



Ministry
of Justice

The Right Honourable
Stuart Andrew MP
Minister of State for
Justice

Mr Peter Dawson
Director
Prison Reform Trust
5 Northburgh Street
London
EC1V 0JR

MoJ ref: ADR98876

1 September 2022

Dear Peter

ELIGIBILITY FOR OPEN CONDITONS

Thank you for your letter of 21 July, regarding the test for indeterminate sentence prisoners' suitability for open prison conditions; this follows your earlier letter of 6 June on the same subject. I will take this opportunity to also respond here to your letter dated 4 July to Victoria Atkins about the wider changes to the parole system.

My officials are considering your request for data and for the Equalities Analysis from your letter dated 21 July, under the Freedom of Information Act, and they will provide you with a response in due course. I have responded to your remaining questions below. However, I must emphasise that the move to open conditions is a categorisation decision for the Secretary of State and that he is not bound by a recommendation made by the Parole Board:

Test for indeterminate prisoners' suitability for open conditions

You ask what guidance has been provided on the criteria in the new test for indeterminate prisoners' suitability for open conditions to Her Majesty's Prison and Probation Service (HMPPS) staff, including psychologists, prisoners and their families, and the Parole Board. HMPPS staff have access to regular briefing sessions run by HQ staff with significant operational experience. In addition, Public Protection Group issued detailed guidance and staff bulletins which outlined the change and what it meant in practice, particularly for probation practitioners when producing their reports. HMPPS Psychology Services produced similar guidance for psychologists. In recognition of the higher threshold which they will have to meet before they are approved for a move to open conditions, prisoners have been provided with a letter explaining the change and what this means for them, in both standard and easy read format. Family services providers have been briefed on the changes and, as you touch on in your letter of 21 July, the family guide is in the process of being updated and is expected to be republished shortly.

The Secretary of State issued revised directions to the Parole Board and are available on gov.uk. It is clear that it does not fall to the Parole Board to make judgments as to whether public confidence in the Criminal Justice System would be undermined if a given prisoner were moved to an open prison. That is a judgment for the Secretary of State or his approved delegates, taking account of the discretion, which is his, as I have noted above.

When it comes to deciding whether to accept a recommendation from the Parole Board, I can confirm that no additional training will be provided as officials who are empowered to make decisions or to advise

Ministers are experienced in reviewing and considering recommendations from the Parole Board. The only thing which has changed is the policy test, and experience as a probation practitioner is not a prerequisite for making the judgments needed.

You ask for clarity around cases assessed to be low risk of abscond. All three parts of the open test must be met, so if a prisoner is assessed to be a low risk of abscond, but a period in open conditions is not considered essential for their progression towards release, they will not be suitable for transfer to the open estate.

You ask which Minister will be charged with undertaking the scrutiny required by the new process, and what criteria will determine which cases are personally considered by that Minister. Ministerial portfolios and responsibilities are subject to change; however, we anticipate that the Minister responsible for prisons and probation, and the Secretary of State for Justice, will both be sighted on the cases escalated to them. To clarify, where the Parole Board makes a recommendation for open conditions in the case of a prisoner convicted of murder, other homicide rape and causing or allowing the death of a child, it will fall to Ministers ultimately if the recommendation is to be accepted. As I have explained above, the judgment as to whether public confidence in the Criminal Justice System would be undermined by moving the prisoner to open conditions is one for Ministers or their approved delegates. It is vital for the continuation of open prisons for suitable prisoners, that the public has confidence in the robustness of the risk assessment processes, being mindful of the terrible harm which those who have committed serious offences have already caused. Where a decision is taken by a Minister, the Minister will receive comprehensive advice from officials, analysing the key reports and evidence upon which the Parole Board relied. Those reports will be attached to the advice.

As set out in my previous letter, Prisoners will continue to receive written confirmation of the reasons for their approval or rejection for suitability for open conditions. They will still have the option of applying for judicial review.

You ask if the Secretary of State will provide the Parole Board with a view on suitability for open conditions at the original consideration of the case. I can confirm that the Secretary of State will not offer a single view on the suitability of indeterminate sentence prisoners for a progressive move to open conditions; a single view will only be offered in cases where release is a possibility. However, the Secretary of State does have the option of not asking the Parole Board for advice on a prisoner's suitability for open conditions, if he considers that moving the prisoner to an open prison would undermine public confidence in the Criminal Justice System.

You ask about the consequences of these changes in terms of the impact on casework capacity within the Ministry, on the progression of those serving indeterminate sentences, and the resulting impact on prison capacity. I can confirm that casework teams are adequately resourced to manage the workload presented by this change.

Following a discussion at the Prisons Operational Management Committee on the impact of the changes on the opportunities for some indeterminate sentence prisoners to move to an open prison, officials are considering options for increasing progression opportunities provided within the Closed Estate. We have already had some successes from the Progression Regimes as an alternative to open conditions. With regard to the consequential impact on prison capacity, as set out in my previous letter, these are expected to be manageable. There are currently a large number of determinate sentenced prisoners awaiting transfer into the open estate. With fewer indeterminate sentence prisoners now eligible for transfer into open conditions, we will instead fill available vacancies in the open estate with a higher proportion of determinate sentenced prisoners. Looking to the future we are expanding the open estate with fit for purpose, modern and uncrowded accommodation. We anticipate that the Category D prisoner population

will increase alongside with the rest of the prison population in coming years, providing sufficient demand to fill these additional places.

Single Secretary of State view

You ask a range of questions about the application and process surrounding this new policy. The decision on whether the release test is met is a matter for the Parole Board. The custom of probation practitioners and psychologists providing a recommendation as to whether the statutory release test is met blurred lines of accountability, which is why it has now been prohibited by way of changes to the Parole Board Rules. The same changes empower the Secretary of State to enter a view as to whether he considers the statutory release test is met. It should be remembered that the Secretary of State is a party to the parole proceedings.

We estimate that a single view will be provided in a relatively small number of cases, around 150 per year, and these will be prisoners convicted of murder, rape, causing or allowing the death of a child, terrorist or terrorist connected offences, and high-profile cases which may engage public confidence. Officials based within the Public Protection Casework Section of HMPPS will consider these cases and we anticipate that the Minister responsible for prisons and probation, and the Secretary of State for Justice, will both be sighted on the cases escalated to them.

You have also asked what the test for appropriateness is for the expression of a view by the Secretary of State or his delegate. In addition to the criteria listed above, the Secretary of State, who is a party to the parole proceedings, will make a formal recommendation to the Panel as to whether the prisoner is safe to be released. Those cases will be selected by the Secretary of State, taking account of advice from officials, applying the following criteria:

- a) The nature and characteristics of the offending are particularly severe and risks damaging public confidence if the prisoner were to be released (e.g., where the victim(s) was a child or vulnerable; or cases with a sadistic or predatory motivation);
- b) Cases involving multiple victims or where there was a history of serious offending, indicating a pattern or escalation of such offences;
- c) Where the gravity of the offending behaviour indicates that, if further such offences were to be committed again, the level of harm to the public would be particularly grave; and/or
- d) Where a case raises issues in relation to victims' confidence more broadly in the criminal justice system.

The single Secretary of State view will be based on the reports, assessments and other evidence prepared for a parole review and which forms the contents of the parole dossier. Secretary of State representatives and/or Counsel will represent the Secretary of State at oral hearings.

The prohibition on report writers providing a view or recommendation in reports or in oral hearings applies only to those working for HMPPS. This includes reports commissioned on behalf of HMPPS; it does not apply to reports commissioned by the prisoner, or to those who have written them. HMPPS report writers are providing a view on behalf of the Secretary of State, so it is important that we are able to offer a consistent position.

Views or recommendations provided for earlier parole reviews will remain in parole dossiers, and HMPPS report writers/witnesses will be able to discuss these earlier views as they were held at the time; however, HMPPS report writers will not offer an updated view or recommendation. This approach does not change the essential role of report writers, which is to provide robust and comprehensive assessments of a prisoner's risk to inform the judgment which falls in law to the Parole Board. Practitioners will retain their vital role in work with prisoners, to engage, encourage and motivate them to undertake appropriate

interventions to address and reduce their identified risks. HMPPS report writers are still expected to clearly set out what risk management options they assess to be necessary to manage specific risks, whether the measures are available and necessary, and in what setting. The management of individual prisoners will continue to be undertaken as now and officials offering a view on behalf of the Secretary of State will not be directly involved in the management of prisoners.

You will no doubt be aware that on 9 August, the Court considered an application for expedition from Adrian Bailey, who is serving a mandatory life sentence for murder. Mr Bailey asked the Court to find unlawful the change to the Parole Board Rules, which prohibits probation officers (and psychologists employed by HMPPS) from making a recommendation in their reports as to whether the statutory release test is met. Mr Bailey also asked the Court to find unlawful the non-statutory guidance which HMPPS issued to assist witnesses adapt to the change to their role. The Court granted Mr Bailey interim relief in directing that witnesses should not follow the guidance at his oral hearing (on 10 August in his oral hearing). The Court did not make a more general finding with respect to the guidance. No interim relief was given regarding the changes to the Rules. The issue of the lawfulness of the guidance and the Rules will be set down for full hearing at a later date. HMPPS has not withdrawn the guidance and continues to keep the guidance under review and will consider whether changes need to be made to it.



STUART ANDREW MP