

Consultation on changes to the Parole Board (Scotland) Rules 2001

July 2022



Scottish Government
Riaghaltas na h-Alba
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1. Consultation Process

Responding to this consultation

1.1 The consultation will run for 12 weeks and we are inviting responses to this consultation until 12/10/2022.

1.2 In order to respond to this consultation, please use the Scottish Government's consultation hub Citizen Space, which you can access online <https://consult.gov.scot/justice/parole-board-changes>

1.3 You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date above. You do not need to respond to every question.

1.4 If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send your responses to consultation questions using the Comments Form at page 14 to Sandra.Wallace@gov.scot.

Handling Your Response

1.5 If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

1.6 All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

1.7 If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document. To find out how we handle your personal data, please see our [privacy policy](#).

Next steps in the process

1.8 Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at Scottish Government consultations. If you use the consultation hub to respond, you will receive a copy of your response via email.

1.9 Following the closing date, all responses will be analysed and considered along with any other available evidence. Responses will be published where we have been given permission to do so. An analysis report will also be made available in Autumn/Winter 2022.

Comments and complaints

1.10 If you have any comments about how this consultation exercise has been conducted, please send them to Scottish Government consultations.

Scottish Government consultation process

1.11 Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

1.12 You can find all our consultations online: [Scottish Government consultations](#). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

1.13 Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented
- While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

2. Introduction

The Parole Board (Scotland) Rules 2001

2.1 The procedure under which the Parole Board considers cases is determined by the Parole Board (Scotland) Rules 2001, as amended (“the 2001 Rules”). There are currently two main routes of consideration - either part III cases (which can be casework considerations, but may also involve an oral hearing) or part IV cases (tribunal considerations, in which an oral hearing is held unless all parties agree otherwise).

2.2 The rules set out, among other things: the dates at which certain steps must take place, the information to be available to the Parole Board and to the parties, and the means by which the Board and the parties may determine or request certain aspects of the case to be handled.

2.3 The 2001 rules are now some 20 years old and have undergone multiple amendments in that time which has led to them being more complex and inaccessible. They are in need of change to make them more understandable and fit for purpose. In addition, as things have changed there is a need to consider some new rules for certain procedures.

2.4 The Scottish Government is committed to modernising and simplifying the 2001 rules and this consultation focuses on the main changes and new additions that will be provided in the updated rules, for which we are seeking your views. In addition, the new rules will be aligned so as common procedures in the current part III [casework considerations] and part IV [tribunal considerations], will be merged to apply to both parts. There will also be some changes to the language and structure used in order to simplify and provide clarity but the substance of these changes will remain the same. In some areas different procedure may still apply to determine how particular types of case are considered e.g. whether a case is determined on papers or via a hearing. However, the procedures and powers available to the Board will be simplified wherever possible, in particular by ensuring a common procedure is used for oral hearings.

3. Background

3.1 The Parole Board for Scotland (“the Parole Board”) is an independent Non-Departmental Public Body which makes recommendations to the Scottish Ministers about the release of prisoners on parole licence.

3.2 The Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) determines the point at which a person will be considered for parole based on the sentence the person gets after conviction.

3.3 The Parole Board makes recommendations for release for people who have been sentenced to four years or more, extended sentence prisoners, people subject to Orders of Lifelong Restriction and Life Sentence Prisoners. The Parole Board

also makes recommendations on the licence conditions of Short Term Sex Offenders and for people who have reached their Earliest Date of Liberation.

3.4 The Parole Board, along with the Scottish Ministers, also makes recommendations on the recall and re-release of people if they have breached their licence conditions.

4. Proposed Changes to the Current Rules

Non-Disclosure of Information (current rule 6)

4.1 There can be instances where it would not be in the public interest to disclose information to the person concerned or their representative. This is commonly known as 'damaging information'. Examples of this might include police intelligence in relation to an ongoing investigation, information which might lead individuals to be vulnerable to retaliation or information where national security is at risk. On occasions where such damaging information is provided in confidence the Parole Board must take a decision on whether this information should be provided to the person concerned or their legal representative. The damaging information may be significant in assessing risk and applying the tests for release.

4.2 We propose add to the rules a procedure for handling damaging information and to include provision for the Parole Board to appoint a special advocate to represent the prisoner's interest in the consideration any Non-Disclosure of damaging information.

4.3 Where such damaging information is present, the prisoner requires to be notified of this fact and provided with the "substance" of the information (i.e. as much information as can be safely disclosed) unless disclosing the substance would prejudice the purposes for which the information is not being provided.

4.4 The issues the Parole Board tribunal/panel determine are:

- a) Whether the damaging information is significant, i.e. does it impact on the Board's assessment of risk and its application of the tests for release?
- b) If it is significant, does the tribunal/panel require to consider it? There may be cases where, although the damaging information is significant, there is enough disclosed information within the dossier or from evidence provided at a hearing to allow the Board to reach a conclusion without consideration of the damaging information.

Changes to current procedure

4.5 It is proposed that express provision is made in the rules for the tribunal/panel to appoint a **special advocate** if it has concluded that the damaging information is significant and that fairness requires that it be tested by a special advocate.

4.6 The role of a special advocate will be to test, by examination of evidence, if the case for withholding the damaging information is made. This role should be carried out without taking any instructions from any party to the proceedings on any aspect of the information. It is intended that the special advocate may communicate with the prisoner and their legal representative after they had been provided with the dossier. The special advocate would also be prohibited from initiating any communication with the person concerned or their legal representative, once the damaging information is served upon them. The person appointed as a special advocate would not be responsible to the person concerned or their legal representative

4.7 The primary role of the special advocate would be to seek to challenge the classification of some or all of the evidence classified as damaging information and to submit representations as to whether the Board should place any reliance upon the evidence. Part of the function of a special advocate is to ensure that the damaging information is subject to independent scrutiny and adversarial challenge this would include making submissions (in closed session) on whether or not the damaging information should in fact be disclosed to the person concerned and their legal representative.

4.8 We also propose adding to the list of reasons that information should not be disclosed a new category where it is in the **interests of national security**. This could be applied where the Parole Board considers that the security of the country could be at risk if the information is divulged.

4.9 The final decision on whether to disclose damaging information would remain with the Parole Board.

Questions

1. Do you agree or disagree that provision should be made for the appointment of a special advocate to represent the prisoner's interests in the consideration of the damaging information being withheld?

2. Do you agree or disagree with the additional reason for information to be withheld from the prisoner if the interests of national security are at risk?

Matters to be taken into Account by the Parole Board (current rule 8)

4.10 Current Rule 8 contains provisions which list the matters that the Parole Board may take into account when considering a person's case. This is not a comprehensive list but it brings to the attention of the Board specific matters it may consider.

4.11 We propose to add to the list a provision which outlines that the Board may, in applicable cases, take into account any failure to reveal the location of a victim's body.

4.12 This would be relevant in cases where a person has been convicted of murder or culpable homicide and the victims remains have never been discovered or disclosed, and where the convicted person keeps silent on the whereabouts of their victim. This would not amount to a prohibition on parole in such circumstances as the decision on whether to grant parole or otherwise is one for the independent Parole Board to make taking into account all of the circumstances and evidence in the case.

4.13 We also propose to strengthen this rule and change the wording in this rule from 'matters the Parole Board **may** consider' to 'matters the Parole Board **must** (where it is relevant) consider'.

Questions

3. Do you agree or disagree that there should be a provision which asks the Parole Board to consider the failure to reveal a victim's body as a specific matter they should consider?

4. Do you agree or disagree with the change of term from 'may consider' to 'must (where relevant) consider' in this specific rule?

Observation of a Parole Hearing (current rule 26A)

4.14 The Parole Board (Scotland) Amendment Rules 2021 brought in new provisions, with effect from 1 March 2021, to allow a victim or family member(s) of a victim to request to observe a parole hearing relating to the person involved in their case.

4.15 This provision currently applies to all victims who are registered with the Victim Notification Scheme ("the scheme") under part's 1 or 2 , and family member(s) of such victims.

4.16 The scheme operates as follows:

- Part 1 gives the registered person(s) the right to receive information about the person concerned release.

- Part 2 gives the registered person(s) the right to know if the person concerned is being considered for parole or for release with an electronic tag (Home Detention Curfew).

4.17 We propose to amend this to restrict the entitlement to ask to observe a hearing to those registered with part 2 of the scheme only.

4.18 This move avoids re-traumatising those victims who have made the choice to register only for part 1 and to hear about the person's release and have not requested to have information about parole and do not want to receive unexpected news about the person concerned. We feel this sits better with the registered person(s) choice.

4.19 Should the registered person choose at a later date that they do wish to hear about the parole hearing they are free to register for part 2 of the scheme to receive that information and request to observe a hearing, should they change their mind and wish to do so.

4.20 This move avoids contacting people about parole hearings who do not wish to have the information. It follows from feedback from people registered with part 1 of the scheme who have indicated that they do not welcome being contacted in this way.

4.21 Registered victims are also entitled to receive a redacted/anonymised note of the decision minute. We consider that this information is also only of interest to part 2 registered victims but would welcome views on whether the decision minute should be sent to part 1 and part 2 victims.

4.22 An independent review of the scheme started in April. The review is examining the scheme to ensure it is fit for purpose and serving victims effectively. Outcomes, including any related to these arrangements, will be carefully considered by the Scottish Government.

Questions

5. Do you agree or disagree that only victims registered on part 2 should be contacted in regards to observing parole hearings?

6. Should the redacted/anonymised decision minute be sent to all victims registered with the scheme or only victims registered with part 2 of the scheme?

5. New Rules

Order for Lifelong Restriction

5.1 Section 5.3 (dossiers in tribunal cases) of the Parole Board guidance manual states at 5.3.2 that the dossier contents should, where the person is subject to an order for lifelong restriction, contain a risk management plan (RMP) approved by the Risk Management Authority (RMA), where one has been prepared by the lead authority.

5.2 We propose to include in the rules a specific provision to make clear that the dossier must contain the most up-to-date available RMP which has been approved by the RMA.

5.3 This provision is needed to ensure that the most recently approved RMP is available to the Board. The final decision whether to release a person would remain for the Parole Board having had regard to the information contained within the RMP.

5.4 Two recent judicial reviews¹ reinforced that whilst a Parole Board tribunal does not have to follow the conclusion in the RMP on manageability in the community, “having regard” meant that a clear explanation should be provided if a different conclusion is reached. These reviews also confirmed that the Board does not have the power to direct the creation of community risk management plan as this would run counter to the statutory regime. We therefore also propose to reinforce the need to “have regard” to the RMP to clear up any ambiguity on the rationale for a decision to release, contrary to the risk assessment and plan. We consider this may be part of the decision note where an explanation for the reasons for release is provided and that the rules should expressly provide for this.

Questions

7. Do you agree or disagree that provision should be made in the rules making clear the Parole Board must consider the most up to date risk management plan which has been approved by the Risk Management Authority and that an up-to-date plan should always be available, where it has been prepared by the lead authority?

8. Do you agree or disagree that the decision note should provide the rationale for the reasons to release when the reasons are contrary to the risk management plan and that provision should be included in the rules?

Reviewing a Decision

5.5 We propose to introduce a new provision which allows the Parole Board time to review a case once the initial decision has been taken. The proposal is that a decision is provisional for a period of time, and becomes final unless an application is made to review the decision.

5.6 A review would be considered if ‘new’ evidence or a ‘new’ document becomes available which was not contained within the dossier of information considered by the panel taking the original decision. This would allow a review based on the new evidence or new document.

5.7 It is also considered that a review may be requested where an administrative error has occurred which prevented documentation or evidence being available due to no fault of the person concerned or their representative. For example, where the individual’s representations had been sent on time but had not been made available to the panel by adding the documentation to the dossier.

5.8 We propose that any request to review would have to be made within 28 days of a provisional decision, thereafter the decision would become final.

5.9 We propose to restrict the review availability so as a review cannot be requested because a person or their representative does not agree with or dislikes the decision.

5.10 The grounds where a review may be granted are where the decision was:

- Procedurally unfair – i.e. the correct process was not followed, for example, important evidence was not shared or available; or
- Irrational - the decision makes no sense based on the evidence of risk that was considered and that no other rational panel could come to the same conclusion.

5.11 We consider the final decision on whether to conduct a review in any circumstances would be for the Parole Board.

5.12 It is considered the availability of a review would reduce the need for costly judicial reviews in certain circumstances.

Questions

9. Do you agree or disagree with the proposal to allow a review of a Parole Board decision if:

- **additional information or documentation becomes available,**
- **the decision is procedurally unfair, or**
- **the decision was irrational**

10. Are there any other circumstances which you consider a review of the decision should be available?

Prisoner Representation

5.13 Under the current rules, a prisoner may be represented (whether by a solicitor or by any other person) in parole proceedings **only if they have appointed the representative themselves**, or if they have **agreed to the Parole Board appointing a representative on their behalf**.

5.14 There is a lack of clarity as to how a prisoner, who is unable either to appoint a representative or to agree to one being appointed on their behalf, could be represented in parole hearings. While this may only affect a small number of cases (i.e. cases where through illness or disability a prisoner entirely lacks capacity to appoint or agree to the appointment of a representative), it is considered that provision should be made to clarify how the Parole Board may ensure that the interests of prisoners in this position can be represented. At the moment a hearing can go ahead with no representation. This presents some uncertainty that the prisoner fully understands what is happening to them or if they comprehend their rights and choices.

5.15 We propose to include in the rules a provision to enable the Parole Board to appoint a representative without the prisoners agreement, in circumstances where the Parole Board consider it necessary, taking into account the principles of the Adults with Incapacity (Scotland) Act 2000 and where the Board has been advised that the prisoner is unable to instruct their own representative. This may be due to the prisoner having a mental disorder or an inability to communicate because of a physical disability.

5.16 The Parole Board can already seek medical/psychologist/prison reports to enable them to reach a decision on the person's capacity to take part in proceedings. These reports assist the Board in reaching a decision on whether a representative is necessary or whether the prisoner can be supported to appoint a representative themselves. The Parole Board can also provide guidance to members on alternatives to appointment of a representative in suitable cases, including advocacy services.

Question

11. Do you agree or disagree, that if a prisoner lacks capacity to make decisions for themselves the Parole Board should be able to appoint a representative for them without their agreement?

Preparation for parole hearing

5.17 Information provided by the Parole Board indicates that often individuals attend their parole hearing without proper preparation. This can lead to postponements whilst additional information is sourced, which is not a good use of public funds. To better prepare an individual for a parole hearing we propose to make provision in the rules about information to be obtained from the prisoner in advance, which will help assess the prisoner's state of preparation. A check list for this information will be provided with the parole dossier to enable the prisoner to go through the list and ensure they are ready to proceed. The check list may, for example, ask questions such as:

- Whether the person is seeking release.
- If the person is not seeking release but instead wishes to propose a date for a future hearing, the proposed date and the reasons for this.
- Whether the person has received a copy of the dossier information and the date they received this.
- Whether the person wishes to be represented at the hearing, and if so, the name and address of their proposed representative.
- Whether the person wishes the Parole Board to consider their case without a hearing.
- A copy of any documentation that the person wishes to submit to the Parole Board.
- The person's views on whether they are adequately prepared for the hearing.
- If the person considers they are not prepared for the hearing what are the reasons for this and what date they consider they will be adequately prepared.

- Information about any requirements the person has in relation to the hearing, including—
 - particular facilities or equipment,
 - assistance or support from any other person,
 - interpretation services required,
 - other special arrangements the person considers necessary to assist them to participate in the hearing.

5.18 Provision would be made to ensure that failure to provide the check list or to fail to complete it, should not be a barrier to the hearing going ahead. The check list would be provided to assist the individual to understand all the points they should consider in advance of the hearing and to allow the individual to be in the best state of preparation for the hearing.

Question

12. Do you agree or disagree with the proposal to include a check list to assist the individual to be in the best state of preparation in order to fully participate in a parole hearing?

6. Question Summary – Comments Form

Questions from section 4

Non-disclosure of Information

1. Do you agree or disagree that provision should be made for the appointment of a special advocate to represent the prisoner’s interests in the consideration of the damaging information being withheld?

2. Do you agree or disagree with the additional reason for information to be withheld from the prisoner if the interests of national security are at risk?

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Matters to be taken into Account by the Parole Board

Questions

3. Do you agree or disagree that there should be a provision which asks the Parole Board to consider the failure to reveal a victim’s body as a specific matter they should consider?

4. Do you agree or disagree with the change of term from ‘may consider’ to ‘must (where relevant) consider’ in this specific rule?

Comments

Observation of a Parole Hearing

Questions

5. Do you agree or disagree that only victims registered on part 2 should be contacted in regards to observing parole hearings?

6. Should the redacted/anonymised decision minute be sent to all victims registered with the scheme or only victims registered with part 2 of the scheme?

Comments

Questions from Section 5

Order for Lifelong Restriction

Questions

7. Do you agree or disagree that provision should be made in the rules making clear the Parole Board must consider the most up to date risk management plan which has been approved by the Risk Management Authority and that an up-to-date plan should always be available, where it has been prepared by the lead authority?

8. Do you agree or disagree that the decision note should provide the rationale for the reasons to release when the reasons are contrary to the risk management plan and that provision should be included in the rules?

Comments

Reviewing a Decision

Questions

9. Do you agree or disagree with the proposal to allow a review of a Parole Board decision if:

- additional information or documentation becomes available,
- the decision is procedurally unfair, or
- the decision was irrational

10. Are there any other circumstances which you consider a review of the decision should be available?

Comments

Prisoner Representation

Question

11. Do you agree or disagree, that if a prisoner lacks capacity to make decisions for themselves the Parole Board should be able to appoint a representative for them without their agreement?

Comments

Preparation for a Parole Hearing

Question

12. Do you agree or disagree with the proposal to include a check list to assist the individual to be in the best state of preparation in order to fully participate in a parole hearing?

Comments



Consultation on Changes to the Parole Board (Scotland) Rules 2001

6. Respondent Information Form

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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