

Terrorist Offenders (Restriction of Early Release) Bill

Memorandum from the Ministry of Justice to the Delegated Powers and Regulatory Reform Committee

A. Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Terrorist Offenders (Restriction of Early Release) Bill (“the Bill”). The Bill was introduced in the House of Commons on 11 February 2020. Whilst no completely new powers are created by the Bill, this memorandum identifies the provision of the Bill which amends an existing power.

B. Purpose and effect of the Bill

2. The purpose of the Bill is to ensure terrorist offenders in Great Britain are not automatically released before the end of their custodial term without agreement of the Parole Board.
3. The provisions in the Bill change the release point for offenders who have committed a relevant terrorism offence and refer those offenders to the Parole Board at the two-thirds point of the sentence. The changes will apply to offenders currently serving a custodial sentence for terrorist offences, as well as to future terrorist offenders who receive a standard determinate sentence or sentence for offenders of particular concern (SOPC) in England and Wales, and to terrorist offenders who receive a short term or long term determinate sentence in Scotland.
4. This will include terrorist offenders aged under 18 who have been, or in the future will be, sentenced under section 91 of the Powers of Criminal Courts Sentencing Act 2000 (which is a fixed term sentence and applies to offences where an adult over 21 could receive a sentence of 14 years or more) or children detained in solemn proceedings under section 208 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) in Scotland.
5. The Bill does not retrospectively alter a serving offender’s sentence as imposed by the court, or alter the maximum penalties for offences.

C. Delegated powers

6. The Bill includes an amendment to one existing delegated power: the power in section 128 of the Legal Aid, Sentencing and Punishment of Offender Act 2012 to change the test for release on licence of certain prisoners.

Clause [7]: Power to change test for the release on licence of certain prisoners

Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution

Context and purpose

7. Section 128 of the Legal Aid, Sentencing and Punishment of Offender Act 2012 (“2012 Act”) provides a power for the Secretary of State to change the release test applied by the Parole Board for the initial release of a prisoner serving:
 - an indeterminate sentence for public protection (IPP) under section 225 of the Criminal Justice Act 2003 (“2003 Act”) (release for which is governed by section 28 of the Crime (Sentences) Act 1997¹);
 - a determinate extended sentence under section 226A or 226B of the 2003 Act) (release for which is under 246A of the 2003 Act);
 - a sentence for offenders of particular concern under section 236A of the 2003 Act (release for which is under section 244A of the 2003 Act); and
 - some transitional determinate sentence prisoners (release for which is under paragraph 6, 15, 25 or 28 of Schedule 20B to the 2003 Act).

The release provisions of all these sentences make provision for offenders to be released by discretion of the Parole Board.

8. The power under section 128 of the 2012 Act allows the Secretary of State to make an order setting out the conditions under which the Parole Board may release such prisoners. The conditions may be either requirements that must be satisfied for release to be directed or requirements that must be satisfied for release to be refused. The power allows for consequential amendment of the sections which would need to be altered to achieve the change.
9. The Terrorist Offenders (Restriction of Early Release) Bill makes provision to alter automatic release for determinate sentence terrorist offenders to a discretionary release by the Parole Board at the two thirds point of the sentence. It creates a new section (section 247A) of the 2003 Act and in effect removes any terrorist prisoners who are subject to automatic release from the existing release provisions and makes them subject to the new release provision in section 247A.
10. The proposal in the Bill is to amend the existing power in section 128 of the 2012 Act so that it also covers the Parole Board release test for terrorist prisoners in the new section 247A. Clause [7(8)] of the Bill provides for new section 247A of the 2003 Act (as to be inserted by clause 1 of the Bill) to be added to the list of provisions to which section 128 of the 2012 Act can apply. This would therefore allow for an order under section 128 of the 2012 Act to alter the Parole Board release test in new section 247A.
11. For the following reasons we believe that this is a suitable delegation.

¹ 1997 c.43

Justification for taking the Power

12. Currently the Parole Board applies the same release test to all prisoners and the test to be applied in new section 247A conforms with that test. The power in section 128 of the 2012 Act is designed to allow for different release tests for prisoners subject to different sentencing release regimes, if, or when, evidence indicated that the current test was not suitably calibrated for the release or continued detention of a cohort of offenders. The terrorist prisoners are a particular group of offenders who were previously subject to various release provisions, depending on the sentence imposed. This is the first time they will be treated as a group and be subject to the same release provisions.
13. There is insufficient evidence presently to determine if this group may need to be treated differently in respect of the requirements they have to meet to be released. If it was found that the current release test did not adequately identify the risk posed by these prisoners, or found that prisoners were not able to meet the test, then it would be important to be able to alter the test without having recourse to primary legislation and waiting for the availability of a suitable Bill.
14. Many of the prisoners moving to the new release arrangements in section 247A are moving from release provisions which are already included in section 128 of the 2012 Act so, whilst in one respect this is an expansion of the power, in another respect it already encompasses many of the prisoners under their existing release provisions.
15. It would create an inconsistency to have this power available to alter all Parole Board release tests for all determinate sentence prisoners *except* those that fall under new section 247A, especially when terrorist prisoners are identifiable by offence type, as opposed to sentence type, and so it may be easier or necessary to focus a test. Terrorist offenders pose a particular threat and danger to the public and such offending can have devastating, wide ranging consequences. It will be important to establish if the current test ensures effective public protection while allowing offenders to demonstrate that they can be safely managed in the community. In the interests of justice and public protection the department would want to be able to respond swiftly to any conclusion that the release test should be revised so that different conditions must be satisfied.
16. Changing the release test will not change the parameters of the sentence set by the court. Nor will it change the eligibility points for release. In enacting section 128 of the 2012 Act, Parliament has already found that secondary legislation is suitable for this purpose.

Justification for the procedure

17. Section 128 of the 2012 Act is already subject to the affirmative resolution procedure and there is no proposal to alter that position. The procedure is suitable because exercise of the power will amend primary legislation.