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22 October 2020

the Parole Board
working with others to protect the public

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Ministry of Justice
102 Petty France
London SW1H 9AJ

Dear [redacted]

I am writing to let you know that I am delighted with the publication this week of the Parole Board's Tailored Review (the Review). I am very pleased that the Review notes the positive progress made by the Parole Board over the last couple of years as well as our strong record on public protection. The Parole Board is supportive of the Review's recommendations. We believe that they will provide a strong platform for further improvements in the parole system.

I also welcome your announcement of a public consultation on options for increasing the transparency of parole hearings by potentially amending the Parole Board's statutory rules which currently require our hearings to be held in private. The Parole Board believes that consideration should be given to measures which achieve greater transparency and which do not risk compromising the effectiveness and fairness of oral hearings. We will be responding in detail to the public consultation.

I also welcome your announcement of a root and branch review of the parole system and I look forward to working with the Department on this. However, there is one issue that has not so far been covered in this review's remit and that is whether a Parole Board panel ought to direct a prisoner's move to open conditions. For public protection reasons, I hope that the arguments for and against this potential change could be considered by this review. I am raising this issue early in the process in order that this request can be considered by you ahead of the review team starting their detailed work.

By way of background, as you will be aware, if a prisoner meets the statutory test for release, a Parole Board panel must direct that prisoner's release. However, in circumstances where a prisoner does not meet the test, the panel ordinarily go on to consider whether that prisoner is suitable for transfer to open conditions. If the panel does find the prisoner suitable, the panel does not currently direct this transfer but instead makes a recommendation to you, as Secretary of State. In 2019/20, we recommended that 689 prisoners be transferred to open conditions.

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Although we do not have a complete data set, as we do not always hear when our recommendations are rejected, we understand that well over 95% of our recommendations for open are accepted and that our recommendations are only ever rejected in a very small number of cases.

However, on the rare occasions when a recommendation for open conditions is not accepted, our experience is that any subsequent panel infers that a further recommendation for open conditions will also be turned down. Given that, in these circumstances a panel feels left with a stark choice of whether to release a prisoner from closed conditions or keep him or her in custody. I am concerned that this raises public protection issues as testing a prisoner in open conditions is often regarded as a vital tool in risk assessment, particularly for some of our most complex offenders. Although, as set out above, the number of panels caught in this dilemma each year is relatively small, they are often our most sensitive cases.

The public protection concern identified above is my primary reason for raising this issue. However, it does feel anomalous that the weightier decision of whether to release a prisoner or not rests with a panel, whereas the decision on whether to move a prisoner to open is only a panel recommendation. Many of the arguments for why a court-like body ought to decide on release could, in my view, equally be applied to decisions on moves to open conditions following a hearing. I am therefore concerned that this is an area of practice that may be open to legal challenge. We are currently awaiting a decision from the Supreme Court in the case of *Gourlay*. In that case, a central plank of the applicant's argument, which we are resisting, is that the Parole Board should not be considered an independent court-like body because we can only provide recommendations on a move to open conditions.

Given the concerns identified, I am writing to respectfully request that consideration be given to whether the root and branch review's remit should be expanded to include an evaluation of whether, as a court-like body, following a hearing the Parole Board should make binding decisions rather than recommendations on moves to open conditions.

Crucially, if the review were to recommend this change, the Parole Board's reconsideration mechanism could be amended to also cover directions to open conditions. This would mean that if you had any concerns about a direction to move a prisoner to open conditions in a particular case, you, as a party to the proceedings, would be able to ask for that decision to be reconsidered. This would ensure that safeguards remained in the system and it would also bring both releases and open conditions transfers under a single, unified process.

The Parole Board received the terms of reference for the root and branch review on 20 October 2020. If there are any further matters that we think it would be helpful to have included in this review's remit, then we will get in touch with your office early on in the process. However, given the public protection issues identified above, I thought it important to bring this matter for your consideration right at the start of the review process.

If it would be helpful to have any further information on this issue, then please do let me know and I would be happy to assist.

Yours sincerely

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The Parole Board for England and Wales