RESPONSE ON BEHALF OF THE CRIMINAL BAR ASSOCIATION ON THE CONSULTATION ON THE FUTURE OF THE PAROLE BOARD

Introduction

In seeking to address the questions raised in the consultation document we have repeatedly been driven back to the view that the questions posed do not address the really serious problems that the Parole Board (PB) currently faces and which in our view prevent it from properly carrying out its duties. In particular, the questions do not begin to address the issues of funding and resources for the PB. The huge increase in indeterminate sentences (from approximately 5,000 in 2005 to the current figure of about 13,000), from which release is only possible by direction of the PB, has increased the strain on the resources of the Board at a time when it is singularly ill equipped to deal with this. This problem is well known to the senior judiciary and

has been noted in a number of recent decisions at all levels of our court system.

The suggestion, which comes from the PB itself, that the massive increase in workload that the number of indeterminate sentence prisoners (ISPs) has brought to the PB is to be offset by the reduction in determinate sentence parole work is fanciful when set against the PB's own forecasts. The PB Business Plan 09/10 projected that the number of ISP oral hearings would *double* during the period.

It is our collective experience as advocates who regularly appear before the Board that delays continue to be caused by the lack of available panels to hear cases and despite whatever attempts the Board has made to address this issue, and which persuaded Collins J in *R (Betteridge) v. Parole Board and Sect of State for Justice* [2009] EWHC 1638 (Admin) that things were improving, our experience is to the contrary. Delay also continues to occur because of the failure by the Ministry of Justice (MoJ) to obtain relevant reports and assessments which are necessary for the Board to have when considering the danger the prisoner may present if released.

Further, the work of the Board continues to be seriously hampered, indeed rendered meaningless in many cases, by the continuing failure to provide acceptable and reasonable levels of offending behaviour work and other treatments, by which risk can be both diminished and measured. In our view unless urgent steps are taken to address these fundamental issues then this consultation exercise will amount to little more than window dressing. The parole process requires substantially greater resourcing, not creative cuts which reduce access to justice. With that substantial caveat we now turn to consider the questions posed.

Q. 1 Jurisdiction

We are concerned about the recent changes to oral hearings; the PB now makes initial paper decisions, declining oral hearings in cases where the member takes the view that there is no realistic prospect of release or open conditions. Previously oral hearings were held in every case where the prisoner requested one. Apart from the legality of the new system - we think it is arguable that compliance with **Article 5(4)** in such circumstances *requires* an oral hearing – our experience is that the oral process is often

very important to the progress of the prisoner even in those cases where recommendation for open or direction for release is not achieved.

In the new system many prisoners will remain in detention long after tariff expiry, with no sufficient access to relevant and necessary courses, and with a mere paper exercise by the 'court' which is to determine the legality of their continuing detention. The only merit in the new system is that it will save costs, laudable in itself, but at real cost to both the prisoner and society with such a big stake in rehabilitation. If proper resources were applied to the system, rather than corner-cutting cost savings, then there would be real savings in terms of the reduction of crime and the reduction in the population of such prisoners which is known to be so expensive.

We think that Parole Board should be able to make recommendations about course work required to be completed by a prisoner, and the timing of reviews by the Board. To the extent that the decision of the House of Lords in *Sect of State for Justice v. James; R. (Lee) v.SSJ* [2009] UKHL 22 may be taken to be a deterrent to the PB making suggestions as to future course work that should be made available to the prisoner, this is to be regretted since it is important that the body tasked with assessing risk should be able to state what in their view the prisoner needs to do in order to address this risk so that proper consideration can be given to assessing

whether the risk has been reduced to the extent that his release can then be ordered.

Since the decision of the PB relates wholly to current risk, it is important that where steps can be identified which can reduce risk these should be spelled out in the decision letter of the PB. If the PB believes that attendance on a specific course is essential to a future decision of the PB they should be able to specify the relevant course in their decision letter. This accords with common sense, and greater direction from the ultimate decision-maker is likely to make savings incurred in providing less important courses and treatment.

As to directions given by the Secretary of State under s.32 (6) of the *Criminal Justice Act 1991* we consider that it is plainly inappropriate for the MoJ as a party to proceedings before the Board to give Directions as to how the Board is to fulfil its function. Whether treating the directions as mere "guidance" (See *R (Girling) v. The Parole Board and SSHD* [2006] EWCA Civ 1779 at para 23) really answers the objection may be open to question.

Q.2 Appeals

Given the intensely fact specific nature of hearings before the Parole Board such decisions would not be readily amenable to an appeal to the Court of Appeal. The possibility of a Second Tier, or Upper Board such as in the recent changes made in respect of Mental Health Tribunals is more complicated. It would create a far more accessible route of review than the current 'big stick' of judicial review, and it could provide similar remedies, but it would require significant extra resources.

Q.3. Sponsorship

We do not consider that the move of sponsorship from NOMS to the Access to Justice Group (AJG) has resulted in the independence of the Parole Board being sufficiently protected. As the Consultation paper itself makes clear in paragraph 5 the AJG has a similar relationship to the Secretary of State as NOMS. Full independence is important to the Board and also to its 'clients'.

We suggest, without having a strong preference, that sponsorship should be transferred to HMCS rather than to the Tribunals Service. On the other hand we do not favour full integration of the Parole Board with HMCS. We consider that it is important that the PB must be able to retain its own identity. We also think it would be a mistake to see the parole process as

simply an extension of the sentencing procedure before the Crown Court. The issues facing a judge at sentencing are very different from those that have to be considered on a parole application.

In particular, although judges often have to consider indeterminate sentences based on a risk of future serious reoffending they are not in a position at the date of sentencing to do any more than decide that future dangerousness will have to be considered at the expiry of the minimum term. To this end the sentencing judge will not have access to more than a minimum of information on which to make his assessment. On the other hand by the time the PB comes to consider an application for release on licence there will have been built up a substantial dossier of material and information on the prisoner, course work undertaken and detailed reports as to his progress, on which a proper assessment of the risk that he presents at that time can be made.

We also consider that it is important that hearings before the PB retain their essentially inquisitorial character and the degree of informality that can only be achieved by the Board visiting the prison and holding the hearing around a table rather than in the very different surroundings of a traditional courtroom. Transferring to HMCS would have a very obvious advantage of

widening the pool of judicial resources, but judges unfamiliar with parole matters would have to be subject to substantial training.

Q.4 Independence and Judicial recourses

Sponsorship by either HMCS or the Tribunals Service would in our view provide the appropriate level of independence from the MoJ. The significance of the point that is made about judicial resources should not be overstated because of the necessity of substantial training. A change of sponsorship would not automatically solve the problem of the availability of judges. There are already some judges who sit in both the Crown Court and the PB. As explained above the work of the PB is significantly different to the sentencing exercise in the Crown Court. As we stated in answer to Q.3 above, the judges who are to work in the PB would need substantial extra training before being able to carry out their functions in the PB. And it should not be forgotten that there remains a shortage of other specialist panel members; for example psychiatrists and psychologists.

Q5. The appointment mechanism

Given the criticism in respect of security of tenure in *Brooke and others* [2008] EWCA Civ 29, at paras 31 to 33 it is hard to see how the current

regime of appointment by the Secretary of State is appropriate given that he is always a party to the proceedings. Given that both Queen's Counsel and Judges are now selected by independent bodies we consider that members of the Parole Board should also be selected in a similar way that is independent of the influence of the Secretary of State. The Judicial Appointments Commission would appear to the obvious body to which responsibility should be transferred.

Q6. Tenure

Of more concern to us than the precise period that should be served by members of the PB is the fact that reappointment is currently in the gift of the Secretary of State, and subject to "satisfactory performance". This is hardly an endorsement of fairness and independence, nor an incentive to members to take decisions they believe to be right but which the Secretary of State may not favour. The way to deal with this, in our view, is for re-appointment to be dealt with by the same independent panel involved in initial selection.

Q.7 Status

We do not think there is any distinction here that would make any difference to the work and performance of the PB.

Q.8

We think the work of the PB would be compatible with it being part of either the Court Service or the Tribunals Service but as set out above we do not have any strong views on which service the PB should be part of. Our views here are however subject to what we have said above in answer to Q 3 about the importance of preserving the current nature of hearings before the Board.

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