



## **Board of Parole Hearings**

### **INITIAL STATEMENT OF REASONS**

#### **Rulemaking Action BPH RN 25-01:**

**Consultations; Commutation and Recall of Sentence Recommendation Assessment Process for Recommendation of Incarcerated Persons for Commutation of Sentence under Penal Code Section 4801 and Recommendation of Incarcerated Persons for Recall of Sentence and Resentencing under Penal Code Section 1172.1**

**California Code of Regulations  
Title 15. Crime Prevention and Corrections  
Division 2. Board of Parole Hearings**

#### **PROBLEM STATEMENT AND PURPOSE OF RULEMAKING ACTION**

This rulemaking action seeks to adopt regulations governing 1) consultations and 2) proceedings for recommending incarcerated persons to the Governor for commutation of sentence and to sentencing courts for recall of sentence and resentencing.

#### **Consultations**

On September 16, 2013, the Governor approved Senate Bill 260 (2013–2014 Reg. Sess.), which amended Penal Code section 3041 to require the Board of Parole Hearings (Board) to conduct a consultation with an incarcerated person during the sixth year prior to their minimum eligible parole release date (MEPD). The purpose of the consultation is to review and document the incarcerated person's activities and conduct pertinent to their parole eligibility. The hearing officer shall provide the incarcerated person information about the parole hearing process, legal factors relevant to their suitability or unsuitability for parole, and individualized recommendations for the incarcerated person regarding their work assignments, rehabilitative programs, and institutional behavior.

Senate Bill 260 also created Penal Code section 3051, establishing youth offender parole hearings. Under Penal Code section 3051, an incarcerated person who was convicted of a controlling offense that was committed before the person attained 18 years of age was potentially eligible for a hearing prior to their MEPD if their youth parole eligible date (YPED) was before their MEPD. Penal Code section 3051, subdivision (c), requires the Board to provide qualified youth offenders with a consultation prior to their hearing, meaning a youth offender shall receive a consultation prior to their earliest eligibility date (MEPD, YPED, or another applicable parole eligible date). The eligibility age for a qualified youth offender was subsequently amended multiple times through legislation, but the requirement that a youth offender receive a consultation has not changed and is currently required under Penal Code section 3051, subdivision (c).

In addition to the statutory introduction of youth offenders, the Elderly Parole Program was created through a court order in *Coleman v. Newsom* and *Plata v. Newsom*. To reduce overcrowding, on February 10, 2014, the three-judge court directed the Board to “finalize and implement a new parole

process whereby incarcerated persons who are 60 years of age and have served a minimum of [25] years of their sentence” would be referred to the Board for parole consideration. On January 1, 2018, the California Legislature enacted Assembly Bill 1448 (2017–2018 Reg. Sess.), which codified into law the Elderly Parole Program by adding section 3055 to the Penal Code. On January 1, 2021, the California Legislature enacted Assembly Bill 3234 (2019–2020 Reg. Sess.), which amended Penal Code section 3055 to encompass a broader version of the statutory Elderly Parole Program to include incarcerated persons who are 50 years old and have served 20 years of continuous incarceration. All incarcerated persons who meet the criteria for elderly parole through the court order or the statute shall receive an Elderly Parole Eligible Date (EPED). Under Penal Code section 3055, subdivision (e), incarcerated persons who qualify for elderly parole consideration shall receive a consultation prior to their hearing. Scheduling of the consultation will be based off their earliest eligible release date (MEPD, EPED, or another applicable parole eligible date).

In addition to youth offender parole and elderly offender parole, California voters approved the Public Safety and Rehabilitation Act of 2016 on November 8, 2016, which created nonviolent offender parole. This act allowed for incarcerated persons who meet certain criteria to come before the Board for a parole hearing prior to their MEPD. Incarcerated persons who qualify for nonviolent parole now have a nonviolent parole eligible date (NPED) and may be scheduled for a hearing based on their NPED if it is earlier than their MEPD. Scheduling of the consultation will be based off their earliest eligible release date (MEPD, NPED, or another applicable parole eligible date).

Prior to 2014, an incarcerated person serving a sentence of life with the possibility of parole had a MEPD that triggered the date they would be eligible for a parole hearing. Now, the date an incarcerated person is eligible for a parole hearing can be triggered by the MEPD, YPED, EPED, or NPED, whichever date entitles the incarcerated person to the earliest possible hearing. The purpose of a consultation is to prepare the incarcerated person for their initial parole hearing. Therefore, the Board schedules the person’s consultation based on the date the person is first eligible for a parole hearing.

The Board must enact these regulations in order to clarify how consultations will be conducted for all eligible incarcerated persons and when the consultations will be scheduled for incarcerated persons under each parole eligibility date.

In 2014, the California Legislature created consultations. The Board began providing consultations to incarcerated persons in accordance with the Penal Code. Over the years, however, statutory language in Penal Code sections 3051 and 3055, as well as the Public Safety and Rehabilitation Act of 2016, broadened the pool of incarcerated persons who qualify for parole hearings by creating new timelines for when an incarcerated person may come before the Board. Sections 3051 and 3055 explicitly require the Board provide youth offenders and elderly offenders with a consultation; however, Penal Code section 3041, subdivision (a), was not updated to reflect the addition of the YPED or EPED. The language of Penal Code section 3041, subdivision (a), only refers to an incarcerated person’s MEPD triggering a consultation, even though an incarcerated person may receive a hearing before they reach their MEPD if their YPED, EPED, or NPED prompts an earlier hearing.

Further, under Penal Code section 4801, subdivision (a), the Board has the authority to report to the Governor the names of incarcerated persons who should be considered for a commutation of sentence based on the incarcerated person’s good conduct, unusual term of sentence, or other cause.

The Board also has the authority under Penal Code section 1172.1, subdivision (a), to recommend incarcerated persons to sentencing courts for recall of sentence and resentencing. Currently, there is no regulatory mechanism to identify individuals who may be suitable for a recommendation from the Board under either of these Penal Code sections. By enacting these regulations, the Board will have a mechanism through consultations to meet with incarcerated persons to identify persons for a referral to the Governor for a commutation of sentence or a referral to the court for a recall of sentence.

**Commutation and Recall of Sentence Recommendation Assessment Process for  
Recommendation of Incarcerated Persons for Commutation of Sentence under Penal Code  
Section 4801 and Recommendation of Incarcerated Persons for Recall of Sentence and  
Resentencing under Penal Code Section 1172.1**

Including consultations discussed above, this rulemaking action seeks to create a process that allows the Board to exercise its existing authority under Penal Code section 4801 to recommend to the Governor incarcerated persons who meet specified criteria for executive clemency in the form of a commutation of sentence, and under Penal Code section 1172.1 to recommend incarcerated persons to courts for recall of sentence and resentencing.

The Legislature has given the Board the authority to report to the Governor the names of persons incarcerated in state prison who, in its judgment, ought to have a commutation of sentence. (*See* Penal Code section 4801, subdivision (a).) The Board does not currently exercise this authority to make recommendations because it lacks the necessary regulatory framework. The Legislature has also given the Board the authority to recommend incarcerated persons to sentencing courts for recall of sentence and resentencing. (*See* Penal Code section 1172.1, subdivision (a).) The Board does not currently exercise this authority because it lacks the necessary regulatory framework. The proposed regulations establish a regulatory framework to identify persons for commutation and resentencing that leverages the Board's expertise in and well-established processes for assessing incarcerated people for suitability for release on parole.

These proposed regulations provide the Board and the public clear guidelines about who is eligible for a commutation and recall of sentence (C&R) hearing, the procedural details of the process, and the criteria the Board will use to decide whether to exercise its authority. These proposed regulations make use of the Board's current legislative and regulatory mandates and existing staff and resources. The proposed regulations create a public-safety focused framework that is transparent and equitable, and gives victims, law enforcement, and other key stakeholders the opportunity to meaningfully participate.

The proposed regulations focus on public safety risk and provide the Governor and the judges tasked with deciding whether to change an incarcerated person's sentence with reliable information about current public safety risk. Currently, there are no regulations that allow decision-makers, including the Governor and judges, to receive risk assessments before making a release decision for commutation and for recall of sentence.

The proposed regulations also provide transparency and an opportunity for meaningful participation by victims, victims' next of kin, victims' family members (collectively referred to as "victims" throughout this section), prosecutors, law enforcement, and the public. The proposed regulations mirror existing procedures in the parole hearing process that provide victims and prosecutors timely

notice and the opportunity to participate in the hearing, learn about the incarcerated person's current public safety risk, and provide their input for recommendations for commutation and for recall of sentence.

The proposed regulations use a two-step process for identifying and assessing suitable persons for recommending for possible commutation and resentencing. First, eligible incarcerated persons meet with a Board hearing officer at a C&R review. The hearing officer reviews the person's correctional records, interviews the person, and makes a determination based on the criteria established in this rulemaking package whether the person should be advanced in the process. If the hearing officer at the C&R review decides to advance the person, the Board will conduct the incarcerated person's C&R hearing within one year of the referral.

Before the hearing, victims and prosecuting agencies will be notified of a C&R hearing and invited to participate. If the panel finds that the person meets the specified criteria, the Board will notify both the Governor, pursuant to Penal Code section 4801, and the sentencing court, pursuant to Penal Code section 1172.1. At the C&R hearing, a panel of hearing officers will review all relevant information and decide whether the person meets the established criteria. Procedures in the proposed regulations identify who is eligible for the C&R recommendation assessment process by the Board, the information the Board will consider when determining whether a person should receive a C&R hearing, the process associated with a C&R hearing, and the criteria the Board will use in its decision-making for recommendations for commutation and for recall of sentence.

The C&R regulations also adopt the parole suitability process of hearing officers identifying any special conditions of parole required to foster an incarcerated person's safe release. Under the C&R regulations, the hearing panel, upon finding someone meets the standard for a C&R recommendation, will announce any recommended special conditions of parole for the California Department of Corrections and Rehabilitation's (CDCR) Division of Adult Parole Operations (DAPO) to impose should the individual become eligible for parole by resentencing or by commutation. These special conditions of parole may include recommended supervised housing, mandated treatment to address risk areas, or special rules relating to the victims and survivors. The hearing officers make these recommendations based on individual assessments of current risk with the goal of decreasing recidivism and increasing public safety. Currently, there are no regulations that provide courts making release decisions with recommendations for individually tailored recommendations for special parole conditions.

**SPECIFIC PURPOSE OF, RATIONALE FOR, AND NECESSITY OF EACH PROPOSED ADOPTION, PER GOVERNMENT CODE SECTIONS 11346.2(b)(1) AND 11349(a)**

**Consultations**

Section 2267 is added to implement Penal Code section 3041. This section is necessary to provide guidelines concerning the timelines and procedures of a consultation.

Subsection (a) clarifies the purpose and format of a consultation. Specifically, this subsection outlines that a consultation can be conducted by either a commissioner or a deputy commissioner. Additionally, this subsection explains that the commissioner or deputy commissioner will provide the incarcerated person with information about the parole hearing process, legal factors relevant to their suitability or unsuitability for parole, and individualized recommendations for the individual

regarding their programming, institutional behavior, and release plans. This subsection also clarifies that a consultation is not a parole hearing and the notice and appearance rights that apply to parole hearings under Penal Code sections 3041.7, 3042, and 3043, do not apply to consultations. Specifically, only the incarcerated person is provided notice of a consultation and may participate. It is necessary to clarify this information so all stakeholders are aware of who may participate in a consultation and what happens at a consultation. Further, it is necessary to clarify that a consultation is different from a parole hearing and that different notices and rights apply for a consultation.

Subsection (b) clarifies who is eligible to receive a consultation. Specifically, an incarcerated person who has a MEPD, YPED, EPED, or NPED is eligible for a consultation. Additionally, the Board will provide a consultation to an incarcerated person if ordered to do so by other legal authority, such as a commutation of sentence, court order, or the Penal Code. This subsection is necessary to make it clear to all stakeholders that an incarcerated person will receive a consultation prior to their parole hearing regardless of what eligibility date triggers the person's initial parole hearing. Since the purpose of a consultation is to prepare the incarcerated person for a parole hearing, it is necessary to clarify that the consultation is not based solely on a MEPD if another eligibility date makes the person eligible for a parole hearing earlier than the MEPD. This subsection also promotes ease of understanding for stakeholders so they know exactly who is eligible to receive a consultation without having to turn to various legal authority.

Subsection (c) clarifies the timeline for when an incarcerated person shall be scheduled for a consultation. Specifically, the incarcerated person shall receive their consultation during the sixth year prior to their projected initial parole consideration hearing. This timeline follows the requirement set forth in Penal Code section 3041. Penal Code section 3041 dictates that an incarcerated person shall receive a consultation during the sixth year before the person's MEPD, which means no later than five years before the person's initial parole hearing. Penal Code sections 3051 and 3055 also require a consultation for a person who is eligible for youth offender or elderly offender consideration, which means that an incarcerated person who may not have a MEPD must also receive a consultation prior to their hearing. This subsection is necessary because it clarifies that the same timeline applies regardless of how the incarcerated person becomes eligible for a parole hearing.

Subsection (d) clarifies the scheduling of a consultation for an incarcerated person whose parole eligibility date is calculated or modified, making them eligible for a parole hearing within two years of the date of the recalculation. Specifically, this subsection explains that an incarcerated person will not be scheduled for a consultation if they become eligible for a parole hearing in less than two years from the date of the recalculation. The Penal Code set forth the requirement that the Board provide a consultation during the sixth year prior to the initial parole hearing so that the incarcerated person has time to implement the suggestions the Board provides to the incarcerated person at the consultation. The Board determined that the cut-off for a consultation should be two years prior to a parole hearing because this allows the Board to direct its scheduling capabilities and resources to the population who will most benefit from meeting with the Board, as the incarcerated person still has sufficient time to implement the Board's recommendations.

Subsection (e) clarifies the rights of an incarcerated person during a consultation. These rights include participating in the consultation by videoconference and receiving reasonable accommodations that are needed in order to participate in the consultation. This subsection also explains that if the incarcerated person chooses not to participate in the consultation, the consultation

will go forward based on a review of the incarcerated person's central file and the Board will issue its findings and provide the incarcerated person with its recommendations. This is necessary to clarify to the stakeholders that it is the incarcerated person's right to attend or decline to attend a consultation, that the consultation will go forward with or without the incarcerated person, and that the incarcerated person still has the right to reasonable accommodations under the Americans with Disabilities Act even though the other hearing rights do not apply.

Subsection (f) clarifies that an incarcerated person may not have legal representation at a consultation. A consultation is not a hearing and there is no possibility of being found suitable for parole during this proceeding. For this reason, the same due process rights that exist for parole hearings do not exist at consultations. This subsection is necessary to prevent any confusion about whether an incarcerated person may have an attorney at this proceeding.

Subsection (g) clarifies the information the commissioner or deputy commissioner will consider at a consultation in order to identify the incarcerated person's conduct and activity while incarcerated. The information considered includes information in the central file, such as classification chronos, disciplinary records, programming, and information gathered from the incarcerated person during the interview, that the hearing officer determines to be relevant to parole suitability. This subsection is necessary to identify what information the hearing officer should review at a consultation.

Subsection (h) clarifies that the commissioner or deputy commissioner will review the central file to look for missing documents that in their opinion would be of assistance at a parole hearing. Since a consultation is the first time a commissioner or deputy commissioner meets with the incarcerated person and reviews their file, it is an opportune time to identify any missing documents or issues that should be investigated or reviewed prior to the initial parole hearing. This subsection identifies the steps the commissioner or deputy commissioner shall take if they identify missing documents or issues. This subsection is necessary to identify the commissioner's or deputy commissioner's responsibilities at a consultation to minimize the risks of a hearing postponement in the future. Specifically, addressing missing documents and issues at a consultation, which is years before the initial parole hearing, will prevent the issue from being discovered at the parole hearing and potentially avoid needing to postpone the hearing.

Subsection (i) clarifies the timeline for the Board to provide the incarcerated person with their written findings and recommendations from the consultation, regardless of whether the incarcerated person participates in the consultation. Specifically, the Board must issue its findings concerning the incarcerated person's programming, institutional behavior, and parole plans within 30 days following the date of the consultation. This timeline provides a reasonable amount of time for the commissioner or deputy commissioner to finalize their recommendations while providing the incarcerated person plenty of time to implement the recommendations prior to their initial parole hearing. Further, since an incarcerated person may choose not to attend their consultation, this subsection also clarifies that the commissioner or deputy commissioner will issue their findings and recommendations within 30 days, regardless of the person's participation in the consultation.

Subsection (j) clarifies that a commissioner or deputy commissioner may refer an incarcerated person to a commutation and recall of sentence hearing (C&R hearing) following a consultation. This subsection cites to the regulations concerning the commutation and recall of sentence recommendation assessment (C&R recommendation assessment) process (proposed sections 2840 - 2859), which includes a process for making a referral following a consultation. Under Penal Code

section 4801, the Board has authority to refer the names of incarcerated persons that it believes should be considered for a commutation of sentence. Further, under Penal Code section 1172.1, the Board has authority to recommend persons to sentencing courts for recall of sentence and resentencing. The Board is implementing a new C&R recommendation assessment process, in which individuals will be considered for a referral to the Governor for consideration of a commutation of sentence or a referral to the court for a recall of sentence. Since a consultation occurs years prior to a person's eligibility for parole consideration, the Board will utilize the consultation to determine whether the incarcerated person should be considered for a commutation of sentence or a recall of sentence by referring persons to the C&R recommendation assessment process.

Subsection (k) clarifies that a consultation will not be audio-recorded or transcribed. Since the Board audio-records and transcribes parole hearings, this clarification is necessary to inform incarcerated persons and other stakeholders that a consultation is not recorded or transcribed and the only record of the consultation is the consultation form provided to the incarcerated person following the consultation.

Subsection (l) clarifies that an incarcerated person will only receive one consultation during a continuous term of incarceration. This means that, if an incarcerated person who received a consultation subsequently has their parole eligibility dates recalculated to where they are no longer eligible for a hearing within six years, they will not receive a second consultation prior to their new parole hearing date. This is necessary to clarify that if a parole eligibility date is changed, a person will not be scheduled for a consultation every time they are within six years of their projected hearing date. The purpose of a consultation is to inform the incarcerated person of the parole hearing process and to provide them with recommendations concerning their suitability. There is no additional benefit to provide this information more than once to the same incarcerated person. The Board's resources must be directed towards individuals who have not already received a consultation.

**Commutation and Recall of Sentence Recommendation Assessment Process for  
Recommendation of Incarcerated Persons for Commutation of Sentence under Penal Code  
Section 4801 and Recommendation of Incarcerated Persons for Recall of Sentence and  
Resentencing under Penal Code Section 1172.1**

The Board proposes to enact California Code of Regulations, title 15, Chapter 7.1, which will include sections 2840 through 2859. This chapter is necessary to provide guidelines concerning the Board's authority to exercise its discretion in recommending an incarcerated person to the Governor for consideration of a commutation of sentence and the court for consideration of resentencing. Additionally, these regulations will allow the Board to provide the Governor and judges making release decisions with information about a person's current risk to public safety and any necessary special supervision conditions necessary to support the person's safe reintegration into the community should they be released on parole. These regulations are necessary to clearly explain the C&R review and C&R hearing processes, and to make clear the role of the incarcerated person, victims, prosecutors, and public.

**Section 2840 is added** to clarify the terminology, definitions, and abbreviations for the following terms as they are used in this chapter: commutation and recall of sentence recommendation assessment (C&R recommendation assessment), commutation and recall of sentence eligibility date

(CRED), commutation and recall of sentence hearing (C&R hearing), commutation and recall of sentence hearing determination (C&R hearing determination), commutation and recall of sentence hearing panel (C&R hearing panel), commutation and recall of sentence recommendation (C&R recommendation), commutation and recall of sentence review (C&R review), commutation and recall of sentence review outcome (C&R review outcome), consultation, effective communication, hearing officer, incarceration, meeting, member of a victim's family, physical presence or physically present, prosecuting agency or agencies, referral, sentencing court, victim, victim's next of kin, victim support person, and videoconference. These terms are used throughout the proposed chapter and require defining in order to properly understand their meaning, roles, and responsibilities.

**Section 2841 is added** to clarify the Board's authority to hold C&R hearings and make recommendations to the Governor and the court.

Subsection (a)(1) clarifies the Board's legal authority to refer cases to the Governor for commutation. Specifically, this section clarifies that any recommendations to the Governor for commutation following a C&R hearing will be made under the Board's authority in Penal Code section 4801, subdivision (a). This subsection is necessary to distinguish the Board's authority to make a recommendation for a commutation to the Governor under section 4801 from the Governor's authority to ask the Board to investigate clemency applications under Penal Code sections 4802.5 and 4812. It is necessary to specify the authority the Board is utilizing in making these recommendations to mitigate confusion for stakeholders and the public.

Subsection (a)(2) clarifies the legal authority for the Board to recommend a case to the sentencing court for possible recall and resentencing. This is necessary to distinguish the Board's authority to recommend cases for recall of sentence to courts from the Board's authority to recommend cases for commutation to the Governor. A recommended referral at a C&R hearing will result in a referral to both the Governor for a possible commutation of sentence and to the sentencing court for a possible recall of sentence. Therefore, this subsection is necessary to clarify to the incarcerated population and stakeholders the Board's authority to make a recommendation to the sentencing court.

Subsection (a)(3) clarifies the purpose of these regulations. Specifically, this process will create a regulatory framework for the Board to exercise its existing authority under Penal Code sections 4801, subdivision (a), and 1172.1, subdivision (a)(1), to recommend cases for commutation and for recall and resentencing. This subsection specifies that the proposed regulations will require the Board to exercise its authority based on informed decision-making and in a process that allows stakeholders to participate. This subsection is necessary to identify the participants in the process, the entities to which the Board will make recommendations for commutation and for recall of sentence, and the authority under which the recommendations are made.

Subsection (b) clarifies that the recommendations for commutation and for recall of sentence are not parole release decisions and the C&R reviews and hearings are not parole release proceedings. This subsection is necessary to distinguish this process from the parole suitability hearing process. The Board is not authorized to consider parole release for the people who qualify for the C&R process. Further, the rights that are provided to participants in the parole suitability hearing process do not apply to the C&R review or C&R hearing processes unless specifically provided in the



proposed regulatory chapter. This subsection is necessary to clarify that these proceedings are not parole release proceedings or decisions, and that the processes are not identical.

Subsection (c) clarifies that the Board's decision to consider an incarcerated person for C&R review is within the Board's discretion. This subsection is necessary for transparency and to make clear to all stakeholders that the Board's decision to enact this proposed regulatory process, and then to evaluate incarcerated individuals under it is, unlike the parole hearing process, completely within the Board's discretion. These proposed regulations do not create an entitlement for incarcerated people to participate in the C&R review process or be recommended by the Board for resentencing or for commutation, and do not mandate the Board to conduct C&R reviews or make recommendations. This subsection is necessary to distinguish this proposed regulatory process from the parole hearing process and to inform stakeholders that consideration of an incarcerated person under this chapter is within the Board's discretion and the incarcerated person is not entitled to a C&R review or C&R hearing.

Subsection (d) clarifies that the C&R recommendation assessment does not affect an incarcerated person's right to submit an application for a commutation of sentence directly to the Governor's office. This subsection is necessary to distinguish this process from the Governor's authority to consider commutation applications pursuant to article V, section 8, of the California Constitution and Penal Code sections 4800 and 4802.5. This subsection is also necessary to clarify for stakeholders that the proposed regulations do not change any individual's right to apply to the Governor directly for a commutation and do not change the Governor's current, broad authority to grant commutation requests received from any source. Rather, the proposed regulations create a process for the Governor to consider individuals for a commutation that does not require the person submit an application. This section clarifies that an incarcerated person in the C&R recommendation assessment process, or an incarcerated person ineligible for, or unsuccessful in, the C&R recommendation assessment process may submit an application for a commutation of sentence directly to the Governor's office; consideration of an incarcerated person under this process does not prevent them from pursuing other legal avenues for possible commutation of sentence.

Subsection (e) clarifies that the provisions of the other chapters in the Board's regulations do not apply to the C&R recommendation assessment process described in this chapter, unless the regulations specifically incorporate the provisions of other chapters. The rights provided to an incarcerated person and other stakeholders in the parole suitability process are different from the process provided under this chapter. The Board's authority to refer individuals to the Governor or sentencing court is discretionary. Additionally, there are other processes related to the parole suitability process, such as administrative review and petitions to advance, that do not apply to the C&R hearing process. In order to avoid confusion about which processes apply to the C&R recommendation assessment process, it is necessary to state that the provisions in other chapters do not apply in this chapter unless specifically incorporated.

Subsection (f) clarifies that these regulations may be repealed or amended in the future. This subsection is necessary to ensure that the incarcerated population is aware that this process is discretionary and may be repealed or amended in the future, without raising ex-post facto concerns.

**Section 2842 is added** to clarify the methods of conducting a C&R review or C&R hearing and the meaning of conducting a review or hearing in person versus by videoconference.

Subsection (a) specifies that a C&R review is considered to be conducted by videoconference if the incarcerated person communicated by videoconference with the hearing officer. This subsection is necessary to clarify for incarcerated persons what to expect when their review is identified as being conducted by videoconference.

Subsection (b) specifies that a C&R hearing is considered to be conducted by videoconference if the incarcerated person or their attorney communicates by videoconference with all the hearing officers. First, subsection (b) establishes the essential parties that need to be communicating by videoconference. Specifically, a proceeding will only be considered to be conducted by videoconference if certain participants, specifically the hearing panel and the incarcerated person, communicate by videoconference. Other participants, such as the representative from the prosecutor's office or victims, may participate by videoconference or by telephone, but that does not change whether the hearing is designated as a videoconference hearing. As long as the method of communication between the incarcerated person and the hearing panel is by videoconference, the hearing will be considered to have been conducted by videoconference.

Second, subsection (b) also provides an exception that allows the proceeding to be considered a videoconference proceeding if the incarcerated person waives their appearance and the incarcerated person's attorney communicates by videoconference with the panel. This exception is necessary because not all incarcerated persons personally appear at their proceedings, so this alternate method of determining whether a proceeding was held by videoconference is needed when the incarcerated person is absent.

Subsection (c) specifies what it means to conduct a C&R review in person. It identifies that, for a C&R review to be considered to have been held in person, the incarcerated person must be physically present with the hearing officer. This subsection is necessary to clarify for incarcerated persons what to expect when their review is identified as being conducted in person.

Subsection (d) clarifies what it means to hold a C&R hearing in person. It identifies that, for a hearing to be considered to have been held in person, the incarcerated person (or the incarcerated person's attorney) must be physically present with the hearing officers. As with subsection (b), it does not matter whether other proceeding participants attend by videoconference or by telephone. As long as the incarcerated person (or the incarcerated person's attorney) and the hearing officers are physically present, the proceeding will be considered to have been conducted in person. Subsection (d) is necessary to avoid disputes about whether a proceeding was held in person where participants other than the incarcerated person (or the incarcerated person's attorney) and the hearing panel appeared by videoconference or by telephone.

Subsection (e) clarifies how the Board will determine whether to hold a C&R review and C&R hearing by videoconference or in person. This subsection cites the Board's regulations that explain the criteria for a videoconference or in person parole hearing. It is necessary to cross reference to the Board's regulations on videoconference and in person hearings as the Board will use the same standard to determine if a C&R review or C&R hearing will be held by videoconference or in person. This subsection will clarify for stakeholders the criteria the Board uses in making the decision on how to conduct these proceedings.

**Section 2843 is added** to clarify an incarcerated person's eligibility for participation in the C&R Recommendation Assessment Process.

Subsection (a) clarifies that an incarcerated person is eligible for participation in the C&R recommendation assessment process after completing 25 years of continuous incarceration. This subsection is necessary because it outlines the minimum amount of time an incarcerated person must serve before being eligible to be considered for this process. The Board is requiring the incarcerated person to serve 25 years before being eligible for this process to be consistent with the standard sentence for the most serious offenses in the California Penal Code, including first degree murder. Additionally, this requirement is consistent with the timelines associated with the court-ordered elderly parole program and the youth offender program. This will also give the incarcerated person significant time to engage in and internalize relevant rehabilitative programming. This subsection is also necessary to prevent any confusion as to when the incarcerated person may be considered by the Board under this process.

Subsection (b) clarifies who is excluded from consideration under for the C&R review process, despite completing 25 years of continuous incarceration. Specifically, incarcerated persons who are sentenced to death, has been convicted of a sexual offense that currently requires or will require registration as a sex offender under Penal Code section 290, is scheduled for release from incarceration within three years, has a past parole eligibility date, will be eligible for parole consideration within three years, or previously received a commutation of sentence during their current term of incarceration are not eligible for the C&R recommendation assessment process.

The Board is excluding incarcerated persons who are sentenced to death from this process, which focuses only on current risk assessment, because courts' resentencing discretion is limited for people under sentence of death. By excluding incarcerated persons who are sentenced to death, the Board is focusing its limited resources on evaluating individuals who are more likely to meet the standard for a C&R recommendation and are more likely to be commuted or resentenced upon the Board's issuance of a C&R recommendation to the court and to the Governor. For these reasons, the Board determined excluding persons sentenced to death from this regulatory scheme was appropriate. Persons sentenced to death may still apply directly to the Governor for a commutation of sentence.

The Board is excluding incarcerated persons who are or will be required to register under Penal Code section 290 from this process because this will allow the Board to focus its limited resources on evaluating persons who are more likely to meet the standard for recommending commutation and recall of sentence and are more likely to be commuted or resentenced upon the Board's issuance of a C&R recommendation to the court and to the Governor. While an incarcerated person who is required to register as a sex offender is excluded from this process, they are not prevented from applying directly to the Governor for a commutation of sentence or from being resentenced by a court pursuant to other legal provisions.

Additionally, the Board is excluding incarcerated persons who are expected to be released from incarceration within three years, are already in the parole suitability cycle, or will receive a parole hearing within three years, in order to direct the Board's resources to individuals who otherwise would not have an opportunity to be considered by the Board for release for a long time, if ever. Additionally, the Board is excluding people who already received a commutation of sentence during their current term of incarceration because one purpose of a recommendation for commutation is to receive a commutation of sentence, which these individuals already received.

This subsection is necessary to identify the incarcerated persons who are excluded from this process so that incarcerated persons and stakeholders are aware of who is and is not eligible and to focus the Board's resources on the population that is most likely to receive a recommendation for commutation and for recall of sentence.

Subsection (c) clarifies which department and unit is responsible for determining who is eligible for the C&R review and C&R hearing processes. Specifically, this subsection explains that CDCR's case records staff is responsible for determining an incarcerated person's eligibility and calculating their CRED. Case records staff is responsible for calculating an incarcerated person's other parole eligibility dates, with the exception of the elderly parole eligible date; therefore, case records is the most appropriate CDCR department to calculate this date. This subsection is necessary to make it clear that, while the Board conducts the C&R review and C&R hearing, it is CDCR and not the Board that is responsible for determining an incarcerated person's eligibility and calculating their CRED.

Subsection (d) defines the "controlling parole eligible date" for the purposes of this section. Specifically, the "controlling parole eligible date" is the earliest date that an incarcerated person is eligible for parole consideration by the Board. An incarcerated person may have multiple parole eligibility dates including a minimum eligible parole date, youth parole eligible date, elderly parole eligible date, nonviolent parole eligible date, or executive parole eligible date. This subsection is necessary to avoid confusion as to what date is considered controlling for purposes of excluding an incarcerated person from the C&R recommendation assessment process.

**Section 2844 is added** to clarify the C&R review process.

Subsection (a) clarifies the purpose of a C&R review and its participants. Specifically, this subsection clarifies that at a C&R review the incarcerated person will meet with a hearing officer and the hearing officer will determine whether the person should be referred for a C&R hearing. This subsection is a necessary introduction to the incarcerated person and other stakeholders about the purpose of a C&R review.

Subsection (b) clarifies the timeline of when an eligible incarcerated person will receive a C&R review. Specifically, an incarcerated person will receive their initial C&R review within one year following the person's CRED. Similarly to how the Board schedules hearings based on an incarcerated person's elderly, youth, or nonviolent parole eligibility dates, an incarcerated person must meet their eligibility date prior to being considered by the Board. Once a person meets their CRED, the Board needs time to schedule the person for a review. Since this is a discretionary process, the Board is allowing one year to conduct the C&R review in order to find space on the Board's proceedings calendar that does not conflict with scheduled parole hearings or consultations. This subsection is necessary because it clarifies the timeline for C&R reviews so that incarcerated persons are aware of when they will be eligible for their review and can begin preparing for their meeting with the hearing officer.

Subsection (c) clarifies that notwithstanding the timeline set forth in subsection (b), the Board has until December 31, 2035, to conduct an initial C&R review for all incarcerated persons eligible to receive a review on or before that date. Specifically, the Board will conduct all initial C&R reviews for eligible incarcerated persons by December 31, 2035, based on the availability of staff and

resources. This subsection is necessary because the Board estimates 2,456 incarcerated persons to be immediately eligible for an initial C&R review upon enactment of these regulations. Further, the Board estimates 3,959 incarcerated persons will be eligible for an initial C&R review by December 31, 2035. By spreading the initial C&R reviews over a roughly 10-year period, the Board can better absorb the additional workload with the Board's current staff. The Board determined that a shorter timeline would require significant increases to staffing and a significant increase to the Board's budget. Specifically, a shorter timeframe would require the Board hire additional hearing officers, psychologists, attorneys, and support staff in order to carry out the C&R reviews and C&R hearings. The Board also needs time to build out technology for the process, allocate appropriate staff, and complete all of the required initial C&R reviews, which cannot be done in one year; therefore, the Board requires additional time to complete the necessary initial reviews. In terms of updating the Board's technology, this includes expanding the Board's Information Technology System to comply with the requirements of the regulation including scheduling proceedings, notifying participants, and entering, storing, and reviewing the panel's decisions. The Board selected a deadline of December 31, 2035, to conduct initial C&R reviews for eligible persons in order to manage the additional workload without incurring significant additional costs. Of the estimated 2,456 incarcerated persons immediately eligible for initial C&R review, a smaller subset of those will be advanced for a full risk assessment. Of that group, a smaller subset will then be advanced to a C&R hearing. Of that group, a smaller subset will be found to meet the standard for a C&R recommendation and be referred to the Governor for commutation and the courts for resentencing. The December 31, 2035 timeframe will provide a longer timeframe for the Governor and the courts to receive and, if they exercise their discretion to do so, review and act on any recommendations. This subsection is necessary for transparency and to alert incarcerated persons that even though they may have a past CRED or have a CRED that otherwise makes them eligible for an initial review by December 31, 2035, the Board has until December 31, 2035, to conduct their initial C&R review.

Subsection (d) provides the timeline for the Board to notify an incarcerated person of their scheduled C&R review date. Specifically, the Board is required to provide at least 30 days' notice before a person's scheduled C&R review. Additionally, this section specifies that the notice must include information about the C&R review and C&R hearing processes. An incarcerated person is given 30 days' notice before their scheduled parole suitability hearing; therefore, the 30 days' notice before the C&R review is consistent with the Board's other practices. It is necessary to provide notice to an incarcerated person that includes information about the C&R review and C&R hearing processes so that they can prepare for the C&R review and understand what to expect before they meet with a hearing officer.

Subsection (e) clarifies that the Board will provide an incarcerated person with reasonable accommodations as required under the Americans with Disabilities Act that are needed in order for the incarcerated person to participate in the C&R review process. As with all other Board proceedings, the Board will provide an incarcerated person with reasonable accommodations so that the person can meaningfully participate in the Board's proceedings. This subsection is necessary to ensure that all eligible incarcerated persons are aware the Board will ensure they have an equal opportunity to participate in the C&R review process to the best of their abilities, despite a disability.

Subsection (f) clarifies that the Board will provide an incarcerated person with a foreign language interpreter if necessary to achieve effective communication with the hearing officer. All Board proceedings are conducted in English; therefore, it is important for incarcerated persons who do not speak English to be provided a foreign language interpreter so they can understand the hearing

officer and meaningfully participate in the C&R review. Additionally, it is important for the hearing officer to be able to understand the incarcerated person's answers to their questions, which can only be achieved by using a foreign language interpreter. This subsection is necessary to ensure that all eligible incarcerated persons have an equal opportunity to participate in the C&R review and to establish effective communication between the incarcerated person and the hearing officer.

Subsection (g) clarifies that an incarcerated person may not have legal representation at a C&R review. A C&R review is not a hearing and no other stakeholders, such as prosecutors or victims, appear at and participate in the review. The review is a more informal meeting between a hearing officer and the incarcerated person. The same rights that exist for parole hearings do not exist at the C&R review and the same interest in creating a robust record for potential review by ultimate decision makers does not exist at the review as it does at a C&R hearing. This subsection is necessary to prevent any confusion about whether an incarcerated person may have an attorney at this review.

Subsection (h) specifies that an incarcerated person will have an opportunity to meet with a hearing officer on the date of the C&R review, prior to the officer making a final determination as to whether to refer the incarcerated person for a C&R hearing. Further, subsection (h) clarifies if an incarcerated person refuses to attend the C&R review, then the hearing officer will complete the C&R review without meeting with the incarcerated person. The Board has a full calendar of proceedings and it is imperative for the Board to timely complete its scheduled proceedings, even if the incarcerated person refuses to participate in the proceeding. This subsection is necessary to clarify that the incarcerated person may attend or decline to attend a C&R review, and that the C&R review will go forward with or without the incarcerated person present at the review.

Subsection (i) clarifies what happens during the C&R review. Specifically, during the C&R review, the hearing officer will provide the incarcerated person with information about the C&R hearing process and may ask the incarcerated person questions concerning issues that are relevant to determining whether the person should be referred for a C&R hearing. The answers provided by incarcerated persons in response to questions asked by a hearing officer are useful in determining whether an incarcerated person poses an unreasonable risk of danger to the public. By asking questions during the C&R review, the hearing officer will be better informed to make their decision whether to refer the person for a C&R hearing. Additionally, it is important to provide the incarcerated person with information about the C&R hearing process so they can understand and be better prepared to participate in the process going forward, regardless of whether they are referred for a C&R hearing that day. The more the Board educates the incarcerated population about the C&R hearing process, the more likely they will be to engage in programming and rehabilitation, which can improve the safety of the institution and community. This subsection is necessary to inform the incarcerated person of the benefits of a C&R review and what they should expect to happen at a C&R review and after.

Subsection (j) clarifies the standard the Board applies in making a decision at a C&R review. Specifically, a hearing officer will refer an incarcerated person for a C&R hearing if there is a reasonable likelihood a C&R hearing panel will recommend the person for commutation and for recall of sentence. In order to conserve the Board's resources, the Board intends to refer for a C&R hearing only persons who are likely to be found not to pose an unreasonable risk of danger to the public if released. This subsection is necessary to establish the standard that will be used for determining whether to refer an incarcerated person for a C&R hearing at every C&R review. Additionally, establishing a uniform standard promotes transparency and fair decision-making.

Subsection (k) clarifies what information a hearing officer will consider in making a determination to refer or not refer the incarcerated person to a C&R hearing based on their current risk of danger to public safety. Specifically, this subsection cites section 2850, which outlines all of the information that will be considered by the C&R hearing panel. The information on current risk that will be considered by the hearing officer at a C&R review includes all relevant and reliable information available in the incarcerated person's confidential and non-confidential records, including the person's criminal and parole history, demonstration of self-control, involvement with available programming, institutional behavior, degree of personal change since the commitment offense, release plans, age and circumstances at the time of the commitment offense, current age, and diminished physical condition, if any. By requiring the hearing officer to review the same information that will be reviewed at a C&R hearing, the hearing officer will be able to make an informed decision as to whether the incarcerated person is likely to be found not to pose a current and unreasonable risk of danger to the public if released. This subsection is also necessary to inform the incarcerated person of what information the hearing officer will consider in making their decision so that the incarcerated person can prepare for their review.

Subsection (l) clarifies that a hearing officer may request an investigation be completed to obtain specific information for consideration by the Board at a future C&R review or C&R hearing. This subsection is necessary because it permits a hearing officer to request additional information by way of an investigation, which will promote informed decisions. Additionally, this promotes transparency by informing the incarcerated person that the hearing officer may request an investigation that may be considered at future C&R reviews and C&R hearings.

Subsection (m) clarifies that the hearing officer will issue a written decision specifying the decision to refer or not refer the incarcerated person for a C&R hearing. Specifically, the written decision will include the hearing officer's findings and recommendations for the person regarding their work assignments, rehabilitative programs, and institutional behavior. A person's work assignments, rehabilitative programs, and institutional behavior are important factors when determining whether a person poses an unreasonable risk of danger to the public if released. Therefore, making findings in these areas will assist the hearing officer in making an informed decision, and making recommendations to the incarcerated person will assist the incarcerated person in their rehabilitation efforts and goals. Since the Board is not recording or transcribing a C&R review, the written decision is the only document the incarcerated person will be provided that documents the hearing officer's recommendations. Therefore, this subsection is necessary to explain the contents of the written decision.

This subsection also specifies that the hearing officer has 30 days following a C&R review to issue a written decision, and that decision must be served on the incarcerated person and placed in their central file within 15 business days of issuing the decision. It is necessary to provide a timeline for issuing and serving the written decision so that the incarcerated person is aware of when to expect the decision and to ensure the hearing officer has sufficient time to issue the decision. Specifying the contents of the written decision and providing a timeline for issuing and serving the decision promotes transparency in the C&R review process and provides the incarcerated person with additional information to prepare them for their next C&R review or C&R hearing.

Subsection (n) clarifies that the Board will notify the Office of Victim and Survivor Rights and Services (OVSRS) in the event an incarcerated person is referred to a C&R hearing. This subsection

is necessary to provide the maximum amount of time and opportunity for OVSRS to locate and contact the victims and their family members (this includes the victim's next of kin), so that they will have an opportunity to register to participate in the C&R hearing. It is important that victims and their family members are provided with an opportunity to participate in this process. Currently, approximately 24.6 percent of all crime victims, survivors, and next of kin eligible to register with OVSRS are registered. Therefore, this subsection is necessary to provide as much time as possible for OVSRS to attempt to locate victims and their families so that they can participate in this process.

Subsection (o) clarifies the timeline for a subsequent C&R review if the incarcerated person, after their initial review, is not referred for a C&R hearing at their review. Specifically, the Board will conduct a subsequent C&R review within three years from the date of their last C&R review. The Board selected a three-year period between a C&R review and each subsequent review to match the three-year denial period in the parole suitability hearing process. An incarcerated person should be able to implement the recommendations and continue their rehabilitative efforts during this three-year period, which may make them more likely to be referred to a C&R hearing at the next C&R review. This section also clarifies that a person will not be scheduled for a subsequent C&R review if they will no longer meet the eligibility criteria for the C&R review on the date of the subsequent C&R review. This subsection informs the incarcerated person of when they can expect a subsequent review and puts them on notice that they will not receive a subsequent C&R review if they will no longer be eligible for the process.

Subsection (p) clarifies that the C&R review determination to not refer a person to a C&R hearing is not subject to CDCR's grievance and appeal process under article 1 of subchapter 5.1 of chapter 1 of division 3. This subsection is necessary to clarify for incarcerated persons that they may not appeal the Board's decision to CDCR. The C&R hearing process is a Board proceeding and is not subject to CDCR's oversight. Previously, there have been instances where an incarcerated person has tried using CDCR's grievance and appeal process to appeal a Board decision and the incarcerated person has become frustrated with the delay in response, not understanding that CDCR is not the appropriate venue for appeals. In order to avoid confusion and delay, this subsection makes it clear that these decisions are not subject to CDCR's grievance and appeal process.

**Section 2845 is added** to clarify the process for referring a case to a C&R hearing following a Penal Code section 3041 consultation.

Subsection (a) clarifies that a hearing officer may refer an incarcerated person for a C&R hearing following a consultation. Specifically, if a hearing officer finds there is a reasonable likelihood a C&R hearing panel will recommend an incarcerated person for commutation and for recall of sentence under the C&R regulations, the hearing officer will refer the incarcerated person to the C&R hearing process. In this situation, a hearing officer will issue a written referral as described in subsection (j) of section 2267, and the Board will notify OVSRS of the referral so that OVSRS has sufficient time to notify victims and their family members of the C&R hearing process. Procedurally, a consultation is very similar to a C&R review. At both a consultation and a C&R review, a hearing officer informally meets with the incarcerated person and discusses matters relevant to a person's suitability for release. Since the goal of the C&R processes is to recommend releasing those who the Board believes no longer pose an unreasonable risk of danger to the public, allowing referrals following a consultation supports this purpose. Consultations are typically held about five years prior to an incarcerated person's initial parole suitability hearing. Thus, if a hearing officer determines someone may already meet the standard for recommending commutation and



recall of sentence at a consultation, the incarcerated person could benefit substantially from a commutation by the Governor or resentencing by a sentencing court by being released before their initial parole hearing. This subsection is necessary to identify the standard used for referring an incarcerated person to the C&R hearing process following a consultation, and to specify that OVSRS will be notified of the referral to ensure proper notification to the victims and their family.

Subsection (b) clarifies that if a hearing officer does not determine there is a reasonable likelihood a C&R hearing panel will recommend an incarcerated person for commutation and for recall of sentence, then the hearing officer will not refer the person for a C&R hearing. Additionally, if the hearing officer determines the person is not eligible for the C&R review process based on the criteria in subsection (b) of section 2843, the hearing officer will not refer the person for a C&R hearing. This subsection is necessary to explain to the incarcerated person and stakeholders the circumstances in which an incarcerated person will not be referred to a C&R hearing following a consultation.

**Section 2846 is added** to clarify the purpose and timing of a C&R hearing.

Subsection (a) clarifies that a C&R hearing will only be held after an incarcerated person receives a referral at a C&R review or consultation. Additionally, this subsection clarifies that the purpose of a C&R hearing is to determine whether to recommend an incarcerated person for commutation and for recall of sentence. This subsection is necessary to ensure stakeholders understand the purpose of a C&R hearing and that it only occurs after receiving a referral at a C&R review or consultation.

Subsection (b) clarifies the timeline for scheduling a C&R hearing. Specifically, a C&R hearing will be conducted no later than one year from the date the incarcerated person was referred for a C&R hearing at a C&R review or consultation. The Board determined one year between a referral and the C&R hearing was necessary in order to properly notice all stakeholders, prepare a comprehensive risk assessment, appoint legal representation for the incarcerated person, and to schedule the hearing on the Board's proceeding calendar. This subsection is necessary because it sets forth a timeline for the Board to follow in scheduling hearings, and it informs the incarcerated person and stakeholders by when they should expect a hearing to be held following a referral to a C&R hearing.

**Section 2847 is added** to clarify the procedures the Board must follow before a C&R hearing is held.

Subsection (a) clarifies the requirements to provide notice of the C&R hearing date to an incarcerated person. Specifically, the Board must provide notice of the C&R hearing date to the incarcerated person at least 120 days prior to the scheduled date of the C&R hearing. Additionally, the hearing notice must include a brief written description of the C&R hearing process. A copy of the notice must be placed in the incarcerated person's central file. This subsection is necessary to ensure the incarcerated person receives timely notice of their C&R hearing and has sufficient time to prepare for their hearing. Additionally, it is necessary for the Board to provide the incarcerated person with a description of the C&R hearing process that they can refer to if they have questions about the hearing process. It is necessary to place a copy of the notice in the person's central file so that there is evidence the person was served with notice of the hearing that can be referred to in the event there is uncertainty concerning the notice to the incarcerated person.

Subsection (b) clarifies the requirements to notify registered victims and their family members, and the prosecuting agency or agencies, of a C&R hearing. Specifically, this subsection requires the

Board to notify victims and their family members who are registered with OVSRS of the date of an incarcerated person's C&R hearing at least 90 days prior to the scheduled hearing. Additionally, the Board must notify the prosecuting agency or agencies of the scheduled hearing date at least 90 days prior to the date of the hearing. Under Penal Code section 3043, subdivision (a), the Board must provide at least 90 days' notice of a parole suitability hearing to the registered victim and the victim's next of kin. While a C&R hearing is not a parole hearing, for consistency, the Board has chosen to provide the same notice requirements to avoid confusion for stakeholders concerning notice timelines. This will mitigate potential confusion for Board staff as well and make it easier to implement these regulations if notice timelines are similar to existing processes for parole hearings.

In addition to the date of the hearing, the notice must include the methods by which these individuals may attend the hearing. For consistency and clarity, the Board elected to cross reference to sections 2852, subsections (d) and (e), and 2851, subsections (g) and (h), of this proposed chapter, instead of duplicating the methods by which these participants may participate in the hearing. Doing so also clarifies for relevant stakeholders how this section works in conjunction with proposed sections 2852 and 2851, helping to ensure stakeholders know to review all relevant regulatory sections to understand how they will be notified of a scheduled C&R hearing and, subsequently, how they must inform the Board of their intention to attend and participate in a hearing. This subsection is necessary to ensure these stakeholders are given sufficient notice to decide whether they want to participate in the C&R hearing and, if so, how they want to participate in this hearing.

Subsection (c) clarifies the requirements for the victim and their family members to notify the Board of their intention to attend a C&R hearing and the method of their attendance. Specifically, this subsection requires these stakeholders to notify OVSRS at least 15 days prior to the scheduled C&R hearing date of their intention to attend and method of attendance, as well as the name of any person who will attend the hearing with them as support. This section is modeled after Penal Code section 3043, subdivision (a)(4), which applies to parole suitability hearings. Penal Code section 3043, subdivision (a)(4), requires victims and their family members to notify the Board of their intention to attend a parole suitability hearing no later than 15 days prior to the scheduled hearing. While a C&R hearing is not a parole hearing, for consistency, the Board has elected to provide the same notice requirements to avoid confusion for stakeholders concerning notice timelines; this will also mitigate potential confusion for Board staff and make it easier to implement these regulations if notice timelines are similar to existing processes for parole hearings. If a victim, their family member, or support person does not provide timely notice to OVSRS of their intent to attend the hearing and method of attending, they will not be permitted to attend the hearing. Therefore, this subsection is necessary to alert these stakeholders of their requirements to notify OVSRS of their attendance in order to ensure they are able to participate in the hearing.

Subsection (d) clarifies the requirements for a prosecuting agency to attend a C&R hearing. Specifically, a representative from the prosecuting agency or agencies must notify the Board at least 14 days prior to the scheduled date of the C&R hearing of their intention to attend and the method by which they will attend the C&R hearing. Under sections 2030 and 2466, a prosecuting agency is only required to provide notice to attend a parole suitability hearing or a rescission hearing 14 days before the hearing. While a C&R hearing is not a parole hearing, for consistency, the Board has elected to provide the same notice requirements to avoid confusion for stakeholders concerning notice timelines; this will also mitigate potential confusion for Board staff and make it easier to implement these regulations if notice timelines are similar to existing processes for parole hearings. If this stakeholder does not timely alert the Board of their attendance, they may be denied admittance

to the hearing. This subsection is necessary to alert this stakeholder of their requirement to notify the Board of their intention to attend the hearing and the method of their attendance so that the Board can prepare for their participation in the C&R hearing.

Additionally, this subsection requires the Board to provide notice of the prosecuting agency or agencies planned participation in the hearing to the incarcerated person's attorney. This subsection is necessary in order for the incarcerated person's attorney to have sufficient time to prepare their client for the prosecutor's participation in the hearing. For example, the incarcerated person's attorney may need to prepare their client to respond to possible clarifying questions posed by the representative from the prosecuting agency. Under section 2030, the Board is required to notify the incarcerated person's attorney that the prosecutor will attend a parole hearing. Therefore, the Board has elected to provide the same requirement for consistency and to avoid confusion.

Subsection (e) clarifies the incarcerated person will have legal representation available for a C&R hearing. Specifically, an incarcerated person will receive legal representation by a state-appointed attorney at a C&R hearing, unless the incarcerated person retains private legal representation at their own expense or chooses self-representation. Under Penal Code section 3041.7, an incarcerated person may have an attorney at a parole suitability hearing. While a C&R hearing is not a parole suitability hearing, the Board is extending this representation to the C&R hearing to assist the incarcerated person in the hearing process. This subsection is necessary to establish an incarcerated person's access to legal counsel for a C&R hearing and to distinguish legal representation at a C&R hearing from a C&R review where an incarcerated person may not have legal representation. Providing an incarcerated person with state-appointed legal representation at a C&R hearing will also assist the Board with its goal of ensuring a robust record is created in support of any recommendation for commutation and for recall of sentence because legal representation will help ensure all relevant factors in support of a recommendation are fully expressed to the panel when making a determination at a C&R hearing.

Subsection (f) clarifies the Board's requirements for notifying law enforcement agencies of a C&R hearing. Specifically, for a C&R hearing where the incarcerated person was convicted of murder of a peace officer, the Board must notify the law enforcement agency that employed the victim at the time of the murder of the C&R hearing. This notice must be provided at least 30 days before the scheduled C&R hearing date. Additionally, the notice must include information regarding the ability of any individual to submit information concerning the incarcerated person and the commitment offense to the Board. This subsection is necessary to ensure the Board provides timely notice to the law enforcement agency so that the law enforcement agency and its employees have sufficient time to submit information to the Board for consideration by the C&R hearing panel. This requirement matches the notice requirement for parole hearings as required by Penal Code section 3042, subdivision (a)(1). The Board is extending this same notice to the C&R hearing process for consistency and fairness. Further, maintaining consistency with processes in the parole hearing process will assist Board staff with implementation of these regulations by mitigating any potential confusion.

Subsection (g) clarifies the Board's requirements for notifying fire department agencies of a C&R hearing. Specifically, for a C&R hearing where the incarcerated person was convicted of murder of a firefighter, the Board must notify the fire department that employed the victim at the time of the murder of the C&R hearing. This subsection requires the fire department submit a request to the Board to be notified of future C&R hearings, similar to the requirement that victims must register

in order to receive notification of hearings. The notice to the fire department must be made at least 30 days prior to the scheduled date of the C&R hearing. Additionally, the notice must include information regarding the ability of any individual to submit information concerning the incarcerated person and the commitment offense to the Board. This subsection is necessary to ensure the Board provides timely notice to the fire department so that the department and its employees have sufficient time to submit the information to the Board for consideration by the C&R hearing panel. This requirement matches the notice requirement for parole hearings as required by Penal Code section 3042, subdivision (a)(2). The Board is extending this same notice to the C&R hearing process for consistency and fairness. Further, maintaining consistency with processes in the parole hearing process will assist Board staff with implementation of these regulations by mitigating any potential confusion.

Subsection (h) clarifies any person's opportunity to submit comments to the Board concerning an incarcerated person and their crimes. Specifically, any person may submit information to the Board to be considered by the C&R hearing panel, and the Board will provide the documents to the C&R hearing panel before the hearing. This subsection is necessary to ensure people who have opinions about a case understand that they may participate in this process by submitting information to the Executive Officer for consideration by the hearing panel. This process matches section 2028 of this division, which permits the public to submit information to the executive officer for consideration at a parole suitability hearing. The Board seeks transparency in the C&R hearing process and to guarantee its hearing officers have relevant information to make an informed decision. For this reason, the Board welcomes comments and information from the public.

Subsection (i) clarifies the deadline for when documents submitted under this section must be received by the Board for consideration by the C&R hearing panel. Specifically, in order for the C&R hearing panel to consider the documents, the Board must receive the documents at least 10 days prior to the hearing. Under subsection (j) of this section, the incarcerated person is able to review non-confidential documents located in their central file at least 10 days prior to the C&R hearing. Therefore, the Board must receive all information at least 10 days prior to the hearing so that the incarcerated person is able to review the additional information before the hearing. Any documents received pursuant to this section less than 10 days prior to the hearing will not be reviewed by the hearing panel. This subsection is necessary to promote transparency and clearly identify the deadline by which documents must be received in order to be considered by a C&R hearing panel.

Subsection (j) clarifies the timeline for an incarcerated person to view the non-confidential documents in their department central file and the deadline for providing notice of confidential information to the incarcerated person. Specifically, the incarcerated person may review the non-confidential documents in their department central file at least 10 days prior to the C&R hearing. Additionally, at least 10 days prior to the C&R hearing, the incarcerated person must be given notice of any confidential documents in their department central file that may be used to make a C&R hearing determination. This regulation also specifies that the incarcerated person must comply with the department's procedures for reviewing the documents. Under section 2247 of this division, an incarcerated person is permitted to review all non-confidential documents in their central file at least 10 days prior to their parole suitability hearing. Additionally, section 2235, subsection (b), of this division requires notice to the incarcerated person of confidential information relied on by the hearing panel. While different from a parole suitability hearing, the Board is extending this same process to the C&R hearing so that an incarcerated person is aware of the information they may be

asked about at the C&R hearing. This subsection is necessary to inform the incarcerated person that they may review non-confidential documents in their central file and receive notice of confidential information that may be considered by the C&R hearing panel. Providing this notice to an incarcerated person allows them to prepare to address potential issues with the hearing panel at their hearing, which will enable hearing panels to make more informed decisions.

**Section 2848 is added** to clarify that the Board's Forensic Assessment Division will prepare a comprehensive risk assessment (CRA) prior to a C&R hearing and clarify the procedures that apply to preparing the CRA. The CRA report will provide essential information to hearing panels in the parole hearing process that will help the hearing officers make a determination about the person's risk for future violence in the community. Preparing a CRA before any C&R hearing will ensure this valuable tool is available to any hearing panel in the C&R hearing process, providing critical forensic psychological analysis to use along with the other information, records, and testimony they consider at the hearing in making informed decisions about who to recommend for commutation and for recall of sentence.

Subsection (a) clarifies who prepares the CRA, what factors are considered in the CRA, and what risk assessment instruments are used by the psychologist in preparing the CRA. Specifically, a licensed psychologist employed by the Board will complete a CRA prior to the incarcerated person's scheduled C&R hearing. Additionally, the psychologist must consider factors that impact an incarcerated person's risk of violence, including those listed in section 2850, subsection (a). The psychologist must incorporate structured risk assessment instruments (currently the HCR-20-V3 and Static 99R) in their analysis. These risk assessment instruments are used to prepare the CRAs used for parole suitability hearings and are established in the psychology community as proper tools for this purpose. A CRA is a valuable document considered by the hearing panel at a parole suitability hearing. While a C&R hearing is different from a parole suitability hearing, the standard for making a recommendation for commutation and for recall of sentence at a C&R hearing is the same standard for granting parole. Therefore, the Board will utilize the CRA at a C&R hearing just as it would at a parole suitability hearing to assist the hearing officers in making a determination. For consistency, this subsection matches section 2240, subsection (a), of this division governing the CRA at a parole suitability hearing. This subsection is necessary because it establishes that a CRA will be prepared prior to a C&R hearing, and it establishes the procedures for creating a CRA and identifies staff who are responsible for preparing the CRA.

Subsection (b) clarifies the review process for a CRA. Specifically, the Chief Psychologist or a senior psychologist must review the CRA to ensure that the psychologist's opinions are based upon adequate scientific foundation. This practice is consistent with section 2240, subsection (c)(1), of this division, which requires that a CRA prepared for a parole hearing be reviewed by the Chief Psychologist or a senior psychologist. The subsection is necessary to ensure the psychologist's opinions are supported and well-reasoned so that the C&R hearing panel can rely on the CRA when making their determination whether to recommend an incarcerated person for commutation and for recall of sentence.

Subsection (c) clarifies the timeline for completing a CRA. Specifically, the CRA must be completed, approved, and served on the incarcerated person within six months following a referral for a C&R hearing. The Board must complete the CRA within six months following the referral for a C&R hearing because, under section 2849, the Board may cancel a C&R hearing based on a "high" risk rating. Because a C&R hearing is conducted within one year of a referral after a C&R review

or consultation, completing the CRA within six months of the referral ensures the Board does not unnecessarily expend resources on scheduling an incarcerated person for a hearing that may be cancelled because of the CRA risk rating. It also allows the Board to cancel a hearing for someone who received a “high” risk rating before any notices regarding the hearing are sent to registered victims or prosecuting agencies. Additionally, for incarcerated persons who receive a “low” or “moderate” CRA risk rating, the C&R hearing may go forward and requiring the CRA be served to the incarcerated person within six months of the referral will give the incarcerated person a significant amount of time to review and understand the CRA, with assistance from a state-appointed attorney, and prepare for their hearing.

Subsection (d) clarifies that the CRA pre-hearing objection process outlined in subsections (e) through (h) of section 2240 of this division does not apply to the C&R hearing process. Specifically, an objection to information in the CRA may only be raised at the C&R hearing and with the C&R hearing panel. While the Board permits an incarcerated person to submit pre-hearing objections to alleged factual errors in a CRA prior to a parole suitability hearing, the Board has elected not to permit this pre-hearing objection process for a C&R hearing to conserve Board resources. The Board receives hundreds of pre-hearing objections to CRAs each year, and review of the pre-hearing objections takes considerable time and resources from the Board’s Legal Division and Forensic Assessment Division, yet rarely is an error determined to have a material impact on the risk rating in the CRA. To avoid adding to the workload already associated with the Board’s pre-hearing CRA objection process, the Board determined that objections to CRAs prepared as part of the C&R hearing process should only be raised at the hearing, and the hearing panel can address any error and determine whether to give the CRA less weight due to the error. This subsection is necessary to clarify for incarcerated persons, who may be familiar with the Board’s CRA pre-hearing objection process, that the process does not apply to a CRA prepared for a C&R hearing.

**Section 2849 is added** to clarify the circumstances in which the Board may cancel a C&R hearing following a referral from a C&R review or consultation.

Subsection (a) clarifies that a C&R hearing will not be scheduled, or if already scheduled, will be cancelled, if, following a referral to a C&R hearing, an incarcerated person receives a “high” risk rating on the CRA or is found guilty of a serious rules violation report (RVR). This subsection is necessary to ensure the Board is directing its resources to the individuals most likely to have a positive outcome at a C&R hearing. An incarcerated person who receives a “high” risk rating or is found guilty of a serious RVR after being referred for a hearing is unlikely to be recommended for a commutation and for recall of sentence by a C&R hearing panel. Therefore, the Board will conserve resources by cancelling these hearings if either situation occurs. Additionally, by cancelling a hearing under these circumstances, a victim or their family will not unnecessarily be subjected to a hearing that was unlikely to result in a recommendation for commutation and for recall of sentence. This subsection is necessary to explain to the incarcerated population and stakeholders the circumstances that will result in the cancellation of a C&R hearing.

Subsection (b) clarifies the scheduling of a subsequent C&R review following the cancellation of a C&R hearing. Specifically, an incarcerated person whose hearing was cancelled under subsection (a) will receive a new C&R review within three years from the date the C&R hearing was cancelled. The Board is treating a decision to cancel a C&R hearing similarly to a decision not to refer an incarcerated person to a C&R hearing. In both situations, the subsequent review will occur three years after the decision in order for the incarcerated person to focus on their rehabilitative efforts

and increase their likelihood of receiving a referral to a C&R hearing at their subsequent C&R review. Additionally, an incarcerated person will only receive a subsequent C&R review if the person will still meet the eligibility criteria outlined in section 2843 at the time of the subsequent C&R review. This subsection is necessary to explain to stakeholders what happens after a C&R hearing is cancelled and the timelines for a subsequent C&R review.

**Section 2850 is added** to clarify what information is considered at a C&R hearing.

Subsection (a) clarifies the information the hearing panel must consider at a C&R hearing. Specifically, the hearing panel must consider all relevant and reliable information available in the incarcerated person's confidential and non-confidential records. This subsection also identifies specific topics of information that are considered relevant and should be considered by the hearing panel. The topics identified include the person's criminal and parole history, demonstration of self-control, involvement with available programming, institutional behavior, degree of personal change since the commitment offense, release plans, age and circumstances at the time of the commitment offense, current age, and diminished physical condition, if any. The information considered is based on evidence-based factors shown to predict a person's future risk. These same factors are considered in parole suitability hearings; therefore, the Board will consider the same information at the C&R hearing as it considers at a parole suitability hearing for consistency in decision-making. This subsection is necessary to inform the incarcerated person of the information the hearing officer will consider in making their determination so that the incarcerated person can meaningfully prepare for the C&R hearing.

Subsection (b) clarifies additional information that a C&R hearing panel is required to review. Specifically, a hearing panel must review all information regarding the incarcerated person received by the Board from victims and their family members, the public, the prosecuting agency, and police or fire departments at least 10 days prior the hearing. A hearing panel must also review documents submitted by the incarcerated person at least 10 days prior to the hearing, as well as the CRA. This subsection is necessary to establish a requirement that the Board review important information provided by stakeholders to ensure the hearing panel considers all relevant and reliable information in making their decision.

**Section 2851 is added** to clarify the C&R hearing process.

Subsection (a) clarifies what happens on the date of a C&R hearing. Specifically, a hearing panel will conduct a C&R hearing to determine whether to recommend the person for commutation and for recall of sentence. This subsection is necessary to make it clear to stakeholders that a decision concerning whether the person will be referred to the Governor and the sentencing court will be made at the C&R hearing, and that the decision will be made by a C&R hearing panel.

Subsection (b) clarifies that, at a C&R hearing, the Board will provide an incarcerated person with reasonable accommodations as required under the Americans with Disabilities Act that are needed in order for the incarcerated person to participate in the C&R hearing process. Specifically, an incarcerated person will be provided with reasonable accommodations so that the incarcerated person can meaningfully participate in the C&R hearing process. This subsection is necessary to ensure that all eligible incarcerated persons are aware the Board will ensure they have an equal opportunity to participate in the C&R hearing process to the best of their abilities, despite a disability.

Subsection (c) clarifies that the Board will provide an incarcerated person with a foreign language interpreter if necessary to achieve effective communication with the hearing panel. All Board proceedings are conducted in English; therefore, it is important for incarcerated persons who do not speak English to be provided a foreign language interpreter so they can understand the hearing panel and meaningfully participate in the C&R hearing. Additionally, it is important for the hearing panel to be able to understand the incarcerated person's answers to their questions, which can only be achieved by using a foreign language interpreter. This subsection is necessary to ensure that all eligible incarcerated persons have an equal opportunity to participate in the C&R hearing process and to establish effective communication between the incarcerated person and the hearing panel.

Subsection (d) clarifies the location of an incarcerated person's attorney during a C&R hearing. Specifically, an attorney representing an incarcerated person will be physically present with the incarcerated person during the hearing, unless the incarcerated person waives the attorney's physical presence at the hearing. If the incarcerated person waives the attorney's physical presence at the hearing, then the attorney will participate in the hearing remotely by videoconference. The attorney does not need to be physically present with the incarcerated person if the incarcerated person waives the attorney's presence. Since the attorney's physical presence with the incarcerated person is for the incarcerated person's benefit, the incarcerated person may waive the physical presence of their attorney, just as they may waive attorney representation altogether. This subsection is necessary in order to clarify that an incarcerated person can choose whether their attorney will participate in the hearing in person or by videoconference. Additionally, this puts the incarcerated person's attorney on notice that the expectation is for them to be physically present at the institution with their client.

Subsection (e) clarifies what happens if the incarcerated person waives their appearance or declines to participate in the C&R hearing. Specifically, if the incarcerated person waives their appearance or declines to participate in the hearing, the hearing will go forward without the incarcerated person's participation. However, so long as the incarcerated person has not chosen self-representation for the hearing, the incarcerated person's attorney may still appear at and participate in the hearing on the incarcerated person's behalf. This subsection is necessary to inform the incarcerated person that the hearing will go forward even if the person declines to participate in the hearing. This means that a hearing will not be postponed because the incarcerated person declines to participate in the hearing or waives their appearance at the hearing. Additionally, this clarifies that the incarcerated person's attorney may still represent the incarcerated person at the C&R hearing, even if the incarcerated person is not present or declines to participate. This is necessary to establish expectations of the incarcerated person's attorney at a hearing so that there is no confusion as to whether an attorney can represent the incarcerated person when the incarcerated person is absent from the hearing.

Subsection (f) clarifies the hearing panel's authority to order an investigation at a C&R hearing. Specifically, a hearing panel may request the Board complete an investigation into information necessary to determine whether to recommend the incarcerated person for commutation and for recall of sentence. This subsection is necessary because it permits a hearing officer to request additional information by way of an investigation, which will promote informed decisions. Additionally, this promotes transparency by informing the incarcerated person that the hearing officer may request an investigation that may be considered at future C&R reviews and C&R hearings.



Subsection (g) clarifies how a representative from a prosecuting agency may participate in a C&R hearing when the hearing is conducted in person. Specifically, a representative from a prosecuting agency may participate in person, by videoconference, or by telephone when a C&R hearing is conducted in person. This subsection is necessary to establish the methods in which a representative may participate in the C&R hearing, so that the representative is aware of their options for attendance.

Subsection (h) clarifies how a representative from a prosecuting agency may attend a C&R hearing when the hearing is held by videoconference. Specifically, when a hearing is conducted by videoconference, the representative may only participate in the hearing by videoconference or by telephone. The representative does not have the option to attend in person. This subsection is necessary to distinguish the methods of participation for the representative from a prosecuting agency when a hearing is held by videoconference instead of in person.

Subsection (i) clarifies the role of the representative from the prosecuting agency at the C&R hearing. Specifically, a representative from the prosecuting agency may ask the hearing panel to ask clarifying questions of the incarcerated person at the hearing. Additionally, the representative may provide their opinion regarding whether the panel should recommend the incarcerated person for commutation and for recall of sentence. This subsection also clarifies that the hearing panel may limit the clarifying questions to questions the panel determines are relevant and useful to making their decision. By providing authority to the hearing panel to limit the prosecutor's clarifying questions, the Board will prevent time from being spent on questions that the panel deems irrelevant and unnecessary to make a decision. However, by allowing the prosecutor to ask relevant clarifying questions and to provide a statement regarding whether the incarcerated person should be recommended for commutation and for recall of sentence, the hearing panel will have additional relevant information that will promote informed decision making. This subsection is necessary to identify the role of the prosecutor and to inform the incarcerated person of what to expect from the prosecutor's participation at a hearing.

Subsection (j) clarifies that the representative from the prosecuting agency must be available at the scheduled start time of the C&R hearing, otherwise the representative may be excluded from the hearing if the presiding hearing officer determines their delayed participation would disrupt the hearing. The requirement that the representative from the prosecuting agency be available at the start time of the proceeding is a logistical necessity, as hearing officers usually have multiple hearings scheduled per day. While panels may provide a courtesy waiting period for delayed participants, they must at some point proceed with the hearing. The Board has determined that, if a participant's tardiness will significantly disrupt the current hearing or if it will jeopardize the timeliness of the remaining hearings on calendar for the day, the hearing panel shall proceed with the hearing. This subsection is necessary to put the prosecuting agency on notice that they must be available at the scheduled start time of the hearing or risk not being able to participate in the hearing. Further, allowing a hearing participant to join a hearing late or once it starts can disrupt the flow of the hearing and impede the hearing panel's process of obtaining relevant information through interviewing the incarcerated person; it can also impede the Board's interest in maintaining a complete and accurate record of attendees at a hearing.

Subsection (k) clarifies that an incarcerated person's attorney may directly ask their client clarifying questions at the C&R hearing, as well as provide a final statement regarding whether the panel should recommend the incarcerated person for commutation and for recall of sentence. This

subsection is necessary to identify the incarcerated person's attorney's role at the hearing so that the attorney and their client are aware of the attorney's ability to ask clarifying questions and make a final recommendation to the hearing panel. Moreover, allowing the incarcerated person's attorney to ask questions and to make a statement will provide additional information to the hearing panel that may aid the panel in making an informed decision.

Subsection (l) clarifies that an incarcerated person may make a final statement regarding whether the panel should recommend them for a commutation and for recall of sentence. This subsection is necessary so that the incarcerated person is aware that they may make a statement at the hearing and can prepare their statement before the hearing. Moreover, allowing the incarcerated person to make a statement will provide additional information to the hearing panel that may aid the panel in making an informed decision.

Subsection (m) clarifies the length of time permitted for the final statement made by the representative from the prosecuting agency, the incarcerated person's attorney, and the incarcerated person. Specifically, all final statements are limited to ten minutes per speaker and will be made prior to the hearing panel making their decision whether to recommend the incarcerated person for commutation and for recall of sentence. This subsection is necessary to notify the speakers that there is a time limit for their final statements which will allow the speakers to prepare their statement accordingly prior to the hearing. The Board elected to limit the statements to ten minutes per speaker because that is sufficient time to express their recommendations, and it will help in preventing hearings from being unnecessarily long.

Subsection (n) clarifies the record of a C&R hearing. Specifically, a transcript of the hearing will be created and will be the official record of the hearing. Additionally, this subsection requires the Board provide a copy of the transcript to the incarcerated person, and upon request, to a victim and their family members, and the public. Creating a record of the hearing is important in order for the Board and stakeholders to review the decision and what transpired during the hearing. This subsection is necessary to explain that a transcript will be considered the record of the hearing.

**Section 2852 is added** to clarify victim participation at a C&R hearing.

Subsection (a) provides that a victim and their family members may appear personally or have an attorney represent them at a C&R hearing. This subsection further clarifies that either a represented party or their attorney may make a final statement concerning whether the incarcerated person should be recommended for commutation and for recall of sentence. This means that the represented party and their attorney cannot both make a final statement. This subsection aligns with the rights provided to victims and their family members at a parole suitability hearing. It is important to provide victims and their family members an opportunity to voice their opinions at a C&R hearing and with options regarding how their opinions are delivered, as they would at a parole suitability hearing. This subsection is necessary to clarify the option of a victim and their family members to make a statement at a C&R hearing.

Subsection (b) clarifies the role of a victim support person at a C&R hearing. Each victim or member of the victim's family may be accompanied at the hearing by a person known as a victim support person. A victim support person may not participate in or make a statement at the hearing. The purpose of the victim's support person is to provide emotional support to the victim or their family member during the C&R hearing. For this reason, the victim support person may only attend the

hearing in the manner that the person they are supporting attends. For example, if the victim is attending the hearing in person, the victim support person must also attend in person. This subsection also requires the victim or member of the victim's family to notify OVSRS of the name of the victim support person as described in section 2847, subsection (c). This subsection is necessary to alert victims and their family members they may designate a victim support person and to explain the requirement to provide OVSRS with the name of their support person to prevent the support person from being denied admittance into the hearing.

Subsection (c) clarifies that the victim and their family members, or their attorney, will have the opportunity to make a final statement concerning whether the incarcerated person should be recommended for commutation and for recall of sentence prior to the C&R hearing panel making a decision. This subsection is necessary to inform these individuals that they will have the opportunity to make a statement at the hearing expressing their opinions on the matter, and that this statement will be considered by the hearing panel before making their decision. This subsection also reiterates that if the victim or victim family member is represented by an attorney, it is either the attorney or the represented party who may make a statement. Providing the victims and their family members an opportunity to make a statement allows the victims and their family members to be heard and is consistent with the rights provided to them in the parole suitability hearing process.

Subsection (d) clarifies the methods a victim or their family members and their counsel can attend a C&R hearing when the hearing is conducted in person. Specifically, these individuals may attend in person, by videoconference, or by telephone if the hearing is held in person. This subsection is necessary to clarify the methods of attendance so that these individuals may choose how they want to attend the hearing. This subsection is consistent with the options given to victims and their family members at a parole suitability hearing.

Subsection (e) clarifies the methods a victim or their family members and their counsel can attend a C&R hearing when the hearing is conducted by videoconference. Specifically, when a hearing is held by videoconference, these individuals may attend by videoconference or by telephone. This subsection is necessary to clarify the methods of attendance so that these individuals are aware of their options on how to attend the hearing. This subsection is consistent with the options given to victims and their family members at a parole suitability hearing.

Subsection (f) clarifies that the victim and their family members must be available at the scheduled start time of the C&R hearing, otherwise they may be excluded from the hearing if the hearing officer determines their delayed participation would disrupt the hearing. The requirement that the victims and their family members be available at the start time of the proceeding is a logistical necessity, as hearing officers usually have multiple hearings scheduled per day. While panels may provide a courtesy waiting period for delayed participants, they must at some point proceed with the hearing. The Board has determined that, if a participant's tardiness will significantly disrupt the current hearing or if it will jeopardize the timeliness of the remaining hearings on calendar for the day, the hearing panel shall proceed with the hearing. This subsection is necessary to provide notice to these individuals that they must be available at the scheduled start time of the hearing or risk not being able to participate in the hearing. Further, allowing a hearing participant to join a hearing late or once it starts can disrupt the flow of the hearing and impede the hearing panel's process of obtaining relevant information through interviewing the incarcerated person; it can also impede the Board's interest in maintaining a complete and accurate record of attendees at a hearing.

Subsection (g) clarifies that a victim and their family members may submit a written statement prior to the hearing to be considered by the hearing panel. The Board intends to offer the victim and their family members similar opportunities to participate in the C&R hearing as they would in a parole suitability hearing. This includes providing them an opportunity to provide a written statement for the C&R hearing panel to consider in making their decision. This subsection is necessary to inform these individuals that they have the option of submitting a written statement which will be considered by the hearing panel the same as it would be if provided at the C&R hearing.

**Section 2853 is added** to clarify the restrictions on participants at the C&R hearing.

Subsection (a) clarifies that participants and attendees present at a C&R hearing are not permitted to record or transmit the hearing. Additionally, this subsection prohibits an attendee from allowing any unauthorized individuals to hear, view, record, or transmit any portion of the hearing. If the presiding hearing officer becomes aware of a participant recording or transmitting the hearing or the presence of an unauthorized person in the virtual hearing room, then the hearing officer may remove the participant or attendee from the hearing. For safety, security, and confidentiality purposes, participants and attendees must be authorized by the Board to participate in a Board proceeding. Therefore, it is necessary for the Board to prohibit unauthorized recording or viewing of hearings and to clarify, in subsection (a), that these unauthorized behaviors will result in the participant's removal from the proceeding. Further, the Board has an interest in maintaining hearing decorum at the C&R hearing and preserving the integrity of the C&R hearing process, which is furthered by enabling a hearing officer to remove participants or attendees who fail to comply with these requirements.

Subsection (b) clarifies that the presiding hearing officer may remove a participant or attendee if the person engages in disruptive behavior during the C&R hearing. While emotions may run high at a C&R hearing, it is important that basic decorum is preserved. To that end, participants shall not engage in disruptive behavior, which may include displaying inappropriate gestures or repeatedly interrupting the hearing. If such disturbances occur, the presiding hearing officer may attempt to resolve the disruption, for example, by muting the individual's microphone or requesting the individual maintain decorum. However, if the individual continues to be disruptive, the hearing officer will remove the participant from the hearing.

Subsection (c) clarifies that when participating in a hearing in person at an institution, each participant is subject to the institution and facility procedures where the hearing is being held. For security purposes, institutions have procedures that participants and attendees must observe to enter and stay on the premises. The Board has no authority to set institution policy or to override institution procedures, including an institution's decision to prevent a person from entering an institution or to remove a person from a hearing if they violate policy or procedure. Therefore, subsection (c) provides notice to all participants that they must comply with the procedures of the institution where the hearing is held if they are attending a proceeding in person.

**Section 2854 is added** to clarify the Board's procedures for addressing equipment and connectivity issues for participants attending by videoconference or telephone. While the Board determines the options available for participants to attend a proceeding, the Board is not responsible for connectivity issues that participants may experience as a result of the technology they are using or their internet connectivity. This section is necessary to implement this proposed regulatory scheme

in a meaningful and practical way that does not result in a C&R hearing being postponed whenever there is an issue with a participant's equipment or connectivity.

Subsection (a) establishes that participants are responsible for having the proper equipment and connectivity to participate at the proceeding. While victims and their family members may reach out to OVSRS or the prosecuting agency for assistance in securing means of participation, it is necessary to clarify that the Board is not responsible for providing equipment or internet connectivity.

Subsection (b) specifies that the hearing panels are not required to continue or postpone a hearing due to a participant's equipment or connectivity issues. This section is necessary to preserve the Board's ability to move forward with the hearing and avoid rescheduling the hearing every time a participant experiences equipment or connectivity issues. Participants attending a hearing by videoconference are responsible for securing the necessary equipment and connectivity for the proceeding, and the Board is not responsible for issues arising from a participant's inability to electronically participate in the hearing. Hearing panels often allow a reasonable amount of time for participants to resolve videoconference issues, but this is not guaranteed and is dependent on the panel's schedule, the stage of the hearing when issues arise, and reasonable alternatives available.

**Section 2855 is added** to clarify the process and procedures involving postponing or continuing a C&R hearing.

Subsection (a) clarifies the circumstances in which the C&R hearing panel or the Board's executive officer may postpone the scheduled date of an incarcerated person's C&R hearing. Specifically, subsections (a)(1) through (7) provide that a hearing may be postponed due to (1) hearing panel unavailability; (2) the absence or untimeliness of a required notice described in section 2847; (3) the inability of the incarcerated person to review non-confidential documents despite timely requests or the absence of a timely disclosure of confidential documents; (4) the absence of required accommodations for the incarcerated person under the Americans with Disabilities Act; (5) the absence of a foreign language interpreter when necessary to achieve effective communication with the incarcerated person; (6) exigent circumstances such as illness of the incarcerated person or their attorney, natural disasters, or institutional emergencies, or (7) the need for additional information necessary to make a decision that cannot be obtained prior the date of the scheduled hearing. The need to limit postponements is a logistical necessity as the Board schedules thousands of hearings each year and each time a hearing is postponed the Board has to find room on the proceedings calendar to reschedule the hearing. Therefore, the Board tries to prevent hearings from being postponed unless absolutely necessary. By specifying the reasons a C&R hearing may be postponed, the Board will limit unnecessary hearing postponements. This subsection is necessary to describe the circumstances where the Board may postpone a C&R hearing. In doing so, all parties will be aware of the situations in which a hearing may be postponed.

Subsection (b) clarifies the circumstances where an incarcerated person may request the Board postpone a C&R hearing. Specifically, the Board must find the incarcerated person has demonstrated good cause for this request and that the person did not know and could not have known about the need for a postponement earlier than when they made the postponement request. Additionally, good cause is defined in this subsection to be the incarcerated person's excused inability to obtain essential documents or other material evidence of information despite their diligent efforts. This subsection is necessary to inform the incarcerated person of their ability to request a postponement

and under what circumstances the Board may grant the postponement. To avoid confusion, this subsection is consistent with section 2253, subsection (d)(2), of this division, addressing requests by incarcerated persons to postpone parole suitability hearings. The Board prefers to go forward with all scheduled hearings and avoid postponements so as to not waste Board resources; therefore, postponements will only be granted in specific situations when the Board's criteria are met.

Subsection (c) clarifies the timeline to reschedule a C&R hearing following a postponement. Specifically, following a postponement, a C&R hearing will be rescheduled to a date that is consistent with resolving the issue that caused the postponement, the need to provide notices of the new hearing date, and the availability of the C&R hearing panel. This section also clarifies that a rescheduled C&R hearing cannot displace a previously scheduled C&R, parole suitability, rescission, or reconsideration hearing. It is in every participant's best interest to resolve the issue that caused the postponement before rescheduling the hearing in order to prevent a second postponement. Additionally, the Board must notice the incarcerated person, the prosecuting agency or agencies, and any registered victims or members of the victim's family of the rescheduled hearing. This subsection is necessary so that stakeholders are aware of the timeframe for rescheduling a C&R hearing following a postponement.

Subsection (d) clarifies that, when a hearing is postponed during the week of the scheduled date, the Board must provide representatives from the prosecuting agencies, victims and their family members scheduled to appear at the hearing, or their counsel, an opportunity to make a statement on the record concerning whether the incarcerated person should be recommended for commutation and for recall of sentence. Additionally, this statement will be transcribed and made available for consideration at the subsequent C&R hearing and be provided to the incarcerated person. This subsection clarifies that making a statement at the postponed hearing does not preclude the speaker from making a statement at the rescheduled hearing. To avoid confusion, this subsection is consistent with section 2253, subsection (d)(4), of this division, which addresses a postponement granted during the week of a parole suitability hearing. The Board recognizes that attending a Board hearing may be difficult and inconvenient for victims and their family members. Therefore, the Board wants to ensure that if a participant made the effort to attend a hearing that is going to be postponed the week of the hearing, they have the opportunity to make a statement that will be considered by a future panel in the event they are unable to attend and participate in the rescheduled hearing. Additionally, the Board wants to make sure the representative from the prosecuting agency has the opportunity to make a statement in the event they are unable to appear at the rescheduled hearing. This subsection is necessary in order to protect the participants' opportunity to make a statement at a hearing and to remain consistent with the Board's practices for handling a postponement for other types of hearings.

Subsection (e) clarifies the process for continuing a C&R hearing. Specifically, a hearing panel may continue a hearing to a future date only upon a showing of good cause that the party requesting a continuance could not have known prior to the start of the hearing. This subsection also specifies that the panel must weigh the reasons and the need for a continuance against any inconvenience to the Board, or other stakeholders, and must determine whether continuing the hearing will best serve the interest of justice. As with a postponement, when a hearing is continued, the Board will have to reschedule the continued hearing and find a spot on the hearing calendar to reconvene the hearing. In order to preserve the Board's resources, a hearing should only be continued when necessary. To avoid confusion, this subsection is consistent with section 2253, subsections (e) and (e)(1), of this division, addressing continuances at parole suitability hearings. This subsection is necessary to

establish the standard the Board must follow when determining whether to grant a request for a continuance.

Subsection (f) clarifies that the Board will attempt to assign the same C&R hearing panel members when the C&R hearing is reconvened. However, this subsection permits a new hearing panel to move forward with the continued hearing and reconvene from where the prior hearing panel left off at the hearing, if the new hearing panel was able to review the transcript from the continued hearing. If the hearing panel cannot review the transcript from the hearing that was continued, then the hearing panel will start a new C&R hearing. While the Board makes every attempt to assign the same hearing panel to a continued hearing, it is not always possible. This subsection is necessary to clarify that if a new hearing panel is assigned to a reconvened hearing, the hearing can be reconvened with a different panel so long as the new panel reviews the transcript from the continued hearing. By permitting a new hearing panel to review the transcript from the continued hearing, the Board may continue the hearing efficiently without having to address the issues and questions that have already been asked and answered. Instead, the new panel can focus on addressing the outstanding issues and reaching a decision on whether to recommend the person for commutation and for recall of sentence.

Subsection (g) clarifies that in the event of a continuance, the representative of a prosecuting agency, the victims and members of the victim's family, or their counsel, that are present at the hearing, may provide a statement on the record concerning whether the incarcerated person should be recommended for a commutation and recall of sentence. Any statement provided at the continued hearing will be made available to subsequent C&R hearing panels. To avoid confusion, this subsection is consistent with section 2253, subsection (e)(3), of this division, which addresses the ability to make a statement before a parole suitability hearing is continued. The Board recognizes that attending a Board hearing may be difficult and inconvenient for victims and their family members. Therefore, the Board wants to ensure that, if a participant made the effort to attend a hearing that is going to be continued, they have the opportunity to make a statement that will be considered by the panel when the hearing is reconvened. Additionally, the Board wants to make sure the representative from the prosecuting agency has the opportunity to make a statement in the event they are unable to appear at the reconvened hearing. This subsection is necessary in order to protect the participants' opportunity to make a statement at a hearing and to remain consistent with the Board's practices for handling a continuance for other types of hearings.

**Section 2856 is added** to clarify the process of making a C&R hearing determination.

Subsection (a) clarifies that a C&R hearing panel will determine whether to recommend or not recommend the incarcerated person for a commutation and recall of sentence. As outlined in subsection (b) of this section, the purpose of a C&R hearing is to determine whether an incarcerated person no longer poses an unreasonable risk of danger to the public and should be recommended for a commutation and recall of sentence. Therefore, this subsection is necessary to clarify the purpose of the C&R hearing and the requirement of the C&R hearing panel to make a decision at the hearing.

Subsection (b) clarifies the standard for making a recommendation for commutation and for recall of sentence. Specifically, a C&R hearing panel will recommend an incarcerated person for commutation and for recall of sentence if all members of the panel determine that the person no longer poses a current unreasonable risk of danger to the public. This subsection also notes this

determination includes consideration of whether the person, if released on parole, is likely to commit antisocial acts, which include crimes of violence and financial harm or noncompliance with the reasonable restrictions imposed by a parole agent. This standard is derived from case law establishing the legal standard used by the Board in parole suitability hearings, including *In re Lawrence*. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 - 1206, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) This subsection is necessary to establish a standard governing the Board's decisions under this process, to assist the Board with making consistent and uniform decisions. Moreover, it is necessary to alert the incarcerated person and stakeholders of the standard that must be met before an incarcerated person will receive a recommendation for commutation and for recall of sentence. The Board also finds it necessary to clarify what constitutes antisocial acts for transparency and clarity.

Subsection (c) clarifies that the decision to recommend an incarcerated person for commutation and for recall of sentence must include (1) a recommendation that the incarcerated person be considered for release from incarceration following all applicable review periods, (2) a recommendation that the person's new sentence include a period of supervised release in the community by the Division of Adult Parole Operations, and (3) a recommendation that specifies which, if any, special conditions of parole should be placed on the incarcerated person while serving the period of supervised release in the community. The Board is requiring these recommendations be included as part of the decision because they are recommendations or conditions of release that act as protective factors to help ensure successful transition for the person upon release. Similar conditions are often ordered during a finding of parole suitability by Board hearing officers at parole suitability hearings. Keeping decision-making at parole suitability hearings and the circumstances that apply to releasing a person under that process as consistent as possible with decision-making in the C&R hearing process will assist the Board with implementing the regulations and training its hearing officers to make sound decisions at hearings under both processes. Further, recommendations for persons to serve a period of parole supervision and imposing special conditions of parole give the incarcerated person their best chance of success upon release and protect public safety by reducing the likelihood of recidivism. Finally, including these additional recommendations in every recommendation for commutation and for recall of sentence informs the ultimate decision maker (Governor or sentencing court) that the Board's determination that a person no longer poses an unreasonable risk of danger to the public is made with an understanding that these conditions (parole supervision and the imposition of specified conditions of parole) will apply if and when the person is ultimately released back into society.

When the Board makes a recommendation to the Governor or to the sentencing court for commutation and for recall of sentence, the Board does not expect these individuals to be sent back to the Board for a parole suitability hearing. Instead, the Board expects any action taken by the court or the Governor to result in the release of the incarcerated person because in making a recommendation for commutation and for recall of sentence, the Board is saying the incarcerated person is safe to release at the time the recommendation was made. For this reason, it is necessary for the Board to add these recommendations to the decision so that the Governor is aware of the Board's recommendations and may add these conditions as part of the commutation order, if the Governor so chooses.

Subsection (d) specifies that if all members of the C&R hearing panel do not determine the incarcerated person does not pose an unreasonable risk of danger to the public, then the hearing panel will not recommend the incarcerated person for commutation and for recall of sentence. This



subsection is necessary so that all parties understand that, if all members of the hearing panel do not find the incarcerated person to meet the applicable legal standard for recommendation, then the person will not be referred for commutation and for recall of sentence.

Subsection (e) clarifies that the C&R hearing panel will inform the incarcerated person of whether they are recommending them for commutation and for recall of sentence at the conclusion of the C&R hearing. This is similar to the Board's practice of providing a decision on the record at the conclusion of a parole suitability hearing. The Board does not want to keep the incarcerated person or other stakeholders waiting for a decision. This subsection is necessary to explain to the incarcerated person and other stakeholders that a decision will be made at the conclusion of the hearing.

Subsection (f) clarifies that the C&R hearing panel will be impartial. Specifically, this subsection cross-references to section 2250 of this division, which establishes impartial hearing panels in the parole suitability hearing process. All parole hearings conducted by the Board must be impartial and free of bias. It is necessary to apply this same standard to C&R hearings to maintain the integrity of the Board and its decisions.

Subsection (g) clarifies the use of confidential information at a C&R hearing. Specifically, if a C&R hearing panel relies on confidential information in making their decision, the panel must notify the incarcerated person of the confidential reports that the panel relied on and find that the confidential information was reliable. This subsection is necessary for transparency and to inform the incarcerated person when confidential information was considered and relied upon by the hearing panel in reaching a decision. It is also necessary that the hearing panel only consider reliable confidential information and provide notice of the information to the incarcerated person so that the incarcerated person is generally aware of what information was considered and relied upon during their hearing, which can assist the incarcerated person with preparing for any subsequent C&R reviews and hearings. This practice is consistent with use of confidential information at a parole suitability hearing, as outlined in section 2235 of this division.

Subsection (h) clarifies the timeline for serving a written decision of the C&R hearing to the incarcerated person following the hearing. Specifically, a C&R hearing panel must issue a written decision on the date of the C&R hearing. The decision must be provided to the incarcerated person and their attorney and placed in the person's central file within 15 business days of the hearing. The record of the C&R hearing is the transcript of the hearing; however, the transcript may take 30 days or more to become available. Therefore, the Board must issue a written decision outlining the determination made at the hearing in order for the incarcerated person to have a document of the decision as soon as possible. The Board is allowing up to 15 business days to serve the incarcerated person with a copy of the decision in order to give CDCR sufficient time to serve the document based on the availability of staff. This subsection is necessary to clarify the timeline for receiving written notice of the C&R hearing.

Subsection (i) clarifies the contents of the written decision. Specifically, a written decision must include individual recommendations for the incarcerated person regarding their work assignments, rehabilitative programs, and institutional behavior. It is in the best interest of the incarcerated person for the Board to provide the person with recommendations to aid in their rehabilitation because doing so provides guidance to the incarcerated person on what they might do to continue to mitigate their risk to society. Regardless of whether the incarcerated person receives a recommendation for

commutation and for recall of sentence, the Board's recommendations will still benefit the incarcerated person's continued rehabilitative efforts. This subsection is necessary in order to ensure the incarcerated person receives these recommendations to help guide their rehabilitation.

Subsection (j) clarifies that a decision made at a C&R hearing is a proposed decision that is subject to review under section 2859. Moreover, the proposed decision does not become final until the decision is upheld under section 2859. This subsection is necessary to clarify that the C&R hearing decision is not final on the date of the C&R hearing because there is a decision review period where the decision may be vacated or modified. This promotes transparency among all parties that the decision is subject to review by the Board during the decision review period.

Subsection (k) clarifies that the C&R decision is not subject to CDCR's grievance and appeal process under article 1 of subchapter 5.1 of chapter 1 of division 3. This subsection is necessary to clarify for incarcerated persons that they may not appeal the Board's decision to CDCR. The C&R hearing process is a Board proceeding and is not subject to CDCR's oversight. Previously, there have been instances where an incarcerated person has tried using CDCR's grievance and appeal process to appeal a Board decision and the incarcerated person has become frustrated with the delay in response, not understanding that CDCR is not the appropriate venue for appeals. In order to avoid confusion and delay, this subsection makes it clear that these decisions are not subject to CDCR's grievance and appeal process.

**Section 2857 is added** to clarify the actions the Board takes after it decides not to recommend a person for commutation and for recall of sentence. Specifically, this section specifies that the Board will hold a subsequent C&R review within three years from the date of the C&R hearing. The Board selected a three-year period between a C&R hearing and a subsequent C&R review to match the three years between subsequent C&R reviews and the three-year denial period in the parole suitability hearing process. This provides a reasonable timeframe for an incarcerated person to implement the Board's recommendations for rehabilitative change which may make them more likely to be referred to another C&R hearing in the future. This section also clarifies that a person will not receive a subsequent C&R review if they will no longer meet the criteria for referral under the C&R process at the time of the subsequent review. This subsection is necessary because it outlines the timeline for when a person will receive a C&R review following a C&R hearing that did not result in a recommendation for commutation and for recall of sentence. Additionally, it will inform the incarcerated person of when to expect a subsequent review and put them on notice that they will not receive a subsequent C&R review if they no longer meet the eligibility criteria for the process at that time.

**Section 2858 is added** to clarify the actions following a decision to recommend an incarcerated person for commutation and for recall of sentence.

Subsection (a) clarifies that the decision to recommend an incarcerated person for commutation and for recall of sentence will be subject to the review process outlined in section 2859. This process is generally consistent with the Board's procedures for reviewing a decision to grant parole at a parole suitability hearing. This subsection is necessary to explain to stakeholders that the panel's decision will be reviewed and is not final until the review process is complete.

Subsection (b) clarifies that, if the Board upholds a C&R hearing determination to recommend an incarcerated person for commutation and for recall of sentence under section 2859, the decision will

become final and the incarcerated person will not be scheduled for a subsequent C&R review. The purpose of the C&R hearing process is to make recommendations for commutation and for recall of sentence to the Governor and sentencing courts. Once a decision to make the recommendation for commutation and for recall of sentence is final, the Board no longer needs to schedule the person for a subsequent C&R review. This subsection is necessary for transparency and to inform stakeholders that once a decision to recommend a person for commutation and for recall of sentence is final, the person will no longer be scheduled for any future C&R reviews or C&R hearings under this chapter.

Subsection (c) clarifies that, within 30 days of the Board upholding a C&R hearing decision to recommend an incarcerated person for commutation and for recall of sentence, the Board will notify the Governor's Office of the recommendation under Penal Code section 4801. This subsection also specifies that the incarcerated person must be served a copy of the notice to the Governor's Office within 15 days, and a copy of the notice shall be placed in their central file. The timelines set forth in this section to provide notice to the Governor's Office and subsequent notice to the incarcerated person is established to allow sufficient time for the Board to carry out these tasks based on the Board's resources. This subsection is necessary to establish a process and timeline for notifying the Governor's office and the incarcerated person.

Subsection (d) clarifies that once a decision to make a recommendation for commutation and for recall of sentence is final, the Board will notify all sentencing courts with jurisdiction over the case of the Board's recommendation for commutation and for recall of sentence within 30 days from the date the decision becomes final. In the Board's notice to the sentencing court, the Board will include its recommendation that the incarcerated person be considered for a recall of sentence and resentencing. The Board will provide a copy of the notice to the sentencing court to the incarcerated person within 15 days of the notice, and a copy of the notice will also be placed in the incarcerated person's central file. The timelines set forth in this section to provide notice to the sentencing court and subsequent notice to the incarcerated person is established to allow sufficient time for the Board to carry out these tasks based on the Board's resources. This subsection is necessary to clarify that all applicable sentencing courts will be given notice of the Board's recommendation, and the incarcerated person will be provided with a copy of that notice.

**Section 2859 is added** to clarify the review process following a C&R hearing decision.

Subsection (a) is added to clarify that the chief counsel, or a designee, will review all decisions to recommend an incarcerated person for commutation and for recall of sentence within 120 days of the decision. During this review, if an error of law or fact is discovered, new information becomes available after the decision was made, or the decision raises concerns regarding the consistency in decision-making, the case may be referred to the full board for an en banc review. This subsection also establishes the en banc referral standard, which is whether the error, new information, or concerns in consistency suggest there may be a substantial likelihood a future C&R hearing panel would make a different decision. This subsection states that the Board must provide notice of the en banc review at least 10 days prior to the review, to the incarcerated person, their attorney, victims and their family members who are registered with OVSRS, and the prosecuting agency or agencies. This subsection is necessary to establish a legal standard to refer a case en banc, clearly identify the reasons for an en banc referral, and set forth notice requirements to stakeholders if a case is going to be voted on en banc. The Board wants its decisions to be legally supported and consistent, and the decision review process assists with this mission. To avoid confusion, this process is generally

consistent with the Board's review process following a grant of parole, as outlined in sections 2041, 2042, and 2043 of this division.

Subsection (b) clarifies the en banc process following an en banc referral. Specifically, if a determination to recommend an incarcerated person for commutation and for recall of sentence is sent en banc, the en banc panel must vacate the decision if a majority of the panel finds that a future C&R hearing panel would make a different decision after considering the error of law or fact, new information, or concerns regarding consistency in decision-making. This subsection requires the Board to publish the en banc decision on the Board's website and provide the incarcerated person and their attorney a copy of the written decision. This subsection requires a copy of the decision to be placed in the incarcerated person's central file within 15 business days following the en banc decision.

This subsection is necessary to establish a legal standard that the en banc panel must follow in making their decision. Specifically, the en banc panel must vacate the decision if, based on the reason for the referral, the en banc panel determines there is a substantial likelihood a different hearing panel would make a different decision. This standard is similar to the standard established for reviewing an en banc referral for a parole suitability decision in section 2042 of this division. In addition to establishing a legal standard, this subsection is necessary to specify the timeline and method for publishing and noticing the en banc decision. Since the incarcerated person is not present at the en banc proceeding, it is necessary to provide notice of the decision to the incarcerated person in a timely manner.

Subsection (c) clarifies the en banc panel's options following a decision to vacate a recommendation of an incarcerated person for commutation and for recall of sentence. Specifically, the en banc panel will vote to either conduct a new C&R hearing for the incarcerated person within one year of the en banc review, or they will vote to conduct a new C&R review for the incarcerated person within one year of the en banc review. This subsection is necessary in order to use the Board's resources efficiently and ensure that C&R hearings are allocated to the most likely to be found suitable for a commutation and recall of sentence. If an en banc panel determines that the decision to recommend a case for commutation and for recall of sentence should be vacated, the en banc panel can then determine whether the incarcerated person should receive a new hearing, or, if the en banc panel finds they are no longer likely to be approved for commutation and for recall of sentence, they have the option to put that person back in the C&R review cycle.

An incarcerated person's decision may be sent en banc for an error of fact or law, new information, or concerns with consistent decision making. Some of these reasons for referral may not reflect on the incarcerated person's suitability for commutation and for recall of sentence. For instance, the Board may have to vacate a decision because of a procedural issue, such as failure to provide proper notice of the hearing to a relevant party under these regulations or a technology error that resulted in the hearing not being recorded. In those situations, the en banc panel would likely vacate the decision, but would want the incarcerated person to have another hearing, as the reason for vacating the decision had nothing to do with the incarcerated person's suitability for commutation and for recall of sentence. On the other hand, the decision might be vacated based on new information, such as a new rules violation or new concerning confidential information, which might suggest the incarcerated person is unlikely to be recommended for commutation and for recall of sentence at a hearing within the next year. In that situation, the en banc panel could refer the person for a C&R review, where a hearing officer can weigh that new information and determine whether to

recommend them for another C&R hearing or a subsequent C&R review. This allows the Board to conserve its resources by not holding a C&R hearing for someone unlikely to receive a recommendation for commutation and for recall of sentence. This also prevents stakeholders, such as victims and their family members, from being asked to participate in another hearing that is unlikely to result in a recommendation for commutation and for recall of sentence so soon after the prior hearing.

Subsection (d) clarifies the actions following an en banc panel's decision to uphold the recommendation for commutation and for recall of sentence. Specifically, this subsection requires the Board to notify the Governor's Office of the Board's recommendation for commutation in accordance with section 2858. This subsection is necessary to clarify the Board's responsibility to notify the Governor's Office after the recommendation is upheld en banc. It is also necessary to clarify for stakeholders how this regulatory section works in conjunction with the regulatory section on notifying the Governor's Office of a recommendation for commutation.

Subsection (e) clarifies the actions following a proposed decision to recommend an incarcerated person for commutation and for recall of sentence becoming final. Specifically, in the event a decision becomes final and is not sent en banc during the decision review period, the Board must notify the Governor's Office of the Board's recommendation for commutation in accordance with section 2858. This subsection is necessary to clarify the Board's responsibility to notify the Governor's Office after the recommendation for commutation becomes final. It is also necessary to clarify for stakeholders how this regulatory section works in conjunction with the regulatory section on notifying the Governor's Office of a recommendation for commutation.

Subsection (f) clarifies that, if a decision to recommend an incarcerated person for commutation and for recall of sentence is upheld following an en banc decision or the decision becomes final during decision review, the Board must review the person's current sentence and notify all applicable sentencing courts of the Board's recommendation for recall of sentence in accordance with section 2858. The Board will review the incarcerated person's current sentence to ensure that all sentencing courts for which the incarcerated person is serving a sentence are notified of the Board's recommendation for recall of sentence. This subsection is necessary to clarify the Board's responsibility to notify the sentencing court of its recommendation that the incarcerated person be considered for recall of sentence once the decision becomes final. It is also necessary to clarify for stakeholders how this regulatory section works in conjunction with the regulatory section on notifying sentencing courts of a recommendation for recall of sentence.

Subsection (g) clarifies the chief counsel's authority to vacate a decision to not recommend an incarcerated person for commutation and for recall of sentence. Specifically, this subsection gives the chief counsel or their designee the authority to vacate a decision not to recommend a person for commutation and for recall of sentence if the chief counsel finds an error of law or fact, new information, or concerns regarding consistency in decision-making, and finds there is a substantial likelihood a future C&R hearing panel would make a different decision. In this situation, the chief counsel or designee can vacate the determination without referring the case en banc and order a new C&R hearing be conducted within one year of the chief counsel or designee's finding. This subsection is necessary to ensure the Board makes consistent and legally supported decisions, as well as to conserve Board resources by not requiring the matter be referred en banc in order to vacate the decision. In the last few years, the Board regularly reviewed 30 to 40 cases en banc each month. By authorizing the chief counsel to vacate a determination to not recommend an incarcerated person

for commutation and for recall of sentence without referring the matter en banc, it conserves the en banc panel's resources and allows the en banc panel to focus on cases that must legally be decided en banc. Streamlining the process for a new hearing is also advantageous to hearing participants who will be able to participate in the C&R hearing once it is rescheduled. This subsection provides the Board with a year to hold a new hearing, which is sufficient time to schedule the new hearing and provide all required notices in a timely manner.

### **ANTICIPATED BENEFITS**

Defining who is entitled to a consultation, who may participate in a consultation, and what happens at a consultation benefits all stakeholders by resolving several ambiguities and clarifying the process. This process also benefits public safety by ensuring incarcerated persons receive information that will assist in their rehabilitation, which will contribute to the public's safety upon the person's release.

Additionally, the proposed rulemaking will create a transparent, fair and equitable process for the Board to exercise its existing statutory authority to recommend incarcerated persons to the Governor for commutation and the sentencing court for recall of sentence. The proposed decision provides public-safety focused, equitable, and transparent rules to guide the Board's exercise of its currently unbounded and unutilized statutory authority to recommend people for commutation and for recall and resentencing. The regulations leverage the Board's existing expertise and tested procedures for assessing current risk.

The proposed regulations are designed to increase public safety. They create a process for judges and the Governor to receive expert, and current information about an individual's current risk before making a decision to release someone on parole. The regulations also provide DAPO with necessary, individualized special conditions to apply in cases where an individual becomes eligible for release on parole, which will increase their safe release on parole.

The regulations ensure that the Board does not exercise its discretion to make recommendations without providing those impacted by a crime with a meaningful opportunity to participate in the process. Victims will have the opportunity to provide information to the Board and learn about an individual's rehabilitative status and current risk level, information to which they do not routinely currently have access and in some cases may address anxiety about safety. The process provides for outreach and support for victims and the opportunity to connect with resources.

The proposed regulations are likely to decrease violence and antisocial conduct in prison, increasing staff and incarcerated person safety by incentivizing good conduct and meaningful, sustained engagement in rehabilitative treatment that targets the causative factors of offending.

The regulations leverage the Board's existing resources and expertise to identify incarcerated people who may be safely released into the community after long terms of incarceration. If the courts and the Governor exercise their discretion to release these low risk incarcerated people, CDCR will be able to more effectively focus its limited resources to fulfill its public safety mandates. This is especially the case because this population of older people is the population at lowest risk for recidivism and have the highest medical costs.

## **ECONOMIC IMPACT ASSESSMENT**

### ***Creation of New Jobs or the Elimination of Existing Jobs Within the State of California***

The proposed action to regulate consultations is designed to bring the Board's regulations into compliance with Penal Code sections 3041, 3051, 3055. However, the Board determined this proposed action will have no impact on the creation or elimination of jobs within the State of California because the impact of these regulations on the Board's workload has been absorbed within the Board's existing resources.

Specifically, this proposed action requires the Board to conduct consultations for incarcerated persons in the hearing cycle, which the Board has been doing since consultations were added to the Penal Code in 2014.

With regards to the C&R recommendation assessment process, the Board projects approximately 3,959 people may be eligible for an initial C&R review under these regulations by December 31, 2035. Based on current workload projections over the next several fiscal years, the Board currently anticipates needing 1.05 additional psychologist positions to assist with preparing CRAs prior to C&R hearings. This assumes 1) the Board starts conducting C&R reviews in fiscal year 2027-2028 and 2) 20 percent of reviews result in a referral for C&R hearing, which would necessitate the preparation of a CRA. However, workload associated with conducting C&R reviews and C&R hearings is currently anticipated to be absorbed with existing staffing based on projected decreases in other workload over the next few years, including workload associated with nonviolent parole reviews.

It is difficult for the Board to project workload more than a few years in advance due to the variability associated with its other processes, including the number of incarcerated persons to whom it grants parole each year at parole hearings and the length of denials imposed at parole hearings that result in a denial. The Board will schedule C&R reviews and C&R hearings on the same hearing calendar it uses for the parole hearing process, so the number of additional hearing officers, if any, the Board may need in future years to continue implementation of these regulations will be largely dependent on factors that increase or decrease the number of available calendar spots the Board will need to dedicate to parole hearings and consultations.

Case Records Services of the California Department of Corrections and Rehabilitation will also need 1 additional Correctional Case Records Administrator on a two-year limited term to facilitate implementation of processes for Case Records to determine eligibility for the C&R recommendation assessment process and calculation of CREDs.

### ***Creation of New Businesses or Elimination or Expansion of Existing Businesses Within the State of California***

This regulatory action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because businesses are not directly affected by whether the Board conducts a consultation, C&R review, or C&R hearing. These proposed regulations will have no additional effect on the creation or elimination of businesses in California.

### ***Expansion of Businesses within the State of California***

This regulatory action will not have a significant, statewide adverse economic impact directly affecting the expansion of business in California because private businesses are not directly affected by whether the Board conducts a consultation, C&R review, or C&R hearing. These proposed regulations will have no additional effect on business expansion in California.

### ***Benefits to the Health and Welfare of California Residents, Worker Safety, and the State's Environment***

This regulatory action generally benefits the health and welfare of California residents by continuing to promote public safety. Additionally, the Board anticipates the proposed regulations will benefit the health and welfare of California residents by encouraging rehabilitation among the incarcerated population by giving them hope that they may receive a recommendation for commutation and for recall of sentence, which includes a referral to the Governor for a commutation of sentence and to the sentencing court for resentencing. Many of the individuals eligible for this process were not anticipating being eligible for evaluation by the Board so soon or at all; therefore, this process incentivizes incarcerated persons to engage in rehabilitation when they otherwise might not be so incentivized. The proposed regulations further this goal by creating a transparent process for decision making and allows stakeholders such as victims and prosecutors to participate in the process and have their voices heard. Promoting transparency and participation in the C&R review and C&R hearing process ultimately benefits the safety and welfare of all residents in California by ensuring the Board makes well informed decisions that are consistent with public safety.

### **OTHER REQUIRED DISCLOSURES**

**Studies, Reports, or Documents Relied Upon (Gov. Code § 11346.2(b)(3)):** None

**Reasonable alternatives that would be less burdensome and equally effective (Gov. Code §11346.2(b)(4)(4)):** The Board has determined that no alternative considered would be (1) more effective in carrying out the purpose of this action, (2) as effective and less burdensome to affected private persons than the action proposed, or (3) more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

**Reasonable alternatives that would lessen the impact on small businesses (Gov. Code §11346.2(b)(4)(B)):** None

**Evidence relied upon to support the initial determination that the regulation will not have a significant adverse economic impact on business (Gov. Code §11346.2(b)(5)(A)):** The Board has made an initial determination that this regulatory action will not have a significant adverse economic impact on business. No facts, evidence, documents, testimony, or other evidence to the contrary has been provided to or reviewed by the Board.

The Board has determined this action imposes no mandates on local agencies or school districts, or mandates which require reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.



The Board, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

**\*\*END\*\***