

**EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE AND IMMIGRATION ACT 2008 (TRANSITORY
PROVISIONS) ORDER 2008**

2008 No. 1587

1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2 Description

2.1. The Criminal Justice and Immigration Act 2008 (the “2008 Act”) makes a number of changes to the provisions in respect of public protection sentences in the Criminal Justice Act 2003 (the “2003 Act”) and makes new provision for the recall and re-release of certain offenders who breach the terms of their licence. The relevant provisions are to be brought into force on 14 July 2008 (see the Criminal Justice and Immigration Act 2008 (Commencement No. 2 and Transitional and Saving Provisions) Order 2008). This Order ensures that public protection sentences, as modified by the 2008 Act, and the new arrangements for recall and re-release apply to offenders aged 18 to 20 who are sentenced to detention in a young offender institution in the same way as they apply to those aged 21 or over who are sentenced to imprisonment.

2.2. Section 47 of and Schedule 8 to the 2008 Act make alterations to a number of aspects of the procedure governing criminal appeals in England and Wales and in Northern Ireland. Paragraphs 13, 24 and 26 of Schedule 8 make provision in respect of prosecution appeals from the Court of Appeal to the Supreme Court. The Order provides that references to the Supreme Court are read as references to the House of Lords until such time as the Supreme Court is established.

3 Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

4 Legislative Background

4.1. Sections 13 to 18 and 25 of and Schedule 5 to the 2008 Act make a number of changes to the public protection sentences provided for in Chapter 5 of Part 12 of the 2003 Act. The reforms achieve the following:

- Imposing a “seriousness threshold” on both indeterminate and extended sentences for public protection. The effect of the amendments is that such

sentences may only be imposed where the offender would be required to serve at least two years in custody or (in the case of offenders over 18) where the offender has a previous conviction for one of a specified list of very serious offences.

- Removing the rebuttable presumption of risk (requirement for judges to conclude that the offender is dangerous) where there is a previous conviction for violent or sexual crime.
- Allowing courts greater discretion so that where all the conditions for an sentence of imprisonment for public protection are met (sexual/violent offence which carries penalty of 10 years or more; risk test; seriousness threshold passed) the court may impose a sentence of imprisonment for public protection, extended sentence or other sentence as it finds most appropriate in the case; where the conditions for an extended sentence but not a sentence of imprisonment for public protection are met (sexual/violent offence carrying penalty of less than 10 years; risk test; seriousness threshold passed) the court may impose an extended sentence or other sentence.
- Changing the structure of extended sentences so that offenders are automatically released on licence halfway through the custodial period, rather than release between this point and the end of the custodial term being at the Parole Board's discretion as previously.

4.2. Section 29 of the 2008 Act provides for non-dangerous offenders who are recalled to prison to be released again after a fixed period of 28 days (subject to certain exceptions). The role of the Parole Board is changed in such cases so that it no longer routinely reviews all recalls. It also provides for other offenders (except those serving extended sentences) to be released after recall by the Secretary of State without referral to the Parole Board, if he considers that it is safe to do so. Prisoners serving extended sentences will, as now, be released following recall only after a recommendation by the Parole Board.

4.3. Section 61 of the Criminal Justice and Court Services Act 2000 (the "2000 Act") abolishes the sentences of detention in a young offender institution and custody for life. Following abolition, all defendants aged 18 or over at the time of sentencing who receive a custodial sentence will, in the same way as other adult offenders, be sentenced to imprisonment or life imprisonment. Section 61 of the 2000 Act has not yet been commenced.

4.4. Paragraph 13 (and the equivalent provision in paragraph 24 in respect of Northern Ireland) of Schedule 8 to the 2008 Act provides that, when the prosecution successfully appeals from the Court of Appeal to the Supreme Court an offender can be compelled to serve out any remainder of his sentence unless the Court of Appeal has actively made an order to the contrary effect. Paragraph 26 of Schedule 8 makes

a similar amendment to section 5 of the Administration of Justice Act 1960 in connection with appeals from the High Court to the Supreme Court in England and Wales. In each of paragraph 13, 24 and 26 of Schedule 8 to the 2008 Act uses the language of the 'Supreme Court'.

4.5. Part 3 of the Constitutional Reform Act 2005 (the "2005 Act") creates the Supreme Court of the United Kingdom and abolishes the appellate jurisdiction of the House of Lords. Section 40 of and Schedule 9 to the 2005 Act makes provision for the jurisdiction of the Supreme Court including by transferring to the Court the appellant functions of the House of Lords in respect of criminal cases under the Administration of Justice Act 1960, the Criminal Appeal Act 1968 and, in Northern Ireland, the Criminal Appeal (Northern Ireland) Act 1980. Section 40 of and Schedule 9 to the 2005 Act are not yet in force.

5 Territorial Extent and Application

5.1. This instrument applies to England and Wales and Northern Ireland.

6 European Convention on Human Rights

6.1. As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7 Policy Background

7.1. The sentence of detention in a young offender institution (YOI) was originally available for all those under the age of 21. The Crime and Disorder Act 1998 replaced the Secure Training Order and detention in a young offender institution for under 18s with the Detention and Training Order, implemented in April 2000. This leaves the sentence of DYOI available only for the 18-20 age group. However, given that 18, and not 21, is the age of majority, the government accepts that, in principle, there is no logic in having a separate sentence for those aged between 18 and 20 years old, and those aged 21 and over.

7.2.. Abolition of the sentence of detention in a young offender institution would remove the need for separation between those aged 18-20 and those aged 21 and over. This would, in the longer term, enable the Prison Service to manage its estate more efficiently and provide young adult offenders with access to a wider range of regime activities.

7.3. In November 2005, the Government announced the National Offender Management Service Young Adult Offenders Project, as part of the new approach to offender management, to consider the implications of abolishing detention in a YOI and the regime that would need to be in place to ensure sufficient safeguards for this age group both in custody and the community.

7.4. The conclusions of the Project were announced in a Written Ministerial Statement on 8 May 2007 (House of Commons Hansard, col. 6WS), namely that taking account of the constraints posed by current prison capacity and the need to undertake further work to test out an approach to Young Adult Offenders the time is not yet right to abolish detention in a YOI.

7.5. In these circumstances, the Government has no immediate plans to bring section 61 of the 2000 Act into force and, as a result, it is necessary to make transitory modifications to the provisions in the 2003 Act in respect of public protection sentences and release on licence (as amended by the 2008 Act) to ensure that those provisions in the 2003 Act are read as including young adult offenders sentenced to detention in a young offender institution.

7.6. In establishing the Supreme Court, the 2005 Act seeks to strengthen the constitutional framework of the United Kingdom by providing for a distinct separation between the legislature and the judiciary. The Government announced in a written ministerial statement on 17 October 2006 (House of Lords Hansard, col. WS78) that the Supreme Court would be established from October 2009. In common with other legislation passed since the 2005/06 session, the 2008 Act makes reference to the Supreme Court rather than to the House of Lords. Transitory provisions are required to ensure that the references to the Supreme Court are read as references to the House of Lords until the Supreme Court is established.

8 Impact

8.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary sectors.

8.2. The instrument has no material impact on the public sector.

9. Contact

Charles Goldie at the Ministry of Justice. Tel: 020 7035 3512 or e-mail: charles.goldie@justice.gsi.gov.uk can answer any queries regarding the instrument.