CONVEN TION RIGHTS (COMPLIANCE) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Convention Rights (Compliance) (Scotland) Bill introduced in the Scottish Parliament on 10 January 2001:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on Legislative Competence; and
- the Presiding Officer’s Statement on Legislative Competence.

A Policy Memorandum, also prepared by the Scottish Executive, is printed separately as SP Bill 25–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill is in seven parts:

Part 1 alters the release arrangements for adult mandatory life prisoners to bring them into line with the arrangements for other categories of life prisoner.

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

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

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

Part 5 amends the Lyon King of Arms Act 1867 to transfer from the Lord Lyon to the Scottish Ministers the power to appoint the Procurator Fiscal of the Lyon Court.
This document relates to the Convention Rights (Compliance) (Scotland) Bill (SP Bill 25) as introduced in the Scottish Parliament on 10 January 2001

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

Part 7 makes provision for the short title and commencement of the different parts of the Bill.

The schedule deals with transitional arrangements for existing life prisoners, existing transferred life prisoners and existing members of the Parole Board.

PART 1 - PRISONERS AND PAROLE

Release of life prisoners

5. This part of the Bill relates to the release arrangements for life prisoners sentenced after this section of the Bill comes into force. It amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”).

6. Section 1(2) repeals sections 1(4) to 1(7) of the 1993 Act. Sections 1(4) to (7) (as read with section 53 and section 117 of the Scotland Act 1998) provide that the Scottish Ministers may, after consultation with the Lord Justice General, whom failing the Lord Justice Clerk, and, if available, the trial judge, release on life licence a prisoner who is not a designated life prisoner i.e. an adult mandatory life prisoner (“AMLP”) if this is recommended by the Parole Board. Under these provisions the decision whether or not to release the prisoner is entirely a matter for the Scottish Ministers and they are not obliged to accept the Board’s recommendation or the judiciary’s views. These provisions are repealed because the Bill makes provision for the future sentencing and release of AMLPs to be dealt with under section 2 of the 1993 Act in the same way as the sentencing and release of other life prisoners. At present the release arrangements in section 2 are restricted to discretionary life prisoners and persons who committed a murder whilst under the age of 18 years (“under 18 murderers”). These prisoners are currently defined as “designated life prisoners” in the 1993 Act.

7. 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 and amends the definition of “life prisoner” for the purposes of that part of the 1993 Act. 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.
8. 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 discretionary life prisoners, under 18 murderers and AMLPs. As mentioned above, at present, section 2 only applies to discretionary life prisoners and under 18 murderers.

9. Section 1(3)(b) amends section 2(2) of the 1993 Act. Sub-paragraph (i) repeals the redundant word “designated”. Sub-paragraph (ii) substitutes the words “punishment part” for the words “designated part” in the original text. Sub-paragraph (iii) inserts the words “to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)” into section 2(2) of the 1993 Act. The effect of these amendments is to provide 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 amendments 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 “for the purposes of 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.

10. Section 1(3)(c) substitutes section 2(3) of the 1993 Act and inserts a new subsection (3A). At present subsection (3) of the 1993 Act provides that where a court imposes 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 may decide not to make an order setting a “designated part” (now a “punishment part”), but if the court does this it must state its reasons for that decision. At present, the subsection also provides that the designated part constitutes 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 current 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 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.

11. 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 a period in years and months that the court considers appropriate under that subsection. In making the order the court must take into account the factors presently specified in subsection (2), namely, the seriousness of the offence, or the offence combined with other offences associated with it, 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 the new subsection provides that the order specifying the punishment part may specify any period of years and months notwithstanding the likelihood that that such a period will exceed the remainder of the prisoner’s natural life. The effect of this provision is that if, exceptionally, a judge considered in a particular case, because of matters such as the gravity of the crime or the criminal record of the convicted person, he required to set a punishment part which might exceed the individual life expectancy it would be open to him to do so. Since the punishment part must reflect the appropriate punitive period for the particular case it might also exceed the person’s life expectancy in circumstances where the person was elderly or ill.

12. Paragraph (d) repeals the redundant word “designated” in sections 2(4) and 2(6) of the 1993 Act.

13. Paragraph (e) 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.

14. Paragraph (f)(i) repeals paragraph (a) of section 2(9) of the 1993 Act which provides that a life prisoner serving two or more sentences of imprisonment can only be regarded as a designated life prisoner if he has a designated part for all of his life sentences. This is no longer necessary because, under the changes made by the Bill, 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 (f)(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 outlined above, 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.

15. Section 1(4) repeals sections 6(2) and 6(3) of the 1993 Act. Section 6(2) empowers the Scottish Ministers to release on licence a child detained without limit of time under section 208 of the Criminal Procedure (Scotland) Act 1995 on the recommendation of the Parole Board. Section 6(3) empowers 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. The provisions are being repealed because they are no longer necessary by virtue of the amendments outlined above to section 2 of the 1993 Act. 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 to section 2(3) of the 1993 Act and the Scottish Ministers will require to release such prisoners on licence under section 2 if directed to do so by the Parole Board.

16. Section 1(5) amends sections 17(2), 17(3)(a) and 17(4) of the 1993 Act (revocation of licence). The effect of section 1(5)(a) 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 he will have the express
right to require the Scottish Ministers to refer his case to the Parole Board rather than simply having the right to make written representations to the Scottish Ministers. Paragraph (b) of section 1(5) is consequential on the amendment to section 17(2) of the 1993 Act. It has the effect that the Scottish Ministers must refer to the Board the case of a person who has required them to do so under section 17(2).

17. Section 1(5)(c) of the Bill 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.

18. Section 1(6) of the Bill 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.

19. Section 1(7) of the Bill 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 Bill. The other amendments to paragraphs 6(2)(a), 6(2)(b), 6(3)(a), 6(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.

20. Section 1(8) of the Bill 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, as above and, as above, 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 to the Criminal Procedure (Scotland) Act 1995**

21. Section 2 repeals subsections (4) to (6) of section 205 of the Criminal Procedure (Scotland) Act 1995. Subsection (4) empowers 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) provides that the judge must give his reasons for his recommendation. Subsection (6) provides that the recommendation shall form part of the prisoner’s sentence and, as such, is appealable. By virtue of the amendments to section 2 of the 1993 Act outlined above these provisions are no longer necessary as all life prisoners will have a punishment part set by the court.
Amendment of provisions relating to transferred life prisoners

22. Section 3 amends section 10 of the 1993 Act.

23. Section 3(1)(a) amends section 10(1) which deals with discretionary life prisoners and under 18 murderers who are transferred to Scotland from England and Wales on an unrestricted basis, namely those prisoners who come here to serve their sentences and who become subject to Scots law following their transfer. At present, section 10(1) of the 1993 Act provides for the recognition of the England and Wales equivalent to the “designated” part and for the prisoner to thereafter be treated as a designated life prisoner sentenced in Scotland.

24. Section 3(1)(a)(i) ensures that the amendments to section 10(1) apply to such prisoners who are transferred after the Bill comes into force as well as the prisoners who are transferred before the provisions of the Bill come into force.

25. Section 3(1)(a)(ii) inserts a reference to section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act"). This ensures that where an under 18 murderer is transferred to Scotland from England and Wales, the judicial tariff specified under section 82A of the 2000 Act is recognised in Scotland.

26. Section 3(1)(a)(iii) removes the reference in section 10(1) to section 1(4) of the 1993 Act since that provision is repealed by the Bill.

27. Sections 3(1)(a)(iv) and (v) remove redundant references to “designated” life prisoners since the transferred prisoners will in future be treated as if they were life prisoners sentenced in Scotland. The amendments also substitute the term “designated” with “punishment” to ensure that the judicial tariff imposed in England and Wales is recognised as a Scottish punishment part and insert a further reference to section 82A of the new 2000 Act.

28. Section 3(1)(b) makes provision for the way in which other transferred life prisoners will be treated following their transfer to Scotland. It covers prisoners with indeterminate sentences who are transferred to Scotland from countries other than the UK under repatriation arrangements, military prisoners and prisoners from other parts of the United Kingdom who are transferred here on an unrestricted basis (other than the under 18 murderers and discretionary life prisoners sentenced in England and Wales who are, as mentioned above, dealt with under the provisions of section 10(1) of the 1993 Act).

29. The amendment that is made by section 3(1)(b) substitutes a new section 10(2) of the 1993 Act. This substituted version applies to prisoners who are transferred after the coming into force of section 3 of the Bill. Under the substituted version of section 10(2), the transferred life prisoners described in paragraph 28 above will be treated as life prisoners sentenced in Scotland, once there has been a court hearing following their transfer. At the court hearing, 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 Bill, had been in force at the time the prisoner was sentenced.

30. Section 3(1)(b) also inserts into section 10 of the 1993 Act new subsections (2A) to (2I) which enable the High Court to hold the hearing to set a punishment part for the transferred life prisoner.

31. 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 AMLPs sentenced in Scotland which are provided for in Part 1 of the schedule to the Bill. New subsections (2B) to (2I) accordingly make equivalent provision to the provision that is made for the AMLP hearings in paragraphs 6 to 12 and 15 of Part 1 of the schedule.

32. Section 3(1)(c) amends section 10(3). The amendments remove redundant references to section 1(4), the word “designated”, and insert new references to the punishment part and the court hearing that is provided for in new subsection (2F). As amended by the Bill, section 10(3) will have the effect of applying the 1993 Act to the transferred life prisoners once the court has fixed a punishment part at the hearing. The prisoners will thereafter be treated as if they were life prisoners sentenced in Scotland.

33. Section 3(1)(d) amends the definition of a transferred life prisoner in section 10(4) to make it clear that the provision in section 10(2) in relation to the court hearing for transferred life prisoners from other parts of the United Kingdom and the provision in section 10(1) for the recognition of the judicial tariff imposed in England and Wales for discretionary life prisoners and under 18 murderers sentenced in England and Wales only applies where the prisoners are transferred to Scotland on an “unrestricted basis” i.e. they are subject to Scots law following the transfer. This is in contrast to prisoners who come from other parts of the United Kingdom on a “restricted basis” who remain subject to the law of the sentencing jurisdiction. The amendments to section 10 make no provision for such prisoners.

34. 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 (2F) and the “punishment part”.

35. Section 3(2) substitutes new paragraphs 7 to 7D for paragraph 7 of Schedule 6 to the 1993 Act which will apply to transfers after the Bill comes into force. At present, paragraph 7 enables the recognition of a “tariff” that has been certified by the Lord Chief Justice under England and Wales transitional arrangements for discretionary life prisoners sentenced in England and Wales. Since it is no longer appropriate to recognise a tariff or punishment part that has not been set by an Article 6 compliant court at first instance, the new paragraph 7 of Schedule 6 makes provision for the prisoner to have a court hearing in the same way as other transferred life prisoners, subject to the additional provision that is made in new paragraphs 7A to 7D for the prisoner to be able to waive his right to a hearing if he is content with the part that has been certified by the Lord Chief Justice. The waiver provisions are similar to those that apply for existing Scottish
discretionary life prisoners and under 18 murderers who have a punishment part that is certified by the Lord Justice General (see paragraphs 4 to 6 and 13 of Part 1 of the schedule). Where the prisoner waives his entitlement to a hearing the term specified in the certificate would then be treated as a Scottish punishment part.

**Transitional provisions**

36. Section 4 introduces the transitional provisions in relation to the release of life prisoners which appear in Parts 1 to 3 of the schedule to the Bill.

**PART 2 - CONSTITUTION OF PAROLE BOARD FOR SCOTLAND**

37. This part of the Bill amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) to provide new arrangements for the appointment, tenure and removal of Parole Board members.

**Appointment and removal of Parole Board members**

38. Section 5(1) amends section 20(1) of the 1993 Act by repealing the words “this Part of”. This is a technical and consequential amendment. It is intended to ensure that the Board as reconstituted by the Act can still consider the cases of persons who are subject to the release provisions in the Prisons (Scotland) Act 1989.

39. Section 5(2) inserts two new paragraphs into Schedule 2 of the 1993 Act. Paragraph 1A requires the Scottish Ministers to comply with any regulations they make on the procedure that is to govern the appointment of Board members, and the consultation with other parties which should take place before appointments are made.

40. Paragraph 1B allows the regulations to specify different procedures for the appointment of different Parole Board members. For example, it is intended that regulations will require most vacancies to be advertised in national newspapers or specialist journals. However, this would not be appropriate in relation to the appointment of a Lord Commissioner of Justiciary. A recommendation is received from the Lord Justice General prior to this appointment.

41. Section 5(3) contains 9 new paragraphs to be inserted into schedule 2 to the 1993 Act (paragraphs 2A to 2I) which regulate the conditions of service of Parole Board members.

42. Paragraph 2A provides that a Parole Board member will have a term of office of not less than 6 years and not more than 7 years. The variable length of appointment is designed to ensure that all appointments can end on 31 December, even if they begin on a date other than 1 January. The term of appointment provided for in this paragraph is however subject to paragraphs 2B to 2D.
43. Although every member will be appointed for between 6 and 7 years, paragraph 2B provides that he or she is still entitled to resign at any point during that term by notifying the Scottish Ministers accordingly.

44. Paragraph 2C will have the effect of removing any Parole Board member from office on reaching his or her 75th birthday. It also means that no person can be appointed or re-appointed as a member of the Parole Board after the age of 75.

45. Paragraph 2D provides that a Parole Board member’s appointment will come to an end if that member is removed from office by the tribunal that is provided for in the new paragraph 3 of Schedule 2 to the 1993 Act.

46. Paragraph 2E provides that a person may only be re-appointed as a member of the Parole Board if two conditions are fulfilled. One is that at least 6 years have passed since the person was previously a member and the other is that the person has not already been re-appointed under these provisions.

47. Paragraph 2F allows a person who has previously been a member of the Parole Board but who has resigned from that office to be re-appointed, provided the conditions laid out in paragraph 2E are fulfilled.

48. Paragraph 2G precludes the reappointment of a person who has been removed from office under the new paragraph 3 of Schedule 2 to the 1993 Act.

49. Paragraph 2H provides that a person who is reappointed under paragraph 2E will be subject to the provisions of paragraphs 1 to 2D in the same way as a person who has been appointed for the first time.

Performance of duties

50. Paragraph 2I requires the Chairman of the Parole Board to ensure that, where possible, each member of the Parole Board has the opportunity to participate in the functions of the Board for at least 20 days in each 12-month period.

Removal of members from office

51. Section 5(4) replaces the original paragraph 3 of Schedule 2 to the 1993 Act with new paragraphs 3 to 3D. These new paragraphs detail the conditions under which a Parole Board member may be removed from office.

52. Paragraph 3 places the responsibility for deciding on removal on a tribunal to be constituted for this purpose.
53. Paragraph 3A provides that the tribunal can only remove a member from office if an investigation has been carried out at the request of the Scottish Ministers and where that investigation has found the member to be unfit for office because of inability, neglect of duty or misbehaviour.

54. Paragraph 3B fixes the membership of the tribunal. The members will be appointed by the Lord President of the Court of Session and will be:

   (a) a Senator of the College of Justice or a Sheriff Principal (who shall preside),

   (b) a person who is, and has been for at least 10 years, legally qualified, and

   (c) one other person.

55. Paragraph 3D(a) allows the Scottish Ministers to make regulations, which will allow the tribunal to suspend a member of the Parole Board from office during an investigation. The regulations may also make provision for the length and effect of any such suspension. Sub-paragraph (b) of the paragraph empowers the Scottish Ministers to make any other provisions considered necessary in respect of the tribunal, including procedure to be followed by and before it.

**PART 3 - LEGAL AID**

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

*Extension of advice and assistance and civil legal aid under Legal Aid (Scotland) Act 1986*

57. Section 6(1) amends section 6(2) of the 1986 Act by extending the definition of “court or tribunal” in Part 2 of the 1986 Act, which relates to advice and assistance. This has the effect of allowing advice and assistance to be made available for any proceedings or bodies which determine persons’ civil rights and obligations.

58. Section 6(2) amends section 13 of the 1986 Act by extending the definition of “court or tribunal” in Part 3 of the 1986 Act, which relates to civil legal aid. This has the effect of allowing civil legal aid to be made available for any proceedings or bodies which determine persons’ civil rights and obligations.

59. Section 6(3) inserts a new regulation making power into section 14 of the 1986 Act. It provides that for certain courts and tribunals as will be specified in the regulations, further tests of eligibility may be prescribed by those regulations over and above the existing tests of *probabilis*
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causa, reasonableness and financial eligibility. These regulations will be made by the Scottish Ministers and subject to negative resolution procedure.

60. Section 6(4) is a technical change to section 16, which relates to expenses, to ensure that it also applies to any proceedings or bodies covered by the amended definition of “court or tribunal” as inserted in section 13(6) of the 1986 Act by subsection (2) above.

61. Section 6(5) inserts a new section 38(1A). This is a technical change to ensure that the amended definition of “court or tribunal” applies in section 38(1)(a), which relates to the power of the Court of Session to regulate the procedure of courts and tribunals in relation to legal aid.

Fixed payments for criminal legal assistance: exceptional cases

62. Section 7 of the Bill inserts further subsections (3C) to (3J) into section 33 of the 1986 Act.

63. New subsection (3C) allows the Scottish Ministers to make regulations in which they prescribe the circumstances and conditions when a solicitor shall be paid under section 33(2) and (3) of the 1986 Act instead of being paid under section 33(3A) of the 1986 Act. This means that a solicitor will be paid on a time and line basis rather than under the fixed payment scheme. The purpose of these regulations is to enable the Scottish Legal Aid Board to ensure that a person who is provided with criminal legal assistance under section 33(3A) of the 1986 Act is not deprived of the right to a fair trial because of the fixed payments payable under section 33(3A) of the 1986 Act. Such regulations will be subject to negative resolution procedure.

64. New subsection (3I) allows the Scottish Ministers to apply any regulations made under subsection (3C) retrospectively to cases ongoing at the time of the commencement of section 7 of the Bill. It also enables the Scottish Ministers to disapply any conditions in the regulations made under subsection (3C)(b) to any such ongoing cases.

65. Subsection (3J) requires the Board to set up a procedure to allow the review of any decision by it to refuse an application under subsection (3H) or determine that a solicitor is not to be paid under section 33(2) and (3) of the 1986 Act.

Criminal legal assistance: retrospective revision of fixed payment regulations

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

67. Section 9 of the Bill makes technical amendments to sections 4, 11, 12, 25A, 25B, 26, 28A and 31 of the 1986 Act to enable the Scottish Legal Aid Board to use its powers under section 26 of that Act to directly employ solicitors for the purpose of providing criminal legal assistance.

68. Sections 9(1) and (2) are technical changes to sections 4 and 11 of the 1986 Act to ensure that any client represented by a directly employed solicitor is treated in the same way as a client represented by a private solicitor under legal aid, in relation to expenses and payment of contributions respectively.

69. Section 9(3) amends section 12 of the 1986 Act. This is a technical change to ensure that the salary of a directly employed solicitor is not subject to the regulations that apply to the payment of legal aid fees and expenses to a private solicitor providing advice and assistance under Part II of the 1986 Act.

70. Sections 9(4) and (5) amend sections 25A and 25B of the 1986 Act respectively. They have the effect of ensuring that any solicitor employed by the Board under section 26 of the 1986 Act for the purpose of providing criminal legal assistance is required to be registered under section 25A of the 1986 Act and allow the Board to set different provisions in a Code of Practice under section 25B for such directly employed solicitors.

71. Section 9(6) amends section 26(1)(a) of the 1986 Act by inserting a new regulation making power. This power will allow the Scottish Ministers to prescribe the cases in which the Board may employ solicitors for the purposes of providing advice and assistance under Part II of the 1986 Act. Such regulations will be subject to negative resolution procedure.

72. Section 9(7) makes technical amendments to section 28A of the 1986 Act. The effect is to ensure that the provisions of section 28A have no effect on the power to commence sections 26 to 28 of the 1986 Act. Technical amendments also have the effect of ensuring that provisions that would by virtue of section 28A(12) cease to have effect would remain in force in relation to solicitors employed under sections 26 to 28 of the 1986 Act.

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

PART 4 - HOMOSEXUAL OFFENCES

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

74. Section 13(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) provides that a homosexual act in private shall not be an offence provided that the parties consent
and have obtained the age of 18 years (to be changed to 16 years in the Sexual Offences (Amendment) Bill in Westminster). Section 13(2)(a) provides that an act which would otherwise be treated for the purposes of the 1995 Act as being done in private shall not be so treated if done when more than 2 persons take part or are present. The effect of section 13(2)(a) of the 1995 Act is that it is an offence for more than two consenting adult males to take part in homosexual acts in private. Section 10(a) repeals section 13 (2)(a).

75. Section 10(b) makes a necessary consequential amendment to section 13(5)(b) of the 1995 Act. At present, section 13(5)(b) makes it an offence to commit or to be party to the commission of, or to procure or attempt to procure the commission of a homosexual act without the consent of both parties to the act. Section 8(b) changes the reference to “both parties” to “the parties” to cover the situation where more than two men are involved.

PART 5 - PROCURATOR FISCAL OF THE LYON COURT

Appointment of Procurator Fiscal of the Lyon Court

76. This part of the Bill amends the Lyon King of Arms Act 1867 (“the 1867 Act”).

77. Section 11(2) amends section 9 of the 1867 Act to remove references to the Procurator Fiscal of the Lyon Court.

78. Section 11(3) inserts a new section 9A, which provides for the Procurator Fiscal of the Lyon Court to be appointed by the Scottish Ministers on such terms and conditions as they determine.

79. Section 11(4) provides that the incumbent Procurator Fiscal will cease to hold office on the day this Part of the Bill is brought into force under section 15(2).

PART 6 - POWER TO MAKE REMEDIAL ORDERS

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

Remedial orders

81. Section 12(1) confers the new power on the Scottish Ministers to make remedial orders and defines the scope of that power. A remedial order may be made as a consequence of any Act of Parliament, Act of the Scottish Parliament, subordinate legislation made under any such Act, any provision in any such Act or subordinate legislation or any exercise or purported exercise of functions by the Scottish Ministers, which is or may be incompatible with any of the Convention rights. Ministers may make such provision as they consider necessary or expedient.
82. Section 12(2)(d) enables a remedial order to modify any enactment, prerogative instrument (such as an Order in Council), other instrument or document.

83. Section 12(2)(e) provides that a remedial order may make provision which has retrospective effect, since actions or provisions which are or may be incompatible are likely to have already taken practical effect. This mirrors the provision that is made for remedial orders under the Human Rights Act (see paragraph 1(1)(b) of Schedule 2 to that Act) and the subordinate power in the Scotland Act to remedy ultra vires Acts (see sections 107 and 114 of the Scotland Act). Provisions which increase the punishment for or create criminal offences are specifically excluded from having retrospective effect. Section 12(2)(f) specifies that the remedial order may provide for the delegation of functions, e.g. to the Scottish Ministers.

84. Section 12(3) restricts the maximum penalties which may be imposed for any criminal offence created by a remedial order. For an offence punishable on summary conviction, the maximum penalty is restricted to 3 months imprisonment or a fine not exceeding level 5 on the standard scale. For more serious offences punishable on indictment, the maximum penalty is restricted to 2 years imprisonment and the fine would remain unlimited.

85. Section 12(4) ensures that the conferring of this new general power to make a remedial power does not affect any other power which the Scottish Ministers may have to remedy the ECHR incompatibility, such as any existing powers to make regulations.

Procedure for remedial orders: general

86. Section 13 outlines the general procedure which the Scottish Ministers must follow in making a remedial order.

87. Section 13(2) provides that the remedial order cannot be made until it has been laid in draft and approved by resolution of the Scottish Parliament.

88. Section 13(3) provides that, before the order is laid in draft for this purpose, the Scottish Ministers must give the Scottish Parliament and the public the opportunity to comment on a copy of the proposed draft order by:

- Laying a copy of the proposed draft order and a statement of their reasons for making the order before the Parliament;
- Giving appropriate public notice of the proposed order, inviting comments in writing. Such comments are to be made within a period of 60 days beginning with the earlier of the day the notice was given or the day the proposed order was laid (this may be but need not be the same day);
- Having regard to any comments made within that period.

89. Section 13(4) provides that when laying the draft remedial order for approval, the Scottish Ministers must also lay a statement which summarises the comments made during the 60 day period.
outlined in section 13(3)(b) and which specifies any changes made to the draft order and the reasons for those changes.

**Procedure for remedial orders: urgent cases**

90. Section 14(1) confers power on the Scottish Ministers, for reasons of urgency, to make a remedial order forthwith without applying the procedure specified in section 13.

91. The remainder of section 14 specifies the procedure that the Scottish Ministers must follow having made an urgent remedial order.

92. Section 14(2) provides that the Scottish Ministers must give appropriate public notice of the contents of the order, inviting comments in writing to be made within a period of 60 days beginning with the day the order was made. Ministers must also lay the order before the Parliament with a statement of reasons for having made it.

93. Section 14(3) provides that the Scottish Ministers must have regard to comments made within the stipulated period. Section 14(4) provides that as soon as practicable after the end of the stipulated period, Ministers must lay a statement before the Scottish Parliament summarising the comments made and specifying any changes (if any) they consider should be made to the order.

94. Section 14(5) outlines the procedure to be followed if the Scottish Ministers consider that changes should be made to the original remedial order. Ministers must either make a second remedial order which gives effect to those changes and replaces the original remedial order and lay it before the Parliament or make an order which simply revokes the original remedial order.

95. Section 14(6) provides that the Parliament must, if it so chooses, within a period of 120 days from the date when the original remedial order was made, approve the original order or the second remedial order where it has replaced the original order. If the remedial order is not approved within this time, the remedial order, or as the case may be, the second remedial order, will cease to have effect. However, this will not affect anything done under either order or the power which the Scottish Ministers have to make a new remedial order.

96. Section 14(7) provides that section 14(6) has no effect where the Scottish Ministers simply revoke the original remedial order within the period of 120 days referred to in that subsection.

97. Section 14(9) ensures that any period during which the Parliament is dissolved or any recess of more than 4 days does not count towards the 60 day period specified in section 14(2)(a) or the 120 day period specified in section 14(6).
PART 7 - GENERAL PROVISIONS

Short title and commencement

98. Part 7 deals with the short title and the commencement provisions. Section 15(1) gives the short title as the Convention Rights (Compliance) (Scotland) Act 2001. Section 15(2) provides that Part 1 of the Bill in relation to adult mandatory life prisoners, Part 2 in relation to the constitution of the Parole Board and Part 5 in relation to the Procurator Fiscal of the Lyon Court come into force by commencement order. Section 15(3) provides that all other provisions in the Bill would come into force on the day following Royal Assent.

SCHEDULE - TRANSITIONAL PROVISIONS

PART 1 - Existing life prisoners

99. Part 1 of the schedule to the Bill makes provision for handling the cases of existing life prisoners.

100. Paragraph 1 defines a life prisoner to whom Part 1 of the schedule applies. Such prisoners are to be referred to as “an existing life prisoner”. An “existing life prisoner” is a life prisoner who was sentenced for murder committed by the prisoner when aged 18 years or over and who was sentenced prior to the provisions contained in Part 1 of the schedule coming into force (paragraph 1(a)), or a prisoner in respect of whom the Lord Justice General or the Lord Justice Clerk has issued a certificate under paragraph 6(1) of Schedule 6 to the 1993 Act or section 16(2) of the Crime and Punishment (Scotland) Act 1997 under previous transitional arrangements for discretionary life prisoners and under18 murderers (paragraph 1(b)).

101. Paragraph 2 provides definitions for Part 1 of the schedule. “Life prisoner” has the same meaning as it has in section 27(1) of the 1993 Act (as read with section 6 of that Act), that is, “a person serving a sentence of imprisonment for life.” “Punishment part” has the same meaning as it has in section 2(2) of the 1993 Act (as amended by section 2(3)(b) of this Bill), that is, as the part required “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)”. “Relevant date” means the date when Part 1 of the schedule comes into force.

102. Paragraph 3 provides that the Scottish Ministers shall, as soon as reasonably practicable after the relevant date, refer the case of an existing life prisoner to the High Court of Justiciary for a hearing under paragraph 10 of Part 1 of the schedule (the hearing at which the High Court will make an order specifying the punishment part).

103. Paragraph 4 provides that the Scottish Ministers will not refer the case of an existing transitional discretionary life prisoner or under 18 murderer to the High Court of Justiciary for a hearing under paragraph 10 if the prisoner has waived his entitlement to a hearing or if such a prisoner has, at the time of referral, served the part of the sentence referred to in the certificate.
issued by the Lord Justice General or the Lord Justice Clerk. The effect of these provisions is that an “existing life prisoner” to whom Part 1 of the schedule applies will be any adult mandatory life prisoner and those transitional discretionary life prisoners and under 18 murderers who have not served the “designated part” of their sentence specified in a certificate by the time they are referred for a hearing.

104. Paragraph 5 provides that a transitional discretionary life prisoner or under 18 murderer may waive his entitlement to a court hearing under paragraph 10 (at which an order specifying the punishment part of his sentence would be made), provided he has had independent legal advice or has declined the opportunity to take such advice and a written copy of the waiver has been sent to the Scottish Ministers.

105. Paragraph 6 entitles an existing life prisoner, who has not waived his right to a hearing under paragraph 5, and has not already served the part of the sentence referred to in the certificate issued by the Lord Justice General or the Lord Justice Clerk, to refer his case to the High Court of Justiciary for a hearing after the relevant date.

106. Paragraph 7 provides that not later than two weeks after a case is referred to the High Court of Justiciary for the punishment part to be set, the Scottish Ministers shall send to the High Court, the Lord Advocate and the existing life prisoner copies of the documents and information set out in paragraph 8. The Crown will require to be represented at the hearing to set the punishment part, as it is a sentencing matter.

107. Paragraph 8 sets out the documents and other information, which must be sent to the parties, mentioned above. These are a copy of the indictment, a copy of any report by the trial judge, a copy of any certificate fixing the “designated part” referred to in paragraph 1(b) (in the case of discretionary life prisoners and under 18 murderers) and any other documents or information which the Scottish Ministers consider relevant.

108. Paragraph 9 provides that a report prepared by the trial judge can be sent to the parties mentioned above notwithstanding the fact that the report was originally prepared on the understanding that it would not be disclosed to the prisoner. However, such a report shall be sent to the parties only for the purpose of the hearing under paragraph 10.

109. Paragraph 10 provides that there shall be a hearing at which the High Court shall make the order referred to in paragraph 11 i.e. an order specifying the part of the sentence which would be considered to be the punishment part.

110. Paragraph 11 provides that the order is an order specifying a part of the life sentence which the court considers would have been specified as the “punishment part” under section 2(2) of the 1993 Act had that section (as amended by the Bill) applied to the prisoner at the time he was sentenced. This means that existing life prisoners will have the punishment part of their life sentence set retrospectively by means of an order specifying that part of the sentence which would be considered to be the punishment part made by the court under paragraph 11.
111. Paragraph 13 provides that where the court makes an order under paragraph 10, which has the effect of setting a punishment part for that prisoner, any certificate that has previously been issued by the Lord Justice General or the Lord Justice Clerk under the transitional provisions for discretionary life prisoners and under 18 murderers in paragraph 6(1) of the 1993 Act or section 16(2) of the Crime and Punishment (Scotland) Act 1997 specifying the “designated part”, shall have no further effect.

112. Paragraph 14 provides that the provisions contained in section 2 of the 1993 Act (as amended by the provisions contained in the Bill) shall apply to an existing life prisoner as if the order made under paragraph 10 - setting the punishment part – were an order made under section 2(2) of the 1993 Act at the time the existing life prisoner was originally sentenced. This provision has the effect that the release provisions in section 2 of the 1993 Act as amended by the Bill will apply to an existing life prisoner once his punishment part has been set at the court hearing.

113. Paragraph 15 provides that a hearing under paragraph 10 shall be a criminal procedure for the purposes of section 305 of the Criminal Procedure (Scotland) Act 1995. This means that the High Court of Justiciary will have power to regulate the procedure applicable to the hearing to set the punishment part by an Act of Adjournal.

114. Paragraph 16 makes provision for existing life prisoners (other than those released on compassionate grounds in terms of section 3 of the 1993 Act) who have already been released from prison on life licence, before the provisions in Part 1 of the schedule to the Bill come into force. A prisoner in this category will, on the date the provisions in Part 1 of the schedule come into force, be deemed to be a prisoner who was released on licence under section 2(4) of the 1993 Act (as amended by section 1(3)(d) of this Bill) as if that prisoner had been a life prisoner to whom section 2(4) applied and who had served the punishment part of his sentence. If a prisoner requires to be recalled to prison for any reason after this he will be treated under the new provisions.

115. Paragraph 17 provides that where an existing life prisoner released on licence is treated, by virtue of paragraph 16, as a prisoner who was released under section 2(4) of the 1993 Act, then the validity of his licence will not be affected by the absence in the licence of such a condition as is specified in section 12(2) of the 1993 Act. Section 12 (2) of the 1993 Act contains two standard conditions for inclusion in a prisoner’s licence on release from prison. They are that the prisoner shall be under the supervision of a relevant social work authority or probation officer and that he shall comply with such requirements as that officer might specify for the purposes of supervision. It is not a statutory requirement that these conditions appear in the licence of a prisoner released under the 1989 Act, although such conditions do appear in almost all licences issued under the 1989 Act.

**PART 2 - Existing life prisoners recommended for release**

116. Part 2 of the schedule makes additional transitional provision for existing adult mandatory life prisoners who have been recommended for release before the new provisions come into force.
117. Paragraph 18 records the specific categories of prisoner to whom the provisions of this part of the schedule apply. In order to obtain the benefit of the transitional provisions the prisoner must satisfy the requirements of paragraphs 18(a) to (c). Paragraph 18(a) and 18(c) will have the effect of applying these provisions to prisoners who have had a recommendation for release from the Parole Board prior to the relevant date and to whose release the judiciary do not object. Paragraph 18(b) provides that the provisions of Part 2 will only apply to those prisoners who have not received a hearing under Part 1. Once a hearing has taken place and a punishment part set under Part 1, Part 2 ceases to apply and the prisoner is dealt with under section 2 of the 1993 Act as amended by the Bill.

118. Paragraph 19 provides that “existing life prisoner” has the meaning given in paragraph 1(a) of Part 1 of the schedule, namely a person who was prior to the relevant date sentenced for a murder committed when the person was aged 18 years or over. “Punishment part” has the same meaning as in Part 1. “Relevant date” means the date when this part of the schedule comes into force. “Provisional release date” (“PRD”) is defined to ensure that, if the PRD fixed by the Scottish Ministers or the Parole Board has been fixed by reference to a month but not to a particular day in that month, e.g. release in July 2001, the prisoner would be released on the first day of that month provided that day was not a Saturday, Sunday or public holiday. In the latter case, the prisoner would be released on the last preceding day which was not a Saturday, Sunday or public holiday. ‘Public holiday’ has the meaning given in section 27(8) of the 1993 Act, that is, any day on which in the opinion of the Scottish Ministers, public offices or facilities the prisoner is likely to need in the area he is likely to be following release will be closed.

119. Paragraph 20 provides that, where a PRD has been fixed by the Scottish Ministers, the prisoner will be released on licence on that date and deemed to be released as if he had already served his punishment part and the Parole Board had directed his release under 2(4) of the 1993 Act. The requirement that the Scottish Ministers release the prisoner on the PRD is however subject to the qualification that is provided for in paragraph 21.

120. Paragraph 21 provides the Scottish Ministers with the power to refer a prisoner for whom they have fixed a PRD back to the Parole Board before his release for a review of the original recommendation to release. This power is restricted to cases where Ministers are of the view that the prisoner’s conduct before release suggests that a review is required to ensure that the Board is still satisfied that there will be no unacceptable risk to the public from that release. The power may be exercised, for example, if, during the pre-release programme, the prisoner commits a serious disciplinary offence.

121. Paragraph 22 stipulates that the review referred to in paragraph 21 falls within the functions of the Parole Board which are contained in section 20 of the 1993 Act. This will enable the Parole Board Rules that are made under section 20 to be amended to require the Parole Board to sit in its tribunal capacity when carrying out a review under paragraph 21.

122. Paragraph 23 provides that, where Ministers refer a prisoner back to the Board under paragraph 21, the Board has two options. It can either direct that the PRD should continue to apply
This document relates to the Convention Rights (Compliance) (Scotland) Bill (SP Bill 25) as introduced in the Scottish Parliament on 10 January 2001

and that the Scottish Ministers should release the prisoner on the PRD, or alternatively, it can direct that the PRD no longer applies.

123. Paragraph 24 provides that, even if the Parole Board has made a direction under paragraph 23(a) that the PRD be adhered to, if the Scottish Ministers consider that the prisoner’s behaviour between the time of that direction and the PRD gives rise to concern about the protection of the public, they may refer the case back to the Parole Board for review. In such a case, paragraphs 22, 23 and 25 apply as they would to a referral made under paragraph 21.

124. Paragraph 25 provides that if the Parole Board, on undertaking a review under paragraph 21, is of the opinion that the PRD should no longer apply, the end of the day prior to the PRD should be regarded as being the end of the prisoner’s punishment part and that punishment part would be deemed to have been given in accordance with the provisions in the Bill amending the 1993 Act. This means that at the expiry of the punishment part the prisoner’s case would be referred to the Parole Board sitting as a tribunal to consider whether or not he should continue to be confined for the protection of the public. If the Parole Board does not direct release at that stage a further tribunal would be held under section 2 of the 1993 Act.

125. Paragraph 26 deals with those prisoners whose provisional release date has not yet been fixed by the Scottish Ministers. These are the cases where, although there is a favourable Parole Board recommendation and the judiciary do not object to release in accordance with that recommendation, Ministers have not had an opportunity to consider the prisoner’s suitability for release before the new provisions of the Bill come into force. It provides that such a prisoner will be released on the date recommended by the Board and deemed to be released on licence as if the prisoner had already served his punishment part and the Parole Board had directed his release under section 2(4) of the 1993 Act. This mirrors the provision in paragraph 20 for prisoners for whom Ministers have fixed a PRD. Paragraph 26 is subject to paragraphs 21 to 25. This means that, as with the cases in which the Scottish Ministers have fixed a PRD, Ministers have the power to refer the case back to the Parole Board in the event of any adverse developments that occur before the Board’s PRD.

126. Paragraph 27 provides the Scottish Ministers with an additional power for prisoners whose PRD has been fixed by the Parole Board. In view of the fact that, as mentioned above, Ministers will not have had an opportunity to consider the prisoner’s suitability for release before the Bill comes into force, Ministers will be given power to refer the case back to the Parole Board if they consider, on looking at the available information, that there is a need for a further review. Paragraph 28 provides that if the Scottish Ministers wish to refer a prisoner back to the Board under paragraph 27, they must do so no later than two weeks after the Bill comes into force.

127. Paragraph 29 mirrors paragraph 22 and provides that the consideration and disposal of the prisoner referred to in paragraph 27 falls within the functions of the Parole Board which are outlined in section 20 of the 1993 Act. This will enable the Parole Board Rules that are made under section 20 to be amended to require the Parole Board to sit in its tribunal capacity when considering and disposing of the reference by Ministers.
128. Paragraph 30 mirrors paragraph 23 and ensures that, where the Scottish Ministers refer a prisoner back to the Board under paragraph 27, the Board has the power to direct Ministers to release the prisoner on the PRD, or direct that the PRD no longer applies.

129. Paragraph 31 mirrors paragraph 25 and provides that if the Parole Board on undertaking a review under paragraph 27 is of the opinion that the PRD should no longer apply, the end of the day prior to the PRD should be regarded as being the end of the prisoner’s punishment part and the punishment part would be deemed to have been given in accordance with the provisions in the Bill amending the 1993 Act. This means that at the expiry of the punishment part the prisoner’s case would be referred to the Parole Board sitting as a tribunal to consider whether or not he should continue to be confined for the protection of the public.

PART 3 - Transferred life prisoners

130. Part 3 of the schedule makes additional provision for transferred life prisoners.

131. Paragraphs 32 and 33 provide definitions for the purposes of Part 3 of the schedule. Paragraph 32 defines an existing transferred life prisoner as a prisoner who has been transferred to Scotland before the provisions of Part 3 of the schedule come into force and to whom section 10(2) of the 1993 Act applies but not section 10(1) or (3) or to whom sections 10(2) and 10(3) apply, including a prisoner to whom those provisions apply by virtue of paragraph 7 of Schedule 6 to the 1993 Act. This has the effect of applying Part 3 to existing adult mandatory life prisoners who were transferred to Scotland from other countries under repatriation arrangements, under military rules and from other parts of the United Kingdom on an unrestricted basis and to existing discretionary life prisoners and under 18 murderers who received a designated part by virtue of a certificate from the Lord Justice General or Lord Justice Clerk in Scotland or from the Lord Chief Justice under the transitional arrangements for prisoners sentenced in England and Wales. Paragraph 33 defines “life prisoner” and “punishment part” as having the same meaning in Part 3 as they do in Part 1 of the schedule. “Relevant date” means the date this part of the schedule comes into force.

132. Paragraph 34 provides that the Scottish Ministers shall refer the case of an existing transferred life prisoner (defined under paragraphs 32 and 33) to the High Court of Justiciary for a hearing as soon as reasonably practicable after Part 3 of the schedule comes into force.

133. Paragraph 35 provides that the Scottish Ministers will not refer the case of existing transferred discretionary life prisoners or under 18 murderers who are in possession of a certified designated part from the Lord Justice General or the Lord Justice Clerk or prisoners sentenced in England or Wales who have a part certified by the Lord Chief Justice under transitional arrangements contained in the Criminal Justice Act 1991 if such a prisoner has waived his right to a hearing under paragraph 41 or has served the part of the sentence specified in the certificate.

134. Paragraph 36 provides that such a prisoner may only waive his right to a hearing if he has obtained or declined to obtain legal advice and the Scottish Ministers have been sent a copy of the waiver in writing.
135. Paragraph 37 provides the additional right for existing transferred life prisoners to refer their own case to the High Court of Justiciary for a hearing unless they have waived their right to a hearing and provided they have nor served the part of the sentence specified in a certificate.

136. Paragraph 38 provides that, not later than two weeks after a case is referred to the High Court of Justiciary for the punishment part to be set, the Scottish Ministers shall send to the High Court, the Lord Advocate and the prisoner copies of the documents outlined in paragraph 39. Those documents are a copy of the indictment or corresponding document, a copy of any report by the trial judge, a copy of the certificate, if any, certifying the “designated part” and any other relevant documents or information. Paragraph 40 provides that the trial judge’s report may be provided to the parties listed notwithstanding the fact that it was originally prepared on the understanding that it would not be disclosed to the prisoner. However, the report will be provided for the purposes of the hearing under paragraph 41 only.

137. Paragraph 41 provides that there shall be a hearing at which the High Court of Justiciary will make an order under paragraph 42, i.e. an order specifying the part of the prisoner’s sentence which would be considered to be the punishment part. Paragraph 42 provides that the order will be an order specifying that part of the life sentence which the court considers would have been specified as the “punishment part” under section 2(2) of the 1993 Act, if the prisoner had been sentenced for the offence in Scotland and had that section (as amended by the Bill), applied to the prisoner at the time he was sentenced. This means that existing transferred life prisoners will receive a retrospective punishment part.

138. Paragraph 44 provides that, once a prisoner has received a punishment part at a hearing under paragraph 41, the release provisions contained in Part 1 of the 1993 Act (except section 2(9)), as amended by the Bill, will apply to the existing transferred life prisoner and any certificate previously issued by the Lord Justice General, Lord Justice Clerk or Lord Chief Justice specifying the “designated part” will cease to have effect.

139. Paragraph 45 provides that where a prisoner has waived the right to a hearing under paragraph 41, section 10(3) of the 1993 Act will apply and has the effect of applying the release provisions of the 1993 Act to the prisoner. The part of the prisoner’s sentence specified in the certificate, will be treated as though that part were the punishment part of their sentence.

140. Paragraph 46 provides that a hearing under paragraph 41 will be criminal procedure for the purposes of the Criminal Procedure (Scotland) Act 1995. This means that the High Court of Justiciary will have the power to regulate the procedure applicable to the hearing to set the punishment part by Act of Adjournal.

141. Paragraph 47 provides that a transferred life prisoner to whom section 10(2) of the 1993 Act applies (i.e. a transferred life prisoner who is not a discretionary life prisoner or a prisoner who committed murder when under the age of 18 years) who, before the relevant provisions of this Bill come into force, has been released on life licence (other than on compassionate grounds) shall be deemed to have been released on licence under section 2(4) of the 1993 Act after having served the punishment part of his sentence. This mirrors the provision for existing AMLPs who were
sentenced in Scotland and have been released on licence before the Bill comes into force (see paragraph 16 of Part 1 of the schedule).

142. Paragraph 48 provides that where a transferred life prisoner released on licence is treated as a prisoner who was released under section 2(4) of the 1993 Act, the validity of his licence will not be affected by the absence in the licence of such a condition as is specified in section 12(2) of the 1993 Act. Again, this mirrors the provision for existing AMLPs who were sentenced in Scotland and who have been released on licence before the Bill comes into force (see paragraph 17 of Part 1 of the schedule).

143. Paragraph 49 provides that the transitional arrangements set out in Part 2 of the schedule, which apply to existing life prisoners recommended for release who were sentenced in Scotland, shall also apply to transferred life prisoners to whom section 10(2) of the 1993 Act applies (i.e. a transferred life prisoner who is not a discretionary life prisoner or a prisoner who committed murder when under the age of 18 years). This is to cover transferred life prisoners who are currently treated as adult mandatory life prisoners sentenced in Scotland and who have had a provisional release date fixed by the Parole Board or by the Scottish Ministers under the existing release arrangements. They will be subject to the same arrangements that will apply to existing AMLPs to ensure that they are not prejudiced. As with AMLPs sentenced in Scotland, these special arrangements will cease to apply if the prisoner obtains a punishment part fixed at the hearing provided for at paragraph 41.

PART 4 - Existing members of the parole board

144. Part 4 of the schedule makes additional provision for existing members of the Parole Board.

145. Paragraph 50 provides that, subject to paragraphs 51 to 54 of the schedule, the provisions in section 5 of the Bill that alter the constitution of the Parole Board apply to existing members as well as new members. Therefore, for example, the appointment of an existing member will not extend beyond that member’s 75th birthday. Similarly, existing members may only be removed from office by the tribunal that is provided for in section 5(4) of the Bill.

146. Paragraph 51 provides that any period of appointment served by an existing Board member prior to the period of appointment that is being served at the time when section 5 of the Bill comes into force will be disregarded for the purposes of determining eligibility for reappointment under paragraph 2E(b) of Schedule 2 to the 1993 Act (as inserted by section 5(3) of the Bill). Therefore, a previous period of appointment will not be regarded as an appointment under paragraph 2E(b) and all existing members will be eligible to apply for reappointment provided there is an interval of at least 6 years between the end of their existing appointment and the start of any reappointment.

147. Paragraphs 52 and 53 set out the basis for calculating the terms of appointment for existing members and the point when the appointment of each existing member should be deemed to begin and end. In some cases, the period of appointment of an existing member will not begin or end on the date that is specified in that member’s current instrument of appointment. In addition, the period of appointment may be different to that specified in the appointment instrument.
148. Paragraph 52 provides that if an existing member’s current appointment followed a response to a public advertisement seeking applications for membership of the Board, and if this advertisement was in a newspaper that was circulating throughout Scotland, then that member will be entitled to serve as a Board member for 6 years, beginning on the date when the current appointment actually began.

149. Paragraph 53 provides that an existing member who was not appointed in the manner described in paragraph 52 will be entitled to serve whichever is the later of either the period that is specified in that member’s existing instrument of appointment, or a fixed period of 6 years beginning on the date when the member was first appointed as a member of the Board.

150. Paragraph 54 defines “existing member” as meaning a person who is a member of the Parole Board when section 5 of the Bill comes into force. “Current appointment” is defined as meaning the appointment that is held by a member at the time that section 5 of the Bill comes into force. “Public advertisement” is defined as meaning an advertisement in a newspaper circulating throughout Scotland.

FINANCIAL MEMORANDUM

SENTENCE AND RELEASE OF LIFE PRISONERS

151. It is estimated that the additional Departmental running costs associated with the proposed changes in procedures governing the release of adult mandatory life prisoners will be up to £120,000 per annum. It is estimated that the additional costs for the Parole Board associated with the proposed changes in procedures governing the release of adult mandatory life prisoners will be of the order of £150,000 to £200,000 per annum. The additional costs in providing Parole Board members with security of tenure will be minimal.

152. The legal aid costs in setting punishment periods for existing adult mandatory life prisoners may amount to around £84,000. This is a transitional cost, which will not recur. In addition, certain prisoners will find that their “punishment” period has expired and will be entitled to a parole tribunal hearing. The legal aid costs of such hearings are estimated at £42,000. The provisions for parole tribunal hearings may also lead to increased demand for legal aid. This is estimated at £42,000 per annum.

153. There will also be transitional costs in judicial and court time in assessing the punishment periods for adult mandatory life prisoners.

Costs on Local Authorities

154. None.
Costs on other bodies, individuals and businesses

155. None.

LEGAL AID

Costs on the Scottish Administration

156. The Bill makes new provisions in two areas that might affect legal aid expenditure. Firstly, the power to allow the Scottish Legal Aid Board to exempt cases from the Fixed Payments Scheme will have a modest impact on expenditure. The Executive anticipates that only about 500 cases each year are likely to qualify for exemption and the costs involved will be minimal. Secondly, the power to grant ABWOR or civil legal aid to additional bodies based on new tests is not possible to predict with any accuracy. This will depend on the number of applications for legal aid, particular criteria, and the bodies that will attract legal aid.

Costs on Local Authorities

157. None.

Costs on other bodies, individuals and businesses

158. None.

OTHER PROVISIONS

Costs on the Scottish Administration

159. None.

Costs on Local Authorities

160. None.

Costs on other bodies, individuals and businesses

161. None.
EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

162. On 9 January 2001, the Minister for Justice (Mr Jim Wallace) made the following statement:

“In my view, the provisions of the Convention Rights (Compliance) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

163. On 9 January 2001, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Convention Rights (Compliance) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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