

Criminal Justice Committee

6th Meeting, 2023 (Session 6), Wednesday, 22 February 2023

Subordinate legislation – motion to annul

Note by the clerk

Background

1. The Committee considered the following negative instrument at its meeting of [Wednesday 8 February](#):
 - [Parole Board \(Scotland\) Rules 2022](#) (SSI 2022/385) [see Annexe A]
2. Members raised a series of issues with the instrument during the discussion on the SSI.
3. On 9 February 2023, Jamie Greene MSP lodged [motion S6M-07891](#) - that the Criminal Justice Committee recommends that the instrument be annulled.

Correspondence

4. The Parole Board for Scotland wrote to the Committee on 14 February 2023. A copy of the letter can be found in Annexe B.

Procedure

5. This SSI follows the negative procedure for statutory instruments. That means the provisions the SSI contains will come into force on a given day unless the Parliament, on a motion from any member, decides against this (usually referred to as a “motion to annul”).
6. A motion to annul needs to be taken and agreed not later than 40 days after the instrument was laid. This then means that the lead committee, in this case the

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Criminal Justice Committee, has to consider the SSI and any relevant motion to annul within the same time period.

7. For this particular SSI, the 40-day period ends on **Friday 24 February**. This means a motion to annul would need to be taken in the Chamber by close of business on **Thursday 23 February** at the latest.
8. The Cabinet Secretary for Justice and Veterans will attend the Committee meeting on 22 February 2023. There will be an evidence session followed by a formal debate on the motion to annul.
9. If, at the end of the debate, the motion is pressed, the Committee will be invited to agree to it.
10. If the Committee agrees to recommend to the Parliament that the instrument be annulled, the Parliament is asked to vote on a Bureau motion to that effect. If the Parliament then 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.
11. 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.

Criminal Justice Committee Clerks
February 2023

Annexe A

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.

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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

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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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Annexe B

Dear Ms Nicoll

PAROLE BOARD (SCOTLAND) RULES 2022

In anticipation of the forthcoming debate on the SSI introducing new Parole Board Rules, I am writing to you to provide the Board's views on the issues raised at the Committee's meeting on 25 January. I hope this provides some additional context for the Committee's consideration.

Before commenting on the specific issues raised at Committee, I can confirm that the Board is, in general, content with the new Rules which, have been the subject of extensive discussion over the last year with Scottish Government officials. There are a number of further changes that the Board would like to see, such as a formal appeal process, but we agreed that these would take more time to develop and that the benefits of introducing the new Rules as they stand outweighed the necessary delay in properly considering the additional issues. Scottish Ministers have agreed that discussions on the remaining issues should continue this year with a view to subsequently introducing amendments to the Rules if and when required. It may be that some of the issues raised by the Committee could be included in those discussions.

I have set out comments below on what we have taken to be the main concerns raised at the Committee meeting.

Suzanne's Law

New Rule 12 means that the Board may take into account a failure to disclose where a victim's remains have been disposed of. Whilst the Board would have already taken this into account we believe it is helpful, from a victim's perspective, to have this explicitly stated.

In reaching its decision the test that the Board has to apply is clearly set out at Section 2 (5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993. The test is that "the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined." As with all the Board's decisions this is a risk assessment taking into account all the information provided to the Board by Scottish Ministers. A failure to disclose the whereabouts of a body can only be considered in the context of that overall assessment of risk.

Given the test is statutorily defined it is difficult to envisage how the Rules could be amended to require more significance or weight to a failure to disclose the whereabouts of a body without amending the primary legislation.

We understand that there is a view that such a failure to disclose should be a determinative factor in release decisions. This however is a policy issue and would in our view require amendment of the 1993 Act to bring into force.

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In this respect we would note that making a failure to disclose a factor that would prohibit release could mean that there would be no purpose in referring such cases to the Board as arguably there would be no role for them to play and the person would remain confined without limit of time which is contrary to the sentence they received. We also observe that such a policy may not be ECHR compliant.

Victims registered under Part 1 of the Victim Notification Scheme (VNS) – Observation of Hearings and right to receive a decision summary

The proposed new Rules remove the rights of victims registered under Part 1 of the VNS to request, in certain cases, to observe a parole hearing and to receive a summary of the decision where a release decision is made.

This addresses an anomaly in the current arrangements. Victims are initially given the choice as to whether to sign up to Part 1 or Part 2 of the VNS. If they sign up to Part 1 of the VNS they are opting to only be contacted when a prisoner is released. Part 2 registered victims opt to hear about a greater range of information including when the prisoner is to be considered for parole and the outcome of that consideration. The Scheme is administered by SPS and not the Parole Board.

The impact of including Part 1 registered victims in the 2021 revision of the rules, which introduced the rights mentioned above, is that these victims are now receiving communications containing information that they had explicitly chosen not to sign up for when they opted to register for Part 1 and not Part 2 of the VNS. This has the potential for retraumatising victims who will unexpectedly be receiving information that they had not requested and may not want.

The Board's view is that the new Rules correct this anomaly appropriately, but that there is a more significant issue with the VNS that is beyond the scope of these Rules. Victims sign up to Part 1 or Part 2 of the VNS many years before a parole consideration. The Board's view is that, after their initial VNS registration, victims may well change their mind about what information they receive and when. Whilst it is possible for victims to change their registration this is not necessarily clear to victims who can find the system confusing and complicated. We are aware that there is a wider review of the VNS that is to report shortly. Our hope is that this review will propose changes to the VNS to make it more victim centred and flexible. This of course may require further changes to the Parole Board Rules in due course.

Victim observations

Concerns were raised at the Committee meeting around the application of the right to observe and the extent of that right. In particular the issue of victims being able to speak at oral hearings was raised.

The Board has significant concerns about the consequences of allowing victims to make an oral statement to a parole hearing. This is because the parties to the proceedings are the prisoner and Scottish Ministers. Victims are not party to the proceedings. As the Board operates as a court, if a victim were allowed to present an

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oral statement to the tribunal, fairness would dictate that the prisoner or their representative would be able to cross examine the victim.

Reference was made to the number of requests to observe that had been declined by the Board. It is the case that immediately following the introduction of the Parole Board (Scotland) Amendment Rules 2021 all requests were declined as there was no safe way to facilitate observations because of the Covid 19 pandemic. Although the majority of observations would have been held remotely at venues close to the observers home, this would still have required staff members to be present in close proximity to assist with the set-up of the equipment, to support the observer throughout the observation and to ensure confidentiality requirements were observed. The Board issued guidance to members to the effect that requests should generally be declined for this reason. With the lifting of restrictions and changes in official Scottish Government guidance relating to Covid 19 the Board changed its approach from February 2022. Since that date over 80% of requests to observe have been approved, with the percentage approval rate steadily increasing over that period.

There was a suggestion at the Committee meeting that it was inappropriate that the decision as to whether to approve an observation request should be for the tribunal chair as set out in the 2021 amendment Rules. It is not clear what the specific concerns are in this respect, or who else it is suggested could or should make that assessment, but it is the Board's view that it is appropriate for the chair to make this decision in the context of the Board operating as a court. The decision is taken on the basis of both the victims written request and any relevant information in the parole dossier. The chair is also required, where a request is refused, to write to the victim setting out the reasons for this.

Risk Management Plan

Some concern was expressed around Rule 33 (4) which states that

“Where the case relates to a person in respect of whom a risk management plan has been prepared and provided to the Board, and where the panel's decision is different in any respect from the recommendations in that plan, the reasons provided under paragraph (3)(a) must include an explanation of the reasons for that difference.”

We can confirm that the Board is comfortable with this provision. It is the Board's role to assess the (sometimes conflicting) evidence before it, to come to a decision and to explain the reasons for that decision. This new Rule simply makes that explicit in relation to cases where there is an RMP.

Prisoner Preparation – literacy

We note the comments around this at the Committee meeting and agree that it would be helpful for the issue of literacy to be considered in relation to this Rule. We suggest that this could be picked up by issuing guidance to assist in compiling the preparation statement.

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VNS

Wider issues around the VNS were discussed at the Committee meeting but these are beyond the scope of these Rules. As above we hope the outcome of the current review of the VNS will be proposals to make the scheme more victim focused and flexible.

I hope this further information is of assistance to the Committee. Please let me know if I can be of any further help.

Yours sincerely

JOHN WATT
Chairperson