

# CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) ACT 2001

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## EXPLANATORY NOTES

### THE ACT

#### Schedule

#### *Transitional Provisions*

#### Part 1

#### Existing life prisoners

104. [Part 1](#) of the schedule to the Act makes provision for handling the cases of existing life prisoners. The interpretation and ECHR compatibility of Part 1 was considered in *Flynn & Ors v HMA*, Privy Council, 18<sup>th</sup> March 2004 (see also the earlier decision of the High Court at 2003 SLT 2003).
105. [Paragraph 1](#) defines a life prisoner to whom Part 1 of the schedule applies. Such a prisoner is referred to as an “existing life prisoner” (see paragraph 2). An “existing life prisoner” is a life prisoner who was sentenced for murder committed by the prisoner when aged 18 years or over and who was sentenced prior to the provisions contained in Part 1 of the schedule coming into force (paragraph 1(a)), or a prisoner in respect of whom the Lord Justice General or the Lord Justice Clerk has issued a certificate under paragraph 6(1) of schedule 6 to the 1993 Act or section 16(2) of the Crime and Punishment (Scotland) Act 1997 under previous transitional arrangements for discretionary life prisoners and under 18 murderers (paragraph 1(b)).
106. [Paragraphs 3 to 26](#) set the arrangements for the referral of the cases of existing life prisoners to the High Court to enable those prisoners to have a punishment part fixed so that they can be treated under the new release regime.
107. Certain life prisoners had the punishment element of their sentence fixed previously by a judge under the law as it stood before this Act. Provision is made to enable those prisoners to waive their right to the hearing provided they confirm they have had independent legal advice or have declined the opportunity to take such advice and the Scottish Ministers receive a written copy of the waiver.
108. Provision is also made to enable a report from the original trial judge to be made available for the purposes of the hearing even if the report was originally prepared on the understanding that it would not be disclosed to the prisoner.
109. [Paragraph 25](#) makes provision for existing life prisoners (other than those released on compassionate grounds in terms of section 3 of the 1993 Act) who have already been released from prison on life licence before the provisions in Part 1 of the schedule to this Act come into force. A prisoner in this category will, on the date the provisions in Part 1 of the schedule come into force, be deemed to be a prisoner who was released on licence under section 2(4) of the 1993 Act (as amended by section 1(3)(d) of this Act) as if that prisoner had been a life prisoner to whom section 2(4) applied and who

had served the punishment part of his sentence. If a prisoner requires to be recalled to prison for any reason after this he will be treated under the new provisions.

110. [Paragraph 26](#) provides that where an existing life prisoner released on licence is treated, by virtue of paragraph 25, as a prisoner who was released under section 2(4) of the 1993 Act, then the validity of his licence will not be affected by the absence in the licence of such a condition as is specified in section 12(2) of the 1993 Act. Section 12(2) of the 1993 Act contains two standard conditions for inclusion in a prisoner's licence on release from prison. They are that the prisoner shall be under the supervision of a relevant social work authority or probation officer and that he shall comply with such requirements as that officer might specify for the purposes of supervision. It is not a statutory requirement that these conditions appear in the licence of a prisoner released under the 1989 Act, although such conditions do appear in almost all licences issued under the 1989 Act.

## **Part 2**

### **Existing designated life prisoners**

111. [Paragraphs 27 to 30](#) make provision so that, when the Act comes into force, the designated part of a designated life prisoner's sentence is treated as a punishment part. Provision is also made so that the Parole Board is required to fix a date for its next consideration of a prisoner's case, being no more than 2 years from its last consideration, where it has not directed the prisoner's release when it last considered the case.

## **Part 3**

### **Existing life prisoners recommended for release**

112. [Part 3](#) of the schedule makes additional transitional provision to ensure that certain existing adult mandatory life prisoners who have been recommended for release before the new provisions come into force are not disadvantaged.
113. [Paragraph 31](#) specifies the categories of prisoner to whom Part 3 applies. In order to obtain the benefit of the transitional provisions the prisoner must satisfy the requirements of paragraphs 31(a) to (c). Paragraph 31(a) and (c) apply Part 3 to prisoners who have had a recommendation for release from the Parole Board prior to the relevant date and to whose release the judiciary do not object. Paragraph 31(b) provides that the provisions of Part 3 apply only to those prisoners who have not received a hearing under Part 1. Once a hearing has taken place and a punishment part has been set under Part 1, Part 3 ceases to apply and the prisoner is dealt with under section 2 of the 1993 Act as amended by this Act.
114. [Paragraph 32](#) provides that "existing life prisoner" has the meaning given in paragraph 1(a) of Part 1 of the schedule, namely a person who was prior to the relevant date sentenced for a murder committed when the person was aged 18 years or over. "Punishment part" has the same meaning as in Part 1. "Relevant date" means the date when this Part of the schedule comes into force. "Provisional release date" ("PRD") is defined to ensure that, if the PRD fixed by the Scottish Ministers or the Parole Board has been fixed by reference to a month but not to a particular day in that month, e.g. release in July 2001, the prisoner would be released on the first day of that month provided that day was not a Saturday, Sunday or public holiday. In the latter case, the prisoner would be released on the last preceding day which was not a Saturday, Sunday or public holiday. "Public holiday" has the meaning given in section 27(8) of the 1993 Act, that is, any day on which in the opinion of the Scottish Ministers, public offices or facilities the prisoner is likely to need in the area he is likely to be following release will be closed.
115. [Paragraph 33](#) provides that, where a PRD has been fixed by the Scottish Ministers, the prisoner will be released on licence on that date and deemed to be released as if he had

*These notes relate to the Convention Rights (Compliance) (Scotland)  
Act 2001 (asp 7) which received Royal Assent on 5 July 2001*

already served his punishment part and the Parole Board had directed his release under 2(4) of the 1993 Act. The requirement that the Scottish Ministers release the prisoner on the PRD is, however, subject to paragraph 34.

116. [Paragraph 34](#) provides the Scottish Ministers with the power to refer a prisoner for whom they have fixed a PRD back to the Parole Board before his release for a review of the original recommendation to release. This power is restricted to cases where Ministers are of the view that either the prisoner's conduct before release or a material change in the prisoner's circumstances suggests that a review is required to ensure that the Board is still satisfied that there will be no unacceptable risk to the public from that release. The power may be exercised, for example, if, during the pre-release programme, the prisoner commits a serious disciplinary offence or there is a change of some significance in the prisoner's plans on release.
117. [Paragraph 35](#) stipulates that the review referred to in paragraph 34 falls within the functions of the Parole Board which are contained in section 20 of the 1993 Act. This will enable the Parole Board Rules that are made under section 20 to be amended to require the Parole Board to sit in its tribunal capacity when carrying out a review under paragraph 34. Paragraph 36 requires the Parole Board to carry out such a review as soon as reasonably practicable after the case has been referred to it by the Scottish Ministers.
118. [Paragraph 37](#) provides that, where the Scottish Ministers refer a prisoner back to the Parole Board under paragraph 34, it has two options. It can either direct that the PRD should continue to apply and that the Scottish Ministers should release the prisoner on the PRD or, alternatively, it can direct that the PRD no longer applies.
119. [Paragraph 38](#) provides that, even if the Parole Board has made a direction under paragraph 37(a) that the PRD be adhered to, if the Scottish Ministers consider that either the prisoner's behaviour between the time of that direction and the PRD or a material change in the prisoner's circumstances gives rise to concern about the protection of the public, they may refer the case back to the Parole Board for review. In such a case, paragraphs 35 to 37, 39 and 40 apply as they would to a referral made under paragraph 34.
120. [Paragraph 39](#) provides that where the Parole Board has made a direction to the release a prisoner on or after the prisoner's PRD, the Scottish Ministers shall release the prisoner as soon as reasonably practicable after the direction is made and the prisoner shall be regarded as having been released under section 2(4) of the 1993 Act on the PRD.
121. [Paragraph 40](#) provides that if the Parole Board, on undertaking a review under paragraph 37, is of the opinion that the PRD should no longer apply, the end of the day prior to the PRD should be regarded as being the end of the prisoner's punishment part and that punishment part would be deemed to have been given in accordance with the provisions in this Act amending the 1993 Act. This means that at the expiry of the punishment part the prisoner's case would be referred to the Parole Board sitting as a tribunal to consider whether or not he should continue to be confined for the protection of the public. If the Parole Board does not direct release at that stage a further tribunal would be held under section 2 of the 1993 Act.
122. [Paragraph 41](#) deals with those prisoners whose PRD has not yet been fixed by the Scottish Ministers. These are the cases where, although there is a favourable Parole Board recommendation and the judiciary do not object to release in accordance with that recommendation, Ministers have not had an opportunity to consider the prisoner's suitability for release before the new provisions of the Act came into force. It provides that such a prisoner will be released on the date recommended by the Parole Board and deemed to be released on licence as if the prisoner had already served his punishment part and the Board had directed his release under section 2(4) of the 1993 Act. This mirrors the provision in paragraph 33 for prisoners for whom Ministers have fixed a PRD. Paragraph 41 is subject to paragraphs 34 to 40. This means that, as with the cases in which the Scottish Ministers have fixed a PRD, Ministers have the power to refer

the case back to the Parole Board in the event of an adverse development occurring before the PRD.

123. [Paragraph 42](#) provides the Scottish Ministers with an additional power for prisoners whose PRD has been fixed by the Parole Board. In view of the fact that, as mentioned above, Ministers will not have had an opportunity to consider the prisoner's suitability for release before this Act comes into force, they are given power to refer the case back to the Parole Board if they consider, on looking at the available information, that there is a need for a further review. Paragraph 43 provides that if the Scottish Ministers wish to refer a prisoner back to the Board under paragraph 42, they must do so no later than two weeks after this Act comes into force.
124. [Paragraph 44](#) mirrors paragraph 35 and provides that the consideration and disposal of the prisoner referred to in paragraph 42 falls within the functions of the Parole Board which are outlined in section 20 of the 1993 Act. This will enable the Parole Board Rules that are made under section 20 to be amended to require the Parole Board to sit in its tribunal capacity when considering and disposing of the reference by Ministers. Paragraph 45 mirrors paragraph 36 and requires the Board to consider the prisoner's case as soon as reasonably practicable after it has been referred to it by the Scottish Ministers.
125. [Paragraph 46](#) mirrors paragraph 37 and ensures that, where the Scottish Ministers refer a prisoner back to the Parole Board under paragraph 42, the Board has the power to direct the Scottish Ministers to release the prisoner on the PRD, or direct that the PRD no longer applies.
126. [Paragraph 47](#) mirrors paragraph 40 and provides that if the Parole Board, on undertaking a review under paragraph 42, is of the opinion that the PRD should no longer apply, the end of the day prior to the PRD should be regarded as being the end of the prisoner's punishment part and the punishment part would be deemed to have been given in accordance with the provisions in this Act amending the 1993 Act. This means that at the expiry of the punishment part the prisoner's case would be referred to the Parole Board sitting as a tribunal to consider whether or not he should continue to be confined for the protection of the public. Paragraph 48 mirrors 39 and requires the Scottish Ministers to release the prisoner as soon as reasonably practicable after the Board's direction is made. It further provides that the prisoner shall be regarded as having been released under section 2(4) of the 1993 Act.

## **Part 4**

### **Transferred life prisoners**

127. [Part 4](#) of the schedule makes provision for certain existing transferred life prisoners, equivalent to the provision in Part 1, to enable an existing transferred life prisoner covered by Part 4 to have a punishment part hearing so that the new regime can apply as if the prisoner had a punishment part fixed at the time of sentence.
128. As in Part 1, the Scottish Ministers will refer the case to the High Court unless the prisoner already has an equivalent to a punishment part from the sending jurisdiction and waives his right to have a part set by the High Court.
129. In particular, paragraph 61 provides that it shall not be a ground of appeal that, in setting the punishment part for a transferred life prisoner, the court had regard to any certificate or judicial recommendation made by the Lord Chief Justice of England and Wales relating to the period that the prisoner should serve before becoming eligible to be released on licence.

## **Part 5**

### **Life prisoners transferred under the Mental Health Acts**

130. Paragraphs 75 to 78 make provision for life prisoners who have been transferred to Scotland from England and Wales or Northern Ireland and who are detained in Scotland under the Mental Health (Scotland) Act 1984 so that they are treated in the same way as life prisoners transferred to Scotland on an unrestricted basis. This means that a person in this category will be referred to the High Court of Justiciary to have a punishment part set, in accordance with the procedures set out in Part 4 of the schedule unless they exercise a waiver.

## **Part 6**

### **Existing members of the Parole Board**

131. Part 6 of the schedule makes additional provision for existing members of the Parole Board.
132. Paragraph 79 provides that, subject to paragraphs 80 to 83 of the schedule, the provisions in section 5 of the Act that alter the constitution of the Parole Board apply to existing members as well as new members. Therefore, for example, the appointment of an existing member will not extend beyond that member's 75<sup>th</sup> birthday. Similarly, existing members may only be removed from office by the tribunal that is provided for in section 5(4) of the Act.
133. Paragraph 80 provides that any period of appointment served by an existing Parole Board member prior to the period of appointment that is being served at the time when section 5 of the Act comes into force will be disregarded for the purposes of paragraph 2E of schedule 2 to the 1993 Act (as inserted by section 5(3) of the Act). Therefore, a previous period of appointment will not be regarded as an appointment under paragraph 2E and all existing members will be eligible to apply for reappointment provided there is an interval of at least 6 years between the end of their existing appointment and the start of any reappointment.
134. Paragraphs 81 and 82 set out the basis for calculating the terms of appointment for existing members and the point when the appointment of each existing member should be deemed to begin and end. In some cases, the period of appointment of an existing member will not begin or end on the date that is specified in that member's current instrument of appointment. In addition, the period of appointment may be different to that specified in the appointment instrument.
135. Paragraph 81 provides that if an existing member's current appointment followed a response to a public advertisement seeking applications for membership of the Parole Board, and if this advertisement was in a newspaper that was circulating throughout Scotland, then that member will be entitled to serve as a Board member for 6 years, beginning on the date when the current appointment actually began.
136. Paragraph 82 provides that an existing member who was not appointed in the manner described in paragraph 81 will be entitled to serve whichever is the later of either the period that is specified in that member's existing instrument of appointment, or a fixed period of 6 years beginning on the date when the member was first appointed as a member of the Board.
137. Paragraph 83 defines "existing member" as meaning a person who is a member of the Parole Board when section 5 of the Act comes into force. "Current appointment" is defined as meaning the appointment that is held by a member at the time that section 5 of the Act comes into force. "Public advertisement" is defined as meaning an advertisement in a newspaper circulating throughout Scotland.