

A Human Rights Analysis of Orders for Lifelong Restriction: A Discussion Paper

Key findings

We are concerned that some OLR prisoners are at risk of experiencing violations of their rights to liberty and to private and family life under the European Convention on Human Rights. The psychological distress caused by the uncertainty of release on an OLR sentence could result in inhuman or degrading treatment or breaches of the right to private and family life under the ECHR.

Scotland is not meeting its international human rights obligations to ensure the right to liberty under the International Covenant on Civil and Political Rights.

We recommend detailed consideration by the Scottish Government and Scottish Parliament of the administration of OLRs in Scotland, taking account of the views of people with lived experience, including victims.

Introduction

The Scottish Human Rights Commission (SHRC) has identified Orders for Lifelong Restriction (OLRs) as a matter requiring close human rights scrutiny. OLRs are indeterminate sentences given to those deemed to present a long-term risk to the safety of others. These sentences are not imposed lightly and those who receive them may have committed serious crimes. The human rights framework acknowledges the need for punishment of crimes and management of risk: victims' human rights must be protected, and risks posed by offenders must be appropriately managed. It may be that an indeterminate sentence is necessary to effectively manage the serious risks posed by some offenders. However, there is a sensitive balance to be struck to ensure the State does not act disproportionately in doing so and that real opportunities for rehabilitation are provided.

Any indeterminate sentence carries with it strict human rights requirements in light of the substantial impact on those subject to them. It is within those bounds that scrutiny of policy and practice is necessary.

As the National Human Rights Institution, the Scottish Human Rights Commission has undertaken this analysis to ensure that the State fulfils its duty to protect everyone's human rights, including those deprived of their liberty.

The SHRC carried out an analysis of the human rights standards applicable to Orders for Lifelong Restriction. We have examined the data on their usage, the evidence of people with lived experience and commentary from human rights experts. This paper presents our analysis with a view to stimulating discussion on options for review and amendment which may be required to ensure human rights compliance. We believe there is a strong case for the Scottish Government and Scottish Parliament to give serious consideration to the concerns set out in this paper, with a view to taking appropriate action to ensure human rights are being adequately protected.

Further discussion in this area should take full account of the impacts on both offenders and victims.

What is an Order for Lifelong Restriction?

The Order for Lifelong Restriction (OLR) is a lifelong sentence. It is a form of indeterminate sentence with no fixed release date and a perpetual licence, where individuals remain under the intensive supervision of a criminal justice social worker for the rest of their life. This means that those sentenced to an OLR can be detained indefinitely and, if they are released, recalled to prison at any time throughout their life. The sentence was recommended by the Maclean Committee and introduced by the Criminal Justice (Scotland) Act 2003 and became available for use in the High Court of Justiciary when the legislation was commenced in June 2006. The sentence was created as a response to concerns about the management of serious violent and sexual offenders who were viewed as at risk of reoffending.¹

The sentence is split into a 'punishment part', which is the time which must be served in prison, and the subsequent 'indeterminate part', which may be served in prison or in the community under strict licence and recall conditions. This means that, when OLR prisoners are released from custody, they must follow rules like curfews, wearing an electronic tag, or not entering certain areas or contacting certain individuals or groups of people. If they breach these rules, they can be sent back to prison. The Maclean Committee envisaged that:

'the period spent in the community should be regarded as being an integral part of the sentence. Our proposals envisage that community services for offenders serving this sentence would involve a greater degree of intensive supervision than is the current norm.'²

Who can be given an OLR?

An OLR is designed to protect the public from the risk of serious harm. It can be imposed if the court considers that the individual's offence and behaviour suggest a serious risk to members of the public.

An OLR can be granted where an individual meets the below risk criteria:

'[T]he nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty of either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being of members of the public at large.'³

If the individual may meet these criteria, the court must order the individual to undergo a risk assessment by an accredited risk assessor, who will categorise the individual as low, medium or high risk. This will be done in respect of a conviction for a serious sexual or violent crime, or where the court considers that the individual has a propensity to commit such a crime. An individual does not need to be categorised as high risk to have an OLR imposed. It is also important to note that an OLR cannot be imposed in respect of murder, which carries a mandatory life sentence.

There is no mechanism to remove an individual from an OLR. It remains in place for life, although it may latterly be served in the community on licence.

The risk assessment process and post-sentencing risk management process are overseen by a statutory body called the Risk Management Authority (RMA). The RMA is responsible for setting standards for risk assessment, accreditation of risk assessors and for approving Risk Management Plans for OLR prisoners.

Human Rights at Stake

Summary of Human Rights Requirements

The following requirements must be met in order for the imprisonment of a person by the state to comply with international human rights standards:

- Individuals may only be detained where detention is in accordance with the law and justified. Otherwise, detention may be arbitrary and in breach of the right to liberty.

- The justification for indeterminate detention must include rehabilitation, and as such, access to rehabilitative programmes leading to the possibility of release must be available.
- Detention for the purpose of rehabilitation beyond the punishment part of a sentence should be distinct in nature and character from the punitive element of the sentence.
- Detainees must be able to ascertain what they must do in order to be released.
- The mental anguish related to indefinite detention must not amount to inhuman or degrading treatment.
- The administration of sentences must not be discriminatory.

Indeterminate sentences, including the OLR specifically, have a substantial impact on those who are subject to them. As such, there are strict standards set for their use by a variety of international conventions and their associated treaty bodies. This discussion paper focuses on the European Convention on Human Rights (ECHR). ECHR compliance is a requirement of domestic law, as guaranteed by the Human Rights Act 1998 and Scotland Act 1998. ECHR requirements are also broadly mirrored in the UN treaty, the International Covenant on Civil and Political Rights (ICCPR).

The ECHR standards relevant to OLRs are discussed below.

Right to liberty (Article 5 ECHR)

- Arbitrary detention

The right to liberty and security is protected by Article 5 ECHR. The purpose of Article 5 has been explained by the European Court of Human Rights (ECtHR) as being to ensure that no one is stripped of their liberty in circumstances where it is not justified, and not in accordance with law and procedure.⁴ This ensures freedom from arbitrary detention. This obligation is also mirrored under the ICCPR. The ECtHR has identified a range of factors which could render detention arbitrary, however, the most relevant factor for the purpose of the OLR is where the detention is disproportionate to the stated aim of the detention.⁵

OLRs have been subject to scrutiny of their human rights compliance by the Scottish courts on several occasions. In the leading case on the imposition of OLRs, Lord Drummond Young made the following observation;

In these circumstances it is perhaps worth emphasising that prisoners subject to OLRs must have their cases reviewed regularly, to ensure that continued custody is necessary to meet the objectives of the OLR. That is clearly contemplated by the terms and structure of the governing legislation, and it is in my opinion essential to ensure that the OLR does not become an unjustified form of preventive detention.⁶

We outline our views below, in the section outlining our concerns, as to whether usage indicates that this risk has materialised.

- Rehabilitation

ECtHR caselaw demonstrates that the purpose of indeterminate sentences must be, at least in part, the rehabilitation of the offender. For example, the ECtHR has observed that;

"[A] real opportunity for rehabilitation is a necessary element of any part of the detention which is to be solely justified by public protection."⁷

Cases concerning indeterminate sentences and rehabilitation in the ECtHR, and in the domestic courts in Scotland, have usually centred on access to rehabilitative courses. In cases where there have been significant delays to accessing rehabilitative courses, which has prevented the prisoner from demonstrating a reduced risk level, and consequently prevented the prospect of their release, the Courts have found this violates prisoner's right to liberty.

In terms of the OLR specifically, in the case of *BS v Scottish Ministers* the Court found that an OLR prisoner who required a specific offending behaviour course, who had waited twenty months to access it and would likely have to wait a further twelve, had suffered a breach of his right to liberty.⁸ The Court noted that there is a high bar for a finding of a breach of this nature, but in situations where there has been no opportunity for a prisoner to demonstrate their reduced risk level for an extended period, their detention would be arbitrary. This would amount to a violation of the right to liberty:

"Without access to that [offending behaviour] course, and without the wide range of access to other rehabilitative coursework seen in decided cases, the petitioner's ability to demonstrate reduced risk to the parole board is so severely compromised that he has not been provided with a real opportunity of rehabilitation.... The stage has been reached at which his detention has become arbitrary in an Art 5(1) sense, until real opportunities for rehabilitation are provided to him."⁹

We outline our views below, in the section outlining our concerns, as to whether this issue has systemic implications.

Prohibition of inhuman and degrading treatment, and the right to psychological integrity (Articles 3 and 8 ECHR)

Article 3 ECHR prohibits torture and inhuman or degrading treatment. Although the threshold is high, it has been recognised that the psychological impact of certain treatment can reach the threshold which amounts to inhuman and degrading treatment, even where there is no physical injury to the victim. Article 3 is an absolute right, so any interference is a breach of the ECHR and cannot then be justified. An equivalent obligation exists under the ICCPR. The threshold for a breach takes into account the nature of the treatment, as well as the consequential effects on the victim, and the circumstances of the victim such as their age, health, vulnerabilities and gender.¹⁰ Therefore, circumstances which would not meet the minimum threshold for one victim may meet it for another.

If treatment does not meet the threshold of inhuman and degrading treatment, it can nevertheless be an interference with Article 8 ECHR, which protects, among other things, the right to psychological integrity. Article 8 is not absolute, so an interference with the right can be justified, if it is in accordance with the law, necessary and proportionate.

The psychological distress caused by the uncertainty of release on an OLR sentence, as discussed below, could result in breaches of Article 3 or Article 8 of the ECHR.

We outline below our views on further consideration of this question.

Non-discrimination

All rights must be protected in a manner which does not discriminate against any group. Where a right protected by the ECHR is engaged, Article 14 ECHR requires that every group of people must have the same ability to enjoy it, unless there is a justification. The right to be free from arbitrary detention under Article 5 is included in this. This means that the OLR sentence cannot be applied in a discriminatory manner, such as being imposed on people or preventing their progression based on their characteristics. This obligation is mirrored under the ICCPR.¹¹

International human rights standards

Indeterminate sentences have been subject to criticism from a variety of international human rights bodies, and experts.¹²

The Human Rights Committee, responsible for oversight of ICCPR, has noted in a General Comment on the right to liberty some of the requirements of indeterminate sentences:

"When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society." ¹³

From an international perspective therefore, the right to liberty requires a distinction between the conditions of detention for the purposes of safety, and those of detention intended as punishment for an individual. The Human Rights Committee has found violations of the right to liberty where prisoners were kept in the same prison and the same level of security and were imprisoned alongside others who were serving the punitive element of their sentence, in combination with an excessive period of preventative detention (15 years).¹⁴ They also found that the length of re-detention post-recall (13 years) of one of the prisoners was a violation of the Covenant, as post-recall detention is meant to be avoided and for the minimum term possible to facilitate safe re-release.

The United Nations Special Rapporteur on Torture, Alice Jill Edwards has expressed deep concern at the Imprisonment for Public Protection (IPP) sentence, an indeterminate sentence in England and Wales.

"I invite the new Government to reconsider a full or partial re-sentencing exercise of IPP-sentenced individuals as a matter of priority. The IPP sentencing scheme causes severe distress, fear, depression and anxiety, including for families, and may result in physical and psychological damage, including incidents of self-harm, suicide attempts and suicides."¹⁵

The IPP sentence was abolished in 2012 due to extensive criticism and reforms have taken place to end lifetime supervision for some prisoners. There are a few formal distinctions between an OLR and an IPP which in theory distinguish the two. The first is that IPP (initially) was a mandatory sentence for certain repeat offenders.

This is distinct from the OLR and the ECtHR in *James, Wells and Lee v The United Kingdom*,¹⁶ noted that this increases the risk of arbitrary detention. Linked to this, the OLR requires a risk assessment in order to be granted, which IPPs did not. The third meaningful distinction is that IPP prisoners had ten year (reduced to three year) sunset clauses on their licences, in comparison with the perpetual licenses for OLR prisoners. This safeguard against arbitrary detention or recall is absent from the OLR regime.

While the differences between OLRs and IPPs must be given due consideration, especially when applying ECtHR cases, both have the fundamental character of an indeterminate sentence. The concerns raised by the Special Rapporteur have a clear overlap with OLRs, especially in terms of outcomes for individuals.

The IPP has been mentioned in many coroners reports as a directly contributing factor in the suicides of several individuals serving the sentence.¹⁷ There may be evidence of similarly concerning outcomes in relation to OLRs in Scotland. It is noted in Fatal Accident Inquiries that individuals who have committed suicide were serving OLR sentences.¹⁸

OLRs in practice

Usage and Statistics

According to the RMA's 2023-24 annual report, there are 249 active OLR sentences, of which 193 have completed the punishment part of their sentence. Of these 193 individuals, 178 remain in prison (10 in open prisons), 5 are in NHS care settings and 10 are in the community.

This means that 92% of OLR prisoners remain in prison beyond the punitive element of their sentence.

2023-24 saw 18 new OLRs imposed, to reach the total of 249 active OLR sentences. 5 individuals subject to an OLR died, and one was deported. Of the new OLRs, 2 were made against 21–25-year-olds and a further 2 against 25-30-year-olds. The majority of OLRs were imposed on over 40s, who accounted for 12 out of the 18.¹⁹

Disaggregated data on the characteristics of those subject to OLRs is not publicly available at present. However, the RMA will be publishing data on certain specific characteristics of the population such as learning and communication needs, and physical & mental health issues, in the course of 2025-2026. The collection of disaggregated data is a pre-requisite for ensuring compliance with non-discrimination obligations across various human rights treaties.

Experiences of offenders

In 2023 the RMA published a paper looking at the experiences of individuals serving OLRs, who had experience of being reintegrated into the community.²⁰ The report found that the individuals on OLRs felt that:

- they had limited access to programmes and support in prison,
- the goalposts for their release were constantly shifting,
- asking for help or admitting they were struggling would be used punitively against them as evidence that they were not making progress, and
- while the support from professionals in the community was helpful, the intensity of licence conditions combined with the looming and permanent threat of recall made reintegration difficult.

While the study was limited in scope, it demonstrates the hopeless feelings of individuals on OLRs.

The study aligns with the feelings expressed by OLR prisoners in letters to the SHRC. We have encountered cases where individuals remain in prison where their punishment parts expired between seven and sixteen years ago with no release in sight. We have heard about the mental distress caused to those serving the sentence, who describe feeling utter hopelessness.

Issues with progression

Other relevant information as to the experiences of OLR prisoners comes from a Thematic Review of Prisoner Progression carried out by HM Inspectorate of Prisons for Scotland. While this report was not focused on OLR prisoners specifically, progression and rehabilitation are key parts of the OLR sentence and are essential for human rights compliance.

This Review found that there is not an up-to-date strategic approach to case management and progression, and processes are disparate across different units and prisons. Additionally, there is a lack of knowledge as to the process of progression across frontline staff.²¹ Prisoners perceived a lack of interest from staff and frustration at long waiting lists to access offending behaviour programmes.²²

Specific insights which affect OLR prisoners include delays in accessing National Top End (NTE) facilities, which facilitate greater independence and access to the community. Both NTEs are at capacity and tend to hold individuals coming to the end of long-term determinate sentences in the build-up to release. Once in NTEs,

there can be delays in accessing special escorted leave, preventing OLR prisoners from demonstrating a reduction in risk level.²³ It is also 'difficult' to progress OLR prisoners from the NTEs to the next stage - the Open Estate. The Open Estate – operates at only 60% capacity.²⁴

Views of victims

Victim Support Scotland promotes the rights and wellbeing of victims of crime. They have highlighted the following points in relation to OLRs:

"OLRs are essential for victim and public protection. People affected by crime must be put at the forefront of any decision to release a perpetrator on an order of lifelong restriction, and their safety must be paramount.

If a perpetrator who has been given an OLR is released into the community, we strongly encourage professionals to complete robust risk assessments to ensure a victim's safety is not compromised.

Perpetrators released into the community who have an OLR must be monitored closely, with recall to prison always an option if they do not complete all of the conditions related to their release into the community.

We encourage professionals to closely monitor any individual on an OLR who is released into the community, that risk assessments are completed, and re-offending against any member of the public is extremely minimised."²⁵

Our concerns

In considering the human rights standards outlined above compared with current experiences of OLRs in practice, we are concerned that some OLR prisoners are at risk of experiencing violations of their rights under Articles 5 and 8, and possibly 3, of the ECHR. Scotland is not meeting its international human rights obligations under ICCPR.

The SHRC is concerned that the risk of unjustified preventive detention identified by Lord Drummond Young may have materialised.

The particular issues facing OLR prisoners in accessing necessary progression indicate that there are systemic issues which undermine the operation of OLRs as they were intended. The SHRC is concerned that, based on the HMIPS Review of Progression, the cases which have come before the domestic courts, and the correspondence we have received on this issue, that the human rights of OLR prisoners are at risk. OLRs may, in more than isolated cases, be operating in such a

manner that the detention of many individuals held on them is at risk of being unjustified, and therefore in breach of ECHR rights.

The progression report, combined with the observations of OLR prisoners in the RMA's Initial Insights paper, and the correspondence we have received suggests that many OLR prisoners are not able to access the rehabilitative courses required to demonstrate a reduction in their risk level which is a precondition of their release. It is likely that many OLR prisoners will have faced extended delay, which could render their detention arbitrary.²⁶ We know that 92% of OLR prisoners remain in prison after having served their punishment part. This raises questions as to whether the integral community element envisaged by the Maclean Committee is being realised in practice. In addition, this is failing to achieve a distinction between the conditions of punitive and preventative detention as required by Article 9 ICCPR.

In particular, it is striking that there is no mechanism for the review of whether an OLR continues to be necessary. Given that some OLRs are imposed for people in their early twenties, this raises questions as to whether there may come a point where an OLR is no longer the most proportionate means of managing the risk presented by the individual.

It is also clear from comparisons with the IPP sentence in England & Wales, commentary by the UN Special Rapporteur on Torture and evidence of the lived experience of OLR prisoners, that both those in custody and in the community face significant mental distress at the prospect of never being released from prison, or being recalled for minor infractions of license conditions. At least one OLR prisoner has died by suicide in custody after having a negative decision from the Parole Board.²⁷ We believe serious consideration must be given to the potential for mental distress which could infringe upon some OLR prisoners' Article 3, or Article 8 ECHR rights. If OLR sentences, by their nature, create mental distress that meets the Article 3 threshold, consideration ought to be given to whether their ongoing use is unacceptable, as has been the case in England & Wales. Alternatively, it may be that OLR practice and progression can be improved across the system in order to address this risk.

The SHRC is concerned that the OLR may disproportionately impact people with autism and neurodivergence. Further research is needed to determine whether autistic or neurodivergent individuals are more likely to receive the sentence, or whether when serving an OLR, autistic or neurodivergent individuals are less likely to progress to open conditions and release on licence.

Conclusion and matters for consideration

Having assessed the operation of OLRs with the assistance of the human rights framework, it appears to the SHRC that the operation of OLRs, in particular delays to rehabilitation and a lack of distinction between conditions of preventative and punitive detention, is very likely to lead to human rights breaches.

The existence of the sentence at all, at least without a review mechanism to ensure continued proportionality, may incur consequences serious enough to breach the prohibition on inhuman and degrading treatment or the right to private and family life.

There is also a clear need for further consideration of disproportionate impacts on autistic/neurodivergent groups.

Given the seriousness of the human rights at stake and the potential for human rights violations, the SHRC recommends detailed consideration by the Scottish Government and Scottish Parliament of the administration of OLRs in Scotland. We will share this paper with the Scottish Government and with the Criminal Justice Committee of the Scottish Parliament to inform that consideration. OLRs impact not only on the offender but also on victims in the community whose protection is currently assured by imprisonment. Their perspectives should be taken into account alongside the perspectives of those with lived experience of OLRs.

Any alternatives or amendments must ensure greater human rights compliance, ensuring that they are not replaced with less proportionate alternatives. The OLR does, at least, have some prospect for release from prison, as opposed to an indeterminate sentence with no prospect of release into the community.

We recommend consideration of the following questions in particular:

Are there sufficient safeguards in place to ensure that OLRs do not, in individual cases and systemically, become a form of arbitrary detention where continued imprisonment is no longer justified? For example, should a mechanism for review of whether an OLR is no longer justified be introduced?

Is there evidence that OLRs are working as intended by the Maclean Report whereby time in the community is an integral part of the sentence?

What are the characteristics of those subject to OLRs, and do they disproportionately affect certain groups, for example neurodivergent people or people with intellectual disabilities?

Endnotes

- ¹ Report of the Committee on Serious Violent and Sexual Offenders (Maclean Report) June 2000 p34. available at [The Maclean Report](#).
- ² Report of the Committee on Serious Violent and Sexual Offenders (Maclean Report) June 2000p2.
- ³ CP(S)A 1995 s210E
- ⁴ For example, M. v. Germany, no. 19359/04, § 89, ECHR 2009
- ⁵ James, Wells and Lee v The United Kingdom, §§191-195, (25119/09) and 2 others, 18 September 2012.
- ⁶ Ferguson v HM Advocate 2014 HCJAC 19, the Lord Drummond Young at Para 135.
- ⁷ James, Wells and Lee v The United Kingdom, § 209.
- ⁸ BS v Scottish Ministers [2024] CSOH 47.
- ⁹ BS v Scottish Ministers [2024] CSOH 47 at para 46.
- ¹⁰ Muršić v. Croatia [GC], 2016, § 97 ECHR.
- ¹¹ "Arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is also in principle arbitrary" UN Human Rights Committee (CCPR) General Comment no. 35 (2014): Article 9: Liberty and Security of Person, Para 17.
- ¹² See, for instance, Recommendation Rec(2003) 22 of the Council of Europe Committee of Ministers, and the Council of Europe Committee for the Prevention of Torture (CPT) Report of the CPT's visit to Switzerland of 10-20 October 2011 (25 October 2012, CPT/Inf (2012) 26).
- ¹³ UN Human Rights Committee (CCPR) General Comment no. 35 (2014): Article 9: Liberty and Security of Person, Para 21.
- ¹⁴ Communication 2502/2014 (Miller and Carol v NZ), available at [Jurisprudence Database \(ohchr.org\)](#)
- ¹⁵ [UN expert urges UK Government to prioritise the review of indefinite prison sentences | OHCHR](#)
- ¹⁶ James, Wells and Lee v The United Kingdom §189
- ¹⁷ For example see [Haydar Jefferies: Prevention of Future Deaths Report - Courts and Tribunals Judiciary](#) December 2024, and [Sean Davies: Prevention of Future Deaths Report - Courts and Tribunals Judiciary](#) August 2024.
- ¹⁸ For Example, Fatal Accident Inquiry into the death of Gary Gallacher, [SHERIFFDOM OF SHERIFF COURT](#).
- ¹⁹ RMA annual report p24.
- ²⁰ [Initial Insights into Experiences of Release, Community Reintegration and Recall for Individuals on the Order for Lifelong Restriction \(rma.scot\)](#)

²¹ Review of Prisoner Progression, p11.

²² Review of Prisoner Progression, p12.

²³ Review of Prisoner Progression, p47.

²⁴ Review of Prisoner Progression, p13.

²⁵ Victim Support Scotland ['Comment on new Risk Management Authority report'](#) 6 July 2023

²⁶ as demonstrated by the case of BS v Scottish Ministers [2024] CSOH 47

²⁷ See FAI into the Death of Gary Gallacher available at; [SHERIFFDOM OF SHERIFF COURT](#).