parole decision-makers, even though it now operates within a more formalised framework. Finally, reform of the mandatory nature of the life sentence for murder fell outside the remit of this legislation but, given its impact on the increasing life sentence prisoner population, its use as a penalty needs to be reconsidered. As O’Malley notes, mandatory life imprisonment for murder is not constitutionally required and there are strong policy reasons for revisiting the regime.<sup>199</sup> With the momentum of reform and an increasing level of scrutiny on the use of life imprisonment nationally and internationally, it is time to examine alternatives to the mandatory life sentence for murder.

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<sup>198</sup> Catherine Appleton and Dirk van Zyl Smit ‘The paradox of reform: Life imprisonment in England and Wales’ in Dirk van Zyl Smit and C. Appleton (eds), *Life imprisonment and human rights* (Hart, 2016) 235–236.

<sup>199</sup> Thomas O’Malley, *Sentencing law and practice* (Thomson Round Hall 2016) 307.