

EXPLANATORY MEMORANDUM TO

THE PAROLE BOARD RULES 2019

2019 No. 1038

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument replaces the Parole Board Rules 2016 and Parole Board (Amendment) Rules 2018. It contains procedural rules for the Parole Board for England and Wales and introduces a new process for challenging certain Parole Board decisions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The Criminal Justice Act 2003¹ allows for the making of rules governing the proceedings of the Parole Board by the Secretary of State for Justice. The Rules are periodically amended to reflect changes in procedure and any relevant case law. The Rules were most recently amended in 2018 to abolish the previous ban on any information on parole cases being shared beyond the prisoner and the Secretary of State, and introduce a mechanism whereby victims and members of the public can request summaries of Parole Board decisions.

¹s239(5) *Criminal Justice Act 2003*

7. Policy background

What is being done and why

- 7.1 As a result of the High Court verdict in the judicial review² of the Parole Board's decision to release John Radford (John Worboys), the 2016 Rules were amended to allow victims and other members of the public to request summaries of Parole Board decisions. Furthermore, the Government consulted on a reconsideration mechanism whereby victims could challenge Parole Board decisions without having to resort to judicial review and also committed to reviewing all the rules to ensure that they were fit for purpose and to identify scope to make further improvements to parole procedures. This instrument is the outcome of that review.
- 7.2 The content of many rules is similar to the provisions within the Parole Board Rules 2016, however the structure of the rules has been revised leading to changes in numbering. All rules are of general application, except where there is a specific exception. Furthermore, the rules now apply to all matters before the Parole Board, rather than just those referred to the Board by the Secretary of State. Previously, the Board and Her Majesty's Prison and Probation Service ("HMPPS") followed administrative guidance in dealing with case types that did not explicitly fall within the Rules. Now all case types are governed by statutory procedure, including applications from offenders to cancel their licence period 10 years after release from a sentence of Imprisonment for Public Protection ("IPP").
- 7.3 Details of significant rule changes are below:
- New Rules
- 7.4 **Delegations:** A new Rule 4 has been created to codify the various delegations able to be made by the Chair of the Parole Board. The 2016 Rules were silent on which functions of the Parole Board Chair could be delegated, and to whom, even though in practice some functions are carried out by Parole Board panel members or member of staff.
- 7.5 **Paper Hearings:** Rule 21 provides for the procedure whereby a case which was directed to an oral hearing can be concluded on the papers if further evidence is received which satisfies the panel Chair that the case can be concluded fairly without an oral hearing. This aims to reduce the number of unnecessary oral hearings, speeding up the completion of the parole review and reducing costs. This does not dispense with the prisoner's right to request an oral hearing, and a case will not be concluded on the papers if an oral hearing remains necessary in the interests of fairness and justice. The case cannot be concluded on the papers if the oral hearing is less than three weeks away.
- 7.6 **Reconsideration Mechanism:** Rule 28 introduces the 'reconsideration mechanism' which allows both parties (i.e. the prisoner and the Secretary of State for Justice) the opportunity to apply to the Parole Board for a decision to be reconsidered if they believe it was not legally sound. Applications should be received within 21 days of the decision and must be on the basis that the panel's decision was either irrational and/or procedurally unfair. This test is similar to that required to launch a judicial review. The reconsideration mechanism applies to all decisions relating to the release of prisoners serving an indeterminate sentence (life or IPP) and certain determinate

² *R (DSD, NBV & Ors) v the Parole Board & Ors* [2018] EWHC Admin 694

sentences where initial release is at the discretion of the Parole Board (including Extended Determinate Sentences and Sentences for Offenders of Particular Concern).

- 7.7 Victims who have serious concerns about a decision can ask the Secretary of State's officials, aided by their Victim Liaison Officer if appropriate, to apply for reconsideration. This provides a quick and straightforward way for victims to seek to challenge a decision they believe to be seriously flawed without having to engage legal representation or pursue the onerous and costly route of applying for judicial review. This measure responds to concerns arising from the 'Worboys' case and delivers on the proposals in the subsequent public consultation³.
- 7.8 **IPP licence terminations:** Rule 31 introduces procedural rules for applications to terminate IPP licences under *s31A Crime (Sentences) Act 1997*. Due to the ten-year period following release required before an application can be made, IPP offenders are only now starting to reach the point when they may make an application and provision was required to establish a statutory procedure for this type of case.

Amended Rules

- 7.9 **Lack of mental capacity:** Rule 10 specifically provides for a panel to appoint a representative for prisoners who lack the mental capacity to participate in the proceedings or make decisions about instructing legal representatives. The amended rule is based on the procedures within the Mental Health Tribunal⁴ (whose proceedings can include those who ultimately go through the parole system) and ensures that where a prisoner is unable to appoint a representative, or lacks the capacity to consent to a representative being appointed, the panel has the explicit power to appoint one for them. The panel will need to decide what is in the best interests of the prisoner to ensure a fair hearing and can appoint a legal or other representative to meet that requirement.
- 7.10 **Service of documents:** Various rules relate to the service of evidence and provide certainty as to how and when service of documents is deemed to have taken place. These provisions are based on similar clauses within the Criminal Procedure Rules, which also cover proceedings involving prisoners.
- 7.11 **Non-disclosure applications:** Rule 17 introduces a new direct route for third parties applying for non-disclosure of evidence straight to the Board. Previously, such applications were sent via the Secretary of State, so it was not sufficiently clear as to who was applying to limit disclosure of sensitive material. The creation of a direct application route for authorised third parties (such as the Police or security services) is part of the wider reforms to clarify the roles and responsibilities of the parties and the Board – and makes the process quicker and more efficient.
- 7.12 **Review on the papers:** Rule 19 expands the type of cases in which a decision can be taken on the papers (rather than always requiring an oral hearing in every case) to include prisoners serving life sentences. Decisions following a review on the papers could previously be taken in all other types of cases, including IPP prisoners, and the amended rule brings life sentence prisoners in line with that. Previously, life sentence prisoners could be denied initial release on the papers but could only be released following an oral hearing – and all decisions following recall always required an oral

³ Ministry of Justice. (2019). *Reconsideration of Parole Board decisions: creating a new and open system* (CP 30). London: HMSO.

⁴ s11(7) *The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rule 2008*. SI 2008 No 2699 (L.16)

hearing. It is envisaged that decisions in life sentence cases will continue primarily to be made following an oral hearing – and this will be necessary in the majority of cases in the interests of public protection and fairness. But there are some cases – most likely where a life sentence prisoner has been recalled for breaching licence conditions and is being considered for re-release – in which a decision can safely and fairly be made following a paper review of the case (i.e. where witnesses do not need to be called to provide oral evidence) and this allows for such cases to be concluded without unnecessary delay. For example, where there is clear consensus among report writers that a recalled prisoner can safely be managed back in the community on licence and the Board is satisfied there are robust risk management plans to support their safe release, the power to release following a paper review allows that to go ahead where previously an oral hearing could take up to six months.

- 7.13 **Decision summaries:** In order to make parole decisions more transparent, the Government made the Parole Board (Amendment) Rules 2018 which introduced a new mechanism for victims (who are registered under the Victim Contact Scheme) to apply for a summary of the final decision in their case. The Board may only refuse requests in exceptional circumstances. Any other person could apply for and receive a decision summary if the Board Chair considered that it was in the interests of open justice.
- 7.14 This reform has been widely welcomed, with over 1,400 summaries being produced to date and the contents ensuring that victims receive written reasons for the Board’s decisions and helping to better inform media coverage of parole proceedings. Having reviewed the operation of decision summaries, it was concluded that it is unnecessary to adopt a different test for providing a summary depending on whether the request comes from a victim or a member of the public. The 2019 Rules have been amended to adopt a single test for all cases – that being, a summary will be provided on request and the Parole Board will only refuse in exceptional circumstances (i.e. the test that applied in respect of victim requests remains unchanged but now applies in all cases). This reflects the position that the Board should always provide a summary unless there is very good reason not to, regardless of who is asking for it.
- 7.15 Additionally, a six-month time restriction on applying for a summary following the decision has been introduced so that the Parole Board is not required to provide a decision summary in respect of historical decisions. The Rules also now provide that the decision summary procedure applies as well in respect of decisions on applications to terminate IPP licences.

Other changes

- 7.16 **Referral:** The point in the process at which referral of a case from the Secretary of State to the Parole Board takes place has been changed. The referral of a case (and any time limits in the rules that arise as a result) will now be deemed to take place once all the relevant material for the parole dossier is sent to the Board, enabling them to start actively managing the case as soon as it has been received. Previously, the dossier was submitted eight weeks after the case had been deemed referred to the Board, thereby limiting the Board’s activity and ability to progress the case until this point. This change in approach therefore supports more effective and efficient case management by the Board.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 The 2019 Rules replace both the Parole Board Rule 2016 and the Parole Board (Amendment Rules 2018) so no further consolidation is needed.

10. Consultation outcome

- 10.1 There has been extensive consultation with both internal and external parties including a formal public consultation regarding the introduction of the new reconsideration mechanism⁵. This ran from 28 April to 28 July 2018 and received a total of 74 responses. The Government's response was published on 4 February 2019⁶. Internal stakeholders were also consulted about the additional changes to the Rules, including the formation of a working group with the Parole Board and HMPPS, which led to the commitment to form a permanent non-statutory Procedure Rules Committee⁷.
- 10.2 Those who responded to the consultation generally had an interest in the parole process, such as prison and victim interest groups, legal practitioners, Parole Board members, other Parole Boards in different jurisdictions and the Victims' Commissioner. Most respondents were broadly supportive of the introduction of a reconsideration mechanism for both parties, with access for victims through the Secretary of State. There were concerns about the potential impact of delaying release of prisoners, causing backlogs in the system and increasing pressure on already limited resources. The approach adopted in the 2019 Rules seeks to address these concerns by applying a 21-day application window (which balances allowing sufficient time to make an application against avoiding long delays to release); and by limiting the types of sentences which are subject to reconsideration.
- 10.3 A majority of the respondents did not support public parole hearings but were in favour of increasing transparency and guidance for victims.

11. Guidance

- 11.1 Guidance will be published for victims, Victim Liaison Officers and prisoners to ensure they have the information and support needed about the new reconsideration mechanism and how it will operate. Guidance will also be published for those involved in the parole system about the changes to the Rules, and the other reforms the Government committed to introduce, to assist with their effective implementation.

12. Impact

- 12.1 There is no impact on business, charities or voluntary bodies.

⁵ Ministry of Justice (2018). *Reconsideration of Parole Board decisions: creating a new and open system*. (Cm 9612). London: HMSO

⁶ Ministry of Justice. (2019). *Reconsideration of Parole Board decisions: creating a new and open system* (CP 30). London: HMSO.

⁷ Ministry of Justice (2019) *Review of the Parole Board Rules and Reconsideration Mechanism: Delivering an effective and transparent system*. (CP 29). London: HMSO, pg11.

12.2 There is an impact on the public sector in additional resourcing required for the Parole Board, HMPPS and Legal Aid arising from the creation of the reconsideration mechanism which is estimated to be in the region of £1.4M per year.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Department has committed to establish a non-statutory Parole Board Rules Committee to oversee the operation of these Rules and identify any future changes. Members will be drawn from the Board, HMPPS and prisoner and victims' interest groups.

14.2 The performance of the Parole Board is monitored by its sponsor within the Ministry of Justice. Quarterly Business Assurance meetings are held at which performance, finance and risk are discussed.

15. Contact

15.1 Steve Bailey at the Ministry of Justice. Telephone: 07799 478313 or email: Stephen.bailey@justice.gov.uk can answer any queries regarding the instrument.