

Criminal Justice Committee

5th Meeting, 2023 (Session 6), Wednesday, 8 February 2023

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
 - [The Parole Board \(Scotland\) Rules 2022](#) (SSI 2022/385) [see page 3];
2. If the Committee agrees to report to the Parliament on the instrument, it is required to do so by **13 February 2023**.

Delegated Powers and Law Reform Committee Consideration

2. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 17 January 2023.
3. The DPLR Committee agreed that it did not need to draw the instrument to the attention of the Parliament on any grounds within its remit.

Procedure for negative instruments

4. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
5. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

6. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
7. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
8. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
9. Each negative instrument appears on the Criminal Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
10. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

11. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

12. **The Committee is invited to consider the instrument.**

**Clerks to the Committee
February 2023**

Policy Note

The Parole Board (Scotland) Rules 2022

SSI 2022/385

The above instrument was made in exercise of the powers conferred by section 20(4), (4A) and (4B) of the Prisoners and Criminal Proceedings (Scotland) Act 1993. The instrument is subject to negative procedure.

Purpose of the instrument

These Rules set out the procedure to be followed by the Parole Board for Scotland (“the Board”) when considering cases referred by the Scottish Ministers.

Policy Objectives

The Rules apply to all cases considered by the Board in relation to people subject to parole proceedings. The main policy aim is to simplify and modernise the procedures of the Board by bringing together some common procedures into one place and updating the language and terminology used. The Rules also introduce some new or different requirements to the Board’s procedures. Some of the most significant changes include:

Casework procedure and oral hearing procedure

Provision is made to simplify the procedures used to determine different types of parole case. The Rules now set out the procedure to apply where the case can be determined based on the case papers (in Part 3), and separately provide a single procedure to be used if an oral hearing is to be held (in Part 4). Previously there were two hearing procedures available for different types of cases. Despite this structural change the detailed procedural requirements remain in most respects the same as those set out in the previous Rules.¹

The term ‘indeterminate case’ is used to describe the cases in which there is a presumption of an oral hearing under Part 4. The presumption applies to cases involving a person sentenced to a life sentence or to detention without limit of time or detention for life, a person subject to an order for lifelong restriction and a person serving an extended sentence who has been recalled to prison in the extension part of that sentence. The presumption of an oral hearing applies due to the different basis for detention in such cases, compared to a prisoner serving a determinate sentence.

¹ The Parole Board (Scotland) Rules 2001 S.S.I. 2001/315, as amended. The 2001 Rules are revoked and replaced by these Rules.

Information provided about people subject to an Order for Lifelong Restriction (OLR)
Provision has been made in rule 5 so that either the most recent, Risk Management Plan (RMP) (approved by the Risk Management Authority) or the Risk Assessment Report, is available to the Board when considering the release of a person sentenced to an OLR. There is also a new addition to the rule on decision summaries (rule 34) which provides that the Board must give reasons for a decision where it differs from the recommendations in a RMP. These provisions ensure that the most recent assessment of risk is available to the Board in their consideration of such a case and that they articulate their reasoning in reaching their decision.

Use of a Special Advocate

Provision has been made in the Rules to make it clear that the Board can appoint a special advocate to ensure fairness where damaging information is being withheld from disclosure to the person to whom the case relates. Such information may be withheld under rule 9, for example due to safety or national security concerns. The primary purpose of a special advocate is to challenge the classification of some or all of the evidence classified as damaging information and ensure that the withholding of damaging information is subject to independent scrutiny.

Matters the Board may consider

In circumstances where a person has been convicted of murder or culpable homicide a specific provision has been added to the Rules (rule 11) which outlines that the Board may, in applicable cases, take into account amongst other matters, any failure to reveal the location of a victim's body. This clarifies that this matter may be considered where relevant, but does not change the underlying test for release applied by the Board in such cases.

Reconsidering a decision

A new provision has been introduced in Rule 19 to allow the Board to reconsider a case where there has been a decision not to release a person and where an administrative or procedural error has or may have occurred. A case can only be reconsidered if selected by the Chairperson of the Board within 20 working days of the decision being made. This will provide the Board with more flexibility to amend or re-make decisions where there have been errors without the requirement to have them referred again by the Scottish Ministers.

Prisoner representation

In cases where, through illness or disability, a person lacks capacity to appoint or agree to the appointment of a representative (such as a solicitor), provision has been made in rule 26 enabling the Board to appoint someone to represent the person's interests at an oral hearing. This provision provides an alternative to the position under the previous Rules which required the person's agreement before any such arrangements for representation of their interests could be put in place. It was considered that this presented a barrier to participation in parole proceedings for prisoners who are unable to provide such agreement.

Prisoner preparation

A provision has been added to the rules to assist the person concerned to be better prepared for a parole hearing. Rule 28 requires the person to whom the case relates or their representative to send to the Board a written statement of their state of

preparation for an oral hearing. This allows information to be obtained from the person concerned in advance to assess whether they are ready to proceed. A simple check list will be provided by the Scottish Prison Service in advance of the hearing to help with the preparation of this statement. This is aimed at reducing the number of oral hearings postponed at short notice because the person is not ready to proceed.

Victims

The new Rules make a slight change to the provision relating to victims observing parole hearings. Rule 30 permits observation only by those victims who have registered with Part 2 of the Victim Notification Scheme (VNS). This excludes Part 1 registered VNS victims, as they have indicated by registering for Part 1, that they only wish to have information about the person's release. We have also changed provision for decision summaries to be sent to victims. Rule 34 provides that Part 1 registered victims will only get a summary of the Board's decision minute if they say, when they are told of the person's release, that they wish to receive one. Both of these changes are intended to prevent any victim getting information or contact that they do not wish to have and which may cause distress or disruption. It is important to note that a victim can change their mind at any point and register for Part 2 of the VNS if they wish to do so.

Consultation

A public consultation took place from 20 July 2022 to 12 October 2022. There were 29 responses from individuals and organisations. We also worked and consulted with the Board in the drafting of the Rules and they are fully supportive of the changes made. We also specifically consulted with the Scottish Prison Service, the Risk Management Authority and the Equality and Human Rights Commission. Victim Support Scotland also indicated they were content with the changes in Rule 30. A full list of those consulted and who agreed to the release of this information is attached to the consultation report published on the Scottish Government website.

Impact Assessments

An Equality impact assessment has been completed on the SSI and [is attached](#).

Financial Effects

The Cabinet Secretary for Justice and Veterans confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Justice Directorate
December 2022

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