

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 3: Sentencing and punishment of offenders

Chapter 5: Dangerous Offenders

Section 122 and Schedules 18 and 19: Life sentence for second listed offence

637. **Section 122** inserts a new section 224A (life sentence for second listed offence) into the 1991 Act, together with a new Schedule 15B (which is set out in Schedule 18). Schedule 19 contains related consequential and transitory provision.
638. New section 224A provides that a court must impose a life sentence on a person aged 18 or over who is convicted of an offence listed in Part 1 of Schedule 15B of that Act which is serious enough to justify a sentence of imprisonment of 10 years or more, if that person has *previously* been convicted of an offence listed in any Part of Schedule 15B and was sentenced to imprisonment for life or for a period of 10 years or more in respect of that previous offence. Parts 2 to 4 of new Schedule 15B include offences under legislation which is no longer applicable, offences in other UK jurisdictions and those of other member States of the European Union, as well as offences under service law.
639. However, the court is not obliged to impose a life sentence where it is of the opinion that there are particular circumstances which relate to the offence, the previous offence or the offender which would make it unjust to do so in all the circumstances.

New section 224A

640. Subsection (1) of new section 224A sets out the conditions under which the new mandatory life sentence must be imposed. The offender must be an adult when convicted, and the present offence must be listed in Part 1 of Schedule 15B and have been committed after the coming into force of section 224A. The sentence condition and the previous offence condition must also be met (see below).
641. Subsection (2) of new section 224A gives the court a discretion not to impose the life sentence where it is of the opinion that there are particular circumstances which relate to the offence, the previous offence or the offender, which would make it unjust to do so in all the circumstances.
642. Subsection (3) of new section 224A sets out the sentence condition. The present offence must be serious enough to justify the imposition of a sentence of imprisonment of 10 years or more. The court must consider what sentence it would have imposed but for section 224A, and disregarding any extension period it would have imposed under new section 226A (which relates to the new extended sentence). This consideration includes, for example, any guilty plea made by the offender, as well as any aggravating or mitigating factors.

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643. Subsection (4) of new section 224A sets out the previous offence condition. The offender must have been previously convicted of an offence listed in any Part of Schedule 15B, and on conviction must have received a relevant life sentence or a relevant determinate sentence.
644. Subsection (5) of new section 224A sets out what is meant by a relevant life sentence. A relevant life sentence is one where the offender was not eligible for release during the first 5 years of the sentence (not taking into account any period spent on remand or bail). The term 'life sentence' in subsection (5) includes a sentence of imprisonment or detention for public protection (see subsection (10), which refers to the definition of 'life sentence' in section 34 of the Crime (Sentences) Act 1997).
645. Subsections (6) and (7) of new section 224A set out when an extended sentence (defined in subsection (10), see below) is relevant. An extended sentence is relevant if the custodial term was 10 years or more.
646. Subsection (8) of new section 224A provides that any other determinate sentence of imprisonment or detention of 10 years or more is a relevant sentence.
647. Subsection (9) of new section 224A ensures that any reduction of a sentence for the purpose of taking account of time spent on remand, either in custody or on bail, is to be disregarded when considering whether the previous offence condition has been met. It may be that in some jurisdictions where a previous offence might have been committed time spent on remand is, or may be, applied to reduce the length of the sentence, so the provision deals with that possibility.
648. Subsection (10) of new section 224A defines "extended sentence" and "life sentence." The definitions include equivalent sentences imposed under the law of Scotland, Northern Ireland and other member States of the European Union.
649. "Sentence of imprisonment or detention" is defined to include any sentence of a period in custody imposed for an offence.
650. Subsection (11) of new section 224A provides that offences in respect of which the new mandatory life sentence under that section is imposed are not to be regarded as offences for which the sentence is fixed by law. Among other things, this obliges the court to follow any relevant sentencing legislation when determining the sentence, if it decides that to impose the mandatory life sentence would be unjust.

Section 122(2) and (3) and Schedules 18 and 19

651. Subsection (2) of section 122 introduces Schedule 18. Schedule 18 inserts new Schedule 15B into the 1991 Act. New Schedule 15B sets out particularly serious sexual and violent offences which are relevant for the purposes of (a) the new life sentence requirements in new section 224A, (b) the extended sentence provisions under new section 226A (see section 124) and (c) the release arrangements under new section 246A for persons serving extended sentences under new sections 226A and 226B (see section 125).
652. New Schedule 15B contains those offences which are listed in Schedule 15A, which is relevant for the purposes of indeterminate sentences for public protection and extended sentences under section 227 of the 1991 Act and will be repealed. In addition, new Schedule 15B contains certain child sex and terrorism offences as well as the offence of causing or allowing the death of a child or vulnerable adult (under section 5 of the Domestic Violence, Crime and Victims Act 2004). In Part 2, it also includes offences which were abolished before the coming into force of new Schedule 15B, and would, if committed on the relevant day, constitute an offence listed in Part 1 of new Schedule 15B.
653. Subsection (3) of section 122 introduces Schedule 19. Schedule 19 makes consequential and transitory provisions in respect of new section 224A.

Section 123: Abolition of certain sentences for dangerous offenders

654. **Section 123** repeals provision in sections 225 and 226 of the 1991 Act for sentences of imprisonment for public protection and detention for public protection (the equivalent sentence for persons under 18).
655. It leaves in place the provision in section 225 which requires life imprisonment to be imposed where the offence for which an offender is convicted carries a maximum sentence of life imprisonment and the court considers the seriousness of the offence justifies a life sentence. It also leaves in place the equivalent provision in section 226 with respect to detention for life.
656. **Section 123** also repeals sections 227 and 228 of the 1991 Act which provide for extended sentences for certain violent or sexual offences (listed in Schedule 15 to that Act).

Section 124: New extended sentences

657. **Section 124** inserts new sections 226A and 226B in the 1991 Act. Those sections create new extended sentences for adults and persons under 18 respectively. The sentences may be imposed in respect of the sexual and violent offences listed in Schedule 15 to the 1991 Act (referred to as “specified offences”) where certain conditions are met. For both sentences, the court must consider that the offender presents a substantial risk of causing serious harm through re-offending.
658. For adults, two further conditions apply as alternatives. Either the court must consider that the current offence is serious enough to merit a determinate sentence of at least 4 years, or at the time the present offence was committed the offender must have previously been convicted of an offence listed in new Schedule 15B.
659. The second of these alternative conditions does not apply in respect of persons under 18.
660. Where these conditions are made out, the court may impose an extended period for which the offender is to be subject to a licence (an ‘extension period’) of up to 5 years for a violent offence and up to 8 years for a sexual offence. Schedule 15 lists violent and sexual offences separately. Specific provision is made about the release on licence of persons serving sentences under these new sections - see section 125 below.

New section 226A

661. Subsection (1) of new section 226A provides that the new section applies where (a) an offender aged 18 is convicted of a specified offence (whenever that offence was committed); (b) the court considers that the offender presents a significant risk to members of the public of serious harm through the commission by the offender of further specified offences; (c) the court is not obliged to impose a life sentence because of the seriousness of the offence by virtue of section 224A (life sentence for second listed offence) or 225(2) (life sentence for dangerous offenders); and (d) either condition A or condition B is met.
662. The ‘significant risk’ test in subsection (1)(b) is the same as the test for indeterminate sentences for public protection, which are abolished by section 123.
663. Subsection (2) of new section 226A sets out condition A, which is that when the current offence was committed the offender had a previous conviction for an offence listed in Schedule 15B (in relation to the scope of the offences listed there see paragraph 633 above).
664. Subsection (3) of new section 226A sets out condition B, which is that the current offence is serious enough that, if the court imposed an extended sentence under this section, it would specify an appropriate custodial term of at least 4 years.

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665. Subsection (5) of new section 226A sets out the structure of the new extended sentence. It consists of the appropriate custodial term followed by an extension period, which is a further period during which the offender is to be subject to a licence.
666. Subsection (6) of new section 226A provides that the court must determine the custodial term in accordance with section 153(2) of the 1991 Act (provision for length of discretionary custodial sentences).
667. Subsection (7) of new section 226A stipulates that the extension period must be a period of such length as the court considers necessary to protect the public from serious harm caused by the offender's commission of further offences listed in Schedule 15.
668. Subsection (8) of new section 226A sets out the maximum extension periods of 5 years for a violent offence and 8 years for a sexual offence.
669. Subsection (9) of new section 226A stipulates that the appropriate custodial term and the extension period must not together exceed the maximum term of imprisonment that may be imposed for the offence.
670. Subsection (10) of new section 226A follows from the fact that sentences under that section are to be available in respect of offences whenever committed. It allows the court to impose the new extended sentence on an adult offender who has committed an offence which was abolished before 4th April 2005, but which, if committed on the date the offender was convicted, would have constituted a specified offence. And subsection (11) makes section 226A work for offences committed before that date.

New section 226B

671. New section 226B makes similar provision to new section 226A, in respect of persons aged under 18. It contains no equivalent to condition A (see new section 226A(2)).

Section 125 and Schedule 20: New extended sentences: release on licence

672. **Section 125** sets out the release arrangements for the new extended sentence (see new sections 226A and 226B, inserted by section 125). Different release arrangements will apply depending on the seriousness of the offence in respect of which the sentence was imposed. Offenders who have committed an offence listed in Parts 1 to 3 of Schedule 15B, or whose offending merits a custodial term of 10 years or more, will be considered for release on licence by the Parole Board once the offender has served two-thirds of the appropriate custodial term, and will be released automatically at the end of the appropriate custodial term if the Parole Board has not already directed release. Offenders who have not committed a Schedule 15B offence but have committed an offence meriting an appropriate custodial term of less than 10 years will be released automatically after two-thirds of the appropriate custodial term.
673. The section also provides for the Parole Board to apply the same release test for the new extended sentence as it currently applies to indeterminate sentences for public protection and life sentences (see section 28 of the Crime (Sentences) Act 1997).
674. *Subsection (2)* amends section 244 of the 1991 Act to exclude the new extended sentence from the automatic release provisions that apply to other determinate sentences.
675. *Subsection (3)* of the new section inserts a new section 246A in the 1991 Act (release on licence of prisoners serving extended sentence under section 226A or 226B).

New section 246A

676. *Subsection (1)* of new section 246A provides that the section applies to a prisoner ("P") who is serving an extended sentence under new section 226A or 226B. It therefore applies to both adults and juveniles.

677. *Subsection (2)* of new section 246A provides that the Secretary of State must automatically release the prisoner after the requisite custodial period has been served. The requisite custodial period is defined in subsection (8) as two-thirds of the appropriate custodial term. But subsection (2) does not apply where the prisoner's appropriate custodial term is 10 years or more or the sentence was imposed in respect of an offence listed in Parts 1 to 3 of Schedule 15B.
678. *Subsection (3)* of new section 246A provides that where the prisoner's appropriate custodial term is 10 years or more or the prisoner's sentence was imposed in respect of an offence listed in Parts 1 to 3 of Schedule 15B, the Secretary of State must release the prisoner on licence in accordance with subsections (4) to (7) ., Those provisions provide for the Parole Board to be able to direct release after the requisite custodial period. There is no automatic release until the appropriate custodial term is completed.
679. *Subsection (4)* of new section 246A provides that the Secretary of State must refer P's case to the Parole Board when the two-thirds point of the appropriate custodial term has been reached. Where the Parole Board declines to direct P's release, the Secretary of State must refer his case to the Parole Board for further consideration at least every 2 years.
680. *Subsection (5)* of new section 246A provides that the Secretary of State must release the prisoner in accordance with a direction from the Parole Board, provided that the prisoner has reached the two-thirds point of the appropriate custodial term.
681. *Subsection (6)* of new section 246A sets out the test to be applied by the Parole Board when considering whether to direct a prisoners' release. The test replicates the release test currently applied by the Parole Board to indeterminate sentences for public protection and life prisoners (see section 28 of the Crime (Sentences) Act 1997).
682. *Subsection (7)* of new section 246A provides for the automatic release of P at the end of the appropriate custodial term where P has not previously been released automatically or released on a direction by the Parole Board. Where P has previously been released and recalled to custody the automatic release provision at the end of the appropriate custodial term will not apply (and P's further release will be dealt with under section 255C of the 1991 Act).
683. *Subsection (8)* of new section 246A provides that the "appropriate custodial term" means the term imposed by the court as the custodial element of the new extended sentence. This is the sentence imposed by the court excluding the extended licence period. This subsection further defines the "requisite custodial period" as two-thirds of the appropriate custodial term, where a single sentence is imposed. Where a prisoner is serving consecutive or concurrent sentences the requisite custodial term is calculated in accordance with the aggregation of the sentences under sections 263(2) and 264(2).
684. *Subsection (4)* introduces introduces Schedule20, which makes consequential amendments to the release and recall provisions in Chapter 6 of Part 12 of the 1991 Act. These amendments add references to extended sentence and the new section 246A , so that the appropriate provision in Chapter 6 of Part 12 applies to prisoners released under the new arrangements (for example to allow licences to be set for such offenders and for them to be recalled once released).

Schedule 20: Release of new extended prisoners: consequential provision

685. *Paragraph 6(3)* (new section 250(5A) of the 1991 Act) provides for the Parole Board to set licence conditions where P is initially released by the Parole Board. Where the prisoner is released automatically the Secretary of State sets the conditions.
686. *Paragraph 9(2)* (new section 260(2A) of the 1991 Act) provides for the removal of P from prison for the purposes of deportation where P has passed the two-thirds point of the sentence but the Parole Board have not directed release.

687. *Paragraph 9(4)* (inserting the new subsection (7)(za) in section 260 of the 1991 Act) provides for early removal to apply 270 days prior to the two-thirds point for the new extended sentence, rather than 270 days prior to the half way point as for other determinate sentences.
688. *Paragraph 10(3)* (new section 261(6)(za) of the 1991 Act) provides for a prisoner who returns to the jurisdiction during the currency of the sentence, after being released from prison early and removed under section 260 of that Act, to be liable to serve the period to the two-thirds point that was not served prior to removal.
689. *Paragraph 12(2)* ensures that when aggregating consecutive sentences the two-thirds point of the new extended sentence is appropriately calculated.

Section 126: Sections 123 to 125: consequential and transitory provision

690. *Section 126* introduces Schedule 21, which includes provision that is consequential on sections 123, 124 and 125. It also contains transitory provision.

Section 127: dangerous offenders subject to service law

691. *Section 127* introduces Schedule 22, which applies the provision made in Chapter 5 of Part 3 in respect of offenders subject to service law and makes consequential and transitory provision.

Section 128: Power to change test for release on licence of certain prisoners

692. *Section 128* gives the Secretary of State a power to set a release test, or tests, that the Parole Board must apply when considering the release of prisoners serving indeterminate sentences under section 225 or 226 of the 1991 Act (IPP prisoners), prisoners serving extended sentences imposed under section 226A or 226B of that Act and determinate sentence prisoners subject to Parole Board release whose release provisions have been saved under Schedule 20B of the 1991 Act (collectively, “discretionary release prisoners”).
693. *Subsection (1)* gives the Secretary of State a power to make orders setting out when the Parole Board must direct release of discretionary release prisoners. The order may set out either requirements which, if satisfied, mean the Parole Board must direct a prisoner’s release or requirements that must be satisfied for release to be refused.
694. *Subsection (3)* provides that orders can amend the legislation which sets out the release criteria for IPP prisoners, for discretionary release prisoners. Orders may also make provision for prisoners whose case is being considered by the Board at the time when a release test is amended. They may make separate provision for IPP prisoners, extended sentence prisoners and the other determinate sentence prisoners. They may include consequential provision.
695. *Subsections (4) and (5)* provide that any order made under the section must be made by statutory instrument subject to the affirmative procedure.
696. *Subsection (6)* defines IPP prisoners and new extended sentence prisoners so as to include both adults and juveniles.