Law Society of Scotland

Consultation Response

Parole Board (Scotland) Rules 2001 changes: consultation

October 2022

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee and Mental Health and Disability Law sub-committee welcome the opportunity to consider and respond to the Scottish Government consultation: Parole Board (Scotland) Rules 2001 changes. The committees have the following comments to put forward for consideration.

General comments on the proposals

We welcome the Scottish Government's commitment to modernising and simplifying the Parole Board (Scotland) Rules 2001 (hereafter 'the 2001 rules')[1]. Numerous amendments to the 2001 rules over the last 20 years have made reading and interpretation a difficult task. Given the importance of the 2001 rules, we are of the view that consolidating the rules and their various amendments will ensure that they are clear and fit for purpose.

[1] The Parole Board (Scotland) Rules 2001 (legislation.gov.uk)

Consultation Questions

Question 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?

We agree but would state that further clarity is needed here. The non-disclosure of any information as foreseen by Rule 6 of the Parole Board (Scotland) Rules 2001 is a serious step which is likely to have profound consequences for the individual whose release is being contemplated by the Board of Scotland (hereafter 'the board'). This is because it results in a situation whereby a decision on release may be based on evidence that the prisoner is likely wholly unable to challenge. The extent therefore to which there is a prospect of realistic scrutiny of said evidence, when a decision to withhold parole it is taken, under the current dispensation, is minimal.

The appointment of a special advocate to challenge the classification of said evidence is therefore to be welcomed given that it brings to matters at least somewhat of an added layer of scrutiny and proportionality at a preliminary stage. Precedent for the system of the appointment of special advocates already exists in certain tribunals in the United Kingdom such as e.g., the Special Immigration Appeals Commission. We would add that if the proposed system is implemented then further work is obviously required by the Board and Scottish Government in respect of the mechanics of instruction of such special advocates including funding. From our perspective, and at this stage we would merely add that Scottish solicitors should clearly be eligible for appointment to this role. In addition, we consider that it would be helpful as the consultation progresses if data could be made available relating to the annual incidence of the exercise of the withholding of information under Rule 6 by the board as this information was not set out within the proposed changes.

As a final comment, at paragraph 4.4. of the consultation the criteria which condition the exercise of the test of withholding information under Rule 6 is outlined. Given the purported aim of clarifying the 2001 Rules, it strikes us as preferable that such criteria are put on a statutory footing at this stage.

Question 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?

Neutral. It strikes us that such matters would already be caught by s.6(1)(v) which allows the board to withhold information if it is considered to be contrary to the public interest. We would however point out that this is a broad head of discretion. As a result, we would welcome a definition for this term which would no doubt be of assistance to prisoners but also to victims and their families. As a general comment we would highlight that questions should be asked as to the extent which such information relating to national security is meaningfully subject to scrutiny when a decision is taken to withhold. It strikes us as unlikely, in such circumstances, that the board can do much other than simply accept the conclusions of the security services when such information is provided. We would therefore expect that security services be required to provide

clear rationale and evidence to prevent the board from disclosing information to the prisoner or their legal representative to allow for necessary scrutiny. Our comments above about the consequences for the prisoner concerned when this occurs should be borne in mind.

Question 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?

Disagree. The inclusion of the proposed provision strikes us as moving the Board away from a decision relating to the calculation of risk, as it should properly consider given its statutory function, and into new territory of performing a punitive & reparative function by taking into account a matter that may be of limited relevance to its proper function related to risk.

If the failure to disclose the whereabouts of a body is actual relevant to the calculation of risk, then this can be considered by the board under the current rules. We are concerned that the proposed additional provision, combined with the strengthening of the wording relating to the rule suggested by Question 4, seems to be moving the Board in a direction whereby they are being utilised to advance the interests of bereaved family members rather than the general public interest in ensuring the safety of those released from custodial sentences.

That is not to suggest that such information will never be relevant to the calculation of risk, as we have already noted (indeed given the wording of s.8(a) of the 2001 Rules it strikes us as extremely likely that such information is already taken into account in appropriate cases. The change therefore is unnecessary and as we have noted may serve to confuse the exercise of the board's proper function.

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

Disagree. See answer to Question 5 below.

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

Disagree. We consider that the proposed change should only be made following the conclusion of the independent review mentioned in para 4.22 of the consultation document[2]. We are of the firm view that anecdotal evidence should not be a sufficient basis to change matters especially when an independent

[2] 6. Question Summary – Comments Form - Parole Board (Scotland) Rules 2001 changes: consultation - gov.scot (www.gov.scot)

review is ongoing. Further, we consider that the proposed changes seem logical but favour that the final decision in this respect should wait until matters have been properly considered and decided upon.

Question 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?

Please refer to our answer at question 5 above.

Question 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?

Agree. Given the importance of this information to the Board's task, a contemporary risk management plan from the Risk Management Authority (RMA) strikes us as essential for the reasons given in the consultation document. We would suggest that the lead authority have an obligation to provide an updated risk management plan for prisoners subject to an Order for Lifelong Restriction (OLR) approximately 2 months in advance of any scheduled hearing of the board. Given that the board does not have control of the scheduling of its hearings, the responsibility to ensure that up to date information is available should rest outwith the boards remit[3].

Question 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?

Agree. We consider that the more information provided in respect of this matter the better. Particularly in light of the caselaw referenced in the consultation document and given that such information should, in our view, be available to be taken into account by interested parties via the published anonymised decision note.

Question 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,**

[3] 2022csoh13.pdf (scotcourts.gov.uk)

- **the decision is procedurally unfair, or**
- **the decision was irrational**

Differing views were expressed in relation to this proposal. We would remark that it is not clear from the consultation document whether the proposal for review would replace the current system or whether this was intended to provide an additional step in the process. We acknowledge that there is a financial cost to the board in respect of challenging decisions by way of a Judicial Review and note that the current system discourages prisoners from lodging a Judicial Review on the basis that they do not like or are unhappy with the board's decision. We note that the Judicial Review system currently considers whether a decision which was taken by the board was procedurally unfair or irrational. We also note that in cases where it is expected that new information or risk assessments are forthcoming, legal representatives can request further time to review and consider materials.

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

Please refer to our answer at question 9 above.

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?

We agree that, where a prisoner lacks the capacity to appoint a representative and there is no attorney or guardian with relevant powers to instruct a solicitor on the prisoner's behalf, the board should be able to appoint a representative for them. This would address a lacuna in the Parole Board for Scotland Rules of Procedure in relation to prisoners with impaired capacity, which has left the Scottish system out of step with analogous tribunal proceedings in Scotland and the position in England and Wales, and which has a potential for injustice. It would also be consistent with Scotland's obligations under the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD).

We welcome the reference at para 5.15 of the consultation paper to the principles of the Adults with Incapacity (Scotland) Act 2000 and agree that any such appointment must be made and carried out in line with the definitions and principles of that Act. In particular, prisoners whose capacity may be impaired should be provided with all necessary support to enable them to appoint a representative where possible, or to express a view on the appointment, in line with section 4(a) of the 2000 Act and Article 12 UN CRPD. We would suggest that changes to the Parole Board for Scotland Rules of Procedure should be accompanied by detailed guidance which makes clear that a representative should only be appointed by the board as a last resort and where all possible support has been given to maximise the prisoner's ability to instruct a solicitor. This should include enabling any attorney appointed by the prisoner but without

relevant powers to instruct a solicitor to fully support the prisoner in the matter and may, depending on the closeness of the guardian's relationship with the prisoner, also include enabling any guardian without relevant powers to support the prisoner. There should be greater focus within the system on identifying prisoners who might have impaired capacity, and require support, at an earlier stage in the system and providing them with that support.

We note the reference at para 5.16 of the consultation document to alternatives to appointment by the board of a representative in suitable cases, including advocacy services. Whilst advocacy support can be extremely valuable for prisoners who may lack capacity, in our view advocacy should be provided alongside - not in place of - representation by a qualified legal representative. Further, to ensure human rights compliance no limitation must be placed by SLAB or otherwise on the ability of a solicitor, where appropriate through the attorney or guardian, to adequately understand and represent the prisoner's position[4].

Whilst this question specifically relates to capacity, we consider that it may also be beneficial to appoint a legal representative for those who refuse to engage with the process, for example those who do not recognise the legitimacy of the board. This may ensure that the process remains fair despite any non-engagement.

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?

Agree. We are of the opinion that it would also be of assistance to make clear that this checklist sets out the requirements in generic board hearings. Those with specialist assessment papers or additional requirements will have supplementary requirements which may not ordinarily be included in a checklist.

[4] 2019scjed85.pdf (scotcourts.gov.uk)

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