

CRIMINAL JUSTICE (SCOTLAND) ACT 2003

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);

*These notes relate to the Criminal Justice (Scotland) Act
2003 (asp 7) which received Royal Assent on 26 March 2003*

- 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”.

*These notes relate to the Criminal Justice (Scotland) Act
2003 (asp 7) which received Royal Assent on 26 March 2003*

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 Adjournment (a statutory instrument made by the High Court). In pursuance of such an objection,

*These notes relate to the Criminal Justice (Scotland) Act
2003 (asp 7) which received Royal Assent on 26 March 2003*

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.