

Power to Detain Standard Determinate Sentence

Cases Information Sheet

This document has been produced to support MCA panels to undertake reviews of cases where the Secretary of State (SSJ) has referred a high-risk prisoner to the Parole Board for review in place of automatic release at their Conditional Release Date (CRD). These are known as Power to Detain (PTD) cases.

The power to refer high-risk prisoners to the Board, in place of automatic release, is set out in Section 132 of the Police, Crime, Sentencing and Courts Act 2022 and came into force upon Royal Assent on 28 April 2022.

The use of this power is reserved for:

- Standard Determinate Sentence (SDS) prisoners who are not serving a sentence for a terrorism or terrorism connected offence; and
- who were not judged to be dangerous at the point of sentence (or who may have been considered dangerous but owing to the offence committed or another reason were not eligible for an extended determinate sentence at the time of sentencing); and
- where there are reasonable grounds, based on new or additional information, to believe that the prisoner poses an imminent and very high risk of committing a serious specified offence on release, as set out by the PCSC Act.

This document may also assist panels to prepare for an oral hearing, where one has been directed for a PTD case.

These cases are managed through the Specialist Case Management Team and will be allocated on an individual basis in the same way as terrorism-risk, Noteworthy, and Mental Health cases.

Annex A contains more detailed background information on PTD, including the legal and policy thresholds, and identifying and progressing cases.

Should panels have any queries about the process, please contact the Specialist Case Team.

If panels have any policy or practice queries, please contact the Practice Advisor.



Member Practice

MCA panels can do one of the following for PTD cases:

- Direct release on the papers;
- Refuse release on the papers;
- Direct the case to oral hearing; or
- Adjourn or defer for further information.

The test for release to be applied in PTD cases is the public protection test:

The Board must not give a direction [for release] unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

If directed to oral hearing by the MCA panel, the case will not receive priority listing unless so directed by the MCA panel.

MCA panels should undertake a risk assessment as with any other case and should refer to existing advice in the *Parole Board MCA Guidance*.

Considerations

The key points for MCA panels to be aware of are:

- The SSJ assesses that the prisoner is very high risk and would pose an imminent danger to the public if released;
- The prisoner has had their conditional release date, which was set by the sentencing court, overridden;
- As with all other determinate sentence prisoners, the period over which a panel is considering risk is indefinite (as per the *Johnson* Judgment).

Whilst the test for release must be applied in the usual way, the above points will need to be taken into consideration by MCA panels.

The Evidence considered by the HMPPS Panel

The HMPPS panel that considers whether to refer the case to the Board will be provided with information that satisfies the following:

- As part of the dangerousness test, prisoners must be assessed as being very high risk of serious harm on OASys (or Asset+) meaning that there is an imminent risk of serious harm i.e., the potential event is more likely than not to happen imminently, and the impact would be serious. Please see Annex A for more information on the dangerousness test.
- Prisoners must also be identified for management at MAPPA level 3, or the equivalent of MAPPA level 3 in circumstances where, due to restrictions around the index offence(s) not allowing for MAPPA level 3 management, a bespoke MAPPA information sharing meeting has taken, or will take, place.

The HMPPS panel will have decided that, on balance, it is in the public interest to detain the prisoner, potentially to the end of their sentence, rather than automatically release them at their CRD.

There must be a deliverable plan produced which sets out how any extra time served in prison will be used to reduce risk of harm.

As well as addressing how the prison will work to reduce the prisoner's risk during the additional time in custody, and submission of a risk management plan, ongoing risk management will remain important. Referring a prisoner under this power could have a damaging effect on their relationship with their COM and POM or cause the prisoner to disengage with identified interventions.

Where a PTD prisoner is referred to the Board, the HMPPS panel must have reached a determination that the shorter-term reduction in risk to the public is not outweighed by a longer-term increase in risk. It may be that further detention under this provision may only be to secure public safety in the short term and no risk reduction or other custodial offending behaviour work is thought to be of effective use. Alternatively, further custodial risk reduction work may be of benefit.

The dossier should include the reasons as to why the SSJ has deemed the prisoner too dangerous to release at CRD. It will include the letter (the Notice pursuant to section 244ZB(4) of the Criminal Justice Act 2003) notifying the prisoner of the HMPPS decision to make a referral to the Parole Board. This will explain:

- the effect of the referral in relation to the prisoner's release;
- the SSJ's reasons for making the referral; and
- the prisoner's right to make representations to the HMPPS panel (which can be made at any time up until the Parole Board makes a decision).

The letter must contain sufficient material for the prisoner to understand the HMPPS panel's decision and why it was taken. The evidence used by HMPPS when determining these cases must, therefore, be credible and predominantly overt and disclosable.

The dossier

The dossier will follow the same format as a standard Generic Parole Process (GPP) determinate dossier. However, it will differ in that the initial report will be completed by the Community Offender Manager (COM), with input from the Prison Offender Manager (POM) and is specific to this new power. There will not be a separate report from the POM.

All other documents will be the mandatory documents as set out in the Schedule to the Rules. Should there be any missing documents, the MCA panel can make a direction for these to be submitted.

While HMPPS aims to avoid using non-disclosable material, a prisoner may be provided with a gist of material that cannot be fully disclosed. Where a letter to the prisoner contains a gist, the MCA panel will need to make sure they have sight of the full material and direct it be provided, accompanied by a non-disclosure application, if it is not already available.

The MCA panel should be open to the potential negative effect of detaining the prisoner beyond CRD, for example, reduction of time spent in the community on licensed supervision which may increase the prisoner's long-term risk. These potential impacts must be balanced with the shorter-term increase in public safety and must clearly be set out in the case presented by the reports in the dossier.

Prisoner Representations

PPCS will request prisoner representations on the PTD to be considered by the HMPPS panel prior to referring the case to the Parole Board. These representations may only seek to challenge HMPPS in relation to not being released automatically, i.e., that the prisoner believes they do not meet the criteria under PTD. However, it may be that due to the timeframe the prisoner representations also include the case for release by the Board.

The MCA panel should check that any representations do in fact properly address the consideration of release by the Board.

Once the case is referred to the Parole Board, under Rule 18, the prisoner will have 28 days from the point of referral to submit representations, if earlier representations are not sufficient.

The Decision

As mentioned above, the test for release to be applied is the public protection test:

The Board must not give a direction [for release] unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

Where the MCA panel decides that the prisoner does not meet the test for release. the prisoner will remain in custody. The SSJ must refer the prisoner to the Board again no later than the first anniversary of the decision, and then annually thereafter, until the full expiration of the sentence. At this point, release must take place.

Where the MCA panel decides that the test for release is met, the prisoner will be released either at their CRD, or as soon as is reasonably practicable if the review takes place after the CRD. The Parole Board will set the licence conditions and the prisoner will be managed in line with their SDS licence unless no licence period remains.

Victims

On a case-by-case basis, victims engaged in the Victim Contact Scheme must be notified only once the prisoner has received their notice stating the CRD is overridden, in order to mitigate any worry or concern at not having been contacted about licence conditions for the CRD. The victim will then be given the chance to make a Victim Personal Statement (VPS) for the parole review and to request additional licence conditions for their protection if the prisoner were to be released by the Board. MCA panels should check to ensure that the victim has been contacted and whether a VPS has been provided or is to be provided.

Victims can also apply to read their VPS to the panel at an oral hearing, if one is directed.

Annex A

POWER TO DETAIN - ADDITIONAL INFORMATION

Background

The Power to Detain provision¹ empowers the Secretary of State for Justice (SSJ) to refer certain Standard Determinate Sentence (SDS) prisoners to the Parole Board instead of automatically releasing them at their Conditional Release Date (CRD).

The statutory test set out below must be met in order for the Secretary of State to use the power:

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.

Prisoners must meet both a legal threshold and Her Majesty's Prison and Probation Service (HMPPS) policy threshold to be eligible for consideration under this provision.

Eligibility

This provision applies to prisoners who are serving an SDS for offences other than terrorism or terrorism connected offences, and where there are reasonable grounds, based on new or additional information, to believe that the prisoner poses an imminent and very high risk of committing a serious specified offence on release. These are referred to as "qualifying" sentences.

Prisoners subject exclusively to Parole Board release cannot be made subject to this power. These are referred to as "non-qualifying" sentences.

Extended Determinate Sentences (EDS) and Sentences for Offenders of Particular Concern (SOPC) cases are therefore not eligible, although if a prisoner is serving one of these and an SDS which meets the criteria, they will be eligible.

Prisoners with consecutive or concurrent non-qualifying and qualifying sentences are legally eligible but the appropriate dates to consider (CRD, Sentence Expiry Date (SED) etc) will vary depending on the length and type of each of the sentences².

¹ The power to refer high-risk offenders to Parole Board in place of automatic release cases to the Parole Board is set out in Section 132 of the Police, Crime, Sentencing and Courts Act 2022.

² The HMPPS Policy Framework helpfully sets out examples of how the policy will be applied for prisoners serving concurrent or consecutive sentences.

The process is restricted by the age of the prisoner. To be eligible under the legislation, prisoners must be (or will be) aged 18 or over by the date of their original CRD regardless of their age at sentence.

It is important to note that assessing prisoners to be generally very high risk is not considered sufficient on its own to qualify them for consideration under this power³. There must be new evidence or intelligence that was not available at the time of sentencing, and which gives cause to reasonably believe that the prisoner poses an imminent and very high risk of committing a specific offence on release, and that this risk is not manageable using existing measures i.e. probation supervision using licence conditions.

Legal Threshold

To meet the legal threshold, the SSJ must believe on reasonable grounds that the prisoner would, if released, pose a significant risk of serious harm to members of the public 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.

Policy Threshold

The policy threshold includes a dangerousness test and a public interest test. HMPPS has established a panel to determine which cases are eligible to be referred to the Board based on the following:

Dangerousness test – the risk presented by the prisoner would:

- a. cause serious harm to the public (through terrorism, death or serious injury/sexual assault) or present a national security threat if the risk were to materialise;
- b. be likely to materialise at or soon after the conditional release point (i.e., a degree of probability about the risk arising following release and that it may be imminent);
- c. be credible (the prisoner has the capability and means to commit a serious offence); and
- d. not be safely manageable using the normal means of applying even very stringent licence conditions, supervision, and restrictions.

Public interest test – if the dangerousness test is met, the public interest test must determine whether, on balance, it is in the public interest to detain the prisoner, potentially to the end of their sentence, rather than automatically release them at their CRD.

³ The HMPPS Policy Framework helpfully sets out examples of what may be considered inappropriate reasons for detaining a prisoner under this power.

HMPPS has published a new Policy Framework [*Power to Detain Dangerous Prisoners Serving a Standard Determinate Sentence \(SDS\)*](#), which sets out the criteria and approach they are taking.

Identifying Cases

Potential cases may be identified by Prison Offender Managers (POMs), Community Offender Managers (COMs), Regional Counter-Terrorism Leads (RCTL) and/or the Probation Service National Security Division. Where a case is identified as potentially meeting the criteria, it will be referred to an HMPPS panel to assess.

Where the HMPPS panel assess that the case meets the threshold, it will issue a notice to prisons via their Offender Management Unit's functional mailbox. This notice overrides the prisoner's conditional release date, and the prisoner will not be released.

The case will be managed in line with the Generic Parole Process (GPP) and a dossier will be prepared in the same way as for other GPP cases.

Once the parole dossier is complete, the formal referral to the Parole Board will be made by the SSJ under an expedited timeline. Where possible, the Board will aim to progress the MCA as quickly as possible.

The prisoner may make representations to the HMPPS panel at any time following receipt of the Notice, including once the GPP review has commenced, and up to the point the Board makes a decision. The HMPPS panel must consider any representations made by the prisoner (these are representations about being detained under PTD and not representations for the parole review itself).

Ministerial intervention

The Board has been informed that Ministers will take an interest in some of these cases. Cases may be escalated to Ministers to make a decision only in circumstances where the HMPPS panel decides **not** to refer a case to the Parole Board on the basis that the dangerousness test criteria (a) and (b) above are satisfied, but do not intend to refer to the Board because of their view of (c) and (d). The HMPPS panel will provide advice to Ministers who will personally take the decision whether to refer the prisoner to the Parole Board.

Progressing Cases

The National Security Casework Team within PPCS will manage these cases.

Referrals are likely to be made quite close to the original CRD as they will be based on an assessment of risk of release at that time.

Following referral, the prisoner would not be released until or unless:

- a) the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined and so directs their release;

- b) the prisoner reaches the end of their sentence; or
- c) the SSJ rescinds the notice to the prisoner (and the referral to the Parole Board if a review is ongoing) where the prisoner is no longer considered to meet the criteria.

Once the referral to the Board has taken place, if at any time the HMPPS panel assesses that the prisoner no longer meets the legal threshold (either because of representations or other reasons), they must rescind the referral to the Parole Board and must revoke the notice provided to the prisoner. If the referral is rescinded, all work by the MCA panel must cease. The prisoner will revert to an SDS prisoner and be released at CRD, or immediately if that date has already passed.

PPCS will refer the prisoner's case to the Parole Board annually following a no release decision, until either the prisoner is deemed safe to be released and managed on licence (the Parole Board will set the licence conditions), or their sentence ends, and they are released with no licence, or no supervision in place unless they are subject to post-sentence supervision.

These cases will be referred again to the Parole Board on an annual basis until the SED where the prisoner will be released automatically.

Where the Board directs release of the prisoner, the Board is responsible for setting the licence conditions and considering any requests for variation of those conditions. The Board is also responsible for considering re-release should the prisoner be recalled to custody. The prisoner will remain a PTD case thereafter until they reach the SED.

Once the sentence expires, that is the end of PTD. Should the individual be returned to custody on a different sentence after the PTD sentence has expired, they will serve the new sentence in the same way as any other individual.

In PTD cases where the Board does not recommend release and HMPPS must release at SED, the PTD is concluded for that prisoner as the sentence has expired.