

# CRIMINAL JUSTICE (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

**THE ACT THE ACT IS IN 12 PARTS.**

### **Part 1 – Protection of the Public at Large**

#### **Risk assessment and order for lifelong restriction; Disposal in case of insanity**

##### ***Sections 1 and 2 and schedule 1 – Risk assessment and order for lifelong restriction; Disposal of case where accused found to be insane***

1. **Sections 1 and 2** amend Parts XI and VI respectively of the Criminal Procedure (Scotland) Act 1995 to:
  - provide a new sentence to be called the order for lifelong restriction (OLR);
  - define the offences which may attract the new disposal;
  - provide the process for assessing the risk the offender's being at liberty presents to the public at large and consequent eligibility for the new disposal;
  - provide for arrangements for dealing with an offender who may have a mental disorder;
  - make an interim hospital order available to the court as an interim disposal in cases of insanity; and
  - remove the mandatory restriction requirement for persons dealt with on the grounds of insanity where the charge is murder.
2. **Schedule 1** provides for consequential amendments to the Prisoners and Criminal Proceedings (Scotland) Act 1993 concerning the release on licence of offenders sentenced to an OLR and to the Criminal Procedure (Scotland) Act 1995 in relation to the notification of previous conviction information, the accused's right of appeal against sentence and the power of the sheriff to remit cases to the High Court for sentencing.
3. **Section 1** amends the 1995 Act by inserting new sections 210B to 210H. It introduces a new sentence for the lifetime control of serious violent and sexual offenders who present a continuing risk to the public (the order for lifelong restriction (OLR)) and sets out the process by which such a sentence may be imposed.
4. **Section 210B** defines the offences for which the OLR may be imposed and prescribes that the disposal is available to the High Court only, although offenders can be remitted for sentence from the sheriff court where the offence falls within the relevant definition and it appears to the sheriff that the offender may meet the statutory criteria in the new section 210E. The relevant offences, excluding murder, are:
  - a sexual offence (as defined by section 210A of the 1995 Act);
  - a violent offence (as defined by section 210A of the 1995 Act);

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- an offence which endangers life; or
  - an offence which by its nature or circumstance indicates in the opinion of the Court a propensity to commit any of the preceding offences.
5. “Sexual offence” is defined in section 210A of the 1995 Act as:
- (i) rape;
  - (ii) clandestine injury to women;
  - (iii) abduction of a woman or girl with intent to rape or ravish;
  - (iv) assault with intent to rape or ravish;
  - (v) indecent assault;
  - (vi) lewd, indecent or libidinous behaviour or practices;
  - (vii) shameless indecency;
  - (viii) sodomy;
  - (ix) an offence under section 170 of the Customs and Excise Management Act 1979 in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876, but only where the prohibited goods include indecent photographs of persons;
  - (x) an offence under section 52 of the Civic Government (Scotland) Act 1982 (taking and distribution of indecent images of children);
  - (xi) an offence under section 52A of that Act (possession of indecent images of children);
  - (xii) an offence under section 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 (incest);
  - (xiii) an offence under section 2 of that Act (intercourse with a stepchild);
  - (xiv) an offence under section 3 of that Act (intercourse with child under 16 by person in position of trust);
  - (xv) an offence under section 5 of that Act (unlawful intercourse with girl under 16);
  - (xvi) an offence under section 6 of that Act (indecent behaviour towards girl between 12 and 16);
  - (xvii) an offence under section 8 of that Act (abduction of girl under 18 for purposes of unlawful intercourse);
  - (xviii) an offence under section 10 of that Act (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16);
  - (xix) an offence under subsection (5) of section 13 of that Act (homosexual offences);  
and
  - (xx) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (abuse of position of trust).
6. “Violent offence” is defined in section 210A of the 1995 Act as “any offence (other than an offence which is a sexual offence within the meaning of this section) inferring personal violence”.

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7. Section 210B also deals with the circumstances in which the court may make a new order called a risk assessment order (RAO). This is an order to be made by the court, either following a motion by the prosecutor or at its own instance.
8. Section 210B(2) provides that where an offender is convicted of an offence defined at 210B(1) and where it appears that the risk criteria set out in the new section 210E may be met, and provided that the prosecution has given prior notice to the accused of the intention to make a motion to the court, the prosecutor will ask the court to make a RAO. Alternatively, the court may make a RAO of its own accord where it is satisfied that the same statutory tests may be met. The court cannot make a RAO if the offender is already subject to an OLR or if it is satisfied that it is appropriate to make an interim hospital order under 210D(1).
9. The risk assessment order has the effect of adjourning the case for the purpose of an assessment to be carried out under section 210B(3) as to what risk is posed to the public by the offender being at liberty and for a report (a risk assessment report or “RAR”) of that assessment to be prepared and submitted to the court. The RAR is to be prepared by a person accredited for that purpose by the Risk Management Authority and in a manner which will also be accredited by the RMA. The accreditation procedures are set out in section 11.
10. Section 210B(3) further provides that the RAO is authority for the offender to be taken to a place specified in that order and remanded in custody there pending the preparation of the RAR and a date being fixed for the sentencing hearing.
11. Section 210B(4) provides that when the risk assessment order is made, the case will be adjourned for no more than 90 days for the assessment to be carried out and the risk assessment report prepared. Under section 210B(5) if cause is shown, the court may extend the adjournment for a further period not exceeding 90 days. Where, because of circumstances outwith the control of the risk assessor, the assessor has been unable to complete the report within the period allowed by the extension the court may exceptionally grant a further extension for such period as appears to it to be appropriate. There is no right of appeal against the granting or refusal to grant a risk assessment order.
12. Section 210C deals with the risk assessment report (RAR). It provides that in preparing the RAR the assessor may take into account any allegation that the offender has engaged in criminal behaviour whether or not it resulted in prosecution and acquittal. Where the assessor takes such allegations into account in preparing the RAR each allegation must be listed in the report along with details of any additional evidence supporting the allegation. The assessor must also include in the risk assessment report an opinion as to whether the risk mentioned at 210B(3)(a) is high, medium or low and explain the extent to which any allegation and evidence has influenced that opinion. In reaching that assessment, the assessor must have regard to any relevant guidelines or standards issued by the Risk Management Authority.
13. Section 210C sets out the process for submitting the RAR and any accompanying documents to the court and to the other parties including the offender. On receipt of the RAR, the court must set a date for the sentencing hearing.
14. Section 210C also gives the offender a right to instruct a risk assessment report to be prepared at the same time as the RAR is being prepared by the court appointed risk assessor. The report instituted by the offender will be subject to the same conditions for completion and extension as provided at 210B(5) in respect of the RAR being prepared by virtue of the RAO. Provision is made for this report to be submitted to the court and other parties in the same fashion as the RAR.
15. Section 210C provides for the offender to object to the content or findings of the risk assessment report. The form of the objection will be prescribed by Act of Adjournal (a statutory instrument made by the High Court). In pursuance of such an objection,

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the prosecutor and offender will be able to produce witnesses and examine them about the content or findings of the RAR or alternative report prepared at the instruction of the offender.

16. Section 210D deals with offenders who may meet the risk criteria and may be suffering from a mental disorder. The provisions will enable the court to get information on the nature of the offender's mental disorder and how that relates to the risk the offender's being at liberty presents to the safety of the public at large. To achieve this the court must, instead of making a RAO, make an interim hospital order (IHO), where it appears to the court that the offender may meet the risk criteria and also the criteria for an interim hospital order as set out in section 53(1) of the 1995 Act unless the offender is already subject to an order for lifelong restriction previously imposed.
17. Section 210D also provides that where an IHO is made, a report assessing the risk the individual presents to the public at large shall also be prepared by a person accredited for that purpose by the RMA and in a manner that will also be subject to RMA accreditation. The assessment of risk is in addition to any psychiatric or medical report that is required to be submitted to the court under the IHO provisions. The process for submitting a RAR and the information it may contain as set out in section 210C(1) to (3) and the procedure for objecting to its content or findings as set out in section 210C(6)(a) and (b)(i) apply equally to the assessment of risk under section 210D(2).
18. Section 210E sets out the risk criteria to be considered at the stage when the court is considering whether to make a RAO (whether following a motion by the prosecutor or of its own accord) or an interim hospital order and at the stage when imposing or considering a motion to impose an OLR. The criteria will be applied in these circumstances to cases tried before the High Court and to those remitted from the sheriff court for sentence.
19. Section 210F deals with the new sentence – the order for lifelong restriction (OLR). The section provides that the OLR is a sentence of imprisonment or detention for an indeterminate period.
20. The section sets out the circumstances where a court must impose an OLR. Where however the offender has a mental disorder and satisfies the requirements of section 58 of the 1995 Act and the court considers it appropriate to make a hospital order with restriction, section 58(8) will apply and the court will not have power to impose an OLR even if the offender is also high risk.
21. The prosecutor has the right of appeal against a refusal by the court to make an OLR on the grounds that, on the balance of probabilities, the risk criteria are met.
22. Section 210G clarifies the court's powers where following upon conviction for a serious violent or sexual offence falling within section 210B:
  - the court does not make a Risk Assessment Order (RAO) under new section 210B(2) or Interim Hospital Order (IHO) and assessment of risk under new section 210D(1) because it does not consider that the risk criteria may be met; or
  - the court considers that the risk criteria are met but a RAO or an IHO is not made because the person has an Order for Lifelong Restriction (OLR) already.
23. In these circumstances the court may deal with the case in any way that it considers appropriate.
24. Section 210G also provides that where following upon a RAO an offender is not given an OLR under section 210F because the court is not satisfied that the risk criteria are met, it may impose any competent disposal except a life sentence or detention without limit of time.
25. Section 210H requires a judge (including a sheriff where the case has been prosecuted on indictment in the sheriff court), following conviction for an offence of the type listed

in section 210B(1) (except murder), to prepare a report of the circumstances of the case including all information which the judge considers appropriate. This report will be done in writing as soon as practicable after the case is dealt with, unless a report has been called for under the provisions of section 21(4) of the Act (which deals with sexual offences and offences with a significant sexual element). The form of the report will be prescribed by Act of Adjournal. It is intended that such a report may be provided to and used by the assessor in preparing the RAR.

### ***Section 2 – Disposal of case where accused found to be insane***

26. **Section 2** amends section 57 of the 1995 Act which provides the disposals for cases where the accused is found insane. This is where the accused is acquitted on grounds of insanity at the time of the act (or omission) constituting the offence (section 54(6)), the accused is acquitted following an examination of the facts (section 55(3)) or, following an examination of the facts, the court concludes that there are no grounds for acquitting the accused (section 55(2)). In these circumstances, the court can at present dispose of the case in the following ways:
- “(a) make an order (which shall have the same effect as a hospital order) that the person be detained in such hospital as the court may specify;
  - (b) in addition to making an order under paragraph (a) above make an order (which shall have the same effect as a restriction order) that the person shall, without limit of time be subject to the special restrictions set out in section 62(1) of the 1984 Act;
  - (c) make an order (which shall have the same effect as a guardianship order) placing the person under the guardianship of a local authority or of a person approved by a local authority;
  - (d) make a supervision and treatment order (within the meaning of paragraph 1(1) of Schedule 4 to [the 1995] Act, or
  - (e) make no order
27. **Section 2** amends these provisions to add to the list of disposals a power for the court to make an interim hospital order (IHO) under section 53 of the 1995 Act. An IHO may be imposed by the court after it is satisfied, on the evidence of two medical practitioners, that the offender is suffering from a mental disorder that requires the offender to be remanded to the State Hospital or other appropriate hospital. Section 53 also sets in place the procedure to be followed for the imposition, renewal and cessation of an IHO.
28. **Section 2** replaces section 57(3) of the 1995 Act to provide that where an assessment following an IHO finds that an offender poses a high risk to the public and meets the criteria for compulsory detention, the court must impose a hospital order with restrictions.
29. The replacement removes the existing provisions which had the effect of requiring the court to make a hospital order and a restriction order where section 57(1) applied and the charge was murder even although the offender might not have a mental disorder. The effect of removing this provision is that where the charge is murder the court will have all the disposals under 57(2) available to it.

## **The Risk Management Authority**

### ***Sections 3 to 13 and schedule 2 – The Risk Management Authority***

30. **Sections 3 to 13** and schedule 2 provide for the establishment of a new authority to be known as the Risk Management Authority (RMA) and for this authority to be a public body. These sections also confer upon the RMA certain specific statutory functions in relation to the assessment and minimisation of risk posed to the public by offenders and certain accused persons.

31. Sections 3, 12 and 13 provide for the establishment of the RMA as a public body, and for the powers the RMA requires to operate as a public body and to discharge its functions in relation to the assessment and minimisation of risk. The sections also prescribe the RMA's duties in relation to account keeping and the production of annual reports. Schedule 2 makes provision concerning the constitution etc of the RMA.
32. Sections 4 to 11 set out the RMA's functions in relation to its broad remit of co-ordinating research and promulgating best practice in the field of risk assessment and the minimisation of risk and in playing a direct part in the management of high risk offenders for whom a risk management plan (RMP) is to be prepared. These functions are :
- to develop policy and carry out research in the field of assessment and management of risk posed by offenders;
  - to monitor research into and promote effective practice in the assessment and minimisation of risk by issuing guidelines and standards and to commission research and pilot schemes in this area;
  - to administer a scheme of accreditation and provide or secure education and training in relation to those professionals involved in the assessment and minimisation of risk;
  - to monitor risk management plans for certain classes of offender.

### ***Section 3 – The Risk Management Authority***

33. This section establishes the Risk Management Authority and provides that it will exercise the functions given to it by the Act and any other legislation to ensure effective risk assessment and the minimisation of risk. The section also defines risk as the risk the person being at liberty presents to the safety of the public at large, and covers a person convicted of an offence or a person disposed of by the court on the grounds of insanity.
34. Section 3 also introduces schedule 2, which deals with a number of matters concerning the structure and procedures of the RMA (as a public body). Schedule 2 provides for:
- the status of the new body;
  - the procedures for membership of the new body, including appointment, resignation and removal from office;
  - the procedure of the authority;
  - the arrangements for remuneration, allowances and pension for members of the authority;
  - the arrangements for the employment of staff and for their pensions, allowances and gratuities.

### ***Section 4 – Policy and research***

35. This section describes the various functions the RMA will be required to undertake in relation to its policy and research role. In relation to research, the RMA will be able to compile and keep under review research and developments in the field of risk assessment and risk minimisation, including information about how relevant services are provided in Scotland. The section also empowers the RMA to carry out its own research or commission or co-ordinate research and to publish the findings. The RMA will be able to carry out pilot schemes for the purposes of developing and improving risk assessment and minimisation methods and use the results of the research and pilots to promote effective practice throughout Scotland. This will be done through issuing standards and guidelines which are dealt with in section 5. As part of this

function the RMA will also be able to give appropriate advice and make appropriate recommendations to the Scottish Ministers.

### **Section 5 – Guidelines and standards**

36. This section enables the RMA (in pursuance of its policy and research function, prescribed by section 4) to produce, by means of guidelines, a common framework including standards within which those involved in the assessment and management of risk are to operate. The standards will be defined, approved and published by the RMA. The section also provides that those involved in the assessment and minimisation of risk must have regard to the RMA's guidelines and standards when exercising their relevant risk management functions. Practitioners involved in the field of risk assessment and the minimisation of risk may also be accredited for those purposes. This matter is dealt with in section 11.

### **Sections 6 to 9 – Risk management plans: preparation, further provision, implementation and review**

37. As explained above, the RMA has a specific function in relation to offenders for whom a risk management plan (RMP) is to be prepared. Initially this will be for those offenders who are sentenced to an order for lifelong restriction (OLR). However, the Act makes provision for the Scottish Ministers to make an order prescribing other categories of offenders for whom a RMP would have to be prepared. There is a statutory requirement for the authorities who have responsibilities in connection with the relevant offenders when in prison or released into the community on licence to prepare a RMP. The RMP will detail the role of those authorities involved with the offender in minimising the risk the offender's being at liberty presents to the safety of the public at large. The RMA has a specific function to approve and monitor the implementation of the RMP. The provisions dealing with the preparation of the RMP, its implementation and review and the RMA's function in relation to these matters are set out in sections 6 to 9.
38. **Section 6** requires that a RMP must be prepared for an offender who is sentenced to an OLR, and any other category of offender which the Scottish Ministers may, by order, prescribe. The types of offences and the process by which an offender will be assessed for an OLR, including the criteria against which his or her level of risk will be measured, are dealt with in section 1.
39. Before making an order prescribing any new category of offender for whom a RMP will be required, the Scottish Ministers must consult the RMA and any other person as considered appropriate.
40. This section also prescribes that the RMP must contain an assessment of risk, the measures to be taken to minimise this risk and how these will be co-ordinated. The form of the RMP is to be specified and published by the RMA, which may also provide guidance as appropriate on how the form should be prepared, implemented and reviewed. The authority preparing the RMP must use the published form.
41. The purpose of a RMP is to ensure that the risk the offender's being at liberty presents to the safety of the public at large (offender's risk) is properly managed on a multi-disciplinary basis and will detail the role of those authorities or bodies involved in managing the offender's risk. The RMP may place responsibility for implementing the RMP on any person who could reasonably be expected to assist with the minimisation of the offender's risk.
42. **Section 7** prescribes that "the body" who will be responsible for preparing the RMP will be known as the "lead authority".
43. The identity of the lead authority following conviction will depend on the age of the offender and where the offender is liable to be detained or imprisoned.

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44. There is no age limit on who may be sentenced to an OLR. If the offender is serving a sentence in prison or is being detained in a young offenders institution or is a child and is detained in some other establishment under section 208 of the Criminal Procedure (Scotland) Act 1995, the lead authority will be the Scottish Ministers. If the offender has a mental disorder and is detained in hospital under any of the provisions described in subsection (2) of section 7, the lead authority will be the State hospital or appropriate NHS authority.
45. This section also provides for a local authority to be the lead authority where the lead authority is not the Scottish Ministers or a hospital. In practice, the local authority will become the lead authority when the offender has been released from detention or imprisonment. Arrangements for transferring the lead from one authority to another, for example when an offender is released from detention or imprisonment are dealt with in section 9.
46. **Section 8** sets out the preparation process for the RMP. The initial RMP is to be prepared within 9 months of the offender being sentenced or detained in hospital, although the RMA can grant a reasonable extension where an appeal under subsection (7) is pending. The lead authority is to consult any person or authority upon which it is considering conferring functions in relation to the implementation of the RMP and any other appropriate person. Those consulted are under a duty to comply with reasonable requests.
47. This section also requires the lead authority to submit the RMP to the RMA for approval. The RMA may either approve the plan or reject it if it does not comply with the minimum standards set out in section 6(3) or any other guidelines and standards which the RMA have prepared. If, in rejecting the RMP, the RMA considers that the lead authority has disregarded minimum standards or any relevant guideline, standard or requirement produced by the RMA in relation to the preparation of RMPs, the RMA can give reasonable directions to the lead authority or any person named in the plan concerning the preparation of a revised plan. Those receiving such a direction are obliged to comply with any reasonable direction. Those receiving such a direction may appeal to the sheriff against such a direction on the grounds that it is unreasonable.
48. **Section 9** provides for the procedures for the implementation and review of RMPs. The lead authority and any other person having functions under the risk management plan are required to implement their respective responsibilities. If the RMA considers that the lead authority or other persons with duties under the plan are failing, without reasonable excuse, to implement the plan in accordance with those functions, the Authority may give directions to the lead authority or person concerned as to the implementation of the plan. The lead authority or relevant person is under a duty to comply with such a direction. Those receiving such a direction may appeal to the sheriff against such a direction on the grounds that it is unreasonable. The lead authority must report to the RMA annually on the implementation.
49. The section also provides a review process to be activated where there is likely to be a significant change in the offender's circumstances, for example, where the offender may be considered by the Parole Board for release on licence. Where a change is considered, the lead authority must review the RMP. If after review the lead authority considers that the current RMP is no longer suitable or is likely to become unsuitable then that authority must prepare a revised RMP and submit it to the RMA for approval within a period which the RMA may reasonably require. Where, following a review, the lead authority considers that it is no longer appropriate for it to continue as "lead" (for example where an offender is being released on licence), the responsibility will pass to a different lead authority as prescribed under section 7 and the new lead authority must prepare a revised RMP and have it approved by the RMA. The RMA's power to reject a RMP on the grounds that it does not meet agreed standards and issue directions apply equally to revised RMPs.



***Section 10 – Grants to local authorities in connection with risk management plans***

50. **Section 10** enables the Scottish Ministers to make specific grants to local authorities subject to such conditions as they consider appropriate to assist with the preparation and implementation of the RMP. Before making such a grant the Scottish Ministers are to consult local authorities and other persons as appropriate.
51. It is expected that local authorities will bear the cost of preparing and implementing RMPs from within existing budgets on the basis that they already have a statutory duty to provide appropriate services for these offenders. However the RMA will be able to make recommendations to the Scottish Ministers concerning the granting of specific funding where it appears to the Authority that this is required to ensure that a RMP can be prepared or implemented.

***Section 11 - Accreditation, education and training***

52. This section gives the RMA two roles. It enables the RMA to:
- administer any scheme set up by the Scottish Ministers for the purpose of accrediting the processes of assessing and monitoring risk and practitioners who work in the area of risk assessment and minimisation. The RMA's function in this respect extends to awarding, suspending or withdrawing accreditation;
  - carry out or commission relevant educational and training activities.
53. The section also empowers the Scottish Ministers to make regulations to establish appropriate accreditation schemes for the RMA to administer. The accreditation may cover any RMA-sponsored education or training and may also recognise other relevant experience or qualifications held. For example, the accreditation may recognise relevant qualification previously obtained, or obtained from a source other than the RMA. As respects the processes of assessing and minimising risk, the accreditation will provide recognition of the effectiveness of any method and practices which may be employed in that regard.

***Section 12 – Functions: supplementary***

54. This section makes the standard provisions required to enable the RMA to operate as a public body. In particular the RMA is empowered to acquire and dispose of land, enter into contracts, charge for goods and services and, with the consent of the Scottish Ministers, invest and borrow money. In addition it provides a power for the Scottish Ministers to direct the RMA in relation to the discharge of its functions.

***Section 13 – Accounts and annual reports***

55. This section provides for the standard account keeping and reporting procedures for a public body including the preparation and submission to the Scottish Ministers of annual accounts and annual reports. The Scottish Ministers must publish the RMA's annual reports and lay a copy before the Scottish Parliament.