

CRIMINAL CASES (PUNISHMENT AND REVIEW) (SCOTLAND) ACT 2012

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT – AN OVERVIEW

3. The Criminal Cases (Punishment and Review) (Scotland) Act 2012 makes provision in two specific areas. The Act addresses an issue arising from the Appeal Court's judgment in the *Petch and Foye v. HMA* case concerning the time those prisoners given a discretionary life sentence or an Order for Lifelong Restriction must serve before they become eligible to apply for parole. The Act also provides a framework for the Scottish Criminal Cases Review Commission to decide whether it is appropriate to disclose information concerning cases it has referred to the High Court for appeal against conviction where such an appeal has subsequently been abandoned.

COMMENTARY ON SECTIONS

Part 1 – Punishment part of non-mandatory life sentences

Section 1 – Setting the punishment part

4. Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ('the 1993 Act') makes provision regarding the duty to release discretionary life prisoners. Section 1 of the Act makes various amendments to section 2 of the 1993 Act.
5. At present, section 2(2)(aa) of the 1993 Act provides the existing framework that courts use in setting the 'punishment part' of discretionary life sentences and any Order for Lifelong Restriction ('OLR' – see section 210F of the Criminal Procedure (Scotland) Act 1995). The punishment part of non-mandatory life sentences (i.e. either a discretionary life sentence or an OLR) is the period of time an offender must spend in prison before they become eligible to apply for parole.
6. [Section 1\(2\)](#) of the Act makes various changes to section 2(2) of the 1993 Act. Section 1(2)(b) and (c) of the Act repeals section 2(2)(aa) of the 1993 Act and replaces it with new section 2(2)(d) providing that a court, when determining the punishment part of a non-mandatory life sentence, is to follow the rules laid out in new section 2A(1) of the 1993 Act (as being inserted by section 1(3) of the Act).

7. [Section 1\(2\)\(a\)](#) and (d) of the Act inserts (with a consequential change) new section 2(2A) into the 1993 Act and this new section retains the matters mentioned in existing section 2(2)(a) to (c) of the 1993 Act for application in fixing the punishment part of a sentence of all offenders who receive mandatory sentences of life imprisonment i.e. for murder or any other offence for which life imprisonment is the sentence fixed by law.
8. [Section 1\(3\)](#) of the Act inserts new section 2A into the 1993 Act. New section 2A provides the rules by which the court is to set the punishment part of non-mandatory life sentences.
9. New section 2A(1)(a) provides that the court must firstly assess the period of imprisonment which the court considers would have been appropriate for the offence had the prisoner not been sentenced to a non-mandatory life sentence. New section 2A(2)(a) provides that in considering the period of imprisonment under new section 2A(1)(a), the court must ignore any period of confinement which may be necessary for the protection of the public.
10. New section 2A(1)(b) provides that the court must then assess the part of that period of imprisonment which would represent an appropriate period to satisfy the requirements of retribution and deterrence. New section 2A(2)(b) provides that new section 2A(1)(b) is subject to the requirements of new section 2B.
11. New section 2B(1) provides that the part of the period of imprisonment is to either be one-half of the period specified under new section 2A(1)(a) or a greater proportion of the period specified under new section 2A(1)(a). However, a greater proportion than one-half can only be specified if new section 2B(2) applies. New section 2B(2) provides that the court can specify a greater proportion of the period specified under new section 2A(1)(a) if it considers it appropriate to do so having considered, in particular, the matters specified in new section 2B(5).
12. New section 2B(5)(a) to (c) provides that the matters are:
 - the seriousness of the offence, or the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence;
 - where the offence was committed where the prisoner was serving a period of imprisonment for another offence; and
 - any previous convictions of the prisoner.

(In considering these matters, the court is still not to take into account any period of confinement which may be necessary for the protection of the public.)
13. New section 2B(3) provides that the court can specify a greater proportion of the period under new section 2A(1)(a) up to and including the whole of that period. New section 2B(4) provides that references in new sections 2B(1) to (3) to the period mentioned in new section 2A(1)(a) are references to that period as informed by new section 2A(2)(a) (i.e. ignoring any period of confinement which may be necessary for the protection of the public).
14. The combined effect of new sections 2A(1)(c) and 2A(2)(c) is to provide that the required consideration by the court as to whether and at what level any sentence discount for an early guilty plea is appropriate is to be left until after the court has made the assessment under new section 2A(1)(a) and (b).
15. [Sections 1\(4\) to \(6\)](#) of the Act make a number of amendments to section 20 of the Custodial Sentences and Weapons (Scotland) Act 2007 ('the 2007 Act') and introduces new section 20A into the 2007 Act. Section 20 of the 2007 Act contains as yet uncommenced provisions relating to the setting of punishment part of life sentences. The purpose of sections 1(4) to (6) of the Act is to make similar changes to the 2007 Act as are being made to the existing 1993 Act framework for the setting of punishment

parts of life sentences by sections 1(1) to (3) of the Act. When the provisions in Part 1 of the 2007 Act are brought into force, part 1 of the 1993 Act will be repealed. The changes contained in sections 1(4) to (6) make a number of necessary changes to the 2007 Act so that when they are commenced along with the rest of the as yet uncommenced provisions in the 2007 Act, the system for setting punishment parts of life sentences as provided for in the 1993 Act and amended by the Act will continue in the same manner within the 2007 Act.

Section 2 – Ancillary provision

16. **Section 2** of the Act provides for a regulation-making power for the Scottish Ministers to make such supplemental, incidental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purpose of, or in connection with, section 1. The power covers modification to Part 1 of the 1993 Act or Part 2 of the 2007 Act for this purpose. Any regulations made under the power will be subject to the affirmative procedure.

Part 2 – Disclosure of information obtained by Scottish Criminal Cases Review Commission

Section 3 – Exception to non-disclosure rule

17. Part XA of the Criminal Procedure (Scotland) 1995 Act ('the 1995 Act') established the Scottish Criminal Cases Review Commission ('the Commission'). Sections 194A to 194L of, and Schedule 9A to, the 1995 Act provide for the operation of the Commission. Section 194J(1) of the 1995 Act provides for an offence in relation to either a member or employee of the Commission disclosing information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted by virtue of section 194K of the 1995 Act. Section 194J(2) provides for an offence where a member of the Commission authorises the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions unless the authorisation of the disclosure of the information is excepted by virtue of section 194K of the 1995 Act. This is the means by which disclosure of information is regulated. Section 3 of the Act is described below in this context.
18. **Section 3(2)** adds two new references into section 194J of the 1995 Act. These new references are to new section 194M of the 1995 Act (added by section 3(3) of the Act) and the effect of adding these references is to provide a further exception to the offence provision in section 194J of the 1995 Act.
19. Along with adding in new section 194M of the 1995 Act, section 3(3) adds a number of other new sections (194N to 194T) into the 1995 Act which taken together constitute a framework for the Commission to determine whether it is appropriate to disclose information on certain cases they have referred to the High Court.
20. Section 194M(1) provides that the disclosure of information, or authorisation of disclosure of information, by the Commission is excepted from the offences listed in section 194J of the 1995 Act if the conditions specified in section 194M(2) are met and the Commission have determined in the whole circumstances of the case that it is appropriate for the information to be disclosed. The rule in section 194M(1)(b) may be called the 'appropriateness test'.
21. Section 194M(2) sets out the conditions that require to be met for the Commission to determine that the disclosure of information, or authorisation of disclosure of information, is excepted from the offence of disclosure under section 194J. Section 194M(2)(a) provides the information must relate to a case that has been referred to the High Court by the Commission under their powers contained in section 194B(1). Section 194M(2)(b) provides that the reference made by the Commission under section 194B(1) must concern either a conviction or a finding under the examination of facts procedure under section 55(2) of the 1995 Act. Therefore, a reference made

by the Commission under section 194B(1) which relates to a sentence is not included within the ambit of section 194M(2). Section 194M(2)(c) provides that the case (upon which the reference relates) must have fallen or been abandoned. A case may have fallen because, for example, the party has chosen not to proceed or has missed a time limit for lodging notice to proceed with the court. A case may have been abandoned through, for example, the lodging of a notice of abandonment under section 116 or 184 of the 1995 Act.

22. Whether information is actually released turns principally on the appropriateness test under section 194M(1)(b). It should be noted that the Commission's ability to disclose information will be informed (and may be restricted) by the application of ECHR law and the operation of reserved statutes such as the Data Protection Act 1998 and the Official Secrets Acts 1911-1989.
23. Section 194N(1) provides that where the effect of section 194J of the 1995 Act (which prohibits the Commission from disclosing information about a case) is disapplied by new section 194M, the disclosure of that information is not prevented by any obligation of confidentiality or other limitation on disclosure.
24. Section 194N(1) therefore provides that the fact that, for example, information is covered by legal professional privilege, or that a common law duty of confidentiality applies to the information, does not in itself represent an absolute barrier to disclosure. This does not mean that such obligations or limitations are treated as if they no longer exist, but rather they do not of themselves prevent disclosure. The Commission would be required to consider these other obligations and limitations and weigh them in the balance before reaching a conclusion as to whether it was appropriate, in all the circumstances, to disclose information.
25. Section 194N(2) provides that the effect of the general override on obligations of confidentiality and other limitations on disclosure does not apply in respect of any obligation or limitation imposed by, under or by virtue of any enactment (such as, for example, the Official Secrets Acts) or in respect of any court interdict or other court order imposed to prevent the Commission from disclosing information under this section. Therefore, if a court reaches a decision that information should not be disclosed by the Commission, section 194N(1) does not override that decision.
26. Section 194O sets out the duties that the Commission have in considering the question of whether it is appropriate for information to be disclosed under section 194M(1).
27. Section 194O(2)(a) requires the Commission (so far as practicable) to take reasonable measures to notify each of the affected persons of the possibility that the information may be disclosed and seek the views of each of them. Section 194O(2)(b) requires the Commission (to such an extent and such manner as they consider appropriate) to consult the other interested persons.
28. 'Affected persons' and 'other interested persons' are defined in section 194O(5). References to an 'affected person' are to a person to whom the information pertains (e.g. a suspect or witness in the investigation) or from whom the information was obtained. References to 'other interested persons' are to the Lord Advocate, and to other persons (if any) who the Commission consider have a substantial interest in the question of whether the information should be disclosed and who do not fall within the definition of an 'affected person'. The effect of including the Lord Advocate as an interested person is that in every case where the Commission are considering whether it is appropriate to disclose information under section 194M(1), the Lord Advocate will always be notified.
29. Section 194O(3)(a) requires the Commission to allow for the prescribed period for the affected persons and other interested persons to take steps (including legal action e.g. interim interdict) in their own favour, in relation to the question as to whether it would be appropriate for the Commission to disclose information. Section 194O(3)(b) requires that the Commission must have regard to any material representations made

to them by the affected or other interested persons within the prescribed period on the question of whether it is appropriate for the information to be disclosed. The 'prescribed period' is defined in section 194O(6) as being a period of at least 6 weeks starting on the last date on which the notification or consultation period commenced. Section 194O(7) provides that where the Commission cannot reasonably ascertain the person's whereabouts, sections 194O(3) and (6) do not apply.

30. Section 194O(4) provides that the Commission must have regard to any other factors that they consider to be significant in relation to the question of whether the information should be disclosed.
31. Section 194P applies in respect of information which is held by the Commission and which has at any time been supplied by the UK Government under arrangements of any kind.
32. The effect of section 194P(1) is that an offence under section 194J would be committed if the Commission disclosed any information under section 194M(1) unless section 194P(3) had been complied with (because the exception to the offence would not stand).
33. Section 194P(3) is complied with if, at any time, the UK Government has, in connection with section 194M(1), given its consent for the information to be disclosed by the Commission.
34. Section 194Q applies in respect of information which is held by the Commission and has at any time been supplied by a designated foreign authority..
35. The effect of section 194Q(1) is that an offence under section 194J would be committed if the Commission disclosed any information under section 194M(1) unless section 194Q(3) had been complied with (because the exception to the offence would not stand).
36. Section 194Q(3) is complied with where the designated foreign authority has given its consent to the disclosure of the information either by virtue of the arrangements under which it has been supplied or by virtue of section 194Q(4), which provides that where such consent has not previously been given by virtue of those arrangements, it is for the Commission to seek the designated foreign authority's agreement.
37. Section 194Q(5) provides that where the consent provisions at section 194P(2) relating to information provided by the UK Government apply, the requirement to seek consent from a 'foreign authority' under section 194Q does not apply.
38. Section 194R defines important terms used in section 194Q.
39. Section 194R(1) provides that references to the 'designated foreign authority' are to the current or previous authority of a prosecutorial, judicial or other character (e.g. a police force) which is or was located within a country or territory outwith the United Kingdom.
40. Section 194R(2) provides that where the Commission are unable to locate the designated foreign authority for the purpose of section 194Q, the references in subsections 194P(3) and (4) to the 'designated foreign authority' should be read as if they were to the government of the country or territory.
41. Section 194R(4) provides the reference in section 194R(2) to the relevant foreign government is a reference to the government of the other country or territory. In the event of any doubt as to the status or operation of a governmental system in the other country or territory (which is possible in times of political upheaval), section 194R(5) provides that the relevant foreign government is to be regarded as the principal body in the country or territory that is being recognised by the UK Government as having responsibility for exercising governmental control centrally within the country or territory.

42. Section 194S provides that where, on their preliminary examination of whether it is appropriate to disclose information under new section 194M(1), the Commission determine that it is manifestly inappropriate for the information to be disclosed, they are not required to undertake the steps at new sections 194O to 194R. This is particularly relevant in the application of section 194O(1). The effect of section 194S(3) is that where there is a material change in any significant factor on which the Commission made that determination, the Commission may re-examine the question and that, if (on doing so) it is concluded that it is no longer manifestly inappropriate that the information should be disclosed, the effect of sections 194O to 194R is restored.
43. Section 194T sets out the functions of the Commission when they decide under section 194M(1) it is appropriate to disclose information. Section 194T(1) provides that the Commission must initially meet the requirements of section 194T(2) and then subsequently section 194T(3).
44. Section 194T(2)(a) provides that before the Commission disclose information, they must (so far as practicable) take reasonable measures to notify their decision to disclose to each of the affected persons and any other interested persons. In the latter case, this is to the same extent as they were consulted under section 194O(2)(b). Section 194T(2)(b) provides that the Commission must allow the prescribed period to pass in order to allow any of the affected persons and other interested persons to take steps (including legal action) in their own favour in relation to the decision to disclose information. Section 194T(4) attracts the earlier definition of the affected and other interested persons, and section 194T(5) provides that the prescribed period runs for at least 6 weeks and starts with the date notification was sent to the particular person (but subsection (6) negates this where the person's whereabouts are unknown).
45. When the Commission disclose information under section 194M(1), section 194T(3) provides that the Commission are required to explain the context in which the information is being disclosed. This would include the Commission describing the background to the case and may include the reasons that it is considered appropriate to disclose the information. If the Commission decide it is appropriate to disclose information, but other information relating to the case remains undisclosed by them (for example, because it consists of information from a designated foreign authority where consent has not been obtained), the Commission are required to explicitly state this fact. Section 194T(7) ties the reference to other information in section 194R(3)(b) to the Commission's exercise of their functions.

Section 4 – Consequential revocation

46. In consequence of section 3, section 4 of the Act revokes the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 ([SSI 2009/448](http://www.legislation.gov.uk/ssi/2009/448)¹). This Order contains a different approach to disclosure by the Commission (involving the seeking of consent) in a case of the type falling within section 194M(2) of the Act.

Part 3 – Commencement and short title

Section 5 – Commencement

47. [Section 5\(1\)](#) confirms that the provisions in Part 3 of the Act will come into force on the day after Royal Assent. Section 5(2) provides for the rest of the Act to come into force by appointed-day order. Section 5(3) provides that a commencement order may include transitional, transitory or saving provision. Section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010 allows for different days to be appointed for different purposes.
48. [Section 6](#) gives the short title of the Act.

¹ <http://www.legislation.gov.uk/ssi/2009/448/contents/made>

PARLIAMENTARY HISTORY

49. The table below sets out, for each stage of the proceedings in the Scottish Parliament on the Bill for the Act, the dates on which the proceedings at that stage took place, the reference to the Official Report of those proceedings and the dates on which the committee reports and other papers relating to the Bill were published.

<i>Bill Stage</i>	<i>Date</i>	<i>Official report</i>
Stage 1: Finance Committee – approach to Financial Memorandum	21 December 2011	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=6808&mode=pdf
Stage 1: Subordinate Legislation Committee - consideration of the Bill	24 January 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=6894&mode=pdf
Stage 1: Justice Committee evidence session	31 January 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=7125&mode=pdf
Stage 1: Subordinate Legislation Committee - consideration of the Bill	7 February 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=6818&mode=pdf
Stage 1: Justice Committee evidence session	7 February 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=7147&mode=pdf
Stage 1: Justice Committee evidence session	21 February 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=6858&mode=pdf
Stage 1: Justice Committee Report	29 March 2012	http://www.scottish.parliament.uk/parliamentarybusiness/ CurrentCommittees/49040.aspx
Stage 1: Debate	19 April 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=6976

*These notes relate to the Criminal Cases (Punishment and Review)
(Scotland) Act 2012 (asp 7) which received Royal Assent on 26 July 2012*

Bill Stage	Date	Official report
Stage 2: Justice Committee session	15 May 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=7135&mode=pdf
Stage 3: debate	20 June 2012	http://www.scottish.parliament.uk/ parliamentarybusiness/28862.aspx?r=7094
Royal Assent	26 July 2012	http://www.legislation.gov.uk/asp/2012/7/contents/enacted