

SECTION 236A CRIMINAL JUSTICE ACT 2003 – SPECIAL CUSTODIAL SENTENCE FOR CERTAIN OFFENDERS OF PARTICULAR CONCERN.

This legislation predominantly deals with defendants convicted of terrorism offences but section 236A also applies to the following offences that if committed today would be prosecuted under:

1. Section 5 of the Sexual Offences Act 2003 (rape of a child under the age of 13).

Para 19 of Schedule 18A of the CJA 2003 – in force since 13th April 2015.

2. Section 6 of that act (assault of a child under 13 by penetration).

Para 20 of Schedule 18A of the CJA 2003 – in force since 13th April 2015.

236A States:

(1) Subsection (2) applies where—

(a) a person is convicted of an offence listed in Schedule 18A (whether the offence was committed before or after this section comes into force),

(b) the person was aged 18 or over when the offence was committed, and

(c) the court does not impose one of the following for the offence—

(i) a sentence of imprisonment for life, or

(ii) an extended sentence under section 226A.

(2) If the court imposes a sentence of imprisonment for the offence, the term of the sentence must be equal to the aggregate of—

(a) the appropriate custodial term, and

(b) a further period of 1 year for which the offender is to be subject to a licence.

(3) The “appropriate custodial term” is the term that, in the opinion of the court, ensures that the sentence is appropriate.

(4) The term of a sentence of imprisonment imposed under this section for an offence must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence.

(5) The references in subsections (1)(c) and (2) to a sentence imposed for the offence include a sentence imposed for the offence and one or more offences associated with it.

(6) The Secretary of State may by order amend Schedule 18A by—

(a) adding offences, or

(b) varying or omitting offences listed in the Schedule.

(7) An order under subsection (6) may, in particular, make provision that applies in relation to the sentencing of a person for an offence committed before the provision comes into force.

(8) In the case of a person aged under 21, this section applies as if the references to imprisonment were to detention in a young offender institution.

This provision effectively creates a new sentence for those defendants who fall under its realm. The notes attached to the legislation make it clear that the new sentence must consist of a custodial term and a one year period of licence, and offenders serving the new sentence will be subject to discretionary release by the Parole Board between the halfway and end point of the custodial term.

Practically, this means that defendants convicted in 2015 onwards of historical penetrative sexual offences committed against children, who are not imprisoned for life or given an extended sentence of imprisonment must, if imprisoned, be made the subject of a section 236A licence.

The cases of R v. Clifford [2015] and R v. H [2012] still apply to these historical cases; so, for example, if a defendant is sentenced to a total of 8 years imprisonment for multiple offences, one of which is an indecent assault but would today be charged under section 6 of the Sexual Offences Act 2003 and he is not considered to be dangerous he will not be automatically released at the previously deemed appropriate stage. He would be entitled to discretionary release by the Parole Board at any time they thought fit between the 4 to 8 year period.

This section needs to be brought to the sentencing judge's attention by prosecuting counsel so that he or she when passing sentence can stipulate that the defendant has been made subject to the legislation.

The lay client will also need to be advised by their defence advocate that they will be subject to Parole Board not automatic release.

Kelly Scrivener, April 2016

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