

Robert Banks, a barrister, writes Banks on Sentence. It is the second largest selling practitioner's criminal text book and is used by judges for sentencing more than any other. The book is classified by the Ministry of Justice as a core judicial text book. The new edition has recently been published and is also available for tablets and computers. The print copy costs £96 on the web and there will be regular updates on www.banksr.com If you have access to a computer, you can follow Robert on [twitter: @BanksonSentence](https://twitter.com/BanksonSentence)

Q I was convicted of possession of an offensive weapon and given 12 months. I am told I won't be tagged. Can I appeal?

A Yes. We received a large number of letters about tags and so it might be helpful to set the rules out for all the common situations. The reasons are set out at 5 b) and 6 below.

1) General entitlement

All prisoners except those listed in section D are eligible if a) they are serving a sentence of at least 12 weeks and have at least 28 days left to serve and b) the sentence is not more than 4 years in total. A prisoner should be informed of his or her entitlement when received into prison. Some prisoners will have been excluded from the scheme by changes that came into force on 3 December 2012. They should have been informed of this by now.

2) What does being released under the scheme entail?

The prisoner is released early and has to abide by his or her curfew conditions and wear a tag. A monitoring box is installed in the prisoner's home. The tag is strapped to the person's ankle and it informs a base station of their movements and whether the tag has been removed. The normal period for the curfew is 7pm to 7am. The prisoner may not leave the house. If he or she goes outside the back door to smoke, the alarm will go off, because the tag monitors whether you are indoors, not whether you are in your house or garden. If the prisoner wants to be temporarily exempt from complying with a condition (such as to travel to or from a funeral), he or she must seek permission. Permission to attend a social event after a funeral is likely to be refused if, with travelling, this would mean arriving home after the start of the curfew.

3) Can the prisoner remove the tag to have a bath, go to the gym or have sex?

No. The tag is waterproof and shockproof. Some time ago a Premier League football player played his matches wearing a tag.

4) Those statutorily excluded from the scheme

The following are excluded from the scheme:

- a) those serving sentences which when taking into account consecutive sentences total 4 years or more,
- b) those who are subject to the notification requirements of Sexual Offences Act 2003 (i.e. are made to comply with a set of reporting etc. conditions),
- c) those serving Criminal Justice Act 2003 extended sentences for sexual or violent offences (including extended sentences imposed under LASPO and inserted into CJA 2003 as section 226A),
- d) those liable to be removed from the UK (which includes those illegally here and those being deported),
- e) those who have had their licence revoked because they committed an offence when i) they were on licence, or ii) they were released early on compassionate grounds,

- f) those serving sentences imposed for failing to return to custody following periods of temporary release,
- g) those currently serving a custodial sentence imposed for breaching a curfew condition of their community order,
- h) those detained under Mental Health Act 1983,
- i) those who have breached a Home Detention Curfew licence before and were recalled to prison as a result (except where there has been a successful appeal against the revocation of that licence).

5) Those presumed unsuitable

Those serving sentences for the following offences are presumed unsuitable for the scheme:

- a) murder, manslaughter, attempted/conspiracy/soliciting to commit murder, threats to kill, causing death by dangerous or reckless driving, causing death by careless driving when under the influence of drink or drugs and aggravated vehicle-taking resulting in death,
- b) possession of an offensive weapon and possession of a 'sharp bladed article' (which is likely to be interpreted as possession of a bladed article), possession of firearms (including imitation firearms) with intent to a) endanger life, or b) resist arrest, or c) cause fear of violence commit an offence. Possession of a firearm whilst committing an offence (which is likely to be interpreted as possession of a firearm with intent to commit an indictable offence),
- c) 'ill treatment or neglect of children', child abduction, abandoning children under 2 years and other child neglect/violence offences,
- d) offences which are racially or religiously aggravated offences under Crime and Disorder Act 1998 namely: a) ABH, b) common assault, c) criminal damage, d) 'intentional harassment, alarm or distress', e) harassment, f) causing fear of violence and g) malicious wounding or GBH,
- e) 'incitement to racial hatred offences under the Public Order Act 1986 s 18-23', 'Incitement to hatred on the grounds of religion or sexual orientation' [namely] i) use of words or behaviour or display of written material, ii) publishing or distributing written material, iii) public performance of play, iv) distributing, showing or playing a recording, v) broadcasting material and vi) possessing material,
- f) certain explosive offences with intent offences,
- g) mOST terrorist offences.

Full details of the offences can be found in the National Offender Management Service instruction PSI 432/2012 page 16.

6) If a person is presumed unsuitable, can they argue that they should be released?

Yes. To be successful the prisoner has to show that there are exceptional circumstances. Prisoners in this category should try to obtain legal assistance. Foreign nationals subject to IND reviews who have not yet received a decision should seek legal assistance.

7) Do the prison authorities have a discretion whether to release prisoners who are eligible?

Yes. Acceptance for the scheme is not an entitlement. Prisoners must meet the eligibility criteria and pass the risk assessment, which includes a home circumstances check. This check includes checking that the person who the prisoner wishes to reside with is suitable and there is access to electricity which is not subject to disruption. It is no longer necessary that there is a landline telephone.

Common reasons for refusal include a belief that the prisoner will fail to comply with the conditions and a lack of suitable accommodation. The fact that the house is not tidy is not a reason to refuse eligibility.

8) The procedure

The prisoner does not have to make an application. Prisoners should be automatically notified of HDC entitlement by the prison service. The current guidance from the MoJ has not yet become permanent after the December 2012 changes. Details of an appropriate address will have to be provided. If a prisoner wishes to appeal he or she must act quickly and should obtain legal assistance.

9) After what period during the prison term is the HDC scheme available?

All prisoners have to serve at least 28 days. HDC is only available if your sentence is for 12 weeks or more.

10) Are there any special rules for young offenders?

Yes. All young offenders, including those serving a term of less than 12 months, have to be subject to supervision on release. Where the sentence is less than 12 months the supervision period will be for 3 months. Where the young offender is released early on HDC then they will be subject both to their curfew and supervision. They will be provided with a single document setting out both sets of conditions.

11) Can the curfew condition apply to different places and different periods on different days?

Yes, although in practice this will be rare.

12) What if the prisoner has no suitable accommodation?

The prisoner will not be considered eligible for release on the scheme.

13) What if the prisoner is released but is no longer able to live at the appointed address?

He or she will be recalled to prison until another address is found which is considered suitable.

14) How long does the tag last?

The condition lasts until the prisoner would have been released on licence or unconditionally if he or she had not been released under the scheme.

15) Mixture offences. Some are excluded from the scheme and some are not.

The rules are needlessly complex. Prisoners should seek legal advice.

16) Can I ask the sentencing judge to pass a lesser sentence because a defendant is not eligible for release under the scheme?

No. The possibility of release under the scheme should not be considered by the sentencing judge.

Asking Robert and Jason questions

Please make sure your question concerns sentence, prison law or release (dealt with by Jason Elliott, Dere Street Chambers, Newcastle upon Tyne) and not conviction. It is usually not possible to determine whether a particular defendant has grounds of appeal without seeing all the paperwork. Analysing all the paperwork is not possible. The column is designed for simple questions and answers.

Please start your letter with the question you want answered and send the letter to Inside Time, marked for Robert Banks. Unless you say you don't want your question and answer published, it will be assumed you don't have an objection to publication. No-one will have

their identity revealed. Letters which a) are without an address, b) cannot be read, or c) are sent direct, cannot be answered. Letters sent by you to Inside Time are sent on to a solicitor, who forwards them to Robert. If your solicitor wants to see previous questions and answers, they are posted on the website, www.banksr.com.