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the Parole Board
working with others to protect the public

10 May 2022

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Ministry of Justice
102 Petty France
London SW1H 9AJ

Dear [redacted]

The Management Committee of the Parole Board has carefully considered the Root and Branch Review of the Parole System which was published on 31 March 2022 and thought it might be helpful to share with you and the Ministry our considered advice on what is proposed.

As you will be aware, the Parole Board has been through a number of reviews since April 2018 and we have always welcomed and sought to do all we can to embrace the changes proposed. There are many positive proposals in the Root and Branch Review that we do welcome and we will work with your officials to further develop and implement them.

We are, however, committed to ensuring that any changes brought forward are practical and legally workable and informed by our close knowledge of the system. At present we see some risks with some aspects of the planned reforms and thought it would be helpful to draw these to your attention.

Introduction

We are glad that the Root and Branch Review has concluded, as all other reviews have concluded, that the parole system performs its core functions effectively. Public protection has always been, and will aways remain our top priority. It is probably inevitable that the public perception, and media focus, of our work is on those one in four prisoners we release rather than the 75% of offenders who are lawfully kept in custody because a court (the Parole Board) has determined they remain an unacceptable risk to the public. I am certain that an incalculable number of serious offences have been avoided by the diligent work of our members, making fair decisions based on evidence, that imprisonment remains necessary for the protection of the public. It is notable that since the TORERA Act 2020 was implemented, the overwhelming majority of terrorist prisoners who would otherwise have been automatically released at the half way point of their sentence; have, after a thorough review of the evidence by a parole panel, been ordered to remain in prison for the protection of the public.

[redacted] (direct line) - [redacted]
3rd Floor, 10 South Colonnade, London E14 4PU www.gov.uk/government/organisations/parole-board
info@paroleboard.gov.uk @Parole_Board 0203 880 0885
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A mark of how seriously we take our duties is that in 2020-21, the Parole Board made 16,443 decisions on whether the test for release was met; 4,289 directions for release; and 27 alleged serious further offences were referred to our Review Committee following an offender being charged with a serious further offence (even fewer, around half of those charged, are subsequently convicted). The Ministry's figures suggest that 23% of people currently in prison serving a life sentence have served their minimum tariff set for punishment, and are being kept in custody because of the oversight of the Parole Board; those prisoners have spent an average of 9.2 extra years in prison as a result.

Since we mainly assess those who have committed grave offences, victims and the public sometimes find our decisions difficult to fathom and that is why honesty and transparency about the law and the reasons for our decisions is so vital. We absolutely endorse proposals to provide even greater detail in our decision summaries for victims, and look forward to holding public hearings where it is in the interests of justice.

Changes to sentencing are often at the heart of public concern. Until the passing of the Criminal Justice Act 2003, twenty to thirty years was usually the longest tariff imposed for those convicted of the worst categories of murder including the murder of a child, whereas the starting point may now be a whole life sentence. Confusion can therefore be caused when the Parole Board is asked to consider the release of an offender who if sentenced today might never be eligible for release (by reason of punishment) given that it is not generally well understood that our sole focus, in law, is risk. The media often approach Parole Board hearings as though they should be re-sentencing exercises, but release can only be directed by a parole panel in cases where such a release has been envisaged to be possible by the sentencing judge.

This misunderstanding about our role can create issues with public confidence; however, there is research, which indicates there are many factors, such as length of time in prison, age of the prisoner, and changes they have made through interventions and maturation that are linked to a reduction in risk that an offender presents. Furthermore, millions of pounds are invested by HMPPS each year, seeking to reform offenders through courses and interventions. These interventions lead to professionals presenting evidence that an offender has made substantial changes and may be safe to be released, sometimes against public expectation, and this is evidence that our panel members must by law consider. The incidence of serious reoffending by those serving life sentences in the UK and across the World, supports that assessment in most cases. In England and Wales just 2% sentenced to a mandatory life sentence were reconvicted of any criminal offence within a year of release, compared to 45% of the overall prison population. Our alleged SFO figures for 2020/21 involve just two cases where an offender was released from a life sentence. All decisions are however taken on their individual merits and can only be based on the evidence which is received by the Panel both in written reports and after having listened to the witnesses. That is why we welcome your agreement to send a legal representative to our hearings where as Secretary of State you do not believe that the test for release is met, even where there may be other evidence supporting release. Our panels sometimes receive overwhelming evidence in support of release in high profile cases, and it would be helpful if the Secretary of State asserted alternative arguments for the panel to

consider. There is a huge amount to be gained by better presentation of the evidence, including for example, evidence from the police where an offender has been arrested but not been charged with an offence. At present the Parole Board go to great lengths to direct such evidence, but there is undoubtedly a case for better protocols so that it is presented at the point of referral, wherever relevant.

Although it is an ongoing challenge, the Parole Board will continue to work hard to increase public confidence and understanding of our remit and our strong record on public protection.

The release test

The Parole Board notes that the Ministry intends to seek to clarify the release test and we will of course apply the law as decided by Parliament.

We also note that the Review proposes a precautionary principle. We very much support a precautionary approach to public protection, and that is built into our training and guidance, and reflected in our outcomes. In our view, the legal position is clear that the protection of the public is always paramount, and if our members are not satisfied that the test for release is met, our members must not direct release.

In the Review, emphasis is placed upon how it is said the statutory release test has over time been changed by the courts and moved away from Parliament's original intention (in your foreword page 3, introduction page 8, paragraph 14, page 13, paragraph 27, page 23, paragraph 74). We have reviewed the legal position carefully, and would like to reassure you that this may be a misreading of Sir Thomas Bingham MR's judgment in *R v Parole Board, ex parte Bradley* [1991] 1 WLR 134. Currently, there is a presumption of release only in a very small sub-set of cases but that presumption does not remove the requirement to consider public safety. The legal position in all cases is that the protection of the public has been and is always paramount. If our members are not satisfied that the test for release is met, (i.e. that is no longer necessary for the prisoner to be detained in order to protect the public from serious harm), they will not direct release. The release test itself has not changed. In a particularly strong Court of Appeal judgment in King v Parole Board [2016] EWCA Civ 51, the then Master of the Rolls made it clear that the words "necessary for the protection of the public" do not entail "a balancing exercise in which the risk to the public is to be weighed against the benefits of release to the prisoner or the public. The concept of 'protecting the public' does not involve any kind of balancing exercise. It simply involves safeguarding the public from the danger posed by the prisoner." That remains the position today as reflected in our guidance. It is simply not correct to state that the Board has treated its task as a balancing exercise considering the competing interests of the prisoner and the protection of the public. With respect, our legal reading is that the test has not seen a drift away from its original meaning. It remains in the terms set out in your foreword and requires no refinement.

Although the list of proposed specific, statutory criteria (at paragraph 77 of the Root and Branch Review) would routinely be covered by our members, it is not, and could not be an exhaustive list, nor could it indicate how the interplay between different criteria might further exacerbate risk. There is indeed a potential argument that

unless carefully drafted, the setting of statutory criteria, by implying the exclusion of unstated criteria, may actually impede the abilities of panels to take into account all aspects of risk. It does seem inevitable to us that the higher the bar set by the release test, the greater the chances that hearings will get longer, and that the number of prisoners directed as safe to be released will reduce. If our release rate reduced from 25% to 20%, it would increase the prison population by approximately 800 places per year. The size of the prison population plays no part in Parole Board decision making, of course, but felt we should note the point.

Composition of panels

The Parole Board believes that the strength of its membership lies in its diversity and our ability to bring together different experiences and expertise to bear on the needs of each case. Two thirds of our members already have real world experience of the criminal justice system as judges, magistrates, forensic psychologists, probation officers, prison officers and police officers or as criminal lawyers. This variety of background and experience enables us to flexibly assign our members to panels where their individual expertise is best used. The Parole Board takes very great care in how it panels cases.

Given the value of having a variety of skills amongst our members, we welcome the intention to recruit more members from a law enforcement background and believe this will enable us to meet our steadily increasing caseload. We hope to commence a new recruitment exercise to recruit more people to chair hearings and have begun work on how to expand that to include prospective candidates from a law enforcement background.

We would urge caution on mandating that certain membership types should sit on certain cases. All of our members are trained to make decisions based on the evidence, and their ability to be fair. Our evidence is that there is no significant difference in decision making between member types, including police officers. It could create legal risk in the future, if the appointment of police officers was presented as an attempt to influence decision making. The Court of Appeal, in the case of *Brooke*[1], found that the Ministry had acted unlawfully in seeking to influence Parole Board decision making through the appointment process. Secondly, and of vital importance, a blanket requirement to use members of a particular background has the potential to create immense practical difficulties. For our most complex cases we use our most experienced and specialist members. It would be impossible for us to panel cases appropriately, without huge legal and reputational risk, and potential risk to the public, if we were required to panel our most important cases with newly appointed members who are still building their experience. The alternative would be long delays in these cases while we deploy our limited number of existing members or wait until new members are upskilled; and that would come at a cost to the public purse, as prisoners are entitled to seek compensation in respect of excessive delay.

[1] [2008] 1 WLR 1950

Introducing a new ministerial power to refuse release

We note that the Root and Branch Review includes proposals to give minister's the final say in a small number of cases. We understand that further work will need to be done on these proposals to ensure it is workable and abides by the legal framework. Currently two models are proposed and we do not know which will eventually be preferred. We look forward to seeing the detail of what is proposed so we can better understand its implications and how the numbers are to be limited. We think that as many as 2,000 prisoners per year may potentially qualify for the top tier. We do not know whether all of these will be treated as top tier cases, or only some – and in the latter case, how they will be selected, how public transparency of the selection process will be ensured, who will select them, and what opportunity any prisoner might have to challenge a decision to include (or exclude) them from the top tier. We would of course be happy to work with your officials on these details.

The Root and Branch Review itself noted that parole decisions are fair, robust and of a high quality having considered all of the evidence. However, the ability to challenge a decision is a fundamental part of the criminal justice system. As such, we have always welcomed developments which enabled people seeking to review our decisions where they believe they are irrational, unfair or unlawful. In recent years, we have introduced the reconsideration mechanism to enable parties to Parole Board proceedings to do so, and we have also previously proposed introducing a statutory right of appeal to the Court of Appeal (Criminal) Division where the parties were concerned about our decisions.

Whilst it is a matter for Parliament to decide how it wishes to legislate, and we will of course act in accordance with the law, we are aware that this is a complex legal area. Article 5(4) of the European Convention on Human Rights assigns the role of making decisions about restrictions on liberty to a court. Accordingly, the current legal framework has developed in response to a long series of judgments in both UK courts and the European Court of Human Rights[2]. The clear principle is that the <u>final</u> decision on the release of prisoners should be a matter for a court or a court-like body - a function that the Parole Board currently performs.

[2] For example, *Thynne, Wilson and Gunnell v UK (1990) 13 EHRR 666; Singh and Hussain v UK (1996)* 22 EHRR 1; *Stafford v UK (2002) 13 BHRC 260; Girling [2007] 2 WLR 282; Brooke [2008] 1 WLR 1950.*

We do note that since the final decision was moved to the Parole Board, media and public criticism and scrutiny of controversial decisions has shifted from criticism of ministers, to direct criticism of the Parole Board. We accept that scrutiny. Whilst in reality there are only a handful of controversial decisions each year, there must be an inevitable risk that victims and media interest will grow and affect increasing numbers of decisions, if that decision rests with a minister. Moving the final decision to ministers will, inevitably shine a light on the fact that it is almost unheard of for a parole panel to release a notorious offender without strong evidence from officials that an offender is safe to be released. It may also create further delays to cases in respect of which a prisoner may be able seek compensation.

Any ministerial decision to override a Parole Board decision will attract legal risk. Your decision to send proper legal representation to the cases which cause you most concern will no doubt be helpful if such decisions are challenged. Given you have floated two options; we would urge some caution on the suggestion that has been floated in the review that you may personally [redacted] sit on appeal decisions given you are already a party to the proceedings. One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. The guiding principle, which has been a hallmark of our law since the C19, is that no one may be a judge in his own cause. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings and is likely to apply to any duality of role which suggest to an informed observer a real danger or possibility of apparent bias.

As you acknowledge, the assessment of future risk is difficult and complex; and also sometimes counter-intuitive. Some of the most difficult and complex cases in the system are not the controversial cases which attract public attention. In our experience it is more common for serious further offences to be committed by offenders with live risk factors who have been recalled to prison, or those serving IPP sentences for offences of violence and robbery, than those serving life sentences for murder and serious sexual offences.

Moves to open conditions

We note your intention to restructure your approach to making decisions about recommendations for open conditions. That is clearly a matter for you. Whilst extremely rare, we can understand the public concern that arises when prisoners abscond from open conditions, and we would be happy to work with the Ministry on better refining the criteria for moves to open.

We should, however note that testing in open conditions for some prisoners is critical to assessing whether that person has sufficiently reduced his/her risk, in a controlled fashion, and whether an offender is ready for release. Some prisoners who move to open conditions fail that test, because their behaviour in open conditions provides crucial new risk related evidence on whether their apparent progress in custody translates into a lower risk in the community when they are in a less structured environment with greater freedom. If that option is off the table, it is inevitable that some of the most complex individuals will be released directly

from closed conditions into the community, with less certainty on how they might behave and that could increase risk to the public.

The role of victims

The Parole Board welcomes moves to allow greater access for victims. Given the harm caused by those in the parole process we think it important that there are clear rights and proper support for victims when they choose to be involved in the process. Currently a prisoner's progress in custody (or lack of it) is often shrouded in a veil of secrecy and this secrecy means that victims are ill-prepared for when a prisoner is to be considered for release. We believe there is a strong case for (HMPPS) providing victims with much clearer and regular updates on how a prisoner is progressing in custody as this will better prepare them when a prisoner enters the parole process. We have been working on our own transparency. Since 2018, we have provided well over 6,000 decision summaries, of which over 95% were to victims. We have put in place systems to enable victims to attend hearings to read their statements to the panel, or to pre-record those statements so that the panel can see them. We have also started work on how we can facilitate the attendance of victims at hearings more widely. The Root and Branch Review noted the MoJ plans to conduct a further Review around this area and the Board would be keen to offer any assistance it can in aiding this work.

We are looking at the Review's proposals to enable victims to make submissions to the panels and ask questions. It is currently unclear to us how these submissions will feed into the test for release – both as it is, and under any new release test – or the extent to which victims will need access to information held in the dossier in order to make submissions. We are also unsure about which point or points during the hearing that any questions posed by a victim can be put. We would also wish to protect victims from being unnecessarily called as witnesses to be cross-examined in front of, or by, prisoners, which further insertion of victims into the process may facilitate. We look forward to working with your officials on how this may work in practice.

The Parole Board is also concerned that those victims engaged in the parole process are given the support they deserve when they are involved in the parole process. Whilst Victim Liaison Officers carry out a valuable role, we do not believe they have the time, nor the skills to provide the specialist support that many victims may need when observing parole hearings. For good and understandable reasons, parole hearings will often ask probing and direct questions exposing graphic details about a prisoner's offending, sexual predilections, and alleged but unproven allegations. These questions can be vital to our assessment of risk. In opening up parole hearings to victims, we are mindful that the system needs to do all it can to avoid re-traumatisation of victims who may find such evidence distressing.

Improving the wider system

The Parole Board welcomes the introduction of a Parole System Oversight Board and independent inspection of the wider system which we have argued for since 2019.

Parole Board decision making can only be properly understood through the prism of the work that has been undertaken with a prisoner for many years before they are even eligible for parole. Whether it is a prisoner's progress, the cause of delay or the failure to comply with directions of the Parole Board – we are clear that there is considerable scope for improving the system through increased scrutiny and better leadership and would be keen for this work to start immediately.

Since primary legislation is required, we do think it would be a missed opportunity not to look at increasing the Parole Board's powers to enforce its directions. Failure to comply with Parole Board directions is a huge blight on the system and the cause of considerable delays and wasted public money. We have also previously argued for contempt powers if we are to hold public hearings in the future.

We would welcome the opportunity to work with your officials as you further develop the details of these proposals in the coming months.

Yours sincerely

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The Parole Board for England and Wales

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