

CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) ACT 2001

EXPLANATORY NOTES

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)*

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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.

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

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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.
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

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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.
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
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

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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.