

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

CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) ACT 2001

EXPLANATORY NOTES

THE ACT

3. The Act is in seven Parts:

Part 1 alters the release arrangements for adult mandatory life prisoners to bring them into line with the arrangements for other categories of life prisoner. Parts 1 to 5 of the schedule to the Act contain transitional provisions for existing life prisoners and existing transferred life prisoners.

Part 2 relates to the constitution of the Parole Board for Scotland. It introduces statutory tenure for Parole Board members to ensure that the Board, when sitting as a tribunal, complies with Article 6 of the ECHR as an "independent and impartial tribunal". Appointments would be made by the Scottish Ministers in accordance with procedures to be specified in regulations and a tribunal would be established to consider the removal of Board members. Part 6 of the schedule to the Act contains transitional provisions for existing Parole Board members.

Part 3 relates to legal aid in Scotland. It amends the legal aid fixed payments scheme for summary criminal cases to allow for the payment of "time and line" fees for a small number of exceptional and complex cases. It also amends the powers of the Scottish Ministers to make provision that would enable the Scottish Legal Aid Board to grant legal aid for proceedings determining civil rights and obligations where legal assistance was required to comply with Article 6 of ECHR. Technical amendments are also made to the Legal Aid (Scotland) Act 1986 to enable the Scottish Legal Aid Board to directly employ solicitors under Part V of the 1986 Act to provide legal assistance in summary criminal cases when necessary.

Part 4 repeals a provision in the Criminal Law (Consolidation) (Scotland) Act 1995 which states that a homosexual act will be unlawful where the act takes place in private if more than two persons take part or are present.

Part 5 amends the Lyon King of Arms Act 1867 to transfer from the Lord Lyon to the Scottish Ministers the power to appoint the Procurator Fiscal of the Lyon Court.

Part 6 confers a new power on the Scottish Ministers under which they are able to make remedial orders to remedy actual or perceived incompatibilities with ECHR.

Part 7 makes provision for the short title and commencement of the Act.

Part 1

Prisoners and Parole

Release of life prisoners

4. This Part of the Act relates to the release arrangements for life prisoners sentenced after this Part comes into force. It amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 (the “1993 Act”).
5. **Section 1(2)** repeals subsections (4) to (7) of section 1 of the 1993 Act. These provisions (which dealt with the release of life who prisoners who were not “designated life prisoners”) are now unnecessary. This Act makes provision for the future sentencing and release of all life prisoners to be dealt with under section 2 of the 1993. Previously the release arrangements in section 2 were restricted to designated life prisoners (discretionary life prisoners and persons who committed a murder whilst under the age of 18 years (“under 18 murderers”).
6. **Section 1(3)** amends section 2 of the 1993 Act. Paragraph (a)(i) repeals the term “designated” in consequence of the fact that section 2 will now apply to all life prisoners. Paragraph (a)(ii) inserts a new paragraph (aa) into section 2(1) of the 1993 Act and paragraph (a)(iii) repeals paragraph (c) of the same section. The effect of the amendments is that a “life prisoner” for the purposes of Part I of the 1993 Act is defined as a person:
 - “(a) *sentenced to life imprisonment for an offence for which such a sentence is not the sentence fixed by law; or*
 - (aa) *sentenced to life imprisonment for murder or for any offence for which that sentence is the sentence fixed by law.*
7. These amendments as read with sections 6 and 27(1) of the 1993 Act have the effect that the sentencing and release provisions in section 2 will now apply to all life prisoners. As mentioned above, previously, section 2 only applied to discretionary life prisoners and under 18 murderers.
8. **Section 1(3)(b)** amends section 2(2) of the 1993 Act. Sub-paragraph (i) repeals the redundant word “designated”. Sub-paragraph (ii) substitutes the words “punishment part” for the words “designated part” in the original text. Sub-paragraph (iii) inserts the words
“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)
into section 2(2) of the 1993 Act. Sub-paragraph (iv) substitutes the words “of which the life prisoner is convicted on the same indictment as that offence” for the words “associated with it.” The effect of these provisions is that, firstly, the part of the life sentence that requires to be specified in the order made by the court at the time that sentence is passed is now called the “punishment part” instead of the “designated part”. This is intended to reflect its purpose more clearly. Secondly, the provisions define more fully what is meant by a punishment part. It is defined as being the part of the life sentence that the court considers is the appropriate length of time that the prisoner requires to serve to satisfy the criminal justice requirements for retribution and deterrence. The amended definition makes it clear that the punishment part is the part of the sentence which represents the punitive element only and does not take account of any period of imprisonment that may be necessary for the protection of the public. After the punishment part has been served, it is for the Parole Board to determine, under section 2(5)(b) of the 1993 Act, whether it is no longer necessary for the protection of the public that the prisoner should be confined. The punishment part is therefore not concerned in any way with the issue of risk to the public. The provision at sub-paragraph (iv) makes clear that the length of the punishment part should reflect all the offences in respect of which the person has been convicted on a single indictment.

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9. Sub-paragraph (v) makes provision for determining the appropriate punishment part in the case of a person given a discretionary life sentence. This is to avoid any doubt that the new provisions in the Act could be regarded as altering the way in which the appropriate punishment period should be determined for discretionary life prisoners. The provision therefore preserves the effect of the decision in the case of *O'Neill v Her Majesty's Advocate*, 1999 SLT 958 so that courts set punishment parts for discretionary life prisoners in the same manner as they have set designated parts for discretionary life prisoners by virtue of the criteria in *O'Neill* (see also the case of *Ansari* 2003 SLT 845 where the High Court has considered the interpretation of this provision).
10. Sub-paragraph (vi) repeals the redundant word “designated” in section 2(2)(b) of the 1993 Act.
11. **Section 1(3)(c)** substitutes section 2(3) of the 1993 Act and inserts a new subsection (3A). Previously subsection (3) of the 1993 Act provided that where a court imposed a life sentence (in relation to a murder committed by someone under 18 or for an offence for which such a sentence is not the sentence fixed by law) it could decide not to make an order setting a "designated part" (now a "punishment part"), but if the court did this it had to state its reasons for that decision. Previously the subsection also provided that the designated part constituted part of the person's sentence for the purposes of any review or appeal. The substituted subsection (3) removes the sentencing court's discretion not to set a punishment part and provides that a part must be set in all cases. The substituted subsection (3) also makes equivalent provision to the previous section 2(3) in that it provides that the punishment part constitutes part of a person's sentence within the meaning of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”) for the purposes of any appeal or review. As the punishment part forms part of the person's sentence it will continue to be appealable under the relevant provisions of the 1995 Act.
12. The new subsection (3A) provides, in paragraph (a), that the order made under section 2(2) of the 1993 Act setting the punishment part must specify the period in years and months that the court considers appropriate. In making the order the court must take into account the factors specified in subsection (2), namely, the seriousness of the offence, or the offence combined with other offences of which the prisoner is convicted on the same indictment, any previous convictions, and, where appropriate, the stage in the proceedings at which the offender indicated his intention to plead guilty and the circumstances in which that indication was given. Paragraph (b) of new subsection (3A) provides that the order specifying the punishment part may specify a period of years and months notwithstanding the likelihood that that such a period will exceed the remainder of the prisoner's natural life. A judge might specify such a period where the seriousness of the offence required a long punishment part to be set. Subsection (3A) also makes it clear that a punishment part can be set as normal in a case where the convicted person's life expectancy is short due to age or illness.
13. Paragraph (d) repeals the redundant word “designated” in subsections (4) and (6) of section 2 of the 1993 Act.
14. Paragraph (e) inserts new subsections (5A), (5B) and (5C) into section 2 of the 1993 Act. Subsection (5A) provides that where the Parole Board, in considering the case of a life prisoner after the expiry of the punishment part or the case of a life prisoner who has been released on licence but recalled to custody, does not direct the prisoner's release on licence, it shall give the prisoner reasons, in writing, for its decision and shall fix the date for the next consideration of the prisoner's case. Subsection (5B) provides that the Scottish Ministers are required to refer the prisoner's case to the Board to enable the Board to consider it on the date that it has fixed for its next consideration. Subsection (5C) provides that the prisoner can invite the Board to bring forward the date for its next consideration of his or her case and if the Board agrees it can direct the Scottish Ministers to refer it before the date that it had originally fixed.

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15. Paragraph (f) repeals the words “designated” and “at any time” because they are redundant.
16. Paragraph (g) inserts a new subsection (6A) into section 2 which restricts the prisoner’s right as to when he may require the Scottish Ministers to refer his case to the Parole Board, in the light of the new provisions inserted by paragraph (e).
17. Paragraph (h) removes the provision which prevented a prisoner having a right to require his case to be referred to the Parole Board if less than 2 years had elapsed since the most recent review. This is in consequence of the changes mentioned above through the introduction of new subsections (5A) to (5C) into section 2 of the 1993 Act which make the date for any review a matter for the Parole Board.
18. Paragraph (i) repeals the redundant word “designated” where it first occurs, and substitutes the word “punishment” for the word “designated” where it secondly occurs in section 2(8) of the 1993 Act, to take account of the change in terminology that is provided for by the amended version of section 2(2) of the 1993 Act.
19. Paragraph (j)(i) repeals paragraph (a) of section 2(9) of the 1993 Act which provided that a life prisoner serving two or more sentences of imprisonment could only be regarded as a designated life prisoner if he had a designated part for all of his life sentences. This is no longer necessary because, under the changes made by the Act, all life prisoners will now have an order setting the punishment part made by the court under section 2(2) of the 1993 Act. Paragraph (j)(ii) repeals the term “designated” and substitutes “punishment”. This amendment is consequential on the change in terminology provided for by the amendment of section 2(2) of the 1993 Act, whereby there will no longer be a designated part specified in an order under section 2(2) but instead a punishment part will be specified in any such order.
20. [Section 1\(4\)](#) repeals sections 6(2) and 6(3) of the 1993 Act. Section 6(2) empowered the Scottish Ministers to release on licence a child detained without limit of time under section 208 of the 1995 Act on the recommendation of the Parole Board. Section 6(3) empowered the Scottish Ministers, after consultation with the Parole Board, to make an order providing that in relation to all children or a particular class of children specified in the order detained without limit of time that the word “may” in section 6(2) shall be substituted by the word “shall”. The effect of such an order is that a recommendation to release from the Parole Board is treated as a direction to release i.e. the Scottish Ministers are required to release the child. These provisions are no longer necessary because all children who are sentenced to detention without limit of time will require to have a punishment part set by virtue of the substituted version of section 2(3) of the 1993 Act and the Scottish Ministers will require to release such prisoners on licence under section 2 if directed to do so by the Parole Board.
21. [Section 1\(5\)](#) amends sections 17(2), and 17(3)(a) of the 1993 Act (revocation of licence). The effect of section 1(5)(a) and (b) is that, where a prisoner’s release licence has been revoked and he has been recalled to custody under section 17(1) of the 1993 Act, the Scottish Ministers are required to refer his case to the Parole Board. Previously, they were required to refer the case to the Parole Board only if the prisoner was recalled without a Parole Board recommendation or the prisoner put in written representations.
22. [Section 1\(5\)\(c\)](#) of the Act inserts a new subsection (4AA) into section 17 of the 1993 Act. This new subsection provides that where the Parole Board directs the release of a prisoner under section 17(4) they may recommend that the Scottish Ministers insert, vary or cancel conditions in the prisoner’s licence.
23. [Section 1\(6\)](#) of the Act repeals the definition of “discretionary life prisoner” in section 27 (interpretation of Part I) because it is no longer necessary. The words discretionary life prisoner will no longer be used in the 1993 Act. The amended section 2 of the 1993 Act only makes reference to life prisoners.

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24. **Section 1(7)** of the Act makes some purely technical and consequential amendments to schedule 6 to the 1993 Act (which relates to transitional and savings provisions for existing discretionary life prisoners). Paragraph (a)(i) amends paragraph 6(2) of schedule 6 to remove the reference to section 1(4) of the 1993 Act which is repealed by section 1(2) of the Act. The other amendments to paragraphs 6(2)(a), (2)(b), (3)(a), (3)(b) and 6A(2) simply repeal the word “designated” where it appears in relation to an existing designated life prisoner and substitute for the word “designated” the word “punishment” in relation to the part in the light of the change in terminology provided for above in the amendments to section 2(2) of the 1993 Act.
25. **Section 1(8)** of the Act makes similar purely technical and consequential amendments to section 16 of the Crime and Punishment (Scotland) Act 1997 (which relates to transitional and savings provisions for existing under 18 murderers). These amendments repeal references to section 1(4) of the 1993 Act and repeal the word “designated” where it appears in relation to an existing under 18 murderer and substitute for the word “designated” the word “punishment” in relation to the part, in the light of the change in terminology provided for above in the amendments to section 2(2) of the 1993 Act.

Amendment of the Criminal Procedure (Scotland) Act 1995

26. **Section 2(1)(b)** repeals subsections (4) to (6) of section 205 of the 1995 Act. Subsection (4) of the 1995 Act empowered the sentencing judge, on sentencing any person convicted of murder, to make a recommendation as to the minimum period that the prisoner should serve in custody before the Scottish Ministers release that prisoner on licence. Subsection (5) required the judge to give reasons for his recommendation. Subsection (6) provided that the recommendation should form part of the prisoner's sentence and, as such, was appealable. By virtue of the amendments to section 2 of the 1993 Act outlined above these provisions are redundant because all life prisoners will have a punishment part set by the court.
27. **Section 2(2)** inserts a new section 205D which provides that where a person is convicted of more than one crime libelled on the same indictment for which the court would be required to, or would have decided to, impose life sentences, the court shall impose only a single life sentence. The punishment part will therefore reflect the appropriate period of punishment and deterrence taking into account all crimes for which a life sentence is imposed and any other crime of which the offender is convicted on the same indictment.

Amendment of provisions relating to transferred life prisoners

28. **Section 3(1)(a)** and (b) amend section 10 of the 1993 Act by substituting new subsections for subsections (1) and (2) and by inserting new subsections (1A) and (2A) to (2U).
29. Previously, section 10(1) of the 1993 Act dealt with discretionary life prisoners and under 18 murderers who were transferred to Scotland from another UK jurisdiction on an unrestricted basis, that is certain prisoners who transfer to Scotland to serve their sentences and who become subject to Scots law following their transfer. Section 10(1) of the 1993 Act provided for the recognition of the equivalent to the “designated part” and for the prisoner to thereafter be treated as a designated life prisoner sentenced in Scotland.
30. **Section 10(1)**, as amended, applies to the classes of prisoners specified therein who are transferred after the Act comes into force as well as such prisoners who were transferred before the provisions of the Act came into force. It enables all prisoners transferred from another UK jurisdiction who are to be subject to Scots law following their transfer and who have an equivalent to a punishment part that has been set by another UK court to have that part recognised and deemed to be a punishment part for the purposes of the 1993 Act

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31. Provision is contained in section 10(2) for the way in which transferred life prisoners – to whom section 10(1) does not apply - will be treated following their transfer to Scotland. It will apply in the case of prisoners not mentioned in section 10(1) with indeterminate sentences who are transferred to Scotland after section 3 of the Act comes into force from countries outside the UK under repatriation arrangements, military prisoners and life prisoners from other parts of the UK who are transferred here on an unrestricted basis. These prisoners either do not have any equivalent to a punishment part under the law of the sending jurisdiction, or an equivalent to a punishment part has been fixed in the sending jurisdiction but not by a court.
32. Under the substituted version of section 10(2), subject to certain exceptions, the transferred life prisoners to whom the subsection applies will require to have their cases referred to the High Court for a punishment part hearing. They will be treated as life prisoners sentenced in Scotland, once the High Court has set their punishment part. At the court hearing to set the punishment part, the court will be required to make an order specifying the punishment part that the court would have specified if the prisoner had been sentenced for the offence in Scotland and if section 2(2), as amended by the Act, had been in force at the time the prisoner was sentenced.
33. New subsections (2A) to (2U) make provision in relation to the holding of a hearing by the High Court to set a punishment part for the transferred life prisoner.
34. New subsection (2A) requires the Scottish Ministers to refer the case to the High Court of Justiciary as soon as reasonably practicable following the prisoner's transfer to Scotland. Thereafter, the hearing will be held on the same basis as the hearings that are to be held for existing life prisoners sentenced in Scotland which are provided for in Part 1 of the schedule to the Act. New subsection (2B) allows certain transferred life prisoners (i.e. those in respect of whom certificates or directions referred to in subsection (2D) have been issued) to waive their entitlement to a hearing. In these cases, the certificate or direction fixes a punishment period but the period was not fixed in open court. New subsections (2E) to (2U) make provision as to the hearing to set a punishment part, the order to be made by the High court, the circumstances in which such a transferred life prisoner will be deemed to have served the punishment part, the procedure where the life prisoner is incapable of instructing a solicitor, and to allow the High Court to regulate procedure at a hearing to set a punishment part.
35. [Section 3\(1\)\(c\)](#) amends section 10(3). The amendments remove redundant references to section 1(4), the word “designated”, and insert new references to the punishment part and the court hearing that is provided for in new subsection (2J). As amended by this Act, section 10(3) has the effect of applying the 1993 Act to the transferred life prisoners once the court has fixed a punishment part. Such prisoners will thereafter be treated as if they were life prisoners sentenced in Scotland.
36. [Section 3\(1\)\(d\)](#) amends the definition of a “transferred life prisoner” in section 10(4) (b)(i) to make it clear that section 10 applies only to those prisoners who are transferred to Scotland on an "unrestricted basis", i.e. those who are subject to Scots law for all purposes following their transfer. This is in contrast to prisoners who come from other parts of the UK on a "restricted basis", and who remain subject to the law of the sentencing jurisdiction. The amendments to section 10 make no provision for such prisoners, because they remain subject to the early release law of the jurisdiction from which they are transferred and are not covered by the release regime in the 1993 Act. The amendment also ensures that prisoners transferred from other parts of the UK under mental health provisions are covered by the definition of transferred life prisoner.
37. [Section 3\(1\)\(e\)](#) amends section 10(5) by repealing redundant references to the word “designated”, making reference to the new court hearing under new subsection (2J) and the “punishment part”.
38. [Section 3\(2\)](#) inserts a new section 10A into the 1993 Act. Section 10A makes provision for those life prisoners whose supervision is transferred to Scotland on an unrestricted

basis on or after their release from another UK jurisdiction, except for those who have been released on compassionate grounds for whom special provision is made. Those to whom section 10A applies are regarded as having served their punishment part and will be treated as if they had been released under section 2(4) of the 1993 Act.

Part 2

Constitution of Parole Board for Scotland

39. This Part of the Act amends the 1993 Act to provide new arrangements for the appointment, tenure and removal of Parole Board members.

Appointment and removal of Parole Board members

40. [Section 5\(1\)\(a\)](#) amends section 20(1) of the 1993 Act by repealing the words “this Part of”. This is a technical and consequential amendment. It is intended to ensure that the Board as reconstituted by the Act can still consider the cases of persons who are subject to the release provisions in the Prisons (Scotland) Act 1989.
41. [Section 5\(1\)\(b\)](#) amends section 20(4) of the 1993 Act by inserting new paragraph (ba). This paragraph allows the Scottish Ministers to make rules that would enable the Board to require any person to attend a hearing before it, either to give evidence or to produce documents. However, the Board’s power to require persons to attend does not extend to the prisoner whose case is being considered.
42. [Section 5\(1\)\(c\)](#) inserts subsection (4A) into section 20 of the 1993 Act. This allows the Scottish Ministers to apply subsections (4) and (5) of section 210 of the Local Government (Scotland) Act 1973 to any rules made under new paragraph (ba). These subsections make provision as to the attendance of witnesses and productions of documents at public inquiries. Section 210(4) sets out the persons who may be cited, the books and documents they may be required to produce, and the questions they may be required to answer. Section 201(5) sets out the circumstances in which an offence is committed, the method of trial and the sanctions available on conviction. However, subsection (4A) restricts the maximum penalty to a fine which cannot exceed level 2 on the standard scale.
43. [Section 5\(2\)](#) inserts two new paragraphs into schedule 2 to the 1993 Act. Paragraph 1A requires the Scottish Ministers to comply with any regulations they make on the procedure that is to govern the appointment of Board members, and the consultation with other parties which should take place before appointments are made.
44. Paragraph 1B allows the regulations to specify different procedures for the appointment of different Parole Board members. For example, it is intended that regulations will require most vacancies to be advertised in national newspapers or specialist journals. However, this would not be appropriate in relation to the appointment of a Lord Commissioner of Justiciary. A recommendation is received from the Lord Justice General prior to this appointment.

Appointment of Parole Board members

45. [Section 5\(3\)](#) contains 9 new paragraphs to be inserted into schedule 2 to the 1993 Act (paragraphs 2A to 2J) which regulate the conditions of service of Parole Board members.
46. Paragraph 2A provides that a Parole Board member will have a term of office of not less than 6 years and not more than 7 years. The variable length of appointment is designed to ensure that all appointments can end on 31 December, even if they begin on a date other than 1 January. The term of appointment provided for in this paragraph is, however, subject to paragraphs 2B to 2D.

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47. Although every member will be appointed for between 6 and 7 years, paragraph 2B provides that he or she is still entitled to resign at any point during that term by notifying the Scottish Ministers accordingly.
48. Paragraph 2C provides that a Parole Board member's appointment will end on reaching his or her 75th birthday regardless of whether the period of appointment under paragraph 2A has expired. It also means that no person can be appointed or re-appointed as a member of the Parole Board after the age of 75.
49. Paragraph 2D provides that a Parole Board member's appointment will come to an end if that member is removed from office by the tribunal that is provided for in the new paragraph 3 of schedule 2 to the 1993 Act (inserted by section 5(4)).
50. Paragraph 2E provides that a person may be reappointed as a member of the Parole Board only if two conditions are fulfilled. One is that at least 3 years have passed since the person was previously a member and the other is that the person has not already been reappointed under these provisions.
51. Paragraph 2F allows a person who has previously been a member of the Parole Board but who has resigned from that office to be reappointed, provided the conditions laid out in paragraph 2E are fulfilled.
52. Paragraph 2G precludes the reappointment of a person who has been removed from office under the new paragraph 3 of schedule 2 to the 1993 Act.
53. Paragraph 2H provides that a person who is reappointed under paragraph 2E will be subject to the provisions of paragraphs 1 to 2D in the same way as a person who has been appointed for the first time.
54. Paragraph 2J requires the Chairman of the Parole Board to ensure that, where possible, each member of the Parole Board has the opportunity to participate in the functions of the Board for at least 20 days in each 12-month period.

Removal of Parole Board members from office

55. [Section 5\(4\)](#) replaces the original paragraph 3 of schedule 2 to the 1993 Act with new paragraphs 3 to 3D. These new paragraphs set out the grounds for removing a Parole Board member from office and the procedure for doing so.
56. [Paragraph 3](#) places the responsibility for deciding on removal on a tribunal to be constituted for this purpose.
57. Paragraph 3A provides that the tribunal can remove a member from office only if an investigation has been carried out at the request of the Scottish Ministers and that investigation has found the member to be unfit for office because of inability, neglect of duty or misbehaviour.
58. Paragraph 3B determines the membership of the tribunal. The members will be appointed by the Lord President of the Court of Session and will be:
 - (a) *a Senator of the College of Justice or a sheriff principal (who shall preside),*
 - (b) *an advocate or a solicitor who has been qualified for at least 10 years; and*
 - (c) *one other person who shall not be legally qualified.*
59. Paragraph 3D(a) allows the Scottish Ministers to make regulations, which will allow the tribunal to suspend a member of the Parole Board from office during an investigation. The regulations may also make provision for the length and effect of any such suspension. Sub-paragraph (b) empowers the Scottish Ministers to make any other provision considered necessary in respect of the tribunal, including procedure to be followed by and before it.

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60. **Section 5(5)** inserts paragraphs 6A and 6B into schedule 2 to the 1993 Act. These paragraphs provide that the regulations under paragraphs 1A and 3D of schedule 2 will be made by statutory instrument, and must be laid in draft before and approved by a resolution of the Scottish Parliament.
61. **Section 5(6)** gives effect to Part 6 of the schedule for the purpose of making transitional provisions for existing members of the Parole Board.

Part 3

Legal Aid

62. This Part of the Act deals with the extension of advice and assistance and civil legal aid under the Legal Aid (Scotland) Act 1986 (the “1986 Act”), gives additional powers to the Scottish Ministers to enable specified cases to be excluded from the fixed payments scheme, provides a retrospective power for future changes to the fixed payments scheme, and makes further provisions about the employment of solicitors by the Scottish Legal Aid Board (the “Board”).

Extension of advice and assistance and civil legal aid under the 1986 Act

63. **Section 6(1)** amends section 6(2) of the 1986 Act by extending the definition of "court or tribunal" in Part 2 of the 1986 Act, which relates to advice and assistance. This has the effect of allowing advice and assistance to be made available for any proceedings or bodies which determine persons' civil rights and obligations.
64. **Section 6(2)** amends section 13 of the 1986 Act by extending the definition of "court or tribunal" in Part 3 of the 1986 Act, which relates to civil legal aid. This has the effect of allowing civil legal aid to be made available for any proceedings or bodies which determine persons' civil rights and obligations. This section also repeals subsection (5) of section 13, which is considered redundant.
65. **Section 6(3)** inserts a new regulation making power into section 14 of the 1986 Act. It provides that for certain courts and tribunals as will be specified in the regulations, further tests of eligibility may be prescribed by those regulations over and above the existing tests of *probabilis causa*, reasonableness and financial eligibility. These regulations will be made by the Scottish Ministers and subject to negative resolution procedure.
66. **Section 6(4)** makes a consequential change to section 16, which relates to expenses in favour of certain assisted persons, to ensure that it also applies to any proceedings or bodies covered by the amended definition of “court or tribunal” as inserted in section 13(6) of the 1986 Act by section 6(2) of this Act.
67. **Section 6(5)** inserts a new section 38(1A). This is a consequential change to ensure that the amended definition of “court or tribunal” applies in section 38(1)(a), which relates to the power of the Court of Session to regulate the procedure of courts and tribunals in relation to legal aid.

Fixed payments for criminal legal assistance: exceptional cases

68. **Section 7** of the Act inserts new subsections (3C) to (3K) into section 33 of the 1986 Act.
69. New subsection (3C) allows the Scottish Ministers to make regulations in which they can prescribe the circumstances and conditions under which a solicitor shall be paid under section 33(2) and (3) of the 1986 Act instead of being paid under section 33(3A) of the 1986 Act. This means that a solicitor will be paid on a "time and line" basis rather than under the fixed payment scheme. The purpose of these regulations is to enable the Scottish Legal Aid Board to ensure that a person who is provided with criminal legal assistance under section 33(3A) of the 1986 Act is not deprived of the right to a fair trial because of the amount of the fixed payments payable under section 33(3A) of

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the 1986 Act (see new subsection (3D)). Such regulations will be subject to negative resolution procedure.

70. New subsection (3J) allows the Scottish Ministers to apply any regulations made under subsection (3C) retrospectively to cases ongoing at the time of the commencement of section 7 of the Act. It also enables the Scottish Ministers to disapply any conditions in the regulations made under subsection (3C)(b) to any such ongoing cases.
71. Subsection (3K) requires the Board to set up a procedure to allow the review of any decision by it to refuse an application under subsection (3H) or determine that a solicitor is not to be paid under section 33(2) and (3) of the 1986 Act.

Criminal legal assistance: retrospective revision of fixed payment regulations

72. [Section 8](#) of the Act inserts new subsections (3AA), (3AB) and (3AC) into section 33 of the 1986 Act. These new subsections will enable regulations made under section 33(3A) (which amend or replace existing regulations made under section 33(3A)) to apply retrospectively. This retrospective power is for the purpose of ensuring that no person is deprived of the right to a fair trial as a result of the total amount payable under the regulations prior to amendment or replacement. The regulations would apply retrospectively to any commenced and continuing proceedings where criminal legal assistance was being provided when the amendment or replacement regulations come into force.

Employment of solicitors by the Board: further provisions

73. [Section 9](#) of the Act makes amendments to sections 4, 11, 12, 25A, 25B, 26, 28A and 31 of the 1986 Act to enable the Board to use its powers under section 26 of that Act to directly employ solicitors for the purpose of providing criminal legal assistance.
74. [Sections 9\(1\)](#) and [\(2\)](#) amend sections 4 and 11 of the 1986 Act which deal with the provision of advice and assistance and any associated contributions to ensure that any client represented by a directly employed solicitor is treated in the same way as a client represented by a private solicitor under legal aid, in relation to expenses and payment of contributions respectively.
75. [Section 9\(3\)](#) amends section 12 of the 1986 Act. This is to ensure that the salary of a directly employed solicitor is not subject to the regulations that apply to the payment of legal aid fees and expenses to a private solicitor providing advice and assistance under Part II of the 1986 Act.
76. [Sections 9\(4\)](#) and [\(5\)](#) amend sections 25A and 25B of the 1986 Act respectively. The amendments have the effect of ensuring that any solicitor employed by the Board under section 26 of the 1986 Act for the purpose of providing criminal legal assistance is required to be registered under section 25A of the 1986 Act and allow the Board to set different provisions in a Code of Practice under section 25B for such directly employed solicitors.
77. [Section 9\(6\)](#) amends section 26(1)(a) of the 1986 Act by inserting a new regulation making power. This power will allow the Scottish Ministers to prescribe the cases in which the Board may employ solicitors for the purposes of providing advice and assistance under Part II of the 1986 Act. Such regulations will be subject to negative resolution procedure.
78. [Section 9\(7\)](#) amends section 28A of the 1986 Act. The effect is to ensure that the provisions of section 28A have no effect on the power to commence sections 26 to 28 of the 1986 Act. The amendments also have the effect of ensuring that provisions that would by virtue of section 28A(12) cease to have effect would remain in force in relation to solicitors employed under sections 26 to 28 of the 1986 Act.

79. [Section 9\(8\)](#) amends section 31(1A) of the 1986 Act. The effect is that the entitlement of a person to select a solicitor or counsel under section 31(1) of the 1986 Act does not apply where that person is provided with criminal legal assistance by a solicitor employed by the Board under sections 26 and 27 of the 1986 Act.

Part 4 – Homosexual Offences

Repeal of section 13(2)(a) of the Criminal Law (Consolidation) Act 1995

80. Section 13(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 provides that a homosexual act in private is not an offence provided that the parties consent and have obtained the age of 16 years. Section 13(2)(a) provided that an act which would otherwise be treated for the purposes of the 1995 Act as being done in private should not be so treated if done when more than two persons took part or were present. The effect of section 13(2)(a) of the 1995 Act was that it was an offence for more than two consenting adult males to take part in homosexual acts in private. Section 10(a) repeals section 13(2)(a).
81. [Section 10\(b\)](#) makes a necessary consequential amendment to section 13(5)(b) of the 1995 Act. Section 13(5)(b) made it an offence to commit or to be party to the commission of, or to procure or attempt to procure the commission of a homosexual act without the consent of *both parties* to the act. Section 8(b) changes the reference to “both parties” to “the parties” to cover the situation where more than two men are involved.

Part 5

Procurator Fiscal of the Lyon Court

82. [Part 5](#) amends the Lyon King of Arms Act 1867 to transfer from the Lord Lyon to the Scottish Ministers the power to appoint the procurator fiscal to the Lyon Court.

Appointment of procurator fiscal of the Lyon Court

83. [Section 11\(2\)](#) amends section 9 of the 1867 Act to remove references to the procurator fiscal of the Lyon Court.
84. Subsection (3) inserts a new section 9A, which provides for the procurator fiscal of the Lyon Court to be appointed by the Scottish Ministers on such terms and conditions as they determine.
85. Subsection (4) provides that the incumbent procurator fiscal will cease to hold office on the day this Part of this Act comes into force.

Part 6

Power to Make Remedial Orders

86. [Part 6](#) confers a power on the Scottish Ministers under which they are able to make orders (“remedial orders”) to remedy any actual or potential incompatibility between provisions in primary or subordinate legislation and the ECHR.

Remedial orders

87. [Section 12\(1\)](#) confers power on the Scottish Ministers to make remedial orders and defines the scope of that power. Further clarification of the scope of the power is contained in section 12(3). A remedial order may be made as a consequence of any Act of Parliament, Act of the Scottish Parliament, subordinate legislation made under any such Act, any provision in any such Act or subordinate legislation or any exercise or purported exercise of functions by a member of the Scottish Executive, which is or may

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be incompatible with any of the Convention rights. Ministers may make such provision as they consider necessary or expedient. Section 12(2) further provides that before using the power, Ministers must be satisfied that there are compelling reasons for taking the remedial order route as opposed to some other route (such as using primary legislation). Similar wording appears in section 10(2) of the Human Rights Act 1998.

88. [Section 12\(3\)\(d\)](#) enables a remedial order to modify any enactment, prerogative instrument (such as an Order in Council), other instrument or document provided these relate to the exercise or purported exercise of functions by the Scottish Ministers.
89. [Section 12\(3\)\(e\)](#) provides that a remedial order may make provision which has retrospective effect, since actions or provisions which are or may be incompatible are likely to have already taken practical effect. This mirrors the provision that is made for remedial orders under the Human Rights Act (see paragraph 1(1)(b) of schedule 2 to that Act) and the subordinate power in the Scotland Act 1998 to remedy *ultra vires* Acts or exercises of functions (see sections 107 and 114 of the Scotland Act). However, provisions which increase the punishment for, or create, criminal offences are specifically excluded from having retrospective effect. Section 12(3)(f) specifies that the remedial order may provide for the delegation of functions.
90. [Section 12\(4\)](#) restricts the scope for creating offences in a remedial order by imposing maximum penalties which may be imposed for any such criminal offences. For an offence punishable on summary conviction, the maximum penalty is restricted to 3 months' imprisonment or a fine not exceeding level 5 on the standard scale. For more serious offences, punishable on indictment, the maximum penalty is restricted to 2 years' imprisonment. No limit is placed on the fine that may be imposed.
91. [Section 12\(5\)](#) confirms that the conferring of this power to make a remedial order does not affect any other power which the Scottish Ministers may have to remedy the ECHR incompatibility, such as any existing powers to make regulations.

Procedure for remedial orders: general

92. [Section 13](#) outlines the general procedure which the Scottish Ministers must follow in making a remedial order. Section 13(1) confirms that the order is made by statutory instrument.
93. [Section 13\(2\)](#) provides that the remedial order cannot be made until it has been laid in draft before, and approved by resolution of, the Scottish Parliament (affirmative resolution procedure).
94. [Section 13\(3\)](#) provides that, before the order is laid in draft for this purpose, the Scottish Ministers must give the Scottish Parliament and the public the opportunity to comment on a copy of the proposed draft order by:
 - Laying a copy of the proposed draft order and a statement of their reasons for making the order before the Parliament;
 - Giving appropriate public notice of the proposed order, inviting comments in writing. Such comments are to be made within a period of 60 days beginning with the earlier of the day the notice was given or the day the proposed order was laid (this may be, but need not be, the same day);
 - Having regard to any comments made within that period.
95. [Section 13\(4\)](#) provides that when laying the draft remedial order for approval, the Scottish Ministers must also lay a statement which summarises the comments made during the 60 day period outlined in section 13(3)(b) and which specifies any changes made to the draft order and the reasons for those changes.

Procedure for remedial orders: urgent cases

96. [Section 14\(1\)](#) confers power on the Scottish Ministers, for reasons of urgency, to make a remedial order forthwith without applying the procedure specified in section 13.
97. The remainder of section 14 specifies the procedure that the Scottish Ministers must follow having made an urgent remedial order.
98. [Section 14\(2\)](#) provides that the Scottish Ministers must, after making the order, give appropriate public notice of the contents of the order, inviting comments in writing to be made within a period of 60 days beginning with the day the order was made. Ministers must also lay the order before the Scottish Parliament with a statement of reasons for having made it.
99. [Section 14\(3\)](#) provides that the Scottish Ministers must have regard to comments made within the stipulated period. [Section 14\(4\)](#) provides that as soon as practicable after the end of the period, Ministers must lay a statement before the Scottish Parliament summarising the comments made and specifying the changes (if any) they consider should be made to the order.
100. [Section 14\(5\)](#) outlines the procedure to be followed if the Scottish Ministers consider that changes should be made to the original remedial order. Ministers must either make a second remedial order which gives effect to those changes and replaces the original remedial order and lay it before the Scottish Parliament or make an order which simply revokes the original remedial order. [Section 14\(8\)](#) provides that an order that simply revokes a remedial order will be made by statutory instrument and that instrument will be made subject to annulment in pursuance of a resolution of the Scottish Parliament (negative resolution procedure).
101. [Section 14\(6\)](#) provides that the Scottish Parliament must, if it so chooses, within a period of 120 days from the date when the original remedial order was made, approve the original order or the second remedial order where it has replaced the original order. If the remedial order is not approved within this time, the remedial order, or as the case may be, the second remedial order, will cease to have effect. However, this will not affect anything done under either order or the power which the Scottish Ministers have to make a new remedial order.
102. [Section 14\(7\)](#) provides that section 14(6) has no effect where the Scottish Ministers simply revoke the original remedial order within the period of 120 days referred to in that subsection.
103. [Section 14\(9\)](#) ensures that any period during which the Scottish Parliament is dissolved or is in recess for more than 4 days does not count towards the 60 day period specified in section 14(2)(a) or the 120 day period specified in section 14(6).

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, 18th 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

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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 sentenced 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.

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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 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.

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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 75th 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

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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.