

# **MANAGEMENT OF OFFENDERS (SCOTLAND) ACT 2019**

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## **EXPLANATORY NOTES**

### **THE STRUCTURE AND A SUMMARY OF THE ACT**

5. The Act is in 5 Parts and 2 Schedules.
6. Part 1 provides for the expansion of the current electronic monitoring regime, including facilitating the introduction of new technologies, increasing the options available to manage and monitor offenders in the community.
7. Part 2 provides for a reduction in the length of period during which people have to disclose their offending history, while still protecting public safety. This will help individuals to break the cycle of offending by assisting their attempts to, for example, gain employment or attend university or college.
8. Part 3 provides reforms designed to simplify and modernise processes, and support consistency of approach in relation to parole matters and the Parole Board for Scotland.
9. Part 4 provides for matters related to the release of prisoners from custody, introducing a new offence of remaining unlawfully at large and making changes to Home Detention Curfew (HDC) eligibility and powers of recall.
10. Part 5 deals with some standard final matters for the Act.
11. Schedule 1 makes additional and consequential provision in relation to certain community orders and other orders made by a criminal court.
12. Schedule 2 makes a number of minor and consequential amendments to the Rehabilitation of Offenders Act 1974.

### **Part 1 – Electronic Monitoring Etc.**

#### **Monitoring in criminal proceedings**

##### ***Section 1 – Requirement when disposing of case***

13. Section 1 provides the overarching arrangements under which a criminal court can, when disposing of a case, require an individual to submit to electronic monitoring.
14. Section 1(1) provides that the court may, when disposing of a case, require the person whose case is being disposed of to submit to monitoring by means of an approved device. A description of the relevant disposals that can be monitored is contained in section 3(2) and a definition of approved device is contained in section 8(1).
15. Section 1(3) provides that a requirement made under this section is to be monitored by a person designated by the court in terms of section 11(1)(a). It also sets out that the person subject to the monitoring requirement is bound by the obligations described in sections 12(2) and (3) whilst being electronically monitored.

16. Section 1(4) provides that electronic monitoring is for the dual purpose of ascertaining whether or not the monitored person is, firstly, complying with the specific requirements of the disposal which are to be electronically monitored, and secondly, fulfilling the obligations placed on the individual under section 12(2) and (3).
17. Section 1(5) provides that the court must explain to a person who is being made subject to an electronic monitoring requirement the purpose of the electronic monitoring as defined at subsection 1(4) above (i.e. to ascertain whether or not they are complying with the specific requirements of the underlying disposal and fulfilling the section 12 obligations placed on the individual). Section 1(5) also provides that the person must be warned of the consequences of failing to fulfil the section 12 obligations.
18. Section 1(6) provides that the electronic monitoring requirement is to be stated in an order of the court, and that the form of that order is to be prescribed by Act of Adjournal.
19. Section 1(7) provides that it is for the court to specify the particular aspects of the disposal that are to be monitored when disposing of the case.

### ***Section 2 – Particular rules regarding disposals***

20. Section 2(1) provides that if a person’s agreement is necessary before they can become subject to any of the disposals listed in section 3(2), then it is also necessary that they agree to become subject to an electronic monitoring requirement before it can be made.
21. Section 2(2) provides that an electronic monitoring requirement lasts for as long as a person is subject to the related disposal. It further provides that a court may vary or revoke an electronic monitoring requirement when the related disposal is being varied or revoked.

### ***Section 3 - List of the relevant disposals***

22. Section 3 contains a list of the relevant disposals in relation to which a court may additionally require a person to be subject to electronic monitoring. The list covers the making, altering, varying and renewing of the various disposals. These disposals are—
  - a supervised release order made under section 209(1) of the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’);
  - a restriction of liberty order made under section 245A of the 1995 Act;
  - a movement restriction forming part of a drug treatment and testing order made under section 234C(1) of the 1995 Act;
  - a restricted movement requirement forming part of a community payback order made under section 227A(2)(j) of the 1995 Act;
  - a sexual offences prevention order made under section 104(1)(b) (as read with section 104(2) and (3)) of the Sexual Offences Act 2003; and
  - a sexual harm prevention order made under section 11 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

### ***Section 4 - More about the list of disposals***

23. Section 4(1) provides that the Scottish Ministers may by regulations modify the list of relevant disposals so as to add, alter or remove an entry. It also provides that the Scottish Ministers may limit an entry to the list of relevant disposals so as to specify a certain aspect of what a court can do. This would enable Ministers to add a specific court order to the list in section 3 but limit that entry to a specified aspect of the court order. The modifications that can be made to the list are however limited by the provisions of subsections (2) and (3).

24. Section 4(2) provides that an entry included in the list of relevant disposals may relate to anything at any stage in criminal proceedings which may be made or imposed by the court on a person or to which a person can otherwise be made subject by a court. Section 4(2) also provides that an entry in section 3(2) cannot be something under which a person is to be detained in custody – for example, a sentence of imprisonment could not be added to the list in section 3(2).
25. Section 4(3) provides that an entry in the list of relevant disposals can only relate to the monitoring of a person's whereabouts (including being at or not being at a particular place) or a person's consumption, taking, or ingestion of alcohol, drugs or other substances.
26. Section 4(4) provides that any entry in section 3(2) is to be regarded as a disposal for the purposes of Part 1 regardless of whether or not it is a final disposal.

## **Monitoring on release on parole**

### ***Section 5 - Requirement with licence conditions***

27. Section 5 enables the Scottish Ministers to impose an electronic monitoring requirement on a person when imposing licence conditions on the release of that person from a prison or young offenders institution. In effect section 5 replicates for licence conditions the provisions of section 1 relating to court disposals.
28. Section 5(1) provides that the Scottish Ministers may, when imposing licence conditions, require a person to submit to monitoring by means of an approved device. A description of the relevant licence conditions that can be monitored is contained in section 7(1) and a definition of approved device is contained in section 8(1).
29. Section 5(3) provides that a requirement made under this section is to be monitored by a person designated by the Scottish Ministers in terms of section 11(2)(a). It also sets out that the person subject to the monitoring requirement is bound by the obligations described in sections 12(2) and (3) whilst being electronically monitored.
30. Section 5(4) provides that electronic monitoring is for the dual purpose of ascertaining whether or not the monitored person is, firstly, complying with the specific requirements of the licence conditions which are to be electronically monitored, and secondly, fulfilling the obligations placed on the individual under section 12.
31. Section 5(5) provides that the court must explain to a person who is being made subject to an electronic monitoring requirement the purpose of the electronic monitoring as defined at subsection 5(4) above. Section 5(5) also provides that the person must be warned of the consequences of failing to fulfil the section 12 obligations.
32. Section 5(6) provides that the terms of the requirement for electronic monitoring are to be stated in the licence on which the person is released.
33. Section 5(7) provides that it is for the Ministers to specify the particular aspects of the licence conditions that are to be monitored when imposing the licence conditions.

### ***Section 6 – Particular rules regarding conditions***

34. Section 6(1) provides that if a recommendation of the Parole Board for Scotland is necessary before particular conditions mentioned in section 7(1) can be imposed on a person, then a recommendation from the Parole Board for Scotland is also necessary before an electronic monitoring requirement can be made in relation to those conditions.
35. Section 6(2) provides that an electronic monitoring requirement lasts for as long as a person is subject to the related conditions. It further provides that the Scottish Ministers may however vary or revoke an electronic monitoring requirement when the related conditions are being varied or revoked.

### ***Section 7 – List of the relevant conditions***

36. Section 7(1) lists the relevant conditions in connection with which the Scottish Ministers may require a person to submit to electronic monitoring. Section 7(1)(e) allows the Scottish Ministers to prescribe by regulations additional types of early release conditions which can be electronically monitored.
37. Section 7(2) provides that the reference to conditions mentioned in section 7(1) is limited so as to relate to the monitoring of either a person's whereabouts (including being at or not being at a particular place), or a person's consumption, taking, or ingestion of alcohol, drugs or other substances.

### **Devices, use and information**

#### ***Section 8 – Approved devices to be prescribed***

38. Section 8(1) provides that an approved device, in relation to the electronic monitoring of a person either in relation to a court disposal or on release from prison/young offenders institution on licence, is an electronic device prescribed in regulations made by the Scottish Ministers.
39. Section 8(2) provides that the type of device that may be specified in regulations made by the Scottish Ministers includes devices to monitor a person's whereabouts (including being at or not at a particular place) or detect whether they have consumed, taken, or ingested alcohol, drugs or other substances (and to measure the level of alcohol, drugs or other substances).
40. Section 8(3) provides that regulations under (1) may include provision as to any apparatus linked to a device as well as prescribing the device itself.

#### ***Section 9 – Use of devices and information***

41. Section 9 provides the Scottish Ministers with regulation-making powers under affirmative procedure to make provision in relation to the use of approved devices, and the use of information obtained through the monitoring of a person by means of such devices. It also sets out a number of examples of what regulations made under these powers may do.

### **Arrangements and designation**

#### ***Section 10 – Arrangements for monitoring system***

42. Section 10(1) provides that the Scottish Ministers are obliged to make arrangements to secure the monitoring of a person, by means of an approved device, in connection with an electronic monitoring requirement made in relation to either a relevant court disposal or licence condition. Section 10(3) states that different arrangements may be made by the Scottish Ministers, under section 10(1), for different purposes.
43. Section 10(2) provides that the Scottish Ministers are obliged to keep the Scottish Courts and Tribunals Service informed of the identity of persons who are eligible for the courts to designate under section 11(1)(a). This designated person being responsible for monitoring a person for the purposes of an electronic monitoring requirement imposed by the court.

#### ***Section 11 – Designation of person to do monitoring***

44. Section 11(1) provides that where an electronic monitoring requirement is made under section 1(1), the court must designate a person responsible for monitoring the person subject to the requirement and notify the monitored person of that designation. It further provides a list of information which the court must send to the designated person.

45. Section 11(2) provides that where an electronic monitoring requirement is made under section 5(1), the Scottish Ministers must designate a person responsible for monitoring the person subject to the requirement and notify the monitored person of that designation. It further provides a list of information which the Scottish Ministers must send to the designated person.
46. Section 11(3) specifies that if the relevant disposal or condition is suspended, the designated person's responsibility for monitoring the monitored person is likewise suspended. It also provides that the designated person's responsibility ends when the disposal ceases, or the conditions cease to have effect, or if someone else is designated as a replacement.
47. Section 11(4) provides that if the designated person can no longer discharge their responsibility to monitor a monitored person the court or the Scottish Ministers (as the case may be) must designate a replacement. It also provides that the court or the Scottish Ministers must notify the monitored person of the replacement designated person, and send the replacement designated person the same information as was provided to the person first (or previously) designated.

## **Obligations and compliance**

### ***Section 12 – Standard obligations***

48. Section 12 sets out the standard obligations placed on a person in relation to an electronic monitoring requirement made either by the court under section 1(1) or by the Scottish Ministers under section 5(1).
49. Section 12(2) provides that a monitored person must obey the instructions given by the designated person on how the approved device must be worn or used so as to enable electronic monitoring for the purposes set out in section 1(4) or 5(4).
50. Section 12(3) provides that a monitored person must not tamper with or intentionally damage or destroy the device, nor cause or permit someone else to tamper with, damage or destroy the device.

### ***Section 13 – Deemed breach of disposal or conditions***

51. Section 13 deals with the consequences of a person failing to comply with the obligations set out in section 12.
52. Section 13(1) provides that an electronic monitoring requirement made under section 1(1) is to be regarded as if it is part of the relevant disposal listed in section 3(2). It further provides that any contravention of the obligations set out at either section 12(2) (to obey instructions given by a designated person) or 12(3) (not to tamper with or intentionally damage the device) is to be taken as a breach of the relevant disposal.
53. Section 13(2) provides that in the event a person contravenes the section 12 obligations, any statutory provisions as to breach of the relevant disposal are triggered. This allows the court to utilise the breach procedures that attach to the relevant disposal (including any powers to vary or revoke the relevant disposal following a breach) where the electronic monitoring requirement has been breached by the person.
54. Section 13(3) provides that, where it is an offence to breach the underlying disposal, that offence cannot be committed by breaching the section 12 obligations. For example, a person who removes the electronic tag, and thereby breaches the associated disposal by virtue of section 13(1)(b), does not commit an offence by doing so, even if a breach of the associated disposal constitutes an offence.
55. Section 13(4) provides that an electronic monitoring requirement made under section 5(1) is to be regarded as if it is part of the relevant licence conditions listed in section 7(1). It further provides that any contravention of the obligations set out at

either section 12(2) (to obey instructions given by a designated person) or 12(3) (not to tamper with or intentionally damage the device) is to be taken as a breach of the relevant conditions.

56. Section 13(5) provides that any statutory provisions for breach of the associated conditions or the licence in which they are contained are therefore triggered by any such failure to comply with the section 12 obligations. In addition, section 13(5) also provides that any statutory provisions for recall to prison or another place in consequence of a breach of the conditions or licence are also triggered by any such failure to comply with the section 12 obligations.
57. Section 13(7) provides that any references to provisions relating to breach of something include provisions relating to variation or revocation of it in consequence of breach of it.

### ***Section 14 – Documentary evidence at breach hearings***

58. Sections 14(1) and 14(2) provide that the rule on documentary evidence in section 14(3) applies in relation to a hearing on the issue of whether a person subject to an electronic monitoring requirement has breached the associated disposal, the associated conditions or the section 12 obligations.
59. Section 14(3) provides that evidence in relation to such a breach may be given by way of a document which contains both a statement produced by an approved device or linked equipment showing information relevant to the issue, and a certificate signed on behalf of the designated person to state that the information is accurate.
60. Section 14(4) provides that the evidence given by way of such a document might include, by way of example: information about the whereabouts of the device; the connectivity, working or wearing of the device at a particular time; or the presence or level of alcohol, drugs or other substances in the wearer or user's body, at a particular time.
61. Section 14(5) provides that the document is sufficient evidence of everything contained in it and is only admissible if it is served on the person to whom the hearing relates prior to the start of the hearing.

## **SSI procedure and schedule**

### ***Section 15 – Procedure for making regulations***

62. Section 15 provides that regulations made under this Part, if enabled by section 9(1) are subject to the affirmative procedure and are otherwise subject to negative procedure. It also provides that regulations may make different provisions for different purposes (including provision of temporary or local effect) and include incidental, supplementary, consequential, transitional, transitory or saving provisions.

### ***Section 16 – Additional and consequential provisions***

63. Section 16 introduces Part 1 of schedule 1 which amends provisions about court orders, and Part 2 of schedule 1 which contains consequential amendments.

## **Part 2 – Disclosure of Convictions**

### **Rules relating to disclosure**

### ***Section 17 - Effect of expiry of disclosure periods***

64. Section 17 of the Bill amends section 1 of the Rehabilitation of Offenders Act 1974, ("the 1974 Act"), by substituting subsection (1) with new subsections (1), (1A), (1B) and (1C).

65. New section 1(1) provides that new subsections 1(1A) and 1(1B) will apply where:
- an individual has at any time been convicted of any offence, and
  - an excluded sentence was not imposed on the individual in respect of the conviction.
66. ‘At any time’ in new section 1(1)(a) retains the effect of the opening words of the current section 1(1) which refers to an individual having been convicted of an offence “whether before or after the commencement of this Act”. New section 1(1)(b) refers to an ‘excluded sentence’ rather than a ‘sentence excluded from rehabilitation’ in accordance with the changes made to the terminology used in the 1974 Act by the Bill. An “excluded sentence” is one that is never treated as spent for the purposes of the 1974 Act. Other changes made to the terminology used in the 1974 Act are also reflected, with references now being to ‘disclosure period’ and ‘protected person’ as opposed to ‘rehabilitation period’ and ‘rehabilitated person’.
67. The application of new section 1(1A) and (1B) changes the effect of receiving an excluded sentence. This is to ensure it will only be ‘excluded sentences’ that can never become spent (subject to the rules under the 1974 Act). This means that any conviction other than an ‘excluded sentence’ can become spent even if a subsequent conviction results in an excluded sentence being given during the disclosure period for a previous conviction. The 1974 Act currently provides that any subsequent conviction resulting in an excluded sentence, during a period in which a person was still required to disclose earlier convictions would mean that neither the earlier nor later conviction could become spent.
68. New section 1(1A) provides that, after the disclosure period applicable to a conviction has expired, the convicted person shall be treated as a protected person and their conviction is to be treated as spent. Section 6(4) of the 1974 Act sets out the rules for when one conviction can extend the disclosure period of another. Section 1(1A) makes clear that the reference to the expiry of a disclosure period includes any period extended under section 6(4).
69. New section 1(1B) ensures that, where a person’s conviction would have been spent prior to commencement of the 1974 Act, they are not a protected person and the conviction is not spent, until commencement of the 1974 Act. This is to retain the effect of existing section 1(1).
70. New section 1(1C) provides that the new subsections (1) to (1B) are subject to subsections (2), (5) and (6) in the same way subsection 1(1) is currently subject to these subsections.

### ***Section 18 - Sentences excluded from becoming spent***

71. Section 18 of the Bill amends section 5(1) of the 1974 Act, which sets out sentences that are ‘excluded sentences’ for the purposes of the 1974 Act. An excluded sentence, as noted, is one which cannot become spent under the 1974 Act, and so is excluded from the protections of the 1974 Act.
72. Section 18 amends section 5(1) of the 1974 Act to change when certain custodial sentences become excluded sentences, from a period of 30 months to a period of 48 months. This means that convictions attracting a sentence of up to and including a period of 48 months will now be capable of becoming spent.
73. Section 18 also contains provision to remove references in section 5(1) to repealed disposals, such as under the Criminal Procedure (Scotland) Act 1975; to update the references in section 5(1) to reflect current disposals available to the courts under the Criminal Procedure (Scotland) Act 1995; and repeal references to disposals which are not available to Scottish courts. However, no changes are made to disposals specified under the Armed Forces Act 2006.

**Section 19 - Disclosure periods for particular sentences**

74. Section 19 further amends section 5 of the 1974 Act.
75. New section 5(2A) relates to the disclosure periods for the sentences set out in new Table A and signals that the columns of Table A provide different disclosure periods for those below the age of 18 at the date of their conviction and those 18 or over at the date of their conviction. Currently section 5(2) of the 1974 Act provides that those under the age of 18 at the date of their conviction have to disclose their conviction for half the period that applies to a person who was 18 or over. Although this age distinction is retained in Table A, some of the disclosure periods set out in the table for under 18's are not a simple 50% reduction of the period applicable to persons aged 18 or above. The distinction between under 18s and persons that age or over also applies to the sentences in Table B, by virtue of new subsection (2C).
76. New subsection (2B) restates the current rule that the disclosure period for a sentence starts from the date of the conviction for which the sentence was imposed.
77. New subsections (2D) and (2E) are included to prescribe a disclosure period for certain court orders. These are orders which are not mentioned in subsections (1) to (2C) of section 5, including Table A or Table B, or in sections 5C to 5J (as inserted by sections 22 to 29 of the Bill). They are imposed by a court as part of its dealing with a person for their conviction and they impose a disqualification, prohibition, requirement or restriction or, in some other way, regulate the person's behaviour. This broadly captures orders currently provided for under section 5(8) of the 1974 Act.
78. However, new subsections (2D) and (2E) will also include orders now available to the courts in Scotland which were not available when the 1974 Act was commenced. They will include those which are preventative in character as well as those which are penal. For example, this could include non-harassment orders imposed under section 234A of the Criminal Procedure (Scotland) Act 1995. The disclosure period for such orders which is set out in the new section (2E) begins on the date of conviction and ends when the order ceases to have effect. If the order is imposed indefinitely, then section (2E) (a)(ii) will apply with the effect that it is disclosed until revocation or until the person is deceased.
79. In the case of any other order the disclosure period will be two years from the date of conviction with this disclosure period being set out in the proposed new subsection (2E) (b) of the 1974 Act. This will therefore apply in a scenario where it is not possible to determine the point at which the conditions of the order no longer require to be complied with.
80. New subsection (2F) replaces the current sections 5(9)(b), (5)(9)(c) and 5(9)(d) of the 1974 Act.
81. New subsection (2F)(a) and (b) replaces section 5(9)(b) and explains when consecutive or concurrent sentences are to be treated as a single term. This is not intended to change the effect of existing section 5(9)(b); rather it is to clarify the rules in relation to when a sentence can be treated as a single term.
82. Consecutive terms of imprisonment or detention as provided for in new section 5(2F) (a) can be treated as a single term whether they are imposed in the same or in different proceedings. Terms of imprisonment or detention which are wholly or partly concurrent can only be single termed if they are in respect of offences for which a person was convicted in the same proceedings.
83. The effect of sentences being treated as a single term is that the accumulation of sentences which are not, individually, excluded sentences, can mean that taken together, they would amount to an excluded sentence. For example, if a person was sentenced on four different occasions to a custodial sentence which exceeded 12 months, each one to



run consecutively to the last, this could be treated as a single term and would result in a custodial sentence which exceeded 48 months, which would be an excluded sentence.

84. New section 5(2F)(d) retains the ‘closest equivalent rule’. However this rule is amended by this Bill and now provides that a sentence imposed by a court outside Scotland shall be treated as a sentence mentioned in the relevant provision to which it most closely corresponds. This is because as a result of changes made to the 1974 Act there is no longer a single text for all sections of the 1974 Act which applies to the whole of Great Britain. Instead, in some places there are two sets of texts, one of which is the law in Scotland and the other, the law in England and Wales. It is therefore necessary to make provision for convictions not just from outwith Great Britain, but for convictions from England and Wales too.
85. New section 5(2G) recognises that whilst there are disposals which are no longer available to the courts, (for example because they were statutory disposals and have since been repealed), there may be people to whom these disposals have been given, prior to their repeal. To ensure that they still qualify for the protections of the 1974 Act, new section 5(2G) provides that any disposals which have been superseded by a newer disposal specified in an enactment will be covered by the rule that applies to the newer disposal.
86. Section 19(3) of the Bill amends the power contained in current section 5(11) of the 1974 Act. This power enables the Secretary of State, (and by virtue of the operation of the Scotland Act 1998, the Scottish Ministers in relation to devolved matters), to amend the periods set out in current section 5 of the 1974 Act and the age mentioned in subsection (2A)(a) of the 1974 Act. The amendments made to section 5(11) do not modify the power or what it can be used for; however, they are necessary as a consequence of the structural changes made to the 1974 Act which mean that the periods which can be amended using this power are no longer confined to section 5.
87. Section 19(4) inserts a new section 5(12) into the 1974 Act which includes definitions. It states that Table A means the table in section 5A, Table B means the table in section 5B and it defines what a custodial sentence and sentence of imprisonment means for the purposes of the section 5 of the 1974 Act as amended.

#### ***Section 20 - Table A – disclosure periods: ordinary cases***

88. Section 20 amends the 1974 Act so as to insert a new section 5A, containing Table A into the 1974 Act.
89. This new Table A sets out the revised disclosure periods and sentence bands for custodial sentences, fines and compensation orders. It maintains the current disclosure period for an endorsement for a road traffic offence, which is currently captured by the last entry in existing table A. It also sets out a revised ‘default’ disclosure period of 12 months (6 months for persons under 18 at date of conviction) for any sentence not mentioned in Table A, Table B, section 5(2D) or any sections 5C to 5J.
90. New Table A provides a disclosure period for those who are under 18 at the date of their conviction. This is done by halving the “buffer period” attached to the length of the custodial sentence rather than halving the rehabilitation period under the current 1974 Act. This approach is necessary because of the way disclosure periods for custodial sentences will be calculated under a reformed 1974 Act. That is the length of sentence plus a buffer period rather than a set disclosure period associated with a sentence band.

#### ***Section 21 - Table B – disclosure periods: service sentences***

91. Section 21 inserts a new section 5B after section 5A. Section 5B adds a new Table B to replace the current Table B in section 5 of the 1974 Act.
92. This new table deals only with disposals given to an individual as a result of a service disciplinary offence. It does not amend the disclosure period for these disposals. The

only change is that now, rather than being separated across Table A and Table B, all are located in Table B. .

***Section 22- Disclosure period: caution for good behaviour***

93. Section 22(2) inserts a new section 5C after section 5B. New section 5C provides a disclosure period for a person who is ordained to find caution for good behaviour, (sentence provided for under section 227 of the 1995 Act). A “bond of caution” is a sum of money lodged with the court by the person who has been convicted, as security of their being of “good behaviour” for a certain stated period, (“the caution period”). If the individual is of good behaviour for the specified period, the money is returned and the sentence has been served. The person is required to disclose their conviction for a period of 6 months from the date of conviction (three months if under 18) or, if longer, the length of the caution period.
94. The current disclosure period for such an order, no matter what the age of a person, is one year or the length of the order, whichever is the longer.

***Section 23 - Disclosure period: particular court orders***

95. Section 23(1) provides for amendments to the 1974 Act
96. Section 23(2) inserts a new section 5D after section 5C. Section 5D sets out the new disclosure periods for a community payback order, a drug treatment and testing order and a Restriction of Liberty Order.
97. Currently section 5 of the 1974 Act does not make any specific reference to these three community orders. Therefore, the disclosure period for these disposals is the current default period in existing Table A of 5 years or 2½ years if the person was under 18 at date of conviction.
98. New section 5D(1) of the 1974 Act sets out the disclosure period for these 3 disposals and section 5D(2) describes what these orders are. Section 5D(1)(a) sets the disclosure period for a person 18 years or older at date of conviction, that being one year from date of conviction or, if longer, a period beginning with date of conviction and ending when the order ceases to have effect. Section 5(1)(b) sets the disclosure period where the person was under 18 at the date of conviction.
99. Section 5D(3) sets out what is meant by ‘when the order ceases to have effect’. For community payback orders (CPO)s this a reference to when the requirement imposed by the order ceases or ceased to have effect or otherwise requires or required to be complied with. This is because CPOs may include elements, such as a compensation requirement, which has to be complied with within a set time frame, however may be complied with prior to expiry of this timeframe.
100. For drug treatment and testing orders and for restriction of liberty orders, this is when the requirement that is imposed by the order ceases (or ceased) to have effect.

***Section 24 - Disclosure period: adjournment or deferral***

101. Section 24(1) provides for further amendments to be made to the 1974 Act.
102. Section 24(2) inserts a new section 5E after section 5D. Section 5E provides that adjournments and deferrals are to be treated as a sentence for the purposes of the 1974 Act. The disclosure period is set out by section 5E(2) of the 1974 Act and is a period beginning with the date of conviction and ending on the date a ‘relevant sentence’ in respect of the conviction is imposed on the person.
103. Section 5E(3) of the 1974 Act defines a ‘relevant sentence’ as any sentence which is not an adjournment or a deferral. This means that once a person is given the ‘relevant sentence’ for being convicted of the offence the disclosure period will be determined

by that sentence, (e.g a fine or CPO), and will run from the date of conviction for that disposal. For the purposes of disclosure under the Police Act 1997, this provision means that a person's conviction will be disclosed, even if sentence is deferred or the case is adjourned, from the date of conviction.

### ***Section 25 - Disclosure period: mental health orders***

104. Section 25 inserts new section 5F into the 1974 Act which makes provision for the disclosure period applicable to certain mental health disposals. This section does not deal with compulsion orders if they are made alone, without a restriction order, as they are provided for elsewhere.
105. Currently, section 5(7) of the 1974 Act makes provision for a scenario where, in respect of a conviction, a hospital order under Part 3 of the Mental Health Act 1983 or Part 6 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), was made. The Mental Health Act 1983 does not extend to Scotland. Further, hospital orders have been replaced by compulsion orders. Accordingly, the 1974 Act requires to be updated in order to reflect the current law in relation to mental health disposals.
106. Section 5F(1), read with section 5F(2), sets out the relevant disclosure period when a restriction order is made in addition to a compulsion order under section 59 of the 1995 Act. Section 5F(3), read with section 5F(4), sets out the relevant disclosure period when a restriction order is made in addition to a compulsion order under section 57 of the 1995 Act. In either case, the restriction order must be disclosed from the date of conviction until such time as it ceases or ceased to have effect, at which point, the related compulsion order will fall to be treated under the provisions governing disclosure of relevant compulsion orders. As the compulsion order will become a 'relevant compulsion order' at the point at which the restriction order is revoked, the person subject to the order will be entitled to apply to the Mental Health Tribunal for a determination of their disclosure obligations in respect of a CO once a period of 12 months has elapsed from revocation of the restriction order.
107. Sections 5F(5), (6) and (7) deal with disclosure periods applicable to an assessment order, a treatment order and an interim compulsion order, each imposed under separate provisions of the 1995 Act.
108. The disclosure period for these orders is set out in section 5F(5) and states it will be a period beginning with the date of the conviction and ending on the date a 'relevant sentence' in respect of the conviction is imposed on the person. Section 5F(6) describes what these orders are and section 5F(7) defines 'relevant sentence' as any sentence other than an assessment order, a treatment order and an interim compulsion order (or, where applicable, a further such order). In effect, these orders are to be treated in the same way as adjournments and deferrals.

### ***Section 26 - Disclosure period: compulsion orders***

109. Section 26(2) inserts a new section 5G after section 5F of the 1974 Act. This new section provides that convictions for which compulsion orders are given are to be disclosed from the date of conviction until the order ceases or ceased to have effect. However, this disclosure period will be subject to a new process which will allow an application to be made to the Mental Health Tribunal for Scotland by a patient or the patient's named or listed person in order to ask for the disclosure of that conviction to end. (See sections 138 and 257A of the Mental Health (Care and Treatment) (Scotland) Act 2003, ("the 2003 Act") for meanings of named and listed persons).
110. In order for this application process to take place, amendments to the 2003 Act are also necessary. New section 5G(2) states that section 5G(1), (i.e. the default disclosure period for a compulsion order as the length of the order), will be subject to new sections 164A and 167A of the 2003 Act.

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111. Section 5G(3) states that if the Tribunal determines, as a result of receiving an application, that disclosure of the conviction which resulted in the compulsion order is no longer necessary then the person will be treated for the purposes of the 1974 Act as a 'protected person' and the conviction will be treated as spent.
112. Section 5G(4) ensures the rule in section 6(2) of the 1974 Act which enables a sentence with a longer disclosure period to extend the disclosure period of another sentence, applies to such a compulsion order, even if a determination has been made by the Tribunal.
113. Section 26 also amends the 2003 Act.
114. Section 26(4) inserts new section 164A after section 164 of the 2003 Act. It is this new section that allows a patient, the patient's named or listed person to apply to the Mental Health Tribunal Scotland for the disclosure of the conviction which resulted in a compulsion order to come to an end. Section 164A(2) and (3) states who is able to apply to the Tribunal.
115. When a compulsion order with a restriction order is given, an application cannot be made to the Tribunal whilst the restriction order remains in force. Once the restriction order is revoked, section 198 of the 2003 Act says that Part 9 of that Act shall apply to the patient as if the compulsion order were a relevant compulsion order made on the day on which the order revoking the restriction order has effect in accordance with section 196 of the 2003 Act. This means the person will be eligible to apply to the Tribunal once a period of 12 months has passed from revocation of the restriction order.
116. Section 164A(4) of the 2003 Act sets out the time frame for when an application can be made to the Tribunal for a determination on the issue of disclosure. That is, an application cannot be made to the Tribunal until at least 12 months have passed after the date the relevant compulsion order was made.
117. Section 164A(5) sets out the time period for making a further application to the Tribunal if a previous application was not successful. That is, when an application has been refused by the Tribunal, a new application can be made after a period of 12 months has elapsed from the date the application was refused. Section 164A(6) confers a power on the Scottish Ministers to prescribe, by regulations, documents which accompany any application made. This power is subject to negative procedure.
118. Section 26(5) inserts new sections 167A and 167B after section 167 of the 2003 Act. Section 167A sets out the test the Tribunal must apply when determining whether the disclosure period for a compulsion order should be brought to an end. It also sets out who can make representations to the Tribunal during the application process. The Tribunal must consider whether, without the provision of medical treatment to the person who is subject to the compulsion order, there would be a significant risk to the safety of other persons. This applies one element of the test that the Tribunal currently requires to consider when reviewing a person's compulsion order under section 139 of the 2003 Act.
119. New section 167B of the 2003 Act provides that the Scottish Ministers may require the Tribunal to provide information to them regarding whether a determination or a refusal has been given in respect of an identified person. This information will indicate whether the conviction continues to require to be disclosed. The reference is to the Scottish Ministers but the function will be undertaken by Disclosure Scotland, which is an executive agency of the Scottish Government, whose statutory functions relate to disclosure of criminal convictions.
120. Sharing this information is necessary only where a request is received by the Tribunal from Disclosure Scotland. Such a request will be made when an enquiry is made by Disclosure Scotland to the Tribunal as a result of receiving a basic disclosure application by the patient or their named person. The Tribunal must respond to Disclosure Scotland within 15 working days of receiving the request.

***Section 27 – Disclosure period: juvenile offenders***

121. Section 27 inserts a new section 5H into the 1974 Act in relation to the disclosure period for orders under section 61 of the Children and Young Persons (Scotland) Act 1937. New section 5H provides a disclosure period of one year for such an order. The purpose of this is to maintain the protections for such orders under the 1974 Act.

***Section 28 – Disclosure period: service discipline***

122. Section 28 inserts a new section 5I into the 1974 Act after section 5H to move certain service disciplinary disposals in the current 1974 Act to a new location.
123. Section 5I(1), (2) and (3) restate the current service disciplinary orders and associated disclosure periods for these disposals currently set out in sections 5(4A), 5(5)(g) and 5(6A) respectively. No changes to the disposals or the disclosure periods are being made by the amendment.

***Section 29 - Sentences to which no disclosure period applies***

124. Section 29 inserts a new section 5J into the 1974 Act after section 5I, listing the disposals for which there is no disclosure period applicable. Section 5J(1) sets out the types of disposals where no disclosure period will apply under an amended 1974 Act.
125. Section 5J(2) makes it clear that the disclosure periods for these disposals should be read as if the period of time is nil. These will all become spent immediately on imposition.

***Section 30 - Disclosure periods applicable to convictions***

126. Section 30 of the Bill amends section 6 of the 1974 Act. Section 6 of the 1974 Act makes provision for ascertaining the disclosure period applicable to a conviction.
127. Section 30(2) substitutes the words “section 5” in each of section 6(1) and section 6(2) with “sections 5 to 5I” to reflect the structural changes being made to the 1974 Act.
128. If one sentence is imposed in respect of a conviction, the disclosure period is as set out in the relevant sections of the 1974 Act, as amended by the Bill. Section 6(2) means that if more than one sentence is imposed in respect of a conviction (for example, a fine and a custodial sentence), and the two sentences have a different disclosure period attributable to them, the conviction requires to be disclosed in accordance with the longer or longest of these periods.
129. Section 30(3) repeals the current section 6(3) but provision for conditional discharges will continue to be made by section 30(4) of the Bill, which inserts new subsections (3ZA) to (3ZD) into section 6 of the 1974 Act.
130. Although a conditional discharge is not a disposal under Scots Law, the absence of a specific Scottish equivalent means that the reference is retained to ensure that the amendments do not create a gap in the regime for people in Scotland who have received this disposal elsewhere in Great Britain. These new provisions replicate the existing rule in section 6(3) but extend it to apply to specific Scottish disposals. The disposals to which it applies are set out in section 6(3ZC) and are an order for conditional discharge (a non-Scottish disposal), a CPO, a drug treatment and testing order and a restriction of liberty order.
131. The applicable rule is set out in new section 6(3ZA) and (3ZB) of the 1974 Act. This applies if a person is given one of the orders listed in section 6(3ZC) for an offence (“offence A”) and the person breaches the order and, as a result of this breach, the person is sentenced for offence A after the disclosure period for the order has ended. The person is not to be treated as a protected person, and the conviction is not spent, until the disclosure period for that second sentence has expired.

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132. To use the example of a CPO, in some circumstances where there has been a breach of the order, the court may revoke the order and deal with the person in respect of offence A as if the order had not been imposed. In this case, the disclosure period for the conviction resulting in the CPO would end at the point of revocation. However, the effect of new section 6(3ZB) is that the person will not be treated as a ‘protected person’ in respect of the conviction until the expiry of the disclosure period applicable to how the person is dealt with by the court as a result of breaching the CPO and the conviction will not be treated as spent until that period has expired.
133. Section 6(3ZD) of the 1974 Act gives the Scottish Ministers the power by regulations, subject to the affirmative procedure, to modify the list of orders set out under section 6(3ZC).
134. Section 30(5) of this Bill substitutes the current rule under section 6(4) of the 1974 Act. The rule applies where a person is convicted of one offence and during the disclosure period for that offence, is convicted of a further offence. Without this rule the disclosure period for the two convictions would end on different dates. However, under this rule, the disclosure period applicable to both convictions will end at the same time, in accordance with whichever period is the longer or longest.
135. For example, if conviction A has a disclosure period which would end 6 months prior to the disclosure period for conviction B, conviction A’s disclosure period will be extended to end at the same time as conviction B’s. However, this is subject to exceptions.
136. The first exception, inserted by section 30(6) of the Bill, which inserts new 6(4A)-6(4C), applies where, in respect of the first conviction, the court adjourns the case or defers sentence, and during the disclosure period for the period of adjournment or deferral, the person is convicted of a second offence. In this case if, when sentencing the person for the first offence, the court imposes a sentence which has no disclosure period, section 6(4) does not apply to extend the disclosure period of the first conviction to accord with the second conviction. In other words, the first conviction will be able to become spent on imposition of the sentence, irrespective of the sentence imposed for the second conviction.
137. Section 30(7) of this Bill substitutes the current rule under section 6(5) of the 1974 Act with an updated rule set out in new section 6(5) to (5B), maintaining a further exception to the rule in section 6(4). Section 30(7) updates this rule in section 6(5) to take account of the orders which will be provided for in new section 5(2D) and (2E) of the 1974 Act, inserted by section 19 of the Bill. It provides that where the disclosure period applicable to a conviction is as a result of an order being imposed under new section 5(2D) of the 1974 Act, this will not extend the disclosure period of another conviction.
138. Under new section 6(5), if the only sentence for a conviction is a sentence mentioned in new section 5(2D), the disclosure period for another conviction is never extended to match the disclosure period for that sentence. For example, if a non-harassment order with a disclosure period of 5 years (but no other sentence) is imposed for conviction 1, the disclosure period for a fine with a disclosure period of (say) 12 months for conviction 2 is not extended to match the five-year period.
139. However if, in addition to the non-harassment order for conviction 1, a custodial sentence with a disclosure period in excess of 12 months were imposed, this would extend the disclosure period for conviction 2 (although the disclosure period for the non-harassment order would effectively be ignored in determining the length of the extension). This is the effect of new subsections (5A) and (5B) of section 6.
140. Section 30(8) of the Bill amends the 1974 Act to update the legislative reference as it relates to Scotland. The effect is to leave paragraph (a) of section 6(6) in place and replace paragraph (b) with a reference to Scottish courts of summary jurisdiction. The reason for this is that the current references in section 6(6)(b) are outdated. The effect

of this is that the rule in section 6(4) of the 1974 Act is subject to a further exception, which is that a conviction from a Scottish court in summary proceedings is not capable of extending the disclosure period of another conviction.

## **Regulation-making and other powers**

### ***Section 31 – Powers as to alternatives to prosecution***

141. Section 31 of the Bill provides new powers for the Scottish Ministers in relation to alternatives to prosecution (AtPs), under the 1974 Act. The powers are contained in a new section 8C of the 1974 Act which is inserted by section 31(2) of this Bill.
142. Section 8C(1) empowers the Scottish Ministers, by regulations, to modify the list of circumstances in section 8B(1) of the 1974 Act in which a person is given an AtP. Section 8C(2) enables modification of Schedule 3 of the 1974 Act by regulations. The effect of this is to enable the Scottish Ministers to amend, remove or add provision specifying when an AtP will become spent. These powers are subject to affirmative procedure.

### ***Section 32 – How particular powers are exercisable***

143. Section 32 amends the 1974 Act by inserting a new section 10A, (“Order-making powers: Scottish Ministers”) into the 1974 Act. The new section 10A is inserted to ensure orders made by the Scottish Ministers under the existing provisions of the 1974 Act (i.e. made by virtue of Ministers’ devolved competence under the Scotland Act 1998) can include different provision for different purposes and can include ancillary provision. In addition, section 10A(2) provides that the Scottish Ministers can make consequential provision modifying enactments in cases where, in exercise of their devolved competence, they exercise the order-making power in section 5(11) of the 1974 Act.

### ***Section 33 – Excluded sentences: applications for convictions to be treated as spent***

144. Section 33(1) enables the Scottish Ministers to make regulations for or in connection with the purpose of allowing a person on whom a relevant sentence was imposed to apply to be treated as a protected person in respect of that conviction and for the conviction to be treated as spent. Subsection (6) provides that references to protected persons and convictions being treated as spent are to be construed in accordance with the 1974 Act.
145. Subsection (3) provides a definition of what a “relevant sentence” is. That is,
  - a sentence mentioned in section 5(1)(b) or (da) of the 1974 Act, or
  - a sentence imposed by a court outwith Scotland which, by virtue of section 5(2F) (d) of the 1974 Act, falls to be treated as such a sentence.
146. Subsection (4) provides the regulations must contain provision on certain matters including: that applications are to be made to a specified reviewer; that the application is to be determined by the specified reviewer; and that those subject to sex offender notification requirements cannot make an application. Under subsection (4), regulations must contain provision that an application cannot be made until the expiry of the “appropriate period”. Subsection (5)(a) defines the appropriate period as, 6 years plus the length of sentence for convictions obtained when aged 18 or older and 3 years plus the length of sentence for convictions obtained when under the age of 18 on date of conviction. Regulations made under subsection (1) must also contain provision setting, or for ascertaining, the “relevant date”. As defined by subsection (5)(b), the “relevant date” is the date from which the applicant’s conviction is to be treated as spent and on which the applicant is to be treated as a protected person in respect of that conviction.

***Section 34 – Regulations under section 33: general details***

147. Section 34 sets out further details on regulations made under section 33(1).
148. Section 34(1) sets out an indicative, and non-exhaustive, list of the matters which the regulations may contain provision on.
149. Subsection (2) provides that the regulations can contain provision relating to the operation of higher level disclosure in the area of when a conviction becomes a protected conviction following that conviction becoming spent by virtue of a determination by the specified reviewer.
150. Subsection (3) provides that references to “the specified reviewer” in sections 33 and 34 means whoever is specified in the regulations made under section 33.

***Section 35 – Regulations under section 33: appropriate period***

151. Section 35 provides an enabling power for the Scottish Ministers to modify aspects of the definition of “appropriate period” in section 33(5)(a). The power conferred by section 35 enables the Scottish Ministers to adjust either the age when different buffer periods apply or the length of buffer periods or both. The “buffer periods” refer to the number of years added to the length of the sentence for the purposes of determining the appropriate period in section 33(5)(a).

***Section 36 – Regulations under sections 33 and 35: procedure etc.***

152. Section 36(1) provides that regulations made under section 33 can modify any enactment (including the 1974 Act) and can make different provision for different purposes. Section 36(2) provides that regulations made under section 33 and section 35 are subject to affirmative procedure.

**Transitional, schedule and definition**

***Section 37 – Transitional provision***

153. Section 37 of the Bill contains transitional provisions. Amendments made to the 1974 Act by Part 2 of the Bill which refer in any way to a sentence apply to sentences imposed in respect of a conviction before the date on which the amending provision comes into force. Similarly, any amendment referring to a conviction applies in relation to a conviction before the date on which the amending provision comes into force. Both also apply in respect of a conviction on or after that date. This means that the changes to disclosure periods will apply in relation to convictions and sentences before and after the commencement of Part 2 of the Bill, and to convictions on the date of commencement.
154. Section 37(3) means that section 37(2) will also apply to a provision referring to a court’s convicting of a person as it applies to a conviction.
155. Section 37(4) of the Bill says that the 1974 Act applies as if the amendments mentioned in section 37(1) and (2) had always had effect. However, this has to be read subject to section 37(5) to (9) of the Bill. This means that if, by virtue of section 37(4), a person would have been a protected person before the commencement of the relevant provisions of the Bill, and if their conviction would have been spent before such date, they are not in fact to be treated as a protected person, and their conviction is not to be treated as spent, until the date that the relevant amending provision comes into force. These provisions prevent the amendments made by Part 2 of the Bill from having retrospective application.



### ***Section 38 – Remainder of amendments***

156. Section 38 introduces schedule 2 which makes minor and consequential amendments to the 1974 Act.

### ***Section 39 – Meaning of the 1974 Act***

157. Section 39 makes it clear that any references to “the 1974 Act” in Part 2 of the Bill means the Rehabilitation of Offenders Act 1974.

## **Part 3 – the Parole Board**

### **Independence and governance**

#### ***Section 40 – Continued independence of action***

158. Section 40 provides that the Parole Board continues to act as an independent tribunal when exercising its decision making functions.

#### ***Section 41 – Administrative arrangements***

159. Section 41 provides that the Scottish Ministers may make regulations authorising the chairperson of the Parole Board to make provision about administrative arrangements within the Parole Board.
160. Subsection (2) provides an indication as to the types of arrangements that may be provided for by those regulations.
161. Subsection (3) provides that the regulations may allow for the chairperson to delegate responsibility for the arrangements and any further sub-delegation as required.
162. Subsection (4) provides that the Scottish Ministers must consult with the Parole Board before making any regulations under this section.
163. Subsection (5) provides that these regulations are subject to affirmative procedure in the Scottish Parliament.

### **Membership and appointment**

#### ***Section 42 – Mandatory categories of member***

164. Section 42 amends paragraph 2 of schedule 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) in relation to the list of persons who must be amongst the members of the Parole Board. Section 42 removes a Lord Commissioner of Justiciary and a registered medical practitioner who is a psychiatrist, from the list of persons who must be included among the members of the Parole Board.

#### ***Section 43 – Appointment to be for fixed period***

165. Section 43 amends paragraph 2A of schedule 2 of the 1993 Act in relation to the length of a term of appointment to the Parole Board. Section 43 provides that the length of the period of appointment is reduced from a maximum of seven years, to a fixed period of five years beginning with the date of appointment.

#### ***Section 44 – Further appointment to membership***

166. Section 44 amends paragraph 2 of schedule 2 of the 1993 Act in relation to the appointment of Parole Board members. Section 44 provides that a person, who has been a member of the Parole Board, is eligible for appointment on a subsequent occasion. It also provides for a new automatic reappointment procedure for Parole Board members.

167. Subsection (2) of section 44 inserts a new paragraph 2DA into schedule 2 of the 1993 Act to permit a person who has been a member of the Parole Board to be eligible for appointment on a subsequent occasion. New paragraph 2DA(2) of schedule 2 provides exceptions to this, namely where a person has: (a) reached the age of 75; or (b) has been removed from office by virtue of a tribunal constituted under paragraph 3 of schedule 2 of the 1993 Act.
168. Subsection (3) of section 44 makes consequential repeals of current provisions concerning membership of the Parole Board, contained in paragraphs 2E to 2H of schedule 2 of the 1993 Act.

### **Automatic reappointment**

169. Subsection (4) of section 44 inserts new paragraphs 2HA and 2HB into schedule 2 of the 1993 Act to make provision for a new automatic reappointment procedure for Parole Board members. New paragraph 2HA(1) provides that a member of the Parole Board is to be reappointed to membership of the Parole Board unless the circumstances in paragraph 2HA(2) or (3) apply. Sub-paragraph (2) provides that automatic reappointment does not apply where the Parole Board member declines reappointment. Sub-paragraph (3) provides that automatic reappointment does not apply where the Scottish Ministers accept the recommendation of the chairperson of the Parole Board that it should not occur. Sub-paragraph (4) provides the grounds for the chairperson of the Parole Board to make such a recommendation; namely that: (a) the person has failed to comply with any of their terms and conditions of appointment; or (b) the Parole Board no longer requires the same number of members to carry out its functions. Sub-paragraphs (3) and (4) do not apply to the reappointment of the chairperson of the Parole Board.
170. Subsection (5) of section 44 provides that the instrument of appointment may be annotated and reissued to allow it to show that a member has been reappointed.
171. New paragraph 2HB of schedule 2 of the 1993 Act provides that the period of appointment, referenced in paragraph 2H(1), includes each period of reappointment. It also provides that the provisions concerning appointment of Parole Board members apply to periods of reappointment of Parole Board members and that reappointment is for a period of five years each time.

### ***Section 45 – References to the chairperson***

172. Section 45 amends paragraph 2 of schedule 2 of the 1993 Act to provide for gender neutrality in reference to the chairperson of the Parole Board.

### ***Section 46 – Amendment of oversight provisions***

173. Section 46 amends schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to remove the entry relating to the Parole Board for Scotland. The Judiciary and Courts (Scotland) Act 2008 is also amended to add the Parole Board for Scotland (including its Chair) to the offices that fall within the remit of the Judicial Appointments Board for Scotland. This changes the oversight of Parole Board appointments from the remit of the Commissioner for Ethical Standards in Public Life to the remit of the Judicial Appointments Board for Scotland.

### ***Section 47 – Repeal of statutory provisions***

174. Section 47 repeals Part 1 and Schedule 1 of the Custodial Sentences and Weapons (Scotland) Act 2007. Section 1 of that Act provided for the continuation of the Parole Board for Scotland and the functions that it would exercise for the purposes of that Act. Schedule 1 of that Act makes further provisions concerning the Parole Board (constitutional issues, membership, etc.). Section 2 of that Act provided that the Scottish Ministers may make rules to regulate the Parole Board's proceedings. Part 1 and

Schedule 1 of that Act were not commenced. As a consequence of this repeal, the word 'rules' is also repealed from section 65 of the Act.

#### **Part 4 – Prisoners: Control of Release, Being Unlawfully at Large Etc.**

##### ***Section 48 – Release on licence under section 3AA of the 1993 Act***

175. Section 48(2) amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"), removing the "four week" minimum period in custody before someone can be considered for release on licence and leaving in place only the "one quarter of the prison sentence" minimum period. This changes the minimum period that a person must be in custody before becoming eligible for home detention curfew ("HDC") to one quarter of their sentence.
176. Section 48(3) also gives Ministers the ability to amend the minimum period that a person must be in custody before becoming eligible for HDC (set at one quarter of the sentence by section 48(2)). This could be done by referring instead to a particular length of time served or by substituting a proportion of a prisoner's sentence. Subsection (4) clarifies that the provisions in section 3AA of the 1993 Act do not place the Parole Board under any duty to make a decision on parole, in relation to a long term prisoner, by a particular date.

##### ***Section 49 – Release timed to benefit re-integration***

177. Section 49 makes a change to replace the word "days" with "working days" in section 26C(3) of the 1993 Act with the effect that the release of a prisoner timed to benefit reintegration can be brought forward by two working days rather than two days.

##### ***Section 50 – Representations by certain recalled prisoners***

178. Section 50(2) amends section 17A of the 1993 Act to remove the previous grounds for recall from HDC and instead makes provision that a licence can be revoked and a person recalled if it is expedient to do so in the public interest.
179. Section 50(3) amends section 17A of the 1993 Act in relation to the recall of prisoners released on HDC. Section 50(3) inserts a new subsection (2A) into section 17A to provide that a person must make any written representations to the Parole Board, concerning the revocation of their licence and recall to prison, within six months of being informed of the decision, or later if allowed by the Parole Board on cause shown by the person.
180. Section 50(4) amends section 17A of the 1993 Act to make it clear that if the Parole Board cancel the revocation of a person's licence, the recall remains effective and Scottish Ministers must consider whether the person should again be released under section 3AA.

##### ***Section 51 – Frequency of review of particular decisions***

181. Section 51 amends the 1993 Act to make provision in relation to reviews of the consideration for initial release of determinate sentence prisoners, who have their case considered by the Parole Board, and any further consideration for release where the prisoner's licence has been revoked and the prisoner's case has subsequently been considered by the Parole Board.
182. Subsection (2) amends section 3A of the 1993 Act (re-release of prisoners serving extended sentences) to provide that extended sentence prisoners, who have had their licence revoked and been returned to custody, must be given written notification of the process involved in having their case referred to the Parole Board.
183. Subsection (3) inserts a new section 3B into the 1993 Act to provide a new review process which applies to all determinate sentence prisoners who have their case

considered by the Parole Board, with the exception of recalled extended sentence prisoners. New section 3B(2) and (3) provides that a relevant determinate sentence prisoner is entitled to have a review of the recommendation not to be released from the sentence within 12 months of the date of that decision. New section 3B(4) and (5) provides that a determinate sentence prisoner (not including those subject to an extended sentence) is entitled to have a review of the decision not to release them, following the revocation of the prisoner's licence under section 17 of the 1993 Act, within 12 months of the date of their return to prison. In both scenarios, it is for the Parole Board to fix a date to review the prisoner's case within the 12 month period.

184. New section 3B(7) provides for exceptions to this automatic annual review of a determinate sentence prisoner's case. These are: (a) where the prisoner has less than 12 months of their sentence to serve following the decision not to release them; or (b) where the prisoner has received a further custodial sentence and is not eligible for release from the other matter until after the review date. In this instance, the Parole Board will postpone their scheduled consideration of the case and fix a date for consideration of the case at the earliest point the prisoner would be eligible for release on all matters currently being served.
185. New section 3B(8) provides that the Parole Board must provide the determinate sentence prisoner with reasons for a decision not to recommend release of the prisoner from the sentence in the first instance. It also provides that determinate sentence prisoners, subject to the new review process, must be given written notification of their entitlement to a review.

#### ***Section 52 – Parole Board decisions: consideration of impact on prisoner's family***

186. Section 52 inserts a new subsection 4B into section 20 of the 1993 Act. This provides specific reference that the Parole Boards Rules of procedure may include provision about the Parole Board's consideration of the "likely impact" of any of its decisions on a prisoners' family.

#### ***Section 53 – Re-release after revocation of licences generally***

187. Section 53(3)(a) amends section 17(2) of the 1993 Act so as to provide that the Scottish Ministers must provide reasons for the revocation of a person's licence to that person on their return to prison rather than when the licence is revoked.
188. Section 53(3)(b) also amends section 17(4) of the 1993 Act in relation to the revocation of a prisoner's licence under section 17 of that Act. Section 53 removes the word "immediate" in relation to a direction to release a prisoner on licence by the Parole Board under that section, following the consideration of the prisoner's case. Section 17(4) is further amended to provide that the Scottish Ministers should give effect to any direction to release a prisoner on licence "without undue delay".
189. As a consequence of removing the word 'immediate' from section 17(4), subsection (2) removes the word 'immediately' from subsection (3)(b) of section 10A of the 1993 Act.

#### ***Section 54 – Long-term prisoners due for removal from the UK***

190. Section 54 amends section 1 and 9 of the 1993 Act concerning long-term prisoners who are subject to removal from the UK. Section 54 provides that it will be the Parole Board who will recommend to the Scottish Ministers if this category of prisoner should be released on licence. Where such a recommendation is made, this will be binding on Scottish Ministers. This amendment removes the Scottish Ministers from the decision to release this category of prisoner.

***Section 55 – Temporary release on licence under prison rules***

191. Section 55 amends the Prisons (Scotland) Act 1989 to make temporary release a form of release on licence.

***Section 56 – Co-operation between public authorities***

192. Section 56 amends the Management of Offenders (Scotland) Act 2005 so that Scottish Ministers, local authorities, the Scottish Courts and Tribunal Service and the chief constable of the Police Service of Scotland, have a duty to cooperate with one another in carrying out their respective functions in relation to relevant persons as defined in the 2005 Act (such co-operation may include exchange of information).

***Section 57 – Operating protocol for release on licence under section 3AA of the 1993 Act***

193. Section 57 inserts a new section into the 1993 Act which places an obligation on Scottish Ministers to produce a document describing the processes and procedures which underpin release on licence under section 3AA.
194. Subsection (1) sets out that such description should cover: the process of risk assessment prior to release, the factors taken account of in such risk assessment, the procedures for monitoring a prisoner while released, the process for investigating a suspected failure to comply with a licence condition and the process under which a licence is revoked and a prisoner is recalled.
195. Subsection (2) places a requirement on Scottish Ministers that the document produced under subsection (1) is kept under review and is revised to reflect changes in the things it describes.
196. Subsection (3) places a requirement on Scottish Ministers that: the Scottish Courts and Tribunal Service, the Parole Board, the chief constable of the Police Service of Scotland, local authorities and the Risk Management Authority, are consulted in the preparation of the first version or a revised version of the document.
197. Subsection (4) places a requirement on Scottish Ministers to make the document publically available and must lay a copy of it before the Scottish Parliament.
198. Subsection (5) places a requirement on Scottish Ministers to lay the first version of the document before the Scottish Parliament within 6 months of Royal Assent.

***Section 58 – Parole Board recommendations: publication of test***

199. Section 58 inserts a new subsection 3B into section 1 of the 1993 Act which requires the Parole Board to publish, by whatever means it sees fit, the test that it will apply in making a recommendation to release a long-term prisoner under subsection (3) of section 1 of the 1993 Act.

***Section 59 – Offence of remaining unlawfully at large***

200. Section 59 makes provision for a new offence of remaining unlawfully at large by inserting into the Prisons (Scotland) Act 1989 (“the 1989 Act”) new sections 32A to 32D.
201. New section 32A of the 1989 Act makes it an offence for a person who has been deemed to be unlawfully at large under the 1989 or 1993 Acts to remain unlawfully at large. It also sets out the maximum penalties for that offence.
202. New section 32B of the 1989 Act provides that, in proceedings for the unlawfully at large offence, the fact that a person has been deemed to be unlawfully at large can be evidenced by a document certifying that fact which is signed and dated by the Scottish Ministers.

203. New section 32C of the 1989 Act explains what constitutes remaining unlawfully at large for the purposes of the offence in section 32A. A person on temporary release from prison remains unlawfully at large if, having been notified of the period of their temporary release, the requirement to return to prison on the expiry of that period and the consequences of a failure to return to prison, they fail to return to prison on the expiry of the temporary release. A person otherwise remains unlawfully at large if they are notified of having been deemed to be unlawfully at large and fail to return to prison as soon as possible thereafter. In both cases, the person must take all necessary steps to return to prison and the person does not remain unlawfully at large if they have a reasonable excuse for their failure to return to prison. Notification can be given orally or in writing, must contain the information listed in section 32C(4) and can be deemed to have taken place where written notice is sent or delivered to the person's address.
204. New section 32D of the 1989 Act provides definitions of the terms used in the preceding sections.

### ***Section 60 – Arrest where unlawfully at large***

205. Section 60 amends section 40 of the 1989 Act to clarify the powers of a constable (or prison officer) to arrest a person who is unlawfully at large. Section 60(2) amends section 40 so as to provide that a person who is deemed to be unlawfully at large from a period of temporary release is deemed to be unlawfully at large in general and not just for the purposes of section 40.
206. Section 60(3) amends section 40A of the 1989 Act to provide that a warrant to arrest a person who is unlawfully at large can only be sought under that section by a constable. It also adds subsection (1A) to section 40A to provide that a warrant granted under that section confers a power to enter and search premises, and to use reasonable force in doing so.
207. Section 60(5) amends section 9C(4) of the 1993 Act (as nominally inserted by paragraph 4 of schedule 6 of the Custodial Sentences and Weapons (Scotland) Act 2007) so as to provide that a person who is deemed to be unlawfully at large under section 9C(4) (re-entry into United Kingdom of prisoner removed from prison early) is deemed to be unlawfully at large in general and not just for the purposes of section 40 of the 1989 Act.

## **Part 5 – Final Provisions**

### ***Section 61 – Meaning of the 1993 Act***

208. Section 61 provides that any references to “the 1993 Act” in Part 3 of the Bill means the Prisoners and Criminal Proceedings (Scotland) Act 1993.

### ***Section 62 – Ancillary provision***

209. Section 62 provides that the Scottish Ministers may make, by regulations, incidental supplementary, consequential transitional, transitory or saving provision relating to the Bill.

### ***Section 63 - Commencement***

210. Section 63 provides that sections 62, 63 and 64 of the Bill come into force on the day after Royal Assent. All other provisions are to come into force on a day appointed by regulations made by the Scottish Ministers, and those regulations may make transitional, transitory or saving provision related to commencement.