

Parole Board response to
Ministry of Justice consultation paper
“The Future of the Parole Board”

17 November 2009



Introduction

1. In general, the Consultation Document accurately sets out the background to the need for a re-evaluation of the work of the Parole Board and its place in the Criminal Justice System. It does not, however, make sufficiently clear the extent to which a reappraisal is necessary in order to meet the requirements of Article 5(4) of the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights, and the domestic courts. These legal constraints require a significant proportion of the Board's work to be dealt with by a "court-like" body, in other words a body entirely independent of the executive. Whatever the exact parameters of that requirement may be, it undoubtedly encompasses decisions relating to release from life and indeterminate sentences. In the Board's view, such a body cannot have the necessary independence unless it is free from executive, as opposed to legislative, control. This means that the body exercising the Board's present functions which engage Article 5(4) of the European Convention on Human Rights cannot be a body which is appointed by the executive or subject to any form of control, by way of directions or otherwise, by the executive.
2. It follows that there will of necessity have to be a body which is Article 5(4) compliant to meet the requirements set out above. The Consultation Document makes it clear that, at present, there are many functions carried out by the Board which are arguably free from the constraints of Article 5(4), but which require precisely the same expertise as those which are not. These

functions are, can, and sensibly should, be carried out by the same body which is necessary to carry out the functions which are undoubtedly caught by Article 5(4). The body which is required to comply with the requirements of Article 5(4) is essentially one which will be concerned with the assessment of the risk of future relevant offending on release be it in the context of life, indefinite or extended sentences, or in any other context. And, it may be that, either as a matter of policy, or judicial interpretation of the extent of Article 5(4), there will ultimately be other decisions which should be taken by a body with similar expertise extending beyond the present jurisdiction of the Board. It seems to the Board, therefore, that it is essential that any decisions taken at this stage should ensure that the structures put in place can provide the framework within which not only the present functions of the Board can sensibly, and lawfully, be exercised, but which provides a sound basis for any future developments in relation to other functions relevant to ultimate release which may be considered appropriate, or necessary, in the future.

3. The Board, therefore, proposes to respond to the Consultation Document by indicating, firstly, what the functions of the body which has necessarily to be created as a result of the legal constraints which have been referred to above should be, what powers that body should have, what expertise should be required of the members of that body, and finally the place of that body within the criminal justice system. The response will then deal with some of the practical consequences, such as any necessary appellate structures, and in particular the administrative and other necessary staff structures.

Functions

4. The present functions of the Board are set out accurately in the Consultation Document. They are essentially concerned with the protection of the public and form a critical part of the criminal justice system. There is what in this context may be called the core function, which is the function of determining whether or not and when it is appropriate to release prisoners who have been subject to sentences of life imprisonment, imprisonment for public protection, extended sentences, and some other determinate sentences. There is a function in relation to the release of prisoners on licence who have been administratively recalled to prison; and there is an advisory function in certain cases as to whether or not prisoners should be moved from closed to open conditions. The Board considers that all these functions raise the same essential question namely whether or not the risk to the public of the prisoner re-offending has sufficiently reduced to justify release. Accordingly they can and should be exercised by the same body which is necessary in any event to meet the requirements of Article 5(4). It would be unnecessary and potentially a procedural disaster if different bodies carrying out the same essential function as to risk assessment were to have jurisdictions which depended on the somewhat uncertain line as to whether or not a particular decision engaged Article 5(4) or not.

5. At the present time the Board's function in relation to recall does not strictly speaking include determining the question of whether or not recall was factually justified, save insofar as determining that question may affect assessment of risk. Whatever in future may be considered the extent of this

jurisdiction, to disentangle the decision as to the appropriateness of recall from the decision as to the appropriateness and timing of further release could produce an unwieldy structure; and the Board is content for the two functions to be exercised by the same body, were it considered appropriate for there to be a formal decision as to the appropriateness of recall.

6. Whether or not the body should have any functions beyond those which are at present exercised by the Board is, as has been indicated above, essentially a question of policy, or perhaps development of the jurisprudence in relation to Article 5(4). The Board has in mind, in particular, decisions made by the executive, for example the prison authorities, which may have a significant effect on the length of time to be served by a prisoner. The Board makes no comment at the moment on the appropriateness or otherwise of such an extension of jurisdiction, but considers that whatever structure is ultimately put in place should provide an appropriate forum within which such further functions could be exercised.

Powers

7. At present the only power which the Board has is to order or refuse to order release in cases involving life sentences, indefinite sentences, extended sentences and some other determinate sentences. Any other decision by the Board, or any member of the Board, is only a recommendation or a direction which has no sanction. As far as substantive decisions are concerned, i.e. decisions directly relating to release or transfer to open conditions, the only distinction between the two is that in the latter prison resources are involved,

whereas in the former the prisoner is released from custody and probation resources are involved. As the present philosophy is that NOMS should be a seamless structure, it is difficult to justify the difference in powers. The only relevant justification for refusing to accept a decision as to transfer to open conditions, could, it seems to the Board, be the fact that for example there is no room within open institutions or some other clearly established operational reason such as security considerations for not moving the prisoner. Those, therefore, should be the only justifications for not transferring a prisoner if otherwise that would be appropriate. If the functions at present exercised by the Board are extended beyond the present ones, again the only justifiable reason for not making what would otherwise be an appropriate order should be practicable impossibility for clearly established operational reasons. In other words, all substantive decisions by the body should be enforceable as a matter of law. The prison authorities' position would be protected by the need to take account of functional requirements or constraints.

8. As far as procedural decisions are concerned, the Board considers that similar considerations should apply. In order to determine satisfactorily the issues as to risk raised by any particular case, those exercising the relevant functions must be entitled to require reports or evidence, including the attendance of witnesses, in the same way as a Court. The only exceptions must again be related to practical impossibility for example because of clearly established constraints of resources. And the powers to make the appropriate orders should be as simple to exercise and enforce as possible.

9. The opportunity should be taken to define these powers clearly in statutory form. If there is no present intention to extend the functions of the body beyond the functions at present exercised by the Board, it should be made clear that the powers should not extend to any requirement as to the appropriate prison regime or other operational matter other than clearly defined procedural requirements such as the reports which have already been referred to. The basis upon which substantive decisions are made, which are at present governed essentially by directions given by the Secretary of State (which have the status of guidance and are accordingly not mandatory), should also be statutorily defined. The tests at present applied appear to be generally accepted as appropriate. In the case of life sentences and other indeterminate sentences, the relevant risk which needs to be considered is the risk to life or limb, in order to reflect the original justification for the sentence and in so far as determinate sentences including extended sentences are concerned, the risk of re-offending within the determinate term.

The expertise of the relevant body

10. The Board knows of no justifiable criticism of the way in which its functions have to date been exercised which are related to the makeup of the panels which have been carrying out its functions. At present the panels are drawn from three essential constituencies. These are the judicial members, the professional members, and the independent members. The judicial members are at present drawn, with the exception of two or three High Court Judges, from serving or retired Circuit Judges. The professional members are

recruited from psychiatrists, psychologists, members of the Probation Service and those with other experience of the criminal justice system. The independent members are intended to reflect a wide range of lay experience and expertise. At present, apart from those decisions which are capable of being determined by a single member, in which case any appropriately qualified and trained member can be asked to exercise the Board's functions, decisions are taken by panels of three (unless in special circumstances it is appropriate for there to be a panel of two). A judicial member will chair the panel in oral hearings involving life sentences and a proportion of those involving other indeterminate sentences. In the latter case, panels may be chaired by other members, appropriately qualified and trained. Applications dealt with in writing are generally determined by panels which do not include a judicial member. There is no doubt that the mix of expertise which is brought to bear has been a critical factor in the quality of decision making by the Board. The Board is firmly of the view that its functions cannot be properly exercised unless the same spread of experience and expertise is retained. And of particular importance is the fact that the culture of the Board is that each member whether judicial, professional or otherwise considered by colleagues as of equal status.

Its place in the criminal justice system

11. The functions presently exercised by the Board, and those further functions discussed above, underline the fact that this consultation paper is concerned, as already stated, with a fundamental part of the criminal justice system. The Board considers that its functions should continue to be exercised by a

body which includes those who do not necessarily have any judicial or quasi-judicial experience. Although lawyers are now involved in many oral hearings, and indeed make written submission in some of the applications dealt with on paper, the procedure adopted reflects the fact that decisions in relation to risk cannot be taken in the context of a formal trial structure. Concepts of legal admissibility and formal standards of proof have no place in such proceedings. Decisions are essentially an exercise of judgement based on whatever material can properly be considered relevant. The procedure is essentially inquisitorial. The nature of the body exercising the functions of the Board, and the nature of the hearing itself therefore, may point towards the body in question being more satisfactorily categorised as a tribunal than as a court. And there are some who would consider that the tribunal system would be the appropriate ultimate resting place for the body intended to carry out its functions. This would reflect the relative informality of the procedure, the mix of expertise required for the purpose of decision making, and would help retain the collegiality and informality of the proceedings. Even those who think that that solution is inappropriate accept that there is no insuperable obstacle to the Board's functions being subsumed within the tribunal service in one form or another.

12. However, that solution fails to recognise the importance of the functions of the Board as an integral part of the criminal justice system. Its functions represent the ultimate conclusion of the legal process which was started by conviction and sentence. Article 5(4) reflects the basic principle that no person should be deprived of their liberty for any longer than is legally justifiable, a question properly the function of a court. There is, therefore, a

jurisprudential justification for the view that the functions of the Parole Board should be exercised either within the court structure, or by a body for which the Courts retain ultimate responsibility. Becoming a Court, in the strict sense of the word, could, however, result in procedural and structural rigidity which would not enable it to exercise its public protection function effectively. But the desired effect can be achieved by transfer of sponsorship from the Ministry of Justice to HMCS. This would impose direct responsibility for the effective discharge of Parole Board functions on HMCS, and the Lord Chief Justice, which would enable more focussed decisions to be taken by those responsible for judicial deployment in relation to the judicial and other resources necessary to carry out those functions. That would not be the case if the functions were exercised within the Tribunal system where the Parole Board would become subsumed within a structure in which it would simply be one Tribunal amongst many.

13. There are therefore good practical arguments for the Board's functions being exercised within or attached to the court system. A significant proportion of the Board's work needs to be carried out by panels chaired by judges as a result of the long standing policy that the release of those subject to life sentences should be determined by panels which include a judge. Because the Board is not at present part of the court system, judges are not *ex officio* members of the Board, have to apply to become members, and be subject to an appointment process which has inhibited recruitment for no apparent benefit. This has prevented the Board from responding effectively to the substantially increased need for panels including judges resulting from sentencing policy changes. Whatever the rights and wrongs of the latter, it is

obviously necessary now to accept that the only way to ensure that the functions of the Board can be resourced adequately is to ensure that provision of judicial resources in so far as possible a matter of judicial deployment and not recruitment by way of application. If the functions of the Board were to be part of the Court Service or at least the responsibility of the Court Service that could readily be achieved. Judges, or retired judges who wish to do the work, would be trained and appraised, but not subject to any other inhibition on their deployment by the Lord Chief Justice. Provided that retired judges are appropriately remunerated, this would transform the ability of the system to absorb the workload. It should be said that the difficulties have been significantly eased by the recent decisions firstly to remove appointment of judges from the OCPA structure and to pay retired judges the normal rate for judicial and quasi judicial work.

Consequences generally

14. Whether the Board's functions are exercised by a body within or attached to the Court Service, or the Tribunals system, the Board considers that there would need to be a dedicated administrative structure carrying out the same work as that which is carried out by the present administration. The Chairman, or President, should be a senior judge supported by a Chief Executive who should be given the powers of a member. There is merit, in addition, in giving similar powers to one or more senior staff, in the same way as at present. This structure provides a valuable link between members and

staff which it would be a pity to lose. Whether the Chief Executive should have such powers is, however, a matter for debate.

Appointment and tenure

15. Whether the functions of the Board are to be carried out by a tribunal within the tribunal service, or a court, or an independent body, consideration will undoubtedly have to be given to the appropriateness of the present recruitment process for professional and independent members. At present, all members (including judicial members) are appointed by the relevant Minister. That, for reasons which are obvious from the introduction to this response, can no longer be justified. As they will no longer be ministerial appointments, the system will not be required to meet the considerations laid down by the Office of the Commissioner for Public Appointments. This will enable not only the system of recruitment to be revisited, but also the terms of appointment. As far as the former is concerned, it will to some extent necessarily be determined by whether or not the functions are to be exercised by a tribunal or as part in some way of the Court Service. But there is much to be said for a system which permits the recruitment process to be tailor made. Apart from the fact that at present there are real concerns that reapplying members have been excluded at too early a stage in the process, the later stages, namely case study, role play and interview, have real merit. These mirror aspects of the actual work a member will have to do. Questions will, however, arise as to the length of tenure which is appropriate. At present that is three years, with a three year extension subject to satisfactory appraisals, and in some cases a final year before the need to re-apply. There

is clear justification for the view that the period should be longer, for example five years, followed by a further five years subject to satisfactory appraisal, making ten years before the need to reapply. Whether or not there should be a "fallow" year or two before such reapplication is also a matter for debate. Permanent appointment is another alternative, although that would require a regular reappraisal mechanism and would reduce the opportunity to bring in new members. Any extension of the term of appointment will require a concomitant increase in the frequency of appraisals.

Review of Decisions

16. Where any person or body (including the Secretary of State) affected by a decision, whether procedural or substantive, wishes to challenge such a decision, an appellate structure needs to be provided. The Board suggests that, in relation to procedural decisions, they could be reviewed in the first instance by another member if it was a decision by a single member, and by the Chairman or President where there has already been a first review by a single member, or where the original decision was made by a panel. There should be no further appeal other than on a point of law raising an issue of importance, and then only with leave, either to the Court of Appeal Criminal Division or whatever appellate body is appropriate within the Tribunals system. As far as substantive decisions are concerned, an appeal, including an appeal on the merits, should be brought, but only with leave, to a panel consisting of the Chairman or President, and two other members on paper only. If successful, and that decision does not determine the review, the case will be remitted for rehearing by a new panel. Thereafter there should be an

opportunity for a further appeal, but only with leave, on a question of law raising an issue of importance, to the appropriate body.

17. There is also a need for review, in a different sense, of decisions as to release which have resulted in the commission of a serious offence or offences by the prisoner who has been released. The Board at present has an informally constituted Review Committee consists of internal members and distinguished people with relevant experience. The Board considers that this is a necessary auxiliary function of whatever body succeeds the Board. It would be appropriate to formalise such a Committee and define the circumstances in which its function will need to be exercised.

Answers to the questions

Question 1

How should the Parole Board's existing jurisdiction, functions and powers be clarified?

The jurisdiction and function should be specifically identified, that is the determination of questions as to the appropriateness of release of prisoners sentenced to life imprisonment, imprisonment for public protection, extended sentences of imprisonment, and the remaining categories of prisoners subject to determinate sentences where the Board continues to have a statutory jurisdiction, questions as to the appropriateness of recall and release after recall, and decisions in relation to transfer to open conditions.

The Board does not consider (and this reflects the views of a substantial majority of members) that the jurisdiction should yet be extended to any other decisions relating to sentence management, or otherwise.

In order to carry out these functions, the body should have the power to make enforceable orders not only as to release, but also as to transfer of a prisoner to open conditions, with a necessary consequential power, to review any decisions to return such a prisoner to closed conditions.

Procedurally, it should have the power to make enforceable orders as to the attendance of witnesses, the provision of reports and other written material and to determine appropriate timetables for the provision for any material which it

considers necessary for the purpose of making a decision. In support of such orders it should have the power to make wasted costs orders and orders requiring anyone responsible for the failure to comply to attend and explain in person.

It should have the power to determine the extent to which any material should be disclosed to any relevant participant in the procedure.

It should have the power to determine the nature and the extent of the involvement of any victim, and the nature and extent of any evidence or material which a victim wishes to put before the body.

Question 2

Should there be alternative arrangements, other than Judicial Review in place to enable parties to proceedings to challenge parole board decisions? If so what might those arrangements be?

See paragraphs 16 and 17 above.

Question 3

Has the move of Sponsorship of the Parole Board within MOJ gone sufficiently far to protect the Board's independence and does it provide the best means for ensuring the Board's effectiveness and efficiency?

No. The most obvious problem is the fact that appointments remain a ministerial responsibility. But also, the fact that NOMS is the direct responsibility of the MOJ

continues to affect the perception of whether the Board has sufficient independence from executive functions relating to prisoners.

Question 4

Do you think sponsorship by either HMCS or the Tribunals Service would provide the appropriate level of independence and sufficient access to judicial resource?

Either would provide the appropriate level of independence. Transfer to HMCS to be part of the court service or transfer of sponsorship to HMCS would provide greater access to judicial resource.

Question 5

In light of your views as to the jurisdiction, function, powers and place which the Board has within the Criminal Justice System, what is the appropriate mechanism, for appointing members?

The most logical mechanism is the Judicial Appointments Commission. But there would be merit in considering direct appointment by the new body perhaps overseen by the JAC. This would enable the appointments structure to be tailor made, and would reduce bureaucracy.

Question 6

What should the tenure arrangements be for members?

Five years plus five years, although there is some support from members for unrestricted appointment, subject only to a rigorous appraisal system and a retirement age.

Question 7

In light of your responses to the previous questions, what status should the Parole Board hold within the Criminal Justice System? Should it be a court, tribunal or hold some other status as its current NDPB status?

The Board considers that transfer of sponsorship to HMCS would best serve the requirement of independence would enable its functions to be carried out with the necessary informality and would retain the essential inquisitorial nature of the proceedings. If it became part of the court structure formally, the latter two could be put at risk. If HMCS is directly responsible, as the sponsorship body, for delivery of the functions of the Board, the Board will be in a better position to obtain the necessary resources for it to fulfil its functions effectively, and to do so without being subsumed within a large organisation in which its functions are of peripheral relevance, which would be the case if it became part of the Tribunal Service.

Question 8

Do you think the type of work dealt with by the Parole Board would be compatible with becoming part of either the Tribunals or Courts structure?

Both.

Question 9

Do you have any alternatives to the above models?

See answer to question 7.

Question 10

Do you have any views on the initial impact assessment, including any potential adverse impact on any particular group of people, what steps should be taken to mitigate this, and anything else the full impact assessment should cover?

If the ultimate solution is that the Parole Board remains the body which is charged with carrying out the functions which have been discussed above, and that the only structural change necessary is to transfer sponsorship to HMCS, the only impact will be on areas where a closer relationship with HMCS might result in the opportunity for efficiency savings. An appeal structure, whilst capable of encouraging "litigation" by way of appeal, will reduce litigation by way of judicial review.

Integration into HMCS as a Court is capable of having significant resource implications. The impetus to formalise procedure would inevitably have an impact on the Board's ability to deal with its workload with the relatively low level of administrative support needed at present, and would make it even more difficult to keep within the time constraints than at present. It is difficult to see that either problem would be alleviated by integration into the Tribunal Service. Integration into either could clearly have serious effects on the present staff, who provide an outstanding service to the Board.