

CRIMINAL JUSTICE AND COURTS ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Criminal Justice

Release and recall of prisoners

Section 7: Electronic monitoring following release on licence etc

156. *Section 7* makes provision for a mandatory electronic monitoring condition to apply to offenders released from custody on licence. The electronic monitoring condition may be for monitoring of compliance with other licence conditions or monitoring of whereabouts as a stand alone licence condition, or both. Under the legislation prior to the changes in this Act, contained in section 62 of the Criminal Justice and Court Services Act 2000, these conditions may be imposed but only on a discretionary, case by case, basis. In addition, by virtue of section 31 of the Crime (Sentences) Act 1997, conditions may only be attached to an indeterminate sentence prisoner's licence on the recommendation of the Parole Board.
157. *Subsection (2)* amends section 62 of the Criminal Justice and Court Services Act 2000 and provides that any electronic monitoring condition must also state who is responsible for the monitoring and gives the Secretary of State an order-making power, subject to the negative procedure, to specify a description of a person responsible for electronic monitoring.
158. *Subsection (3)* inserts new sections 62A and 62B into the Criminal Justice and Court Services Act 2000. Section 62A(1) provides for an order-making power, subject to the negative procedure, to allow the Secretary of State to provide that offenders released from custody on licence must be subject to compulsory electronic monitoring. Section 62A(2) allows for the Secretary of State to require electronic monitoring in particular cases and to specify the duration of the compulsory condition, which may be for a period shorter than the licence period. The period may be different for different groups of offenders (as provided for by section 76 of the Criminal Justice and Court Services Act 2000). Section 62A(3) allows for the Secretary of State to specify which offenders will be subject to electronic monitoring by reference to whoever is monitoring the offender. It also allows the Secretary of State to make provision by reference to whether a person specified in the order is satisfied of a matter. For example, it might refer to cases in which the Secretary of State is satisfied that the offender has a physical or mental health problem which renders the offender unsuitable for the licence condition, or cases in which a person is satisfied that it is impossible to make arrangements for the offender to recharge the battery in the tag. The Secretary of State may prescribe which offenders must be subject to compulsory electronic monitoring; for example, groups of offenders by type of offence, such as all burglars, or by type of sentence, such as all those serving an Extended Determinate Sentence.
159. New section 62A(4) has the effect that, if an offender is serving one of the specified sentences, a compulsory electronic monitoring condition cannot be applied

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to that person. The sentences are certain custodial sentences available for young offenders. Under these sentences, electronic monitoring will still be available but on a discretionary basis.

160. The use of data, including location data, gathered under an electronic monitoring condition (whether one imposed for the purpose of monitoring whereabouts or one imposed for the purpose of monitoring compliance) is subject to the requirements of the Data Protection Act 1998. Section 62B imposes a duty on the Secretary of State to issue a code of practice on the processing of such data (which will include retention, use and sharing of data).
161. *Subsection (4)* introduces Schedule 2 which contains a number of consequential provisions.
162. *Subsection (5)* applies the provisions to offenders released from custody on or after the day on which they are commenced.

Schedule 2: Electronic monitoring and licences etc: consequential provision

163. **Schedule 2** makes consequential amendments relating to the provisions in section 7. In particular, *paragraph 1* amends section 31 of the Crime (Sentences) Act 1997 to enable a compulsory electronic monitoring licence condition to be imposed on a life sentence prisoner without a recommendation or direction from the Parole Board.

Section 8: Recall adjudicators

164. **Section 8** provides a power for the Secretary of State to appoint “recall adjudicators” whose function is to review the detention of recalled determinate sentence prisoners. This function is currently performed by the Parole Board. This section removes the statutory requirements in the Criminal Justice Act 2003 (“2003 Act”) for the Secretary of State to refer determinate sentence recalled prisoners to the Parole Board and replaces references to the Board in that context with references to a “recall adjudicator”. The Secretary of State is able to appoint the Parole Board or any other person to be a recall adjudicator.
165. *Subsection (1)* inserts a new section in the 2003 Act after section 239. New section 239A provides for the Secretary of State to appoint and remunerate recall adjudicators to carry out all or some of the review functions for recalled determinate sentence prisoners. The Secretary of State’s power includes power to appoint people to carry out such functions only in a specified geographical area or only in relation to a specified type of case. Such functions have to be carried out in accordance with any guidance issued by the chief recall adjudicator as appointed by the Secretary of State. The Secretary of State is able to issue rules about proceedings of recall adjudicators. The rules will be made by statutory instrument subject to the negative procedure.
166. *Subsection (2)* confirms that the amendments of the 2003 Act in section 9 of the Act, which deal with the test for release after recall for determinate sentence prisoners, confer functions on recall adjudicators.
167. *Subsection (3)* introduces the new Schedule 3 which provides for further consequential changes to other enactments to reflect the appointment of recall adjudicators.
168. In particular, Schedule 3 amends:
 - *Mental Health Act 1983* – There is provision in section 50 of that Act under which Parole Board powers in respect of the release of prisoners may be disregarded in respect of prisoners subject to the Mental Health Act 1983. The same provision has been made in respect of recall adjudicators’ powers to direct the release of determinate sentence recalled prisoners. Similarly, section 74 of that Act makes references to the Parole Board and restricted patients subject to restriction directions. References to recall adjudicators have been added.

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- *Criminal Justice Act 2003* –
 - Section 250 (licence conditions) is amended to provide that, in respect of a prisoner serving an extended sentence, where the Parole Board directs the initial release the Board is responsible for setting and varying certain licence conditions (as now) but where a recall adjudicator directs release following recall, the adjudicator has those responsibilities in respect of the licence.
 - Section 260(2B) (early release from prison of extended sentence prisoners who are liable to be removed from the United Kingdom) provides that the Secretary of State’s power of removal applies whether or not the Parole Board has given a direction to release. Equivalent provision has been made in relation to recall adjudicators.
 - A definition of “recall adjudicator” has been added to section 268 (interpretation of Chapter 6 of Part 12).
 - For prisoners whose release is subject to the modifications in Schedule 20B of the 2003 Act (transitional provision for certain cases, including those originally dealt with under the Criminal Justice Act 1967 and the Criminal Justice Act 1991), similar amendments have been made in respect of the setting and varying of licence conditions and the early release of prisoners liable to be removed from the UK.
- *Domestic Violence, Crime and Victims Act 2004* – Schedule 9 to this Act has been amended so that recall adjudicators are listed as one of the authorities falling within the remit of the Commissioner for Victims and Witnesses, in the same way as the Parole Board.
- *Offender Management Act 2007* – Section 3(7)(a) (arrangements for the provision of probation services: risk of conflict of interest) has been amended to require the Secretary of State to have regard to the need to take reasonable steps to avoid a conflict of interest between the obligations of providers of probation services to provide assistance to recall adjudicators and their financial interests. Section 14 has also been amended to provide that the Secretary of State can disclose information to recall adjudicators for offender management purposes.
- *Coroners and Justice Act 2009* – The work of the Parole Board is covered by section 131 (annual report of Sentencing Council for England and Wales: effect of factors not related to sentencing). This has been amended to include reference to the work of recall adjudicators.
- *Equality Act 2010* – Schedule 19 lists the public authorities that are covered by the provisions of the Act, which includes the Parole Board. Recall adjudicators have been added to this list.

Section 9: Test for release after recall: determinate sentences

169. **Section 9** amends the provisions dealing with the recall and further release of prisoners in Chapter 6 of Part 12 of the Criminal Justice Act 2003. It adds to the public protection test, applicable prior to this Act, to include consideration of whether the offender is highly likely to breach their licence conditions if released. This test applies where the Secretary of State is determining whether a recalled prisoner is suitable for automatic release and, where they are subject to discretionary release, when the Secretary of State and recall adjudicators are considering re-release.
170. *Subsection (2)* inserts a new subsection (4A) into section 255A of the Criminal Justice Act 2003 to require the Secretary of State to consider the likelihood of further non-compliance with licence conditions when deciding on the appropriate type of recall for an offender, as well as whether they present a risk of serious harm to the public.

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171. *Subsection (3)* amends section 255B of that Act which deals with recalled offenders who are subject to automatic release after 28 days. *Subsection (3)(b)* inserts a new subsection (3A) in section 255B which provides that the Secretary of State must consider when exercising discretionary release powers whether it appears that the offender would be highly likely to breach a condition contained in their licence. This is in addition to the existing restriction based on risk of serious harm to the public.
172. Where a referral is made to a recall adjudicator to consider the offender's release before the end of the automatic release period, *subsection (3)(d)* inserts further subsections in section 255B – (4A), (4B) and (4C) – which set out the basis on which the adjudicator may consider release in these circumstances.
173. New subsection (4A) provides for the directions the recall adjudicator may make when determining the referral. New subsection (4B) reproduces the current public protection release test to be applied by the adjudicator when considering release. New subsection (4C) adds to that test by restricting the adjudicator's power to release where the adjudicator considers the offender would be highly likely to breach a condition contained in their licence if released.
174. *Subsection (3)(e)* replaces the current subsection (5) to make clear that the Secretary of State must give effect to any direction of the recall adjudicator to release.
175. *Subsection (4)* makes the same changes in respect of the discretion of the Secretary of State and recall adjudicators to release recalled offenders not subject to the automatic release provision in section 255B who are, instead, liable to be detained until the end of their sentence. It imposes a restriction on the exercise of the discretion where the prisoner would be highly likely to breach a condition contained in their licence if released by inserting new subsections (3A), (4A), (4B) and (4C) in section 255C of the Criminal Justice Act 2003 . These replicate the new subsections inserted in section 255B.
176. *Subsection (5)* repeals section 256 of the Criminal Justice Act 2003. Section 256 provides for how the Secretary of State and the Parole Board deal with referrals of recalled prisoners where the Board does not direct immediate release. This section is no longer needed as provision for how the Secretary of State and, now, recall adjudicators are to deal with such cases is now made in each of the relevant sections of that Act as amended by section 9.
177. *Subsection (6)* replaces subsection (1) of section 256A of the Criminal Justice Act 2003 with three new subsections, (1), (1A) and (1B), dealing with the further review of recalled prisoners. For a recalled prisoner who is serving one sentence of imprisonment the prisoner must have their case referred to a recall adjudicator annually. Where the prisoner is serving multiple sentences, however, and the recall period is running concurrently with the custodial part of another sentence (for example, where a further sentence has been imposed in addition to the recall for offences committed while on licence) then the case will not be referred to an adjudicator until the custodial part of the other sentence has been completed and the prisoner can be released on all sentences – rather than referred annually during that period.
178. *Subsection (6)(d)* replaces the provision for the Parole Board to fix a date for release on licence (section 256A(4)(b) of the Criminal Justice Act 2003) with provision for a recall adjudicator to direct that the prisoner be released on licence as soon as conditions in the direction are met. This is to allow conditional release of an offender on a given set of circumstances, for example when a particular accommodation is available.
179. *Subsection (6)(f)* inserts new subsections (4A) and (4B) in section 256A to provide that recall adjudicators must apply the risk of breach of a licence condition test as well as the public protection test when considering the release of recalled prisoners whose cases have been referred to an adjudicator on their review date under section 256A.

180. *Subsection (7)* removes a transitional provision for prisoners subject to earlier release provisions which becomes redundant on the repeal of section 256 of the Criminal Justice Act 2003.
181. *Subsection (8)* provides that the amendments made by this section apply to those recalled before the day on which these changes are brought into force, as well as those recalled after that date.

Section 10: Power to change test for release after recall: determinate sentences

182. **Section 10** inserts a new section – 256AZA – in Chapter 6 of Part 12 of the Criminal Justice Act 2003. This provides an order-making power subject to the affirmative procedure to change the test to be applied (provided for in section 9) when the Secretary of State decides whether automatic release recall is suitable (as prescribed in section 255A) and the tests applied by the Secretary of State and recall adjudicators for release following recall (as prescribed in sections 255B, 255C and 256A).

Section 11: Initial release and release after recall: life sentences

183. *Subsection (1)* amends section 28(7) of the Crime (Sentences) Act 1997 to refer to the ‘requisite custodial period’ which is defined in section 268(1A) of the Criminal Justice Act 2003 (as inserted by section 14). Section 28(7)(c) of the Crime (Sentences) Act 1997 makes provision in relation to the point at which a life prisoner may require the Secretary of State to refer their case to the Parole Board to consider their release, where such a prisoner is also serving a determinate sentence of imprisonment or detention. This amendment is a consequence of the creation of the new sentencing arrangements set out in new section 236A and the release arrangements in new section 244A of the Criminal Justice Act 2003 (as inserted by Schedule 1); and of the creation of the extended determinate sentence under section 226A and 226B of that Act, as inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
184. *Subsection (2)* amends section 32 of the Crime (Sentences) Act 1997 by inserting the public protection release test applied when considering initial release so that it also applies where the Board is considering the release of recalled life sentence prisoners. This includes prisoners serving sentences of Imprisonment for Public Protection (IPP) who have been recalled.
185. *Subsection (3)* inserts a new paragraph in section 128(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which allows the release test to be changed by an order subject to the affirmative procedure. This ensures that the power to change the release test applies equally to the test as it appears in new subsection (5A) of section 32 of the 1997 Act, in relation to the release of recalled IPP prisoners. The power to amend the release test in section 128 does not apply to the test in respect of those serving life sentences, which cannot be amended by order.
186. *Subsections (4) and (5)* provide that the amendments made by subsections (1) and (2) of this section apply to those sentenced or recalled before the day on which these changes are brought into force, as well as those sentenced or recalled after that date.

Section 12: Offence of remaining unlawfully at large after recall

187. **Section 12** creates a new offence of remaining unlawfully at large following a recall to custody.
188. *Subsection (1)* inserts a new section 32ZA into the Crime (Sentences) Act 1997 to provide for it to be a criminal offence for recalled indeterminate sentence prisoners to remain unlawfully at large. The offence is committed once the offender has been notified of the recall and fails to take all necessary steps to return to prison unless they have a reasonable excuse. Subsection (2) of section 32ZA provides that an offender is treated as being notified of recall if written notification has been delivered to an

appropriate address and the period specified in the notice has expired. Subsection (3) of section 32ZA defines an appropriate address as either an address at which the offender is permitted to stay or an address which is nominated under their licence. Subsection (4) of section 32ZA provides that an offender is also treated as being notified of their recall if their licence requires them to keep in contact with probation in accordance with instructions given by probation officers, they have failed to comply with an instruction and they have not complied with an instruction for at least 6 months.

189. Subsection (5) of section 32ZA provides that the offence of being unlawfully at large can be tried in either the magistrates' court or the Crown Court (an "either way" offence). The maximum penalty of 6 months which can be imposed by a magistrates' court will become 12 months when section 154(1) of the Criminal Justice Act 2003 is commenced (subsection (6) of section 32ZA). Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, when brought into force, will remove the limit on the fine that can be imposed in the magistrates' court for this offence; however until that point any fine imposed by the magistrates' court may not exceed the statutory maximum (subsection (7) of section 32ZA).
190. *Subsection (2)* inserts a new section 255ZA into the Criminal Justice Act 2003 to provide for it to be a criminal offence for recalled determinate sentence prisoners to remain unlawfully at large and provides the same provisions as outlined in paragraphs 187 and 188 above.
191. *Subsection (3)* provides that the offence of remaining unlawfully at large after recall will apply to all those who are already unlawfully at large after the revocation of their licences. Therefore, on commencement, offenders who are already unlawfully at large will be committing this offence if they have been notified of the recall, the time in the notification expires and the offender has not, without reasonable excuse, taken all necessary steps to return to prison.

Section 13: Offence of remaining unlawfully at large after temporary release

192. **Section 13** provides for an increase in the maximum sentence for the offence of remaining unlawfully at large after a period of temporary release on licence and makes it an offence which can be tried in either the magistrates' court or Crown Court (an "either way" offence).
193. The section amends section 1 of the Prisoners (Return to Custody) Act 1995. *Subsection (2)* provides that the maximum penalties that can be imposed by (a) the Crown Court and (b) the magistrates' court to 2 years and 12 months respectively.
194. *Subsection (3)* provides that until section 154(1) of the Criminal Justice Act 2003 is commenced the maximum penalty which can be imposed by a magistrates' court is 6 months.
195. It also provides that until section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is commenced the maximum fine which can be imposed by a magistrates' court is a fine not exceeding the statutory maximum (currently £5,000).
196. *Subsection (4)* provides that the increased maximum penalties will not apply to those whose period of temporary release on licence had expired, or whose order of recall was made, before commencement.

Section 14: Definition of "requisite custodial period"

197. **Section 14** inserts a definition of "requisite custodial period" into the interpretation provision in Chapter 6 of Part 12 of the Criminal Justice Act 2003. "Requisite custodial period" has different meanings for different sentences. For the purposes of a standard determinate sentence (covered by section 243A and 244), the 'requisite custodial period' ends at the half-way point; for the purposes of an extended determinate sentence (imposed under section 226A or 226B) it ends at the two-thirds point of the custodial

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term, or the half-way point of the custodial term for extended sentences imposed under the previous regime (under section 227 or 228) (see sections 246A and 247); for the purposes of the new sentencing arrangements under new section 236A (inserted by Schedule 1 to this Act), it ends at the half-way point of the custodial term (see new section 244A). The definition of 'requisite custodial period' is relevant for the purposes of sections; 246 (power to release prisoners on licence before required to do so), 256A (as amended by section 9 of this Act) (further review), 260 (early removal of prisoners liable to removal from the United Kingdom) 261 (re-entry into United Kingdom of offender removed from prison early), paragraph 8 of Schedule 20A (modification of section 260) and section 28 of the Crime (Sentences) Act 1997 (as amended by section 11 of this Act) (initial release and release after recall: life sentences).

198. *Subsection (3)* makes amendments to section 247 of the Criminal Justice Act 2003 to introduce a definition of the 'requisite custodial period' in respect of an offender serving one sentence or two or more concurrent or consecutive sentences. The requisite custodial period for this type of extended sentence is one half of the custodial term imposed by the court where one sentence is being served and, for those serving multiple sentences, it is the period determined by sections 263(2) and 264(2) which deal with calculating relevant dates for concurrent and consecutive sentences.

Section 15: Minor amendments and transitional cases

199. **Section 15** makes minor consequential amendments and provision to deal with transitional cases stemming from the changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.