

Police, Crime, Sentencing and Courts Bill
House of Lords Committee Stage - Briefing for amendment to clause 109
October 2021

1. Prisoners who receive a standard determinate sentence are entitled to be released automatically, either at the mid or two-third point of their sentence.¹ Clause 109 would create a new power for Secretary of State to determine which prisoners can and cannot be automatically released. In the White Paper, this power was said to only be intended for a small number of individuals.² However, the criteria for the power are broad and apply to a significant number of prisoners. The drafting of clause 109 creates the danger that the power could be used more widely than envisaged in the White Paper. This would undoubtedly put pressure on the Parole Board. Although it has reduced its backlog, the Parole Board still has issues with cases being significantly delayed.³
2. In addition, clause 109 currently creates a worryingly informal procedure with a significant degree of discretionary power being placed in the hands of the Secretary of State. There are few due process safeguards for a prisoner in this process. They are empowered merely to ‘make representations’ to the Secretary of State about a proposed referral to the Parole Board – but even this entitlement is circumscribed by the Secretary of State expressly not being required to delay the referral in order to give them the opportunity to make such representations. The procedure currently envisaged by clause 109 falls a long way short of the usual judicial process that is normally required to find an offender to be ‘dangerous’ with a consequential impact on the sentence they will serve. Upon a referral to the Parole Board, the default position is that the prisoner will serve their full sentence in custody and this would mean that they may spend many extra years in prison because of the determination of future risk made, not by a court upon full consideration of all relevant facts, but by the Secretary of State.
3. For more information on our concerns with clause 109, please see the referenced briefings.⁴

¹ At present, most individuals who receives a standard determinate sentence are entitled to be released automatically at the halfway point of their sentence if their sentence is less than seven years pursuant to the Criminal Justice Act 2003, s.244(3). The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 changed the automatic release point from halfway to two-thirds of their sentence for offenders who are: a) convicted of a specified offence listed in Parts 1 and 2 of Schedule 15 of the 2003 Act for which the maximum penalty is life; and b) sentenced to an SDS of 7 years or more. This means that such prisoners will not appear before the Parole Board.

² Ministry of Justice, [‘A Smarter Approach to Sentencing’](#), September 2020, para 64.

³ Ministry of Justice, [Tailored Review](#), (The Parole Board of England and Wales, October 2020) para 42.

⁴ JUSTICE, [‘Police, Crime, Sentencing and Courts, House of Lords, Committee Stage and Endorsed Amendments, Briefing’](#), October 2021; Prison Reform Trust, [‘House of Lords, Second Reading, Briefing’](#), September 2021.

Effect and purpose of this amendment

4. This amendment would empower the Secretary of State to refer the case of a prisoner serving a determinate sentence to the High Court to consider preventing automatic early release if they reasonably believe that, if released, the prisoner would pose a significant risk to members of the public of serious harm by committing an offence of murder or another specified offence. If the High Court finds that the prisoner does pose such a risk they will be required to halt the automatic early release of the prisoner and instead refer the case to the Parole Board for its consideration as to whether the prisoner is safe to release. If the Parole Board does not direct the release of the prisoner, the Secretary of State must refer the case back to the Board on an annual basis. Ultimately, if the Parole Board does not release the prisoner before the expiry of their custodial sentence, they will spend the full duration of their sentence in custody.
5. This amendment makes one key change to clause 109 by inserting the role of the High Court into the process and, in so doing, it seeks to preserve the important principle that a member of the Executive should not intervene and directly alter a sentence imposed by a court. As clause 109 is presently drafted, it empowers the Secretary of State to halt the automatic release themselves and directly refer the case to the Parole Board.
6. There are legitimate concerns about the automatic early release of prisoners who pose a significant risk of serious harm to members of the public. The issue this amendment seeks to resolve is ensuring that the power to halt automatic release is placed in the hands of the appropriate authority. Determinations about the sentences served by individual offenders lie properly with the judiciary. Clause 109, as currently drafted, would empower the Secretary of State to, in effect, overrule a sentencing judge.
7. Where the Secretary of State has concerns about the risk posed by an individual prisoner, it is appropriate that such cases are referred back to the judiciary for consideration and that the court-imposed sentence is not altered by a member of the Executive themselves. As was noted by the former Lord Chief Justice, Lord Thomas of Cwmgiedd, in the Second Reading debate: 'I am sure that no one wants to see us go down the road of terms of imprisonment being extended other than by an independent judicial body. It may be a small point, but the two hallmarks of our system require independence from political interference and decisions on custody being totally in the hands of independent bodies.' We consider, therefore, that the operative decision in altering the sentence is the referral to the Parole Board and that it should not lie in the hands of the Secretary of State.
8. **This modest amendment ensures that these important principles are preserved, and we urge Peers to support this amendment.**

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Amendment 208

Leave out Clause 109 and insert the following new Clause -

109 Power to refer high-risk offenders to High Court for consideration of referral to Parole Board in place of automatic release

(1) The Criminal Justice Act 2003 is amended in accordance with subsections (2) to (10).

(2) In section 243A (release of prisoners serving sentences of less than 12 months), after subsection (2) insert—

“(2A) Subsection (2) does not apply if—

(a) the prisoner’s case has been referred to the High Court under section 244ZB, or

(b) a notice given to the prisoner under subsection (4) of that section is in force.”

(3) In section 244 (general duty to release prisoners), after subsection (1) insert—

“(1ZA) Subsection (1) does not apply if—

(a) the prisoner’s case has been referred to the High Court under section 244ZB, or

(b) a notice given to the prisoner under subsection (4) of that section is in force.”

(4) After section 244 insert—

“244ZB Referral of high-risk offenders to High Court in place of automatic release

(1) This section applies to a prisoner who—

(a) would (but for anything done under this section and ignoring any possibility of release under section 246 or 248) be, or become, entitled to be released on licence under section 243A(2), 244(1) or 244ZA(1), and

(b) is (or will be) aged 18 or over on the first day on which the prisoner would be so entitled.

(2) For the purposes of this section, the Secretary of State is of the requisite opinion if the Secretary of State believes on reasonable grounds that the prisoner would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission of any of the following offences—

(a) murder;

(b) specified offences, within the meaning of section 306 of the Sentencing Code.

(3) If the Secretary of State is of the requisite opinion, the Secretary of State may refer the prisoner’s case to the High Court.

(4) Before referring the prisoner’s case to the High Court, the Secretary of State must notify the prisoner in writing of the Secretary of State’s intention to do so (and the reference may be made only if the notice is in force).

(5) A notice given under subsection (4) must take effect before the prisoner becomes entitled as mentioned in subsection (1)(a).

(6) A notice given under subsection (4) must explain—

(a) the effect of the notice (including its effect under section 243A(2A), 244(1ZA) or 244ZA(3)),
(b) why the Secretary of State is of the requisite opinion, and
(c) the prisoner's right to make representations (see subsection (12)).

(7) A notice given under subsection (4)—

(a) takes effect at whichever is the earlier of—

(i) the time when it is received by the prisoner, and

(ii) the time when it would ordinarily be received by the prisoner, and

(b) remains in force until—

(i) the Secretary of State refers the prisoner's case to the High Court under this section, or

(ii) the notice is revoked.

(8) The Secretary of State—

(a) may revoke a notice given under subsection (4), and

(b) must do so if the Secretary of State is no longer of the requisite opinion.

(9) If a notice given under subsection (4) is in force and the prisoner would but for the notice have become entitled as mentioned in subsection (1)(a)—

(a) the prisoner may apply to the High Court on the ground that the prisoner's release has been delayed by the notice for longer than is reasonably necessary in order for the Secretary of State to complete the referral of the prisoner's case to the High Court, and

(b) the High Court, if satisfied that that ground is made out, must by order revoke the notice.

(10) At any time before the High Court disposes of a reference under this section, the Secretary of State—

(a) may rescind the reference, and

(b) must do so if the Secretary of State is no longer of the requisite opinion.

(11) If the reference is rescinded, the prisoner is no longer to be treated as one whose case has been referred to the High Court under this section (but this does not have the effect of reviving the notice under subsection (4)).

(12) The prisoner may make representations to the Secretary of State about the referral, or proposed referral, of the prisoner's case at any time after being notified under subsection (4) and before the High Court disposes of any ensuing reference under this section.

But the Secretary of State is not required to delay the referral of the prisoner's case in order to give an opportunity for such representations to be made.

(13) Upon hearing a reference, the High Court must determine whether the prisoner would, if released, pose a significant risk to members of the public of serious harm occasioned by the commission of an offence under subsection (2) and either—

(a) allow the Secretary of State's reference, or;

(b) dismiss the Secretary of State's reference.

(14) If the High Court allows the Secretary of State's reference, the Secretary of State must refer the prisoner's case to the Parole Board.

(15) If the High Court dismisses the Secretary of State's reference, section 243A(2), 244(1) or 244ZA(1), as applicable, of the Criminal Justice Act 2003 applies to the prisoner.

244ZC Proceedings following reference under section 244ZB

(1) This section applies to a prisoner whose case has been referred to the Parole Board under section 244ZB.

(2) If, in disposing of that reference or any subsequent reference of the prisoner's case to the Board under this subsection, the Board does not direct the prisoner's release, it is the duty of the Secretary of State to refer the prisoner's case to the Board again no later than the first anniversary of the disposal.

(3) It is the duty of the Secretary of State to release the prisoner on licence as soon as—

(a) the prisoner has served the requisite custodial period, and

(b) the Board has directed the release of the prisoner under this section.

(4) The Board must not give a direction under subsection (3) in disposing of the reference under section 244ZB unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(5) The Board must not subsequently give a direction under subsection (3) unless—

(a) the Secretary of State has referred the prisoner's case to the Board under subsection (2), and

(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(6) For the purposes of this section, the "requisite custodial period" means the period ending with the day on which the prisoner would have become entitled as mentioned in section 244ZB(1)(a)."

(5) In section 246(4) (exceptions from power to release early subject to curfew), after paragraph (f) insert—

"(fa) the prisoner's case has been referred to the Board under section 244ZB,

(fb) a notice given to the prisoner under subsection (4) of that section is in force,".

(6) In section 255A(2) (duty to consider suitability for automatic release following recall of certain prisoners) (as amended by the Counter-Terrorism and Sentencing Act 2021), for "or a serious terrorism prisoner" substitute "a serious terrorism prisoner or a prisoner whose case was referred to the Board under section 244ZB".

(7) In section 255C(1) (prisoners whose release after recall is not automatic), for the words from "who" to the end substitute "—

(a) whose suitability for automatic release does not have to be considered under section 255A(2), or

(b) who is not considered suitable for automatic release."

(8) In section 260(5) (powers and duties of Secretary of State that continue to apply to prisoner removed from prison pending deportation), after “244,” insert “244ZB,”.

(9) In section 261(5)(b) (application of release provisions to returning deported prisoner), after “244,” insert “244ZC,”.

(10) In section 268(1A) (meaning of “requisite custodial period” in Chapter 6 of Part 12), after paragraph (c) insert—

“(ca) in relation to a prisoner whose case has been referred to the Parole Board under section 244ZB, the requisite custodial period for the purposes of section 244ZC;”.

(11) In Schedule 1 to the Crime (Sentences) Act 1997—

(a) in paragraph 8(2)(a) (provisions relating to release continuing to apply to prisoner transferred from England and Wales to Scotland), for “, 244,” substitute “to”;

(b) in paragraph 9(2)(a) (provisions relating to release continuing to apply to prisoner transferred from England and Wales to Northern Ireland), for “, 244,” substitute “to”.

(12) In section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (power to alter test for release on licence at direction of Parole Board)—

(a) in subsection (2), after paragraph (b) insert—

“(bza) a prisoner whose case has been referred to the Parole Board under section 244ZB of the Criminal Justice Act 2003 (power to refer to Parole Board in place of automatic release),”;

(b) in subsection (3), before paragraph (ab) insert—

“(aaa) amend section 244ZC of the Criminal Justice Act 2003 (proceedings following reference under section 244ZB of that Act),”.