EXPLANATORY MEMORANDUM TO

THE PAROLE BOARD (AMENDMENT) RULES 2023

2023 No. 397

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument amends the Parole Board Rules 2019 (2019 Rules) and replaces certain changes made by the Parole Board (Amendment) Rules 2022 (2022 Amendment Rules). The changes are necessary following the High Court's decision in the case of Bailey and Morris v Secretary of State for Justice [2023] EWHC 555 (Admin) which ruled that aspects of the 2022 amendments which prohibited prison and probation staff from making recommendations to the Parole Board were unlawful. The new Instrument brings into effect new Rules and changes to the Schedule which addresses the concerns of the High Court while still enabling the Department to implement its desired policy for any overarching view to come from the Secretary of State and for it to be clear that where report writers express an opinion, it is clear that they are doing so within their own professional competence.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The following two matters will be of interest to the JCSI:

3.2 Breach of the 21-day rule: The Department is bringing the SI into force in breach of the 21-day rule laying requirement. The Department apologises for such a breach, but to do otherwise could potentially cause disruption for parole hearings. In its judgment in the case of Bailey and Morris v Secretary of State for Justice [2023] EWHC 555 (Admin) dated 15 March, 2023 the High Court have found parts of the 2022 Amendment Rules unlawful and it is possible that they will strike them down on 4 April. The Department is taking the opportunity to amend the Rules taking account of the court judgment before 4th April. This will ensure continuity so that there is no gap in provision while the Department corrects the position.

3.3 The drafting specifically replaces the whole paragraph previously amended by the 2022 Rules because, whilst the High Court have found the relevant 2022 Amendment Rules unlawful it is not certain, although very likely, whether they will strike the relevant 2022 Amendment Rules down on the 4 April. The drafting caters for both eventualities – amending the 2019 Rules on the basis the amendments from the 2022 Amendment Rules remain in place and also if they are struck down.

4. Extent and Territorial Application

4.1 The territorial 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 2003[1] 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 current rules were introduced in July 2019 and were amended on 21 July 2022.

7. Policy background

What is being done and why?

7.1 The 2022 amendments made changes to the way in which recommendations were made to the Parole Board on behalf of the Secretary of State in his role as a party to the parole process. Specifically, it removed the requirement that reports from prison and probation staff must include views on the prisoner's suitability for release and prohibited them from doing so.

7.2 This premise has been successfully challenged by two claimants who have successfully argued that the 2022 amendments and the associated operational guidance were unlawful. The Court's rationale was that the Rule 2(22) as drafted only applied to the written reports provided at the point the case is referred to the Parole Board. The Court's key finding was that the Secretary of State's intention and subsequent application of the Rule has gone further and was aimed at preventing HMPPS witnesses from giving their recommendations at any stage of the process. Accordingly, the Court found that the 2022 Amendment Rules were made with improper purpose and are therefore unlawful. Crucially, the Court found that the rules as drafted were incapable of being applied unlawfully but the intent had rendered them unlawful.

7.3 The Rules are expected to be struck down on 4th April 2023 in accordance with the judgment. Therefore, these rules are being laid and brought into force early as, without replacement Rules in place, there will be a gap where report writers would be obliged to follow the unamended 2019 Rules for a short period and then the process would change again when the new rules came into force. This would be confusing and resource intensive for HMPPS staff and possibly cause Parole delays.

7.4 There are two changes made by this Statutory Instrument in respect of the original 2019 Rules and in line with the 2022 amendments. Amendment Rule 2(2) replaces Rule 24(1) of the Parole Board 2019. This removes the requirement for the Parole Board's panel to ask for the parties' views on suitability for release at the start of the hearing. Rule 24 was not the subject of the judicial review but is amended so it is compatible with the other changes.

7.5 The second change is that Rule 2(3) and 4(a) inserts a new Part A1 to replace the previous paragraph 1Z of Part B of the Schedule to the Parole Board Rules 2019. When providing the report to be included in the parole dossier, the new provision

[1] *s239(5) Criminal Justice Act 2003*

permits prison and probation staff to include their professional opinion whether the prisoner is safe to be managed in the community, provided that they feel able to give such an opinion. They are not required to provide an opinion and any opinion given should be made with reference to their area of competence.

7.6 Rule 2(4) also replaces paragraphs 4 and 5 of Part B of the Schedule to the Parole Board Rules 2019. The effect of this is to remove the requirement for report writers to make a recommendation in the initial dossier.

7.7 We acknowledge that Rule 2(3) can only apply to the initial report prepared for the inclusion in the dossier. Having considered the dossier, the Parole Board may choose to direct that individual report writers must provide a new or updated opinion either in writing or during oral evidence. The Statutory Instrument will be supported by operational guidance that explains to HMPPS staff that they must comply with any directions from the Parole Board to the best of their ability and knowledge but that any opinion offered will remain the individual's own professional opinion and is not the formal view of the Secretary of State as a party to the proceedings.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or the future relationship.

9. Consolidation

9.1 This instrument amends the previous version of the Parole Board Rules and no further consolidation is necessary.

10. Consultation Outcome

10.1 Due to the urgency in wanting to ensure there was not a gap between the 2022 Amendments ceasing to have effect and new rules coming into force to replace them, the Government has not consulted on this Statutory Instrument.

11. Guidance

11.1 HMPPS will produce updated operational guidance in support of the Instrument which explains its application to them. Further, to ensure staff are clear on the application of the instrument to them, HMPPS will set-up dedicated staff sessions to explain this and allow for any questions to be addressed. The sessions will be recorded to ensure these reach all staff. Guidance is published by the Parole Board on aspects of its operation which can be found on its gov.uk pages.

12. Impact

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

12.2 There is no significant impact on the public sector. The main bodies that will be impacted are HMPPS and the Parole Board.

12.3 A full Impact Assessment has not been prepared for this instrument because it refers to secondary legislation which will not meet the impact threshold of £5 million per year required for a full Impact Assessment.

12.4 As a consequence of this instrument, report writers may include a professional opinion on whether the prisoner is safe to be released (or transferred to open conditions) in their initial report if they feel they are able to do so.

12.5 The opinion, where provided, will be the conclusion of the detailed risk assessment reports that prison and probation staff already provide to the Parole Board, but will be their professional opinion on whether the prisoner is safe to be managed in the community or moved to open prison conditions within their area of competence, as well as to their specific interactions with the prisoner. It is likely to consist of no more than one or two paragraphs of additional text, and of similar resource intensity to pre-July 2022 recommendations. We therefore assess that it will generate only a very small amount of additional work for staff in the preparation of their reports.

12.6 There is a risk that changes to the risk assessment report will have an impact on Parole Board behaviour and therefore affect offender outcomes. It has not been possible, however, to quantify the impact of this change but we believe any impact will be low because the Parole Board still receive all the same factual information and risk assessments

12.7 No other costs or benefits have been assessed for this instrument because all further impacts are considered negligible.

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 instrument does not include a statutory review clause.

14.2 The Parole Board Rules are kept under regular review and are updated regularly to reflect any changes to Government policy, operational need or as a result of litigation.

15. Contact

15.1 Kevin Breame at the Ministry of Justice. Email: kevin.breame1@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Christina Pride, Deputy Director for Bail, Sentencing & Release Policy Unit, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt. Hon. Dominic Raab MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.