Association of Prison Lawyers (APL) Response to Civil Procedure Rules Part 77 & Practice Direction 77 Consultation

Contents

1. Introduction

1.1. The Association of Prison Lawyers (APL) was formed in 2008 by a group of specialist lawyers, comprising of barristers, solicitors and legal representatives across England & Wales. We represent and provide training for our members, and endeavour to represent their views in policy development and engage with relevant stakeholders as appropriate to try and ensure that law, policy and practice in this area is made on an informed basis.

1.2. APL welcomes the opportunity to comment on the proposed drafting amendments required for the implementation of the new parole referral power under ss61 and 62 of the Victims and Prisoners Act 2024.[1] We note at the outset that APL had grave concerns when this proposal was first made, as set out in our evidence during the passage of the Bill.[2] Those concerns remain (see §4 onwards below) and what follows is without prejudice to our concerns and in the spirit of constructive engagement to assist in limiting, so far as is possible, the negative impact of these changes on all those involved.

1.3. We appreciate that this consultation is focused on the narrow issue of changes to the Civil Procedure Rules (CPR) to implement the will of Parliament. However, we are acutely conscious that this will be a new and very different type of case for the Administrative Court (and all involved) and we have therefore set out some background information to provide context for the concerns we are raising about practical difficulties posed by the Rules in their current draft, which we hope will be of assistance.

1.4. We have suggested amendments to the Rules. In doing so we have familiarised ourselves with the Committee's recent minutes from its meeting on 9 May 2025 which discussed some of the key issues that are likely to arise.[3]

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[1] The Secretary of State for Justice ('SSJ') will shortly have the power to direct the Parole Board to refer certain top-tier cases to the High Court for a new release decision. This is referred to as the 'parole referral power'. Ss61 and 62 of the Victims and Prisoners Act 2024, respectively, confer this power by amending the relevant legislation for indeterminate prisoners (i.e. IPP or life sentenced prisoners via s. 32ZAA of the Crime (Sentences) Act 1997) and determinate fixed term sentenced prisoners (via s. 256AZBA of the Criminal Justice Act 2003). The powers under both Acts are identical. The primary difference between the two Acts is the offence for which a prisoner is serving a prison sentence. When the Board directs a prisoner's release, the Secretary of State may direct the Board to refer a prisoner's case to the High Court if the Secretary of State considers that: (a) the release of the prisoner would be likely to undermine public confidence in the parole system, and (b) if the case were referred, the High Court might not be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. On a referral under either statutory provision the High Court's powers remain the same as the Parole Board. The High Court: (a) must, if satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined, make an order requiring the Secretary of State to give effect to the Board's direction to release the prisoner on licence, (b) otherwise, it must make an order quashing the decision (c). If the Court makes an order under (a) it can include directions as to the conditions to be included in the prisoner's licence on release. This means, in practice, that the High Court will be retaking the release decision itself and producing its own reasons for doing so. The implementation of this new power requires new provisions in the Civil Procedure Rules.

[2] See our written evidence to the House of Commons Public Bill Committee dated 29 June 2023, https://publications.parliament.uk/pa/cm5803/cmpublic/VictimsPrisoners/memo/VPB40.htm

[3] Available at: https://assets.publishing.service.gov.uk/media/6870d5a6a08d3a3ca3b67a92/Approved_v2_-_CPRC_Minutes_-_MAY_2025_-_annual_open_meeting_-_amended.pdf

1.5. We would be very happy to meet with the Rules Committee should that be of assistance.

2. Executive summary

2.1. The nature and scope of Parole Board work have changed significantly in recent years, resulting in it becoming increasingly complex and drawn out while funding cuts have placed enormous strain on lawyers doing this work: the new referral process is yet another new element that practitioners will need to master and navigate. At the same time, the prison system is in crisis. Referrals will extend a prisoner's detention in conditions that are often sub-standard. For practitioners, obtaining instructions and advising clients can be very difficult and time consuming.

2.2. The anxiety caused by the proliferation in ways in which decisions about liberty can be challenged, even when the Parole Board has sanctioned release, cannot be underestimated and increases the need for additional client care in referral cases.

2.3. It is therefore important that, if implemented, the new system is one that is as clear, accessible and as fair as possible.

2.4. The proposed amendments to the CPR dealing with those matters that pertain only to referrals from the Parole Board that are not covered elsewhere in the Rules mean that there will be no single comprehensive set of rules that can be easily accessed by those dealing with such referrals. Instead, it will be necessary to master all relevant parts of the CPR to navigate these cases. While it follows the approach taken in the CPR generally, it will make it difficult for those unfamiliar with the Rules, including unrepresented prisoners and advisors who are less familiar with them, to navigate them. The Committee is therefore urged to either consider a comprehensive section of the Rules to govern this process, or to provide a user guide which outlines the process with reference to all the relevant Rules (see §9.8-9 below).

2.5. It is equally important that the way in which these cases are funded is ironed out before the legislation and the Rules are brought into force: the Legal Aid Agency (LAA) has confirmed that funding will be managed in the same way as case-stated appeals but there are significant further questions that need to be clarified to ensure a smooth and efficient process. For example, who will administer the scheme, how long will it take and what will be the process for disbursements and payment? We recommend that, as the prisoner will always be the Defendant, representation orders should be issued automatically (see §9.3 below).

2.6. There are real concerns about how unpresented prisoners will navigate these proceedings and specific consideration needs to be given as to how representation will be secured in such instances (see §9.4 below)

2.7. In relation to the draft Rules and Practice Direction, we have set out several observations and recommendations:

(i) Timing of referrals: Although the legislation is silent on any time-limit for when the Secretary of State must make a referral by, it would be in the interests of justice and the principle of legal certainty for the CPR to set a time limit between the decision by the Parole Board and for a referral /application to be made (§7.1 to 7.7 below).

(ii) Unmeritorious referrals: in line with other matters that come before the Administrative court, there should be a mechanism for unmeritorious applications to be concluded expeditiously on the papers, especially as liberty is at issue, and this should be made clear in the Rules (§7.17 to 7.19 below).

(iii) Timing of the Acknowledgment of Service (AOS) at 14 days and penalties for non-compliance: prisoners will always be defendants in these matters, and they and their advisors are likely to be hindered by the barriers of imprisonment in correspondence and access to visits. It is unrealistic to expect an AOS to be dealt with in 14 days and this time limit should be varied, and in any event, the penalty of removing the right to participate in the hearing for non-compliance should not apply given that liberty is at stake. There are practical issues in lawyers being able to access clients in prison and there must be provision for these to be overcome in these cases (see §7.8 to 7.15 below).

(iv) Practicalities and effective participation during hearings: it is unclear how these cases will operate, whether they will all be at the Royal Courts of Justice in London or at regional court centres, in person or remote: clarity is required along with special provision to enable prisoners to attend hearings in person to effectively participate where appropriate. It is also unclear how confidential and sensitive matters will be dealt with and whether there is adequate provision for private parts of hearings. The Rules should expressly deal with this, starting from the default position that the mode of hearing should mirror that at first instance, unless an application to vary that is upheld (§7.20 to 7.31 below).

(v) Disclosure: the proposed Rules provide a detailed framework for non-disclosure applications but some of the timeframes will be difficult for Defendants and should be extended (§7.32 to 7.33 below).

(vi) Rights of audience: these are re-hearings, and it may be appropriate for the lawyers that represented the client at first instance to appear: provision should be made to allow for this (§9.5 to 9.7 below).

(vii) Licence conditions: the reference to the Prison Service framework in the Practice Direction on licence conditions should be reconsidered and, if retained, the overarching legal framework should be referred to (§8.2 to 8.3 below).

(viii) Finally, unlike most hearings in the Administrative Court which are largely confined to points of law, these cases will involve substantive evaluations of

risk[4] and there will be a need for training for all involved: the clearer and smoother the process governing these cases is, the easier that will be to achieve (§9.1 to 9.2 below).

3. Context

The role of prison lawyers

3.1. Prison lawyers play a crucial role in representing people before the Parole Board. We provide important advice and representation to prisoners. We ensure that cases are progressed in a timely manner. We test the evidence of professionals. We instruct our own experts where necessary. We enable the release of prisoners where the public protection test is met and is justified based on the evidence. Our work is not, however, just limited to parole matters. We provide legal advice and representation in disciplinary matters, sentence cases and judicial reviews, often identifying and challenging unfairness, abuse and errors in the prison system. Our work is essential to maintaining a well-run, fair, and lawful criminal justice system.

The unique nature of parole cases

3.2. Parole cases are complex and unique as they involve a level of in-depth risk assessment not seen in any other judicial context. The transfer of this function to the Administrative Court in high profile and complex cases is not straight-forward. The Administrative Court regularly hears judicial review challenges brought on behalf of prisoners, but these are confined of course to points of law. Even so the frequency and outcomes of these claims indicate how complex the work can be. So far this year, there are approximately 19 available judgments concerning applications for judicial review made on behalf of prisoners, many of which our members have been involved in.5

3.3. A recent review of judicial review cases in 2024 suggested that prisoners succeeded in 70% of cases brought against prisons and/or the Parole Board, suggesting that the system is far from perfect and highlighting that this area of decision-making is often fraught with difficulty.6 The Administrative Court's deference to the Parole Board as an expert body when it comes to risk assessment has been reinforced many times in

[4] See §3.2 below. It is accepted that minimum term reviews are already conducted in the High Court, but it is noted that these cases which are confined to the possibility of reducing the minimum term in light of exceptional progress are very different from making risk-related decisions that could reverse the decision of the expert Parole Board to direct release.
[5] See https://www.bailii.org/ew/cases/EWHC/Admin/2025/.
[6] L. Graham, 'Who Wins and Who Loses Before the Administrative Court?', U.K. Const. L. Blog (14th July 2025) (available at https://ukconstitutionallaw.org))

judicial review decisions (although, it is of course accepted, that Parliament has not previously entrusted these decisions to the Courts).7

3.4. The increase in complexity in parole cases over the last 6 years (since the introduction of the Parole Board Rules 2019) results from a combination of changes resulting from case law and amendments to statutory regimes regarding prisoners, their release, when they can be referred to the Parole Board, and when and how the decisions of the Parole Board can be challenged.

The need for clarity and accessibility in the Rules

3.5. Just as the judges hearing parole referrals will need to adapt to a new and complex area of law involving extensive factual and evidential evaluation, so prison lawyers representing their clients (and unrepresented clients) will need to master a new process in an environment that is very different from the Parole Board but essentially conducting the same exercise. It is therefore important that the rules governing it are clear, accessible and user-friendly. In recent years, the Parole Board has developed numerous policies to help clients, their lawyers and victims navigate the process. The draft CPR, with the new mechanism dovetailing into the existing suite of rules, is going to be difficult for many to navigate. Therefore, the Rules should either contain a comprehensive section or these cases or there should be a guide that outlines how these cases will work, cross referencing all relevant parts of the Rules.

3.6. The need for prison lawyers to master the new process must be seen against a backdrop where our members have not seen an increase in fees this century and amounting to 37 per cent reduction in terms of inflation.[8] There has been an 85% decrease in the number of prison law legal aid providers since 2008.[9] New lawyers are not coming into this area. If lawyers continue to leave this area of law, there will be far more unrepresented prisoners navigating the minefield of rules, regulations, guidance and statute which ultimately will result in a denial in access to justice with effective representation.[10] This in turn will affect the important work the Court will be undertaking when applying its new statutory powers under the referral regime.

3.7. The power to refer contained in the Victims and Prisoners Act 2024, and the draft version of the CPR to implement that power, represent substantial changes to the

[7] See, for example, R v Parole Board ex p Blake [2000] 2 WLUK 845 para 54: "The Parole Board have both experience and expertise in making decisions of this character which judges lack."

[8] The Ministry of Justice has proposed to increase fees for prison law legal aid work by 24%. If implemented, the current Legal Aid Consultation on solicitors' fees in criminal legal aid work will go a significant way towards achieving this: it will bring fees up to around two-thirds of the rates in 2011. While the increase is a good first step, it is not enough to ensure long-term sustainability for legal aid providers.

[9] For 2022 data, see https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2022 , at table 9.1, which shows 130 providers doing prison law as of June 2022. For 2008 data, see the Legal Services' Commission's report on 'Prison Law Funding: A Consultation Response', dated 15 July 2009, at §5.4 on p.64, which shows that in 2008/2009 there were over 900 firms doing this work.

[10] See the Guardian, 6 August 2023 available at: https://www.theguardian.com/society/2023/aug/06/prison-lawyers-warn-more-quit-legal-aid-fees-not-raised-england-wales#:~:text=Prison%20lawyers%20provide%20representation%20and,cases%20and%20increased%20its%20members

parole system that add complexity, uncertainty, and length to parole reviews, as well as the work of prison lawyers, who are already under significant strain. The risk in terms of access to justice is obvious.

3.8. It is essential that there be equality of arms and that representation for prisoners in these cases is properly funded. The new process should not commence until the nature of the funding available and how it will be administered is clear and all involved are satisfied that it will be effective and fit for purpose. At present, it is understood that the funding model will be based on the model of case stated applications which are made upon request to the High Court itself by way of a written or oral application.[11] However, it is not clear what resource the Administrative Court Office has to deal with this, how quickly applications will be processed, how the application will differ given that prisoners will always be "defending" applications and never "applying" (ideally application should not be required and a representation order should be granted as of right), whether there is any limit to costs to be incurred and if so, how that will be set, what should happen where expenses are incurred for expert reports (these are not usually a feature of case-stated appeals as they are by definition on a point of law).

4. Concerns about the power to refer release decisions

4.1. The power to refer release decisions gives rises to several concerns, many of which APL set out during the passage of the Victims and Prisoners Bill,[12] and although the law is now passed, may be useful for those adjudicating upon these cases to hold in mind.

4.2. It is extremely unusual, if not a legal first, for a recognised judicial body to have to direct itself to the High Court, based solely on the position of one of the parties.

4.3. There is no statutory time limit to make such a referral. The Parole Board's direction for release is suspended for a period *"as the Secretary of State reasonably requires to determine whether to direct the Board to refer the prisoner's case to the High Court"*. This is a provision that is clearly capable of being abused and may result in the delay of the release of prisoners.

4.4. It is currently unclear how the Secretary of State will decide which cases he will refer to the High Court and a large number of cases could potentially be referred. It is understood that guidance and policy criteria will be published by the Secretary of State prior to the statutory provisions coming into force.

[11] See paragraph 6.12 of the Criminal Legal Aid Manual which states: "Applications for appeals by way of case stated in the High Court must be made via an oral or written application to the High Court judge or appropriate officer. This is not means tested."
[12] See our written evidence to the House of Commons Public Bill Committee dated 29 June 2023.

5. The current legal framework

5.1. In order to frame our concerns about the operation of the new referral process, we have set out the current legal framework and how it has developed. The Parole Board was originally established by s.59 Criminal Justice Act 1967. In its current statutory formulation, it is a body corporate.[13]

5.2. As a creature of statute, it can only do things that are expressly or impliedly authorised by the statutes which regulate it.[14] It has no inherent jurisdiction.[15] The Parole Board is well recognised as an independent[16] quasi-judicial body.[17] It acts as a court when deciding whether to direct a prisoner's release and recommending open conditions.[18]

5.3. The authorities are clear that for indeterminate sentenced prisoners, where Article 5(4) of the European Convention on Human Rights applies, it is the role of the Parole Board to decide whether there is a lawful basis for detention.[19] It must not merely have advisory functions.

5.4. Under Article 5(4) both the Parole Board and Secretary of State for Justice have a duty to:

5.4.1. Provide a speedy and lawful review of a prisoner's post-tariff detention.[20]

5.4.2. Produce a system which ensures that parole hearings are dealt with speedily in accordance with article 5(4). Such hearings must be held as soon as reasonably practicable.[21]

5.5. For determinate sentenced prisoners, the Parole Board has a common law duty to act within a reasonable time when making its decision.[22]

5.6. Parole Board proceedings are complex. They concern the fundamental liberty of the subject. They cannot be neatly said to fall into either civil or criminal litigation. Rather throughout the years, they have entirely developed as their own discrete specialism. Parole Board decisions are reached after carefully applying legal principles as they are contained in statute, and the common law, and only after the Board has read, and in most cases tested the live evidence of experts, including probation officers, psychologists and psychiatrists.

5.7. Parole Board panel members are trained and familiar with such expert reports. In complex cases panels sit with specialist members such as a psychologist or a

[13] s.239(1) Criminal Justice Act 2003.
[14] *R(Roberts) v Parole Board* [2005] UKHL 45.
[15] *R(Dickins) v Parole Board* [2021] EWHC 1166 (Admin), §14.
[16] For further discussions on its independence see: *R(Brooke) v Parole Board* [2008] EWCA Civ 29 and *R(Wakenshaw) v Secretary of State for Justice* [2018] EWHC 2089 (Admin).
[17] *R (Girling) v Parole Board* [2007] QB 783, §69.
[18] *R (Girling) v Parole Board* [2007] QB 783, §13; *R(Bailey and Morris) v Secretary of State for Justice* §11-24.
[19] *Weeks v United Kingdom* (1988) 10 EHRR 293, at §61, and *R (Wells) v Secretary of State for Justice* [2010] 1 AC 553, Lord Hope, at §14.
[20] *R(Sturnham and Faulkner v Parole Board (No 1)* [2013] 2 AC 254.
[21] *R(Noorkoiv) v Secretary of State for the Home Department* [2002] 1 WLR 3824, §58.
[22] *R(Youngsam) v Parole Board* [2017] 1 W.L.R 2848, §43; *R(Adams) v Parole Board* [2022] EWHC 3406 (Admin), §27.

psychiatrist, to evaluate the evidence before it. Panel members are also trained to question prisoners, to identify their risk factors, evaluate whether there has been a reduction in risk, and assess whether the statutory public protection test has been met.

5.8. Parole Board proceedings are largely inquisitorial with the panel usually taking charge of questioning witnesses first, followed by legal representatives. In rare cases an adversarial approach is adopted, particularly in recall matters.

5.9. Parole Board panels are required to determine allegations made against a prisoner.[23] Panels determine whether they are relevant, whether they can be proved on the balance of probability and if so, what weight can be placed on them in its assessment of a prisoner's risk. This has resulted in complex litigation where allegations which may be decades old are examined at findings of fact hearings. Complainants may be called to give evidence in which no prosecution was brought or was successful, and they may be cross-examined.

5.10. In life sentenced and other indeterminate sentenced cases, the Parole Board plays a crucial role in approving whether additional licence conditions are required.[46] Any direction for release by the Parole Board is a direction for release subject to a risk management plan which includes licence conditions.[47]

5.11. Licence conditions fall into two categories. First, standard conditions as set out in Article 3 of the Criminal Justice (Sentencing) (Licence Conditions) Order 2015/337. Second, prescribed conditions (i.e., additional conditions authorised by the Secretary of State) as set out in Article 7 of the 2015 Order.

5.12. All licence conditions must be necessary and proportionate and in accordance with Article 8 of the European Convention on Human Rights where they effect a prisoner's private life.[48] Separately they must be rational, reasoned, and reasonable because they must be enforceable. A prisoner must be able to understand their licence conditions and what is required of them.

5.13. The Parole Board has traditionally sat in private. This practice reflects the fact that it considers particularly sensitive matters. For example, it is well-recognised that a prisoner's rehabilitation and medical history engage article 8 of Schedule 1 of the Human Rights Act 1998.[24]

5.14. However, in *R (DSD) v Parole Board* [2019] QB 285, §§175-7, the Divisional Court held that the open justice principle applies to proceedings before the Defendant and that there are clear and obvious reasons why the Defendant should provide information about its proceedings to the public (provided that it was done so in a way that "*in no way undermines the article 8 rights of the prisoner and the confidentiality that attaches to*" that information).

[23] *R(Pearce) v Parole Board* [2023] AC 807
[24] See, for example, *RXG v Ministry of Justice* [2020] QB 703, §§67-8.

5.15. Following *DSD*, the Parole Board Rules 2019 were introduced. In their current version they allow for greater transparency:

5.15.1. Rule 14(4B) provides that any person may request admittance to an oral hearing as an observer. Their attendance can be subject to conditions (Rule 14(4A)(a). The Board's guidance suggests a confidentiality agreement as one such condition.[25] The pro forma agreement precludes an observer from communicating any information they see or hear whilst observing the proceedings, to anyone outside, without the permission of the Chair of the Parole Board.[26] Following a national trial eligible victims are now permitted to attend private parole hearings.[27] In its recent Transparency Review, the Board welcomed the attendance of victims as observers.

5.15.2. Rule 15 contains a presumption that an oral hearing before the Board must be held in private unless the Board Chair considers, on their own initiative, or receives an application, that it is in the interests of justice for the oral hearing to be held in public. Since July 2024 the Board Chair has delegated her powers under Rule 15 to seven judicial panel members. If any oral hearing is held in public, the panel chair or duty member may give a direction that part of the oral hearing is to be held in private. The Parole Board has produced detailed guidance for both applying for public hearings,[28] and how to conduct them.[29] The non-exhaustive factors the Board considers when determining to conduct a public hearing are broad. The application guidance lists 14 factors. These largely relate to the risks of causing distress to the victim, the wishes of the prisoner, a prisoner's safety, any difficulty in confining personal, confidential or sensitive information, and the concerns about the quality of the evidence given by importance witnesses included the prisoner. To date only 10 applications for a public hearing have been granted,[30] and 5 have been conducted. [31] Arguments for opposing an application for a public hearing often rely on Articles 2, 3, and 8 of the European Convention on Human Rights and highlight a prisoner's safety would be adversely affected if a hearing were to be held in public.

5.15.3. If a public hearing is granted by the Parole Board case management hearings are directed to determine which matters need to be heard in private. It is generally accepted by the Parole Board that any evidence which might compromise a prisoner's resettlement plan should not be heard in public. Confidential health details may need to be covered in private. Some aspects of

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[25] See the Parole Board's 'Victims Member Guidance" dated January 2025, §8.85. Available at: https://assets.publishing.service.gov.uk/media/67b85199ba253db298782bfd/Victims_Member_Guidance_v2.0__2025_EXTERNAL.pd f

[26] See 'The Rook Topolski Transparency Review" by the Parole Board (June 2025) Annex D, p86. Available at: https://assets.publishing.service.gov.uk/media/68406f681d85c6606009cd5a/Rook_Topolski_Transparency_Review_-_June_2025.pdf

[27] See https://www.gov.uk/government/news/victims-attend-parole-hearings-to-see-offenders-held-to-account

[28] See Parole Board Guidance 'Application for a public Parole review' available at: https://assets.publishing.service.gov.uk/media/63e67503e90e0706c1064d42/Application_form_for_public_hearings.pdf

[29] See Parole Board's Guidance on "Public Hearings Members Guidance" (October 2023) available at: https://assets.publishing.service.gov.uk/media/65c38bc3b17912000dba682e/Guidance_for_Public_Hearings__For_Members__EXTERNAL.pdf

[30] See https://www.gov.uk/government/collections/applications-for-public-parole-hearings

[31] Ibid, n28 §4.31.

offending may not be known to the victims or wider public and so will need to be dealt with carefully. The Parole Board may need to make findings of fact in respect of allegations of criminal offences where there has been no prosecution and there may be good reason why those need to be heard in private.[32]

5.15.4. Rule 27 of the Parole Board Rules 2019 was introduced which allows victims and any other person to seek disclosure of a summary of the reasons for a decision whether to release a prisoner. The Parole Board Chair has a power to refuse disclosure of a summary (Rule 27(5).

5.16. Decisions of the Parole Board can currently be challenged through various statutory appeals which are built into the Parole Board Rules 2019, and ultimately via judicial review.

5.17. For eligible cases, either a prisoner and the Secretary of State can ask for reconsideration of a provisional decision of the Parole Board under Rule 28 of the Parole Board Rules 2019, on the grounds of illegality, irrationality or procedural unfairness.[33] An application must be made no later than 21 days. If no application is received the provisional decision becomes final. 92% of reconsideration decisions between 2024 and 2025 were made within 21 days from the application being submitted.[34]

5.18. In 2022 Rule 28A of the Parole Board Rules 2019 was introduced. It allows either a prisoner or the Secretary of State for Justice to set aside a decision to release a prisoner if it is in the interests of justice to do so and one or more of the following criteria are satisfied:

5.18.1. It would not have been made but for an error of law or fact (Rule 28A(4)(a));

5.18.2. It would not have been made if information was not available to the Board when the direction was given had been so available (Rule 28A(4)(b)(i));

5.18.3. A change of circumstances relating to the prison occurred after the Board directed their release (Rule 28A(4)(b)(ii).

5.19. Applications under Rule 28A(4)(a) must be made within 21 days of the decision (Rule 28(4)(5)(a)). For applications under Rule 28A(4)(b) they must be made before a prisoner is released.

5.20. The Board publishes both its decisions made under the reconsideration and set aside process on BAILLI.[35]

[32] Ibid, n28, §5.12
[33] The power was introduced in 2019 following the Divisional Court's decision in *R (DSD) v Parole Board* [2019] QB 285.
[34] Ibid, n15 p22.
[35] Available at: https://www.bailii.org/ew/cases/PBRA

6. The impact of the new power to refer cases to the High Court on prisoners and the parole system

6.1. Considering the above, the introduction of the referral power marks a further significant shift in the parole system and a dilution of the independence of the Parole Board. It provides unfettered access to the High Court's valuable resources in cases where the Secretary of State disagrees with the Parole Board's judicial findings. This has serious consequences.

6.2. First, it will have a substantial effect on prisoners. For those awaiting a Parole Board review and the prospect of release decisions, the prospect of having their case referred to the High Court introduces further delay and uncertainty in an already stressful process. Prisoners face the possibility of release being delayed, or a decision reversed, not because of new evidence of risk, but due to ministerial intervention and an additional layer of litigation. This is likely to create a profound sense of distress and lack of legal certainty for individuals whose liberty is at stake, in circumstances where their risk has already been independently assessed by an expert judicial body, who has carefully considered the expert evidence of professional witnesses.

6.3. Second, it represents a dilution of the Board's powers to direct release. It is vital for the purposes of Article 5(4) that the Parole Board has that power. The Board's judicial determinations on the legality of a prisoner's detention, and whether a prisoner can be managed in the community should not be reduced to a merely advisory function. The latest referral power does just that. Further, with the introduction of the power to refer there will now be four ways in which the Secretary of State can challenge a decision of the Parole Board: i.e. reconsideration, set aside, an application for judicial review, and a referral to the High Court. No other independent quasi-judicial body's decisions are subject to such a variety of appeal mechanisms.

6.4. Third, the power to refer will add complexity to a system that is already highly complicated. It will introduce further delay and uncertainty into the process, adding to the distress of both victims and prisoners and creating pressure on the already overcrowded prison population.

7. Observations and recommendations on the Draft Rules

Timing for the application by the SSJ

7.1. The legislation does not define time periods regulating when: (a) the Secretary of State should inform the Parole Board that it must direct itself to make a referral to the High Court, and (b) after making such a direction, when the Secretary of State as the Claimant must make an application to the Court.

7.2. The only time scale provided in the draft rules on the referral power specifically is for the Claimant to file reasons/evidence two days after the claim form is filed (CPR 77.19(2)).

7.3. There is no requirement that the Secretary of State as the Claimant must act expeditiously in deciding whether to make an application or to make the application itself.

7.4. There is no requirement in the draft CPR that the application by the Claimant is made promptly or in any event within a stipulated period following a release decision or the expiry of the reconsideration period.

7.5. This is clearly capable of giving rise to abuse and delay for the following reasons:

7.5.1. Timing is crucial in Parole Board proceedings. A release direction from the Parole Board is always subject to a risk management plan and licence conditions. Parts of a risk management plan may be time sensitive. For example, the Parole Board may direct release to an Approved Premise (i.e. a hostel) which is only available for a period of several weeks or months. There is already a national shortage of such spaces, which inevitably results in delays of prisoners being released.[36] The fact of an application under the power to refer legislation may mean such accommodation is lost. If the Court upholds the Parole Board's decision, release may be ultimately delayed even further, until suitable accommodation is found again.

7.5.2. In complex cases which require specialist approved premises such as a psychologically informed planned environment, if that place is lost, due to national shortages, that will almost inevitably result in a significant delay to a prisoner being released.

7.5.3. For determinate sentenced prisoners whose cases have been referred to the Court they may be approaching their sentence expiry date upon which they will inevitably be released without any supervision. A delay in issuing Part 8 proceedings may restrict any meaningful time a prisoner can spend on licence.

7.5.4. All periods on licence serve an important statutory objective: (a) the protection of the public, (b) the prevention of reoffending, and (c) securing the successful reintegration of a prisoner into the community.[37] Early release on licence is important in that it serves to maximise a prisoner's chances of successful reintegration into the community.[38]

7.5.5. It is problematic that there is no clarity as to the interplay between the reconsideration mechanism, set aside process and the parole referral power. There appears to be nothing to prevent an application for reconsideration or set aside being made and if that is unsuccessful, a case can then be referred to the High Court upon application by the Secretary of State.

[36] See for example Annual Report of the Independent Monitoring Board at HMP Leyhill (2025) available at: https://www.gov.uk/government/statistics/offender-accommodation-outcomes-update-to-march-2024/offender-accommodation-outcomes-statistical-guidance

[37] See s.250(8) Criminal Justice Act 2003.

[38] *R (West) v Parole Board* [2005] 1 WLR 350, per Lord Bingham, §25

7.5.6. If the Secretary of State does engage with the reconsideration or set aside process, prior to referring the case to the High Court, this involves an additional delay. The application process for reconsideration and certain types of set aside applications must be made within 21 days. 92% of reconsideration decisions are made within 21 days. It is unclear how long applications to set aside take to be considered. A prisoner is therefore waiting approximately 42 days for a decision to be made under the current statutory scheme. If a prisoner receives a positive decision from the reconsideration or set aside process, the Secretary of State could then refer that decision to the High Court, causing a further significant delay.

7.5.7. Unlike cases for judicial review, there is no requirement as required by the common law, that the Claimant must exhaust alternatives remedies prior to making an application to refer.

7.5.8. In submitting a Part 8 claim the Claimant does not have to identify any public law grounds as to why the decision was unlawful.

7.5.9. There is legal uncertainty as to the effect of the Secretary of State for Justice considering whether to refer the matter to the High Court. The statute simply states that the duty to give effect to the Parole Board's decision is suspended. It is unclear if this also suspends the time limits for reconsideration and set aside.

7.5.10. Whilst it is understood that the intention is that these cases will be dealt with expeditiously by the Court, this does not prevent prisoners experiencing significant delays, particularly if the Secretary of State: (i) delays directing the Parole Board to make a referral, and (ii) delays making a Part 8 application to the Court.

7.5.11. The Victims and Prisoners Act 2024 is completely silent on the issue of when an application must be made so there is nothing to prohibit the CPR from imposing one. The only reference to timing in the Act itself is to the need for the Secretary of State to suspend actual release for such as time is "reasonably required" to decide whether to make the direction for a referral. As the statute envisages a reasonableness requirement, there is no reason why the CPR cannot expand on that in more concrete terms, as with all other applications under the Rules.

7.6. We recommend that the CPR sets out a time within which an application must be made, similar to CPR 54. We suggest that the claim form should be filed by the Secretary of State (a) promptly, and (b) no later than 21 days after the Parole Board has issued its initial decision to release. This would keep it in line with the timelines already provided by Parliament for the reconsideration and set aside process. It would also reduce any potential delay and keep the different methods for challenging a decision of the Parole Board as mutually exclusive.

7.7. In the alternative, we suggest that the claim form must be filed (a) promptly, and (b) no later than 7 days after the Parole Board's decision has been made final under the Parole Board Rules 2019 (see Rules 25 and 28).

Timing of AOS by the Defendant

7.8. There is currently no time scale in the draft rules for the Defendant (i.e. a prisoner) to respond to the Claimant's application. It is understood that CPR 8.3(1)(a) will apply, and the Defendant must file and serve an acknowledgment of service not more than 14 days after the service of the claim form.

7.9. This creates real practical difficulties. The Committee should consider whether to amend the time limits to allow a longer period for the Defendant to respond. The 14-day period is at present too short. Within this period, the following will need to happen : (a) the prisoner will need to be informed of the application, (b) they will need to find and contact a solicitor to instruct who is able to represent them, they may be unrepresented or may not want the legal representative who acted for them in parole proceedings to act for them in the High Court, (c) the legal representative will need to take instructions and gather evidence (which may include instructing an expert to consider issues raised by the Secretary of State in his grounds), (d) the legal representative will need to apply to the High Court directly for a representation order (or ensure it is in place), (e) the Court will need to consider the application and communicate with the Defendant to confirm whether it has been granted (unless the Court is to issue representations orders automatically – see above), (f) the legal representative is likely to need to locate and instruct suitable counsel. They may need counsel's assistance to prepare the acknowledgment of service. To do that within 14 days will be very difficult given the various obstacles that both prisoners and legal representatives have in contacting each other.

7.10. It is entirely common in our experience for mail to be delayed for a week if not more. It will be paramount for lawyers to be able to take prompt and sufficient instructions from our clients. This will need to be mandated to prison establishments. Priority will need to be given by prisons to allow legal representatives access to video-links for the purposes of preparing a referral case. At present some prisons do not offer video-link appointments at all, and in person visits can take weeks if not months to become available. Some prisons are in remote geographical locations and are difficult to access. APL has published two reports on the difficulties in accessing clients in prison.[39]

7.11. At present, if an AOS is filed late, the automatic consequence of this is under CPR 8.4 (2) is that that the Defendant may attend the hearing but may not take part in the hearing unless the Court gives permission.

7.12. If the Court is conducting a re-hearing of the evidence, and needs to hear evidence from the Defendant, it would be unworkable to prevent them from taking part in the hearing, subject to a discretionary decision made by the Court to grant them permission to do so. Some prisoners may of course wish to represent themselves before the High Court, as they do before the Parole Board.

7.13. We suggest therefore that the time period for the Defendant to file and serve their acknowledgment of service is extended to 21 days and there should be clarity on how the Court will deal with applications to vary the timetable.

[39] The latest report is available here: https://www.associationofprisonlawyers.co.uk/justice-still-barred-on-going-problems-with-legal-visits/

7.14. It will also be necessary for the Ministry of Justice to ensure that suitable arrangements are made for prisoner access to their legal representatives.

7.15. It is suggested that consideration is given to the consequences of CPR 8.4(2) in these unusual circumstances, to ensure that the Court can still hear from the Defendant even if an acknowledgment of service is not filed or is not filed on time.

The lack of a mechanism to conclude unmeritorious cases swiftly

7.17. There are potentially thousands of cases that could fall into the eligibility provisions for High Court referrals. The criteria which the Secretary of State will apply is yet to be published and will not be subject to consultation.

7.18. The resources of the Administrative Court are crucial to the administration of justice. They are already stretched. They must not be wasted on frivolous referrals. There is nothing in place to stop a significant number of further referrals being made by the SSJ.

7.19. In our view, as with almost every other type of case that comes before the High Court, there should be a mechanism for the Court to exercise its own judgement and to manage its own resources and dispose of unmeritorious claims expeditiously. CPR 77.24 as drafted allows for the court to determine an application for non-disclosure with or without a hearing and the Rules should make it clear that where a claim is plainly without merit, it will conclude the substantive application on the papers.

Practicalities: Evidence/Type of hearing

7.20. There is a lack of detail in the draft regarding the evidence that will be considered in the course of proceedings or how the proceedings will be conducted. It is assumed that these proceedings will be conducted on an expedited basis, not only because it involves a fundamental right i.e. liberty, but also because Article 5(4) of the Convention requires a speedy and lawful review in indeterminate sentenced cases, and to a limited category of extended determinate sentenced prisoners.[40] A delay in the Court determining a referral by the Secretary of State may also give rise to a claim for damages where Article 5(4) applies.[41]

7.21. It is suggested at CPR 77.19(1) that the evidence will be the bundle of evidence that the Parole Board used to decide the case, along with the Board's decision letter, and any further information that has come to light since the Board's decision that is relevant to the taking of the release decision. It is also stated that the Claimant must serve material which adversely affects the Claimant's case or supports the Defendant's case CPR 77.19(5).

7.22. There is no detail however as to the type of hearing the Court is conducting. For example, whether it is a complete rehearing, including hearing live evidence from

[40] Article 5(4) applies to extended determinate sentences in the extended part of their licence period: *R(Sim) v Parole Board* [2004] QB 1288, §50 and §51.

[41] *R(Sturnham and Faulkner) v Parole Board* [2013] 2 AC 254

witnesses, or whether it is merely reviewing the Parole Board's decision such as a case stated appeal or application for judicial review.

7.23. If the Court is rehearing the case, further clarity in the rules is needed on the Court's powers to call witness, hear evidence and make other case management directions. In any case which amounts to a rehearing it will be imperative that witnesses are called. This includes the prisoner, if they elect to give evidence, and any independent witnesses, such as psychologists etc that a prisoner may wish to call on their own behalf. The rules should include a specific reference to the admission of evidence and the questioning of witnesses, mirroring the provisions in CPR 77.15. It should be noted that complex and high profile cases before the Parole Board often last for several days and the Court will need to ensure sufficient time is allocated.

7.24. Although we understand that it is anticipated that prisoners will attend by video link, there appears to be no provision for the prisoner to attend the hearing remotely via video link in the draft Rules. CPR 77.25 anticipates that a prisoner may be present, as the Court has the power to exclude them. In judicial review cases, we must apply for a prisoner to be produced via video-link and incur an application fee. The fee for this in a case referred to the High Court should be waived. It will not be reasonable for the prisoner's legal representative to bear costs for an application in these proceedings. The Claimant will need to be present at least via video-link to (a) provide instructions to their representative, and (b) give evidence if required.

7.25. However, there should not be a default assumption of remote attendance of the prisoner, while lawyers and judges will be in Court. Remote hearings before the Parole Board usually involve the Panel, the prisoner and their legal representative all attending remotely.

Private/public hearings

7.26. As set out above there is a presumption that Parole proceedings are conducted in private. As noted by the CPR Committee in its meeting minutes for 9th May 2025 open justice considerations present a "*culture clash between the private nature of parole board proceedings and the principles of open justice. It is important the parole referral cases are heard in public and that the confidentiality and sensitivity of some evidence in parole board proceedings can be accommodated within a proper application on a case by case basis of CPR R39.2.*"

7.27. We too share concerns as to how this will operate in practice as these proceedings are likely to attract significant attention and members of the media will likely wish to report as much of the proceedings as possible. There should not be two inconsistent schemes, one before the Parole Board where proceedings will be in private, unless it is in the interests of justice to do so, and one before the Administrative Court where the default position is that hearings will be in public, with some matters being heard in private.

7.28. We are concerned that CPR 39.2 does not adequately encompass all the relevant concerns that are specific to parole reviews. Without a specific rule to determine whether the hearing should be heard in public or private, it is possible that some

matters relied upon presently before the Parole Board to refuse a public hearing, would not carry over to hearings before the Administrative Court.

7.29. We recommend that the CPR should provide that the default position will be to mirror the proceedings at first instance before the Parole Board with regard to whether or not it is held in public or in private (in whole or in part). This means that evidence originally given on the understanding that it will be in private will not automatically be transferred for consideration in a public arena. The CPR should make provision for either party to make an application to vary the mode of hearing within a certain timeframe, for example, no later than two weeks after the AOS has been filed.

7.30. The CPR should also require that any case management hearing on the mode of hearing be held private, to determine what matters can be heard in public with only the Claimant and Defendant attending. This would allow for members of the press and the public to be informed of what matters the Court has determined are private. There may need to be some form of a transparency order, much like in the Court of Protection which prohibits the communication or reporting of certain information.

7.31. As a matter of practice if a hearing is held in public:

7.31.1. There may need to opening remarks, as current panel chairs do, introducing the parties and setting out the tests.[42]

7.31.2. There may need to occasional delays or breaks if the proceedings are being broadcast or transmitted, if private information has been or is about to be revealed.

7.31.3. There will need to be reporting restrictions for victims who enjoy lifetime anonymity pursuant to the Sexual Offences (Amendment) Act 1992.

Disclosure

7.32. In respect of the details concerning non-disclosure applications (CPR 77.22), it is considered that time limits need to be carefully reviewed. For example, for the reasons set out above about the difficulties in accessing clients, it may not be possible to obtain an undertaking as required by CPR77.24(3) within seven days.

7.33. Our collective experience is that requests for non-disclosure are made at a late stage, and in turn lead to adjournments in Parole Board hearings. For applications for non-disclosure a legal representative may need instructions from the prisoner before they can respond. It will be necessary for suitable arrangements to be made for consultations for this purpose.

8. Observations and recommendations on the Practice Direction

Venue

[42] Ibid, n28, §5.26

8.1. PD 5.1 states that any application must be filed in the Administrative Court at the Royal Courts of Justice. It is anticipated that if the Court orders a hearing it will be heard there. Further clarity is sought as prisons span the entire country, as do their representatives.

Licence conditions

8.2. In respect of the Practice Direction concerning the implementation of licence conditions (PD7.1) it is noted that it states that the court shall have regard to the guidance in the Ministry of Justice's and His Majesty's Prison and Probation Service's Licence Conditions Policy Framework before giving effect to the Parole Board's direction to release the prisoner on licence. It is important to note that this Framework is not a definitive statement of the law. There are wider considerations, including the statutory framework, the European Convention on Human Rights and relevant case-law which need to be understood and applied in relation to the imposition of licence conditions. It is unusual for the Civil Procedure Rules to refer to Ministry of Justice policy in reference to the court's decision making. The CPR set out how the court will manage a case. The substantive legal matters for the Court to consider are determined by the Court's interpretation of the primary statutes.

8.3. If any reference is to be made at all to the factors the Court should have regard to in setting licence conditions, they should incorporate reference to the wider legal principles as pertaining to licence conditions set out above, rather than just once guidance document from the Secretary of State.

9. Clarity in relation to process, accessibility and specialist training for all involved

Training

9.1. It is clear that this process will involve a great deal of learning for all those involved. It is understood that these applications will be referred to specialist judges who have received relevant training. The rules do not specify the need for the judge to be a specialist in this area. In the absence of this, we would suggest that the Court could provide formal confirmation that these proceedings will be presided over by judges who have undertaken sufficient training or been 'ticketed' to do so.

9.2. We understand that the Judicial College is working with the Parole Board and academics to devise a programme of training for judges. APL will also be devising training for our members once the processes are clearer. APL hopes this contribution is of assistance and would be happy to elaborate further on request or discuss any of the issues arising.

Funding

9.3 The proposal is for these cases to be funded by a representation order granted by the High Court in the same way as case-stated appeals. However, these cases are inherently different as the prisoner is never making the application but always defending it. It would be unacceptable for a prisoner to have to manage these cases without the benefit of representation and therefore Representation Orders should be automatic. However, questions remain which need to be ironed out before these cases are referred. For example, practitioners need to understand how the process will work, who will be responsible for dealing with funding, how disbursements will be dealt with (especially where experts are instructed) and how payment will be made. It will be necessary for the Court to ensure funding is available as promptly as possible and that will cover all that is required in these cases, without leaving providers at risk of not being paid for work completed or disbursements incurred.

Unrepresented prisoners

9.4 There is a real concern as to how prisoners who are not represented will navigate these proceedings and be able to have a fair hearing. It is unclear how a prisoner would be able to represent themselves effectively in these cases. In Court of Appeal (Criminal Division) cases where a prisoner is unrepresented, the Registrar will often make arrangements to secure representation and the same should apply in these cases.

Rights of audience

9.5. The Rules are silent on rights of audience for prisoners' legal representatives. It is presumed that the Court anticipates that Defendants in these proceedings will be represented by Counsel or Solicitor-Advocates with higher courts rights.

9.6. However, the majority of parole proceedings are conducted by non-counsel advocates. Few have higher rights of audience but will have knowledge of the critical facts of the case and will often have built up a rapport with their client that may be critical to maintaining the prisoners' effective participation in the referral review. The Court may wish to consider whether to grant rights of audience exceptionally to individual practitioners in accordance with the Legal Services Act 2007 and the exceptional circumstances test.

9.7. There is also only a small pool of experienced counsel who specialise in representing prisoners in proceedings before the Parole Board. If there are a significant amount of referrals by the Secretary of State for Justice to the Court this may lead to a shortage in experienced counsel being available to assist.

A revised discrete section of the Rules or a user guide

9.8. Some of our members who conduct parole hearings have little civil litigation experience. We would suggest that it would be beneficial for rules governing these proceedings to be self-contained, so far as possible, rather than relying too heavily on reading across to other rules contained in the CPR.

9.9. It would also assist all those involved if the Administrative Court were to create a user guide explaining how the process will work in lay terms with clear references to which steps engage the various provisions of the CPR as a whole, if there is not to be a revised section of the Rules to deal discretely with these proceedings in their entirety.

10. Conclusion

10.1. The APL remains significantly concerned as to how the new referral power will operate in practice. We believe that it will cause significant delay to the release of prisoners, whose risk can be safely managed on licence in the community. The new power undermines the independence of the Parole Board and the judicial status of its release decisions. It adds a further level of complexity to proceedings, when there has been a vast reduction in the amount of Legal Aid firms who have a prison law contract due to the poor levels of remuneration.

10.2. We remain concerned about the risk of the Administrative Court being overwhelmed by the number of referrals, as the eligibility criteria are so wide and there are no limitations at all on the power to refer.

10.3. We have set out above the areas within the draft CPR and practice direction where we would welcome further clarity and have proposed amendments which we believe could make the system fairer and more efficient.

10.4. Thank you for taking the time to consider our consultation response. We reiterate our invitation to meet with you to discuss the points raised in this response.

Association of Prison Lawyers[43]
8 September 2025

[43] This response was drafted by Yasmin Karabasic, Laura Janes, Andrew Sperling and Stuart Withers, with contributions and feedback from APL members.