

THE CRIMINAL JUSTICE ACT 2003

THE SENTENCING PROVISIONS

Part 12

Sections 142 to 305 and Schedules 8 to 32

THE HEADLINES

Sentence

OUT: Longer than commensurate sentences s80 (2) (b) PCC (S) A 2000

Automatic Life Sentences (2 strikes) s.109 PCC (S) A 2000

IN: Imprisonment for Public Protection ss.225-226

New extended sentences ss.227-228

Release

OUT: Distinction between short and long term prisoners

IN: All fixed term prisoners (except extended sentences) released at halfway BUT now on licence to end of sentence rather than 3/4.

Chapter 5 – Dangerous Offenders

Sections 224 to 236

1. These provisions provide an entirely new set of measures to deal with what the Act calls “dangerous offenders”. This term is not defined in the Act but such persons are those who commit a serious offence and whom the court believes are likely to do so again. A serious offence means a specified offence for which the maximum sentence is 10 years or more; **s.224 (2)**. This part of the Act introduces a wholly new concept of “imprisonment for public protection” (IPP); **s.225 – 6**.

A. Life sentences or IPP

2. By **section 225**, where there is a significant risk of serious harm from future specified offences likely to be committed by the offender aged over 18, either a discretionary life sentence **must** be passed (where such is available under the particular offence provision e.g. rape, gbh, robbery, and the seriousness of the offence justifies it) **s.225 (2)**, or a sentence of IPP (where the maximum offence penalty is 10 years or more) **s.225 (3)**. Even though the maximum penalty for the offence might be 10 years, a sentence of IPP is indefinite and release is subject to similar release provisions as for lifers; **s225(4)**. So for example someone convicted of burglary on the basis of having an intent to inflict GBH on someone in the building (max. 14 years) could now receive a sentence of IPP which is indefinite and could end up serving longer than the maximum sentence for the offence.

3. Life sentence prisoners remain on licence for the rest of their lives, those serving IPP sentences can apply to the Parole Board to have their licences rescinded ten years after release; **Sch 18 para.2**

4. For offenders aged under 18, if the court does not impose a sentence of detention for life, it should consider one of the new extended sentences under **s.228** but if that is considered inadequate to provide sufficient protection for the public then the court must impose a sentence of IPP; **s.226**.

5. The specified violent offences are set out in **Schedule 15 Part 1**. They are numerous and varied covering offending at the top end of the scale of violence (manslaughter, threats to kill and s.18 gbh) via abandoning of children (OAPA 1861 s.27) and assaulting an officer preserving a wreck (OAPA 1861 s. 37) to the more familiar offences of arson, affray, s.47 abh and causing death by dangerous driving. The provision of a list is a change from the

position under the PCC(S)A 2000 which simply gave a definition of ‘violent offence’ and which lead to arguments about when a robbery was a violent offence (compare *R.v.Khan* (1995) 16 Cr. App. R. (S.) 180 with *A-G’s Reference (No. 113 of 2001)* [2002] 2 Cr. App. R. (S.) 269. Under the new provisions robbery is *always* a violent offence since it is specified in Sch.15. Note also that offences of aiding and abetting, attempting or conspiring to commit any of the specified offences are also included.

6. Specified sexual offences are set out in **Part 2 of Schedule 15**. In brief they cover most offences under the Sexual Offences Act 1956 and their replacements in the SOA 2003. Again, aiding and abetting etc are included.
7. Section 225 is likely to be the subject of considerable litigation as was the case with the provisions for ‘longer than commensurate sentences’ under the 1991 Act. In particular the terms ‘significant risk’ and ‘serious harm’ will require clarification. Does ‘significant risk’ mean a ‘high risk’ or merely ‘more than minimal’?

B. Extended sentences

8. In the case of those over 18 these are available where the offence is a specified one but is not a serious offence (i.e. max sentence is below 10 years) and the court considers there is a significant risk of the commission of further specified offences; **s.227**. The extended sentence is equal to the aggregate of the appropriate custodial term, and a further period for which the offender will remain on licence. The total term cannot exceed the maximum penalty for the offence, and the ‘appropriate custodial term’ is the period to which the offender would be sentenced if a **s227-8** sentence was not passed. In any event the extension period cannot exceed five years in the case of a specified violent offence and eight years in the case of a specified sexual offence.

9. So for example, such a sentence would be available for a person convicted of s.20 wounding (max 5 years). If the sentence of imprisonment was 18 months the extension period could be up to 3 ½ years.
10. The prisoner is eligible for release at halfway through his ‘appropriate custodial term’ but remains subject to the discretion of the Parole Board up until the expiry of that term. He/she is then subject to the extended licence. So the example above, the prisoner could be released after 9 months, but only on the say so of the Parole Board. Otherwise he would be liable to be detained until he had served the full 18 months and would then be on licence (and therefore subject to possible recall) for the next 3 ½ years.
11. The position is broadly the same for under 18s (**s.228**) except that the sentence is only available if a sentence of detention for life is not appropriate and the court also does not consider a sentence of IPP is required.
12. The ‘two-strikes’ automatic life sentences under **Section 109, PCC(S)A 2000** are repealed for offences committed after 4 April 2005. But they are replaced by ‘one-strike’ indeterminate IPP sentences as above. If the offender has not previously been convicted of a relevant offence (an offence specified in **Schedule 15, 16, or 17**) then the court must make its own assessment of whether he/she is dangerous, based on all information available as to the offence and the offender; **s229(2)**, but if he/she has a previous relevant conviction (i.e. for a specified offence), then the court must assume dangerousness unless it would be unreasonable to make such conclusion in the circumstances; **s229(4)**. Hence the two-strikes idea remains in part, with a statutory exception clause to make it Convention-compliant.

13. It seems inevitable that there will be a significant increase in indeterminate sentenced prisoners in the very near future.

Chapter 7 – The effect of life sentences

Sections 269 to 277 and Schedule 21

14. The regime for the fixing of tariffs for those convicted of murder has changed considerably in the last few years. It began with the decision of the European Court in *T. v. UK; V.v.UK* (2000) EHRR 121, the Jamie Bolger case that the Home Secretary's power to set the tariff in cases involving murder committed by those aged under 18 at the time of the killing contravened the Article 6 right to a fair trial. Then in *Anderson v. Sect. of State for the Home Dept* [2003] 1 AC 837 the House of Lords came to the same decision in respect of the setting of the tariff for those aged over 18. In the meantime the Sentencing Advisory Panel and the Lord Chief Justice had been hard at work devising an alternative way of setting the tariff. In a practice direction issued in May 2002 *Practice Statement (Crime; Life Sentences)* [2002] 2 Cr. App. R. 533 the normal starting point was fixed at 12 years with a higher starting point of 15 to 16 years in exceptional cases.

15. The changes made in s. 269 and Sch 21 which have in fact been in force since December 2003 are substantial. Section 269 applies only to life sentences for murder, hence the reference in paragraph 1 to "where the sentence is fixed by law". By s. 269 (5) the court "when considering the seriousness of the offence...must have regard to the general principles set out in Schedule 21." Not only are there differences between the categories of offences but the minimum terms have been increased by in some cases about double the previous tariff. The three starting points set out in Sch. 21 are now a "whole life tariff" (para. 4), 30 years (para. 5) or 15 years (para. 6) with a 12 year starting point for those under

18 years of age (para. 7). Once the starting point has been chosen the final sentence will then be determined according to the aggravating circumstances (para. 10) or mitigating circumstances (para.11). Whilst it is true that the starting points are just that, starting points and they do not fix mandatory tariffs s.270 requires a judge to state which of the starting points in Sch 21 he or she has chosen and the reasons for doing so, and if the court departs from the starting point reasons for that decision must also be given.

16. One concern caused by the enormous hike in sentences for murder is that there is now a very large gap between the sentence for murder as compared to manslaughter and attempted murder. It seems likely therefore than sentences for these offences will rise to fill the gap.

17. Section 272 provides that where the Attorney-General refers a murder case to the Court of Appeal on the basis that the minimum term set by the court was unduly lenient, the court “shall not ...make any allowance for the fact that the person to whom it relates is being sentenced for a second time.”

Chapter 6 - Release on Licence

A. Release regimes

18. The old rules relating to release regimes derive from the **CJA 1991**. There are still a handful of ‘existing prisoners’ who pre-date the coming into force of that Act (1 October 1992), and are subject to transitional provisions under **Schedule 12** of the 1991 Act. It would only confuse matters to deal with these transitional provisions between ‘very old’, and ‘old’ rules and so an awareness that these provisions exist, and where they are, should be enough for practitioners.

19. Under the old rules there are three release regimes for determinate sentence prisoners;
- a. Short term prisoners serving less than 12 months,
 - b. Short term prisoners serving between 12 months and less than 4 years,
 - c. Long term prisoners serving 4 years and more.
20. Prisoners in the first category (Automatic Unconditional Release; AUR) are entitled to release unconditionally at the halfway stage of their sentence (that is, without licence); **s33(1)(a), CJA 1991**. The prisoner remains at risk of return to prison for the remaining part of the sentence if he/she commits a further offence before the ‘Sentence Expiry Date’ (SED). AUR prisoners are eligible for earlier release on Home Detention Curfew (HDC) if they are serving 3 months or more. The HDC scheme will be dealt with in detail later in the course.
21. Prisoners in the second category (Automatic Conditional Release; ACR) are entitled to release at the halfway stage of the sentence; **s33 (1) (b)**, and possibly earlier under HDC. The prisoner is on licence until the three-quarter point of the sentence (or the SED, for some sex offenders for whom the court ordered an extended licence until the SED), and is therefore subject to administrative recall during this period, pursuant to **Section 39, CJA 1991**, and is at risk of being recalled to prison under **s116** if convicted of another offence during the period from release on licence until the SED.
22. Prisoners in the third category (Discretionary Conditional Release; DCR) are eligible for release on parole at the halfway stage; **s35(1)**, and the decision rests with the Parole Board (**Parole Board (Transfer of Functions) Order 1998**), save for prisoners serving 15 years or more where the Secretary of State makes the final decision. This 15 year plus distinction was recently challenged on the basis that **Article 5(1)** was engaged and the difference in

treatment of those serving between 4 years and less than 15 years, and 15 years plus, was discriminatory within **Article 14; R(Clift) v SSHD [2004] EWCA Civ 514**. The court held that **Article 5** was engaged but the scheme did not breach **Article 14** because those serving 15 years plus would have been convicted of very serious offences over which the Secretary of State was entitled to retain a residual discretion.

23. When dealing with the 2003 Act talk of ‘early release’ from sentence is no longer appropriate because the whole philosophy behind release has changed to one where the offender serves part of the sentence in custody and the whole of the remainder on licence in the community.

24. Under the new **CJA 2003** rules, applicable only to offences committed after commencement of the relevant sections, there are significant changes. Plainly the ‘custody plus’ and ‘intermittent custody’ provisions will lead to a wholly different release scheme for sentences under 12 months, and such prisoners will all be released on licence and under supervision. But ‘Custody plus’ is not yet in force, and ‘intermittent custody’ only partially so, and so the 1991 Act will remain the relevant provision in respect to release for those serving less than 12 months.

25. The distinction between short term and long term prisoners is abolished for offences committed on or after 4 April 2005, and all ‘fixed term’ prisoners (except ‘extended sentence’ prisoners; see below) will be released at half time, but on licence until the sentence expiry date (SED), rather than the three-quarter point. **Section 116, PCC(S) A 2000** is repealed, from that date. Confusingly, the old rules apply for offences committed pre-4 April 2005, and **s39** recall and **s116** orders are retained for such offences, even though they are otherwise repealed.

26. There is no reason in principle why prisoners already serving, and offenders sentenced after 4 April 2005 for offences committed before that date, could not have been subject to the new release rules, but that is not what the Secretary of State has provided for in the secondary legislation (commencement and transitional provision **SI**s). The result will be that offenders sentenced to identical sentences on the same day by the same judge will serve significantly different terms dependent on which side of midnight on 3 April 2005 they committed their offence. Consider two robbers. One commits a robbery on 3 April 2005 and gets 6 years. He is eligible for release at halfway, but only entitled to release at the two-thirds stage, and may not be released until he has served 4 years. The other commits his robbery on 4 April and also gets 6 years. He serves half. But the licence of robber A who might have served a year longer only lasts until the three-quarter stage (4 years 6 months), whilst the licence for robber B lasts until the expiry of the 6 years.

27. The HDC scheme is largely reproduced in the new regime (see s.246, 250 (5) and s.253) and still allows prisoners to be released earlier than the halfway stage of the sentence. The Parole Board will have no further role in the initial release of 'fixed term' prisoners, save for 'extended sentence' prisoners. The focus of the Parole Board involvement will shift to recall.

28. New 'extended sentences' have been dealt with above. These prisoners are ineligible for HDC, and the Parole Board may only direct release if satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined; **s247**. If not released they serve the full custodial term, and the licence lasts until the expiry of the extended term; **s249**.

B. Remand time

29. For offenders under the old rules, the sentencer did not have to deal with allowable remand time, as this was dealt with pursuant to **Section 67, Criminal Justice Act 1967**. This has always been a difficult area, and the courts have made a number of erroneous decisions which have had to be corrected by later litigation. Nevertheless the remand time position has been reasonably settled for the last few years with a basic principle that the number of remand days should count against any future sentence arising out of the same facts or circumstances, but should count only once, and not at all where the prisoner is concurrently serving a sentence, for example; **R v Brockhill Prison, ex parte Evans [1997] QB 443**.
30. The **s67, CJA 1967** approach had the advantage of putting the onus for the calculation on the person who was legally liable for ensuring that the prisoner served the correct amount of days and no more; usually the prison governor. Therefore one important task of the prison administration was to collate the police days and remand time information, as soon as possible after sentence. For reasons which are not easy to understand, the executive decided that this was a function which should be moved to the sentencing process, and **Section 9, Crime (Sentences) Act 1997** was enacted. This would have made the judge order a number of the remand days served to count against the sentence, but the section was never brought into force. Instead the provision was consolidated into **s87, Powers of Criminal Courts (Sentencing) Act 2000**, but neither has this provision been brought into force.
31. Third time unlucky? By **s240, CJA 2003** the sentencing judge has to order a specific number of remand days to count against the sentence, and where this is less than the total number served he must give reasons. Unfortunately for judges they are required to state the total number of remand days, and the number to be allowed to be set against the sentence, and not a general assertion that all (or, for example, half) the days are to count. It is difficult

to view this provision as anything other than a recipe for disaster in the light of the difficulties encountered by the previous legislation. At least with the old regime the prisoner or his representatives could correspond with the prison authorities in order to get a mistake rectified. Now, every mistake will have to be rectified by the Court of Appeal, unless spotted within the 'slip-rule' time limit of 28 days from sentence, when the judge still has jurisdiction.

32. It is difficult to envisage the relevant information being available to the judge at sentencing, which does not only mean the actual number of days served on remand, but other relevant factors such as whether the offender was serving any other sentence, or was concurrently on remand for other matters, subject to a licence recall. Frequently this type of information has been missed in the past (particularly in respect to licence recall periods which are relevant to **s116, PCC(S) A 2000** orders; **R v Stocker [2003] Cr. App. R. (S) 54, CA**). Even when it wasn't missed counsel and judge frequently failed to understand the provisions.

33. It is of note that days in police custody are now not allowable as remand days; **s242 (2)**, but the fact that there is detention concurrent to the remand (for example because the offender is serving another sentence, recall, or immigration detention) does not preclude the days being ordered to count against the sentence; **s240(2)(b)**. Likewise days spent in custody abroad awaiting extradition are potentially allowable; **s243 (2)**.

34. It should be noted that the Home Office intend to produce rules relating to how judges should approach the allowing of remand time, pursuant to **s240 (4) (a)**. It is suspected that judges would have gained more benefit had the rules been drafted before commencement. Or maybe not.

35. It seems inevitable that despite the fact that the prison population has recently exceeded all previous records that the consequences of the new sentencing provisions will be a further rise in the prison population.

Mark George
Garden Court North

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I should like to express my thanks to my colleague in chambers Pete Weatherby for allowing me to use material written by him in preparing this lecture.