This memorandum relates to the Convention Rights (Compliance) (Scotland) Bill (SP Bill 25) as introduced in the Scottish Parliament on 10 January 2001

CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Convention Rights (Compliance) (Scotland) Bill introduced in the Scottish Parliament on 10 January 2001. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 25–EN.

GENERAL POLICY OBJECTIVES OF THE BILL

2. The Bill is designed to ensure that certain elements of Scots civil and criminal law are compatible with the **European Convention for the Protection of Human Rights and Fundamental Freedoms** ("ECHR"). The Bill also proposes to confer a new power on the Scottish Ministers which will extend the circumstances under which they are able to make remedial orders to remedy any incompatibility with ECHR.

3. The United Kingdom ratified the Convention in 1951 and is therefore required to give effect to the rights and freedoms that it sets out. Since 1966, British citizens have had the right to apply to the European Commission of Human Rights if they believe that their rights under the Convention have been infringed by the State. The Commission ceased to exist from November 1998 and applications may now be made direct to the European Court of Human Rights once domestic remedies have been exhausted.

4. The **Scotland Act 1998** and the **Human Rights Act 1998** ("HRA") give further effect to Convention rights in domestic law. The relevant provisions of the Scotland Act are sections 29, 53 and 57(2). Section 29 provides that it is outwith the legislative competence of the Scottish Parliament to enact a provision that is incompatible with the Convention rights. Section 53, as read with section 54, provides in effect that the only functions transferred to the Scottish Ministers under that section are those which are to be exercised compatibly with the Convention rights. Section 57(2) provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act that is incompatible with any of the Convention rights. By virtue

of section 126(1) of the Scotland Act, the expression "Convention rights" is defined as having the same meaning as in section 1(1) of the Human Rights Act:

> "1. - (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in-
>
> (a) Articles 2 to 12 and 14 of the Convention,
>
> (b) Articles 1 to 3 of the First Protocol, and
>
> (c) Articles 1 and 2 of the Sixth Protocol,
>
> as read with Articles 16 to 18 of the Convention."

5. Acts of the Scottish Parliament or subordinate legislation made by the Scottish Ministers and any exercise of functions by the Scottish Ministers may be challenged in any civil or criminal proceedings before Scottish courts and may be struck down as "*ultra vires*" if they are found to be incompatible with the Convention rights.

6. Those provisions of the Human Rights Act not already in force took effect from 2 October 2000. That Act provides that it is unlawful for any public authority anywhere in the United Kingdom to act in a way which is incompatible with the Convention rights. "Public authority" is defined in section 6(3) of the HRA and includes a court or tribunal and any body carrying out functions of a public nature (e.g. a local authority).

7. The Scottish Executive has conducted a detailed ECHR audit across all its departments to seek to identify legislation or acts of the Executive which may be at risk of being found to be incompatible with the Convention rights. The audit took into account those ECHR challenges which have been raised in proceedings in Scotland since devolution. As a result of the audit, Ministers considered for each issue whether it would be appropriate to take administrative or legislative action. The **Bail, Judicial Appointments etc. (Scotland) Act 2000** introduced the first legislative changes to be made as a result of the audit and successful challenges in domestic courts. This Bill proposes further legislative change where Ministers consider that early action is required.

PART 1 - PRISONERS AND PAROLE

Release of Life Prisoners

8. The Executive proposes the introduction of a system for determining the release of adult mandatory life prisoners ("AMLPs") which will bring the arrangements for those prisoners into line with the existing statutory arrangements for other life prisoners. This will involve a "punishment part" (or tariff) being set in open court and a review at the expiry of the punishment part to

determine whether or not the prisoner should continue to be confined for the protection of the public. The Parole Board sitting as a tribunal would carry out the review.

9. An AMLP is a person sentenced to an indeterminate term (a "life sentence") for a murder committed when aged 18 years old or over. Such a sentence is mandatory in that the court is required to impose it by virtue of primary legislation.

Present Arrangements – Adult Mandatory Life Prisoners

10. The current arrangements governing the release of AMLPs appear in the **Prisons (Scotland) Act 1989** ("the 1989 Act") and the **Prisoners and Criminal Proceedings (Scotland) Act 1993** ("the 1993 Act"). The relevant provisions in the 1989 Act were repealed by the 1993 Act. However, the provisions in the 1993 Act apply only to persons sentenced on or after 1 October 1993 (the commencement date of the new provisions). The provisions of the 1989 Act continue to apply to persons sentenced before that date.

11. Section 26 of the 1989 Act (as read with sections 53 and 117 of the Scotland Act 1998) confers power on the Scottish Ministers to release such a prisoner following a *recommendation* of the Parole Board and after consultation with the Lord Justice General and, if available, the trial judge. Section 1(4) of the 1993 Act (as read with the same sections of the Scotland Act) makes similar provision in relation to prisoners sentenced on or after 1 October 1993. The power to release an AMLP under both the 1989 Act and the 1993 Act is entirely at the discretion of the Scottish Ministers.

12. Under the **Criminal Procedure (Scotland) Act 1995**, a judge may make a recommendation on sentencing an AMLP as to the minimum period which should be served before release is considered but is under no obligation to do so. It is open to the judge to take into account matters relating to both punishment and risk when making such a recommendation. This power is rarely used (in under 5% of murder cases).

The Preliminary Review Committee

13. Under existing arrangements, a non-statutory committee, the Preliminary Review Committee ("PRC") recommends to the Scottish Ministers the date for the first review by the Parole Board of an AMLP's suitability for release on life licence. This Committee meets in private and considers each case after approximately four years have been served**.** A senior official of the Scottish Executive Justice Department chairs the Committee and the other members are a High Court judge, the chairman of the Parole Board, a psychiatrist who is a member of the Parole Board and a senior official from the Scottish Prison Service. The Committee considers a variety of reports relating to each prisoner, including one from the sentencing judge, pre-trial psychiatric reports and reports relating to the prisoner's response in custody.

14. The Scottish Ministers reach their decision on the timing of the first review by the Parole Board in the light of the Committee's recommendation and in doing so take into account representations from the prisoner.

The Parole Board

15. The Parole Board carries out the review of an AMLP's suitability for release on life licence. In its consideration of a case the Board focuses on whether or not the risk to the public associated with the prisoner's release on life licence is acceptable. The Board makes a recommendation to the Scottish Ministers about whether or not the prisoner should be released. The Scottish Ministers are not empowered to release an AMLP (except on compassionate grounds – see Section 3 of the 1993 Act) unless this has been recommended by the Board.

16. If the Parole Board recommends that an AMLP should be released on life licence the Scottish Ministers are required by law to obtain the views of the judiciary before taking their decision. The Scottish Ministers look to the judiciary for advice on whether or not the criminal justice requirements of punishment and deterrence will have been satisfied if the prisoner is released in line with the Parole Board's recommendation. The prisoner is informed of the Parole Board's recommendation and the judiciary's views and is invited to make representations before the Scottish Ministers take their decision. The Scottish Ministers are not obliged to accept the Parole Board's recommendation or the judiciary's views but must exercise their discretion reasonably.

17. If the Parole Board does not recommend an AMLP's release or the Scottish Ministers decline to accept a favourable recommendation from the Board, further reviews of a prisoner's case will take place either biennially or annually, normally depending on a prisoner's security category.

18. The procedures relating to the release of AMLPs are also currently affected by what is known as the '20 year policy', which has operated since 1984. The policy, which was announced by the then Secretary of State, Mr George Younger, on 18 December 1984, and endorsed by successive administrations, applies to prisoners sentenced to life imprisonment for the murder of a police officer, murders by terrorists, the sexual or sadistic murder of a child and murders committed by use of a firearm in the commission of a crime. Under the policy prisoners convicted of such murders can expect to spend not less than 20 years in custody unless there are exceptional circumstances.

Present Arrangements – Designated Life Prisoners

19. A designated life prisoner is a discretionary life prisoner or a person convicted of a murder committed when under the age of 18 years ("an under 18 murderer"). A discretionary life prisoner is a person sentenced to life for a crime other than murder where the Court has used its discretion to impose a life sentence. The arrangements for the sentencing and release of such prisoners are dealt with in section 2 of the 1993 Act.

20. Under the existing law a sentencing judge has the discretion to set a "designated part" (the period required to be served to satisfy punishment and deterrence) when sentencing the prisoner. In

determining the length of the designated part the court considers the seriousness of the offence (and any others associated with it), previous convictions, and where appropriate the stage at which the offender indicated his intention to plead guilty, and the circumstances in which that indication was given. Guidance on the way in which these factors should be applied is set out in case law. The designated part is part of the prisoner's sentence and is appealable. If a judge does not set such a part he must give his reasons for not doing so. Case law has established that the judge is required to set a designated part unless he considers that the case is exceptional and that the appropriate "punitive period" for a prisoner to serve in prison is the rest of his natural life (see *O'Neill v HMA 1999, SCCR, 300*).

21. After the designated part expires (and at 2 yearly intervals thereafter) by virtue of section 2(6) of the 1993 Act, the prisoner is entitled to require the Scottish Ministers to refer his case to the Parole Board. In practice, cases are referred automatically and will be reviewed more frequently if the Parole Board recommends it. If the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should continue to be confined it will *direct* the Scottish Ministers to release him. For these purposes the Board is constituted as a Designated Life Tribunal with a holder or former holder of judicial office in the chair.

22. Both designated life prisoners and AMLPs, when released, are released on life licence. A prisoner released on life licence must comply with the conditions contained in the licence. These require him, inter alia, to be under the supervision of a named supervising officer (a social worker) and to comply with that officer's instructions. They further require him to be of good behaviour and keep the peace and not to travel outwith Great Britain without the approval of his supervising officer. Additional conditions, for example, relating to alcohol and drug counselling, may be included in a licence. A prisoner who fails to comply with the conditions of his licence renders himself liable to recall to custody.

ECHR Background

23. Existing ECHR case law has maintained that there is a justifiable difference in the treatment of mandatory and discretionary life prisoners i.e. a prisoner given a life sentence for a crime other than murder. The case of *Thynne, Wilson and Gunnell v the UK [1990] ("Thynne")* held that, unlike mandatory life sentences, a *discretionary* life sentence in the UK is imposed not only because the offence is a serious one but because, in addition to the need for punishment, the accused is considered to be a danger to the public. Therefore such sentences were composed of a punitive element and a security element. Once the punitive element of the sentence had expired, Article 5(4) of the Convention required that the prisoner's continued detention should be reviewed by a court-like body at reasonable intervals.

24. The case of *Weeks v the United Kingdom [1987] ("Weeks")* has also established that the Parole Board could not be considered to be a "court-like body" unless it had the power to *decide* rather than advise Ministers on release. The provisions of the 1993 Act relating to discretionary life prisoners were enacted in consequence of the decisions in *Thynne* and *Weeks*. The arrangements for the release of those prisoners had previously been the same as the current arrangements for AMLPs.

25. In *Wynne v UK [1994] ("Wynne")* the European Court of Human Rights confirmed that a mandatory life sentence belonged to a different category from a discretionary life sentence since it is imposed automatically as a punishment for the offence of murder *irrespective* of considerations about the danger of the offender. Therefore, in mandatory life sentences, the original criminal trial and the appeals system satisfy the guarantee of Article 5(4). The Court held that there was no additional right to challenge the lawfulness of continued detention.

26. In *Singh and Hussein v UK [1996] ("Singh"),* the European Court found that the same principles set out in *Thynne* and *Weeks* applied to persons who were sentenced to an indeterminate period for murders committed by them when they were under the age of 18. The court found that an indeterminate term of detention for a convicted young person, which may be as long as that person's life, could only be justified by considerations based on the need to protect the public. Those considerations centre on an assessment of the young offender's character and mental state and of his or her resulting dangerousness to society and therefore must, of necessity, take into account any development in the young person's personality or attitude as he grows older. Against this background, that the decisive ground for continued detention was a characteristic which was susceptible to change with the passage of time, the court held that such prisoners were entitled under Article 5(4) to take proceedings to have the grounds for their detention reviewed by a court at reasonable intervals. As a result of the decision in *Singh*, in October 1997, section 16 of the **Crime and Punishment (Scotland) Act 1997** amended section 2 of the 1993 Act to extend the discretionary life prisoner provisions to under 18 murderers.

27. In *Ryan v UK [1998]*, which involved the case of a prisoner sentenced in England to custody for life for a murder committed under the age of 21, the European Commission of Human Rights reiterated the court's earlier comments in *Wynne*. The Commission noted that "the administrative" arrangements for setting a tariff and thereafter considering the safety and acceptability of release, fall within the scope of the punishment imposed at the original trial.

28. More recently, in the case of *T v UK [1999]*, the European Court of Human Rights found that Article 6 applies to the process of setting a punishment period or tariff for a discretionary life prisoner or an under 18 murderer. The Court found that the punishment period should therefore be fixed by a court and not by the executive.

29. In terms of existing Strasbourg jurisprudence, the present legislation and procedures relating to AMLPs appear, therefore, to be compatible with Articles 5(4) and 6 of the ECHR. However, the existing arrangements for determining the release of AMLPs which involve the Scottish Ministers deciding on the point in time at which a prisoner's suitability for release should first be reviewed by the Parole Board and the Board considering the risk associated with release and making a recommendation to the Scottish Ministers, mean that, in practice, the adult mandatory life sentence could be said to be effectively split into a punishment period and a risk period. The Scottish Ministers therefore consider that there is a risk of a domestic court taking the view that, in practice, the arrangements for the release of AMLPs are no different from those applying to other prisoners sentenced to indeterminate terms of imprisonment. In those circumstances, a domestic court would find a breach of Article 5(4) (since after the expiry of the punishment period the question of risk

must be considered by a court-like body) and a breach of Article 6 (since the punishment part would require to be set by a court).

Proposed Arrangements

30. The process for setting the punishment part requires to comply with Article 6. After the expiry of the punishment part, Article 5(4) requires the question of risk to be determined by a court or court-like body at reasonable intervals.

31. In view of the terms of the Convention and the perceived risk of successful challenge, the Executive proposes to bring the arrangements for the sentencing and release of AMLPs into line with the current statutory provisions that apply to other life prisoners i.e. prisoners sentenced for a murder committed before the age of 18 and prisoners who have received a discretionary life sentence. In future the same release arrangements would therefore apply to all murderers and life sentence prisoners.

32. The mandatory life sentence would be split into a punishment part and a risk period. The punishment part would be set in open court by the sentencing judge and open to appeal. After the expiry of the punishment part, and at reasonable intervals thereafter, the prisoner would be entitled to have the grounds for his continued detention reviewed by a court-like body. This would be done by the Parole Board sitting as a tribunal, who would have the power to direct the Scottish Ministers to release the prisoner. The 20-year policy (referred to in paragraph 18 above) would no longer operate since it is a policy operated by the Scottish Ministers. Under the proposed arrangements the punishment part would be set by the court and Scottish Ministers would no longer have any discretion to determine the period that should be served in custody by the prisoner. The particular seriousness of the types of murder covered by the policy would be reflected, as appropriate, in the punishment part set by the court. In addition, since the functions of the PRC would no longer be required, that body would be dissolved.

33. Under the present procedures, situations arise where a prisoner is recommended for release by the Parole Board, because it considers that the risk to the public is acceptable, but it then transpires that release would be at a stage when neither the judiciary nor the Scottish Ministers, in the light of the judiciary's views, consider that the criminal justice requirements of punishment and deterrence would have been satisfied. This means that nugatory reviews of prisoners' suitability for release are undertaken. In addition to satisfying the requirements of ECHR, the proposed changes will prevent such situations arising. They will provide prisoners with greater clarity as to the minimum period that they will require to serve in custody before consideration is given to their release and will allow the Scottish Prison Service to manage the prisoner's sentence efficiently and effectively. There will also be greater clarity for the public and the victim's family, since the punishment and minimum period required in prison will be apparent from the outset.

34. The changes proposed are changes in the release arrangements for AMLPs only and, as such, are neutral so far as the length of sentences is concerned. Sentencing remains a matter for the courts and it is not expected that the changes proposed would lead to any increase or decrease in the period that AMLPs are expected to serve in custody.

35. As mentioned, it is at present open to a judge in sentencing a designated life prisoner not to set a punishment part in exceptional cases where he considers that the prisoner should remain in prison for the remainder of his natural life. The Executive considered whether this provision should continue to apply and whether it should therefore also apply to AMLPs. Although case law appears to have established the circumstances under which a judge should make use of the provision not to set a part, there has been a lack of clarity surrounding the operation of this provision in practice. The Executive believes that the system for sentencing life prisoners should be clear and transparent with no room for misunderstanding. On that basis, the Executive proposes to remove the judges' current discretion not to set a punishment part. Instead, the judge will be required to specify a punishment part, in terms of a specific number of years and months, *in every case.* If, exceptionally, a judge considered that a particular case required a long punishment period, it would be open to him to specify a period of years which, if appropriate, clearly exceeded the individual's life expectancy. This will cover the small number of situations where the seriousness of the crime or the age or health of the individual might make it necessary for the punishment part to be longer than that individual's life expectancy. The requirement to specify the length of the period to be served as punishment will remove any potential misunderstandings about the court's intentions.

36. The Executive considered whether the legislation should specify the aggravating and mitigating factors a judge should take into account in setting a punishment part. The Executive concluded that it was not necessary to do so as the factors, other than risk, which a court will wish to take into account in determining the period are the same as it must consider when setting a determinate sentence.

Transitional Arrangements

37. In addition to the proposals for the future sentencing and release of adult mandatory life prisoners, the Bill also requires to make provision for certain transitional arrangements for existing life prisoners.

ECHR Background

38. To ensure compliance with ECHR it will be necessary for the new arrangements for the release of adult mandatory life prisoners to apply to existing AMLPs. All existing AMLPs (around 500) would therefore require to have a punishment part set.

39. It was considered whether, to ensure compliance with Article 6, it would be necessary to hold a court hearing for the setting of the punishment part for each existing prisoner or whether it would be sufficient for the trial judge to set the part as a paper exercise subject to an appeal. In general, ECHR case law confirms that it may not always be necessary to have an Article 6 compliant court at first instance provided that a full appeal on the merits can be made to an Article 6 compliant court. However, where the court at first instance is a court "of the classic kind" then Article 6 must be fully complied with.

40. The existing jurisprudence and the question of what is meant by a court "of the classic kind" should now be seen in the light of the European Court's decision in the case of *T v UK (1999).* The Court confirmed the finding of the European Commission for Human Rights that Article 6(1) guarantees certain rights in respect of the determination of any criminal charge and therefore, in criminal matters, covers the entire proceedings including the determination of the sentence. The Court found that the fixing of the tariff in England and Wales for under 18 murderers was a sentencing exercise and Article 6(1) was applicable. Since the court indicated that the tariff fixing procedure involved the determination of a criminal charge, the Executive takes the view that the procedure would be regarded as involving a court "of the classic kind".

41. Further to the court's decision in *T v UK*, the Executive considers that it would be necessary to allow for a short court hearing for each prisoner who requires to have a punishment part fixed retrospectively. The hearing to set the punishment part would take place before a High Court judge and the decision would be announced by the judge in open court. The parties to the hearing would be the prisoner and the Crown. The procedure for the hearing would be regulated by the High Court by rules made by Act of Adjournal.

42. The transitional provisions would also require to be extended beyond existing AMLPs to a limited number of existing designated life prisoners.

43. As noted above, the arrangements for designated life prisoners have already been brought into line with ECHR. However, when the legislation was changed in 1993 in relation to discretionary life prisoners and in 1997 in relation to those serving a sentence imposed as a result of a murder committed when under the age of 18, a punishment part was fixed by the Lord Justice General (and in some cases by the Lord Justice Clerk) by means of a paper exercise. There was no court hearing since this did not appear to be necessary in terms of ECHR jurisprudence at that time. However, the development of the law in 1999, in terms of the decision in *T v UK*, indicates that a court hearing *is* required to ensure compatibility with Article 6. The Executive therefore takes the view that the Scottish Ministers would be acting incompatibly with ECHR if they continued to recognise punishment parts set as a result of a paper exercise. As a result, discretionary life prisoners and prisoners serving a sentence in relation to a murder committed whilst under 18 who received a punishment part under the transitional provisions contained in the Prisoners and Criminal Proceedings (Scotland) Act 1993 and the Crime and Punishment (Scotland) Act 1997 would also have the right to have a punishment part set at a court hearing.

44. The transitional provisions would apply to existing designated prisoners with a paper tariff unless the prisoner had already served the part previously specified before the prisoner's case was referred to the High Court of Justiciary for a hearing to fix a punishment part. Around 20 to 25 prisoners are likely to be affected by these provisions.

The Transitional Provisions

45. The transitional provisions in the Bill put the onus on the Scottish Ministers to refer the case of an existing life prisoner to the High Court for a court hearing to fix a punishment part in reasonable time. The provisions also provide that an existing discretionary life prisoner or under 18

murderer who is in possession of a certified designated part (received under the transitional provisions in the 1993 and 1997 Acts, referred to above) may choose to waive his right to a hearing to fix a punishment part, provided that he has obtained legal advice or has declined to obtain such advice. The waiver would have to be provided in writing to the Scottish Ministers. It is intended that the Scottish Ministers would write to the prisoners involved and explain the process whereby they may have a further court hearing. The prisoners would be given a time limit within which they should respond to Ministers. If they did not respond within that period or if they responded to the effect that they did not want to waive their right to a hearing, the Scottish Ministers would refer the case to the High Court for a hearing. Prisoners who chose to waive their right would, in effect, have waived their ECHR right to have the punishment part set by an Article 6 compliant court at first instance.

46. The Executive considers that the provision of a waiver is appropriate for existing life prisoners, who may be satisfied with the length of the punishment part that has already been certified and who may not want a further court hearing. ECHR case law establishes that a party may waive his Article 6 rights provided that such a waiver is unequivocal and is attended by minimum safeguards commensurate to its importance (see for example, *Potrimol v France (1993)*). Those prisoners who did not choose to waive their right in this way, would have the additional right to refer their case for a hearing.

47. It is envisaged that, where possible, hearings would be heard before the original trial judge. Ministers would be under a duty to send a copy of the indictment, a copy of any report by the trial judge, a copy of any certificate certifying the designated part and any other relevant information to the High Court no later than two weeks after the referral. A copy of these documents would also be made available to the prisoner and to the Lord Advocate as the representative of the Crown. This would include any report by the trial judge, which would not previously have been disclosed to the prisoner, on the basis that this would be provided for the purposes of a hearing only.

48. At the hearing, the court would make an order specifying that part of the sentence which would be considered to be the punishment part. The punishment part would form part of the prisoner's sentence and would therefore be appealable in the usual way.

49. Prisoners who had already been released on licence by the time the Bill came into force would be integrated into the new system by being deemed to have been released under section 2(4) of the 1993 Act. They would therefore be regarded as having already served their punishment part and would be subject to the new provisions for all purposes thereafter.

The Transitional Provisions for Existing Life Prisoners Recommended for Release

50. The Bill makes additional special provision for existing life prisoners in the following circumstances:

- Those for whom the Scottish Ministers have fixed a provisional release date ("PRD"), in the light of a recommendation in favour of release from the Parole Board and after consulting with the judiciary, before the Bill comes into force;

- Those for whom the Parole Board has recommended release and the judiciary have stated that they are content that the criminal justice requirements of punishment and deterrence will be satisfied if the prisoner is released in accordance with the timing recommended by the Board.

51. The general transitional provisions in the Bill make the necessary provision for the arrangements for a court hearing to set the punishment part. Although all eligible existing prisoners would be entitled to a court hearing, it may be the case that, in practical terms, those prisoners in the two categories noted above may be eligible to be released before a hearing can be arranged in their case. These additional special provisions therefore ensure as far as possible both that the prisoner is not prejudiced as a result of the new system and that there is due consideration of risk to the public before his release. If release proceeds under these transitional provisions the prisoner would be treated as if he had been released under the new system. The additional provisions would not extend to prisoners who had received a recommendation on release from the Parole Board but whose case had not yet been referred to the Judiciary. Those prisoners would receive a court hearing under the general transitional provisions to fix a punishment part.

52. Where a PRD has been fixed by the Scottish Ministers, the prisoner would be released on the PRD and would be deemed to have served his punishment part and to have been released on licence under section 2(4) of the 1993 Act. This provision is subject to an exception in relation to adverse developments. An "adverse development" is anything which occurs before a prisoner is released which throws doubt on the prisoner's suitability for release (e.g. absconding, failing a drugs test etc which suggest a heightened risk). The special transitional provisions provide that, if there is such a development, the Scottish Ministers may refer the prisoner back to the Parole Board, who would reconsider the case sitting as a tribunal. This would allow the Scottish Ministers to monitor the prisoner's progress during the period before the PRD is reached and to satisfy themselves that there would not be an unacceptable risk to the public from that release.

53. The Board would be able to direct Ministers by confirming the prisoner's PRD or to direct that it should no longer apply. In the latter case, the prisoner's punishment part would be deemed to have been served on the day preceding the PRD and, under the normal arrangements that would then apply to all life prisoners, his case would be referred to the Parole Board sitting as a tribunal to consider whether or not he should continue to be detained. This would take place immediately after the PRD. Where the Parole Board confirmed the PRD, the Scottish Ministers would be able to re-refer the prisoner to the Board if any further adverse development arose before release.

54. Where a prisoner had already received a favourable recommendation from the Parole Board and the judiciary had stated that the time served satisfied the criminal justice requirements of punishment and deterrence, the prisoner would be released on the date recommended by the Board and would be deemed to have served his punishment part and to have been released on licence under section 2 (4) of the 1993 Act. Since, in those cases, the Scottish Ministers would not have

had an opportunity to consider the Board's recommendation, the Bill provides an additional power for the Scottish Ministers to refer the case to the Parole Board sitting as a tribunal not later than two weeks after the Bill came into force if they considered there was any information that suggested the prisoner would not be safe to release. In relation to this review, the Board would have similar powers to those that would apply in relation to adverse developments i.e. to direct that the PRD should be adhered to or to direct that the PRD should no longer apply. The provisions covering adverse developments would also apply to these prisoners.

55. The special provisions in relation to existing life prisoners with a provisional release date would cease to have effect in relation to a prisoner's case as soon as a punishment part was fixed by the judiciary at a hearing.

Practical Arrangements

56. Since the arrangements proposed for existing prisoners would create a considerable amount of work for the judiciary and the Parole Board, discussions have been held with the Lord Justice General and the Board in relation to management of the work which will be involved in setting the punishment parts for all existing prisoners and the review by the Board of those cases where the punishment part has expired. No member of the judiciary has expressed any view about the compatibility or otherwise of our proposals with ECHR.

Transferred Life Prisoners

57. In addition to life prisoners who are sentenced in Scotland, other life prisoners may be transferred to Scotland to serve their sentences. Such transfers are made on compassionate grounds to enable the prisoner to be closer to family and friends. The 1993 Act sets out the basis upon which Scottish early release law applies in these cases. The Bill deals with arrangements for both existing and future transferred prisoners. The general intention is to ensure that prisoners who are transferred to Scotland are properly integrated into the new release system.

58. A transferred life prisoner is defined in the 1993 Act as a person who has been transferred to Scotland from another part of the United Kingdom, from other countries under repatriation arrangements or under military rules and has one or more sentences of imprisonment or detention for an indeterminate period imposed by those jurisdictions.

59. The **Crime (Sentences) Act 1997** makes provision for the transfer of prisoners between different jurisdictions in the United Kingdom. Schedule 1 to that Act provides that a prisoner should be transferred on either a 'restricted' or 'unrestricted' basis. A restricted transfer means that the prisoner remains subject to the law governing release of the place from which he was transferred. For example, prisoners transferred from England to Scotland on a restricted basis remain subject to the early release provisions contained in the Criminal Justice Act 1991. An unrestricted transfer means that the prisoner is subject to the law of the place to which he is transferred. Such transfers are subject to a policy statement and underlying principles which were agreed by Ministers and announced in October 1997. This policy establishes that a transfer will

take place on an unrestricted basis when that would have no effect on the sentence or on post-release supervision requirements. An unrestricted transfer is therefore more likely where there are no differences in sentencing process between jurisdictions.

60. Authority to take the decision on whether to transfer a prisoner to Scotland from another part of the United Kingdom and to decide whether the transfer should be restricted or unrestricted rests with the relevant Secretary of State. The Scottish Ministers' consent is not required to a transfer, however, in practice, transfers do not take place unless consent has been obtained from the Ministers of both jurisdictions.

61. The existing system in the 1993 Act for the treatment of transferred life prisoners enables the Scottish early release system to apply to repatriated prisoners, military prisoners and prisoners who have been transferred from another part of the UK on an unrestricted basis. At present (and subject to the special arrangements discussed below that are made for unrestricted prisoners transferred from England and Wales), where the prisoner is the equivalent of a discretionary life prisoner or an under 18 murderer, the Lord Justice General certifies the appropriate punishment part that should apply to the prisoner. Thereafter he is treated as a Scottish designated life prisoner.

62. Special arrangements apply to under 18 murderers and discretionary life prisoners who are transferred from England and Wales on an unrestricted basis. These prisoners will already have a "punishment part" fixed under the equivalent English legislation (section 28 of the Crime (Sentences) Act 1997 and in future section 82A of the Powers of Criminal Courts Sentencing Act 2000). It is therefore unnecessary for the Lord Justice General to fix a punishment part. Section 10(1) of the 1993 Act makes provision for the English punishment part to be recognised as a Scottish punishment part. The prisoner is thereafter treated in the same way as a designated life prisoner sentenced in Scotland.

63. Adult mandatory life prisoners who are transferred to Scotland under repatriation arrangements, military rules or from other parts of the United Kingdom on an unrestricted basis are treated in the same way as AMLPs sentenced in Scotland are at present. They are normally referred to the PRC in the first instance who recommend a date for review by the Parole Board to the Scottish Ministers.

Future Transferred Prisoners

64. The Bill provides that adult mandatory life prisoners who are subject to Scots law by virtue of being transferred under repatriation arrangements, military rules or on an unrestricted basis from another part of the United Kingdom, should be subject to similar arrangements to those proposed for Scottish AMLPs. Following the prisoner's transfer to Scotland, the Scottish Ministers would refer the case to the High Court for a hearing to have a punishment part set. The court would take account of any report by the original trial judge if available. If the prisoner was transferred from England or Wales on an unrestricted basis, any administrative tariff that had been set by the Home Secretary would be superseded by the punishment part set by the Scottish court at the hearing.

65. For under 18 murderers and discretionary life prisoners transferred to Scotland from England or Wales on an unrestricted basis, the 1993 Act would continue to recognise the punishment parts that had been set in England and Wales for the purposes of the application of Scottish law to these prisoners.

66. Provision is also made for future transferred discretionary prisoners from England and Wales who have a 'tariff' that was certified by the Secretary of State under English and Welsh transitional arrangements for discretionary life prisoners. 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 arrangements for these prisoners reflect those outlined above for Scottish designated life prisoners with a punishment part set following a paper exercise. The prisoner would be entitled to a court hearing but would also have the opportunity to waive his right to a hearing if he was content with the part that had been certified by the Secretary of State.

67. For restricted prisoners who transferred from another part of the United Kingdom to Scotland in future, the law of the sending jurisdiction governing release would continue to apply and the Bill therefore makes no provision.

Existing Transferred Prisoners

68. Existing transferred AMLPs who were transferred to Scotland on a restricted basis continue to be dealt with under the provisions of the law of the transferring jurisdiction and the Bill therefore makes no provision for those prisoners. Existing AMLPs who were transferred under repatriation arrangements, military rules or from another part of the United Kingdom on an unrestricted basis, require to be integrated into the new Scottish system. They would be subject to similar arrangements to those proposed for existing AMLPs sentenced in Scotland and future transferred prisoners. As soon as practicable after this Part of the Bill comes into force the Scottish Ministers would refer the case to the High Court for a hearing to have a retrospective punishment part set. The court would take account of any report by the original trial judge if available. If the prisoner was transferred from England and Wales on an unrestricted basis any administrative tariff that had been set by the Home Secretary would be superceded by the punishment part set by the Scottish court at the hearing.

69. The Bill also provides for existing transferred discretionary life prisoners and under 18 murderers who had a punishment part certified by the Lord Justice General following their transfer. As is the case with existing discretionary life and under 18 murderers sentenced in Scotland, it is no longer considered appropriate to recognise a certified punishment part. The Bill therefore makes provision for these prisoners to have a court hearing (subject to the possibility of the prisoner waiving the right to a hearing) so that the punishment part can be set in open court. Similarly, the Bill makes provision for existing transferred discretionary prisoners with a tariff that was certified by the Secretary of State under English and Welsh transitional arrangements. These prisoners will also be entitled to have a court hearing to have the punishment part set in open court or to waive the right to a hearing.

Alternative approaches

70. As recorded above, the Executive considers that the existing statutory arrangements governing the release of AMLPs are vulnerable to successful challenge and consequently considers that the best approach is to bring those arrangements into line with the existing arrangements for other life prisoners, which are ECHR compliant.

PART 2 - CONSTITUTION OF THE PAROLE BOARD

Present Arrangements - appointment, reappointment and removal of Parole Board members

71. At present, the Parole Board advises the Scottish Ministers in relation to any matters that they refer to it in connection with the early release or recall of prisoners. In particular, it advises the Scottish Ministers about the release of Adult Mandatory Life Prisoners ("AMLPs") and has the power to direct the Scottish Ministers in relation to the release of discretionary life prisoners and those convicted of murder committed when under the age of 18. The Board sits as a tribunal when reviewing cases in the latter category.

72. Paragraph 1 of Schedule 2 to the 1993 Act provides that the Parole Board shall consist of a chairman and no fewer than four other members appointed by the Scottish Ministers. Paragraph 2 of Schedule 2 to the 1993 Act specifies the members that must be included in the Parole Board. These are a Lord Commissioner of Justiciary (a High Court Judge), a registered medical practitioner who is a psychiatrist, a person appearing to the Scottish Ministers to have knowledge and experience of the supervision or aftercare of discharged prisoners and a person appearing to the Scottish Ministers to have made a study of the causes of delinquency or the treatment of offenders. At present, the Board has 17 members. In terms of the 1993 Act, the Scottish Ministers determine the remuneration and allowances that are paid to members of the Board.

73. Currently, all appointments, with the exception of that for the Lord Commissioner of Justiciary, operate essentially in the same way and follow guidance issued by the Commissioner for Public Appointments. Appointments are advertised normally in either national or specialist press and applicants are issued with a job and person specification and are invited to complete a standard application form.

74. Applications are sifted and candidates shortlisted by Scottish Executive officials or someone hired for the purpose (in the past the function has been carried out by an ex-civil servant). A sample of those applications not shortlisted is checked to ensure that a consistent standard has been applied throughout. An advisory panel (consisting of senior civil servants and an independent adviser) then decides which candidates should be interviewed, carries out the interviews and ranks candidates. The advisory panel then reports to the Scottish Ministers and a recommendation is made to Ministers by the Justice Department.

75. The appointment of the Lord Commissioner of Justiciary is not advertised. Instead, consultation takes place with the Lord Justice General. A Sheriff is usually appointed to the Board.

Recently the practice has been to circulate Sheriffs and recently retired Sheriffs asking for expressions of interest with candidates being interviewed by an advisory panel. The Panel then makes a recommendation for appointment and the Justice Department consults the Scottish Ministers, who make the decision on the appointment.

76. Paragraph 3 of Schedule 2 to the 1993 Act provides that a member of the Parole Board shall hold and vacate office under the terms of the instrument under which he was appointed. Each instrument of appointment specifies the duration of the appointment. At present, appointments are normally for a three-year term with an expectation of reappointment for a further three-year term. The appointment may be terminated by the Scottish Ministers at any time prior to the expiry of the term on the basis of physical or mental illness, failure to attend regularly to the business of the Board and inability, unfitness or unsuitability to continue in the post. In addition, although the Act states that there is eligibility for reappointment to the Board, it gives no indication of the criteria that will be applied in considering reappointment.

ECHR Background

77. When considering the release of a designated life prisoner (and in the future the release of adult mandatory life prisoners) and when reviewing decisions to recall designated life prisoners to custody, the Parole Board sits as a tribunal. This is in order to satisfy the ECHR requirement that the continued detention of such prisoners is reviewed by a court-like body at reasonable intervals after the punishment part of their sentence has expired.

78. At tribunal hearings officials from the Scottish Executive Justice Department represent the views of the Scottish Ministers. The prisoner is entitled to be present at the hearing and is normally legally represented.

79. When the Parole Board sits as a tribunal, it must satisfy the independence and impartiality requirements of Article 6 of ECHR.

80. In the case of *Findlay v UK [1997]*, the European Court of Human Rights set out the well established ECHR test for independence and impartiality:

> "In order to establish whether a tribunal can be considered "independent" regard must be had *inter alia* to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence."

81. In *Starrs v Ruxton [2000] ("Starrs")*, the High Court of Justiciary held that a temporary Sheriff did not satisfy the ECHR requirements of independence and impartiality since he did not have security of tenure. His appointment was only for one year, he could be removed by the Scottish Ministers at any stage, or, as an alternative to his removal, he could be given no work. Additionally, reappointment was expected but was in the hands of the Scottish Ministers and there could therefore be an appearance of partiality towards the Scottish Ministers.

82. In *Clancy v Caird [2000] ("Clancy"),* it was held that a temporary judge of the Court of Session constituted an independent and impartial tribunal. The term of appointment, which is normally for three years, was regarded as short but unobjectionable. Lord Sutherland stated that:

> "Judges in the ECHR itself are appointed for a fixed term of between three and nine years. Accordingly, it appears to me clear that there can be no objection *per se* to the appointment of judges for a fixed term, provided that during the period there is a security of tenure which guarantees against interference by the executive in a discretionary or arbitrary manner."

83. Other factors that led to temporary judges being regarded as ECHR compatible included the fact that the allocation of their work was in the hands of the Lord President rather than the Executive. Additionally, a temporary judge had no expectation of reappointment at the end of his term and there was not therefore an appearance of dependence on the Executive.

84. The provisions for appointing and removing temporary sheriffs were repealed following the decision in *Starrs*, in the **Bail, Judicial Appointments etc. (Scotland) Act 2000** and new provisions for part-time sheriffs are laid out in the same Act. The Act provides that in making appointments and reappointments, the Scottish Ministers must comply with requirements as to procedure and consultation that may be prescribed in regulations made by them. Appointment is initially for a five-year term. Reappointment is mandatory unless one of a number of conditions applies. Removal from office is only by order of a tribunal appointed by the Lord President of the Court of Session. Similar, though not identical, provisions were made in relation to the appointment and removal from office of Justices of the Peace.

85. The Executive considered, in the light of the case law, whether the existing terms of Parole Board members were ECHR compliant. There has never been any specific court scrutiny of the arrangements for reappointment and removal of members. Lord Reed indicated in *Starrs* that tribunals are not always subject to the same demanding standards as the ordinary criminal court. Nevertheless, the decision-making powers of the Parole Board are of the utmost importance as they concern the liberty of an individual. The possibility of reappointment at the discretion of the Executive immediately after the initial term, together with the possibility of removal by the Executive could be seen as incompatible with Article 6(1). The Executive therefore takes the view that it is right that the appointment and removal procedures for members of the Parole Board should be subject to similar safeguards as apply to other types of judicial appointment.

Proposed Arrangements

86. The proposals in the Bill are designed to enhance the security of tenure of Parole Board members and ensure that the reappointment and removal of members is not at the discretion of the Scottish Executive and accordingly does not give rise to the appearance of either dependence upon or partiality towards the Executive. The proposals have some similarities with the new arrangements for part-time sheriffs.

87. Appointments would still be made by the Scottish Ministers but in accordance with procedures to be specified in regulations. This ensures that there is transparency in the appointment process. It is envisaged that regulations would specifically provide for the existing independent involvement in the appointment process. The term of appointment would be not less than six and not more than seven years with no automatic right to reappointment. Reappointment would be permitted once, but only after a gap in service of six years. It is intended that regulations would require the former member to go through the same application and selection process as new applicants.

88. The Chairman of the Parole Board would be given the task of seeking to ensure that every member of the Board was given the opportunity of at least 20 days of work each year. This provision is designed to make it clear that the allocation of work to individual Board members is the ultimate responsibility of the Chairman, not the Scottish Ministers. Parole Board members would be entitled to resign at any time should they choose to do so. They would cease to be a member of the Board and would become ineligible for reappointment when they reached the age of 75.

89. The Executive proposes that a Parole Board member may only be removed from office by an independent tribunal on the basis of inability, neglect of duty or misbehaviour. The tribunal would mirror the composition and procedures of the tribunal that was provided for part-time sheriffs. The tribunal would consist of a Court of Session judge or Sheriff Principal, a person who is and has been legally qualified for at least 10 years and one other person, all appointed by the Lord President of the Court of Session. Provision is made in the Bill for regulations to specify the tribunal's procedure and to enable it to suspend a member under investigation.

Transitional Arrangements

90. The transitional provisions seek to integrate existing Parole Board members into the new system and ensure that existing members will be subject to the new system in the same way as new members. Existing members would be subject to the new removal provisions. So far as the terms of the appointments are concerned, some existing members were selected following a public advertisement in a national newspaper seeking application for membership of the Board. Members whose current term began in this way would be entitled to serve for a six-year period, running from the start of the current term, and any previous periods of appointment would be disregarded. Members whose current term does not follow a response to a newspaper advertisement would be entitled to serve for six years from the date when they were first appointed as a member of the Board, or for the period that is specified in their existing instrument of appointment, whichever is the latest.

Alternative Approaches

91. The Executive considers that, in the light of the decision in *Starrs*, there is a risk that the current system of appointment, reappointment and removal of Parole Board members may not comply with the independence and impartiality requirements of Article 6 of the ECHR, when the Board is sitting as a tribunal. When the Board is sitting as a Designated Life Tribunal directing the release of prisoners it must comply with Article 6 of the Convention. Since not all members of the

Parole Board sit when the Board is constituted as a tribunal, the possibility of having one set of appointment procedures for tribunal members and one for those that did not sit on tribunals was considered. However, essentially all Parole Board members are potential tribunal members and it would not be practical to have two different sets of procedures.

92. Consideration was also given to leaving the term of appointment at 3 years with an automatic right to a further appointment of three years. However extending the term to between six and seven years further enhances security of tenure. It would have been possible to prohibit reappointment at the end of the initial term. However, it is considered that the requirement of a six-year interval prior to reappointment together with the planned inclusion in regulations of a requirement to undergo the full application and selection process removes any realistic perception that Board members might show partiality towards the Executive in order to ensure their reappointment.

PART 3 - LEGAL AID

Fixed payments - exceptional cases

Present Arrangements - Power to exempt cases from the Fixed Payments Scheme

93. Regulations made under section 33(3A) of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") provide for a system of fixed payments in summary criminal proceedings where legal aid has been made available. This system ("the fixed payments scheme") has applied to summary criminal cases since 1 April 1999. Under this scheme, a solicitor representing a client who is eligible for legal aid receives a fixed payment covering his fee and certain prescribed outlays.

94. For many years, solicitors were paid on a "time and line" basis, that is, they were paid by the Scottish Legal Aid Board ("the Board") based on the number of hours spent on a case, including travel and waiting time in court, plus any outlays such as medical reports and precognitions. Whilst the Board could seek to abate accounts from solicitors, the average cost of a summary criminal case rose in real terms every year. The Government was concerned about the steadily increasing costs of summary criminal legal aid, from £16.7m in 1987/88 to £57.4m in 1995/96 and in the **Crime and Punishment (Scotland) Act 1997** took powers to set fixed payments.

95. The fixed payment scheme allows a solicitor to claim £500 from the Scottish Legal Aid Board for acting in the Sheriff Court for an accused who has been granted a summary criminal legal aid certificate. This covers all work up to and including the first 30 minutes of trial. This fee includes any precognitions that may be needed and any photocopying. It does not include VAT, travel expenses, counsel's fees, and outlays, such as medical reports. Additional fees may be claimed if a trial lasts more than 30 minutes (£100), goes into a second day (£200) or third day (£400). An extra fee of £50 is paid if the case arises in a number of distant courts, such as Fort William and Portree. A lower scale of fees is payable if the case arises in the District Court.

96. The fixed payment scheme does not require solicitors to maintain detailed accounting records to present to the Board, nor are law accountants needed to construct such accounts. Solicitors are paid the appropriate fees, irrespective of the work undertaken.

97. During the consultation process leading to the scheme, considerable thought was devoted to identifying complex cases, which could be excluded. It proved impossible to define a complex case in such a way that it could be set out in regulations. However, the view was taken that complex cases tended to be of longer duration. Therefore, as a measure of complexity, it was decided to set increasing fees for trial days, as indicated above.

98. Certain proceedings are excluded from the scheme, such as solemn cases reduced to summary, and references under the Scotland Act.

ECHR Background

99. Article 6(3)(c) of the ECHR requires that everyone charged with a criminal offence who has insufficient means to pay for legal assistance has the right to free legal assistance when the interests of justice so require. ECHR case law has clarified that legal assistance for the purposes of Article 6(3)(c) must be effective. For example, in the case of *Artico v Italy [1981]* it was confirmed that the ECHR was intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective.

100. In approximately 40 summary criminal cases, the fixed payment scheme has been challenged on the basis that the payments which can be made under the Scheme result in the accused not being effectively represented, therefore breaching Article 6.

101. One decision has been reached by the High Court – the case of *Procurator Fiscal (Fort William) v Norman MacLean and Peter MacLean [2000]*. While the Court considered that in general the scheme was compatible with ECHR, it did consider that it could give rise to cases where there was a breach of Article 6(3)(c). The circumstances in which the court could envisage the fixed payment scheme resulting in a breach of ECHR would have to be a case where an individual could point to facts and circumstances and say with justification that he was so disadvantaged that his legal assistance was not effective for the purposes of Article 6(3)(c). The Court gave no specific guidance on the types of case this might cover. This judgement is now under appeal to the Judicial Committee of the Privy Council – a decision is not expected for some time.

Proposed Arrangements

102. To ensure that the provision of legal aid for defended summary criminal proceedings complies with ECHR, it is proposed that the Board should be given a discretion (on application by a solicitor) to remove cases from the fixed payment scheme where an accused would be deprived of the right to a fair trial as a result of the solicitor being paid under the scheme. These cases would revert to "time and line" payment. It is considered that this would apply in a small number of exceptional cases. It is estimated that complex cases of this kind would cover only about 1% of

summary criminal legal aid cases i.e. around 500 cases per annum. It is intended that a solicitor must apply at the earliest opportunity to the Board, in a form to be decided by the Board, for a case to be removed from the fixed payment scheme. In this way the solicitor will have early reassurance - where appropriate - about the basis of payment.

103. It is not intended that the solicitor would receive part time and line payment and part fixed payment for a case. In any case where the Board has exercised its discretion and agreed that it would be appropriate for the case to be dealt with on a time and line basis, the whole case would be assessed on this basis.

104. It would clearly be appropriate to pay fees only if based on proper records of time spent on a case and thus it would be necessary for full and proper time and line accounts to be submitted to the Board.

105. To enable the Board to identify cases where it would be appropriate to exercise this power, it is proposed that the Scottish Ministers be given a regulation making power that would set out the factors the Board should take into account. These would be likely to include factors like the complexity of the case, number of prosecution witnesses, preparation costs and geographic location of witnesses.

106. In recognition that the commencement of the power to exempt cases from fixed payments could be applied to ongoing cases at different stages of the summary criminal procedure, it is intended that the first set of regulations under this new power will apply retrospectively to such cases. In addition, on similar grounds, the regulations may disapply any of the conditions for exemption from the fixed payments scheme to such ongoing cases. This will ensure that ongoing cases are treated fairly.

Alternative Approaches

107. Many meetings were held with the Law Society of Scotland and the Scottish Legal Aid Board, both when the fixed payment scheme was being constructed and during the operation of the scheme, in an attempt to identify and pay for expensive and complex summary criminal legal aid cases. Consideration was given to prescribing extra fees for items such as the number of prosecution witnesses. Another alternative would be to exclude entire classes of case, such as drugs or fraud, but such a "blanket" exemption could cover cases that were not complex and still omit other complex cases, perhaps an assault. It was agreed between all parties that this would make the fixed payments scheme over-complicated. Therefore, it was decided that the best approach would be to exclude a small number of significantly complex cases, amounting to about 1%, from the fixed payments scheme, as described above.

Retrospective Revision of Fixed Payments Regulations

108. It normally takes about 6 months for a defended summary case to be concluded. There are therefore about 30,000 defended summary criminal legal aid cases - at various stages - in the justice

system at any one time. It is proposed that any amendments to the fixed payments scheme in the future should be capable of being applied to any ongoing case. This will ensure that existing cases would benefit from any changes to the scheme, including exceptional cases (as above).

Extension of Advice and Assistance and Civil Legal Aid

Present arrangements

109. There are 3 forms of legal aid under the 1986 Act which apply to civil issues:

- Advice and assistance, that is, legal advice by a solicitor;
- Assistance by Way of Representation ("ABWOR"), that is, representation in court or other hearing by a solicitor;
- Civil legal aid, that is, detailed investigation by a solicitor, obtaining reports and representation in court.

110. Legal **advice and assistance** is available for general advice on the application of Scots law to any particular circumstances that have arisen in relation to the person seeking advice. This would include a person seeking advice in relation to the determination of civil rights and obligations by a court or tribunal. Legal advice is therefore available to anyone who meets the financial test, irrespective of the forum in which the issue may arise, but a contribution may be required.

111. **ABWOR** is available under the **Advice and Assistance (Assistance by way of Representation) Regulations 1997** for specified hearings and courts. These include Parole Board hearings, civil proceedings arising from a failure to pay a fine and appeals under the **Proceeds of Crime (Scotland) Act 1995**. There is only a financial test but other conditions may apply in particular proceedings. For example, in order for a solicitor to provide ABWOR in a summary criminal case, he or she has to be satisfied that the accused is likely to be deprived of liberty or livelihood.

112. **Civil legal aid** is available for proceedings in the Judicial Committee of the Privy Council, House of Lords, Court of Session, Land Court, Lands Valuation Appeal Court, and the Sheriff Court. In addition, proceedings before the Land Tribunal for Scotland and the Employment Appeal Tribunal are eligible for civil legal aid. The Scottish Ministers believe that these Tribunals have particularly complex issues to resolve and, for that reason, civil legal aid should be made available.

113. Most applications for civil legal aid have to meet the three statutory tests of *probabilis causa*, reasonableness, and financial eligibility. The exceptions are applications under the Convention on the Civil Aspects of International Child Abduction and the European Convention on Recognition and Enforcement of Decisions concerning custody of Children and on the Restoration of Custody of Children.

ECHR Background

114. Article 6(3) of the ECHR requires the provision of free legal aid in criminal proceedings where the interests of justice require it. There is no automatic right to legal aid in civil proceedings, although there have been civil cases, e.g. *Airey v Ireland [1979] ("Airey")*, where the failure to provide legal aid has amounted to a breach of Article 6(1). In that case, the applicant complained that the unavailability of legal aid for judicial separation proceedings amounted to a violation of her right of access to a court under Article 6(1). It is considered that the factors which the European Court of Human Rights took into account in holding that it was not possible for the applicant to represent herself "effectively" were:

- the proceedings were complex, both as to procedure and law;
- there was or may have been a need to establish contested facts by way of expert and/or witness evidence; and
- the applicant was emotionally involved in the proceedings, with the result that she did not have the degree of objectivity required by advocacy in court.

115. On consideration of *Airey*, and other relevant case law, it is considered that refusal to make legal aid available where a court or tribunal is determining civil rights and obligations may amount to a breach of Article 6(1) where:

- the applicant is unable to fund or find alternative representation elsewhere;
- the case is arguable; and
- the case is too complex to allow the applicant to present it to a minimum standard of effectiveness in person.

116. It is considered that, in ECHR terms, reference to a "court or tribunal" in this context means any proceedings in which civil rights and obligations are determined. This extends beyond what is understood by "court or tribunal" at domestic law.

117. The absence of legal aid where a person's civil rights and obligations are being determined by a court or tribunal has already been the subject of ECHR challenge. Several cases before employment tribunals have argued that the failure to make legal aid available for these proceedings amounts to a violation of the right to a fair hearing under Article 6(1).

Proposed arrangements

118. The Scottish Ministers propose to amend the 1986 Act to create the power to make civil legal aid or ABWOR available where there is, or may be, an ECHR requirement.

Understanding of "court or tribunal"

119. To achieve this aim, it is intended to widen the understanding of the term "court or tribunal" where it appears in the 1986 Act, so that it includes any proceedings, however described, which

determine a person's civil rights and obligations. This will enable the Scottish Ministers to prescribe, using the existing regulation-making powers contained in the Act, the bodies, commissions, or organisations for which either ABWOR or civil legal aid may be available subject to certain statutory tests being satisfied.

Scope of the extension of legal assistance

Civil Legal Aid and ABWOR

120. Powers already exist under section 13 of the 1986 Act for the Scottish Ministers to specify the courts and tribunals to which civil legal aid may apply. These bodies are set out in Schedule 2 of the Act. There is no intention to alter or restrict the availability of civil legal aid for those courts and tribunals which are already set out at Part I of Schedule 2 to the 1986 Act.

121. Powers already exist under section 9 of the 1986 Act for the Scottish Ministers to make ABWOR available by regulation, under specified conditions, for courts, tribunals, and statutory inquiries. The Advice and Assistance (Assistance by way of Representation) Regulations 1997 set out the proceedings and conditions that apply. It is intended that the wider understanding of the phrase "court or tribunal" that is to be introduced will allow for ABWOR to be made available for any proceedings where a person's civil rights and obligations are determined. The regulation-making power contained at section 9(2)(c) already allows the Scottish Ministers to prescribe the criteria to be applied in determining whether ABWOR should be provided, so there is no need for a provision of the type proposed (at paragraph 123 below) in respect of civil legal aid. The Scottish Ministers are using the existing powers under section 9 to make ABWOR available for Employment Tribunals, where additional *Airey*- type tests are met. This should come into effect on 15 January 2001.

122. The Scottish Ministers believe that, in order to ensure compatibility with the Convention, legal aid need only be extended to cases that determine persons' civil rights and obligations where certain criteria are met. Whether ABWOR or civil legal aid is made available will be determined by the needs of the particular tribunal or other body.

123. As noted above (paragraph 121), the Scottish Ministers already have the power to make ABWOR available to certain tribunals under criteria prescribed in regulations. It is intended to create a regulation-making power, which will also allow the Scottish Ministers to set factors to be considered by the Board in assessing an application for civil legal aid on a similar basis to any criteria for ABWOR. These factors will only apply to applications for civil legal aid before one of the additional proceedings for which civil legal aid is to be made available. The factors will operate in addition to the existing statutory tests, namely *probabilis causa*, reasonableness and financial eligibility. The additional criteria to be prescribed are likely to be based on *Airey* and may include the following:

- that the proceedings are exceptionally complex;
- that the applicant is unable to understand the proceedings;

- that a substantial point of law needs to be argued.

124. It is not envisaged that legal aid will have to be made available for a large number of new cases. For example in the case of tribunals, the proceedings are intended to allow the ordinary individual the opportunity to set out his or her case in an informal manner and using everyday language. A tribunal does not have to rely on arguments from the parties alone in reaching a decision. This means that the procedure is more inquisitorial than the adversarial civil court. The procedures should be comparatively straightforward and it should not, in general, be necessary for persons appearing before tribunals to have legal representation.

Employment of solicitors by SLAB

125. There have been 2 recent ECHR challenges to the Scottish Ministers where the accused has been unrepresented because local solicitors have refused to provide representation as they consider that the fees to be paid under the fixed payments scheme will not allow them to effectively represent their client. The provision for "exceptional" cases to be opted out of the fixed payment scheme and receive payment under time and line (outlined above) will allow solicitors in such cases to apply to the Board to exercise its discretion thus removing this concern.

126. However, the Scottish Ministers remain concerned that there may still be cases in which an accused is unrepresented. This may occur in the remoter parts of Scotland, for instance, if there are conflicts of interests in cases where there are multiple accused. Therefore to ensure that the provision of legal aid in relation to defended summary criminal proceedings complies with Article 6(3)(c), it is considered necessary to ensure that the Board can exercise its existing powers under Section 26 of the 1986 Act to employ solicitors to act for persons receiving legal aid. The Board, under the auspices of the Public Defence Solicitors Office ("PDSO"), already employs solicitors to provide criminal legal assistance, but the PDSO is only a pilot operating in Edinburgh and will only exist until October 2003. The exercise of the power to employ solicitors under section 26 of the 1986 Act is not intended to have any impact on the operation of the PDSO pilot.

127. It is proposed therefore that the Scottish Legal Aid Board be empowered to deploy its own solicitor in cases where, even under the new system of opting out of fixed payments, an accused would still otherwise be unrepresented. It is envisaged that anyone who cannot obtain representation and feels that he or she should be granted legal aid, could approach the Board who would assess eligibility in the usual way. If a summary criminal legal aid certificate is granted, the Board will provide a solicitor. It is anticipated that leaflets explaining the arrangements would be available from Sheriff and District Courts as well as Citizens' Advice Bureaux. Given the changes being made for exceptional complex cases, it is not expected that this power will be called on at all frequently. However, it is considered that it should be available as a long-stop if all other arrangements fail and this is the only way to ensure that a person, otherwise qualified for summary criminal legal aid, receives representation.

128. In order to give effect to this policy, technical amendments are needed to the 1986 Act to ensure that where solicitors are employed by the Board under section 26 to provide criminal legal aid, other relevant provisions of the 1986 Act will apply as appropriate. Solicitors so employed will

be subject to the same regime as it applies to PDSO solicitors employed under section 28A of the 1986 Act.

PART 4 - HOMOSEXUAL OFFENCES

Present Arrangements

129. 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 have consented and have attained the age of 18 years (changed to 16 years in the Sexual Offences (Amendment) Act). Section 13(2)(a) of the 1995 Act 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) is that it is an offence for more than two consenting adult males to take part in homosexual acts in private.

ECHR Background

130. The English equivalent of section 13(2)(a) was recently successfully challenged in the case of *A.D.T. v the United Kingdom (application no. 35765/97) ("ADT").* On 31 July 2000, the European Court of Human Rights found that section 13 of the Sexual Offences Act 1967 was, in the particular circumstances of the case, a breach of Article 8 of the Convention.

131. The Court held that given the narrow margin of appreciation afforded to national authorities in cases involving intimate aspects of private life, that the absence of any public health considerations and the purely private nature of the behaviour in the present case meant that the reasons submitted by the Government for the maintenance of legislation criminalising homosexual acts between men in private, and prosecution and conviction in the present case, were not sufficient to justify the legislation and the prosecution. In the light of the Court's decision in *ADT* it is clear that the equivalent Scottish provision in section 13(2)(a) of the 1995 Act is open to successful challenge on the basis that it is incompatible with Article 8 of the Convention.

Proposed Arrangements

132. The Bill repeals section 13(2)(a) of the 1995 Act which means that it will no longer be an offence for more than two adult males to take part in consensual homosexual acts in private. In the light of the *ADT* judgement there is no doubt that the proposed repeal is a necessary one.

Alternative Approaches

133. It is considered that there is no alternative to the proposed repeal of section 13(2)(a). The Executive considers that this approach best meets ECHR requirements.

PART 5 - PROCURATOR FISCAL OF THE LYON COURT

Present Arrangements

134. Section 9 of the **Lyon King of Arms Act 1867** ("the 1867 Act") provides for the Lord Lyon to appoint the Procurator Fiscal of the Lyon Court. The Procurator Fiscal's duties are to prevent wrongful assumption of armorial bearings and other abuses of heraldic law, raising at his own instance petitions and complaints in the Lyon Court in appropriate cases. Statutory offences can arise as a result of firms using and displaying a trade mark which consists of armorial bearings which have not been recorded in the Public Register of All Arms and Bearings in Scotland.

ECHR Background

135. It is thought that the Lord Lyon's power to appoint the Procurator Fiscal may create a doubt as to whether the Lord Lyon in his judicial capacity can be seen to be entirely independent and impartial in dealing with cases brought before him by the Fiscal, and thus whether the Lyon Court can be seen to be independent and impartial under Article 6 of the ECHR.

Proposed Arrangements

136. This Bill amends the 1867 Act to allow for the appointment of the Procurator Fiscal to the Lyon Court to be made by the Scottish Ministers, who are independent of the Lyon Court.

Alternative Approaches

137. No suitable alternatives are available.

PART 6 - POWER TO MAKE REMEDIAL ORDERS

Present Arrangements

138. Section 10 of the **Human Rights Act 1998** ("HRA") confers upon UK Ministers powers to make remedial orders, i.e. to use subordinate legislation, to remedy certain legislative provisions which are or may be incompatible with ECHR. In addition, section 107 of the **Scotland Act 1998** confers upon UK Ministers the power by remedial order to make provision in consequence of any Act of the Scottish Parliament ("ASP") or subordinate legislation made under an ASP or any act of the Scottish Ministers, which, among other things, is or may be incompatible with ECHR.

139. The powers under section 10 of the HRA are available to the Scottish Ministers but only to a limited extent. They could only clearly exercise those powers where a Scottish court finds a provision of a Westminster Act relating to devolved matters incompatible with ECHR or where they consider that a provision in a Westminster Act or ASP may be incompatible as a consequence of a Strasbourg decision taken after 2 October 2000.

Proposed Arrangements

140. The Executive proposes to confer a new power on the Scottish Ministers, which will extend the range of circumstances under which they are able to make remedial orders to remedy actual or perceived incompatibilities with ECHR. Provision has therefore been made in the Bill for a general remedial power.

141. The proposed new power will make available to the Scottish Ministers, remedial powers similar in scope to those already available to UK Ministers under section 107 of the Scotland Act. At present, for example, if a provision in an ASP or subordinate legislation made by the Scottish Ministers or any exercise of functions by the Scottish Ministers was either found by a court, or was thought to be, incompatible, only UK Ministers would be in a position to make a remedial order to rectify this. The proposals in the Bill are therefore intended to put the Scottish Ministers on a similar footing with UK Ministers.

142. The new powers will allow the Scottish Ministers to make a remedial order to rectify the position in consequence of any provision in an Act of the Scottish Parliament, an Act of the Westminster Parliament (relating to devolved matters), any subordinate legislation made under any such Act or any exercise or purported exercise of functions by the Scottish Ministers which is found by a court to be, or is thought to be, incompatible with ECHR. The Bill also makes provision for a remedial order to have retrospective effect other than provision creating criminal offences or increasing the punishment for criminal offences. This is necessary to ensure that actions which have already been taken under legislative provisions or functions which are or may be incompatible can be addressed by the order. In practice, it is quite likely to be the case that a provision or function will have been in use before it is either found to be incompatible by a court or found to be at risk of being incompatible by the Scottish Ministers.

143. The Scottish Ministers will therefore be in a position to make a remedial order in a wider range of circumstances than they can at present under section 10 of HRA. For example they will be able to rectify

Provisions in an ASP which have been found by a Scottish Court to be incompatible with ECHR

> Scottish courts have the power to declare that provisions in ASPs are ultra vires and therefore void. In contrast, when a provision in Westminster legislation is found to be incompatible the courts may only make a declaration of incompatibility which does not affect the validity of the provision. The Scottish Ministers are therefore more likely to require to take urgent action to remedy the position. Without the proposed new power, the Scottish Ministers would only be able to promote emergency legislation in the Scottish Parliament or ask UK Ministers to make a remedial order by virtue of their powers under the Scotland Act. In the latter case, the order would not be subject to scrutiny by the Scottish Parliament. The Scottish Ministers do not consider either course of action to be desirable.

Provisions in a Westminster Act extending to Scotland which correspond to provisions in a Westminster Act extending to England and Wales which an English court in England and Wales has declared to be incompatible and which UK Ministers have remedied by remedial order under the HRA

At present, the Scottish Ministers could not remedy the Scottish provisions by remedial order since it was not those specific provisions which had been declared incompatible. Without the proposed new power, the Scottish Ministers would only be able to promote emergency legislation in the Scottish Parliament or wait until a Scottish court declared the similar Scottish provisions to be incompatible. The Scottish Ministers do not consider either course to be desirable.

Any exercise of functions by the Scottish Ministers found by a court to be incompatible with ECHR and ultra vires

Although it may be necessary to take urgent action to remedy the position, at present, the Scottish Ministers would only be able to promote emergency legislation in the Scottish Parliament or ask UK Ministers to make a remedial order by virtue of their powers under the Scotland Act. Again, the Scottish Ministers do not consider either course of action to be desirable.

Any provision in legislation or any function of the Scottish Ministers which is <u>thought</u> to be incompatible

Where there is a clear risk of incompatibility and accordingly a clear risk that the court may strike down ASPs or actions by the Scottish Ministers, it may be necessary for Ministers to take early preventative action. Without the proposed new power, the Scottish Ministers would again only be able to promote early or emergency legislation in the Scottish Parliament or ask UK Ministers to make a remedial order by virtue of their powers under the Scotland Act.

144. The Executive proposes to ensure that the exercise of this new power by the Scottish Ministers is properly controlled by the Scottish Parliament. The procedure provided for in the Bill is therefore modelled upon the procedure for making remedial orders under Schedule 2 to the HRA.

145. The usual procedure for making a remedial order would be as follows –

- before laying a draft remedial order, the Scottish Ministers would be required to lay a copy of the proposed draft order, together with a statement of their reasons for proposing to make the order, before the Scottish Parliament;
- the Scottish Ministers would be required to publicise the contents of the proposed draft order and take into account any comments made upon that order within a period of 60 days (not counting periods when the Parliament is dissolved or in recess for more than 4 days);

- a draft remedial order would then be laid before the Scottish Parliament for approval by resolution, together with a statement summarising all the observations which had been made upon the proposed draft order and specifying any changes made to the draft order and the reasons for them.

146. There may be exceptional cases where the circumstances are so urgent that the Scottish Ministers would have to make a remedial order without observing the above procedure such as when the Parliament is or will be in recess at any time. In such urgent cases, the Scottish Ministers could proceed immediately to make a remedial order but the following procedure would then be followed –

- the Scottish Ministers would be required to lay the order forthwith, together with a statement of their reasons for having made it, before the Scottish Parliament, to give public notice of the contents of the order and take into account any observations submitted upon the order within a period of 60 days;
- as soon as practicable after the end of that period, the Scottish Ministers would be required to lay before the Scottish Parliament a statement summarising all the observations made and specifying the modifications, if any, which they considered appropriate to make to the order;
- if modifications were required, the Scottish Ministers would be required either to lay another remedial order before the Scottish Parliament which gave effect to those modifications and replaced the first order or to lay an order which simply revoked the original remedial order;
- the Scottish Parliament would require to approve, by resolution, either the first or the second remedial order within a period of 120 days (beginning with the day on which the first order was made) or the relevant order would cease to have effect. Where the second remedial order revokes the first remedial order it is subject to annulment in pursuance of a resolution of the Scottish Parliament.

147. In all except the most urgent circumstances therefore, the Scottish Parliament and any other interested parties would be given the opportunity to make comments on a draft of any order in advance of the usual formal procedure for laying orders before the Parliament. The Executive considers that the procedure provided for will ensure that the Parliament is able to exercise adequate control of the Scottish Ministers' proposed powers.

PART 7 - GENERAL PROVISIONS

Commencement

148. Parts 1, 2 and 5 of the Bill in relation to adult mandatory life prisoners, the constitution of the Parole Board and the Procurator Fiscal of the Lyon Court would come into force by commencement order. The other provisions would take effect the day after Royal Assent.

CONSULTATION

149. The Executive held discussions with the Lord Justice General, the Lord Lyon, the Scottish Legal Aid Board, the Law Society of Scotland and the Chairman of the Parole Board, which contributed to the development of our proposals. The Deputy First Minister wrote to the judiciary and the Convener of the Justice and Home Affairs Committee on the day the proposals were announced.

150. Letters were also sent to the Chairman of the Parole Board, the Chairman of the Scottish Legal Aid Board, the President of the Law Society of Scotland, the Dean of the Faculty of Advocates and the Scottish Human Rights Centre. In addition, information was made available to the Scottish Prison Service to inform AMLPs and for use in answering their queries.

151. On introduction, further information was made available to the Scottish Prison Service and all life prisoners affected by the Bill. In addition, the following bodies and individuals were notified of our proposals by letter and sent copies of the draft Bill and accompanying documents:

APEX
Association of Chief Police Officers in Scotland
Association of Directors of Social Work
Association of Scottish Police Superintendents
Association of Visiting Committees for Scottish Penal Establishments
British Medical Association
British Association of Social Workers
Chief Inspector of Prisons for Scotland
Citizen's Advice Scotland
Community Psychiatric Nurses Association
Convention of Scottish Local Authorities (CoSLA)
Crown Agent
Dean of the Faculty of Advocates
District Courts Association
General Manager, State Hospital
Home Office
Howard League
Judicial Studies Committee
Lord Justice General
Lord Lyon
Main political parties
Mental Welfare Commission for Scotland
Part Time Sheriffs' Association
Prison Reform Trust
Prison Complaints Commissioner
Prison Governors
Prison Officers Association (Scotland)
Procurators Fiscal Society

Parole Board for Scotland
Professor Gane, University of Aberdeen
Royal College of Psychiatrists
SACRO
Scotland Office
Scottish Association of Health Councils
Scottish Association for Mental Health
Scottish Civic Forum
Scottish Convention of Mental Health Charities
Scottish Council for Civil Liberties
Scottish Council for Voluntary Organisations
Scottish Court Service
Scottish Development Centre for Mental Health Services
Scottish Health Advisory Service
Scottish Legal Aid Board
Scottish Human Rights Centre
Scottish Law Commission
Scottish Police College
Scottish Police Federation
Scottish Prisons Complaints Commission
Scottish Prison Service
Scottish Trade Union Congress
Sheriffs' Association
The Controller of the Accounts Commission
The Law Society of Scotland
The Lord Chancellor's Department
The WS Society
Women's National Commission
Wide range of churches and religious organisations
Wide range of gay/lesbian organisations
Wide range of organisations who provide support for the victims of crime

EFFECT ON EQUAL OPPORTUNITIES

152. There would be no effect on equal opportunities.

EFFECT ON HUMAN RIGHTS

153. The purpose of the Bill is to bring elements of scots law into line with the European Convention on Human Rights.

EFFECT ON ISLAND COMMUNITIES

154. Most of the provisions in the Bill will have no distinctive effect on island communities. These communities would be affected in the same way as any other community by most of the Bill's proposals. However, the provision relating to direct employment of solicitors may have a particular value in more isolated communities.

155. In more remote parts of the country a person may have more difficulty obtaining a solicitor because there are insufficient solicitors or because there is a conflict of interest because of multiple accused. This is one of the reasons, outlined above, that the Scottish Executive believes that the Scottish Legal Aid Board should be empowered to directly employ solicitors to deal with situations where a client is otherwise unable to gain representation under the fixed fees scheme.

EFFECT ON LOCAL GOVERNMENT

156. There would be no effect on local government.

EFFECT ON SUSTAINABLE DEVELOPMENT

157. There would be no effect on sustainable development.

This memorandum relates to the Convention Rights (Compliance) (Scotland) Bill (SP Bill 25) as introduced in the Scottish Parliament on 10 January 2001

CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) BILL

POLICY MEMORANDUM

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