

# Types of Cases

## Member Guidance

November 2023 (V3.0)

## Document History

Document Version	Date of Issue	Revision description
1.0	03.12.2020	This guidance was created as part of the Parole Board's project to launch fully revised and updated member guidance.
1.1	07.07.2021	Paragraph 12.1 has been amended to reflect the judgment in <i>Dickins v Parole Board for England And Wales</i> [2021] EWHC 1166 (Admin). A new paragraph 13.7 on unlawfully at large in recall cases has been added.
1.2	26.08.2021	Footnote 8 on page 9 has been amended to reflect revised new HMPPS policy
2.0	04.08.2022	The guidance was updated to reflect the changes following: <ul style="list-style-type: none"> <li>• The Police, Crime, Sentencing and Courts Act 2022</li> <li>• The amended Secretary of State 2022 Directions on transfer of indeterminate sentence prisoners to open conditions</li> <li>• The Parole Board Rules 2019 (as amended)</li> <li>• <i>Johnson R v Secretary of State for Justice</i> [2022] EWHC 1282 (Admin)</li> <li>• The review of the Parole Board's paused policies.</li> </ul>
3.0	28.11.2023	<ul style="list-style-type: none"> <li>• Risk Period section amended to reflect judgment in the case of <i>Dich</i> (period at risk)</li> <li>• Paras 4.14 &amp; 4.15 suggested wording amended to third person</li> <li>• Paras 4.16 &amp; 9.19 amended to clarify when presumption in recalled extended sentence cases applies</li> <li>• Paras 4.18 &amp; 4.19 updated</li> <li>• Para 6.2 options table revised to remove reference to policy of no deferrals in IPP cases where Secretary of State view submitted</li> </ul>

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- Section on Open conditions updated to reflect revised Secretary of State Directions
  - Updates to sections on: Reconsideration; Setting Aside a Decision; When a Decision is Made; Requests to Release "subject to"; Restricted Transfer Prisoners
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## 1 **Purpose**

1.1 The purpose of this guidance is to:

- Provide information about the different types of sentence and cases that panels may come across;
- Provide details of the possible Parole Board (“the Board”) decision outcomes for prisoners serving each type of sentence;
- Provide details of relevant dates for each type of sentence and why those dates are important;
- Highlight where the powers and procedures of the Board are affected by the type of sentence the prisoner is serving; and
- Highlight process-related issues relevant to specific types of cases.

## 2 **Importance of the Secretary of State’s Referral**

- 2.1 Panels must always check the terms of the Secretary of State’s referral, as this sets out the Board’s powers in a particular case. This is important as it will enable panels to check the options available in a case and set the limits on what is being requested (e.g. open conditions and release for a post tariff indeterminate sentence prisoner).
- 2.2 By law, the panel must follow the terms of the referral and ensure that all of the requirements have been fully considered and decided upon. The panel’s decision must clearly set out the reasons and considerations as to whether the test for release is met. If consideration of open conditions is part of the referral, the decision must address the test for release and the criteria for recommending transfer to open conditions separately and in that order. The decision must cover all criteria in relation to suitability for open conditions as set out in the Secretary of State’s Directions to the Parole Board of 1<sup>st</sup> August 2023.
- 2.3 The MCA Guidance, Oral Hearing Guidance, the Decision-Making Framework, and Reasons Writing Guidance contain more information about decisions.
- 2.4 Options may not be available for reasons of policy or law. For example, release will not be an option for an indeterminate sentence prisoner who is pre-tariff, and transfer to open conditions may not be an option for a prisoner serving a terrorism or terrorism connected offence, those liable to deportation, or those excluded due to past behaviour.
- 2.5 It is also important to check the date of the Secretary of State’s referral. Sometimes it will pre-date significant developments in the prisoner’s case which might impact on their eligibility for certain options. Where there has been a significant development in a case since the Secretary of State’s referral (e.g. an abscond, a return to closed conditions from open conditions<sup>1</sup>, a deportation order has been served, or changes in legislation or policy), panel chairs should direct the Secretary of State to clarify the terms of the referral.

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<sup>1</sup> More information on open conditions can be found at [section 11](#) of this document.

- 2.6 Where the Secretary of State's referral indicates that the Board is being asked to do something outside the scope of its powers in a particular type of case, panel chairs must direct the Secretary of State to confirm the scope of the referral. A substantive decision should not be made until the position has been clarified.
- 2.7 In determinate sentence recall cases, the Secretary of State's referral is not always included in the dossier in the same format as an indeterminate sentence case, but it will be clear that it is a determinate sentence recall review case by the Dossier Cover Sheet.
- 2.8 Please refer to the table of options ([at paragraph 6.2](#)) for an overview of the Board's powers in each type of case: standard determinate sentence (power to detain), determinate sentence initial release, determinate sentence recall, extended sentence initial release, extended sentence recall, indeterminate sentence pre-tariff and on/post tariff life sentence prisoners and Imprisonment for Public Protection (IPPs), indeterminate sentence recall – life sentence prisoners and IPPs.

### **3 Legal Test for Release**

- 3.1 The statutory wording for the legal test for release is clear:

The Board must not give a direction [for release] unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined [in prison].

This is also known as the public protection test<sup>2</sup>.

- 3.2 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO 2012') amended legislation to impose the same statutory test for the initial release of all determinate and indeterminate sentence prisoners referred to the Board.
- 3.3 The Police, Crime, Sentencing and Courts (PCSC) Act 2022 requires the same test to be applied to recalled prisoners<sup>3</sup>. While the test is the same, there are special considerations when it is applied in the case of extended determinate sentence prisoners who have been recalled and the parole decision is being made in the extended part of the sentence (please refer to [paragraph 4.16](#) for more details).
- 3.4 The Board's decision whether to release a prisoner is binding on the Secretary of State.

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<sup>2</sup> The test for release is set by Parliament. However, section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 and section 137 of the Police, Crime, Sentencing and Courts Act (PCSC) 2022, enables the Secretary of State to change, by affirmative order, the public protection test for release applied by the Parole Board for different categories of prisoners. This power has never been used. The only exception to this potential change is for life sentence prisoners, where there is no such power to amend the release test

<sup>3</sup> Following the case of *Gulliver v Parole Board* [2007] EWCA Civ 1386, the Parole Board applied the same statutory test as imposed by LASPO. This therefore does not represent a change in practice.

- 3.5 The Board's advice on the suitability of a prisoner to move to open conditions is a recommendation provided to the Secretary of State and is not binding.
- 3.6 Panels are reminded that when considering a case, public protection must be the over-riding consideration. The assessment and management of risk remains the focal point for the panel's consideration.
- 3.7 When applying the public protection test, panels need to consider that:
- 1) the nature of risk is 'risk of serious harm';
  - 2) serious harm covers psychological harm as well as physical harm. Serious harm is not limited to life and limb (risk to life and limb was the previous way in which the test was defined<sup>4</sup>. Life and limb should no longer be used to define serious harm); and
  - 3) any risk that is 'greater than minimal' should be considered by the panel.
- 3.8 There is a presumption that release will not be directed unless the evidence demonstrates to the panel's satisfaction that the prisoner's risk has reduced to a level where it can be safely managed in the community<sup>5</sup>. The panel should refuse to direct release where it is satisfied that there is an unacceptable risk of serious violent or sexual offending (including arson and psychological harm), irrespective of the precise nature of the index offence. Part of this consideration will be the risk management plan and whether the prisoner's risk can be safely managed in the community under the proposed plan.

#### 4 **Recalls**

##### Appropriateness of recall – Calder

- 4.1 On a prisoner's first review following recall, before assessing risk, the panel has a duty to consider whether the recall decision is appropriate (in line with the judgment in *Calder*<sup>6</sup>) and make a finding of its appropriateness. This is not an assessment of the lawfulness of recall, which is a matter for the High Court in terms of judicial review.
- 4.2 The principles are:
- 1) The Secretary of State is entitled to recall a prisoner if they conclude on reasonable grounds that the prisoner has intentionally breached the terms of their licence and that the safety of the public would be at risk if the prisoner remained on licence.

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<sup>4</sup> This was confirmed in the case of *King* [2017] 2 All ER 176

<sup>5</sup> Please see the exception at [para 4.16](#)

<sup>6</sup> *R(Calder) v Secretary of State for Justice* [2015] EWCA Civ 1050



- 2) The panel in reviewing the decision to recall must make its decision in the light of all the facts available to it, including those not available to the Secretary of State at the time of recall.
- 3) The panel must then make an assessment of risk to the public on the basis of all of the evidence.

***What does the Calder judgment mean for Parole Board panels?***

- 4.3 The Board is under a duty to consider whether the recall decision was appropriate. In the majority of cases, panels will already be considering the circumstances around recall because it goes directly to consideration of risk. This duty means that panels need to make a determination about the original recall decision by the Secretary of State, whether this is a paper decision at MCA stage or following an oral hearing.
- 4.4 This approach must be taken in all recall cases regardless of sentence type. The appropriateness of recall needs to be considered on first review and does not need to be reconsidered at any subsequent referral for that recall.

***Does the panel need to review the recall decision in every recall case?***

- 4.5 The Board's position is that it is necessary for the panel to consider in detail whether the recall decision was appropriate only if that is a matter in dispute. One or more parties may dispute the circumstances of the recall or the recall decision itself, or the panel may itself identify concerns.
- 4.6 The panel needs to review the original decision to recall on the basis of the material available at the time of the panel's hearing. The panel may well consider information which was not available to the Secretary of State at the time of the recall. For example, the panel may hear an explanation for the events that led to the recall.
- 4.7 Where the prisoner has been recalled for failing to comply with licence conditions, it is not sufficient merely to establish that there has been a breach, for the recall to be appropriate. The power to recall only arises where there are reasonable grounds for believing that the safety of the public will be at risk if the prisoner remains on licence.
- 4.8 Panels will need sufficient information regarding the Secretary of State's original decision to recall, to enable them to consider the appropriateness of the recall. Some suggested factors are set out at [paragraph 4.13](#) below. Exploration of this issue may require additional witnesses or other evidence. Panels should take this requirement into account when setting MCA directions and panel chair directions for an oral hearing.

***What are the implications for release if the recall is found to be inappropriate?***

- 4.9 The test for release is unaffected by the *Calder* judgment and remains a separate issue to the appropriateness of the recall.

- 4.10 Regardless of the panel's finding in respect of the recall, it is still necessary for the panel to go on to consider whether the prisoner should be re-released in a separate analysis. The identification and management of risk remains the focal point for the panel's consideration.
- 4.11 A finding that the recall was inappropriate, and/or there was no breach of licence, does not necessarily mean that the panel must release the prisoner, as the panel still needs to assess the current risk of the prisoner, taking into account the reasons for recall and all other risk factors. The panel is still entitled to make no direction for release. This may be the case, for example, where the Community Offender Manager (COM) recommended recall for reasons that turn out to be erroneous, but other information has come to light after the recall about the prisoner's behaviour on licence; or where since being back in custody, the prisoner has committed an offence or otherwise demonstrated an increase in risk.

### ***Approach to considering whether the recall was appropriate***

- 4.12 Where a panel is considering the recall, the decision should state whether they find the recall was appropriate and outline the reasons for this finding.
- 4.13 Factors that the panel may wish to consider (taking into account the information available at the time of the recall decision together with any subsequent information) include<sup>7</sup>:
- Whether licence conditions were breached;
  - Whether the breach was intentional;
  - The seriousness of the breach;
  - The circumstances of the breach, including any mitigating factors that reduce the fault of the prisoner;
  - The strength of the evidence of the breach and any other evidence supporting the decision to recall;
  - The relevance of the recall incident to risk; and
  - Other information relating to the recall that is available to the panel.

### ***Suggested wording***

- 4.14 Panels may wish to use wording along the following lines:  
*"The panel has a duty to consider the appropriateness of the recall decision in [name of prisoner's] case. On all the evidence available to it, the panel has found that the recall was [not] appropriate. This is because ...."*
- 4.15 Or where there is no dispute about the appropriateness of the recall:  
*"[Name of prisoner] does not challenge the appropriateness of their recall; there is nothing within the dossier that suggests that the recall was inappropriate and in consequence the panel is satisfied that their recall was appropriate."*

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<sup>7</sup> Please refer to [paragraphs 15.4 and 15.5](#) for more information about prisoners who were unlawfully at large.

### Recalled extended sentence prisoners

- 4.16 When reviewing a recalled extended sentence prisoner in the “extension period” part of their sentence, panels are required to apply a presumption *in favour of release*. In such cases the panel should direct release unless they are positively satisfied that continued detention is necessary for the protection of the public<sup>8</sup>. This requirement does not just apply to those prisoners recalled in the “extension period” part of their sentence. Irrespective of when the recall took place, if the prisoner is **servicing** the “extension period” part of their sentence at the point the decision about re-release is made, the presumption will need to be applied. This presumption does not apply in any other sentence type.
- 4.17 Following the judgments in *Johnson* and *Dich*<sup>9</sup> (see [para 5.2](#)), panels will need to consider whether the presumption is disproved by the risk posed up to and beyond the sentence expiry date (SED). When considering risk beyond the SED, there **must be a causal link** between the prisoner’s continued detention until SED and the prevention or reduction of risk.

### Recalled determinate sentence prisoners serving a new sentence with a release date later than the next parole review

- 4.18 Under section 256ZA of the Criminal Justice Act 2003 (inserted by section 136 of PCSC Act 2022), no referral to the Board is required in respect of a recalled determinate sentence prisoner in circumstances where they are serving another sentence. The effect of this is to prevent referrals to the Board where release is not possible from the determinate sentence on which they have been recalled as a consequence of another sentence being served from which the prisoner cannot yet be released.
- 4.19 Should the prisoner be sentenced to a further offence while a parole review is ongoing, the HMPPS Public Protection Casework Section (PPCS) should withdraw the referral<sup>10</sup> and the panel should take no further action. If a panel is considering such a case and the referral has not yet been withdrawn, they should direct the Secretary of State to confirm the status of the referral. If PPCS decline to withdraw the referral, the panel should seek advice from the Parole Board’s Practice Advisor.

### Recalled indeterminate sentence prisoners

- 4.20 Indeterminate sentence prisoners serving an additional sentence that makes them ineligible for release may still be referred to the Board for advice on the suitability of a move to open conditions.

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<sup>8</sup> *R (Sim) v Parole Board [2004] QB 1288*

<sup>9</sup> *Johnson EWHC 1282 (Admin) and Dich and Murphy [2023] EWHC 945 (Admin)*

<sup>10</sup> An agreement has been in place with PPCS since 5th June 2023 whereby they will withdraw the referral where a prisoner receives a further sentence which impacts the current review with the Parole Board. This applies to cases which are at MCA or have been directed to an oral hearing.

## 5 **Risk Period**

- 5.1 The Courts have determined that the statutory test for release has no temporal element<sup>11</sup>. The test is whether release would *cause* a more than minimal risk of serious harm to the public; the point in time when the resulting increased risk of serious harm might manifest itself in actual harm is not determinative.
- 5.2 For indeterminate sentence prisoners, the period over which panels are considering risk is indefinite given the nature of the sentence. For determinate sentence prisoners<sup>12</sup>, panels will need to consider that risk may go beyond conditional release dates (CRD) and sentence expiry dates (SED). This applies irrespective of whether the indeterminate/determinate sentence case to be considered is at initial release or re-release following recall.
- 5.3 In assessing the necessity of continuing detention in determinate sentence cases (on both initial release and after recall), the focus must be on the consequences of early release:
- If release before the date of automatic release (CRD or SED) would clearly significantly increase the risk of serious harm to the public, (relative to continuing detention), even though actual harm might not occur until after that date, the statutory release test is unlikely to be met.
  - Where the prisoner would pose a more than minimal risk of serious harm to the public following automatic release (either at CRD or SED) but not in the period between the panel's decision to release and automatic release, *and* where their early release would not in any way increase the risk of harm to the public following automatic release, it could not be said that continuing detention in the period between the decision and automatic release would be "necessary for the protection of the public".
- 5.4 Panels will need to consider risk beyond the point of CRD and SED. In doing so, panels may wish to seek the views of professional witnesses on the nature and likely level of risk over the longer term. The panel must then make its own assessment of risk and determine whether release would *cause* a more than minimal risk of serious harm to the public whether before or after automatic release. In doing so, panels need to bear in mind that there ***must be a causal link*** between the prisoner's continued detention and the prevention or reduction of risk. It is only those future risks beyond the point of automatic release which might be avoided or reduced by continued detention until CRD or SED that the panel needs to take into account.

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<sup>11</sup> *Johnson EWHC 1282 (Admin) and Dich and Murphy [2023] EWHC 945 (Admin)*,

<sup>12</sup> *While the cases of Johnson, Dich and Murphy related to extended determinate sentence prisoners, the principles set out within the judgments apply to all determinate sentence cases as the statutory test is the same.*

- 5.5 For example, a prisoner may not be assessed as presenting an imminent risk of serious harm but there is evidence that, on release, they will start preparing to carry out activities or may engage in behaviour, for example substance misuse, that would result in serious harm. In those circumstances, it may be necessary for the protection of the public that they remain in custody until the point of automatic release even if the panel cannot predict precisely when that risk may materialise. Conversely, the panel may consider that, although there may be risk over the longer term, there are confirmed rehabilitative activities in the community that the prisoner could engage in on licence post-release that would help reduce those risks.
- 5.6 While it is theoretically possible that risk over the longer term will be relevant to the panel's determination of whether the test for release is met, it is likely to be difficult to establish the necessary causal link between continuing detention and the prevention or reduction of that longer term risk.
- 5.7 Where panels consider future risk is relevant to their decision, it is important they set out the causal link within the reasons. They may wish to use the following suggested wording:

Continuing detention is necessary to prevent/reduce future risk

*"As the test for release has no temporal element, the panel needs to consider future risk and determine whether release would cause a more than minimal risk of serious harm to the public whether before or after the date when [name of prisoner] would be automatically released. In doing so, the panel has borne in mind that there must be a causal link between [name of prisoner's] continued detention and the prevention or reduction of risk. On the evidence available to it, the panel has assessed that [insert details of future risk(s) identified]. It determines that the risk(s) could be prevented or reduced by [name of prisoner's] continuing detention because [insert reasons]."*

Continuing detention is not necessary

*"As the test for release has no temporal element, the panel needs to consider future risk and determine whether release would cause a more than minimal risk of serious harm to the public whether before or after the date when [name of prisoner] would be automatically released. In doing so, the panel has borne in mind that there must be a causal link between [name of prisoner's] continued detention and the prevention or reduction of risk. On the evidence available to it, the panel has assessed that [insert details of any future risk(s) identified]. However, it determines that the risk(s) could not be prevented or reduced by [name of prisoner's] continuing detention because [insert reasons]."*

Future risks reduced by release

*"As the test for release has no temporal element, the panel needs to consider future risk and determine whether release would cause a more*

*than minimal risk of serious harm to the public whether before or after the date when [name of prisoner] would be automatically released. In doing so, the panel has borne in mind that there must be a causal link between [name of prisoner's] continued detention and the prevention or reduction of risk. On the evidence available to it, the panel has assessed that [insert details of any future risk(s) identified]. However, it determines that while there is/are future risk(s), this/these could be prevented or reduced by [insert reasons, e.g., confirmed rehabilitative activities in the community]."*

## 6 **Types of Sentences**

6.1 Below is an overview of the automatic/parole eligibility dates for release for determinate and extended sentences.

**Table 1: Determinate Sentence Eligibility Dates**

<b>Type of sentence</b>	<b>Parole Eligibility Date (PED)</b>	<b>Automatic Release date</b>
Discretionary Conditional Release (DCR) – sentence is four years or more and offence is in Schedule 15 Criminal Justice Act 2003.	Halfway point of sentence.	-Two-thirds point of sentence (non-parole release date (NPD)) -On licence to three-quarter point (LED). -Sentence expiry date (SED)
DCR-ES (extended sentence). Custodial period is four years or more.	Halfway point of sentence.	-Two-thirds point of sentence (non-parole release date (NPD)) -On licence to three-quarter point plus extension period. - SED
DCR with an extended licence – four years or more.	Halfway point of sentence.	-Two-thirds point of sentence (NPD) -On licence to three-quarter point -SED
Standard Determinate Sentence (SDS).	N/A	-Conditional release date (CRD) at halfway point of sentence. -On licence to SED unless recalled
Power to Detain (PTD) Standard Determinate Sentence (SDS) <sup>13</sup> .	Halfway point of sentence.	-SED
Extended Sentence for Public Protection (EPP)- sentenced prior to 14 <sup>th</sup> July 2008.	Halfway point of custodial period.	-End of custodial part of sentence. -On licence to SED unless recalled.

<sup>13</sup> Power to Detain (PTD) cases parole eligibility dates will differ to Standard Determinate Sentences. Please refer to [paragraph 9.5](#) for more information.

EPP – sentenced on/ after 14 <sup>th</sup> July 2008	N/A	-CRD at halfway point. -On licence to SED unless recalled.
Sentence for Offenders of Particular Concern (SOPC).	Those sentenced prior to 28 <sup>th</sup> June 2022 <sup>14</sup> : Halfway way point of sentence.  Those sentenced on or after 28 <sup>th</sup> June 2022: Two-thirds point of custodial period.	-End of custodial part of sentence (CRD). -On licence to SED unless recalled.
Extended Determinate Sentence (EDS) – where the custodial period is 10 years or more or the offence is under schedule 15 B Criminal Justice Act 2003.	Two-thirds point of custodial period.	-End of custodial part of sentence (CRD). -On licence to SED unless recalled.
EDS – where the custodial period is 10 years or less and the offence is not under schedule 15 B Criminal Justice Act 2003.	N/A	-CRD at two-third point of custodial term. -On licence to SED unless recalled.
Terrorist Offenders (Restriction of Early Release) Act 2020 (TORER Act). Prisoners serving determinate sentences who are convicted of terrorism or terrorism connected offences.	EDS, SOPC and EPP sentences: two-thirds of the custodial period.  Any other determinate sentence: two-thirds of the sentence	-SED

6.2 On the following pages is a table which provides an overview of the Board's powers in each type of case.

<sup>14</sup> Following the enactment of the Police, Crime, Sentencing and Courts Act 2022, section 131.

**Table 2: Options Available at MCA and at Oral Hearings**

**Life Sentence Prisoners<sup>15</sup>**

Type of case	Options available at MCA	Options not available at MCA	Options available at oral hearing	Options not available at oral hearing
<b>Lifer pre-tariff</b>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions*</li> <li>• No recommendation for open conditions</li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> </ul>
<b>Lifer on or post tariff reviews</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision**</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)***</li> <li>• Recommendation for open conditions*</li> <li>• No recommendation for open conditions</li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>		<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Adjourn/defer for further information</li> </ul>	
<b>Lifer recall</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)***</li> <li>• Recommendation for open conditions*</li> <li>• No recommendation for open conditions</li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>		<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Adjourn/defer for further information</li> </ul>	

<sup>15</sup> For ISP on/post tariff reviews and ISP recall cases, panels should only consider the suitability for open conditions where the SSJ has specifically requested this in the referral – please check referral

**\*/\*\*/\*\* See exceptions and notes at the end of the document for items starred**



## Imprisonment for Public Protection (IPP) Sentence Prisoners<sup>16</sup>

Type of case	Options available at MCA	Options not available at MCA	Options available at oral hearing	Options not available at oral hearing
<b>IPP pre-tariff</b>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> </ul>
<b>IPP on or post tariff reviews</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)***</li> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>		<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Adjourn/defer for further information</li> </ul>	
<b>IPP Recall</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)***</li> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>		<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> <li>• Adjourn/defer for further information</li> </ul>	

<sup>16</sup> For IPP on/post tariff reviews and IPP recall cases, panels should only consider the suitability for open conditions where the SSJ has specifically requested this in the referral – please check referral

**\*/\*\*/\*\* See exceptions and notes at the end of the document for items starred**

## Determinate Sentence Prisoners<sup>17</sup>

Type of case	Options available at MCA	Options not available at MCA	Options available at oral hearing	Options not available at oral hearing
<b>Determinate and extended sentence<sup>18</sup> initial release</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)<sup>***</sup></li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>
<b>Determinate and extended sentence recalls</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)<sup>***</sup></li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>
<b>Power to Detain<sup>19</sup> determinate sentence initial release</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)<sup>***</sup></li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>
<b>Power to Detain determinate sentence recalls</b>	<ul style="list-style-type: none"> <li>• Conclude on the papers by issuing a release decision</li> <li>• Conclude on the papers by issuing a no release decision (see exceptions)<sup>***</sup></li> <li>• Send the case to an oral hearing</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Release</li> <li>• No direction for release</li> <li>• Adjourn/defer for further information</li> </ul>	<ul style="list-style-type: none"> <li>• Recommendation for open conditions</li> <li>• No recommendation for open conditions</li> </ul>

<sup>17</sup> The Parole Board is not asked for advice about suitability for open conditions for any determinate sentence case

<sup>18</sup> All determinate sentences: SDS, DCR, ESP, EPP, EDS, SOPC

<sup>19</sup> Under the Police, Crime, Sentencing and Courts Act 2022 the Secretary of State has the power to refer certain high-risk Standard Determinate Sentence prisoners to the Parole Board in place of automatic release – Power to Detain cases (PTD)

**\*/\*\*/\*\* See exceptions and notes at the end of the document for items starred**

## **EXCEPTIONS AND NOTES**

### **Life Sentence Prisoners**

\* Current policy: there is a presumption that a recommendation for a life sentence prisoner to progress to open conditions should only take place following an oral hearing.

\*\* Current policy: there is a presumption that the initial release of a life sentence prisoner should only take place following an oral hearing.

### **All Case Types**

\*\*\* EXCEPTIONS for concluding a review on the papers:

- MCA panels must grant an oral hearing if release cannot take place on the papers and the prisoner is under the age of 18 at the point of referral (child cases).
- MCA panels must adopt the starting point of a presumption of an oral hearing if release cannot take place on the papers and the prisoner is aged 18 – 21 (inclusive) at the point of their referral (young adult cases).

### **NOTES**

- The option to direct “immediate” or “release at a future date” in certain types of cases was removed by the Police, Crime, Sentencing and Courts Act 2022. All references to these options have been removed from the table and they are no longer available to panels.
- Panels are not able to issue a release decision “subject to” in any case.
- The policy on mental health cases (restricted patients)<sup>20</sup> remains paused until further notice.

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<sup>20</sup> Automatic granting of an oral hearing, if the prisoner cannot be released on the papers, for prisoners within a secure hospital or mental health setting or it is their first review after having been in a mental health unit or secure mental health setting.

## 7 **Overview of the Board’s Powers for Determinate and Extended Sentence Prisoners**

7.1 When reviewing the sentence types set out below, panels need to bear in mind that in September 2019 the Board’s Management Committee made a policy decision that MCA members can issue a no release decision on the papers (both for initial release and re-release following recall) when it is justified to do so (evidence justifies it and an oral hearing is not required under the principles set out in the case of *Osborn, Booth and Reilly*<sup>21</sup>). However:

- Prisoners who are under 18 at the point of referral (children) should automatically progress to an oral hearing if they cannot be released on papers. There is also a presumption of an oral hearing for those aged between 18-21 if they cannot be released on the papers.
- Prisoners in a secure hospital setting or mental health unit (or where it is their first review after having been in a mental health unit or secure mental health setting) should automatically progress to an oral hearing. **However, please note that this policy is currently paused and will be reviewed in December 2023.**

### Determinate initial release (DCR, EPP, EDS)

7.2 Panels have the power to **direct release on the papers. The period over which panels are considering risk includes both risk during the sentence and after it expires** (see [paragraphs 5.2-5.6](#) for more information). If panels do not direct release, they have the power to **issue a negative decision or to direct the case to an oral hearing**. If panels do not have enough information to make a decision on release or the need for an oral hearing, they have the power to **adjourn or defer** for further information. It should be noted that **open conditions will not** (and should not) form part of the terms of the referral to the Board in cases where the prisoner is serving any type of determinate sentence. This is because it is a matter purely for the prison authorities. Accordingly, it is outside of the Board’s remit and the panel should not provide an opinion on open conditions in such cases.<sup>22</sup>

### Determinate/Extended recalls

7.3 Panels have the power to **direct re-release on the papers.**

7.4 In these cases, panels are assessing risk from the date of the review both during the sentence and after the sentence expires. There is no power to consider or comment on the prisoner’s suitability for open conditions. Panels also have the power to **issue a negative decision or direct the case to an oral hearing** if they do not direct re-release.

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<sup>21</sup> *Osborn & others v Parole Board* [2013] UKSC 61

<sup>22</sup> [The Generic Parole Process Policy Framework \(August 2023\)](#) states the following (4.4.5), “PPCS must not request the Parole Board to consider recommending a transfer to open conditions for determinate sentenced prisoners. This is the responsibility of the prison Governor.”

## 8 **Overview of the Board's Powers for Indeterminate Sentence Prisoners (ISPs)**

Imprisonment for public protection (IPP)/detention for public protection (DPP)<sup>23</sup>

- 8.1 **Pre-tariff IPPs/DPPs:** With pre-tariff IPP or DPP prisoners, panels have the power to **recommend progression to open conditions on the papers, to make no recommendation for progression to open conditions and conclude the case,** (see exceptions noted in [paragraph 7.1](#)) **or to direct the case to an oral hearing.** It is also possible to **adjourn or defer** the case for further information. Panels have **no power to direct release** (either on the papers or at an oral hearing) as the prisoner is still pre-tariff.
- 8.2 **On/post tariff:** With on or post tariff IPP or DPP prisoners, panels have the power **to direct release on the papers or to recommend progression to open conditions on the papers** (if it is part of the terms of referral). It is also possible to make **a negative decision on the papers** for IPP on/post tariff review (see exceptions noted in [paragraph 7.1](#)). It is also possible to **direct the case to an oral hearing,** or to **adjourn or defer** for further information.
- 8.3 **Recall IPP:** With recalled IPP or DPP prisoners, panels have the power to direct **release on the papers** or to **recommend progression to open conditions on the papers** (if it is part of the terms of referral). It is also possible to make a **negative decision on the papers** for IPP recall cases (see the exceptions at [paragraph 7.1](#)). It is also possible to direct the case to an oral hearing, or to adjourn or defer for further information.
- 8.4 A prisoner sentenced to an IPP or DPP has the right, under section 31A of the Crime (Sentences) Act 1997, for consideration to be given to terminating their licence 10 years after their initial release from custody. This is regardless of whether they have been recalled to prison at any point during the ten years. Following the commencement of section 138 of PCSC Act 2022 on 28 June 2022, referrals to the Parole Board are now made automatically by the Secretary of State.
- 8.5 It is only the Parole Board that can terminate an IPP or DPP licence. Rule 31 of the Parole Board Rules 2019 (as amended) deals explicitly with this. When considering these referrals, the panel has the power to:
- a) Where the individual is in the community, terminate the individual's licence
  - b) Where the prisoner is recalled to custody, direct that they are suitable for unconditional release
  - c) In all cases, amend the individual's licence
  - d) In all cases, refuse the application.

For more information please refer to Parole Board guidance on Duty Member Activity

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<sup>23</sup> DPP was given instead of an IPP where the prisoner was under 18 at the time the offence was committed.

## Life sentence prisoners

- 8.6 **Pre-tariff life sentence prisoners:** With pre-tariff life sentence prisoners, current Parole Board policy requires panels to take the starting point of a presumption that a recommendation for a life sentence prisoner to progress to open conditions should only take place following an oral hearing. The policy does not preclude panels from making a positive recommendation for **progression to open conditions on the papers** if they assess there is no need for or added benefit in taking or exploring evidence at an oral hearing. Where a recommendation for open conditions is made on the papers, the panel must clearly set out in the decision that the Board's policy has been carefully considered and provide compelling reasons why an oral hearing will not bring added benefit by enhancing the processes of risk assessment and decision-making. Panels can issue a **negative decision on the papers** if the criteria set out in the Secretary of State Directions on open conditions are not met (but see the exceptions noted in [paragraph 7.1](#)). It is also possible to **adjourn or defer** for further information. Panels have **no power to direct release** (either on the papers or at an oral hearing) as the prisoner is still pre-tariff.
- 8.7 **On/post tariff life sentence prisoners:** With on/post-tariff life sentence prisoners, current Parole Board policy requires panels to take the starting point of a *presumption that initial release of a life sentence prisoner should only take place following an oral hearing*. The policy does not preclude panels from **directing release on the papers** if they assess that the test for release is met and there is, therefore, no need to or added benefit in taking or exploring evidence at an oral hearing. In such cases, the panel must clearly set out in the decision that the Board's policy has been carefully considered and provide compelling reasons why an oral hearing will not bring added benefit by enhancing the processes of risk assessment and decision-making. Panels can issue a **negative decision on the papers** (but see the exceptions noted in [paragraph 7.1](#)) or **adjourn or defer** for further information.
- 8.8 **Recalled life sentence prisoners:** Panels have the power **to direct release on the papers** or to **recommend progression to open conditions on the papers (where the referral seeks such advice)**. It is also possible to make a **negative decision on the papers** (see exceptions noted in [paragraph 7.1](#)) and to **direct the case to an oral hearing**, or to **adjourn or defer** for further information.

## 9 Types of Determinate Sentences

### TORER cases

- 9.1 [The Terrorist Offenders \(Restriction of Early Release\) Act 2020 \('TORER Act'\)](#) was enacted in February 2020. This Act changed the Parole Eligibility Date (PED) for prisoners serving determinate sentences who are convicted of terrorism offences or offences with a terrorism connection. The legislation was enacted retrospectively.

- 9.2 Those whose offences fall within the TORER Act will be referred to the Board at the two-thirds point of their sentence (for extended sentences and SOPCs this is two-thirds of the custodial part of the sentence imposed by the court) for consideration of whether they are safe to release after that point. These prisoners will not be released until or unless:
- the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined and so directs their release; or
  - the prisoner reaches the sentence expiry date or the end of the custodial part of the sentence in the case of SOPC and extended sentences.

### Discretionary Conditional Release (DCR)

- 9.3 This sentence applied to prisoners sentenced under the Criminal Justice Act 1991 on or after 1st October 1992 to a sentence of 4 years or more. They are eligible to be considered for parole at the half-way point in their sentence (the Parole Eligibility Date - PED), and to have regular reviews thereafter until they reach their Non-Parole Date (NDP). If a prisoner is not released on parole, they will be released automatically at their NPD, which comes at the two thirds point of the sentence. Whether they are released on parole or automatically at NPD, prisoners are liable to licence supervision until their Licence Expiry Date (LED) which is at the three quarters point of their sentence. They will be "at risk" during the period between LED and SED, meaning that they are liable to be returned to prison if they commit a further imprisonable offence before their SED.
- 9.4 The Criminal Justice and Immigration Act 2008 introduced important changes in respect of the release, recall and re-release of determinate and indeterminate prisoners. DCR prisoners affected by the Act's release provisions, which took effect on 9 June 2008, are entitled to be released automatically at the halfway point of their sentence (rather than the two thirds point). On release they are subject to probation supervision until the end of their sentence (SED), rather than the three quarters point (LED). These changes apply to all DCR prisoners whose halfway point in their sentence falls on or after 9 June 2008, providing their sentence/single term does not include a sentence for an offence specified in Schedule 15 of the Criminal Justice Act 2003; they will be released automatically at the halfway point of their sentence.

### Standard Determinate Sentence (SDS)

- 9.5 The Criminal Justice Act 2003 introduced a new sentence for those who commit an offence on or after 4 April 2005 and who, if not assessed as "dangerous" by the courts, are sentenced to 12 months or more: the Standard Determinate Sentence (SDS). Most prisoners sentenced to an SDS are automatically released at their CRD, which is the half-way point of sentence<sup>24</sup>.

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<sup>24</sup> With exception to Power to Detain (PTD) standard determinate cases, [please see paragraph 9.5](#) for more information.

- 9.6 Prisoners serving an SDS are on licence supervision until the end of sentence (SLED). For example, a prisoner sentenced to 16 years imprisonment could be automatically conditionally released after serving 8 years and will spend the remaining 8 years on licence (if not recalled to prison).
- 9.7 The PCSC Act 2022 section 132, provides the Secretary of State with the Power to Detain (PTD) certain high-risk SDS prisoners. These cases will be referred to the Parole Board instead of being automatically released at their CRD. This provision applies to prisoners who are serving an SDS for offences, other than terrorism or terrorism connected offences, and where there are reasonable grounds, based on new or additional information, to believe that the prisoner poses an imminent and very high risk of committing a serious specified offence on release.
- 9.8 Only eligible cases that meet the legal and HMPPS policy thresholds, which includes a dangerousness test and public interest test, can be referred to the Board. The assessments for these thresholds can be directed for inclusion in the dossier and they will be relevant when assessing whether the test for release is met.
- 9.9 Following a referral, the prisoner will not be released until or unless:
- the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined and so directs their release; or
  - the prisoner reaches the end of their sentence; or
  - the Secretary of State rescinds the PTD Notice to the prisoner and the referral to the Parole Board.
- 9.10 Where PTD cases are initially released under the above provision, they remain a relevant PTD prisoner up until their SED (unless the Secretary of State rescinds the Notice). Any subsequent re-release following recall requires Parole Board approval. Once the sentence expires in total, that is the end of PTD. Should the prisoner be returned to custody on a different sentence after the PTD sentence has expired, they will serve the new sentence in the same way as any other prisoner.

#### Extended sentences

- 9.11 An extended sentence is comprised of the period of custody and supervision plus a further period for which the prisoner is to be subject to licence (the extension period).
- 9.12 LASPO 2012 abolished all previous forms of extended sentence. However, it is possible that panels may still come across prisoners who are serving a previous form of extended sentence. A brief description of these sentences and the Board's related powers is set out below.



### Extended Sentence Prisoners (ESP)

- 9.13 Section 58 of the Crime & Disorder 1998 Act gave the courts the power to impose extended sentences in certain cases where persons were convicted of a sexual or violent offence. Such a sentence could only be imposed in respect of an offence committed on or after 30 September 1998 and before 4 April 2005.
- 9.14 Section 85 of the Powers of Criminal Courts (Sentencing) Act 2000 gave the court the power to add a period of extended post-release supervision to the sentence it would have normally imposed on a person convicted of a sexual or violent offence. This power was used where the court considered there was a need for a longer than normal supervision period to prevent future re-offending and support the rehabilitation of the prisoner.
- 9.15 Where the offence was a violent offence, an extended sentence could be passed only if the custodial term was 4 years or more. There was no minimum term in respect of a sexual offence. The maximum extension period was 10 years in the case of a sexual offence and 5 years in the case of a violent offence. An extended sentence had to remain within the maximum penalty that was available for the offence in question.

### Extended Sentence for Public Protection (EPP) Criminal Justice Act 2003

- 9.16 For specified sexual and violent offences committed on or after 4 April 2005, but prior to abolition by LASPO 2012, under the Criminal Justice Act 2003 the court could impose an extended sentence for public protection (EPP), which included an extended period of licence. The custodial term of an EPP had to be at least 12 months. The maximum extension period was 8 years in the case of a sexual offence and 5 years in the case of a violent offence. The sentence had to remain within the maximum penalty that was available for the offence in question, but it could only be applied to those offences that attracted a maximum of under 10 years.
- 9.17 The Board is responsible for decisions to release EPPs. These prisoners became eligible for release at the halfway point of the custodial element of their sentence (the CRD); and annually thereafter until the end of the custodial term of their sentence (the Custody Expiry Date - CED). If EPPs were released by the Board, they remained on licence until SED. If an EPP was not granted release by the Board, they were automatically released at CED. Once released, EPPs remained on licence for the entirety of the remaining length of the sentence, until SED. LED and SED were, therefore, the same.
- 9.18 If an EPP was recalled, they were generally subject to a standard recall and referred to the Board following recall. They would be reviewed annually thereafter until re-release was directed or SED reached.

## Sentences for Offenders of Particular Concern (SOPC)

- 9.19 Section 236A of the Criminal Justice Act 2003 introduced a new type of determinate sentence for certain offenders of particular concern. This was to ensure that these prisoners were subject to licence supervision for a period after release, even though they had not been found to be dangerous by the sentencing judge.
- 9.20 This sentence came into force on 13 April 2015. Since 13 April 2015, courts have been able to impose an SOPC sentence where:
- The prisoner is convicted of an offence listed in Schedule 18A to the CJA 2003 (convicted of certain child sex and terrorism offence(s));
  - The offence was committed when the prisoner was aged 18 or over; and
  - The court imposes a custodial sentence but does not impose an Extended Determinate Sentence (EDS) or a Life Sentence.
- 9.21 The SOPC comprises a custodial term and a fixed licence period of one year. The custodial term and the one year licence make up the appropriate sentence commensurate with the seriousness of the offence(s).
- 9.22 Prisoners serving an SOPC become eligible for the Board to consider release at either the halfway point or two-thirds stage of their custodial sentence.<sup>25</sup> If SOPC prisoners are not released by the Board, they will be automatically released once the custodial term has been served in full. Release will be subject to licence supervision until the end of the aggregate of the custodial term and one year.
- 9.23 Panels should note that, unlike EDS (see below) a presumption of release (which would apply where the review for a recalled EDS prisoner takes place during the extended part of their sentence) should not be applied to prisoners serving an SOPC.

## Extended Determinate Sentence (EDS)

- 9.24 The EDS was introduced by LASPO 2012<sup>26</sup>.
- 9.25 An EDS will be imposed on a prisoner who is over 18 years old:
- a) where they are convicted of a Schedule 1527 offence on or after 3 December 2012 (regardless of when the offence was committed); and
  - b) are adjudged to present a significant risk to the public of serious harm; and
  - c) are not suitable for a life sentence; and either

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<sup>25</sup> Those sentenced prior to 28<sup>th</sup> June 2022 will have a PED of the halfway point of their sentence. Those sentenced on or after 28<sup>th</sup> June 2022 have a PED of the two-thirds point of their sentence in accordance with section 131 of the PCSC Act 2022.

<sup>26</sup> Section 124 LASPO 2012 inserted a new section 226A into the Criminal Justice Act 2003.

<sup>27</sup> Criminal Justice Act 2003.

- d) they have a previous conviction for a Schedule 15B28 offence; or
- e) if the court was minded imposing an extended sentence, the custodial period would be at least 4 years.

9.26 An EDS will be imposed on a prisoner who is under 18 years old:

- a) where they are convicted of a Schedule 15 offence on or after 3 December 2012 (regardless of when the offence was committed); and
- b) are adjudged to present a significant risk to the public of serious harm;
- c) are not suitable for a life sentence; and
- d) if the court was minded to impose an extended sentence, the custodial period would be at least 4 years.

9.27 The extension period imposed must not exceed 5 years in respect of a violent offence; and 8 years in respect of a sexual offence.

9.28 In cases where the custodial period is less than 10 years, and the offence is not one listed in Schedule 15B, the prisoner will be released automatically once they have served two thirds of the custodial period. They will be on licence for the remainder of the custodial term plus the extension period, that is until the SED.

9.29 Any case where:

- the custodial period is 10 years or more;
- the EDS was imposed for a Schedule 15B offence; or
- any EDS imposed after 13 April 2015

Will be referred to the Board for consideration of release at the parole eligibility date.

9.30 In EDS cases referred to the Board, the **relevant eligibility date will be the two-thirds stage of the custodial period**. If the Board does not release at this stage, the prisoner will serve the whole of the custodial period subject to further regular reviews (reviews may be at intervals of up to a maximum of two years at the Secretary of State's discretion). On release, the prisoner will be on licence for the remainder of the custodial term (if released by the Board ahead of CRD), plus the extension period until SED.

## 10 **Types of Indeterminate Sentences (ISPs)**

### The Board's role when reviewing ISP cases

10.1 ISP cases referred to the Board by the Secretary of State fall broadly into four categories, to:

- Consider directing release after tariff expiry (under section 28 of the Crime (Sentences) Act 1997).
- Consider directing release after recall (under section 32(4) of the

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<sup>28</sup> *Criminal Justice Act 2003.*

- Crime (Sentences) Act 1997).
- Give advice to the Secretary of State by way of recommendation (under section 239(2) of the Criminal Justice Act 2003). Typically, this advice will ask for a recommendation about suitability for open conditions.
- Consider a recommendation for release on compassionate grounds, where this is practicable (under section 30 of the Crime (Sentences) Act 1997). Please refer to the Duty Member Activities Guidance for more information on this subject.
- Consider terminating an IPP licence ten years following initial release (under section 31A of the Crime (Sentences) Act 1997).

10.2 Referrals under section 28 and section 32 of the Crime (Sentences) Act 1997 may also invite the Board to consider a recommendation for open conditions if release is not directed. Sometimes reviews can be combined. For example, a case may be referred to the Board for advice following an adverse development in open conditions which has led to the prisoner being recategorised and returned to closed conditions. In such cases, the Secretary of State will be seeking advice on the prisoner's suitability for open conditions. However, this type of advice case is often combined with the regular review of the prisoner's case under the Generic Parole Process (GPP), so in effect the panel will be considering both open conditions and release. If the position is unclear (for example due to the timing of the prisoner's last review which would suggest that they would be due for their next review), the Secretary of State should be directed to clarify the scope of the referral.

#### Types of life sentence – adult prisoners

10.3 There are three types of life sentence for adult prisoners:

- 1) Mandatory life sentence: the only sentence available to the courts for persons over the age of 21 who are found guilty of murder.
- 2) Discretionary life sentence: may be imposed for a violent or sexual offence, the sentence for which is not fixed by law (for example rape, manslaughter, arson). It is generally passed because it is not possible to determine at the time of sentence whether the prisoner would be safe to be released at the end of a determinate sentence.
- 3) Automatic life sentence pre LASPO 2012: passed under section 2 of the Crime (Sentences) Act 1997 for a serious sexual or violent offence committed on or after 1 October 1997 by a prisoner who was over 18 at the time and had a previous conviction for such an offence. This sentence type was abolished by the Criminal Justice Act 2003. There is a new type of automatic life sentence, introduced by LASPO 2012 which is detailed at [paragraph 10.4](#) below.

#### Automatic life sentence for over 18-year-olds post LASPO 2012

10.4 LASPO 2012 (s122) introduced a new automatic life sentence which will be imposed on over 18-year-olds where:

- the offence is one of those in the new Schedule 15B; and
- it was committed on or after 3 December 2012; and
- the court would otherwise have imposed a 10-year sentence or more (disregarding the extension period if an extended sentence); and
- the prisoner had a previous conviction for a schedule 15B offence for which they received a determinate sentence of 10 years or more, or a life sentence with a tariff of 5 years or more; and
- it would not be unjust in all the circumstances to impose a life sentence.

### Types of life sentence – under 21-year-olds

10.5 The equivalent life sentences for people under the age of 21 are:

- Detention during His Majesty's Pleasure - the only sentence available to the courts for a person convicted of murder who was under 18 at the time of the offence.
- Detention for life (equivalent to a discretionary life sentence).
- Custody for life - the sentence for a person aged 18 or over but under 21 at the time of the offence who is convicted of murder and sentenced while under 21.

10.6 Prior to LASPO, where a person aged 18 or over but under 21 at the time of the offence is convicted of any other offence for which a life sentence may be passed on an adult, the court shall, if it considers that a custodial sentence for life is appropriate, sentence them to custody for life. Post-LASPO, the new automatic life sentence will replace custody for life as the new automatic life sentence applies to over 18-year-olds.

### Sentence of Imprisonment for public protection (IPP and DPP) post LASPO 2012

10.7 Imprisonment for public protection sentences (IPPs) and detention for public protection sentences (DPPs) were abolished by LASPO 2012 in respect of prisoners convicted on or after 3 December 2012. Where a prisoner was convicted prior to 3 December 2012, but sentenced after that date, they may still have received an IPP/DPP sentence. Prisoners who previously would have received an IPP sentence may be given a life sentence (in the most serious cases) or an EDS. IPP sentences that were imposed remain in force until the individual's licence is terminated.

### Imprisonment or Detention for Public Protection (IPP and DPP)

10.8 Section 225 of the Criminal Justice Act 2003 provided that the courts would impose an IPP when the prisoner:

- was aged 18 or over;
- was convicted of a serious specified violent or sexual offence committed on or after 4 April 2005, for which the maximum penalty is 10 years or more; and who,
- in the court's opinion, poses a significant risk of harm to the public.

10.9 Section 226 of the Criminal Justice Act 2003 provided that a sentence of DPP would have been imposed in the circumstances above when the prisoner is under 18 years of age.

10.10 The Criminal Justice and Immigration Act 2008 made the following changes to the IPP/DPP sentence:

- IPP sentences could only be imposed where the tariff period was a minimum of 2 years;
- Where the prisoner was under 18 years old, they must have had a previous conviction for a specified offence (sexual or violent offences).

### The Board's role in indeterminate sentence prisoner cases

#### ***Tariff/minimum term***

10.11 The "tariff" is the name used to describe the period that must be served in prison in order to satisfy the requirements of retribution and deterrence. Indeterminate sentence prisoners become eligible for release when they have completed this period in prison, but not before<sup>29</sup>. The Secretary of State's referral will usually include details of the prisoner's minimum tariff (expressed in years and/or months and days) and the Tariff Expiry Date (TED). It is important to remember when reviewing the dossier that the minimum tariff may have been revised from that imposed at sentence, for example following a successful appeal.

#### ***Referral of indeterminate sentence cases to the Board***

10.12 The Secretary of State will sometimes first refer an indeterminate sentence prisoner's case to the Board for a pre-tariff review approximately three years before the TED; refer again for all cases for an on-tariff review shortly before tariff expiry; and subsequently at intervals of no more than two years for post tariff reviews. Where the sentencing court has imposed a short tariff, this will usually preclude the possibility of a pre-tariff review as these are not usually provided to prisoners with a tariff of less than 3 years. Depending on the timing of the pre-tariff review, the panel will be considering only the prisoner's suitability for open conditions. However, if the review is close to TED, the Secretary of State's referral may also ask the panel to consider the prisoner's suitability for release<sup>30</sup>.

### Pre-tariff review of ISPs

#### ***Pre-tariff reviews sifting process***

10.13 The Secretary of State operates a sifting process for pre-tariff reviews (see [HMPPS GPP Policy Framework](#)). Sentence Planning and Review

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<sup>29</sup> As per the HMPPS [Early Release on Compassionate Grounds Policy Framework](#) (August 2023), indeterminate sentence prisoners may be considered for early release on compassionate grounds by the Secretary of State at any point in the sentence.

<sup>30</sup> Where the Board directs release in such cases, the prisoner will not be released until TED.

meetings for indeterminate sentence prisoners will make recommendations to PPCS on whether the prisoner's case should be referred to the Parole Board for a pre-tariff review. This policy applies only to indeterminate sentence prisoners who are approaching their first parole review where the consideration is for transfer to open conditions only. This does not apply to post-tariff reviews.

10.14 The Secretary of State only refers those pre-tariff cases to the Board where there is a reasonable prospect of the Board making a positive recommendation.

## 11 **Open Conditions**

11.1 The Board can **recommend** that an indeterminate sentence prisoner is transferred to open conditions (as long as it is part of the Secretary of State's terms of referral). In making such a recommendation, the Board **must** consider the criteria set out in the Secretary of State's Directions of 1<sup>st</sup> August 2023 (Annex One), which are:

- i. a panel must consider all information before it, including any written or oral evidence obtained by the Board; and
- ii. whether the following criteria are met:
  - the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the prisoner in open conditions may be in the community, unsupervised under licensed temporary release); and
  - the prisoner is assessed as presenting a low risk of abscond.

The Parole Board must recommend a move to open conditions only where it is satisfied that the two criteria (as described at (ii)) are met.

11.2 To make a recommendation for open conditions, the Board must be satisfied following an assessment of all the information and evidence available that:

- (1) the level of risk posed by the prisoner can be managed in open conditions; and
- (2) the two criteria set out above at [paragraph 11.1\(ii\)](#) are met.

11.3 Panels must only recommend a move to open conditions where it is satisfied that the two criteria as described in [11.1\(ii\)](#) are met. The decision must detail how the panel reached this conclusion, explicitly addressing each of the criteria.

11.4 It will be helpful for panels when writing their decision to bear in mind that the Secretary of State will accept a recommendation for open only where the criteria is met and there is a wholly persuasive case for transferring the prisoner from closed to open conditions. Whilst there is currently no guidance on how the Secretary of State will interpret a "wholly persuasive" case, the previous advice given in relation to the 2022 Directions may be helpful:

- a) A settled period in less restrictive conditions is considered necessary to prepare the prisoner for eventual release by providing the opportunity for release on temporary licence (ROTL).
- b) Where it is important to test residual risk following the completion of risk reduction interventions which cannot be undertaken in the closed estate.
- c) The criteria have moved away from balancing the assessment of risks and benefits. The emphasis should focus primarily on risk reduction and where it cannot be achieved in closed conditions, be looking for a “wholly persuasive” case in order to agree to the recommendation.

### TACT Prisoners

- 11.5 Where the Secretary of State considers that exceptional circumstances may apply, the referral for a prisoner serving an indeterminate sentence for a specified terrorism or terrorism connected offence may include consideration of whether the prisoner is suitable for open conditions.
- 11.6 In assessing the suitability of open conditions for these prisoners, the 2023 Directions require the Board to be satisfied that exceptional circumstances have been evidenced **and** that all criteria as described in [paragraph 11.1](#) above are met.
- 11.7 Whilst the 2023 Directions require the Board to be satisfied that the exceptional circumstances have been evidenced, the Board understands that a request for advice would not be made by the Secretary of State if the circumstances were not considered exceptional.
- 11.8 If a panel considers that exceptional circumstances have not been evidenced, they may wish to direct the Secretary of State to provide more detailed evidence of the circumstances and the grounds on which they are considered exceptional. If a panel does not consider that exceptional circumstances have been sufficiently evidenced, a recommendation for open conditions should not be made even if the other criteria are met.
- 11.9 Panels will need to check the terms of the referral carefully for these cases.

### Foreign National Prisoners

- 11.10 Foreign National Prisoners (FNPs) who have exhausted all their in-country appeal rights are **not eligible to be considered for open conditions** and the Secretary of State will not seek advice from the Parole Board in such cases.
- 11.11 However, an indeterminate sentence FNP subject to deportation who has not exhausted their appeal rights may still be considered for a transfer to open conditions. The Secretary of State’s Directions emphasise that these prisoners **must present as a very low risk of abscond to be considered**.



11.12 As well as being considered a very low risk of absconding, the panel will also need to be satisfied that the prisoner has made sufficient progress during the sentence in addressing and reducing risk, as set out in the 2023 Directions criteria (see [paragraph 11.1](#)), before recommending a transfer to open conditions.

11.13 Panels will need to check the terms of the referral carefully for these cases.

11.14 Panels should not conflate the test for release with the suitability for open conditions test. The Secretary of State's Directions on open conditions are binding on the Board and failure to apply the criteria may result in the entire decision being quashed by a court if challenged by judicial review.

11.15 Panels will be assessing risk over an indefinite period; a prisoner who is transferred to open conditions may remain there beyond their TED so there is no cut off point for the assessment of risk period in pre-tariff cases.

#### Secretary of State's policy on open conditions – limitations on eligibility

#### ***Abscond/Escape/Failure to return from Release on Temporary Licence (ROTL) or offend on ROTL***

11.16 The HMPPS [Release on Temporary Licence \(RoTL\) Policy Framework](#) (October 2022) ('[the Framework](#)')<sup>31</sup> deals with temporary release for adult prisoner. Instructions relating to temporary release for children remain within PSO 6300.

11.17 The Framework introduces changes in the criteria for ROTL eligibility for adults, which means more prisoners become eligible for ROTL or are eligible for ROTL earlier in their sentence.

11.18 Significant changes to the previous ROTL policy are incorporated at paragraph 1.4 of the Policy Framework.

11.19 Some of the most significant changes include changing the threshold for Restricted ROTL so that it is focused on the most serious prisoners. These cases include indeterminate sentence prisoners, prisoners serving extended determinate sentences, or other legacy extended sentences; prisoners serving sentences imposed under section 236A of the Criminal Justice Act 2003 (offenders of particular concern); and any other prisoner who is currently assessed as high or very high risk of serious harm by OASys.

11.20 The Framework also allows prisoners with a previous abscond history to be risk assessed for open conditions and ROTL, but only if the abscond

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<sup>31</sup> The Policy Framework replaces PSI 13/2015

occurred more than two years ago and only once during their sentence.

### **Restricted ROTL**

11.21 Paragraph 4.9 of the Framework lists the prisoners subject to Restricted ROTL as follows:

- Indeterminate sentence prisoners (ISPs);
- Prisoners serving Extended Determinate Sentences, or other legacy extended sentences;
- Prisoners serving sentences imposed under section 236 or 278 of the Sentencing Code (formerly section 236A of the Criminal Justice Act 2003 (offenders of particular concern));
- Prisoners serving other custodial sentences for an offence described in section 247A(2) of the Criminal Justice Act 2003 (specified terrorist or terrorist connected offences); and
- Any other prisoner who is currently assessed as high or very high risk of serious harm on OASys.

All other prisoners will be considered under the Standard ROTL regime.

11.22 Restricted ROTL includes a number of elements over and above Standard ROTL:

- Prisoner must be in open prison (men), assessed as suitable for open conditions (women);
- Decision must be made at Governor or deputy Governor level;
- The ROTL Board must be chaired by a senior manager;
- The ROTL Board must see an enhanced behaviour monitoring (EBM) assessment;
- EBM for those who require it;
- Mandatory consultation with COM and police;
- Mandatory comments from the COM; and
- Higher level of monitoring whilst on release.

11.23 For more information, please refer to the Open Conditions and Release on Temporary Licence (ROTL) SharePoint page.

11.24 The table on the following pages is taken from the [Framework](#), and outlines the ROTL types, eligibility, frequency and duration.

**Table 3: ROTL types, eligibility, frequency and duration**

<b>Types of ROTL, eligibility for ROTL, ROTL frequency, and ROTL duration</b>			
<b>Type</b>		<b>Eligibility</b>	<b>Frequency and Duration</b>
<b>Resettlement Day Release (RDR)</b>	<b>Standard – from closed men’s prisons/ women not suitable for open conditions</b>	Either 24 months before the effective release date, or once they have served half the custodial period (i.e. half of the number of days between the first date of sentence and the effective release date) less half the relevant remand time, whichever gives the later date.	The governor must decide the frequency and duration of any release. RDR to maintain family ties should generally be limited to once in every 14 day period unless special resettlement circumstances are found to apply.
	<b>Standard – from open/ women suitable for open conditions</b>	Eligible to be considered from the point of entry into the prison (men)/categorisation (women), subject to appropriate risk assessment.	The governor must decide the frequency and duration of any release. RDR to maintain family ties should generally be limited to once in every 14 day period unless special resettlement circumstances are found to apply.
	<b>Prisoner Apprenticeship Programme – from open/women suitable for open conditions</b>	Eligible to be considered from point of entry or from 24 months before the earliest release date whichever is the later.	The governor must decide the frequency and duration of any release. Although an apprenticeship lasts for at least 12 months and requires 30 hours work per week.
	<b>Restricted</b>	As Standard (from open) but must be assessed as suitable for open conditions and be in a prison which has been designated as being able to provide Restricted ROTL (except where the Parole Board has directed the release of a prisoner to supported accommodation, such as Approved Premises, or the prisoner is prevented from transferring to such a prison on health grounds).	The governor must decide the frequency and duration of any release. RDR to maintain family ties should generally be limited to once in every 14 day period unless special resettlement circumstances are found to apply.
	<b>ISP</b>	As Restricted.	The governor must decide the frequency and duration of any release. RDR to maintain family ties should generally be limited to once in every 14 day period unless special resettlement circumstances are found to apply.

<b>Resettlement Overnight Release (ROR)</b>	<b>Standard – from closed men’s prisons/ women not suitable for open conditions</b>	Either 6 months before the release date, or once they have served half the custodial period less half the relevant remand time, whichever gives the later date.	ROR should only take place after a period of successful RDR. ROR should be limited to one ROR session in each 28-day period during the eligibility period. The governor must decide the appropriate duration of any period of ROR – this will not usually exceed 4 nights.
	<b>Standard – from open prisons/ women suitable for open conditions</b>	Eligible to be considered from the point of entry into the prison (men)/categorisation (women), subject to appropriate risk assessment.	ROR should only take place after a period of successful RDR. ROR should be limited to one ROR session in each 28-day period during the eligibility period. The governor must decide the appropriate duration of any period of ROR – this will not usually exceed 4 nights.
	<b>Restricted</b>	As Standard (from open) but must be assessed as suitable for open conditions and be in a prison which has been designated as being able to provide Restricted ROTL (except where the Parole Board has directed the release of a prisoner to supported accommodation, such as Approved Premises, or the prisoner is prevented from transferring to such a prison on health grounds).	As standard but must be in a prison which has been designated as being able to provide Restricted ROTL.
	<b>ISP</b>	As Restricted.	As standard but must be in a prison which has been designated as being able to provide Restricted ROTL.

<b>Childcare Resettlement Licence (CRL)</b>	<b>Standard</b>	No minimum eligibility period. Prisoners are eligible when they have primary caring responsibilities for a child under 18. If the child attains the age of 18 whilst the prisoner remains in custody, the prisoner becomes ineligible for CRL.	CRL may be taken no more than once per week, including one period of overnight release in every 28 day period, which must not exceed four nights away from the prison.
	<b>Restricted</b>	As Standard but must be assessed as suitable for open conditions and be in a prison which has been designated as being able to provide Restricted ROTL.	CRL may be taken no more than once per week including one period of overnight release in every 28 day period which must not exceed four nights away from the prison.
	<b>ISP</b>	As Restricted.	CRL may be taken no more than once per week including one period of overnight release in every 28 day period which must not exceed four nights away from the prison.
<b>Special Purpose Licence (SPL)</b>	<b>Standard</b>	No minimum eligibility period.	SPL will generally be issued in response to a specific event or set of circumstances that would not usually require release on a regular basis. (See attached guidance in 6.23.)
	<b>Restricted</b>	There is no minimum eligibility period but prisoners subject to Restricted ROTL must be assessed as suitable for open conditions and be in a prison that offers Restricted ROTL before being considered for SPL, except where a prisoner is in closed conditions and urgent medical attention is required.	SPL will generally be issued in response to a specific event or set of circumstances that would not usually require release on a regular basis.
	<b>ISP</b>	As Restricted.	SPL will generally be issued in response to a specific event or set of circumstances that would not usually require release on a regular basis.
<b>N.B.</b> The reference to the effective release date must be taken as meaning the latest halfway point of the sentences (i.e. the effective PED or the effective CRD).			

### ***Deportation and eligibility for open conditions***

- 11.25 Panels should read the Secretary of State's referral letter in the dossier to check whether the prisoner is eligible for open conditions. It is also important to check what documentation, if any, is provided in the dossier from UK Immigration about the prisoner's deportation status, and, where necessary, to direct an update.
- 11.26 Please refer to the Board's Guidance on Foreign National Prisoners for more information on cases involving FNPs.

### ***Secretary of State's decision to move a prisoner to open conditions***

- 11.27 There is no legal requirement for the Secretary of State to consult the Board before deciding to transfer an indeterminate sentence prisoner to open conditions. The policy is that in most indeterminate sentence cases the Secretary of State will seek advice but, in some cases, where certain criteria are met, the Secretary of State will take the decision without referring the case to the Board. The Secretary of State does not have to provide reasons for this decision. This policy change came about as the result of the judicial review judgment in the case of *Guittard*<sup>32</sup>.
- 11.28 It must be noted that the Board can only comment on the suitability for open conditions if the Board is invited to do so as part of the terms of referral.
- 11.29 Following the introduction of the amended Secretary of State's Directions of 28<sup>th</sup> June 2022, the Secretary of State ceased to seek advice from the Board on the "continued suitability" of a prisoner for open conditions, including cases where the prisoner remains in open conditions or where they have been returned to closed conditions but remain a Category D prisoner. While the amended 2022 Directions have now been replaced by the Directions of 1<sup>st</sup> August 2023, the Secretary of State has not altered his approach to this. If a panel is considering a case where the referral includes advice on continued suitability for open conditions, they should raise this with the Case Manager who will seek a revised referral from PPCS.
- 11.30 While a referral will not include advice on continued suitability, there may be occasions where the evidence indicates a prisoner's risk is escalating and the panel has concerns about their manageability in open conditions. The panel should raise any such concerns with Secretary of State witnesses as it is for HMPPS to manage risk and determine a prisoner's categorisation. While a panel should not advise on continued suitability, they should record any concerns within their written reasons.

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<sup>32</sup> *R (Guittard) v Secretary of State for Justice [2009] EWHC (Admin)*

## 12 The Reconsideration Mechanism

12.1 Under Rule 28 of the Parole Board Rules 2019 (as amended), in eligible cases the Secretary of State or the prisoner may apply for the Parole Board decision to be reconsidered.

### Eligibility

12.2 For a decision to be eligible for reconsideration, the prisoner must be serving an eligible sentence type (please see paragraph [12.3 below](#)) and the decision must meet the eligibility criteria (please see paragraph [12.4 below](#)).

### Sentences

12.3 Decisions are eligible for reconsideration only where a prisoner is serving:

- a) An indeterminate sentence;
- b) An extended sentence;
- c) A determinate sentence subject to initial release by the Board under Chapter 6 Part 12 of the 2003 Act;
- d) A serious terrorism sentence (under sections 268A and 282A of the Sentencing Code).

These sentence types include:

- All types of life sentence (discretionary or mandatory);
- Imprisonment for Public Protection (IPP);
- Extended Determinate Sentences (EDS);
- Sentences for Offenders of Particular Concern (SOPC);
- Discretionary Conditional Release (DCR)
- Sentences for terrorism or terrorism-related crime to which the Terrorist Offenders (Restriction of Early Release) Act 2020 applies; and
- Old legacy extended sentences – Extended Public Protection (EPP) sentences and former 'section 85' extended sentences (ESP).

### Decisions

12.4 The following decisions **are eligible** for reconsideration:

- Rule 19(1)(a) – the prisoner is suitable for release;
- Rule 19(1)(b) – the prisoner is unsuitable for release;
- Rule 21 (7) – where a direction is made that the case should be decided on the papers and the decision is to release or not release;
- Rule 25(1) – where the case has been heard at an oral hearing and the decision is to release or not to release.
- Rule 31 (6)(a) or (6)(c) or (6A) – where a decision has been made about a termination of a IPP licence<sup>33</sup>

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<sup>33</sup> A decision not to terminate the IPP licence but to vary licence conditions is not eligible for reconsideration.

12.5 Only decisions about release or IPP licence terminations<sup>34</sup> are eligible to be reconsidered. Decisions about transfer to open conditions, case management decisions, or licence variations, and decisions not to grant an oral hearing after a decision not to release has been made on the papers are not eligible for reconsideration.

#### Provisional decisions

12.6 Where the panel makes a no release decision on the papers under Rule 19(1)(b), the prisoner has 28 days to request for their case to be considered at an oral hearing.

12.7 If no application for an oral hearing has been served/received within the 28-day window, the decision remains provisional, subject only to an application for reconsideration, for a further 21 days<sup>35</sup>. If the decision is not eligible for reconsideration, the decision becomes final at the end of the 28-day window.

12.8 Where an application for an oral hearing has been submitted by a prisoner which results in a refusal, the decision:

- Remains provisional for a period of 21 days if it is eligible for reconsideration<sup>36</sup>; or
- Becomes final if it is not eligible for reconsideration.

12.9 Any decision made following a direction that the case be concluded on the papers under rule 21 becomes final if either:

- No application for reconsideration is received (within the 21-day window)<sup>37</sup>; or
- it is not eligible for reconsideration.

12.10 Where the panel has considered a case at an oral hearing, that decision remains provisional for a period of 21 days<sup>38</sup> if the decision is eligible for reconsideration. The decision becomes final if:

- It is not eligible for reconsideration; or
- No application for reconsideration is received within the 21-day window.

#### What happens after a reconsideration application?

12.11 Where the reconsideration panel dismisses the application for

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<sup>35</sup> Unless the time limit has been altered under Rule 9 of the Parole Board Rules 2019 (as amended). Please refer to the Duty Member Activities Guidance for more information.

<sup>36</sup> Unless the time limit has been altered under Rule 9 of the Parole Board Rules 2019 (as amended). Please refer to the Duty Member Activities Guidance for more information.

<sup>37</sup> Unless the time limit has been altered under Rule 9 of the Parole Board Rules 2019 (as amended). Please refer to the Duty Member Activities Guidance for more information.

<sup>38</sup> Unless the time limit has been altered under Rule 9 of the Parole Board Rules 2019 (as amended). Please refer to the Duty Member Activities Guidance for more information.



reconsideration, the original decision becomes final.

12.12 Where the reconsideration panel directs that the provisional decision is to be reconsidered (a granted application), they should direct that the case be either:

- Reconsidered on the papers by the panel that made the original decision or by a new panel; or
- Reconsidered at an oral hearing by the panel that made the original decision or by a new panel.

12.13 Once the reconsideration mechanism process has been exhausted and a decision becomes final, in eligible cases an application may be made for the decision to be set aside (see section below for more information).

For more information, please refer to the Parole Board Guidance on Reconsideration.

### 13 **Setting Aside a Parole Board Decision**

13.1 Under section 133 of the PCSC Act 2022, the Board has the power to set aside a decision in cases that meet the relevant criteria and tests. Rule 28A of the Parole Board Rules 2019 (as amended) lays down the procedure for exercising the set aside power. The power applies to decisions made on or after 21<sup>st</sup> July 2022. Only the parties to the proceedings (Secretary of State and the prisoner) can make an application to set aside a final decision. The Chair of the Parole Board can also decide whether to set aside a decision of the Parole Board on their own initiative.

13.2 The set aside provision applies to eligible cases once the decision is **final**. The decision under challenge must be a final decision<sup>39</sup> and relate to whether the prisoner should be released or not released. A decision regarding a recommendation for open conditions, any other advice, or IPP licence terminations is not eligible for the set aside process.

13.3 The provision can be applied to determinate and indeterminate sentence prisoners where the relevant criteria and tests are met.

#### **Setting aside Parole Board decisions to release:**

13.4 In cases where the application to set aside a release decision relates to there having been an error of law or fact, the time limit for filing an application is 21 days after the decision under challenge becomes final. The time limit for challenging a release decision on the basis of there being new information, or where there has been a change in circumstances, is any time up until the point of release but not once the prisoner has been released on licence into the community.

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<sup>39</sup> *Not a provisional decision subject to a request for an oral hearing under rule 20 or an application for reconsideration under rule 28 of the Parole Board Rules 2019 (as amended).*

- 13.5 If the decision under challenge is a release decision, there are three grounds upon which a setting aside application can be made. These are:
- a) **An Error of Law or Fact:** That the direction for release would not have been made but for an error of law or fact;
  - b) **New information:** That the direction for release would not have been made if information that was not available to the panel when the direction was made had been available; and/or
  - c) **Change in circumstances:** That the direction for release would not have been made if the change in circumstances relating to the prisoner had occurred before the direction was given.

Setting aside Parole Board decisions **not to release:**

- 13.6 The Parole Board has the power to set aside the decision *not to release*, where the case meets the following ground:
- An Error of Law or Fact: That a decision made by a panel not to direct the release of a prisoner would not have been made but for an error of law or fact.
- 13.7 For more information and the process steps to follow, please refer to Parole Board Setting Aside a Decision Guidance.

#### 14 **When a decision is made**

- 14.1 Previously, in the judgment of *Dickins* (2021), a decision was made at the point at which the panel members had agreed the written decision. Following an amendment to rules 19, 21, 25 and 28<sup>40</sup> of the Parole Board Rules 2019, a decision is made at the point it is issued to the parties. Once the decision has been issued to the parties, it becomes final and so the Board has no power to act any further on a case with the exception of licence variation requests. This is because the Board is a statutory body and only has the powers given to it by statute. Once it has exercised them by issuing the decision, it has no further power to act until a case is referred back to it by the Secretary of State, there is a successful reconsideration/set aside application, or a decision is quashed following a judicial review.
- 14.2 Panels should be very wary of requests to change decisions or make further directions after the decision has been made. It may be possible to correct minor accidental errors or omissions by using the slip rule provided for under rule 30 of the Parole Board Rules 2019 (as amended). If such a request has been received, the panel must consult the Parole Board Practice Advisor.
- 14.3 Occasionally, information is sent to the Board after an oral hearing has concluded but before the decision has been made that indicates a change in circumstances, such as so-called "adverse developments". Examples may be evidence of failed drug tests or other significant negative custodial

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<sup>40</sup> Implemented on 21<sup>st</sup> July 2022

conduct, previously unseen criminal allegations or charges, or breakdown in critical release arrangements. These developments may have a bearing on the risk posed by the prisoner and therefore on their suitability for release or transfer to open conditions.

- 14.4 In the event that further information is submitted before the decision is made, the case manager should pass the information to the panel chair for consideration.
- 14.5 In circumstances where the decision has been made, panel chairs should consider if the case is eligible to be set aside (see [paragraph 13.1](#) for more information). If the panel chair assesses that the decision would not have been made had they been aware of the information at the time of making the decision, they can make representations to the [set aside inbox](#) ([settingaside@paroleboard.gov.uk](mailto:settingaside@paroleboard.gov.uk)) for the attention of the Chair of the Board. If the Chair of the Board assesses that the case meets the eligibility criteria for the set aside process, they will confirm this via email and the set aside team will then commence the process. This will include inviting representations from both parties, and then referring the case to an accredited member to consider the application.

## 15 **Factors which may Affect the Calculation of Release Dates**

### Additional days

- 15.1 There may be situations, such as additional days added to a prisoner's sentence (ADAs), that will impact the date<sup>41</sup> the Secretary of State releases the prisoner. Breaches of prison discipline potentially attract the award of additional days as a punishment for determinate/extended sentence prisoners. ADAs put back the release and supervision dates<sup>42</sup>. A prisoner whose behaviour is exceptionally poor could, in theory, spend their entire sentence in prison, rather than spending part of it in the community on licence. However, ADAs do not extend beyond or affect the SED/SLED so the determinate sentence prisoner would be released at SED, which remains unchanged.
- 15.2 Under section of 32ZB of Crime (Sentences) Act 1997<sup>43</sup>, panels are now required to direct "release" without specifying a date or timescale. Following a release decision:

*The Secretary of State must give effect to the direction of the Parole Board as soon as is reasonably practicable in all the circumstances including, in particular, the need to make arrangements in connection with any conditions that are to be included in the person's licence.*

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<sup>41</sup> Section 257, Criminal Justice Act 2003, requires these additional days to be served before release

<sup>42</sup> Section 257, Criminal Justice Act 2003, requires these additional days to be served before release

<sup>43</sup> Inserted by section 139 (1) (b) of the Police, Crime, Sentencing and Courts Act 2022

- 15.3 When assessing the suitability of a Risk Management Plan (RMP), panels may need to take any ADAs into consideration. It might be that the additional days the prisoner is due to serve will impact on the time the prisoner has in the community benefitting from an RMP or on the availability of accommodation.
- 15.4 Any time that a prisoner spends unlawfully at large (UAL) between the revocation of licence notice being issued by the Secretary of State and the prisoner's return to custody is added to the relevant licence (LED) and sentence expiry dates (SED)<sup>44</sup>. Where there has been time spent UAL, panels should have this in mind when looking at the dates in the dossier. In the case of any uncertainty, panels should ask PPCS to confirm the LED/SED, as sometimes the dossier will not include the revised date.
- 15.5 It is worth noting that it is not necessarily a prerequisite for a prisoner to have been notified of the revocation of their licence in order to be considered UAL and for the recall to be lawful<sup>45</sup> (this applies to both determinate and indeterminate sentences). If a panel has concerns with regards to a case, they should contact the Parole Board Practice Advisor.

### Day of Release

- 15.6 The Offenders (Day of Release from Detention) Act 2023<sup>46</sup> provides the Secretary of State with a discretionary power to bring forward the release date of a prisoner by up to two eligible working days, where that release date falls on a Friday or the day preceding a bank/public holiday. In practice, this power will be delegated to the Governor (public prisons)/Director (private prisons)/appropriate officials in youth establishments. By removing the barriers that a Friday release can create, public protection can be maintained by ensuring prison leavers have a better chance to access the support they need to reintegrate into the community. The personal circumstances of a prisoner will be taken into account and guidance on eligibility criteria in order to target those in need will be set out in an HMPPS policy framework.

## **16 Home Detention Curfew (HDC)**

- 16.1 Home detention curfew (HDC) enables the Secretary of State, through the prison governor, to release certain prisoners in advance of their CRD. On release such prisoners are required to comply with an electronically monitored curfew.
- 16.2 Breach of the curfew element alone of an HDC licence can result in return to custody. These cases are not considered by the Board. Prisoners

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<sup>44</sup>UAL from a sentence/term does not count as time served towards the sentence. At the point that the person becomes UAL, the passing of the sentence is frozen and only resumes once the person is arrested/returned to custody. All the release dates of the sentence/term are deferred by a day for every day the person is UAL. When the person returns to custody, they are not required to serve the number of days they have been UAL but are required to serve the number of days in the balance of the sentence that stood at the point they went UAL.

<sup>45</sup> R (Kessie-Adjei) v Secretary of State for Justice [2021] EWHC 1167 (Admin)

<sup>46</sup> The Act received Royal Assent on 29<sup>th</sup> June 2023 but has not yet been implemented.

wishing to appeal against their return to custody do so directly to the Secretary of State. However, breach of any other licence condition can result in referral to the Board in the normal way. If there has been a breach of the curfew element as well as breach of other licence conditions, the panel will review the breach of the curfew as well as considering the other reported breaches of licence conditions.

- 16.3 Prisoners released on HDC and recalled before their CRD, **cannot be released by the Board in advance of CRD**. The case for re-release otherwise falls to be considered in the normal way.

## 17 Requests to Release "subject to"

- 17.1 Panels are sometimes asked to direct release "subject to" an appropriate release plan being prepared by the COM where that is the only issue outstanding. Such an approach is unlawful and should not be used. This is because once such a direction is given, the release decision has been made and the arrangements put in place for managing the prisoner in the community are effectively removed from the Board's control. Additionally, in most cases, this issue is central to assessing the manageability in the community of the assessed levels of risk.
- 17.2 Where a "subject to" direction for release is requested to finalise resettlement plans, the panel chair may (once they have rejected that request) wish to consider whether it might be appropriate to direct a short adjournment to finalise elements of a risk management plan (RMP) if the case could then be concluded on the papers. It may not be appropriate to adjourn if either no RMP has been provided to the panel, or the one that has been provided lacks detail or has significant omissions. It may also not be appropriate to adjourn if, on the basis of the available evidence, it is unlikely that a sufficiently robust risk management plan could be developed to safely manage the prisoner's risk in the community. If sufficient time has already been allowed to finalise an RMP but one has not been provided, panels will need to assess whether the test for release is met on the basis of the information that is in front of them and having taken oral evidence from witnesses on the day.
- 17.3 Where an adjournment is considered appropriate, an example of suitable wording for such a direction might be;
- "The panel adjourns the hearing and directs that a [give detail of the elements of the resettlement plan required], and a report submitted to the Board and the prisoner's representative by [date] at the latest. After [date], the panel will decide whether the case can be concluded on the papers or a further oral hearing is required."*
- 17.4 When adjourning, it is important to make clear that no decision has been made in the case, and no decision will be made until all the directed information has been provided and considered. The panel must avoid expectation of/or momentum towards a decision.

- 17.5 If the information received following the adjournment satisfies the panel that the test for release is now met, it can proceed to make a release decision. If the case was considered at an oral hearing, a further oral hearing may not be necessary, and the case can be determined on the papers and a decision made without a need to reconvene. If this is anticipated, it is good practice to ask for representations from both parties by a set date, thus allowing the opportunity for any further written representations to be made to the panel.
- 17.6 When adjourning, it is important to consider whether there is sufficient time until any significant point in the sentence (e.g. NPD, SED). In adjourning such cases, panels should consider the time it is likely to take for any changes/revisions to the release plan to be put in place.

## **18 Restricted Transfer Prisoners**

- 18.1 Where an indeterminate sentence prisoner is transferred from England or Wales to serve their sentence in either Scotland, Northern Ireland, Isle of Man, Jersey or Guernsey as a "restricted transfer" prisoner, the Secretary of State retains the duty to refer the case to the Parole Board for England and Wales for regular reviews of their continued detention post-tariff. Under a Restricted Transfer, the prisoner remains subject to the parole release and licence schemes of England and Wales.
- 18.2 The conditions and category in which such a prisoner is detained are matters purely for the authorities in each territory. Security classifications are different and progression to open conditions is not referred to the Parole Board. The letter setting out the terms of the referral from the Secretary of State at the front of the dossier should, therefore, not seek advice on suitability for open conditions. If panels are asked to advise on open conditions in such cases, it is best practice to seek confirmation, via a direction to the Secretary of State, of the scope of the referral.
- 18.3 Restricted transfer parole cases will involve different reports and witnesses.
- 18.4 When directing a restricted transfer case to an oral hearing, it is helpful to set out the nature of the referral. Directions should be as specific as possible on why witnesses are being called. It is important to have the involvement of a COM from the relevant Probation Service area in England and Wales where one is identified, normally by teleconference or video-link.
- 18.5 There may be referrals for cases where the prisoner has been transferred into England and Wales from one of the jurisdictions on a restricted basis. In these cases, the Parole Board for England and Wales is only being asked for advice on a move to open conditions.
- 18.6 Further guidance on restricted transfer cases is available on the practice guidance page on SharePoint.

## **ANNEX 1 Suitability for Open Conditions Test**

### **Secretary of State's Directions to the Parole Board 1 August 2023**

#### **Transfer of indeterminate sentence prisoners (ISPs) to open conditions**

1. *The Secretary of State (or an official with delegated responsibility) will accept a recommendation from the Parole Board (to approve an ISP for open conditions) only where:-*
  - *the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the prisoner in open conditions may be in the community, unsupervised under licensed temporary release);*  
*and*
  - *the prisoner is assessed as low risk of abscond; and*
  - *there is a wholly persuasive case for transferring the ISP from closed to open conditions.*

#### **Directions**

2. *Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:-*
  - i. *all information before it, including any written or oral evidence obtained by the Board;*
  - ii. *whether the following criteria are met:*
    - *the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the prisoner in open conditions may be in the community, unsupervised under licensed temporary release); and*
    - *the prisoner is assessed as presenting a low risk of abscond.*
3. *The Parole Board must recommend a move to open conditions only where it is satisfied that the two criteria (as described at 2(ii)) are met.*

#### **TACT Prisoners**

4. *There is a presumption that a prisoner serving an indeterminate sentence for a specified terror or terror connected offence will be unsuitable for open conditions unless exceptional circumstances can be evidenced. Where the Secretary of State considers that exceptional circumstances may apply, the Parole Board will be invited to consider whether the ISP is suitable for a transfer to open conditions.*
5. *Before recommending that an ISP (as described at 4) be transferred to open conditions, the Parole Board must be satisfied that the exceptional circumstances have been evidenced, that the two criteria (as described at 2(ii)) are met.*

#### **Foreign National Prisoners**

6. *Pursuant to Prison Rules, an ISP who has been served with a deportation order and who has exhausted all their in country appeal rights is not eligible to be considered for open conditions. An ISP who is liable for deportation, but has not exhausted appeal rights may still be considered for transfer to open conditions.*
7. *Before recommending that a foreign national ISP (as described at 6) be transferred to open conditions, the Parole Board must be satisfied that the ISP presents as a very low risk of abscond, that the first criterion (as described at 2(ii)) is met.*