CRIMINAL CASES (PUNISHMENT AND REVIEW) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Cases (Punishment and Review) (Scotland) Bill introduced in the Scottish Parliament on 30 November 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 5–EN.

POLICY OBJECTIVES OF THE BILL

2. The Criminal Cases (Punishment and Review) (Scotland) Bill makes provision in two specific areas. The Bill addresses an issue arising from the Appeal Court’s judgment in the *Petch and Foye v. HMA* case\(^1\) (“the Petch and Foye judgement”) concerning the time those prisoners given a discretionary life sentence or Order for Lifelong Restriction (“OLR”) sentence must serve before they become eligible to apply for parole. The Bill also provides a framework for the Scottish Criminal Cases Review Commission (“the Commission”) to decide whether it is appropriate to disclose information concerning cases they have referred to the High Court for appeal against conviction which have subsequently been abandoned or have fallen.

3. The provisions relating to the Petch and Foye judgement reassure the public by providing courts with discretion to determine that discretionary life sentence prisoners and OLR sentence prisoners will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.

4. Although general in nature, the provisions relating to the Commission will apply in the circumstances of the case of Abdelbaset Al-Megrahi, who was convicted in 2001 of the murder of 270 people in the Lockerbie bombing, and take forward the Scottish Government’s commitment to be as open and transparent as it can be in respect of that case.

Part 1 of the Bill - Punishment part of non-mandatory life sentences

Background

5. Discretionary life sentences and OLR sentences are two sentencing options available for offenders who courts consider are likely to pose a continuing high risk to public safety in the future. Discretionary life sentences have been a sentencing option for many years in Scotland. OLRs were introduced in 2006 and data showing how often courts have imposed OLRs is as follows—

- 2006 – 1 OLR
- 2007 – 4 OLRs
- 2008 – 12 OLRs
- 2009 – 24 OLRs
- 2010 – 18 OLRs
- 2011 – 15 OLRs

As can be seen, there are a total of 74 OLRs\(^2\) which have been imposed by courts since they were introduced in 2006.

6. A court will impose an OLR sentence if certain risk criteria in relation to the offender are met. The risk criteria that must be met before an OLR sentence can be imposed are provided in section 210E of the Criminal Procedure (Scotland) Act 1995 where it states that an OLR is able to be imposed if—

“… the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.”

7. The OLR is a sentence designed to ensure that offenders, after having served an adequate period in prison to meet the requirements of punishment, do not present an unacceptable risk to public safety once they are released into the community. The period spent in the community is an integral part of the OLR sentence which lasts for the remaining period of the offender’s life. Discretionary life sentences are also designed for the protection of the public from high risk offenders, though the monitoring and supervisory regime is less restrictive than under an OLR sentence. Since the introduction of OLRs in 2006, courts have generally tended to impose OLR sentences instead of discretionary life sentences for relevant high risk offenders. Collectively, we refer to discretionary life sentences and OLRs as non-mandatory life sentences (as the court has discretion as to whether to impose such a sentence).

8. The “punishment part” of a sentence is the minimum period of time which an offender must serve in prison before they become eligible to apply to the Parole Board for consideration

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\(^2\) This figure excludes 2 OLRs which were imposed by courts, but where 1 OLR for which the offender has died and 1 OLR for which the sentence was successfully appealed.
of being released on parole. The role of the Parole Board is to consider whether prisoners continue to present a risk to public safety. If the Parole Board considers an offender does continue to present a risk to public safety, the Parole Board will not authorise the parole of that offender.

9. Morris Petch and Robert Foye are offenders who appealed against how the “punishment part” of their non-mandatory life sentences had been set by the court. These appeals were heard together by the Appeal Court and led to the Appeal Court’s judgement in Petch and Foye v. HMA issued in March 2011.

10. The effect of the Petch and Foye judgement has been that some offenders who had received a non-mandatory life sentence have been able to successfully appeal against the length of the punishment part of their sentences. In the case of Petch, his punishment part was reduced from 12 years to 8 years. In the case of Foye, his punishment part was reduced from 9 years to 4 years and 6 months. However, although some offenders have had the punishment parts of their non-mandatory life sentences reduced on appeal, no offender has been released from prison as a result of the judgement. Some offenders have (and will) be able to apply for parole at an earlier point in their sentences than previously had been the case, but no prisoner has been or will be released unless the Parole Board is satisfied that the prisoner no longer poses a high risk to public safety.

11. The Petch and Foye judgement had no impact on how courts set the punishment part of mandatory life sentences. A mandatory life sentence is a sentence which is fixed by law i.e. upon conviction of an offender, the court has no discretion in deciding the sentence. In Scotland, a conviction for murder carries a mandatory life sentence. Therefore, the Petch and Foye judgement (and the provisions in the Bill) have no impact on the setting of the punishment parts of life sentences given for murder.


13. Section 2 of the 1993 Act as a whole was originally enacted to give effect in Scotland to the decision of the European Court of Human Rights in Thynne, Wilson and Gunnell v United Kingdom, in which it was held that non-mandatory life sentences imposed by English courts were composed of a “punitive” element and subsequently of a “security” element. In respect of the security element of such a sentence, the European Court of Human Rights found that the applicants were entitled under Article 5(4) of the Convention “to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court”. The Parole Board had been held to have the status of a court for these purposes, and gradually, the power to direct the release of prisoners has moved from the Scottish Ministers to the Parole Board itself, whose decisions are now binding on the Scottish Ministers.

3 http://www.scottishparoleboard.gov.uk/page/about_the_parole_board

4 (1990) 13 EHRR 666

5 Weeks v United Kingdom (1987) A 114
14. In terms of how punishment parts of non-mandatory life sentences should be calculated, case law decreed that it is the imposition of the non-mandatory life sentence itself that protects the public, and therefore protection of the public should not be reflected in the punishment part of the sentence that the court would have imposed. The punishment part is therefore the part of the sentence that collectively reflects retribution and deterrence elements necessary for the punishment of the offender, and is expressed as a determinate figure.

15. This led to the adoption of an approach to determining the punishment period of a non-mandatory life sentence by taking half the determinate period that would have been passed (if a non-mandatory life sentence had been deemed necessary) as the period of ‘punishment, retribution and deterrence’. The English courts noted, however, that the figure of one half may not be the final figure, and “there may well be circumstances where it would be appropriate for the judge, in the exercise of his discretion, to fix a larger fraction, but not more than two thirds”.

The O’Neill case

16. The Appeal Court in Scotland considered the issue of how to interpret section 2 of the 1993 Act in the case of O’Neill v HMA (1999) S.L.T. 958. In that case, the appellant had pled guilty to assault to severe injury, and was given a discretionary life sentence. The “designated part” (as the punishment part was then called under section 2(2) of the 1993 Act) was fixed at seven years. The appellant appealed against the period designated and was successful, the period was reduced to three years, being one half of an appropriate determinate sentence (leaving out of account the element for protection of the public) of six years.

17. Lord Rodger said in his judgement that “… since the purpose of the order under section 2(2) is to determine the punitive period which the prisoner must serve before he can require the Secretary of State to refer his case to the Parole Board, the period selected must be the minimum period which the prisoner should actually serve in prison as a punishment for his crime before he is released.” In selecting that period, “… the prisoner should not be at a disadvantage when compared with a prisoner serving a determinate sentence for a similar crime.”.

18. The O’Neill case resulted in a method being prescribed for determining the designated part (as it then was), with guidance from the English case of R v Marklew and Lambert in particular. This method was as follows—

(a) the judge must determine what sentence would have notionally been imposed had a non-mandatory life sentence not been imposed;

(b) the judge should discount from that figure any proportion of that sentence which would have been necessary for the protection of the public;

(c) from that figure, the judge should work out the proportion of that period that the prisoner would or might serve before being released, whether unconditionally or on licence.

19. The punishment part is the period that is left having gone through this process. The court recognised that (emphasis added) “… in deciding what the appropriate notional determinate sentence is, a court is likely to have regard to the need to protect the public. If, therefore, the court were simply to have regard to what would be the appropriate determinate sentence, given the need to protect the public, the figure reached would include an element of protection of the
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public, rather than being a figure which was concerned only with punishment. If, on the other hand, the element of protection of the public were stripped out, the effect would be to reduce what might be the usual figure for the determinate sentence and hence, correspondingly, to reduce the figure for half that determinate sentence. On that second approach it would be possible, in theory at least, for the Parole Board to recommend that a designated life prisoner should be released earlier than a prisoner who had been given a determinate sentence for the same crime.”

The Convention Rights Compliance (Scotland) Act 2001

20. Section 2(2) of the 1993 Act was amended by the Convention Rights Compliance (Scotland) Act 2001 (“the 2001 Act”). The general purpose of the amendments made to the 1993 Act by the 2001 Act were to bring mandatory life prisoners and those who commit murder before reaching the age of 18 within the scope of section 2 and no changes in this area are being made by this Bill.

21. However, there were also changes made by the 2001 Act relating to non-mandatory life prisoners. In relation to the setting of punishment parts of non-mandatory life prisoners and following the 2001 Act changes, section 2(2)(aa) provides that the court must consider—

(a) the period of imprisonment, if any, which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life, or as the case may be not made the order for lifelong restriction, for it;

(b) the part of that period of imprisonment which the court considers would satisfy the requirements of retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public); and

(c) the proportion of the part mentioned in sub-paragraph (ii) above which a prisoner sentenced to it would or might serve before being released, whether unconditionally or on licence, under section 1 of this Act.

22. Section 2(2)(aa) was introduced to the 2001 Act at Stage 3. The then Deputy First Minister and Minister for Justice, Jim Wallace, stated to Parliament that the legislative provisions were “…to preserve the effect of the decision in the case of O’Neill”. The amendment can be seen as having been lodged to avoid any doubt that that decision in the O’Neill case will be maintained in statute law.

Ansari v HMA case

23. The appellant in the Ansari v HMA case had been sentenced to discretionary life imprisonment for abduction and rape. The trial judge selected a punishment part of 12 years which was reduced on appeal to 9 years in the case of Clark v HMA 1997 S.L.T. 1099, when the appellant was still known as George Clark. Following the O’Neill decision, the Scottish Criminal Cases Review Commission referred the case to a five judge bench to determine whether the approach taken in O’Neill had proceeded on a misunderstanding of the R v Marklew case.

6 http://www.scotcourts.gov.uk/opinions/C94_02.html
24. The approach taken by the majority of judges in the *Ansari v HMA* case was that the relevant punishment part of the appellant’s sentence should have been assessed with the early release provisions in view, so that when imposing a discretionary life sentence the court should—

- assess what determinate sentence it would have imposed, taking into account the seriousness of the offence, any previous convictions of the accused, and any plea of guilty (“the notional sentence”),
- discount the risk element from that sentence and fix a proportion of the resulting period as a punishment part, in light of the early release provisions that would be available to a prisoner sentenced to a determinate sentence for the same crime.

25. The difference in *Ansari* case judgement was that the majority of the bench considered that the reference point specified in section 2(2)(aa)(iii) of the 1993 Act was not the date at which the prisoner became eligible for consideration by the Parole Board, but rather the period he “would or might” serve before release. The view taken was that, in applying this provision, the sentencing judge would normally fix the appropriate portion within the limits of one half to two thirds of the notional sentence, and that it was open to the judge to set a proportion that was even higher in cases of exceptionally grave cases.

26. In the judgement of the *Ansari* case, the Lord Justice Clerk argued that the gravity of the crime was likely to be a significant factor in a decision regarding the early release of a long term determinate sentence prisoner, and thus “it should also be a significant factor in a decision as to the proportion that is appropriate for the assessment of the punishment part of a discretionary life sentence.” It was the view of the majority in that case that the gravity of the offence might, in itself, operate as a militating factor against the grant of parole at the halfway stage of a long sentence, because Rule 8 of the Parole Board Rules 2001 (SSI 2001/315) allows the Board to consider “any matter that it considers relevant” in considering release. It therefore followed that the Parole Board might, in some cases, consider the nature of the offence was a factor to be considered in deciding whether parole was to be granted.

27. Lord Reed, however, disagreed with this reasoning. In his view, “… the fact that the Parole Board is entitled to take account of the nature of an offence does not however entail that its functions include retribution and deterrence: for the nature and circumstances of a person’s offences, as well as the level of risk of reoffending, may plainly be important in deciding whether his confinement is necessary for the protection of the public”.

28. Lord Reed therefore concluded that there did not seem to be any principled basis on which the court could take the gravity of the offence into account in calculating the notional sentence in terms of section 2(2)(aa)(iii), having already taken it into account in selecting the sentence in terms of section 2(2)(i) and (ii). In general, he concluded that the discount to the notional sentence to reflect the proportion which a determinate sentence prisoner would have to serve before being considered by the Parole Board was one half of the notional sentence, although in some cases it could be higher.

29. The consequences of the majority decision in *Ansari v HMA* case was that it was now suggested that the sentencing judge, at the time of sentencing, had to second guess the outcome
of a parole application to be decided in the future in selecting the proportion in terms of section 2(2)(aa)(iii).

The decision in Petch and Foye

30. The Petch and Foye judgement confirmed that Lord Reed’s analysis of the position was the correct one, and overruled the majority in Ansari. The Lord Justice General pointed out in the Petch and Foye case judgement, however, that by giving statutory effect to the O’Neill decision, effect had been given to the situation whereby an indeterminate sentence prisoner could become eligible for parole at an earlier stage than a determinate sentence prisoner sentenced for the same crime, because of the need to strip out the element of public protection from the notional determinate sentence.

The effect of the Bill’s provisions

31. The changes contained in the Bill ensure that the court has discretion to specify that a prisoner given an OLR or discretionary life sentence can become eligible to apply for parole at a point when the court considers the prisoner has served an appropriate period of imprisonment to satisfy the need for punishment of the offender.

32. Lord McCluskey, in his opinion in the Ansari case, explained what he thought the effect of section 2(2)(aa)(iii) was. His interpretation was accepted by the Lord President in Petch and Foye judgement. In Lord McCluskey’s opinion (at paragraph 92) he stated “… if the legislative intention had been that the period selected by the sentencing judge (as appropriate to satisfy the requirements of retribution and deterrence) has to be cut down by some specific fraction, and that that should be done by the judge at the time of sentencing, then it would have been easy to say so in unambiguous terms”.

33. The Bill provisions require the court to set a proportion of that period that is equal to one half of the notional determinate sentence, having stripped out the elements of public protection (i.e. the figure derived from going through steps (i) and (ii) in section 2(2)(aa)). However, the Bill also provides the court with the power to increase that period up to the whole of the punishment element of the notional determinate sentence in cases where the seriousness of the offence, the previous convictions of the offender or other relevant factors, make that appropriate.

34. The effect of the Bill is essentially similar what the court was doing in the Ansari case judgement. That decision has been found by the Petch and Foye judgement not to be correct in terms of the legislation as provided, but this is our broad policy intent as to what the legislation should provide for and the approach we have adopted in the Bill. The anomaly in the O’Neill case was created by the need to strip out the public protection element in a discretionary life sentence case, but not a determinate case, leading to the discretionary life prisoner potentially being released earlier. We consider this “stripping out” exercise does have to remain in order to satisfy the requirements that the ECHR has specified need to take place in respect of a discretionary life sentence. However, by giving the court the power to adjust the subsequent proportions upwards, it allows the anomaly to be addressed so that the court has discretion to specify that a prisoner given an OLR or discretionary life sentence will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.
35. The Bill maintains the current position with regard to the court being able to consider whether to apply a sentence discount for the offender offering a guilty plea.

Illustrative examples of the effect of the Bill

36. This is a very complex and technical area of law. Some illustrative examples of how the Bill’s provisions could operate in practice are provided in the following paragraphs. The examples compare the overall determinate sentence and the period of time an offender would have spent in prison before becoming eligible to apply for parole (if they had not received a non-mandatory life sentence) with both the period of time the offender would spend in prison before becoming eligible to apply for parole following the Petch and Foye judgement and also the period of time the offender would spend in prison before becoming eligible to apply for parole as a result of the Bill. The examples should be seen as merely an illustration of how a court may go about applying the provisions. Interpretation and application of the law is always for the courts to determine and inclusion of these examples are simply to aid understanding of the likely effect of the Bill’s provisions rather than prescribing exactly how courts will interpret and apply the law.

Example 1

37. Offender A receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 12 years. However, the court decides that a sentence discount of 25% applies in respect of an early guilty plea by the offender. This reduces the determinate sentence to 9 years. For a determinate sentence of 9 years, an offender is eligible to apply for parole at the halfway point of the sentence at 4 years 6 months. Offender A is therefore eligible to apply for parole after 4 years 6 months.

38. Following Petch and Foye, where the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 12 years. The protection of the public element is 2 years. This must be stripped out and this leaves 10 years. Applying early release provisions, this would leave a punishment part of 5 years. A sentence discount applies of 25% in respect of an early guilty plea. This leaves a punishment part for offender A of 3 years 9 months.

39. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 12 years. The protection of the public element is 2 years. This leaves 10 years. The court therefore has discretion to set the punishment part at between 5 years and 10 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). Whatever the court decides, a sentence discount of 25% applies for an early guilty plea. This means a punishment part for offender A of between 3 years 9 months and 7 years 6 months can be set.
Example 2

40. Offender B receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 15 years. However, the court decides that a sentence discount of 10% applies in respect of an early guilty plea by the offender. This reduces the determinate sentence to 13 years 6 months. For a determinate sentence of 13 years 6 months, an offender is eligible to apply for parole at the halfway point of the sentence at 6 years 9 months. **Offender B is therefore eligible to apply for parole after 6 years 9 months.**

41. Following Petch and Foye, if the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 15 years. The protection of the public element is 1 year. This must be stripped out and this leaves 14 years. Applying the early release provisions, this would leave a punishment part of 7 years. A sentence discount of 10% applies in respect of an early guilty plea. **This leaves a punishment part for offender B of 6 years 3 months 18 days.**

42. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 15 years. The protection of the public element is 1 year. This leaves 14 years. The court therefore has discretion to set the punishment part at between 7 years and 14 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). Whatever the courts decides, a sentence discount of 10% applies for an early guilty plea. **This means a punishment part for offender B of between 6 years 3 months 18 days and 12 years 7 months 6 days can be set.**

Example 3

43. Offender C receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 9 years. However, the court decides that a sentence discount of 33% applies for an early guilty plea. This reduces the determinate sentence to 6 years. For a determinate sentence of 6 years, an offender is eligible to apply for parole at the halfway point of the sentence at 3 years. **Offender C is therefore eligible to apply for parole after 3 years.**

44. Following Petch and Foye, if the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 9 years. The protection of the public element is 1 year. This must be stripped out and leaves 8 years. Applying early release provisions, this would leave a punishment part of 4 years. A sentence discount of 33% applies in respect of an early guilty plea. **This leaves a punishment part for offender C of 2 years 8 months.**

45. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 9 years. The protection of the public element is 1 year. This leaves 8 years. The court therefore has
discretion to set the punishment part at between 4 years and 8 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). Whatever the court decides, a sentence discount of 33% applies for an early guilty plea. **This means a punishment part for offender C of between 2 years 8 months and 5 years 4 months can be set.**

Example 4

46. Offender D receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 20 years. There is no sentence discount for an early guilty plea in this case. For a determinate sentence of 20 years, an offender is eligible to apply for parole at the halfway point of the sentence at 10 years. **Offender D is therefore eligible to apply for parole after 10 years.**

47. Following Petch and Foye, if the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 20 years. The protection of the public element is 2 years. This must be stripped out and leaves 18 years. Applying the early release provisions, this would leave a punishment part of 9 years. There is no sentence discount for an early guilty plea. **This leaves a punishment part for offender D of 9 years.**

48. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 20 years. The protection of the public element is 2 years. This leaves 18 years. The court therefore has discretion to set the punishment part at between 9 years and 18 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). There is no sentence discount for an early guilty plea. **This means a punishment part for offender D of between 9 years and 18 years can be set.**

49. The above examples demonstrate that the effect of the Bill’s provisions is to give discretion to courts to specify that an offender given an OLR or discretionary life sentence will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.

Part 2 of the Bill - Disclosure of information obtained by the Scottish Criminal Cases Review Commission

**Background**

50. The Commission’s role is to review and investigate cases where it is alleged that a miscarriage of justice may have occurred in relation to a conviction, a sentence or both a conviction and sentence. The Commission can review and investigate both solemn and summary cases and has wide ranging powers of investigation. After a review has been completed, the Commission will decide whether or not the case should be referred to the High Court. If the Commission decide to refer a case, if accepted, the case will be heard and determined by the High Court as if it were a normal appeal. The legislation governing the work of the Commission is set out at Part XA of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).
51. There has been considerable interest in the Commission’s referral in June 2007 of the case of Mr Abdelbaset Al-Megrahi, who was convicted in 2001 of the murder of 270 people in the Lockerbie bombing, to the High Court of Justiciary. The Commission sent a Statement of Reasons for its referral of the case to the relevant parties; namely the High Court, the Crown Office and Procurator Fiscal Service and Mr Al-Megrahi himself. The Commission is prohibited from disclosing information relating to cases it has investigated by virtue of section 194J of the 1995 Act. Section 194K of the 1995 Act provides very limited exceptions where disclosure is authorised. The disclosure by the Commission of its Statement of Reasons in the Al-Megrahi case to the relevant parties was in line with section 194K(1)(a) of the 1995 Act where disclosure of information is excepted from general non-disclosure requirements if disclosure is for the purposes of any criminal, disciplinary or civil proceedings.

52. Following the referral of his case by the Commission, Mr Al-Megrahi was able to lodge an appeal against his conviction. Mr Al-Megrahi subsequently abandoned this appeal in August 2009. Although some of the material contained in the Statement of Reasons was heard in open court during court proceedings while the appeal was live, the appeal did not reach a stage before it was abandoned whereby the substantive content of the Statement of Reasons was heard in open court.

53. The Scottish Ministers have, by virtue of section 194K(1)(f) of the 1995 Act, an order-making power to set out circumstances in which the normal non-disclosure rules that the Commission are subject to may be disapplied. In view of the wider public interest issues raised in the Al-Megrahi case and following the abandonment by Mr Al-Megrahi of his appeal in August 2009, the Cabinet Secretary for Justice made the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009. This order, which was brought forward in late 2009, disapplied the non-disclosure rules in respect of appeals against conviction that had been referred to the High Court and had subsequently been abandoned, providing that the Commission obtained consent from those who provided information to them. This provided a mechanism for the Commission to work towards considering releasing information in the Al-Megrahi case. However, in December 2010, the Commission advised in a news release that it had been unable to obtain the relevant consent from all those who provided information contained in the Statement of Reasons in the Al-Megrahi case and, as such, the Commission was not in a position to publish its Statement of Reasons.

54. In February 2011, in answer to a Parliamentary Question from Christine Grahame MSP, the Cabinet Secretary for Justice stated that—

“The Scottish Government intends to bring forward legislation to allow the Scottish Criminal Cases Review Commission to publish a statement of reasons in cases where an appeal is abandoned, subject of course to legal restrictions applying to the commission such as data protection, the convention rights of individuals and international obligations attaching to information provided by foreign authorities.”
**Effect of the Bill provisions**

55. The Bill provides that, in circumstances where an appeal against conviction has been abandoned or has otherwise fallen following a Commission referral, the Commission may disclose information relating to the case where they determine that it is appropriate to do so. In determining whether it is appropriate, the Commission is required to consult with those affected by, or who otherwise have an interest in, the information being considered for release. This would include those who provided the information and those to whom the information relates.

56. In deciding whether it is appropriate to disclose information, the Commission is required to have regard to any material representations made to it by affected or interested parties as regards whether the information should be disclosed. However, the final decision with regard to whether it is appropriate to disclose information is for the Commission to make. There is one exception to this, and that is where the information that is being considered for disclosure has been obtained by either the Lord Advocate or the Commission from foreign authorities under international assistance arrangements. For this type of information, the consent of the foreign authority that provided the information is required before the Commission can disclose that information. This provision is included to ensure international obligations are not breached. In addition, disclosing information obtained from foreign authorities without their consent could risk undermining the operation of existing mutual legal assistance agreements, adversely affecting efforts to tackle crime, including serious organised crime, in the future.

57. If the Commission decide it is appropriate to disclose information, they are required to notify the affected persons and interested persons and allow at least a 6 week period to elapse. As disclosure of information would be irreversible, this further notification mechanism helps ensure affected persons and interested persons are aware of what the Commission is planning to do and allows these persons to consider what steps, if any, they may wish to take in respect of the forthcoming disclosure of information. Where the Commission decides that it is appropriate to disclose information, the Bill provides that the Commission must explain the context in which the information is being disclosed when they are disclosing the information. This will aid general understanding of the wider context of the case and help ensure information being disclosed is properly interpreted. Where the Commission determines that it is appropriate to disclose some but not all of the information that it holds, it is required to state explicitly that not all the information that it holds is being disclosed. Again, this is to aid general understanding of the context within which the information should be considered and help ensure the information being disclosed is properly interpreted as being part of a wider set of information.

58. In considering whether it is appropriate to disclose information that it holds relating to a case, the Commission will be required to ensure that the disclosure of the information did not contravene any relevant statute applying in the situation. Statutory requirements contained in legislation such as the Data Protection Act 1998 and the Official Secrets Acts are not affected by the provisions in this Bill and these statutory requirements are likely to be relevant in considering the disclosure of information. Other potential obstacles to disclosure of information will remain such as ensuring that the ECHR is not breached.

59. The Bill’s provisions demonstrate that the Scottish Government is being as open and transparent as it can be in respect of responding to the wide ranging public interest in the Al-Megrahi case.
ALTERNATIVE APPROACHES

Part 1 of the Bill - Punishment part of non-mandatory life sentences

60. An alternative approach to legislating to address the Petch and Foye judgement would be to leave the 1993 Act unchanged. This would not necessarily result in prisoners who are given a discretionary life sentence and OLR sentence being released from prison any earlier than would have been the case had they received a determinate sentence for the same offence, as the Parole Board would still be required to be satisfied that the offender did not pose a significant risk to public safety before they could be released. However, the approach of leaving the legislation unchanged would leave the statutory position so that courts had no discretion in some cases to impose anything other than a punishment part of a discretionary life sentence and OLR sentence at a lower level than an equivalent offender given a determinate sentence. This is not considered to be in the interests of justice.

61. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) replaces Part 1 of the 1993 Act. These provisions are not yet commenced. Consideration was given to whether limited commencement of certain provisions of this Act could achieve the desired policy aim. However, it was concluded the policy intention in this case is to address an issue arising out of the operation of the 1993 Act, rather than to bring the provisions of the 2007 Act into force. Also, the approach we have taken is to give discretion to court to specify, if the court considers it appropriate in the circumstances of a case, that up to all of the punishment part of the notional determinate sentence must be served before an offender is eligible to apply for parole. In the 2007 Act, an upper limit of three-quarters of the punishment part of the notional determinate sentence is established. Therefore, commencement of the 2007 Act would not have delivered our policy aim in full and therefore it was not pursued.

Part 2 of the Bill - Disclosure of information obtained by the Scottish Criminal Cases Review Commission

62. The Scottish Government has made clear that we wish to be as open and transparent as possible with regard to the Al-Megrahi case. As such and given the constraints of current legislation, failing to bring forward legislation to enable the Commission to consider whether it was appropriate to disclose information was not considered to be a realistic option.

63. An alternative approach would have been to use the existing power in section 194K(1)(f) of the 1995 Act to provide simply an exception to the offence in 194J where the Commission could disclose information relating to an appeal against conviction which has been abandoned or otherwise fallen, without consent, where the Commission considers it appropriate to do so, without providing a detailed legislative framework setting out how the Commission should undertake this task. However, given the potential for sensitivities to exist with regards the disclosure of information relating to an appeal against conviction, we believe it is necessary and appropriate that the Bill should set out the functions and duties of the Commission in considering whether the disclosure of information is appropriate.

64. In particular, the Bill requires that all those who are affected by, or otherwise have an interest in, the information (e.g. because they provided the information to the Commission, or because the information relates to them) are consulted on the release of the information and have
an opportunity to make representations to the Commission. By providing this framework, the Bill’s provisions balances the rights of those who are mentioned in, or gave information contained in, a Statement of Reasons with wider public interest aims of openness and transparency.

65. We consider Parliament should have full scrutiny powers over the proposed framework for the Commission. As such, we think the legislative process attached to primary legislation is appropriate for the Parliamentary scrutiny of the framework.

CONSULTATION

66. There has been no formal consultation on the content of the Bill. Provisions in part 1 of the Bill are intended, in broad terms, to put back in place policy that existed prior to the Petch and Foye judgement being made in March 2011. As such, the provisions do not implement new policy, but rather respond very specifically to the terms of a judgement.

67. In respect of part 2 of the Bill, we have been clear that we want to be as open and transparent as possible in relation to the Al-Megrahi case given the wide ranging public interest in the case. We announced our intention to bring forward legislation in this area in February 2011 and Ministers have repeated the policy intentions of the Bill’s provisions on a number of occasions since. We have informally consulted the Commission who have offered views that have been considered as the Bill provisions have been developed.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

68. We do not consider that the Bill’s provisions are discriminatory on the basis of age, gender, race, disability, marital status, religion or sexual orientation.

Human Rights

Part 1 of the Bill - Punishment part of non-mandatory life sentences

69. The provisions of Part 1 of the Bill relate to the setting of the punishment part of a discretionary life sentence. This may engage Article 5(4) of the Convention, as the provisions have an impact on when a person serving such a sentence is eligible to have his case considered by the Parole Board.

70. As a preliminary point, Part 1 of the Bill gives powers to the courts. Courts, as public authorities under section 6(3) of the Human Rights Act 1998 (c. 42), have a duty to act in a manner that is compatible with Convention rights. The court would have to apply the provisions in a manner that complied with Convention rights. A person who is unhappy with either their conviction or the sentence they have received is entitled to appeal against their conviction and/or sentence under section 106(1) of the 1995 Act.
71. The European Court of Human Rights has held that a discretionary life sentence is made up of two distinct elements – a “punishment” element and a “security” element. The security part of such a sentence is assessed on the basis of risk factors. Risk factors are liable to change over time, and so must be periodically reviewed by the Parole Board. A non-mandatory life sentence prisoner must be able to have his detention reviewed once he has served the punishment part of his sentence.

72. The provisions of Part 1 are compatible with Article 5(4) for two reasons. First, it is not possible for the sentencing court to include factors relating to public protection (i.e. those which properly form part of the “security” element mentioned above) in the assessment of the punishment part. Therefore there is no possibility that a discretionary life prisoner could be detained beyond the part of their sentence that can be attributed to deterrence and retribution without recourse to the Parole Board to have the lawfulness of their detention challenged. Second, the Parole Board itself has been held to be a “court” for the purposes of Article 5, meaning that the discretionary life sentence prisoner, having served the punishment part of their sentence, has their detention examined by a body that satisfies the requirements of Article 5(4).

73. The provisions of Part 1 of the Bill may also engage Article 14 of the Convention, taken together with Article 5(4), because discretionary life prisoners may have to spend longer in prison than those serving determinate sentences, to whom an automatic early release regime applies. It is considered that any interference with Article 14 can be justified because a discretionary life sentence is imposed for a different purpose than a determinate sentence, therefore does not require be treated in exactly the same way. The overarching legitimate aim of differences in treatment between different groups of prisoners is the protection of the public.

Part 2 of the Bill - Disclosure of information obtained by SCCRC

74. The disclosure of information by the Commission under Part 2 of the Bill could give rise to issues in relation to Convention rights, particularly Article 8 (right to respect for private and family life).

75. As a preliminary point, nothing in the Bill requires the Commission to disclose any information. It remains for the Commission to determine that the disclosure of information is appropriate, in accordance with the requirements set out in sections 194N, 194O and 194R.

76. The Commission is a public authority within the meaning of section 6(3) of the Human Rights Act 1998, and therefore may not act in a way that is incompatible with Convention rights.

77. The disclosure of information is authorised by section 194M(1) if the Commission has determined that it is appropriate that the information be disclosed, subject to sections 194N(1), 194O(1) (read with 194P) and 194R. The procedural safeguards contained within these sections are designed to prevent the disclosure of any information that may breach a person’s Convention rights.

Islands and rural communities

78. We are satisfied the Bill has no differential impact on island and rural communities.
Local government

79. We are satisfied that the Bill has no detrimental impact on local authorities.

Sustainable development

80. We are satisfied that the Bill will have no negative impact on sustainable development.

Business and Regulatory Impact Assessment

81. We are satisfied that the Bill will not have a significant impact on businesses and other non-public bodies.
CRIMINAL CASES (PUNISHMENT AND REVIEW) (SCOTLAND) BILL

POLICY MEMORANDUM


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