

CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) ACT 2007

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 2 - Confinement and Release of Prisoners Chapter 2

Confinement, Review and Release of Prisoners

Custody-only prisoners

Section 5 - Release on completion of sentence

29. This section provides that a custody-only prisoner (i.e. a prisoner sentenced to a term of less than 15 days) will spend the entire sentence in prison and then be released unconditionally.

Custody and community prisoners

Section 6 - Setting of custody part

30. This section describes the arrangements for setting the custody part of a custody and community sentence. This is a sentence for a term of 15 days or more. Subsection (2) provides that, for custody and community sentences, the court must make an order specifying the custody part. Subsection (3) defines the custody part as being the part of the sentence which satisfies the requirements for retribution (or punishment) and deterrence ignoring any period of confinement which may be necessary for the protection of the public since that is already a matter for the court to consider when setting the overall sentence. The decision on whether the prisoner should be released at the expiry of the custody part will depend on the assessment of the risk of serious harm posed and, if necessary, a final decision will be taken by the Parole Board for Scotland.
31. Subsection (4) provides that the custody part will be a minimum of one half of the overall sentence. However, subsection (5) enables the court to specify a greater proportion of the sentence as the custody part taking into account the matters mentioned in subsection (6), namely:
- the seriousness of the offence or of the offence combined with other offences of which the person is being convicted of on the same indictment or complaint,
 - the fact that the offence was committed while still serving a sentence of imprisonment for a previous offence; and
 - any previous convictions.

Subsection (7) prevents the court from setting a custody part in excess of three-quarters of the sentence. Subsection (8) requires the court to specify the custody part as a period

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of time e.g. 2 years and 6 months. Subsection (9) requires that where a custody part would be expressed as a period including a fraction of a day, that it be rounded up to a whole day (with the community part of the sentence reducing respectively). Subsection (10) provides that when setting a custody part in excess of 50%, the court must explain its reasons for doing so in open court. Subsection (11) provides that the custody part forms part of the sentence for appeal purposes.

Section 7 - Power to amend section 6(4)

32. Section 7 gives the Scottish Ministers the power to amend, by order, the minimum custody part specified in section 6(4)(a).

Section 8 – Provision of information by court

33. Section 8 requires a court to produce a report when imposing custody and community sentence. In terms of subsection (2), the court must provide the Scottish Ministers with information about the person and the circumstances of the case as soon as is reasonably practicable. Subsection (3) provides that the court provide the information in a format it deems appropriate.

Section 9 - Joint arrangements between Scottish Ministers and local authorities

34. Subsections (1) and (2) require joint working arrangements to be put in place between the Scottish Ministers and local authorities in relation the assessment and management of the risks posed by custody and community prisoners. The Scottish Ministers and each local authority shall jointly assess whether an individual prisoner is likely to cause serious harm to members of the public if he or she were to be released on community licence on the expiry of the custody part of the sentence.
35. Subsection (4) defines the appropriate local authority as either the one in which the offender resided immediately prior to being sentenced or the one the offender intends to reside in upon beginning the community part of his or her sentence on licence. Subsection (5) provides that in the event of the two authorities being different they can agree between them which one should carry out the functions conferred on them under this section or section 31(4) (which also confers a function on the Scottish Ministers and local authorities to work together).

Section 10 - Review by Scottish Ministers

36. This section provides that the Scottish Ministers must determine, before the expiry of the custody part of the sentence, whether or not a custody and community prisoner is likely to cause serious harm to members of the public if he or she were released on community licence.

Section 11 - Consequences of review

37. This section requires that where the Scottish Ministers have assessed that a prisoner would not be likely to cause serious harm to the public if released then he or she must be released on community licence on the expiry of the custody part of the sentence (this is done without the prisoner's case being referred to the Parole Board). Where a prisoner has been assessed as likely to cause serious harm to the public, subsection (3) requires the Scottish Ministers to refer his or her case to the Parole Board.

Section 12 - Review by Parole Board

38. This section places a duty on the Parole Board to review the case of a prisoner, referred to it by the Scottish Ministers under section 11(3), before the custody part of the prisoner's sentence expires.

Section 13 – Release on community licence following review by Parole Board

39. This section provides that where the Parole Board has determined that a prisoner is not likely to cause serious harm to the public if released when the court-imposed custody part of the sentence expires or after a further review by the Board, the Board shall direct that the prisoner be released on community licence and shall specify the conditions to be included in the licence. Subsection (3) provides that where the Parole Board has made such a direction, the Scottish Ministers must release the prisoner on a community licence. In the case of a determination to release after the first referral by the Scottish Ministers, subsection (4) obliges the Scottish Ministers to give effect to the Parole Board's direction by releasing the prisoner on the expiry of the custody part of the sentence.

Section 14 - Determination that section 10(2) applicable: consequences

40. This section applies where the Parole Board has determined, as a result of an initial referral or of a further review, that a prisoner is likely to cause serious harm to the public on release. Subsection (2) requires that the Parole Board give its reasons in writing.
41. Subsection (3) provides that if, on the day of determination, less than 4 months of the prisoner's sentence remains before reaching the three-quarters point of the sentence, the prisoner must be confined until that point and the Parole Board must specify conditions to be included on the prisoner's community licence.
42. Subsection (4) provides that if, on the day of determination, between 4 months and 2 years remain to be served before reaching the three-quarters point, the Parole Board may fix a date for next considering the prisoner's case during the period specified in subsection (5). Subsection (5) provides that the period begins with the day that falls 4 months after the date of the determination and ends at the three-quarters point. Subsection (6) provides that if the Parole Board decides not to hold another hearing the prisoner must be confined until the three-quarters point and the Parole Board must set a date falling within the period provided for at subsection (5) in order to specify conditions to be included on the prisoner's community licence.
43. Subsection (7) provides that if, on the day of determination, more than 2 years remain before the three-quarters point, the Parole Board must fix a date for when it will next consider the prisoner's case. This must fall within the period provided for at subsection (8), which begins with the day that falls 4 months after the date of the determination and before the second anniversary of the determination.
44. Subsection (9) provides that the "three-quarters" point is the day on which the prisoner will have served three-quarters of his sentence.

Section 15 - Prisoner's right to request early consideration by Parole Board

45. Section 15 provides that a prisoner may request earlier consideration of his/her case by the Parole Board to that fixed under section 14(4) or (7). Subsection (4) also enables a prisoner to request that a date be fixed for next considering his or her case where the Parole Board has not fixed a date under section 14(4). This section applies to those offenders who have been detained in custody following a review by the Parole Board.

Section 16 - Referral to Parole Board for the purposes of specifying conditions

46. Section 16 requires Scottish Ministers before the date fixed by the Board under section 14(6)(b) to refer cases to the Parole Board to enable it to set community licence conditions. This refers to those offenders with between 4 months and 2 years to serve before reaching the three-quarters point and for whom the Board had directed they remain in custody up to the three-quarters point.

Section 17 - Further referral to Parole Board

47. This section applies where the Parole Board has fixed a date under sections 14(4) or (7) to determine whether or not the prisoner would cause the public serious harm if not confined. Subsection (2) provides that the Scottish Ministers must refer the prisoner's case to the Parole Board before that date and subsection (3) requires the Parole Board to determine whether or not the prisoner would be likely to cause serious harm to the public if not confined.

Section 18 - Cases where custody part specified as three-quarters of prisoner's sentence

48. Subsection (1) provides that this section applies to custody and community prisoners whose custody part has been set at three-quarters of the overall sentence by the court. Subsection (2), by disapplying section 10(1) provides that there is no requirement for Scottish Ministers to determine whether or not the prisoner presents a risk of serious harm to the public prior to the end of the custody part with a view to referring the case to the Parole Board. Subsection (3) provides, however, that Scottish Ministers must, before the expiry of the custody part, refer the prisoner's case to the Board and that the Board must specify the conditions to be included on the prisoner's community licence.

Section 19 - Release after three-quarters of sentence served

49. Subsection (1) provides that the Scottish Ministers must release the prisoner on a community licence once three-quarters of the sentence have been served. Subsection (2) provides that the obligation to release at the three-quarter point does not apply in the case of an offender who has been recalled to custody in consequence of the revocation of a community licence by virtue of section 37(1) or (4) of the Act.

Life Prisoners

Section 20 - Setting of punishment part

50. This section sets out the provisions for setting the punishment part of a life sentence. The period will be specified in an order made by the court. Subsection (1) provides that this section applies where the court imposes on a person a life sentence. Subsection (2) requires the court to specify the punishment part in an order after imposing the sentence. Subsection (3) defines the punishment part as being that part of the sentence which, taking into account certain specified matters, the court considers appropriate to satisfy the requirements for retribution and deterrence but ignoring any period of confinement that the court feels may be necessary for protection of the public. It is only once this period has been served in full that the offender can be released on life licence, but this will only happen following a direction from the Parole Board, as explained below.
51. Subsection (4) details the matters the court must take account of when setting a punishment part for someone with a mandatory life sentence (for murder), namely
- the seriousness of the offence, or of the offence combined with other offences of which the person is convicted on the same indictment;
 - any previous convictions;
 - where appropriate, the timing of any guilty plea;

Subsection (5) deals with the relevant matters for those with a discretionary life sentence (for offence other than murder) or an order for lifelong restriction. They are:

- the determinate period of imprisonment the court considers would have been appropriate had the court not imposed a discretionary life sentence or an order for lifelong restriction; and

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- the part of that period of imprisonment which the court would have specified as the custody part, by reference to the matters set out in section 6(4)
52. Subsections (6), (7) and (8) provide that the punishment part, which must be expressed in years and months, may exceed the person's life expectancy, and forms part of the person's sentence for the purposes of any appeal or review.

Section 21 - Referral to Parole Board

53. This section requires the Scottish Ministers to refer a life prisoner's case to the Parole Board before the expiry of the punishment part.

Section 22 - Review by Parole Board

54. This section requires the Parole Board, on referral of the case by the Scottish Ministers under section 21, to determine before the expiry of the punishment part of the sentence whether or not the life prisoner, if not confined, would be likely to cause serious harm to the public.

Section 23 - Release on life licence following review by Parole Board

55. Where the Parole Board is satisfied (either at the first review before the punishment of the sentence expires or at a subsequent review) that it is no longer necessary to confine a life prisoner for the protection of the public, it must direct the Scottish Ministers to release him or her on life licence and must specify conditions to be included in the licence. Where the direction is given at the first review before the punishment part expires, the Scottish Ministers are obliged to give effect to that direction on the expiry of the punishment part. Subsection (3) provides that where the Parole Board has directed that a life prisoner be released, the Scottish Ministers must release the prisoner on a life licence.

Section 24 - Determination that section 22(3) applicable: consequences

56. This section provides that where the Parole Board is satisfied that it is necessary to continue to confine a life prisoner for the protection of the public, it must give the prisoner reasons in writing and fix a date for a further review of the case. Subsection (3) provides that this must be within the period beginning 4 months after the day of the determination and ending immediately before the second anniversary of the determination. Subsection (4) provides that where the Parole Board has set a date for further review under subsection (2)(b), subsection (5) gives the Parole Board the discretion of replacing that date with an earlier one if the prisoner requests this.

Section 25 - Further referral to Parole Board

57. This section provides that where the Parole Board fixes a date under section 24(2)(b) the Scottish Ministers must, subject to section 26 (which is explained below), refer the case before that date to allow the Board to consider the case. The Board is to determine whether the prisoner would be likely to cause the public serious harm if not confined.

Referral to Parole Board: postponement

Section 26 - Referral to Parole Board: postponement

58. Subsections (1) and (2) require the Parole Board to postpone the date which it would otherwise have fixed for the review of a prisoner's case where he or she receives a subsequent sentence of imprisonment after the case has been referred to the Board but before the Board has fixed a date for considering the referral. This applies where the prisoner would not be eligible for release from the subsequent sentence on the date

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which would otherwise have been fixed. In such circumstances, subsection (2) obliges the Board to fix a different date.

59. Subsections (3) and (4) deal with the situation in which the Board has fixed a date to review a particular case and the prisoner subsequently receives a further sentence from which he or she would not be eligible for release at that date. In this event, the Board must fix a different date for considering the case.
60. Subsection (5) provides that, in either of these scenarios, the date fixed must be the date which would have been set if the prisoner were only subject to the subsequent sentence. It replaces any other dates fixed previously.

Compassionate release on licence

Section 27 - Compassionate release on licence

61. Subsection (1) enables the Scottish Ministers to release prisoners on licence at any time if they are satisfied there are compassionate grounds for doing so.
62. Subsections (2) and (3) require the Scottish Ministers, before releasing a prisoner other than a custody-only prisoner under this section, to consult the Parole Board, unless it is impracticable to do so.