



# Convention Rights (Compliance) (Scotland) Act 2001 2001 asp 7

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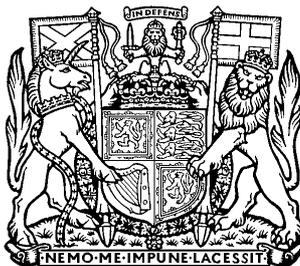
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# Convention Rights (Compliance) (Scotland) Act 2001 2001 asp 7

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 30th May 2001 and received Royal Assent on 5th July 2001**

An Act of the Scottish Parliament to amend certain enactments relating to the sentencing and release of life prisoners, the constitution and powers of the Parole Board, legal advice and assistance and legal aid, homosexual offences and the appointment and removal of the procurator fiscal of the Lyon Court which are or may be incompatible with the European Convention on Human Rights; and to enable further changes in the law where it is or may be incompatible with the Convention.

## PART 1

### PRISONERS AND PAROLE

#### **1 Release of life prisoners**

- (1) The Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9) (in this Act, “the 1993 Act”) is amended as follows.
- (2) In section 1 (release of short-term, long-term and life prisoners), subsections (4) to (7) are repealed.
- (3) In section 2 (duty to release discretionary life prisoners)—
  - (a) in subsection (1)—
    - (i) the word “designated” is repealed;
    - (ii) after paragraph (a) there is inserted, “or
      - (aa) sentenced to life imprisonment for murder or for any other offence for which that sentence is the sentence fixed by law;”;and
    - (iii) paragraph (c) and the word “or” immediately preceding it are repealed;
  - (b) in subsection (2)—
    - (i) the word “designated” where it first occurs is repealed;
    - (ii) for “the designated part” there is substituted “the punishment part”;

- (iii) after “appropriate” where it first occurs there is inserted “to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public);”;
- (iv) for “associated with it” there is substituted “of which the life prisoner is convicted on the same indictment as that offence”;
- (v) after paragraph (a) there is inserted—
  - “(aa) in the case of a life prisoner to whom paragraph (a) of subsection (1) above applies—
    - (i) the period of imprisonment, if any, which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life for it;
    - (ii) the part of that period of imprisonment which the court considers would satisfy the requirements of retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public); and
    - (iii) the proportion of the part mentioned in sub-paragraph (ii) above which a prisoner sentenced to it would or might serve before being released, whether unconditionally or on licence, under section 1 of this Act;”;
  - (vi) in paragraph (b), the word “designated” is repealed;
- (c) for subsection (3) there is substituted—
  - “(3) A court which imposes life imprisonment for an offence such as is mentioned in subsection (1) above shall make such order as is mentioned in subsection (2) above and such order shall constitute part of a person’s sentence within the meaning of the 1995 Act for the purposes of any appeal or review.
  - (3A) An order such as is mentioned in subsection (2) above—
    - (a) shall specify the period that the court considers appropriate under that subsection in years and months; and
    - (b) may specify any such period of years and months notwithstanding the likelihood that such a period will exceed the remainder of the prisoner’s natural life.”;
- (d) in subsection (4), the word “designated” is repealed;
- (e) after subsection (5) there is inserted—
  - “(5A) Where, on the disposal of any reference of a life prisoner’s case under section 28(4) of the 1989 Act, under subsection (5)(a) above, subsection (5C) or (6) below or section 17(3) of this Act or under paragraph 34, 38 or 42 of the schedule to the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7), the Parole Board declines to direct that the prisoner be released on licence, it shall—
    - (a) give the prisoner reasons in writing for the decision not to direct his release on licence; and

- (b) fix the date when it will next consider the prisoner's case under this section, being a date not later than two years after the date of its decision to decline to direct the release of the prisoner.
- (5B) The Scottish Ministers shall refer the case of a life prisoner to the Parole Board so as to enable it to consider the case on the date fixed by the Board under subsection (5A)(b) above.
- (5C) The Parole Board, at the request of a life prisoner in respect of whom it has, under subsection (5A)(b) above, fixed the date of the next consideration of his case, may direct the Scottish Ministers to refer that case to the Board before that date.”;
- (f) in subsection (6), the word “designated” and the words “at any time” are repealed;
- (g) after subsection (6) there is inserted—
  - “(6A) The Scottish Ministers shall not refer the case of a life prisoner to the Parole Board under subsection (6) above if—
    - (a) they have previously so referred his case to the Board under that subsection;
    - (b) they have referred his case to the Board without the prisoner requiring them to do so under that subsection; or
    - (c) the Parole Board has, on a reference to it under section 28(4) of the 1989 Act, under section 17(3) of this Act or under paragraph 34, 38 or 42 of the schedule to the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7), declined to direct that the prisoner be released on licence.”;
- (h) in subsection (7), paragraph (b) is repealed;
- (i) in subsection (8)—
  - (i) the word “designated” where it first occurs is repealed; and
  - (ii) for “designated” where it second occurs there is substituted “punishment”;and
- (j) in subsection (9)—
  - (i) paragraph (a) is repealed; and
  - (ii) in paragraph (b), for “designated” there is substituted “punishment”.
- (4) In section 6 (application of Part I of the Act to young offenders and to children detained without limit of time), subsections (2) and (3) are repealed.
- (5) In section 17 (revocation of licence)—
  - (a) in subsection (2), the words from “and” to the end are repealed;
  - (b) in subsection (3), for paragraphs (a) and (b) there is substituted “a person recalled under subsection (1) above”; and
  - (c) after subsection (4) there is inserted—
    - “(4AA) Where the Parole Board directs the release of a prisoner under subsection (4) above it may recommend that the Scottish Ministers insert, vary or cancel conditions in the prisoner's licence.”.
- (6) In section 27 (interpretation), in subsection (1), the definition of “discretionary life prisoner” is repealed.

- (7) In Schedule 6 (transitional provisions and savings)—
- (a) in paragraph 6—
    - (i) in sub-paragraph (2), for “sections 1(4) and 2(9)” there is substituted “section 2(9)”;
    - (ii) in each of sub-paragraphs (2)(a) and (3)(a), the word “designated” is repealed; and
    - (iii) in each of sub-paragraphs (2)(b) and (3)(b), for “designated” there is substituted “punishment”; and
  - (b) in paragraph 6A(2)—
    - (i) the word “designated” where it first occurs is repealed; and
    - (ii) for “designated” where it second occurs there is substituted “punishment”.
- (8) In section 16 (designated life prisoners) of the Crime and Punishment (Scotland) Act 1997 (c.48)—
- (a) in subsection (3)—
    - (i) for “sections 1(4) and 2(9)” there is substituted “section 2(9)”;
    - (ii) in paragraph (a), the word “designated” is repealed; and
    - (iii) in paragraph (b), for “designated” there is substituted “punishment”; and
  - (b) in subsection (4)—
    - (i) in paragraph (a), the word “designated” is repealed; and
    - (ii) in paragraph (b), for “designated” there is substituted “punishment”.

## 2 Amendment of Criminal Procedure (Scotland) Act 1995

- (1) In section 205 (punishment for murder) of the Criminal Procedure (Scotland) Act 1995 (c.46) (in this Act, “the 1995 Act”)—
- (a) in subsection (1), after “subsections (2) and (3)” there is inserted “and section 205D”; and
  - (b) subsections (4) to (6) are repealed.
- (2) After section 205 of the 1995 Act there is inserted—
- “205D Only one sentence of imprisonment for life to be imposed in any proceedings**
- Where a person is convicted on the same indictment of more than one offence for which the court must impose or would, apart from this section, have imposed a sentence of imprisonment for life, only one such sentence shall be imposed in respect of those offences.”.

## 3 Amendment of provisions relating to transferred life prisoners

- (1) In section 10 (life prisoners transferred to Scotland) of the 1993 Act—
- (a) for subsection (1) there is substituted—

“(1) This Part of this Act, except section 2(9), shall apply to a transferred life prisoner (whether transferred before or after the commencement of this enactment or section 3 of the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7)) who is a life prisoner—

(a) transferred from England and Wales and to whom—

(i) section 28(1)(a) (duty to release certain life prisoners) of the Crime (Sentences) Act 1997 (c.43) (in this section, “the 1997 Act”) applies and in respect of whom the court has made an order under section 28(2)(b) of that Act; or

(ii) section 82A (determination of tariffs) of the Powers of Criminal Courts (Sentencing) Act 2000 (c.6) (in this section, “the 2000 Act”) applies and in respect of whom the court has made an order under section 82A(2) of that Act;

(b) transferred from the Isle of Man and to whom paragraph 4(1) (discretionary life detainees) of Schedule 2 to the Custody Act 1995 (c.1) applies (that Act being an Act of the Tynwald of the Isle of Man to re-enact with amendments certain enactments relating to the custody of offenders and others; to make fresh provision for such custody; and for connected purposes: in this section “the Isle of Man Custody Act”); or

(c) transferred from Northern Ireland and to whom a provision such as is mentioned in subsection (1A) below applies,

as if the prisoner were a life prisoner within the meaning of section 2 of this Act and the punishment part of his sentence within the meaning of that section were the relevant part specified in an order made under the said section 28(2)(b) or 82A(2) or paragraph 4(1) or made under a provision such as is mentioned in subsection (1A) below, as the case may be.

(1A) The provision referred to in paragraph (c) of subsection (1) above is—

(a) a provision made by Order in Council under section 85 (provisions dealing with certain reserved matters) of the Northern Ireland Act 1998 (c.47), where that provision is to the effect that a court in Northern Ireland sentencing a person to imprisonment for life may make an order that early release provisions shall apply to the person as soon as he has served the part of his sentence specified in the order; or

(b) any provision to that effect, including one made as described in paragraph (a) above, identified by the Scottish Ministers by order made by statutory instrument.”;

(b) for subsection (2) there is substituted the following—

“(2) In the case of any other transferred life prisoner, being one whose transfer occurred after the coming into force of section 3 of the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7), subsection (3) below applies where the court, following a hearing under subsection (2J) below, makes an order under that subsection specifying a part of the sentence which the court considers would have been specified as the punishment part under subsection (2) of section 2 of this Act if—

(a) the prisoner had been sentenced for the offence in Scotland; and

- (b) that section (as amended by section 3 of the Convention Rights (Compliance) (Scotland) Act 2001) had been in force at the time when the prisoner was sentenced.
- (2A) The Scottish Ministers shall, as soon as reasonably practicable after the transferred life prisoner is transferred to Scotland, refer the case of the transferred life prisoner to the High Court of Justiciary for a hearing under subsection (2J) below.
- (2B) The Scottish Ministers shall not so refer the case of a transferred life prisoner if the prisoner—
- (a) has, under subsection (2C) below, waived the entitlement to such a hearing; or
  - (b) has served the part of the sentence specified in the certificate or direction referred to in subsection (2D) below.
- (2C) A transferred life prisoner in respect of whom a certificate or direction referred to in subsection (2D) below has been issued or made may waive the entitlement to a hearing under subsection (2J) below provided—
- (a) the prisoner has had independent legal advice or has declined such advice; and
  - (b) a copy in writing of the waiver is sent to the Scottish Ministers.
- (2D) The certificate or direction referred to in subsection (2B)(b) above is—
- (a) a certificate issued under—
    - (i) section 48 of or paragraph 9 of Schedule 12 to the Criminal Justice Act 1991 (c.53); or
    - (ii) section 33 of the 1997 Act;
  - (b) a direction of the Secretary of State made under—
    - (i) section 28(4) of the 1997 Act; or
    - (ii) section 82A(5) of the 2000 Act; or
  - (c) such other certificate or direction as the Scottish Ministers may, by order made by statutory instrument, specify.
- (2E) Notwithstanding subsection (2A) above, a transferred life prisoner—
- (a) who has not, under subsection (2C) above, waived the entitlement to a hearing; or
  - (b) who has not served the part of the sentence specified in the certificate or direction referred to in subsection (2D) above issued in respect of that prisoner,
- may, after his transfer to Scotland, refer his case for a hearing under subsection (2J) below.
- (2F) The Scottish Ministers shall, no later than two weeks after the referral of a transferred life prisoner's case under subsection (2A) or (2E) above, send the documents and other information mentioned in subsection (2G) below to—
- (a) the High Court of Justiciary;
  - (b) the Lord Advocate; and

- (c) the transferred life prisoner.
- (2G) The documents and other information referred to in subsection (2F) above are—
- (a) a copy of the indictment or any corresponding document;
  - (b) subject to subsection (2H) below, a copy of any report by the trial judge;
  - (c) a copy of any certificate or direction referred to in subsection (2D) above; and
  - (d) any other documents or information which the Scottish Ministers consider relevant.
- (2H) A report prepared by the trial judge—
- (a) may be sent under subsection (2F) above notwithstanding that it was prepared on the basis that it would not be disclosed to the transferred life prisoner; and
  - (b) shall be so sent for the purposes only of the hearing under subsection (2J) below.
- (2J) There shall be a hearing at which the High Court of Justiciary shall make the order referred to in subsection (2K) below.
- (2K) That order is an order specifying a part of the sentence which the court considers would have been specified as the punishment part under subsection (2) of section 2 of this Act, if—
- (a) the prisoner had been sentenced for the offence in Scotland; and
  - (b) that section (as amended by the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7)) had been in force at the time when the prisoner was sentenced.
- (2L) The court, in considering the case of a transferred life prisoner—
- (a) who is serving more than one sentence of imprisonment for life; and
  - (b) two or more of whose life sentences were imposed in proceedings on a single indictment,
- shall, in making the order under subsection (2J) above, proceed as if the prisoner had been sentenced in Scotland and section 205D (only one sentence of imprisonment for life to be imposed in any proceedings) of the 1995 Act had been in force at the time the prisoner was sentenced.
- (2M) Such a transferred life prisoner who, before being transferred to Scotland, had been released on licence, otherwise than on compassionate grounds, shall be deemed to have been released on licence under section 2(4) of this Act as if the transferred life prisoner had been a life prisoner to whom that section applied and who had served the punishment part of his sentence.
- (2N) The reference in this section to a transferred life prisoner's release on compassionate grounds has the same meaning as that reference has in section 10A of this Act.
- (2P) The court shall pronounce the order under subsection (2J) above in open court.

- (2Q) If the court is satisfied that the transferred life prisoner is incapable of properly instructing a solicitor in relation to the hearing under subsection (2J) above, whether or not the prisoner has so instructed a solicitor, it shall not make the order under that subsection.
- (2R) If the Scottish Ministers are satisfied that the prisoner is no longer incapable of instructing a solicitor in relation to the hearing under subsection (2J) above, they shall, as soon as reasonably practicable thereafter, refer the case of the prisoner to the court for such a hearing.
- (2S) In this section—
- “incapable” means incapable by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and
- “mental disorder” has the same meaning as it has in section 87 of the Adults with Incapacity (Scotland) Act 2000 (asp 4).
- (2T) Nothing in this section shall be taken as preventing a prisoner, in respect of whom the court declined, under subsection (2Q) above, to make the order under subsection (2J) above, from again referring his case for a hearing under subsection (2J) above.
- (2U) A hearing under subsection (2J) above shall be criminal procedure for the purposes of section 305 of the 1995 Act (power of High Court of Justiciary to regulate criminal procedure by Act of Adjournal).”;
- (c) in subsection (3)—
- (i) for “sections 1(4) and 2(9)” there is substituted “section 2(9)”;
- (ii) in paragraph (a), the word “designated” is repealed; and
- (iii) in paragraph (b), for “designated” there is substituted “punishment” and for the word “certificate” there is substituted “order under subsection (2J) above”;
- (d) in subsection (4), in paragraph (b)—
- (i) in sub-paragraph (i), after “1997” there is inserted “, other than an order for a restricted transfer within the meaning of paragraph 6(1) of that Schedule to that Act,”; and
- (ii) after sub-paragraph (i) there is inserted—
- “(ia) a decision of the Secretary of State under section 80 (removal of patients to Scotland) of the Mental Health Act 1983 (c.20) authorising the prisoner’s removal to Scotland from England and Wales; or
- (ib) a decision of the responsible authority under section 81 (removal to Scotland of patients from Northern Ireland) of the Mental Health (Scotland) Act 1984 (c.36) authorising the prisoner’s removal to Scotland from Northern Ireland; or”;
- (e) in subsection (5)—
- (i) in paragraph (a), the word “designated” is repealed; and
- (ii) in paragraph (b)—

- (A) for “28” there is substituted “28(2)”;
- (B) after “1997” there is inserted “section 82A(2) of the Powers of Criminal Courts (Sentencing) Act 2000 (c.6), paragraph 4(1) of Schedule 2 to the Isle of Man Custody Act or under a provision such as is mentioned in subsection (1A) above relating to Northern Ireland”; and
- (C) for “certificate under subsection (2)” there is substituted “order under subsection (2J)” and for “relevant” there is substituted “punishment”.

(2) After section 10 of the 1993 Act there is inserted—

**“10A Transfer of supervision of life prisoners**

- (1) This section applies to a life prisoner released on licence in respect of whom, whether before or after the coming into force of section 3 of the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7), an order was made under paragraph 4 of Schedule 1 to the Crime (Sentences) Act 1997 (c.43) transferring responsibility for his supervision to the Scottish Ministers and ordering that the supervision or, as the case may be, the remainder of it be undergone in Scotland, that order being an unrestricted transfer within the meaning of paragraph 6(1) of that Schedule.
- (2) This Part of this Act—
  - (a) shall apply to such a life prisoner, except one released on compassionate grounds, as if that prisoner had served the punishment part of his life sentence and had been released on licence under section 2(4) of this Act;
  - (b) shall apply to such a life prisoner released on compassionate grounds as if that prisoner had been released on licence under section 3 of this Act.
- (3) If, in the case of such a life prisoner released on compassionate grounds—
  - (a) the Scottish Ministers revoke that life prisoner’s licence and recall him to prison under section 17(1) of this Act; and
  - (b) the Parole Board does not, under section 17(4) of this Act, direct that he be immediately released on licence,section 10 of this Act shall apply to the life prisoner as it applies to a transferred life prisoner within the meaning of section 10 whose transfer occurred after the coming into force of section 3 of the Convention Rights (Compliance) (Scotland) Act 2001.
- (4) References in this section to a life prisoner’s release on compassionate grounds are references to his release under section 30 of the 1997 Act or under equivalent provision made for Northern Ireland such as is mentioned in subsection (5) below.
- (5) The provision referred to in subsection (4) above is—
  - (a) a provision made by Order in Council under section 85 (provisions dealing with certain reserved matters) of the Northern Ireland Act 1998 (c.47) governing the release of life prisoners on compassionate grounds; or
  - (b) any provision to that effect, including one made as described in paragraph (a) above, identified by the Scottish Ministers by order made by statutory instrument.”

- (3) Paragraph 7 of Schedule 6 to the 1993 Act is repealed.

#### **4 Transitional provisions**

Parts 1 to 5 of the schedule to this Act have effect for the purpose of making transitional provision in connection with sections 1 to 3 above.

### **PART 2**

#### CONSTITUTION OF PAROLE BOARD FOR SCOTLAND

#### **5 Appointment and removal of Parole Board members**

- (1) In section 20 (the Parole Board for Scotland) of the 1993 Act—
- (a) in subsection (1) the words “this Part of” are repealed;
  - (b) in subsection (4), after paragraph (b) there is inserted—
    - “(ba) enabling the Board to require any person, other than a prisoner whose case the Board is considering, to attend a hearing before it to give evidence or to produce documents;” ;and
  - (c) after subsection (4) there is inserted—
    - “(4A) In making provision such as is mentioned in subsection (4)(ba) above, the Scottish Ministers may apply subsections (4) and (5) of section 210 of the Local Government (Scotland) Act 1973 (c.65) with such modifications as may be set out in the rules but subject to the limitation that any penalty under subsection (5) of section 210 as so applied shall be restricted to a fine which shall not exceed level 2 on the standard scale.”.
- (2) After paragraph 1 of Schedule 2 to that Act, there is inserted—
- “1A In making those appointments, the Scottish Ministers shall comply with such requirements as to procedure and consultation as may be prescribed in regulations made by them.
  - 1B In making regulations under paragraph 1A above, the Scottish Ministers may make different provision for different kinds of members of the Board, including the kinds of members having the respective qualifications for office specified in paragraph 2 below.”.
- (3) After paragraph 2 of that Schedule, there is inserted—
- “Limitation, termination etc. of appointment of members*
- 2A An appointment as a member of the Parole Board shall, subject to paragraphs 2B to 2D below, last for such period, being not shorter than six years nor longer than seven years, as is specified in the instrument of appointment.
  - 2B A member of the Parole Board may resign at any time by giving notice to that effect to the Scottish Ministers.
  - 2C An appointment of a person as a member of the Parole Board shall not extend beyond the day when the person reaches the age of 75.
  - 2D The appointment of a member of the Parole Board shall come to an end upon the member’s being removed from office under paragraph 3 below.
  - 2E A person may be reappointed to be a member of the Parole Board but only if—

- (a) three years or more have passed since the person ceased to be a member of the Parole Board; and
  - (b) the person has not previously been reappointed under this paragraph.
- 2F A person whose membership of the Parole Board came to an end by resignation under paragraph 2B above may be reappointed under paragraph 2E above.
- 2G A person whose membership of the Parole Board came to an end on removal from office under paragraph 3 below shall not be reappointed.
- 2H The provisions of paragraphs 1 to 2D above apply to a reappointment under paragraph 2E above as they apply to an appointment.

*Performance of duties*

- 2J The Chairman of the Parole Board shall have regard to the desirability of securing that every member of the Parole Board is given the opportunity of participating appropriately in the functions of the Board under this Act on not fewer than 20 days in each successive period of 12 months beginning with the day of the member's appointment as such.”.

- (4) For paragraph 3 of that Schedule, there is substituted—

*“Removal of members from office*

- 3 A member of the Parole Board may be removed from office by and only by order of the tribunal constituted by and under paragraph 3B below (“the tribunal”).
- 3A The tribunal may order the removal from office of a member only if, after investigation carried out at the request of the Scottish Ministers, it finds that the member is unfit for office by reason of inability, neglect of duty or misbehaviour.
- 3B The tribunal shall consist of the following three members, who shall be appointed by the Lord President of the Court of Session—
- (a) either a Senator of the College of Justice or a sheriff principal (who shall preside);
  - (b) a person who is, and has been for at least ten years, legally qualified; and
  - (c) one other person who shall not be legally qualified.
- 3C For the purposes of paragraph 3B above, a person is legally qualified if that person is an advocate or a solicitor.
- 3D Regulations, made by the Scottish Ministers—
- (a) may make provision enabling the tribunal, at any time during an investigation, to suspend a member from office and providing as to the effect and duration of such suspension; and
  - (b) shall make such further provision as respects the tribunal as the Scottish Ministers consider necessary or expedient, including provision for the procedure to be followed by and before it.”.

- (5) After paragraph 6 of that Schedule there is inserted—

*“Regulations*

- 6A Regulations under paragraphs 1A and 3D above shall be made by statutory instrument.
- 6B No such regulations shall be made unless laid in draft before, and approved by resolution of, the Scottish Parliament.”.
- (6) Part 6 of the schedule to this Act has effect for the purpose of making transitional provision in connection with this section.

**PART 3**

LEGAL AID

**6 Extension of advice and assistance and civil legal aid under Legal Aid (Scotland) Act 1986**

- (1) In section 6(2) (definitions for purposes of Part II – advice and assistance) of the Legal Aid (Scotland) Act 1986 (c.47) (the “1986 Act”) after the definition of “tribunal” there is added—
- “and references to a court, tribunal or statutory inquiry include references to any court, tribunal or statutory inquiry which is established by law for purposes which are or include those of determining persons’ civil rights and obligations and to any person who or group of persons or body or procedure which (however described) is appointed or established by law for such purposes.”.
- (2) In section 13 (meaning of “civil legal aid”) of the 1986 Act—
- (a) subsection (5) is repealed; and
- (b) at the end there is added—
- “(6) In subsection (4) above, the reference to a court or tribunal includes a reference to a court or tribunal which is established by law for purposes which are or include those of determining persons’ civil rights and obligations and to any person who or group of persons, body, statutory inquiry or other procedure which (however described) is appointed or established by law for such purposes.”.
- (3) In section 14 (availability of civil legal aid) of the 1986 Act, after subsection (1), there is inserted—
- “(1A) In the case of proceedings in such courts or tribunals as may be specified in regulations under this Act, civil legal aid shall be available to a person only if, in addition to the requirements which have to be met under subsection (1) above and section 15 of this Act, such criteria as may be prescribed in those regulations are met.
- (1B) In subsection (1A) above, the reference to courts or tribunals shall be construed in accordance with section 13(6) of this Act.”.
- (4) In section 16 (which includes provision that, in sections 17 to 20, “court” includes tribunal) of the 1986 Act, in subsection (2), at the end of the definition of “court”, there is added “and references to either shall be construed in accordance with section 13(6) of this Act”.

- (5) In section 38 (which, amongst other things, enables the Court of Session to regulate the procedure of the civil courts in relation to legal aid) of the 1986 Act, after subsection (1), there is inserted—

“(1A) In subsection (1)(a) above, the reference to any court or tribunal shall be construed, except in relation to criminal proceedings, in accordance with section 13(6) of this Act.”.

## **7 Fixed payments for criminal legal assistance: exceptional cases**

In section 33 of the 1986 Act, after subsection (3B) (which provides that where fixed payments to solicitors for criminal legal assistance are prescribed, a solicitor providing it is not entitled to any other legal aid payment), there is inserted—

“(3C) The Scottish Ministers may, however, for the purpose of enabling the Board to ensure that a person to whom fixed payment criminal legal assistance is provided is not, for the reason specified in subsection (3D) below, deprived of the right to a fair trial, by regulations under this subsection, provide that—

- (a) in such circumstances; and
- (b) under such conditions,

as may be prescribed by the regulations, a solicitor who provides such criminal legal assistance shall, instead of receiving fixed payments, be paid out of the Fund in accordance with regulations made under subsections (2) and (3) above.

(3D) The reason referred to in subsection (3C) above is the amount of the fixed payments payable for the criminal legal assistance provided.

(3E) In subsection (3C) above—

“fixed payment criminal legal assistance” means criminal legal assistance in respect of which fixed payments are prescribed under subsection (3A) above;

“fixed payments” means fixed payments so prescribed.

(3F) Regulations made under subsection (3C) above shall provide that it is for the Board to determine whether any prescribed circumstances exist and whether any prescribed conditions are met.

(3G) Circumstances may be prescribed under subsection (3C)(a) above by reference to such factors as the Scottish Ministers think fit.

(3H) The conditions which may be prescribed under subsection (3C)(b) above include those which stipulate that a solicitor providing criminal legal assistance—

- (a) applies to the Board to exercise its power of determination under subsection (3F) above;
- (b) does so in such manner and form as the Board may specify and at as early a stage in the provision of the criminal legal assistance as is reasonably practicable; and
- (c) keeps proper records of all professional services provided by way of and outlays incurred in the provision of that criminal legal assistance, whether before or after the exercise of that power of determination.

(3J) Regulations may be made under subsection (3C) above so as to relate to criminal legal assistance provided in relation to proceedings commenced before and continuing as at the date of coming into force of section 7 of the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7), and regulations so relating may disapply any condition which would otherwise apply under subsection (3C)(b) above.

(3K) The Board shall establish a procedure under which any person—

- (a) whose solicitor's application under subsection (3H) above has been refused; or
- (b) on whose solicitor's application under that subsection the Board has made a determination which is such that the solicitor will not be paid out of the Fund in accordance with regulations made under subsections (2) and (3) above,

may apply to the Board for review of that refusal or determination.”.

## **8 Criminal legal assistance: retrospective revision of fixed payments regulations**

In section 33 of the 1986 Act, after subsection (3A) (prescription of fixed payments for criminal legal assistance), there is inserted—

“(3AA) Regulations amending or replacing regulations made under subsection (3A) above may, for the purpose specified in subsection (3AB) below, make provision as to fixed payments in relation to criminal legal assistance provided in relation to proceedings commenced before and continuing as at the date of the making or coming into force of the amendment or replacement of the regulations.

(3AB) The purpose referred to in subsection (3AA) above is that of ensuring that persons to whom fixed payment criminal legal assistance is being provided are not, by reason of the amount of the fixed payments payable in respect of that criminal legal assistance under the regulations as they have effect immediately before the coming into force of the amendment or replacement of the regulations, deprived of the right to a fair trial.

(3AC) In subsection (3AB) above “fixed payment criminal legal assistance” and “fixed payments” have respectively the meanings given by subsection (3E) below;”.

## **9 Employment of solicitors by Scottish Legal Aid Board: further provisions**

(1) In section 4 of the 1986 Act, in subsection (3), after paragraph (aa), there is inserted—

“(aaa) any award of expenses made by a criminal court to a person to whom criminal legal assistance has been provided by a solicitor employed by the Board under sections 26 and 27 of this Act;”.

(2) In section 11 (which includes provision about contributions by clients in respect of advice or assistance by solicitors employed by the Board) of the 1986 Act—

(a) in subsection (1), after “(2)” there is inserted “, (2A)”;

(b) after subsection (2) there is inserted—

“(2A) A client to whom paragraphs (a) and (b) of subsection (2) above apply and to whom criminal legal assistance or advice or assistance which is not criminal legal assistance has been provided by a solicitor employed by the Board under sections 26 and 27 of this Act shall pay to the Board such contribution in that respect as the Board may, subject to subsection (3A) below, determine.”; and

(c) after subsection (3) there is inserted—

“(3A) The amount determined by the Board under subsection (2A) above shall not exceed the amount which would be charged by a solicitor who is not employed by the Board under sections 26 and 27 of this Act.”.

(3) In section 12 of the 1986 Act, in subsection (2) (which provides that the rules in that section about the payment of solicitor’s fees etc. do not apply to the salary of a solicitor employed by the Board under section 28A), after “Board” there is inserted “under sections 26 and 27 of this Act or to the salary payable to a solicitor employed by the Board”.

(4) In section 25A (Criminal Legal Assistance Register) of the 1986 Act, after subsection (3) there is inserted—

“(3A) A solicitor employed by the Board under sections 26 and 27 of this Act to provide criminal legal assistance shall require to be registered, and the entry relating to his name on the Register shall include a note that he is so employed; but the Board shall not be regarded as a firm for the purposes of this section, and shall not itself require to be registered.”.

(5) In section 25B of the 1986 Act, in subsection (2) (which enables provision in the criminal legal assistance code of practice which is different for solicitors employed by the Board under section 28A from that for solicitors generally), after “including” there is inserted “in relation to solicitors employed by the Board under sections 26 and 27 of this Act to provide criminal legal assistance, different provision to reflect the fact that they are so employed and including”.

(6) In section 26 of the 1986 Act, in subsection (1), in paragraph (a) (which provides that the purposes for which solicitors may be employed by the Board include those of giving advice and assistance to which Part II of the Act applies), there is added at the end “either generally or in cases of any such description as may be prescribed by regulations made under this section”.

(7) In section 28A (feasibility study of provision of criminal legal assistance by solicitors employed by the Board) of the 1986 Act—

(a) in subsection (12) (provisions which cease to have effect five years after employed solicitors regulations come into effect)—

(i) in paragraph (c), for “but does not apply” there is substituted “or”; and

(ii) in paragraph (e), after “including” there is inserted “, where it second occurs,”; and

(b) at the end, there is inserted—

“(15) The power to bring sections 26 to 28 of this Act into force is not affected—

(a) by the provisions of this section; or

(b) by the fact that it is exercised before the expiry of the period of five years referred to in subsection (11) above.”.

- (8) In section 31 of the 1986 Act, in subsection (1A) (exceptions to provision entitling person receiving legal aid or advice and assistance to select a solicitor and counsel) there is added at the end “and does not apply where the person is being provided with criminal legal assistance by a solicitor employed by the Board under section 26 and 27 of this Act.”.

#### PART 4

##### HOMOSEXUAL OFFENCES

#### 10 **Repeal of section 13(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995**

In section 13 (homosexual offences) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)—

- (a) in subsection (2), paragraph (a) and the word “or” immediately following it are repealed; and
- (b) in subsection (5), in paragraph (b), for “both” there is substituted “the”.

#### PART 5

##### PROCURATOR FISCAL OF THE LYON COURT

#### 11 **Appointment of procurator fiscal of the Lyon Court**

- (1) The Lyon King of Arms Act 1867 (c.17) is amended as follows.
- (2) In section 9 (duties and fees of herald painter and procurator fiscal of Lyon Court)—
  - (a) the words—
    - (i) “and procurator fiscal of the Lyon Court”;
    - (ii) “respectively”; and
    - (iii) “or procurator fiscal”,
 are repealed; and
  - (b) for “and procurator fiscal aforesaid have” there is substituted “has”.
- (3) After section 9, there is inserted—

#### **“9A Appointment of procurator fiscal of the Lyon Court**

- (1) The procurator fiscal of the Lyon Court shall be a person who is legally qualified and shall be appointed by the Scottish Ministers on such terms and conditions as they determine.
- (2) For the purposes of subsection (1) above, a person is legally qualified if that person is an advocate or a solicitor.”.
- (4) The procurator fiscal of the Lyon Court holding office immediately before the coming into force of this section shall cease to hold that office on the day this Part of this Act comes into force.

## **PART 6**

### POWER TO MAKE REMEDIAL ORDERS

#### **12 Remedial orders**

- (1) In the circumstances set out in subsection (2) below, the Scottish Ministers may, by order (in this Part of this Act, a “remedial order”), make such provision as they consider necessary or expedient in consequence of—
  - (a) an Act of Parliament or an Act of the Scottish Parliament;
  - (b) any subordinate legislation made under any such Act;
  - (c) any provision of any such Act or subordinate legislation; or
  - (d) any exercise or purported exercise of functions by a member of the Scottish Executive,which is or may be incompatible with any of the Convention rights.
- (2) Those circumstances are that the Scottish Ministers are of the opinion that there are compelling reasons for making a remedial order as distinct from taking any other action.
- (3) A remedial order may—
  - (a) make different provision for different purposes;
  - (b) relate to—
    - (i) all cases to which the power to make it extends;
    - (ii) those cases subject to specified exceptions; or
    - (iii) any particular case or class of case;
  - (c) make—
    - (i) any supplementary, incidental or consequential provision; or
    - (ii) any transitory, transitional or saving provision,which the Scottish Ministers consider necessary or expedient;
  - (d) modify any enactment or prerogative instrument or any other instrument or document relating to the exercise or purported exercise of functions by the Scottish Ministers;
  - (e) make provision (other than provision creating criminal offences or increasing the punishment for criminal offences) which has retrospective effect;
  - (f) provide for the delegation of functions.
- (4) A remedial order shall not, however, create any criminal offence punishable—
  - (a) on summary conviction, with imprisonment for a period exceeding three months or with a fine exceeding the amount specified as level 5 on the standard scale;
  - (b) on conviction on indictment, with a period of imprisonment exceeding two years.
- (5) The conferring by subsection (1) above of the power to make remedial orders does not prejudice the extent of any other power.

#### **13 Procedure for remedial orders: general**

- (1) A remedial order shall be made by statutory instrument.

- (2) No remedial order shall be made unless laid in draft before and approved by resolution of the Scottish Parliament.
- (3) Before laying a draft remedial order for the purposes of subsection (2) above, the Scottish Ministers shall—
  - (a) lay a copy of the proposed draft order, together with a statement of their reasons for proposing to make the order, before the Scottish Parliament;
  - (b) give such public notice of the contents of the proposed draft order as they consider appropriate and invite persons wishing to make observations on the draft order to do so, in writing, within the period of 60 days beginning with the day on which that public notice was given or the day on which the draft order was laid under this subsection, whichever is earlier, or, if both those actions occurred on the same day, that day;
  - (c) have regard to any written observations submitted within that period.
- (4) When laying a draft remedial order for the purposes of subsection (2) above, the Scottish Ministers shall lay before the Scottish Parliament a statement—
  - (a) summarising all the observations to which they had to have regard under subsection (3)(c) above; and
  - (b) specifying the changes (if any) which they have made in the draft order and the reasons for them.
- (5) In reckoning, for the purposes of subsection (3)(b) above, any period of 60 days no account shall be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than four days.

#### **14 Procedure for remedial orders: urgent cases**

- (1) Where it appears to the Scottish Ministers that, for reasons of urgency, it is necessary to make a remedial order without following the procedure under section 13(2) to (4) above, they may do so.
- (2) After so making a remedial order, the Scottish Ministers shall forthwith—
  - (a) give such public notice of the contents of the order as they consider appropriate and invite persons wishing to make observations on the order to do so, in writing, within the period of 60 days beginning with the day on which it was made;
  - (b) lay the order, together with a statement of their reasons for having made it, before the Scottish Parliament.
- (3) The Scottish Ministers shall have regard to any written observations submitted within the period mentioned in subsection (2)(a) above.
- (4) As soon as practicable after the end of that period, the Scottish Ministers shall lay before the Scottish Parliament a statement—
  - (a) summarising all the observations to which they had to have regard under subsection (3) above; and
  - (b) specifying the modifications (if any) which they consider it appropriate to make to the remedial order.
- (5) If modifications have been specified under subsection (4)(b) above, the Scottish Ministers shall—

- (a) make a remedial order by virtue of this subsection giving effect to those modifications and replacing the remedial order made under subsection (1) above; and
- (b) lay the remedial order made by virtue of this subsection before the Scottish Parliament,

or (where the modification specified consists only of the proposed revocation of the remedial order), by order, simply revoke the remedial order made under subsection (1) above.

- (6) If, at the end of the period of 120 days beginning with the day on which a remedial order was made under subsection (1) above, the Scottish Parliament has not, by resolution, approved the order or any remedial order made by virtue of subsection (5) above replacing it, then the remedial order or, as the case may be the replacement remedial order ceases to have effect (but without that affecting anything done under that order or the power to make a fresh remedial order, whether under the procedure set out in section 13 above or this section).
- (7) Subsection (6) above has no effect where the Scottish Ministers have, before the end of the period referred to in that subsection, simply revoked the remedial order made under subsection (1) above.
- (8) An order made under subsection (5) above simply revoking a remedial order made under subsection (1) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (9) In reckoning, for the purposes of subsections (2)(a), (6) and (7) above, any period of 60 or 120 days, no account shall be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than four days.

## **PART 7**

### **GENERAL PROVISIONS**

#### **15 Short title and commencement**

- (1) This Act may be cited as the Convention Rights (Compliance) (Scotland) Act 2001.
- (2) Parts 1, 2 and 5 of this Act come into force on such day as the Scottish Ministers, by order made by statutory instrument, appoint, and different days may be so appointed for different purposes.
- (3) The other provisions (except this section) of this Act come into force on the day after it receives Royal Assent.

SCHEDULE  
*(introduced by sections 4 and 5)*

TRANSITIONAL PROVISIONS

**PART 1**

EXISTING LIFE PRISONERS

- 1 This Part of this schedule applies to a life prisoner—
- (a) who was, prior to the relevant date, sentenced for murder committed by the prisoner when aged 18 or over; or
  - (b) in respect of whom, the Lord Justice General or the Lord Justice Clerk has issued a certificate under—
    - (i) paragraph 6(1) of Schedule 6 to the 1993 Act; or
    - (ii) section 16(2) of the Crime and Punishment (Scotland) Act 1997 (c.48).
- 2 In this Part of this schedule—
- “existing life prisoner” means a life prisoner to whom this Part of this schedule applies by virtue of paragraph 1 above;
- “incapable” means incapable by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise);
- “life prisoner” has the same meaning as it has in section 27(1) as read with section 6 of the 1993 Act;
- “mental disorder” has the same meaning as it has in section 87 of the Adults with Incapacity (Scotland) Act 2000 (asp 4);
- “punishment part” has the same meaning as it has in section 2(2) of the 1993 Act;
- “relevant date” means the date when this Part of this schedule comes into force.
- 3 The Scottish Ministers shall, as soon as reasonably practicable after the relevant date, refer the case of an existing life prisoner, except the case of such a prisoner who was released on licence under section 3 of the 1993 Act, to the High Court of Justiciary for a hearing under paragraph 12 below.
- 4 The Scottish Ministers shall not so refer the case of an existing life prisoner to whom Part 3 of this schedule applies if the prisoner has, under paragraph 7 below, waived the entitlement to such a hearing.
- 5 The Scottish Ministers shall not refer the case of an existing life prisoner who was released on licence under section 3 of the 1993 Act to the High Court of Justiciary under paragraph 3 above unless—
- (a) the prisoner has been recalled to prison under section 17(1) of the 1993 Act; and
  - (b) the Parole Board has not directed that the prisoner be released on licence immediately under section 17(4) of that Act.

- 6 The Scottish Ministers shall not so refer the case of an existing life prisoner to whom paragraph 1(b) above applies if the prisoner—
- (a) has, under paragraph 7 below, waived the entitlement to such a hearing; or
  - (b) has served the part of the sentence specified in the certificate referred to in paragraph 1(b) above issued in respect of that prisoner.
- 7 An existing life prisoner to whom Part 3 of this schedule or paragraph 1(b) above applies may waive the entitlement to a hearing under paragraph 12 below provided—
- (a) the prisoner has had independent legal advice or has declined such advice; and
  - (b) a copy in writing of the waiver is sent to the Scottish Ministers.
- 8 Notwithstanding paragraph 3 above, an existing life prisoner—
- (a) who has not, under paragraph 7 above, waived the entitlement to a hearing; or
  - (b) who has not served the part of the sentence specified in the certificate referred to in paragraph 1(b) above issued in respect of that prisoner,
- may refer his or her case for a hearing under paragraph 12 below.
- 9 The Scottish Ministers shall, no later than two weeks after the referral of an existing life prisoner's case under paragraph 3 or 8 above, send the documents and other information mentioned in paragraph 10 below to—
- (a) the High Court of Justiciary;
  - (b) the Lord Advocate; and
  - (c) the existing life prisoner.
- 10 The documents and other information referred to in paragraph 9 above are—
- (a) a copy of the indictment;
  - (b) subject to paragraph 11 below, a copy of any report by the trial judge;
  - (c) a copy of any certificate as is referred to in paragraph 1(b) above;
  - (d) any other documents or information which the Scottish Ministers consider relevant.
- 11 A report prepared by the trial judge—
- (a) may be sent under paragraph 9 above notwithstanding that it was prepared on the basis that it would not be disclosed to the existing life prisoner; and
  - (b) shall be so sent for the purposes only of the hearing under paragraph 12 below.
- 12 There shall be a hearing, at which the High Court of Justiciary shall make the order referred to in paragraph 13 below.
- 13 That order is an order specifying a part of the sentence which the court considers would have been specified as the punishment part under subsection (2) of section 2 of the 1993 Act had that section, as amended by this Act, applied to that prisoner at the time he or she was sentenced.

- 14 It shall not be a ground of appeal in relation to the part of the sentence specified in the order made under paragraph 12 above that the court had regard to any certificate as is referred to in paragraph 1(b) above or to any recommendation made under section 205(4) of the 1995 Act as to the minimum period which should elapse before the Scottish Ministers release the prisoner on licence.
- 15 The court shall pronounce the order under paragraph 12 above in open court.
- 16 If the court is satisfied that the transferred life prisoner is incapable of properly instructing a solicitor in relation to the hearing under paragraph 12 above, whether or not the prisoner has so instructed a solicitor, it shall not make the order under that paragraph.
- 17 If the Scottish Ministers are satisfied that the prisoner is no longer incapable of instructing a solicitor in relation to the hearing under paragraph 12 above, they shall, as soon as reasonably practicable thereafter, refer the case of the prisoner to the court for such a hearing.
- 18 Nothing in this Part of this schedule shall be taken as preventing a prisoner, in respect of whom the court declined, under paragraph 16 above, to make the order under paragraph 12 above, from again referring his or her case for a hearing under paragraph 12 above.
- 19 Where the court has made an order under paragraph 12 above in the case of an existing life prisoner to whom paragraph 1(b) above applies, the certificate referred to in that subsection shall have no further effect.
- 20 Section 2 of the 1993 Act as amended by this Act shall apply to the existing life prisoner as if the order under paragraph 12 above were an order such as is mentioned in subsection (2) of that section and had been made at the time the existing life prisoner was sentenced.
- 21 A hearing under paragraph 12 above shall be criminal procedure for the purposes of section 305 of the 1995 Act (power of High Court of Justiciary to regulate criminal procedure by Act of Adjournal).
- 22 The court, in considering the case of an existing life prisoner—
- (a) who is serving more than one sentence of imprisonment for life; and
  - (b) two or more of whose life sentences were imposed in proceedings on a single indictment,
- shall, in making the order under paragraph 12 above, proceed as if section 205D of the 1995 Act had been in force at the time the prisoner was sentenced.
- 23 In the case of an existing life prisoner—
- (a) whose case was, before the relevant date, referred to the Parole Board under section 28(4) of the Prisons (Scotland) Act 1989 (c.45) (in this schedule, “the 1989 Act”) or under section 2 or 17(3) of the 1993 Act and, in respect of whom, the Board declined to direct the prisoner’s release on licence; or
  - (b) who was, before the relevant date, recalled to prison under section 28(1) or (2) of the 1989 Act or section 17(1) of the 1993 Act and not thereafter released,
- the Board shall, as soon as reasonably practicable after the relevant date, fix the date when it will next consider the prisoner’s case, being a date no later than two years after the date of its decision to decline to direct the release of the prisoner or the date when

the prisoner was recalled to prison, whichever is the later; and the date so fixed shall be treated as fixed under section 2(5A)(b) of the 1993 Act.

24 The references in sub-paragraphs (a) and (b) of paragraph 23 above to sections 2 and 17 of the 1993 Act are references to those sections as they had effect immediately before the relevant date.

25 An existing life prisoner who, before the relevant date, has been or is released on licence, otherwise than under section 3 (release on compassionate grounds) of the 1993 Act, shall, at the relevant date, be deemed to have been released on licence under section 2(4) of the 1993 Act as if that prisoner had been a life prisoner to whom that section applied and who had served the punishment part of his or her sentence.

26 Where an existing life prisoner released on licence is treated by virtue of paragraph 25 above as a prisoner whose licence was granted under section 2(4) of the 1993 Act, the validity of his or her licence shall not be affected by the absence in the licence of such a condition as is specified in section 12(2) of that Act.

## **PART 2**

### **EXISTING DESIGNATED LIFE PRISONERS**

27 This Part of this schedule applies to a life prisoner (an “existing designated life prisoner”)—

- (a) who was sentenced before the relevant date; and
- (b) in respect of whom the court made an order under section 2(2) of the 1993 Act that subsections (4) to (6) of that section apply to the prisoner as soon as the prisoner has served the part of the sentence (“the designated part”) specified in the order.

28 In this Part of this schedule—

“life prisoner” and “punishment part” have respectively the same meanings as they have in Part 1 of this schedule;

“relevant date” means the date when this Part of this schedule comes into force; and

the references in paragraph 27(b) above and paragraph 30(a) and (b) below to sections 2 and 17 of the 1993 Act are references to those sections as they had effect immediately before the relevant date.

29 Part 1 of the 1993 Act, as amended by this Act, shall, on the relevant date, apply to an existing designated life prisoner as if the designated part of the prisoner’s sentence were a punishment part specified under section 2(2) of the 1993 Act as amended by this Act.

30 In the case of an existing designated life prisoner—

- (a) whose case was, before the relevant date, referred to the Parole Board under section 2 or 17(3) of the 1993 Act and, in respect of whom, the Board declined to direct the prisoner’s release on licence; or
- (b) who was, before the relevant date, recalled to prison under section 17(1) of the 1993 Act and not thereafter released,

the Board shall, as soon as reasonably practicable after the relevant date, fix the date when it will next consider the prisoner’s case, being a date not later than two years after

the date of its decision to decline to direct the release of the prisoner or the date when the prisoner was recalled to prison, whichever is the later; and the date so fixed shall be treated as fixed under section 2(5A)(b) of the 1993 Act.

### PART 3

#### EXISTING LIFE PRISONERS RECOMMENDED FOR RELEASE

- 31 This Part of this schedule applies to an existing life prisoner—
- (a) in respect of whom, before the relevant date, the Parole Board has recommended a provisional release date on which the prisoner should be released on licence under the 1989 Act or the 1993 Act;
  - (b) whose case has not been the subject of a hearing under paragraph 12 above; and
  - (c) to whose release neither the Lord Justice General, whom failing the Lord Justice Clerk, nor, if available, the trial judge objects.
- 32 In this Part of this schedule—
- “existing life prisoner” means a person who is an existing life prisoner for the purposes of Part 1 of this schedule by virtue only of paragraph 1(a) above;
- “provisional release date” means, where that date has been fixed by reference to a month but not to a specific day in the month, the first day of that month, and, where that date would (but for this provision) be a Saturday, Sunday or public holiday and the prisoner would fall to be released then, means the last preceding day which is not a Saturday, Sunday or public holiday;
- “public holiday” has the meaning given by section 27(8) of the 1993 Act;
- “punishment part” has the same meaning as it has in Part 1 of this schedule;
- “relevant date” means the date when this Part of this schedule comes into force.
- 33 If the Scottish Ministers have fixed a provisional release date in respect of the prisoner, the prisoner shall on that date be released on licence as if the prisoner had been a life prisoner to whom section 2(4) of the 1993 Act applied and had served the punishment part of his or her sentence.
- 34 If, however, the Scottish Ministers, having regard to the need to protect the public, are of the view, at any time between the time when they fixed the provisional release date for the prisoner and that date, that the prisoner’s conduct has been such that or that there has been a material change of circumstances such that the Parole Board should review the recommendation to release the prisoner on licence, they may refer to the Board the question of such release in the light of that conduct or that change of circumstances.
- 35 Such a review as is referred to in paragraph 34 above is, for the purposes of section 20 of the 1993 Act, within the functions of the Parole Board.
- 36 The Parole Board shall carry out such a review as is referred to in paragraph 34 above or 38 below as soon as is reasonably practicable after the question there mentioned is referred to the Board by the Scottish Ministers.
- 37 On such a review, the Parole Board shall either—
- (a) direct that the provisional release date fixed for the prisoner be adhered to and that he or she be released then in accordance with paragraph 33 above or, if the direction is made on or after that provisional release date, that the prisoner be

released as soon as reasonably practicable after the direction is made in accordance with paragraph 39 below; or

(b) direct that the provisional release date so fixed no longer applies.

38 Notwithstanding that the Parole Board has made a direction under paragraph 37(a) above, the Scottish Ministers, if they are of the view that, having regard to the need to protect the public, at any time between the time of that direction and the provisional release date, the prisoner's conduct has been such that or that there has been a material change of circumstances such that the Parole Board should review that direction, may refer the question of such release to the Parole Board in the light of that conduct or that change of circumstances; and paragraphs 35 to 37 above and paragraphs 39 and 40 below shall apply to such a referral as they apply to a referral under paragraph 34.

39 Where the Parole Board has made a direction under paragraph 37(a) above in respect of a prisoner on or after the provisional release date fixed in respect of that prisoner, the Scottish Ministers shall release the prisoner on licence as soon as reasonably practicable after that direction is made; and paragraph 33 above shall apply to the prisoner as if the prisoner had been released on the provisional release date.

40 Notwithstanding that the Parole Board has made a direction under paragraph 37(b) above, the punishment part of the prisoner's sentence shall be regarded as having been served as at the end of the day immediately before the provisional release date and section 2 of the 1993 Act as amended by this Act shall apply to the prisoner as if an order such as mentioned in subsection (2) of that section had been made in respect of the prisoner when sentenced.

41 If the Scottish Ministers have not fixed a provisional release date in respect of the prisoner, then, subject to paragraphs 34 to 40 above, the prisoner shall be released on the provisional release date recommended by the Parole Board as if released on licence under section 2(4) of the 1993 Act as a life prisoner to whom that section applied and who had served the punishment part of his or her sentence.

42 If, however, the Scottish Ministers, having regard to the need to protect the public, are of the view that the Parole Board should consider afresh whether the prisoner should be released, they may refer to the Board the question of such release in the light of that need.

43 No such reference shall be made after the expiry of two weeks beginning with the relevant date.

44 The consideration and disposal of such a reference is, for the purposes of section 20 of the 1993 Act, within the functions of the Parole Board.

45 The Parole Board shall carry out such a review as is referred to in paragraph 42 above as soon as is reasonably practicable after the question there mentioned is referred to the Board by the Scottish Ministers.

46 On such a reference, the Parole Board shall either—

(a) direct that the recommended provisional release date be adhered to and that the prisoner be released then or, if the direction is made on or after that recommended provisional release date, that the prisoner be released as soon as reasonably practicable after the direction is made in accordance with paragraph 48 below; or

(b) direct that the recommended provisional release date no longer applies.

47 Notwithstanding that the Parole Board has made a direction under paragraph 46(b) above, the punishment part of the prisoner’s sentence shall be regarded as having been served as at the end of the day immediately before the recommended provisional release date and section 2 of the 1993 Act as amended by this Act shall apply to the prisoner as if an order such as is mentioned in subsection (2) of that section had been made in respect of the prisoner when sentenced.

48 Where the Parole Board has made a direction under paragraph 46(a) above in respect of a prisoner on or after the recommended provisional release date, the Scottish Ministers shall release the prisoner on licence as soon as reasonably practicable after that direction is made; and paragraph 41 above shall apply to the prisoner as if the prisoner had been released on the provisional release date.

#### PART 4

##### TRANSFERRED LIFE PRISONERS

49 This Part of this schedule applies to—

- (a) a life prisoner to whom subsection (1) of section 10 of the 1993 Act applied and in respect of whom the Secretary of State has issued a certificate under section 28(4) of the Crime (Sentences) Act 1997 (c.43);
- (b) a life prisoner to whom subsection (2), but not subsections (1) or (3), of section 10 of the 1993 Act applied; or
- (c) a life prisoner to whom subsections (2) and (3) of that section applied, including one to whom those subsections applied by virtue of paragraph 7 of Schedule 6 to that Act,

and who was transferred to Scotland before the relevant date; and the references in this paragraph to section 10 of the 1993 Act are references to that section as it had effect at the time the prisoner was so transferred.

50 In this Part of this schedule—

“existing transferred life prisoner” means a life prisoner to whom this Part of this schedule applies by virtue of paragraph 49 above;

“incapable”, “life prisoner”, “mental disorder” and “punishment part” have respectively the same meanings as they have in Part 1 of this schedule;

“relevant date” means the date when this Part of this schedule comes into force.

51 The Scottish Ministers shall, as soon as reasonably practicable after the relevant date, refer the case of an existing transferred life prisoner to the High Court of Justiciary for a hearing under paragraph 59 below.

52 The Scottish Ministers shall not so refer the case of an existing transferred life prisoner to whom Part 3 of this schedule applies if the prisoner has, under paragraph 54 below, waived the entitlement to such a hearing.

53 The Scottish Ministers shall not so refer the case of an existing transferred life prisoner to whom paragraph 49(c) above applies if the prisoner—

- (a) has, under paragraph 54 below, waived the entitlement to such a hearing; or
- (b) has served the part of the sentence specified in the certificate referred to in subparagraph (c) of paragraph 57 below issued in respect of that prisoner.

- 54 An existing transferred life prisoner to whom Part 3 of this schedule or paragraph 49(c) above applies may waive the entitlement to a hearing under paragraph 59 below provided—
- (a) the prisoner has had independent legal advice or has declined such advice; and
  - (b) a copy in writing of the waiver is sent to the Scottish Ministers.
- 55 Notwithstanding paragraph 51 above, an existing transferred life prisoner—
- (a) who has not, under paragraph 54 above, waived the entitlement to a hearing; or
  - (b) who has not served the part of the sentence specified in the certificate referred to in sub-paragraph (c) of paragraph 57 below issued in respect of that prisoner,
- may refer his or her case for a hearing under paragraph 59 below.
- 56 The Scottish Ministers shall, no later than two weeks after the referral of an existing transferred life prisoner's case under paragraph 51 or 55 above, send the documents and other information mentioned in paragraph 57 below to—
- (a) the High Court of Justiciary;
  - (b) the Lord Advocate; and
  - (c) the existing transferred life prisoner.
- 57 The documents and other information referred to in paragraph 56 above are—
- (a) a copy of any indictment or corresponding document;
  - (b) subject to paragraph 58 below, a copy of any report by the trial judge;
  - (c) a copy of any certificate under—
    - (i) section 10(2) of the 1993 Act;
    - (ii) section 48 of or paragraph 9 of Schedule 12 to the Criminal Justice Act 1991 (c.53); or
    - (iii) section 28(4) or 33 of the Crime (Sentences) Act 1997 (c.43);
  - (d) any other documents or information which the Scottish Ministers consider relevant.
- 58 A report prepared by the trial judge—
- (a) may be sent under paragraph 56 above notwithstanding that it was prepared on the basis that it would not be disclosed to the existing transferred life prisoner; and
  - (b) shall be so sent for the purposes only of the hearing under paragraph 59 below.
- 59 There shall be a hearing, at which the High Court of Justiciary shall make the order referred to in paragraph 60 below.
- 60 That order is an order specifying a part of the sentence which the court considers would have been specified as the punishment part under subsection (2) of section 2 of the 1993 Act, if—
- (a) the prisoner had been sentenced for the offence in Scotland; and
  - (b) that section, as amended by this Act, had been in force at the time when the prisoner was sentenced.

- 61 It shall not be a ground of appeal in relation to the part of the sentence specified in the order made under paragraph 59 above that the court had regard to—
- (a) any certificate referred to in paragraph 57(c) above;
  - (b) in the case of a prisoner transferred to Scotland from England and Wales, any recommendation made by the Lord Chief Justice to the Secretary of State as to the period of the life sentence that the prisoner should be required to serve before becoming eligible for release on licence;
  - (c) any other certificate issued or any recommendation, declaration, decision, direction or order made in respect of the prisoner, under any enactment applying in any part of the United Kingdom or in the Channel Islands or the Isle of Man, as to the period that the prisoner should or must serve before becoming eligible for release on licence.
- 62 The court shall pronounce the order under paragraph 59 above in open court.
- 63 If the court is satisfied that the existing transferred life prisoner is incapable of properly instructing a solicitor in relation to the hearing under paragraph 59 above, whether or not the prisoner has so instructed a solicitor, it shall not make the order under that paragraph.
- 64 If the Scottish Ministers are satisfied that the prisoner is no longer incapable of instructing a solicitor in relation to the hearing under paragraph 59 above, they shall, as soon as reasonably practicable thereafter, refer the case of the prisoner to the court for such a hearing.
- 65 Nothing in this Part of this schedule shall be taken as preventing a prisoner, in respect of whom the court declined, under paragraph 63 above, to make the order under paragraph 59 above, from again referring his or her case for a hearing under paragraph 59 above.
- 66 Where the court has made an order under paragraph 59 above—
- (a) Part 1 of the 1993 Act, except section 2(9), as amended by this Act shall apply to the existing transferred life prisoner as if—
    - (i) the existing transferred life prisoner were a life prisoner within the meaning of section 2 of that Act; and
    - (ii) the punishment part of that prisoner's sentence within the meaning of that section were the part specified in the order under paragraph 59 above; and
  - (b) any certificate such as is referred to in sub-paragraph (c) of paragraph 57 above shall have no further effect.
- 67 Where, however, the existing transferred life prisoner has waived, under paragraph 54 above, the entitlement to a hearing under paragraph 59 above, section 10(3) of the 1993 Act shall apply to the prisoner as if the prisoner were a life prisoner and as if the part of the prisoner's sentence specified in the certificate mentioned in sub-paragraph (c) of paragraph 57 above were the punishment part.
- 68 A hearing under paragraph 59 above shall be criminal procedure for the purposes of section 305 of the 1995 Act (power of High Court of Justiciary to regulate criminal procedure by Act of Adjournal).
- 69 The court, in considering the case of an existing transferred life prisoner—
- (a) who is serving more than one sentence of imprisonment for life; and

(b) two or more of whose life sentences were imposed in proceedings on a single indictment or corresponding document,

shall, in making the order under paragraph 59 above, proceed as if the prisoner had been sentenced in Scotland and section 205D of the 1995 Act had been in force at the time the prisoner was sentenced.

70 In the case of an existing transferred life prisoner—

(a) whose case was, before the relevant date, referred to the Parole Board under section 2 or 17(3) of the 1993 Act and, in respect of whom, the Board declined to direct the prisoner's release on licence; or

(b) who was, before the relevant date, recalled to prison under section 17(1) of the 1993 Act and not thereafter released,

the Board shall, as soon as reasonably practicable after the relevant date, fix the date when it will next consider the prisoner's case, being a date no later than two years after the date of its decision to decline to direct the release of the prisoner or the date when the prisoner was recalled to prison, whichever is the later; and the date so fixed shall be treated as fixed under section 2(5A)(b) of the 1993 Act.

71 The references in sub-paragraphs (a) and (b) of paragraph 70 above to sections 2 and 17 of the 1993 Act are references to those sections as they had effect immediately before the relevant date.

72 An existing transferred life prisoner to whom paragraph 49(b) above applies and who, before the relevant date, has been or is released on licence (otherwise than under section 3 of the 1993 Act (release on compassionate grounds)) shall, at the relevant date, be deemed to have been released on licence under section 2(4) of the 1993 Act as if that prisoner had been a life prisoner to whom that section applied and who had served the punishment part of his or her sentence.

73 Where such an existing transferred life prisoner released on licence is treated by virtue of paragraph 72 above as a prisoner whose licence was granted under section 2(4) of the 1993 Act, the validity of his or her licence shall not be affected by the absence in the licence of such a condition as is specified in section 12(2) of that Act.

74 Part 3 of this schedule applies to an existing transferred life prisoner to whom paragraph 49(b) above applies as it applies to an existing life prisoner of the kind mentioned in paragraph 31 above with the substitution in paragraph 31(b) above of a reference to a hearing under paragraph 59 above for the reference to a hearing under paragraph 12 above.

## **PART 5**

### **LIFE PRISONERS TRANSFERRED UNDER THE MENTAL HEALTH ACTS**

75 This Part of this schedule applies to a life prisoner—

(a) to whom—

(i) section 80 (removal to Scotland of patients from England and Wales) of the Mental Health Act 1983 (c.20) applies; or

(ii) to whom section 81 (removal to Scotland of patients from Northern Ireland) of the Mental Health (Scotland) Act 1984 (c.36) applies; and

- (b) who was transferred to Scotland before the relevant date.
- 76 In this Part of this schedule—
- “life prisoner” and “punishment part” have respectively the same meanings as they have in Part 1 of this schedule;
- “relevant date” means the date when this Part of this schedule comes into force.
- 77 Paragraphs 51 to 74 of Part 4 of this schedule apply to a life prisoner to whom this Part applies, except a prisoner such as is mentioned in paragraph 78 below, as if section 10 of the 1993 Act had applied to the prisoner when the prisoner was transferred and as if the prisoner were an existing transferred life prisoner within the meaning of that Part.
- 78 Section 10(1) of the 1993 Act, as amended by this Act, applies to a life prisoner—
- (a) to whom this Part of this schedule applies; and
- (b) to whom, had the prisoner been transferred after the relevant date, section 10(1) would have applied.

## PART 6

### EXISTING MEMBERS OF THE PAROLE BOARD

- 79 Subject to paragraphs 80 to 83 below, the modifications made by section 5 of this Act have effect as respects existing members.
- 80 Any period of appointment occurring prior to—
- (a) an existing member’s most recent appointment or reappointment; and
- (b) the coming into force of section 5 of this Act,
- shall be disregarded for the purposes of paragraph 2E of Schedule 2 to the 1993 Act.
- 81 Any existing member whose current appointment proceeded upon selection following public advertisement seeking applications for membership of the Board shall, for the purposes of Schedule 2 to the 1993 Act and notwithstanding the terms of the instrument of appointment of the member, be regarded, on the commencement of section 5 of this Act as serving a period of appointment of six years in accordance with that Schedule beginning with the date when that current appointment began.
- 82 An existing member whose current appointment proceeded otherwise than as mentioned in paragraph 81 above shall, for the purposes of Schedule 2 to the 1993 Act, be regarded on the commencement of section 5 of this Act as serving whichever of the following expires later—
- (a) the period of appointment provided for in the member’s instrument of appointment; or
- (b) a period of appointment of six years beginning with the date when the member was first appointed to the Parole Board.
- 83 In this Part of this schedule—
- “existing member” means a person who is a member of the Parole Board when section 5 of this Act comes into force;

“current appointment”, in relation to any existing member, means the appointment then held by that member;

“public advertisement” means advertisement in a newspaper circulating throughout Scotland.

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