

Title: Recall Adjudicator for recalled determinate sentence prisoners IA No: MoJ037/2014 Lead department or agency: Ministry of Justice Other departments or agencies: N/A	Impact Assessment (IA)		
	Date: 15 October 2014		
	Stage: Legislation		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
Contact for enquiries: general.queries@justice.gsi.gov.uk			
Summary: Intervention and Options			RPC Opinion: Not applicable

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?
	£m	£m	

What is the problem under consideration? Why is government intervention necessary?

The current legislative framework prescribes that recalled determinate sentence prisoners must be referred to a court like body (the Parole Board) to have their detention reviewed. This, combined with the Parole Board's prioritisation framework, has meant that there is no flexibility in the way those cases are reviewed. However, on 2 July 2014, the *Whiston* Supreme Court judgment overturned previous case-law by finding that determinate sentence recall cases do not engage Article 5(4) of the ECHR. This means that any review of these cases no longer needs to be conducted by a court-like body such as the Parole Board in order to be ECHR compliant. This judgment has therefore opened the possibility, not previously available, of introducing flexibility in the system by allocating determinate recall cases to a body or persons other than the Board. In addition, current pressures on the Board arising from the Osborn, Booth and Reilly Supreme Court judgment – which has resulted in a significant increase in demand for oral hearings – requires further intervention as soon as possible to help alleviate that pressure. Amending primary legislation will ensure determinate sentence recall cases are dealt with in the most flexible and efficient manner possible and allow them to be diverted away from the Board.

What are the policy objectives and the intended effects?

To seize the opportunity presented by the *Whiston* judgment to put in place the most proportionate, effective and efficient mechanism for reviewing the detention of recalled determinate sentence prisoners without compromising the robustness, fairness and impartiality of the decision making in determinate sentence recall cases.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing. Under this option, we would leave the review of determinate sentence recall cases with the Parole Board.

Option 1 (preferred): To legislate to remove the statutory duty to refer determinate sentence recall cases to the Parole Board and instead provide a power for the Secretary of State to appoint Recall Adjudicators (which could include the Parole Board) to review and make decisions about ongoing detention. This is our preferred option as it ensures that determinate sentence recall cases are dealt with in the most flexible and appropriate manner.

Will the policy be reviewed? No If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?				Yes / No / N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro No	< 20 No	Small No	Medium No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded: N/A	Non-traded: N/A

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: To legislate to create a “recall adjudicator” to review recalled determinate sentence prisoners.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

Description and scale of key monetised costs by ‘main affected groups’

- It has not been possible at this stage to quantify any of the expected costs but this will be done once further details of the proposed new recall adjudicator model have been finalised.

Other key non-monetised costs by ‘main affected groups’

- One-off costs associated with a recruitment campaign, training and for setting up the new process
- Potential ongoing costs of running the new process – we do not, however, know the extent of the savings relative to the base case as we do not currently know the exact features of the recall adjudicator model and the extent to which the new system will prove to be more efficient than the existing system.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0		
High	0		
Best Estimate	0		

Description and scale of key monetised benefits by ‘main affected groups’

It is not possible at this stage to quantify and cost any of the expected benefits (or cost savings) but once further details of the new model have been finalised, further analysis will be undertaken.

Other key non-monetised benefits by ‘main affected groups’

- Benefits to the criminal justice system and society stemming from greater flexibility in the system to deal with determinate sentence recall prisoners which may include efficiency savings from a more streamlined process
- Benefits from the more timely treatment by the Parole Board of indeterminate prisoners whose hearings are currently being delayed in the basecase. This ought to ease the pressure on the system (for example by tackling the growth in the Parole Board backlog) and reduce the demand on prison places than would have been the case otherwise
- Potential benefits for determinate sentence recall prisoners, such as a quicker and more effective review of their detention if the future process proves more streamlined, timely and efficient than it currently is.
- Ensuring that there is a proportionate system for determinate recalls is intended to enable the timely hearing of indeterminate sentence prisoners and avoid increasing delays in their release.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

- We assume that the new recall adjudicators will make decisions that are similar in outcome to those of the Parole Board and that the quality of decisions will be maintained. Recall adjudicators will need to be carefully selected and trained and provided with a clear process and guidance to mitigate the risk of their release decisions either being too risk averse, which would add to the pressure on prison places, or failing to take full account of relevant risk factors, which could lead to the release of prisoners who breach their licence conditions and/or re-offend. This would have adverse consequences on the system as well as incur reputational damage to the MOJ.
- There may also be increased judicial reviews initially as the new system is challenged by prisoners who fail to secure their release.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: None	Benefits: None	Net: N/A	Yes/No	IN/OUT/Zero net cost

Evidence Base (for summary sheets)

INTRODUCTION

1. This Impact Assessment (IA) accompanies the Criminal Justice and Courts Bill (“the Bill”). It assesses the proposals to use the Bill to introduce a new provision in the Criminal Justice Act (“CJA”) 2003 creating a “recall adjudicator” to review recalled determinate sentence prisoners.
2. All offenders released from sentences of 12 months or more are subject to a licence (and following commencement of provisions in the Offender Rehabilitation Act (ORA) 2014 all sentences of less than 12 months will attract licences too). A number of those determinate sentence offenders go on to breach their licence conditions or reoffend, leading to their recall to custody. Depending on the risk they are assessed to present, these offenders can be given either: (a) a fixed-term recall (FTR) for 28 days after which the offender is released automatically (or 14 days if on licence from a less than 12 month sentence following ORA commencement); or (b) a ‘standard’ recall, making them liable to remain in custody until their sentence expiry date.
3. Recalled prisoners¹ currently have a statutory entitlement in the CJA 2003 to have their cases referred to the Parole Board within 28 days to review whether, on risk grounds, they should continue to be detained. (Although the referral has to be made within 28 days, there is no statutory timeframe in which the Board has to make its decision.) If the Board decides not to release the offender, there is a statutory requirement for the case to be referred again no later than a year after the previous decision. In other words, a recalled prisoner is reviewed by the Board initially following recall and annually thereafter until their release.
4. There is also a power for the Secretary of State to release a recalled determinate sentence prisoner at any point, subject to the test that detention is not necessary for the protection of the public. In practice this means that a recalled prisoner can be released in between Parole Board reviews if their circumstances change (e.g. previous risk factors are addressed) and arrangements can be put in place to safely manage them back on licence in the community. This means, either the Parole Board or the Secretary of State (in practice officials in NOMS under delegated powers according to the *Carltona* principle) can make the decision to release a recalled prisoner, provided that it is safe to do so, but if the prisoner is not released he or she is entitled to annual reviews by the Board.
5. The statutory provisions in the 2003 Act reflect previously established case law that a recalled prisoner is entitled, under Article 5(4) ECHR, to have their detention reviewed by a court-like body. However, on 2 July 2014 the Supreme Court handed down a judgment in the case of *Whiston v Secretary of State*, in which the Court overturned previous case law by concluding that Article 5(4) is not engaged when a determinate sentence offender is recalled to custody. Accordingly, there is no longer a requirement (in ECHR terms) to refer determinate sentence recall cases to an independent, court-like body, such as the Parole Board for review, though the common law requirements of fairness still apply.
6. Another Supreme Court judgment in October 2013, in the case of *Osborn, Booth and Reilly* (OBR) found that prisoners whose release is subject to the discretion of the Parole Board – including recalled prisoners – have the right to an oral hearing whenever fairness to the prisoner requires one in the light of the facts of the case and the importance of what is at stake. This has led to a considerable increase in the number of cases the Board now has to decide by way of an oral hearing, which makes the process longer and more resource intensive. Due to the Parole Board’s Listing Prioritisation Framework, determinate recall cases have to take priority over indeterminate sentence prisoners (ISPs) which has led to an increase in the backlog of ISPs awaiting a hearing. Changing the Listing Prioritisation Framework would leave the Parole Board under pressure and therefore it has been necessary to take steps to mitigate the impact of the OBR judgment, which

¹ This mostly applies to those subject to a ‘standard’ recall but those who receive a ‘fixed term recall’ also have a statutory entitlement to submit representations to the Parole Board should they wish.

has included the development of a new Parole Board operating model (to process cases more quickly and efficiently) and additional resources allocated to the Board (£1.2m in 2013/14).

7. The combined impact of these two Supreme Court judgments on recalled determinate sentence prisoners is that: (a) it is no longer necessary for them to be referred to the Parole Board, or any other independent court-like body, to remain ECHR compliant (*Whiston*); but (b) they are still entitled under the common law duty of fairness to an impartial and procedurally fair review of their detention – including an oral hearing if fairness to the prisoner and the facts of the case require one (*OBR*). This is, therefore, the legal context in which the Government's proposals have been developed.

EVIDENCE BASE

8. On average², the Parole Board roughly makes 905 paper decisions a month on determinate standard sentence recall cases and an additional 100 decisions a month from the paper appeal process (i.e. appeals against initial paper decisions requesting an oral hearing). Due to the Parole Board's Listing Prioritisation Framework it generally meets the demand for paper decisions for these cases. In addition, there is a demand for actual oral hearings for this type of case of, on average, approximately 175 oral hearings a month³ (so the Parole Board would need to complete approximately 175 oral hearings a month to meet current demand). However the Parole Board currently only holds⁴ approximately 135 oral hearings a month in relation to these determinate standard sentence recall cases. Due to deferrals on the day, this results in the Parole Board completing approximately 110 oral hearings with a decision to release, not release or move to open conditions.
9. The backlog in hearings will not necessarily grow by the difference between demand and supply as there will be a natural drop out in cases (e.g. due to executive release or cases reaching their sentence expiry date prior to a hearing). This suggests that the new recall adjudicators may need to make approximately 870 paper decisions a month, plus 100 appeals requesting an oral hearing, and complete approximately 175 oral hearings a month for these cases.

Problem under consideration

10. The current legislative framework prescribes that determinate sentence prisoners given a standard recall must be referred to a court like body (the Parole Board) to have their detention reviewed. This, combined with the Parole Board's prioritisation framework, has meant that there is no flexibility in the way those cases are reviewed, making it impossible to divert those cases away from the Board. On 2 July 2014, a Supreme Court judgment, in the case of *Whiston*, overturned previous case-law by finding that determinate sentence recall cases do not engage Article 5(4) ECHR. This means that any review of these cases no longer needs to be conducted by a court-like body such as the Parole Board in order to be ECHR compliant. This judgment now opens the possibility of introducing flexibility in the system by allocating determinate recall cases to a body or persons other than the Board. Government intervention to amend primary legislation will ensure those cases are dealt with in the most flexible and efficient manner possible.

Rationale for intervention

11. In this case, intervention is justified primarily on efficiency grounds, which is necessary to ensure that determinate sentence recall cases are dealt with in the most flexible and efficient manner possible. Intervention is also justified on equity grounds, as it should result in faster outcomes for

² Using Parole Board data averaged between August 2013 – July 2014.

³ This excludes Extended Sentence Prisoner supply. The total demand for oral hearings is made up of the direct demand of oral hearing decisions at the paper hearing stage and the additional oral hearing decisions from the paper "appeal" sub-process.

⁴ Using Parole Board data averaged between February 2014 – July 2014. This time period would take into account the impact of OBR and take into account the fact that oral hearings are listed three months in advance. Hence the OBR impact of November 2013 would only start to be dealt with through the increased supply of oral hearings in February 2014. This includes cases deferred on the day.

indeterminate sentence prisoners who should not have decisions on their ongoing detention delayed.

12. The Ministry of Justice, and the Parole Board, have been considering how to deal with the increase in demand for oral hearings following the *OBR* judgment to ensure the Board has the necessary resources and new processes in place to manage this increase and to mitigate the knock-on impact on prison numbers. The Government, while encouraged by the Parole Board's "Fair for the Future" response to the *OBR* judgment, is of the view that more should be done to alleviate the pressure on the Board and is keen to seize the opportunity offered by *Whiston* to look afresh at the most proportionate and efficient way to review determinate recall cases (which could now be undertaken outside of the Parole Board's structure), while continuing to satisfy the common law duties of fairness and impartiality and ensuring that public protection remains the overriding consideration.

Policy objective

13. The primary objective of this policy is to increase the flexibility in the determinate recall review process and ensure that both determinate and indeterminate prisoners can have their cases determined in a timely fashion. The *Whiston* judgment has created an opportunity to amend the legal framework to enable the diversion of determinate sentence standard recall cases away from the Parole Board, to a non court-like body. This opens a window of opportunity for re-thinking the way in which those cases are processed and heard, including maximising the use of technology and streamlining existing processes, benefiting users as well as the Government. It allows us to put in place the most appropriate, effective and efficient mechanism for reviewing the detention of recalled determinate sentence prisoners without compromising the robustness, fairness and impartiality of the decision making.
14. The policy intention is that the Secretary of State should be able to appoint persons or the Parole Board to review the detention of recalled determinate sentence prisoners and make decisions on whether they should be released or remain in custody. There is no intention to alter the legislative framework in respect of indeterminate sentence prisoners (whether in relation to their initial release or when recalled to custody) so their release will remain solely for the Parole Board to decide.
15. This new process will allow for a reduction in the pressure the Board is under to hear enough cases following *OBR*, and prevent a further increase in the backlog of indeterminate sentence prisoners whose hearings are delayed. At present, those ISPs remain in custody as a result of the prioritisation of determinate sentence recall cases. This measure is intended to ease this issue by permitting the allocation of those cases to persons other than the Board and ensuring that prisoners do not stay in prison longer than necessary when they could otherwise be safely released.

Description of options considered

Option 0: do nothing.

16. This is the status quo, resulting in no extra costs or benefits. This will form the baseline. Under this option, we would leave the review of determinate sentence recall cases with the Parole Board.

Option 1: to legislate to create a "recall adjudicator" to review the detention of recalled determinate sentenced offenders

17. Currently, determinate sentence offenders given a standard recall must by law be referred to the Parole Board (a court-like body satisfying the requirements of Article 5(4) ECHR) to have their detention reviewed. The provision introduced by the Government intends to increase flexibility in the system by allowing such cases to be reviewed either by the Parole Board or person appointed by the Secretary of State.
18. The functions of the recall adjudicator will be those currently conferred on the Parole Board. Recall adjudicators will have to satisfy the common law requirements of procedural and impartial fairness

– including the ability to conduct oral hearings where that is required, in line with the *OBR* judgment.

Costs and Benefits

Costs of Option 0: Base case (do nothing)

19. Because the do nothing option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV). Under this option, the Parole Board would continue with its current reforms to try and cope with the increase in oral hearings following the *OBR* judgment. Whilst relative costs to determinate sentence decisions will be necessarily zero under this option, there may be additional costs to the system from delays in indeterminate sentence decisions leading to increased pressure on the prison system.
20. Simply increasing funding into the system and the Board's resources would not resolve the current pressures as it would carry the risk of interfering with the reforms currently being undertaken by the Board. The Board's senior management advised that, for example, recruiting more Parole Board members would in the first instance divert resources currently allocated to hearing cases to the delivery of a considerable amount of training and quality assurance of decisions. This would not be desirable as the Board's priority should be to focus on hearing as many cases as possible. The Board also argued that increasing Member numbers would not by itself suffice, as such an increase would have to be supported by a parallel increase in case management and secretariat staff to handle the extra cases.

Costs of Option 1

21. The constitution and detail of the recall adjudicator model (including remuneration etc) is being considered as part of the implementation plan. Costs will need to be quantified once the detail of the recall adjudicator model is finalised. The aim is that the Recall Adjudicator model will cost the same or less than the Parole Board.

One-off costs

22. We expect there to be one-off costs associated with a recruitment campaign, training and for setting up the new recall adjudicator process.

Ongoing costs

23. There will be potential costs associated with the running of the new system. However we have not been able to quantify this and therefore do not know the extent and balance of possible costs and savings relative to the base case at this time. Recall adjudicators, who are not Parole Board members, will be persons appointed by the Secretary of State. This is likely to mean that it will operate broadly within existing case management structures (subject to future improvements and streamlining). The administration and provision of the necessary reports and dossiers for recall adjudicators to consider will be provided by NOMS, which means that there would be no duplication of the secretariat function currently provided by the Parole Board. This should help minimise operating costs.

Benefits of Option 1

24. We expect there to be benefits to the criminal justice system and society from a more flexible system to deal with determinate sentence recalled prisoners. This may include efficiency savings from a more streamlined process. For example, it should be possible to integrate better the recall adjudicator model with NOMS IT systems and processes, making greater use of technology and streamlining further the review process. The Parole Board is an independent body with its own administration, secretariat, processes and systems. Once dossiers are produced by NOMS they

feed into the Board’s systems for listing and progressing the cases. The recall adjudicator model, on the other hand, will be administered directly by NOMS, providing the opportunity for it to operate within NOMS’ systems, IT and case management processes – thereby benefitting from greater efficiencies and streamlining.

- 25. We intend the recall adjudicator process will bring potential benefits for determinate sentence recall prisoners if decisions on their ongoing detention are taken more efficiently than at present. This proposal provides the opportunity to look afresh at what the most efficient and effective system is for processing these cases now that there is no longer an obligation to refer them to an independent court-like body.
- 26. This new process may help alleviate the pressure the Parole Board is under to hear enough oral hearing cases following the OBR judgement. By diverting determinate standard recall cases, we would hope to free up some of the Parole Board’s resources, which in turn could lead to the quicker treatment of indeterminate prisoners, relative to the base case. This could potentially ease the pressure on the system (for example by tackling the growth in the Parole Board backlog) and reduce the demand on prison places than would have otherwise been the case. If these amendments are not implemented, offenders will continue to receive fair and careful consideration for release by the Parole Board but they may face delays in hearings, particularly for indeterminate sentenced prisoners, leading to potential delay in the release of prisoners who could safely be managed on licence in the community.

Summary of the preferred option with description of implementation plan:

- 27. Option 1 is our preferred option as it ensures that determinate sentence recall cases are dealt with in the most flexible and appropriate manner. While the costs and benefits cannot be quantified, this option presents a real opportunity to improve the current system, with benefits for prisoners and the wider criminal justice system alike.
- 28. The policy intention is to commence the provision as soon as practically possible, with the caveat that the provision will not be implemented until the Government is satisfied that all the safeguards, mechanisms and necessary resources are in place. In practice, this might include initially a phased and incremental transfer of cases from the Parole Board to individuals acting as recall adjudicators to test the new model. Alternatively, a full and speedy transfer of all determinate recall cases from the Board to recall adjudicators would provide the Board will maximum relief, so this may be desirable and necessary following commencement of the provisions. Further work is needed to fully develop the new structures and associated costs.

Risks and assumptions

29. The following risks and assumptions apply:

Assumption	Risk
<p>We assume that the new recall adjudicators will make decisions that are similar to those of the Parole Board and the quality of decisions will remain constant.</p>	<p>The new recall adjudicators may initially be more risk averse resulting in different outcomes and lower release rates than the current decisions made by the Parole Board, leading to further adverse impact on prison places.</p> <p>Conversely, if the decision-making of the new recall adjudicators fails to take adequate account of relevant risk factors this could potentially lead to the release of prisoners who go on to breach their licence or commit further offences. This would incur additional costs to society and the whole of the criminal justice system (police, probation, prosecution, courts and prisons)</p>

	<p>and could have adverse reputational consequences.</p> <p>To mitigate these risks, and ensure robust and consistent decision making by recall adjudicators, they will be carefully selected for their skills and experience and provided with the necessary training and support; and their decisions will be closely monitored. In addition, the Secretary of State will issue procedural rules that must be followed, and may appoint a chief recall adjudicator to oversee recall adjudicators. The chief will also issue guidance which recall adjudicators will have a duty to act in accordance with.</p> <p>As with any new system, there could be an initial increase in judicial reviews arising from Recall Adjudicators' decisions, which will likely require a court judgment to settle the position. The Government is committed to designing a process which features all the necessary safeguards so as to minimise the risk of judicial review.</p>
<p>The new system is assumed to be more efficient and effective than it currently is in the base case.</p>	<p>The expected efficiencies may not be realised and there may not be benefits, for instance, for all types of recall cases. However, the legislation is drafted to mitigate this risk, as cases could still be dealt with by the Parole Board, acting in its capacity as a recall adjudicator, if it was deemed that this would be the most efficient and effective process.</p>
<p>We assume no significant impact of other policies in this area.</p>	<p>Other policies could have an impact on our base case, and that could affect the estimated impact of this policy. For example, the introduction of licence conditions for offenders receiving less than 12 month sentences (provisions contained in the Offender Rehabilitation Act) might increase the volume of cases that are transferred to the new recall adjudicator. This is not expected to have a significant impact, though, as we would expect most of these offenders to either receive a short fixed term recall of 14 days (under the ORA provisions) or be close to their sentence expiry date because the sentence is so short.</p>
<p>We assume that we are able to recruit suitable recall adjudicators in sufficient numbers.</p>	<p>There could be insufficient suitable candidates to be recall adjudicators which means that the recall adjudicator model does not prove to be more efficient or flexible as expected, compared to the current system – or at least means it could take longer to achieve the full benefits. This could impact on the speed and scale of the anticipated benefits.</p> <p>The fall-back position, though, is that the Parole Board may be appointed as a recall adjudicator so could continue to process these cases if necessary.</p>

<p>We assume that recall adjudicators will be based in prison but hearings will also take place by video-links.</p>	<p>There may be practical obstacles to achieving the full benefits from prison based and/or video link hearings, which could mean the new system may not be as effective or efficient as we expect.</p> <p>In developing the new model and processes for recall adjudicators, we will need to ensure that it can operate more efficiently and effectively than the current system, including optimising the use of digital and other technology to support the processing of cases.</p>
<p>We do not expect there to be a change in the rate of deferral of cases relative to the base case.</p>	<p>If recall adjudicators are not satisfied that they are able to make a decision on the evidence and information presented to them, there could be an increase in the rate of deferrals and therefore delays in the process. However, deferrals are already an issue with the current Parole Board process, and it should be possible to mitigate the risk of deferrals, for example through procedural rules issued by the Secretary of State which will make clear how the process will operate and exactly what information, reports and assessments etc will be required for adjudicators to make their decisions.</p>
<p>We assume that there will be benefits from more timely hearings for indeterminate prisoners by the Parole Board (whose hearings are currently being delayed in the base case), which may potentially ease the pressure on the system and reduce the demand on prison places than would have been the case otherwise.</p>	<p>The Parole Board may be unable to reconfigure their processes and resources to reap the full benefits from the determinate standard recall caseload being moved to the new recall adjudicators.</p>