

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 4 – Sentencing

Prisoners on early release

Section 85 – Sentencing under the 1995 Act

220. **Section 85** of the Act inserts a new section 200A into the 1995 Act. New section 200A(1) of the 1995 Act provides that when the court is dealing with a person who has been found to have committed an offence that is capable of being punishable with imprisonment (except where the offence is such that the court is required to impose a life sentence), the court must so far as is reasonably practicable ascertain whether the person was on early release from a previous sentence at the time the offence was committed.
221. Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”), Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003 provide for the operation of release from custody of a prisoner prior to the end of a prisoner’s sentence. The operation of these provisions is commonly known as “early release” arrangements. For the purposes of new section 200A, new section 200A(3) provides that a person is on early release if they are not in custody as a result of the operation of Part I of the 1993 Act, Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003.
222. Section 16 of the 1993 Act provides the court with a power to be able to punish a person who commits an offence while on early release. This power is separate and additional to the normal powers of the court to sentence the person for having committed the offence. These powers are commonly known as section 16 orders and can be seen as a punishment on a person for having abused the trust placed in them by committing an offence while on early release.
223. New section 200A(2) provides that where the court has determined under new section 200A(1) that a person was on early release at the time the offence was committed, the court must consider making a section 16 order.
224. New section 200A(2) also provides that in the case where the court dealing with the offence is inferior to the court which imposed the previous sentence from which the person was released early, an inferior court must consider making a reference to the court which imposed the previous sentence so that they can consider making a section 16 order. This is subject to the new powers being given to inferior courts to make section 16 orders contained in section 73(4) of the Act.

Section 86 – Sentencing under the 1993 Act

225. Where an offence (“the new offence”) has been committed while a person was on early release, section 16(2) of the 1993 Act provides that a Scottish court may, instead of

*These notes relate to the Criminal Justice (Scotland) Act 2016
(asp 1) which received Royal Assent on 13 January 2016*

or in addition to imposing a sentence for plea or finding of guilt, order that a person may be returned to prison for a period of time. This period can be up to a maximum length equal to the period of time between the date on which the new offence was committed and the date of the expiry of their previous sentence. Section 16(2)(b) of the 1993 Act provides that where the court dealing with the new offence is inferior to the court which imposed the sentence from which the person was released early, the inferior court cannot directly impose a section 16 order and can only refer the case to the higher court for consideration to be given as to whether a section 16 order should be imposed.

226. [Section 86\(2\)](#) of the Act adjusts section 16(1) of the 1993 Act so that prisoners released early under Part 12 of the Criminal Justice Act 2003 can have section 16 orders imposed upon them.
227. [Section 86\(4\)](#) of the Act inserts new section 16(2A) into the 1993 Act. New section 16(2A) provides new discretion for courts dealing with persons who have committed offences while on early release from a previous sentence imposed by a higher court. The effect of the new discretion is that inferior courts will be able to consider making a section 16 order in such cases.
228. The powers of inferior courts to impose section 16 orders are restricted to those cases where the maximum length of a section 16 order does not exceed the sentencing powers of the court in respect of common law offences. Section 7(6) of the 1995 Act provides that a Justice of the Peace court can impose a custodial sentence for common law offences of up to 60 days. Section 5(2) of the 1995 Act provides a sheriff summary court can impose a custodial sentence for a common law offence of up to 12 months. Section 3(3) of the 1995 Act provides a sheriff solemn court can impose a custodial sentence for a common law offence of up to 5 years.
229. New section 16(2A)(b)(i) provides that a Justice of the Peace court will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 60 days.
230. New section 16(2A)(b)(ii) provides that a sheriff court sitting summarily (i.e. without a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 12 months.
231. New section 16(2A)(b)(iii) provides that a sheriff court sitting as a court of solemn jurisdiction (i.e. with a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 5 years.
232. [Section 86\(3\)](#) makes consequential changes to section 16(2) reflecting the insertion of new section 16(2A) into the 1993 Act.