

A New Parole System for England and Wales





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Chapter 1

Introduction and summary of recommendations

- 1.1 JUSTICE is an all-party law reform and human rights organisation dedicated to advancing access to justice, human rights and the rule of law.
- 1.2 This report makes recommendations for a new parole system for England and Wales, proposing that an independent Parole Tribunal be established as part of the Tribunals Service to replace the existing Parole Board. As a judicial body making decisions regarding liberty, the tribunal would be independent of the executive and would have the powers and resources necessary to enable it to make expert and informed decisions regarding which prisoners should be released.
- 1.3 We have deliberately refrained from making recommendations in the main body of this report about the sentencing framework in England and Wales, the sentencing practice of judges and magistrates, or the custodial regime in our prisons. However, we offer the following comments by way of context for our proposals.
- 1.4 The difficulties encountered by the Parole Board in its recent history – often resulting in adverse judicial rulings – have two main causes. The first, lack of sufficient independence from the executive, arises from the historical evolution of the Parole Board from a body advising the secretary of state to a tribunal adjudicating upon release of prisoners. The second is the difficulty encountered by the Parole Board, as currently resourced and constituted, in effectively managing its caseload. Chapter 7 of this report, dealing with life and indeterminate sentence prisoners, details the problems caused by the lack of compliance with timetabling and the need for a jurisdiction with the power to supervise cases and manage their progression effectively.
- 1.5 Our proposals will remedy the deficiency in powers but there is also currently a deficit in resources. We anticipate that savings will result if our proposals are adopted, since the Tribunals Service already has an administration and infrastructure which could serve the Parole Tribunal, and some existing tribunal members may be eligible to sit on parole tribunals. The ability of the tribunal to make directions as to listing and case progression is also likely to avoid the unproductive cost of deferred hearings, while appeals to the Upper Tribunal may also cost less than judicial review proceedings.
- 1.6 The huge increase in the Parole Board's caseload detailed in this report has resulted in the temptation to save money by compromising procedural standards – for example, the Intensive Case Management process (ICM) limits the right to an oral hearing and leads to some decisions

being taken by a single member of the Parole Board ‘on the papers’.¹ Throughout this report, we stress that procedural fairness is not only an obligation at common law and under the European Convention on Human Rights (ECHR)² but also promotes optimal decision-making by ensuring that evidence used to release (or refuse to release) a prisoner is properly tested.

- 1.7 Procedural fairness does come at a price, at least in the short term, in the costs of paying members, holding hearings, legal aid, etc. Arguably, alongside the savings detailed above, the promotion of optimal decision-making through procedural fairness and through the increased transparency that we propose for the Parole Tribunal in chapter 5 will recoup these costs and more by reducing reoffending and preventing unnecessarily long incarceration. Meanwhile, we hope that the extended jurisdiction that we propose in chapter 7, and our proposals on recall and re-release in chapter 8, will result in further savings through avoidance of unnecessary recalls and delays in release and re-release.
- 1.8 However, it is important not only for the financial sustainability of the Parole Board or its successor body, but also for the success of the sentencing and offender management framework as a whole, that consideration be given to when conditional release should be used at all. In other words, which categories of offence and sentence benefit from the use of conditional release and, therefore, from the parole process. A focus on risk has become systemic in sentencing and offender management: risk assessment – including the use of actuarial tools such as OASys – is now carried out even in relation to low-level offenders.
- 1.9 This raises important questions across the system: how does a focus upon risk relate to the importance of proportionality in sentencing? Does it mean that sentencing and offender management now discriminate against certain socio-economic and demographic groups who are ill-served by risk assessment methods or considered particularly ‘dangerous’ through factors beyond their control? Can risk be accurately assessed and if so, how should this be done?
- 1.10 In the parole context and other circumstances where individual liberty is engaged, these questions become of paramount importance. We have proposed a tribunal that we believe will be able to make well-informed judgments as to risk of future offending and harm, with the advice of the independent risk assessment advisory group which we propose in chapter 4. However, both the government and the criminal justice system as a whole should respond to the questions that we raise in para 1.9 above. A system unduly dedicated to assessing and managing ‘risk’ in too wide a variety of cases is likely to become financially unsustainable and both procedurally and substantively unfair.
- 1.11 The creation, in the Criminal Justice Act 2003, of the indeterminate sentence for public protection (IPP) for sexual and violent offences that could vary widely in seriousness arguably represented the high watermark of a ‘risk-focused’ rather than ‘just deserts’ approach to sentencing for such offences. The government failed to anticipate the number of these sentences that would be imposed, despite the broad statutory criteria, and failed to provide sufficient courses and

1 See Parole Board for England and Wales, *Annual Report 2008-2009*, p18.

2 Article 5 ECHR (right to liberty and security) provides: ‘(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court

.....

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’

Article 6 ECHR (right to a fair trial) provides: ‘(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...’

programmes to enable such offenders to demonstrate their rehabilitation and, therefore, achieve release. This resulted in litigation and necessitated legislative reform in the Criminal Justice and Immigration Act 2008 to narrow the application of the sentence. However, it is still available in cases of moderate seriousness.

- 1.12 The government's determination to address the risk posed to the public by violent and sexual offences is both understandable and laudable. However, in our view, it is wrong in principle for indeterminate sentences (which are in effect life sentences before the licence stage) to be imposed for offences that would not justify a life sentence and where the maximum term served could be out of all proportion to the index offence. It also places undue pressure on the paroling authority effectively to determine the length of the sentence in a large number of cases.
- 1.13 In relation to determinate sentences, the role of conditional release has now ended for newly sentenced prisoners as a result of the Criminal Justice and Immigration Act 2008. All such prisoners will instead be released automatically. In our view, however, the structure of custodial sentences remains flawed. Life sentences should be reserved for sexual and violent offenders who have committed very serious crimes. The category of IPP sentences, with 'dangerousness' assessed by the sentencing court, should be abolished. Where a sexual or violent offender is sentenced for an offence that is serious but not deserving of a life sentence, and it is concluded that they are likely to represent an ongoing serious risk to the public, a more appropriate sentence would be a determinate sentence with conditional release (managed by the Parole Tribunal) and/or an extended licence period. We invite the government and others to give further consideration to this option.
- 1.14 In all events, the Parole Tribunal should focus upon dangerous sexual and violent offenders; we hope that by doing so, its caseload will eventually be reduced. Simple sentences for other offenders, with automatic release, will obviate the need for a tribunal to determine release date (and its associated costs) in these cases. The reduced caseload of the tribunal, together with the greater efficiency generated by the powers we suggest in chapter 5 to ensure that timetables are complied with, will, we hope, allow it to avoid the temptation to compromise procedural fairness in the name of 'case management' in the future.
- 1.15 This report is published at a time when the Parole Board and the Ministry of Justice are considering the future of the parole system in England and Wales;³ when recent case-law⁴ has highlighted doubts over the adequacy of the Board's procedures in maintaining adequate procedural safeguards, and tensions between resources and the obligation to determine issues fairly; when public concern has been heightened by a number of serious offences committed by prisoners who have been conditionally released; and when the Tribunals Service is establishing itself and has recently added the former Mental Health Review Tribunal to its jurisdiction.
- 1.16 Our report is, therefore, timely and we hope that it will prove influential in further considerations of the future of the parole system in England and Wales by the government; the Parole Board; Parliament and others. We hope that the increased transparency that we recommend in chapter 5, together with the improved decision-making that we hope it will promote and encourage, will produce a robust Parole Tribunal that encourages public confidence in the system while upholding access to justice, human rights and the rule of law.

³ See Ministry of Justice, *The Future of the Parole Board*, consultation paper 14/09, 20 July 2009; and Chairman's Foreword to the Parole Board of England and Wales, *Annual Report 2008-2009*, p9.

⁴ See *Roberts v Parole Board* [2005] UKHL 45 (special advocates); *R (Cooper) v Parole Board* [2007] EWHC 1292 (Admin) (delay).



Summary of recommendations

Conditional release

1. A coherent statement of the purposes of conditional release for prisoners serving determinate, life and indeterminate sentences should be set out in primary legislation. The statement should establish a structure for the application of set principles and reflect the need for consistency and fairness in decision-making.
2. The statement should also make it clear that the primary purpose of conditional release is to facilitate an offender's reintegration into the community in a way that is progressive, controlled and coupled with the best support measures available.
3. Those responsible for administering conditional release schemes should be under a duty to provide a fair, transparent and understandable conditional release process.

The constitutional position of the Parole Board and the need for reform

4. The existing Parole Board should be abolished and a new Parole Tribunal should be set up by primary legislation.
5. The constitutional position of the Parole Tribunal will be within the Tribunals Service and will allow for an appeal to a dedicated chamber within the Upper Tier.
6. Judicial and legal appointments to the Parole Tribunal should be made by the Judicial Appointments Commission. For all members, the period of appointment should be in keeping with that used by other tribunal jurisdictions. In particular, appointments should seek not only to ensure that members have the right capacities and skills but also that they are adequately representative of the community. Consideration should be given to the appointment of full-time members.

Judging risk – predicting recidivism and harm

7. A risk assessment advisory group, independent of government, should be established with the aim of providing the Parole Tribunal with expert advice on general issues relating to offender risk assessment and management. Consideration should also be given to its providing independent advice to the Ministry of Justice on the use of risk assessment by the probation service, and to other authorities and tribunals.

Procedure, guidance and rules

8. The secretary of state should not issue guidance to the Parole Board or its successor body.
9. An expert rules committee, independent of government, should generate rules for the Parole Tribunal.
10. The Parole Tribunal should have the power to compel witnesses to appear before it and to give orders for the production of documents and directions as to matters such as disclosure.
11. Secret evidence should not be used by the Parole Board or Parole Tribunal. Substantive proceedings should take place in the presence of the prisoner and his or her legal representative. Public interest immunity hearings should be used to decide whether sensitive material can be disclosed and if it cannot be disclosed, it should not be relied upon by the tribunal.
12. Parole Tribunal hearings should, at least initially, continue to be held in prisons, but consideration should be given to admitting journalists in the interests of transparency. Post-release hearings should be held in public unless this would not be in the interests of justice or the offender is a child or vulnerable adult. Parole Tribunal decisions and the reasons for them should be published, with appropriate anonymisation if necessary.
13. Victims should normally be informed in good time by the Parole Tribunal of forthcoming hearings and offered the opportunity to attend. Information provided by victims and others should be considered by the Parole Tribunal if it is relevant to the issues to be determined; if disputed, it should only be relied upon if it can be challenged, if necessary by cross-examination.
14. Publicly funded legal advice, assistance and representation should be available to all prisoners in relation to Parole Tribunal proceedings.

Determinate sentence prisoners

15. The Parole Tribunal should be authorised to decide upon the conditional release of those determinate sentence prisoners whose cases are currently considered by the Parole Board. The test for release should be the same as that for life and indeterminate sentence prisoners.
16. We recommend a new appellate structure whereby prisoners who have grounds for doing so can appeal to the Parole Tribunal against any executive decision refusing conditional release.

Life and indeterminate sentence prisoners

17. There should be a statutory duty on the secretary of state to provide specified information to the Parole Tribunal as soon as it becomes available.

18. The Parole Tribunal should be given authority to hold, at its own discretion, further pre-tariff and post-release reviews.
19. The Parole Tribunal should be authorised to set the timing of reviews either of its own motion or on application by one of the parties to the proceedings. At the minimum, sufficiently regular reviews must be held so as to comply with Article 5(4) ECHR.
20. The role of advising the secretary of state on matters relating to the early release or re-release of prisoners should be abolished.
21. The Parole Tribunal should be authorised not only to determine the release of life and indeterminate sentence prisoners but also to decide, on specified grounds, whether such prisoners are ready to be transferred to open conditions.
22. Any variation, cancellation or termination of a life or indeterminate sentence prisoner's licence should require authorisation by the Parole Tribunal.
23. Permanent release on compassionate grounds should be transferred from the competence of the secretary of state to the jurisdiction of the Parole Tribunal, with a single criterion of exceptional circumstances calling for compassionate release. To this should be added appeals against governors' refusals to grant special purpose licences.

Recall and re-release

24. The secretary of state should be empowered to recall life or indeterminate sentence prisoners who have breached their licence, either on grounds of risk of imminent harm to a specific individual or individuals or to members of the public generally, or following a recommendation by the Parole Tribunal.
25. There should be an opportunity for an oral hearing within a short time frame as of right in every case where a prisoner is recalled.
26. The test for re-release in all cases should be that the Parole Tribunal is satisfied that it is not necessary for the protection of the public that the offender remains in prison.



Chapter 2

Conditional release

- 2.1 The vast majority of those in prison in England and Wales will, rightly, be released at some point.⁵ However, the role of the Parole Board in deciding when and under what conditions those serving a determinate or fixed-term sentence will be released from prison is diminishing rapidly. This does not mean that large numbers of prisoners are not being released before their mandatory release date (the various conditional release schemes currently in operation are set out in appendix A). However it is now Parliament and the executive, and not an independent paroling authority, that determines when and under what conditions release is to be allowed.
- 2.2 In most jurisdictions paroling authorities are independent from the executive and those schemes where the decision whether or not to grant early release is made by a prison governor are not usually referred to as parole. Also, while this report uses for convenience the term 'Parole Tribunal' to describe the new body it proposes, it is not strictly correct to talk about parole in the context of cases involving life and indeterminate sentences – such prisoners are released on life licence not parole licence. A less ambiguous term is conditional release: a generic term that denotes discretionary release with conditions.
- 2.3 The Parole Board, in its present statutory form, has been in existence for just over 40 years. Since its inception the Board has been subject to changes in the ambit of its functions. There have also been changes in the views of commentators and policy-makers as to whether prison could ever truly be rehabilitative; rhetoric about the failure of those in power to be sufficiently 'tough on crime'; concerns about the lack of 'honesty in sentencing' engendered by schemes authorising early release; perceptions that parole has become an entitlement rather than a privilege; disquiet about the lack of attention given to the victims of crime; efforts to expose the arbitrariness of a system subject to frequent statutory change;⁶ and criticism of the delays brought about by recurring periods of administrative strain. There have also been court cases that have sought to challenge not only the lawfulness of some of the Board's decisions but also the legality of the system under which it is required to operate.

5 'It is overly simplistic to think of a parole decision as WHETHER or not someone will be released from prison. In fact, the vast majority of those in state and federal prisons today (well over 95%) will be released at some point. The real task of paroling authorities is to decide WHEN and UNDER WHAT CONDITIONS someone will be released from prison. Will it be during a period of parole eligibility when the board can exercise some leverage over preparation for and conditions of release and transition? Or, will it be at a mandatory release date? The job, then, is one of collaborating in the management of that transition. Paroling authorities – with their fellow criminal justice agencies in institutional and community corrections – are key leaders in assuring the safe transition and reentry of offenders into the community. Yours is a key role in public safety – not because you can deny release, but because you can choose to manage transition when the time is right.' P Burke (ed), *A handbook for new parole board members*, sponsored by the Association of Paroling Authorities International and the American National Institute of Corrections, April 2003, p viii.

6 During the last 10 years the government has introduced 55 criminal justice bills, creating over 3,000 new criminal offences.

- 2.4 When the Parole Board was set up in 1967, the system of parole for determinate sentence prisoners augmented the possibility of early release through remission, typically of up to one-third of the sentence. While remission could be earned by prisoners through good behaviour, parole would be available to those who had shown promise or determination to reform.⁷ However, as the Home Office was later to admit, another of the new parole system's main justifications was its effect on the prison population.⁸ Despite its status as a 'non-judicial, independent advisory body',⁹ the Board initially operated in a culture of secrecy: prisoners were not shown the reasons for a refusal of parole, determinations were made in private and decided on the papers, and there was a lack of accessible risk assessment jurisprudence. Procedural aspects of parole hearings have not only improved but have also had an impact on decision-making.
- 2.5 Meanwhile, the politics of prison overcrowding has continued to dog those conditional release schemes that impact on the bulk of the prison population, that is to say determinate sentence prisoners. The tension between, on the one hand, administratively controlled early release mechanisms set up with an eye to managing prison overcrowding and, on the other, the framework of 'public protection' and systemic focus upon risk management in which the Parole Board now operates has produced a conditional release system which lacks simplicity, clarity of purpose and overarching structure.
- 2.6 It has taken time to secure acceptance that decisions concerning the release of prisoners detained solely on the ground of continued risk to the public should be made independently and not by elected politicians. This is, nevertheless, an elementary aspect of the separation of powers, because deprivation or restoration of liberty is an inherently judicial and not an executive function. The difficulty has been overcome in the past by setting up statutory schemes that can operate without the need for an adjudicative function. This report does not go so far as to propose the immediate judicialisation of all existing early release schemes. However, it does propose that where conditional release decisions are made initially at an executive level, an appeal on the merits as well as on the law should be made available.¹⁰ Where prisoners are returned to custody for not complying, or appearing not to comply, with their licence conditions, they should also be entitled to take proceedings by which the propriety of their re-detention can be speedily determined.
- 2.7 Just as there is a difference between the mathematical calculation of an automatic release date and conditional release from a determinate sentence, so there is, again, a difference between the latter and the assessment of the safety of release on licence from a life sentence. The last of these is plainly at the judicial end of the spectrum. The European Court of Human Rights has confirmed that this is so.¹¹ As indeterminate sentences in England and Wales resemble life sentences until long after release takes place, they must be judicially supervised to the same degree. We also propose in chapter 6 below that, following the dissent of Lord Phillips in *Black*,¹² conditional release from a determinate sentence should become a judicial function.
- 2.8 In some jurisdictions, for example, in the USA, parole has historically played an integral part in 'indeterminate sentencing' (which differs significantly from indeterminate sentencing in England and Wales under the Criminal Justice Act 2003). In US 'indeterminate sentencing', the legislature

7 *The Adult Offender*, Cmnd 2852 (HMSO, 1965).

8 Home Office, *Review of Parole in England and Wales*, 1981, paras 50-52.

9 *Ibid*, para 6.

10 Including an independent reconsideration of the decision and of the way it was reached.

11 Cf *Weeks v UK* (1988) 10 EHRR 293; *Singh and Hussain v UK* (1996) 22 EHRR 1; *Stafford v UK* [2002] 35 EHRR 32.

12 *R (on the application of Black) v Secretary of State* [2009] UKHL 1.

sets a broad band range of time, expressed as a minimum and maximum sentence, for a particular offence or category of offences. The judge imposes a term of detention within that range, also with a minimum and maximum term. The paroling authority then determines the actual release date. Much of the literature about the dissatisfaction and disillusionment with parole refers to this type of system.¹³

2.9 This report focuses on those schemes in which, at the time when the decision is made, it is anticipated that the prisoner will not be returning to serve any outstanding part of his or her sentence in custody. It therefore deals only tangentially with release on temporary licence (ROTL).¹⁴

2.10 Conditional release schemes typically contain the following elements:

- the imposition of a custodial sentence by a competent court;
- a licence with both standard and individualised conditions;
- a period of supervision or monitoring in the community;
- a power of recall to prison.

Whether the grant of conditional release includes a period of probation supervision in the community is likely to depend on the length of the sentence, the type of offence committed and the level of risk posed by the offender.

2.11 Monitoring, which can either replace or supplement supervision, may include the offender agreeing to electronic tagging or continued surveillance through registration and police reporting. Licence conditions may include exclusion zones, no contact with named individuals and a requirement to undertake programmes designed to assist rehabilitation or to reduce and manage risk in the community. There is now also an option of polygraph testing as an additional licence condition for certain sex offenders.¹⁵ Conditions are set at the time of release (though they can be varied), subject to the overall requirement of proportionality.¹⁶

2.12 Release, on whatever terms, is said to be conditional on good behaviour and compliance. In theory, all conditionally released prisoners are required to sign the licence that not only authorises their being let out through the prison gates but also sets out the conditions they undertake to observe while living in the community – ‘word of honour’ being the original meaning of parole.

2.13 There is no statutory definition of the purposes of conditional release. The purposes of sentencing were put into primary legislation for the first time in the Criminal Justice Act 2003. The purposes for adult offenders are: the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by the offender to persons affected by their offences.¹⁷ No order of priority is given to these purposes.¹⁸ Exceptions apply where the sentence is fixed by law (ie a mandatory life sentence imposed for murder) or where offences require certain custodial sentences (eg sentences

13 For example, in California at one time judges were required to set sentences at the statutory maximum, which left the paroling authority with a parole eligibility window which spanned the first day of sentence to the last day of sentence with no standards in place to guide the decision.

14 See recommendation at para 7.36 of this report.

15 S28 Offender Management Act 2007, implemented in January 2009.

16 *R (on the application of Craven) v Home Secretary and Parole Board* [2001] EWCH Admin 850.

17 See s142 Criminal Justice Act 2003.

18 For a summary of evidence to the Justice Select Committee on this topic, see their report *Effective Sentencing*, Fifth Report Session 2007-8, para 10.

for public protection) and where various provisions of the Mental Health Act apply.¹⁹ New separate aims for the youth justice system have been inserted into the same Act by the Criminal Justice and Immigration Act 2008.²⁰

- 2.14 It is an accepted duty of the state not only to mark society's condemnation of offending behaviour but also to provide offenders with an opportunity to return to society as law-abiding citizens. The Ministry of Justice has said that '[a] just and civilised society is one where offenders are both punished for breaking the law and given the opportunity to reform and turn away from crime'.²¹ Giving people the opportunity to reform and turn away from crime is a moral purpose that is worth spelling out.
- 2.15 Another reason to have a statutory statement of the purposes and principles of conditional release is that where non-penal incentives are at work there is a danger that unprincipled, arbitrary and unfair conditional release schemes may take root. As Lord Bingham has said:²²

While ... it is true that early release provisions have the practical effect of relieving overcrowding in prisons, that is not their penal justification. But such justification exists. All or almost all, determinate sentence prisoners are expected to return to the community on release from prison after serving their sentences. It is in the interests of society that they should, after release, live law-abiding, orderly and useful lives. For a host of practical, psychological and social reasons, the process of transition from custody to freedom is often very difficult for the prisoner. It is accordingly very desirable that the process of transition should be professionally supervised, to maximise the changes of the ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity.

- 2.16 The Grand Chamber of the European Court of Human Rights has also referred to what it calls the 'progression principle':²³

Criminologists have referred to the various functions traditionally assigned to punishment, including retribution, prevention, protection of the public and rehabilitation. However, in recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively, it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. This objective is reinforced by the development of the 'progression principle': in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.

¹⁹ As specified in s142(2) Criminal Justice Act 2003.

²⁰ See s142(A) Criminal Justice Act 2003 (which is not yet in force). These are: to protect the public, punish the offender, reduce and deter crime, reform and rehabilitate the offender and secure reparation by offenders to persons affected by their offences. All, however, will be subject to the 'principal purpose' of the youth justice system, which is 'to prevent offending by children and young persons' (s37 Crime and Disorder Act 1998); the court must also have regard to the welfare of the child or young person under s44 Children and Young Persons Act 1933.

²¹ Ministry of Justice, *Punishment and Reform: Our Approach to Managing Offenders*, December 2008, p2.

²² *R (Smith and West) v Parole Board* [2005] UKHL 1, para 25.

²³ *Dickson v United Kingdom*, App No 44362/04, [2007] ECHR 1051, para 28.

- 2.17 This approach is reflected in one of the basic principles of the European Prison Rules, that ‘all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty’. This is implemented by assisting prisoners in adequate time prior to release to make the transition from life in prison to a law-abiding life in the community, and in the case of those prisoners serving longer sentences, taking steps to ensure a gradual return by the use of pre-release programmes in prison or by partial or conditional release under supervision, combined with effective social support, working closely with services and agencies that supervise and assist released prisoners and affording them necessary access to prisons and to prisoners to allow them to assist in preparations for release and the planning of after-care programmes.²⁴
- 2.18 Such an approach provides an incentive to those offenders who are able, by their efforts, to influence the timing of their release. It allows information gathered after sentencing, such as progress and performance in prison, victim impact over time, and the prisoner’s proposed release plan, to be considered by those responsible for deciding when and under what conditions prisoners may be conditionally released. It also allows issues of risk assessment and risk management to be considered in an inquisitorial manner by a body independent of the sentencing court (which necessarily focuses on the adversarial process of determining the guilt or innocence of the accused, and on the appropriate sentence for the crime of conviction).

2.19 Recommendations

A coherent statement of the purposes of conditional release for prisoners serving determinate, life and indeterminate sentences should be set out in primary legislation. The statement should establish a structure for the application of set principles and reflect the need for consistency and fairness in decision-making.

The statement should also make it clear that the primary purpose of conditional release is to facilitate an offender’s reintegration into the community in a way that is progressive, controlled and coupled with the best support measures available.

Those responsible for administering conditional release schemes should be under a duty to provide a fair, transparent and understandable conditional release process.

²⁴ Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules, paras 107.1-5 (as adopted by the Ministers’ Deputies at their first plenary meeting of 2006). The new recommendation updates the Recommendation on the European Prison Rules (1987) taking into account the recent case-law of the European Court of Human Rights and the standards developed by the Committee for the Prevention of Torture.



Chapter 3

The constitutional position of the Parole Board and the need for reform

History: 1967-2008

- 3.1 When the Parole Board was set up in 1967, Parliament deliberately chose an administrative rather than a legal process. The reason, as then understood, was explained in the Parole Board's 1975 Annual Report:²⁵

In some countries parole is operated by due process of law, the prisoner being in a position to argue his case before the paroling authority and even to challenge the assessment of that authority. But where this obtains parole is a different concept. It is the right of the individual when he is found suitable, whereas under our system it is a privilege – the sentence is not modified but the prisoner is given the opportunity to complete it in more congenial conditions under supervision in the community.

- 3.2 The distance that parole has since travelled, from the discretionary grant of a privilege to an entitlement to liberty once specific arithmetical and risk criteria have been met, is very considerable. It is the distance, among other things, between an administrative and a judicial function, and it is principally under the stimulus of the European Convention on Human Rights (ECHR) that it has been travelled. The consequence has been a positive change in the constitutional status of the parole system.
- 3.3 The Parole Board was set up to 'advise' the Home Secretary in relation to the exercise of the powers given to him under the Criminal Justice Act 1967 to release prisoners on licence and to recall prisoners to custody.²⁶ The Board was first constituted in November 1967 with administrative arrangements handled, first, by a Parole Unit set up in the Home Office, and then from 1983 by the Prison Service. In 1989, the House of Lords Select Committee on Murder and Life Imprisonment, chaired by Lord Nathan, recommended that the decision to release an indeterminate sentence prisoner after expiry of the penal sanction should be an entirely judicial one. 'The tribunal should have the characteristics of a court under the European Convention, and in particular, should be entirely independent of the executive'.²⁷ The committee's proposals were not accepted by the

²⁵ HMSO, 1975, at para 13.

²⁶ S59 Criminal Justice Act 1967 set out the constitution and functions not only of the Parole Board but also of local review committees – which in turn made recommendations to the Board. These committees were abolished in 1991. The only exception to the Board's exclusively advisory role was found in the requirement that where the immediate re-release of a recalled prisoner was recommended the Home Secretary was obliged to give the recommendation effect (s62(4) Criminal Justice Act 1967).

²⁷ HL Session 1988-89, Paper 78-I. For an overview of the Parliamentary and governmental responses to decisions of the European Court of Human Rights at this time, see N Padfield (ed), *Beyond the Tariff: Human Rights and the Release of Life Sentence Prisoners*, Willan, 2002, chapter 4.

government, and Discretionary Lifer Panels were instituted only in order to comply with rulings issued by the European Court of Human Rights (ECtHR).

- 3.4 The Board became an executive Non-Departmental Public Body (NDPB)²⁸ in 1996. Formal sponsorship lay with the Prison Service (later to be absorbed into the National Offender Management Service (NOMS) in 2004). Becoming a NDPB was said to be ‘essentially administrative in nature’ and was intended to make the Board ‘more accountable for its performance’.²⁹ The option of making the Board a ‘tribunal NDPB’ with jurisdiction in a defined area of law appears not to have been considered. The terms of reference of the first Home Office review of the Parole Board sought ‘to identify the key issues facing the parole and lifer review processes and the Parole Board over the next five years’ and, as part of the Quinquennial Review programme, ‘to consider whether the functions of the Parole Board continue to be required, and, if so, whether a Non Departmental Public Body is the best option for delivery’.³⁰
- 3.5 The continuation of the Board as a NDPB was confirmed before publication of the Review’s subsequent report in 2001.³¹ As noted in *Brooke*, the report’s ‘references to the Board being an instrument of Government policy, to the need for it to engage with wider criminal justice policy development, and to the imposition of sanctions no doubt came naturally enough to a departmental examination of what was seen as an in-house body. These are, however, quite inappropriate to discussion of an independent court making decisions which bind the departmental Head.’³²
- 3.6 Also in 2001, the Leggatt Review published its report.³³ It recommended, inter alia, that the citizen should be presented with a single, overarching structure giving access to all tribunals, that there should be a Tribunals Service committed to producing a service and approach of the highest quality and responsive to the user, that the tribunals system should be divided by subject matter into divisions in a structure which is at once apparent to the user, and that the administration of citizen-and-state and party-and-party tribunals should be combined within the Tribunals Service. In responding to the recommendations on behalf of the Administrative Court, Scott-Baker J (as he then was) commented that it was perhaps curious that the Parole Board (of which he had been a vice-chair) did not come within the remit of the Leggatt inquiry.³⁴

Judicial consideration of independence

- 3.7 By 2007, the chair of the Parole Board was able to say that the principal function of the Board was that of a ‘judicial tribunal at oral hearings’ and it was mooted that the Lord Chancellor’s Department should become the sponsoring body.³⁵ This would not only have enhanced the perceived independence of the Board but also have put the Home Secretary (considered to be one

28 There are four types of non-departmental public body (NDPB): executive, advisory, tribunal and Independent Monitoring Boards. NDPBs are not an integral part of any government department, although ministers are ultimately responsible to Parliament for the activities of bodies sponsored by their department. See Cabinet Office (2006), *Public Bodies: A Guide for Departments*.

29 Baroness Blatch, *Hansard*, HL 27 June 1996, col WA71. Funding was by way of grant-in-aid decided upon by the Home Office, which established a greater degree of departmental control of the content and spending of the budget than if the Board had become a tribunal NDPB.

30 *Comprehensive Review of Parole and Lifer Processes* (2001), para 5.4.7.

31 The recommendation for the Board to remain a NDPB was accepted by the Home Secretary in October 2000. It was said to follow the project team’s survey of stakeholders from whom the overwhelming response was for a continuation of the Board’s present structure.

32 *R (on the application of Brooke & ors) v The Parole Board & ors* [2007] EWHC 2036 (Admin), paras 54 and 55.

33 *Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users – One System, One Service* (published 16 August 2001).

34 See *Judicial Studies Board Tribunals Journal* (2001), vol 8 issue 2.

35 Sir Duncan Nichol, ‘Who should we keep locked up?’ in N Padfield (ed), *Who to release? Parole, Fairness and Criminal Justice*, Willan, 2007, p18.

of the parties to cases before the Parole Board) more nearly at arm's length. The potential benefit of such a move was eroded when NOMS (by then the Board's sponsor within the Home Office) transferred to the new Ministry of Justice in May 2007.

- 3.8 The issue of whether or not the Parole Board was sufficiently independent and impartial was first raised before the ECtHR in *Weeks*.³⁶ The ECtHR held that the Parole Board lacked independence from the Home Secretary not because he appointed its members, provided its staff and made the rules under which it conducted its procedures, but because the Board lacked the competence to decide whether the post-tariff detention of a discretionary lifer was lawful and to order release if it found such detention was unlawful.³⁷
- 3.9 The matter was raised again in the domestic courts 20 years later with a much greater range of evidence than there had been before the ECtHR. In *Brooke*,³⁸ the Divisional Court identified a number of aspects of the relationship between the Secretary of State for Justice and the Parole Board as potential areas of concern. These included the appointment and tenure of its members; the secretary of state's statutory power to make directions; funding; and sponsorship generally. Taking these factors into account, the Divisional Court found that the 'the Parole Board does not meet the requirements of the common law and of Article 5(4) of the Convention for a court to have demonstrated objective independence of the executive and the parties'. The court reached this conclusion because it found that the sponsorship arrangement then in existence placed the secretary of state in a position of apparent influence over the approach of the Board to its court-like duties and 'induces the impression that the Board in some respects is an in-house body for which the Secretary of State has direct responsibility'. The Court of Appeal upheld the finding of the Divisional Court.³⁹
- 3.10 The Court of Appeal did not make any finding that the Board being an executive NDPB, and therefore subject to departmental sponsorship, was in itself incompatible with its actual or perceived independence. This prompted Jack Straw, Secretary of State for Justice and Lord Chancellor, to announce on 1 April 2008:

I have decided not to seek leave to appeal against the court's findings. Instead I have given careful consideration to how the Parole Board's sponsorship arrangements should be altered to meet the concerns of the court.

From 1 April sponsorship of the Parole Board will be transferred from the National Offender Management Service to the Access to Justice Group in the Ministry of Justice. Although responsibility for sponsorship of the Parole Board will remain within the Ministry, there will be a clear separation between responsibility for the board's sponsorship and responsibility for the management of offenders.

³⁶ *Weeks v United Kingdom* (1987) 10 EHRR 293. In *Hirst v United Kingdom* (2000) (App No 407 86/98), the applicant maintained that the Board was not independent because its members included former employees of the Prison Service or members of the Boards of Visitors and because of staffing and budgetary arrangements. That part of the application was found inadmissible.

³⁷ The Parole Board's remit was changed in line with the ECtHR decision in *Weeks* by s34 Criminal Justice Act 1991.

³⁸ *R (on the application of (1) Brooke and Ter-Ogannisyan (2) O'Connell (3) Murphy v The Parole Board (1st appellant) The Lord Chancellor and Secretary of State for Justice (2nd appellant)* [2007] EWHC 2036 (Admin). The four conjoined cases were all slightly different. O'Connell's case was adjourned, separately considered by the CA and disapproved by the HL in *Black*.

³⁹ *R (Brooke & ors) v The Parole Board & ors* [2008] EWCA Civ 29.

However, at the end of 2008, the Ministry of Justice announced that it would undertake a public consultation process to consider what status would best support the work that the Board does. This consultation paper was published on 20 July 2009.⁴⁰

The future of the parole system

- 3.11 Thus, the Parole Board has reached another crossroads in its evolution and now faces the prospect of either joining the Tribunals Service or finding a place within the court system, or (options also covered in the Ministry of Justice consultation paper) having its sponsorship transferred to Her Majesty's Courts Service (HMCS) or the Tribunals Service without full integration.⁴¹ It is worth noting that the Access to Justice Group⁴² is responsible for all the delivery agencies which the Ministry of Justice provides for the justice system, which include not only the present Parole Board but also the Tribunals Service, HMCS, the Legal Services Commission and others.
- 3.12 The absorption of the Parole Board's functions into the Tribunals Service can readily be envisaged, and is recommended as a logical and appropriate placement for the Parole Tribunal proposed in this report. As Hale LJ (as she then was) noted:⁴³

There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of dispute between private persons, tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review.

- 3.13 The alternative of the Parole Board, or a body like it, becoming a court has no obvious precedent in the United Kingdom. This may be because, although a statutory scheme, the power to release prisoners on parole in England and Wales is said to derive ultimately from the royal prerogative of mercy.⁴⁴ It may also be linked to the fact that making predictive judgments based on risk assessment has not traditionally been central to the sentencing exercise.
- 3.14 Lord Phillips (then Lord Chief Justice) said in *Brooke*:⁴⁵

The role of the Parole Board cannot be compared too closely with that of a court. In this country it is the function of a court exercising a civil jurisdiction to resolve disputes between opposing parties and of a court exercising a criminal jurisdiction to preside over an adversarial contest between prosecution and defence and to determine the appropriate sentence for those convicted.

⁴⁰ *The Future of the Parole Board*, Ministry of Justice, consultation paper 14/09.

⁴¹ *Ibid*, Executive Summary, para 8. The consultation paper also puts forward the option of leaving the sponsorship arrangements as they are at present.

⁴² The 'Access to Justice' Group in the Ministry of Justice was set up in January 2008.

⁴³ *R (on the application of Asifa Saleem) v Home Secretary* [2001] 1 WLR 443 at 457H.

⁴⁴ See S McCabe, 'The Powers and Purposes of the Parole Board' (1985) Crim LR 489 at 490.

⁴⁵ *R (on the application of Brooke & Others) v The Parole Board, The Lord Chancellor and Secretary of State for Justice* [2008] EWCA Civ 29, para 43.

There is, of course, no reason of principle why a reshaped Parole Board could not be a court. But there is a difference of kind between the judicial functions of conviction and sentence and assessments of risk, which, while prescribed by law and directly affecting personal liberty, depend on specialised multidisciplinary evaluations.⁴⁶

- 3.15 If tribunals were still regarded, as they were for the greater part of the twentieth century, as instruments of departmental policy, the case for putting parole in the hands of a court would be very strong. But the major constitutional change introduced by the Tribunals, Courts and Enforcement Act 2007 has been a structural severance of these residual ties. The component bodies of the new Tribunals Service have the same independence as a court of law. It is also distinctly possible that its administration will prove more efficient than that of the now underfunded and overburdened Courts Service.
- 3.16 Courts are ordinarily composed of legally trained judges (or, in the case of magistrates, of trained decision-makers with a legal adviser). Tribunals, by contrast, give equal status to judges, lawyers, specialists and lay members. A multidisciplinary tribunal is well suited to risk assessment; the Mental Health Review Tribunal, which is the domestic jurisdiction with functions most similar to that of the Parole Board, has now become part of the Tribunals Service. Thus, it is the tribunal model, rather than the court model, which both the present Parole Board and its proposed successor most nearly fit.
- 3.17 The continuing difference between courts and tribunals is likely to lie:
 - (a) in the varied membership of tribunals;
 - (b) in their relative flexibility and informality; but above all
 - (c) in the probability that tribunals, under the guidance of the Upper Tribunal, will develop a legal culture which is not necessarily that of the courts but which the courts, within broad limits, will respect. In the system proposed this may well turn out to be of importance.
- 3.18 In court, rules of evidence have been developed within an adversarial system in which the only issues are those which the parties choose to raise. The Parole Board is more inquisitorial than adversarial, so it may look at other issues. With the possible exception of some disputed recalls, it is not a conventional fact-finding body. Nor, again, can it be considered an appellate body even in those situations where challenge is to the executive revocation of a prisoner's licence. If this were not so, the Board would be limited to considering the circumstances that led to the secretary of state's decision to recall. By contrast, it has been held that, because the Board's primary concern is the assessment of risk, it is entitled to look at wider issues when considering suitability for re-release.⁴⁷
- 3.19 A large number of judicial reviews are currently brought against the Parole Board each year. Some of these are challenges to the Board's process, particularly delay. Others are challenges to the Board's decisions. There are no other means of legal challenge. Where judicial review succeeds, all that can usually happen from the applicant's point of view is that the case is referred back for

⁴⁶ This difference is a strong argument in favour of confining life and indeterminate sentencing based upon 'risk' to the most dangerous offenders.

⁴⁷ See, for example, *R (Brooks) v Parole Board* [2004] EWCA Civ 80.

the decision to be taken again. It is only if the facts lead only to one outcome that the court can substitute its own decision.

3.20 The Tribunals, Courts and Enforcement Act 2007 provides a unified appeal structure whereby a decision of the First-tier Tribunal may be appealed to the Upper Tribunal with permission either from the tribunal being appealed or from the Upper Tribunal. The grounds of appeal must raise a point of law. This should, however, include a faulty or unreasonable approach to the evidence, or a potentially decisive error of fact. The latter may include ignoring or misunderstanding a risk assessment; the former may include making more or less of it than was reasonably possible. It may well be that the introduction of a specialist appellate tribunal will permit or encourage the retaking of faulty decisions without the need for remission, a process for which the Tribunals, Courts and Enforcement Act 2007 makes provision.⁴⁸ On an important point of law, an onward appeal will lie to the Court of Appeal.

3.21 The 2007 Act also provides for the establishment of 'chambers' within the First-tier Tribunal and Upper Tribunal, each headed by a chamber president. The chambers of the Upper Tribunal are the Administrative Appeals Chamber and the Finance and Tax Chamber. The chambers of the First-tier Tribunal include the Social Entitlement Chamber,⁴⁹ the Health, Education and Social Care Chamber,⁵⁰ the War Pensions and Armed Forces Compensation Chamber, and the Tax Chamber. The purpose of the chambers is to group together jurisdictions dealing with like subjects, or where individual panels need the same types of skilled members. The former Mental Health Review Tribunal, which is most similar in terms of the types of skill required of its members, is within the Health, Education and Social Care Chamber. While chambers are described as being flexible groupings with the potential to incorporate new jurisdictions where they fit best,⁵¹ we believe that a new chamber would be required for the Parole Tribunal within the First-tier and Upper Tier, due to the specialised nature of its jurisdiction.

3.22 Recommendations

The existing Parole Board should be abolished and a new Parole Tribunal should be set up by primary legislation.

The constitutional position of the Parole Tribunal will be within the Tribunals Service and will allow for an appeal to a dedicated chamber within the Upper Tier.

Appointment of members

3.23 At present, with the exception of High Court judge members who are nominated by the Lord Chief Justice, the secretary of state appoints members of the Parole Board. The method of appointment is governed by principles laid down by the Office of the Commission for Public Appointments (OCPA).

48 S12 Tribunals, Courts and Enforcement Act 2007. The Act also provides powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal and, where the tribunal concludes that an error was made, to re-decide the matter (ss9 and 10).

49 Which includes asylum support, criminal injuries compensation support, social security and child support.

50 Which includes care standards, special education needs and disability, and mental health review.

51 See The Tribunal Service, *Transforming Tribunals*, CP30/07 (2007), para 150.

- 3.24 The way in which members are appointed to the Board was considered by the Divisional Court and the Court of Appeal in *Brooke*.⁵² The Divisional Court was of the view that, because the appointing Minister is a party to every case the Board decides, it needed to be shown that he 'demonstrably abjured any significant input into the selection of members'.⁵³ It also found that while the routine arrangements for appointment were consistent with objective independence, the secretary of state had on one occasion used his power of appointment to try to change the approach of the Board to the performance of its duties. This was in the spring of 2006 when the then Home Secretary, John Reid, used the occasion of the Board's annual lecture to announce that in order to ensure that victims had a greater say in the release of offenders:⁵⁴

... we are already interviewing for members with experience of either being a victim or victim support organisation, which I am looking to appoint by June. I want more of them. We will be rebalancing the whole system in favour of victims. It is nothing less that the public expects.

- 3.25 At the time when this announcement was made, a shortlist of applicants had already been compiled. A separate and parallel selection process was, therefore, initiated to target suitable persons. In context (there had recently been two high-profile murders committed by prisoners released by the Parole Board), the Home Secretary's intervention was seen by the Divisional Court as designed to alter, to some extent at least, the outcome of cases before the Board by 'an explicit exercise by that party [the secretary of state] of the power of appointment, alongside exhortation to require a near guarantee of future behaviour in released prisoners, with a view to changing what was perceived to be an over-readiness to release'.⁵⁵ The Court of Appeal also noted that at a quarterly meeting of the Parole Board in March 2004, reference was made to ministers wanting to have more input into the selection of judges to serve on the Board rather than being presented with a list as a *fait accompli*.⁵⁶
- 3.26 Tenure for Parole Board members remained, as it was when the Parole Board was set up in 1967, a renewable three-year term of office. The court considered that this period of appointment was near the borderline of what was acceptable and, when coupled with the minister's unfettered power to remove members without any procedure for the determination of merits, was unacceptable.
- 3.27 When the Parole Board was set up, it was stipulated that its members should be drawn from (but not limited to) four categories: judges, psychiatrists, probation officers and criminologists. In 1967, its membership consisted of a chair, four judges, two psychiatrists, two probation members, two criminologists and six independent members. All members, including the chair, held part-time posts. In the first year of its operation, as many as eight members would sit on a panel. By 1987,

52 *R (on the application of Brooke & ors) v Parole Board & ors* [2007] EWHC 2036; *R (on the application of Brooke & ors) v The Parole Board & ors* [2008] EWCA Civ 29.

53 *Ibid*, para 32. Using rather opaque reasoning, the Court of Appeal (at para 51) did not agree that the position of the secretary of state in applications to the Board could be equated with that of a party to an adversarial process.

54 The Board responded to the Home Secretary by issuing a statement which included the observation that they had carried out a survey of their 160 members to find out how many of them had either been a victim of crime themselves, were closely connected with someone who had been a victim or had first-hand experience of working with victims. Almost half of the membership had responded. 95% had been a direct victim of crime (14% had been victims of rape or sexual assault, 20% had been victims of violent or gun crime and 14% had been victims of domestic violence or stalking). 64% had been closely connected with someone who had been a victim of crime with 9% being closely connected with someone who had been a victim of murder, manslaughter or attempted murder. 53% of members had worked directly with victims of crime in a victim support context, 26% as a representative of a victim-supporting organisation, 21% as a psychologist or psychiatrist and 5% as a police officer.

55 *R (on the application of Brooke & ors) v Parole Board & ors* [2007] EWHC 2036, para 62.

56 *R (on the application of Brooke & Others) v The Parole Board, The Lord Chancellor and Secretary of State for Justice* [2008] EWCA Civ 29, para 64.

the number of the Board's members had swelled to 50 and the size of its panels had shrunk to four or five. The current Parole Board is made up of approximately 170 members, including a part-time chair, a part-time judicial vice-chair, two full-time members (directors of performance and development, and quality and standards respectively) and part-time judicial, psychiatrist, psychologist, probation⁵⁷ and independent members. The Board is supported by a secretariat comprising a chief executive and approximately 100 staff. The panel size has again shrunk to three members at oral hearings for life and indeterminate sentence cases, while recalls are frequently determined by a single member.

- 3.28 In the 2009 advertisement round, it was specified that in order to qualify as a judicial member candidates must be either a serving or retired Circuit Judge or a High Court Judge. Further, the former would need authorisation for murder, attempted murder, or rape cases, or have significant Mental Health Review Tribunal (MHRT) experience.⁵⁸ For psychiatrists, specific experience in forensic psychiatry was not considered essential but highly desirable, while for psychologists there was a requirement of registration with the British Psychological Society as a chartered forensic psychologist. For the probation category, candidates had to be either a serving probation officer or chief probation officer, with experience of assessing and managing high-risk offenders.⁵⁹ Independent members could come from any background or profession but with the expectation that they would bring different perspectives and balance to 'represent the society and victims we protect'. All applicants also 'need[ed] to demonstrate an understanding of and empathy for victims and those affected by crime. This could be through direct experience of being a victim of crime yourself, through having links to others who have been victims of crime or through a wider understanding of the issues victims face'.⁶⁰
- 3.29 It was noted by the National Audit Office in their 2008 report that while the composition of the Board's membership was equally balanced between the sexes, the average age of members was 50 and only four members described themselves as being non-white.⁶¹ The Public Accounts Committee asked for information about the background of members and the data supplied, together with what was reported by the National Audit Office, indicated that the Board had a considerable way to go in ensuring that its membership reflects the composition of society.⁶²
- 3.30 It is suggested that the criteria for appointment need to be examined and consideration given to whether membership should not be made available to a wider range of candidates (the appropriate range of candidates is discussed below at paragraph 5.1). For example, in New Zealand⁶³ the Parole Act 2002 requires the appointment of convenors. These specialist members undertake a number

57 The present practice of appointing probation officer members (who remain employed within the department) following ministerial interview was found to be acceptable. The Court in *Brooke*, following the Court of Appeal decision in *R (PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, held that the practical reality of the availability of suitably qualified persons was a relevant consideration on the question of independence but, given the difficulties recruiting experienced probation officers, and the fact that these members sit alongside judges and other lay and specialist members, there was no significant risk that the performance of their duties as members would be affected by the likelihood of their returning to the department at the end of their tenure on the Board.

58 It is not immediately clear on what basis having a 'ticket' to try murder and rape cases can be equated to experience of mental health tribunals where that legal appointment might have been obtained by virtue of having a seven-year general qualification (within the meaning of the Courts and Legal Services Act 1990).

59 In *Brooke*, the position of those Chief Probation Officers (CPOs) who, although becoming Board members, remained employed by NOMS (the ordinary recruitment process did not yield enough CPOs) created concern but practical issues were relevant. Sitting alongside judges, lay members and members with other experience meant that the practice was considered to fall on the right side of the line in terms of independence. See *R (on the application of Brooke & ors) v The Parole Board & ors* [2008] EWCA Civ 29 para 30.

60 Parole Board website, March 2009.

61 National Audit Office report, *Protecting the public: the work of the Parole Board*, published on 5 March 2008, para 9.

62 Public Accounts Committee, *Protecting the public: the work of the Parole Board*, Ninth Report Session 2008-2009, para 76. 86% of those members who provided information on the question have a degree.

63 An outline of the New Zealand Parole Board's functions is set out in appendix D below.

of specific roles, including chairing panels and determining matters of procedure. To be appointed they must be either retired or serving District judges (equivalent to a Crown Court judge in England and Wales) or a barrister or solicitor who has held a practising certificate for at least seven years.⁶⁴ Otherwise the Act simply requires that members have 'knowledge or understanding of the criminal justice system; and the ability to make a balanced and reasonable assessment of the risk an offender may present to the community when released from detention; and the ability to operate effectively with people from a range of cultures; and sensitivity to, and understanding of, the impact of crime on victims'.⁶⁵

- 3.31 Apart from judicial and legal members, the Tribunals Service has three broad categories of non-legal member: healthcare professionals, other qualified professionals and other experts, ie those whose experience cannot be described in terms of professional qualification.⁶⁶ Existing Parole Board members would not fall outwith these categories.⁶⁷
- 3.32 At present, the deployment of serving judges is a judicial matter. However, under the Tribunals, Courts and Enforcement Act 2007, it is the Senior President who has oversight of the process. There is no reason to suppose that the Senior President will have any less or more leverage over the amount of judges' time that would be set aside than if the Parole Board joined the court system.⁶⁸ One attraction of the Tribunals Service option for judicial and perhaps also for some non-judicial members would be the potential diversity of work available. The Senior President has commented that he sees considerable advantages in formal and informal interchange between the two levels of the First-tier and the Upper Tribunal and exploring in the future the possibilities presented by 'cross-ticketing' between tribunals.⁶⁹
- 3.33 Judges and non-legal members' appointments to the tribunals within the Tribunals Service are made by the Lord Chancellor. In the case of judicial and legal appointments, this is done through the Judicial Appointments Commission (JAC).⁷⁰ For non-legal members recruitment varies according to the jurisdiction.

3.34 Recommendation

Judicial and legal appointments to the Parole Tribunal should be made by the Judicial Appointments Commission. For all members, the period of appointment should be in keeping with that used by other tribunal jurisdictions. In particular, appointments should seek not only to ensure that members have the right capacities and skills but also that they are adequately representative of the community. Consideration should be given to the appointment of full-time members.

64 One serving or retired High Court judge may also be appointed as a convenor: s114(2) Parole Act.

65 S111(3) Parole Act 2002. Victims of crime are identified in s4 Victim's Rights Act 2002.

66 Members of the First-tier Tribunal and Upper Tribunal are appointed respectively under Sched 2 and Sched 3 Tribunals, Courts and Enforcement Act 2007.

67 However, see paragraph 5.1 below regarding the need for specialism in Parole Tribunal proceedings.

68 Concerns have been repeated by the Parole Board over the years about the difficulty of recruiting judges: eg, House of Commons Justice Select Committee, Fifth Report Session 2007-2008, para 76; Public Accounts Committee, *Protecting the public: the work of the Parole Board*, Ninth Report Session 2008-2009, para 23. If it is correct that allocation of adequate judicial time is best achieved by having both the resource and the accountability in the same place, then there is a case for appointing enough judicial tribunal members to the Parole Tribunal to handle the core business on a full-time basis.

69 Senior President of Tribunals First Implementation Review (June 2008).

70 The JAC (an independent NDPB) was set up in 2005 by the Constitutional Reform Act to select candidates for judicial office.



Chapter 4

Judging risk – predicting recidivism and harm

- 4.1 Judicial and quasi-judicial decision-makers are increasingly required to make an assessment of the risk of recidivism and harm posed by an individual, whether for the purpose of sentencing or for the purpose of determining suitability for conditional release.⁷¹ As described elsewhere in this report, there are now statutory sentencing options in England and Wales that depend on a finding that an offender poses a significant risk to members of the public of serious harm caused by the commission of further specified offences.⁷²
- 4.2 In other jurisdictions, legislative provisions have been introduced with specific preventive detention functions. For example, in Queensland, the Dangerous Prisoners (Sexual Offenders) Act 2003 (DPA) provides for the preventive detention or, alternatively, ongoing supervision of ‘dangerous sexual offenders’ after the expiration of their sentence. This legislation requires that before a preventive detention order can be made the court must be satisfied to a ‘high degree of probability’ by ‘acceptable, cogent evidence ... of sufficient weight to justify the decision’ that the prisoner poses a serious danger to the community.⁷³
- 4.3 As with those indeterminate sentencing options that require an assessment of dangerousness (albeit at the time of sentence), it is anticipated that such measures will only apply to small numbers of offenders ‘clustered at or near the extreme end’.⁷⁴ In principle, preventive detention of any kind replaces the objective of balancing the protection of society against the benefit to the offender of re-release back into the community with an exercise of ‘protecting society’, which appears to call for no such balance. With mandatory and indeterminate sentence prisoners, the balancing act (which it is anticipated will be carried out at some time in the future by the Parole Board) can be dispensed with only if the court declines to set a minimum term because the offence is so serious that the court considers that incarceration for life is justified by this alone, irrespective of the risk to the public.⁷⁵ With indeterminate sentences for public protection (IPPs), the primary object is not to rehabilitate the offender but to protect the public. The House of Lords has held that detention under IPP will only cease to be justified when the stage is reached where it is no longer necessary

71 Risk assessment also plays a pivotal role in a number of other areas within the criminal justice system, for example, the grant of bail and the security classification of offenders within the prison estate.

72 For example, the indeterminate sentences for public protection and sentences of detention for public protection introduced by ss225 and 226 Criminal Justice Act 2003.

73 S13(3) Dangerous Prisoners (Sexual Offenders) Act 2003. Similar regimes were introduced in Western Australia and New South Wales in 2006. Preventive detention would be contrary to the ECHR and is considered here merely as a comparator.

74 Comment of the court in *R v Neve* (1999) 137 CCC (3D) 97 (Alta CA) at 59 when considering the proper application of The Dangerous Offender and Long-Term Offender Regime, Part XXIV of the Canadian Criminal Code, R.S. 1985 c.C-46 (s 752 ff).

75 JUSTICE is opposed in principle to the use of ‘whole life’ tariffs but they are currently available in the sentencing law of England and Wales; see Sched 21 Criminal Justice Act 2003 (tariff-setting in murder cases).

for the protection of the public that the offender should be confined, or if so long elapses without a meaningful review of this question that his or her detention becomes disproportionate or arbitrary.⁷⁶

- 4.4 The increase in the use of indeterminate sentencing policies and, in some jurisdictions, the introduction of preventive detention, all in varying degrees reliant on judicial findings of dangerousness, has resulted in a growing range of challenges to the admissibility and evidentiary relevance of the risk instruments being used by assessors.⁷⁷ The extent of judicial disquiet can be seen in a dissenting judgment in the case of *Fardon*, which came before the Australian High Court. The applicant challenged the constitutionality of the power given to the court under the DPA to detain him after completion of his sentence. In finding the provision invalid, Kirby J, dissenting, noted that the evidence to be relied upon was not only otherwise inadmissible in a criminal court but was also 'notoriously unreliable' and given 'by people who do not have the gift of prophecy'.⁷⁸ If the predictions provided by experts in the assessment of risk are at best informed guesses, this must call into question their use in deciding suitability for release.
- 4.5 If such concerns affect the use of risk assessments in the context of sentencing and preventive detention, they will, similarly, affect the grant of conditional release. Issues that have arisen abroad include: the non-disclosure of the fact that a risk assessment instrument has been used; the use of 'ministry override' policies for certain offences; the qualifications of assessors; the information used to formulate the assessment; and the possibility that risk assessment information may lead to the imposition of a sentence 'disproportionate to the gravity of the offence and the degree of responsibility of the offender' (contrary to the Canadian Criminal Code).⁷⁹
- 4.6 Under existing conditional release provisions, different types of risk assessment are required in order to decide whether certain classes of prisoner are suitable to be released or re-released on licence. These assessments may relate to a risk of any reoffending, a risk of the offender committing offences of the type for which he or she was sentenced, or a finding that the offender poses an unacceptable risk regardless of the type of index offence. For example, in applying the statutory test for those who have been sentenced to an indeterminate period of imprisonment or life imprisonment, the Board must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.⁸⁰ This is often referred to as the 'life and limb' test. While this test refers to the nature of a risk which justifies continued detention, it gives no indication of the actual level of risk required: 'the touchstone of acceptability remains unclear'.⁸¹ As Lord Justice Stuart-Smith went on to say in *ex p Bradley*:

Unless the required test is expressed in percentage terms (in the same way that likelihood arguably implies more than 50 per cent.), which is surely impossible, it seems inevitable

76 *Secretary of State for Justice v James (formerly Walker and another); R (on the application of Lee) v Secretary of State for Justice* [2009] UKHL 22 para 69.

77 It has been argued that the burgeoning trend towards indefinite sentencing helps to explain how preventive detention regimes (specifically the Community Protection Act 1994 (NSW) which was later found invalid by the High Court in *Kable v Director of Public Prosecution* (1996)) gain political acceptance. See George Zdenkowski, 'Community Protection Through Imprisonment Without Conviction: Pragmatism versus Justice' (1997) 3 *Australian Journal of Human Rights* (available online in (1997) vol 3 no 2).

78 *Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50, 103 at 192 (High Court of Australia). Kirby J considered the provision invalid on the ground that continued detention in these circumstances was a punitive law, offending against the principles of double jeopardy and retrospective punishment.

79 See Justice David P Cole, Ontario Court of Justice, Toronto, 'The Umpires Strike Back: Canadian Judicial Experience with Risk Assessment Instruments', *Canadian Journal of Criminology and Criminal Justice*, October 2007, vol 49, no 4, p494.

80 S28(6)(b) Crime (Sentences) Act 1997.

81 Per Stuart-Smith LJ in *R v Parole Board ex p Bradley* [1991] 1WLR 134, DC, p144.

that one can say really no more than this: first that the risk must indeed be substantial ... but this can mean no more than that it is not merely perceptible or minimal. Second, that it must be sufficient to be unacceptable in the subjective judgement of the Parole Board to whom Parliament has of course entrusted the decision ... Third, that, in exercising their judgment as to the level of risk acceptable, the Parole Board should clearly have in mind all material considerations.

- 4.7 Terms like ‘substantial’ and ‘more than minimal’, used by the courts to illuminate levels of risk, do not necessarily align with the results produced by standard risk assessment tools.⁸² This means that, when following guidance or applying a statutory test in order to determine suitability for release or re-release, decision-makers must make a value judgment in order to decide, for example, what a ‘low’, ‘medium’, ‘high’ or ‘very high’ risk of reconviction or harm means in terms of the test to be applied.
- 4.8 In relation to the preventive detention legislation in Queensland referred to above, the burden of proof lies with the applicant (the Attorney General). The application of a burden of proof in Parole Board cases is usually regarded as a grey area of jurisprudence. The statutory test presumes that release will not be directed unless the evidence demonstrates to the Board’s satisfaction that the level of risk is acceptable for release. The only exception to this approach is found in recall cases involving prisoners serving extended sentences imposed under the Criminal Justice Act 1991, where the Board must be positively satisfied of the need for continued detention.⁸³ The rationale for this difference in approach is that in these latter sentences, once the term of imprisonment commensurate with the seriousness of the offence has expired, continued detention is warranted in ECHR terms only if the Board makes a positive finding that the offender poses a risk of the commission of further offences of the kind for which the sentence was imposed, namely sexual or violent offences.
- 4.9 One reason why the burden of proof is considered to have ‘no part to play’⁸⁴ in determining suitability for release is the assumption that the Parole Board operates an inquisitorial system in making risk assessments. In a tribunal setting, it is the responsibility of the Board and not of the parties to evaluate risk and determine the outcome as it thinks appropriate. Lord Bingham doubted the existence of any burden on the prisoner to persuade the Board that it was safe to recommend release ‘since this is an administrative process requiring the Board to consider all the available material and form a judgment’.⁸⁵ Lord Carswell in *McClea*n (a Northern Ireland case concerning the release of a prisoner under the Good Friday agreement) also considered that it was inappropriate to place a burden of proof on either the prisoner or the secretary of state as the question whether someone was a danger to the public ‘was more akin to many administrative decisions than the ordinary judicial process of deciding whether a matter requiring proof has been established ... [I]t is not a *lis inter partes*, and it is not the function of the Secretary of State to prove the case for keeping him in custody’.⁸⁶

82 Another example, relevant to the imposition of indeterminate sentences, is ‘significant risk’, which was defined in *R v Lang* [2005] EWCA Crim 2864 at [17i] as having a higher threshold than a mere possibility of occurrence and meaning ‘as in the Oxford Dictionary, noteworthy, of considerable amount or importance’.

83 *R (Sim) v Parole Board and Home Secretary* [2003] EWCA Civ 1854.

84 See Kennedy LJ at para 28, *R (on the application of Brooks) v The Parole Board* [2004] EWCA Civ 80. See also comments by Keene LJ at para 42, *R (on the application of Sim) v Parole Board* [2004] QB 1288.

85 *R v Lichniak and Pyrah* [2002] UKHL 47 at para 16.

86 *Re McClea*n [2005] UKHL 46 at para 73.

- 4.10 In *Brooke* (a case specifically concerned with the Board's independence from the executive), Lord Phillips viewed the formation of the judgment as to the risk of reoffending as a judicial function:⁸⁷

Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the Board is satisfied that there is no risk that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the Board's judicial function.

- 4.11 The outcome for the prisoner, whether the process is administrative or judicial, may be a deprivation of personal liberty – a fundamental human right and a primary value of the common law. In these circumstances, any suspicion that continued detention might be based on an unreliable assessment of risk, or formed with the aid of assessment tools whose major limitations have not been acknowledged, is, understandably, a matter of serious concern.
- 4.12 Devising reliable risk assessment models that will assist decision-makers to protect the public from future criminal behaviour has become the sine qua non of a society preoccupied with the avoidance of risk of harm.⁸⁸ The so-called first generation⁸⁹ – unstructured clinical risk assessment⁹⁰ – allowed anything thought relevant by the assessor to be taken into account. Such assessments have now been superseded by models said to be both more reliable and more transparent. If the major criticism remains their unreliability, no case has yet been made out for dispensing with their use altogether. For example, suspicion and unfamiliarity may have led some panels to avoid taking the results of actuarially based risk assessment tools into account in reaching a decision about suitability for parole in the late 1990s. This produced an over-estimation of risk, particularly for sex offenders, and resulted in an 'actuarially anchored' approach being recommended.⁹¹
- 4.13 An overview of the most commonly used risk assessment tools likely to be found in the dossiers considered by the Parole Board is provided in appendix E. It is proposed that the Parole Tribunal require that whenever a risk assessment tool (or combination of tools) is used to assist a report writer to assess an offender's risk, this should be made clear in the body of the report. This practice would enable those determining suitability for conditional release, as well as those about whom such assessments are made, to know the factors on which the assessment has been made. It would also enable those parts of the risk assessment tool that are actuarially linked to be distinguished from those parts which are based on the opinion of the person entering the data. For example, in

87 *R (on the application of Brooke and others) v The Parole Board and The Lord Chancellor and Secretary of State for Justice* [2008] EWCA Civ 29 at para 53.

88 See R Morgan, 'The Risk of Risk-Preoccupation: Criminal Justice Policy in England' in *Risk and Public Services*, ESRC, 2009.

89 Risk assessment models are often referred to as first, second or third generation, beginning with unstructured clinical assessment as first generation, standardised, actuarial assessment as second generation, and structured clinical assessment as third generation. For a discussion of the utility of the different models see A Maden, *Treating Violence: a guide to risk management in mental health*, OUP, 2007.

90 Now considered to have been accurate in approximately only one-third of cases: see J Monahan, (1981) *The Clinical Prediction of Violent Behaviour* discussed in J Gunn (1993) 'Dangerousness', in J Gunn and PJ Taylor (eds) *Forensic Psychiatry, Clinical, legal and ethical issues*, Butterworth Heinemann, 1995, pp624-645.

91 R Hood and S Shute, *The Parole System at Work: A Study of Risk-Based Decision-Making*, Home Office Research Study No 202 (London: Home Office, 2000). The report argued that actuarial risk of reconviction scores should be available to Board members (a view endorsed by the Comprehensive Review of Parole and Lifer Processes, published in 2001). The 2004 Home Secretary's directions to the Parole Board include as one of the factors to be taken into account, if available, the indication of predicted risk as determined by a validated actuarial risk predictor model.

OASys the estimate of low to high risk of harm is a rating based on the opinion of the compiler.⁹² Risk of harm is also a dynamic concept needing to be kept under regular review.

- 4.14 While many of the most commonly used risk assessment instruments, for example, OASys and RM2000 (for sex offenders), are typically relied upon in preparing parole reports, particularly by offender managers, there are no tools currently in use in England and Wales specifically designed for parole purposes.⁹³ Where report writers fail to base their assessment on the results of a validated risk assessment tool, this does not prevent the Board reaching its own decision but it may result in delay. For example, in a study of DCR panels (determinate sentence cases), only 60 per cent of dossiers were found to contain completed OASys assessments, and panels were found to be more inclined to defer parole decisions if such assessments were missing.⁹⁴
- 4.15 In New Zealand, the Parole Board has available a model of structured decision-making that can be used as a decision-making aid. This involves a three-step process: first, to establish and confirm a baseline assessment of an offender's risk, at conviction, of re-offending if released;⁹⁵ second, to determine whether a change in an offender's risk of re-offending has taken place as a result of the offender's detention and/or rehabilitation while in detention and, if the Board considers the risk is reduced sufficiently to warrant it, to consider the offender for release; third, to determine whether the release proposal presented by the Department of Corrections supports the further rehabilitation of the offender and his or her successful reintegration into the community. In relation to the last step, the 'Structured Consideration for Successful Release Potential' (RPFA-R) has been devised to assist the Board in making 'accurate, transparent and consistent decisions about the validity of release management plans'.⁹⁶ The production by the psychological services of the structured decision-making manual used by the Board was unsuccessfully challenged in *Miller*⁹⁷ on the basis that this (together with a number of other systemic factors) compromised the Board's independence and impartiality.
- 4.16 The dilemma (whether the individual under consideration is a convicted prisoner or a mental patient) is often described in terms of the need to distinguish between 'true positives' – those who will reoffend (or hurt themselves or others) if they are released – and 'true negatives' – those who will not reoffend (or cause harm) if they are released. The individual and social cost of 'false positives', ie those who could safely have been released but were not, and 'false negatives', ie those who were thought safe but went on to reoffend or cause harm, can be very high in terms both of unwarranted continued detention and waste of public resources and of the catastrophic impact on victims and damage to the credibility of the release system employed.
- 4.17 There have been some interesting discussions in relation to the acceptability of 'false negatives'. In the Parole Board's 2003 annual report, David Hatch, the then chair, asked: what is a proper rate for re-offending? That year the reoffending rate for those determinate sentence prisoners granted

92 Thus, discrepancies may arise in ratings depending on the view taken about a particular offence, for example, internet pornography offenders may or may not be rated as posing a high risk of harm.

93 The Home Office discontinued its practice of calculating risk prediction scores for the purposes of parole in the late 1990s.

94 See DW Fitzgibbon, 'Fit for purpose? OASys assessments and parole decisions', (2008) *Probation Journal* at p55.

95 Using the Risk of Conviction/Risk of Imprisonment measure (RoC*RoI) – a computer-based statistical model designed to predict an offender's probability of reconviction within the next five years, the seriousness of the reoffending, and the likelihood of imprisonment. It is based on static variables including gender, age at first conviction, previous convictions and age at subsequent convictions, time in the corrections system, time between offences, seriousness of previous offending, type of previous offending, and current offence.

96 Dr Nick Wilson, National Advisor, Psychological Review, CPPS, Release Disposal Feasibility Assessment – Revised (RPFA-R) Manual and Rating Booklet, March 2009, Department of Corrections, New Zealand.

97 *Miller & Carroll v New Zealand Parole Board & Attorney General* (High Court) Civ 2004-485-1460. An appeal has been lodged.

parole had been 5.8 per cent, up from 3 per cent in the previous year.⁹⁸ It was speculated that the rise might be attributable to zero tolerance by the Probation Service, the targeting of offenders on licence by the police, or the Parole Board not being sufficiently risk-averse. In giving evidence to the Select Committee on Home Affairs, the chair gave the following account as to why a reoffending rate of about 4 per cent was considered acceptable by the Board:⁹⁹

But what is a proper rate for re-offending? When I was given the job and had a conversation with Jack Straw we decided it was around 4%. It is not a target you can hit, but I would be worried if it got to 10 and I think we would have to look very carefully at what was happening and whether members were perhaps becoming a bit too free and easy with release. We do not make the decision because there is overcrowding in prisons, but if there is a possibility of release—with public safety first, second and third in mind—then I think our members feel that that is what they should do.

- 4.18 The worrying independence issues raised by this quotation aside, it is not known whether there has ever been discussion of what, if anything, might constitute an ‘acceptable’ rate of reoffending for released life and indeterminate sentence prisoners. Since risk of reoffending and seriousness of offending are clearly not synonymous, public concern has led those responsible for offender management to focus more on identifying and managing risk of *harm*. For example, in response to the reports published by HM Chief Inspector of Probation into the management of offenders who, following release, went on to commit further very serious offences, the Probation Service introduced a comprehensive risk of harm practice training programme.¹⁰⁰
- 4.19 Risk of serious harm is one of the assessments included in OASys. It ought, therefore, to be available to all parole and life and indeterminate sentence panels.¹⁰¹ All of the cases referred by the Probation Service to a multi-agency public protection panel (MAPPP)¹⁰² come within the ‘High’ or ‘Very High’ *risk of harm* categories identified by OASys.¹⁰³ It is then up to the relevant MAPPP to ensure that the risk management plans drawn up for offenders within these risk categories benefit from the information, skills and resources provided by the individual agencies co-ordinated through MAPPA.¹⁰⁴ Depending on the degree of management intervention required, MAPPA offenders will be managed at one of three levels:

Level 1 – ordinary risk management, where the offender can be managed by one agency. (In 2005/06, 71 per cent of MAPPA offenders were managed at this level).

Level 2 – where the active involvement of more than one agency is required to manage the risk. (In 2005/06, 30 per cent of MAPPA offenders were managed at this level).

98 Between 2002-03 and 2007-08, the percentage of the average number of determinate sentence offenders on parole recalled for having committed a further offence has remained stable at either 6% or 7%. The number of prisoners released on a life licence who were recalled to prison was also constant at 6% until it fell to 3% in 2007-08. Public Accounts Committee, *Protecting the Public: the role of the Parole Board*, Ninth Report Session 2008–2009, para 8.

99 Select Committee on Home Affairs, Session 2002-03, HC 1231-i, Minutes of Evidence dated 28 October 2003, question 17.

100 Her Majesty’s Inspectorate of Probation, *An Independent Review of a Serious Further Offence Case: Damien Hanson and Elliot White*, February 2006.

101 But see DW Fitzgibbon, n94 above, at p55.

102 MAPPA (multi-agency public protection arrangements) were introduced in 2001 (following implementation of the Criminal Justice and Courts Services Act 2000). They bring together the police, probation and prison services in a MAPPA responsible authority. Other agencies, including social care, health, housing and education services are under a duty to co-operate with the responsible authority.

103 But note that as far as MAPPA are concerned the majority of offenders within the scheme (ie those described as level 1 management) are not, in this context, considered to pose a significant risk of serious harm to the public.

104 In 2005/6, there were 29,973 registered sex offenders in Category One, 14,317 violent or other sex offenders in Category Two and 3,363 other offenders in Category Three. See MAPPA – *THE FIRST FIVE YEARS: A National Overview of the Multi-Agency Public Protection Arrangements 2001–2006*, p3.

Level 3 – the Multi-Agency Public Protection Panel. This is responsible for the management of the ‘critical few’ who are assessed as presenting a high or very high risk of causing serious harm and can only be managed by a plan which requires close co-operation between agencies at a senior level. (In 2005/06, 7 per cent of MAPPA offenders were managed at this level).¹⁰⁵

- 4.20 Such figures as there are (based, however, on small numbers) suggest a decline in the course of a single year in the level of serious further offending by level 2 or level 3 offenders, with the greatest decline in the intensely managed level 3 cases. The data also shows a marked increase in action taken in level 2 and 3 cases to recall offenders to prison ‘prior to them having opportunity to commit serious further harm’.¹⁰⁶
- 4.21 The MAPPA system, which theoretically enables offenders who are being considered for conditional release (despite being assessed as posing a high risk or very high risk of serious harm in OASys terms) to be managed in the community, depends on whether the management and monitoring arrangements facilitated by MAPPA are considered robust enough to satisfy the Parole Board. This in turn depends on the correct identification and referral of such offenders in a ‘complex system’ that requires better integration if effective risk management is to be maintained.¹⁰⁷
- 4.22 It also requires panels considering release to get to grips with the ‘quality and likely success of the risk management plan being proposed’,¹⁰⁸ and to possess a proper understanding of risk assessment and its methods, and of what makes effective community management of such risk possible.¹⁰⁹ For example, there is a growing appreciation that it is context – the situations in which offenders find themselves – that plays a substantive role in serious future incidents, rather than factors intrinsic to the offender himself.¹¹⁰
- 4.23 Much of the extensive ‘dangerousness’ legislation (see above) has been focused on serious sexual offenders. While it is widely acknowledged that, as with violence that takes place in the home, the reconviction figures do not accurately reflect the actual reoffending rates,¹¹¹ there are differences of view about recidivism rates and the impact of protective factors on management of risk.¹¹² There may also be conflicting opinion about the extent to which participation in treatment should be equated with a reduction in risk.¹¹³
- 4.24 The need for caution in approaching standardised risk assessment may be particularly appropriate in life and indeterminate sentence cases. In general terms, even with the most statistically robust

105 See MAPPA – THE FIRST FIVE YEARS: A National Overview of the Multi-Agency Public Protection Arrangements 2001–2006, p5; Her Majesty’s Inspectorate of Probation, *An Independent Review of Serious Further Offence Case: Anthony Rice*, May 2006, p16.

106 Ibid, p7.

107 H Kemshall, ‘MAPPA, parole and the management of high risk offenders in the community’ in N Padfield (ed), *Who to Release? Parole, fairness and criminal justice*, Willan, 2007.

108 Ibid, p210.

109 It may not be always appreciated that it is not the duty of any Multi-Agency Public Protection Panel to decide whether an offender can come to its area or be released, but it is the duty of the offender manager to give his or her own opinion to the Parole Board.

110 J Craissati and O Sindall, ‘Serious further offences: An exploration of risk and typologies’ (2009) *The Probation Journal* 56, pp9-27.

111 This concern has led the New Zealand legislature to amend the Parole Act 2002 to provide that in preparing reports for Extended Supervision Order purposes, a health assessor may have regard to conduct that may be an offence but in relation to which the offender has not been charged or convicted.

112 Research suggests that sexual recidivism declines with age. It is likely, therefore, that some static risk instruments used with sex offenders overestimate the risk of men over 60. D Thornton, ‘Age and Sexual Recidivism: a variable connection’, *Sexual Abuse: a Journal of Research and Treatment*, 18, pp123-135.

113 Research indicates that a core sex offender treatment programme is more effective if targeted at medium risk offenders and that dropping out of a sex offender treatment programme doubles the odds of relapse. See C Friendship, RE Mann and AR Beech ‘Evaluation of a national prison-based treatment programme for sexual offenders in England and Wales’, *Journal of Interpersonal Violence* (2003), 18, pp744-759 and F Losel and M Schmuker ‘The effectiveness of treatment for sexual offenders: A comprehensive meta-analysis’ (2005) *Journal of Experimental Criminology*, 1, pp117-146.

risk assessment measures there is a particular difficulty in extrapolating from group reconviction rates (those who fall into the low, medium and high categories – which is reasonably accurate) to the individual case.¹¹⁴ There are also problems when the base rate of the event is low.¹¹⁵ When the base rate falls below 50 per cent, all actuarially based measures become increasingly inaccurate. With a base rate of 10 per cent, a very large number of false positives will occur in the course of trying to capture the tiny number of true positives. In other words, while predicting the risk of another burglary in a young male offender with numerous previous convictions (including burglary) is likely to be moderately accurate, predicting the risk of further serious interpersonal violence in a 50-year-old man with a previous conviction for murder is not.¹¹⁶

- 4.25 Since it was set up in 1967, the Parole Board has had a statutory duty to assess the risk posed by those prisoners whose cases come before it. At times the results of risk assessment tools which purport to record and monitor risk have been available to it. It seems uncontroversial that in the hands of report writers with the requisite knowledge and skills the use of such data adds value to any recommendation about whether an individual can safely be released. But this in turn supposes that the data itself is of good quality and that it has been produced by inputting information which is accurate, thorough and properly sourced. Risk assessment tools are ‘constantly being reinvented, retro-fitted and reassembled in response to governmental/institutional agendas’;¹¹⁷ risk management strategies are subject to continuous development; and ‘the standards and good practice of tomorrow are likely to be different from today’s’.¹¹⁸
- 4.26 It is therefore desirable that a risk assessment advisory group, independent of government, be established with the aim of providing the Parole Tribunal with expert advice on offender risk assessment and management.¹¹⁹ It is envisaged that this body would be well placed to provide a balanced assessment of the risk assessment tools currently in use and to draw attention to their known limitations.¹²⁰ In addition to reviewing research into existing programmes (including work being undertaken abroad), the risk assessment advisory group would also be expected to assist the Parole Tribunal in the provision of training designed to encourage the early identification of poor quality or inadequate risk data (particularly that which has little relevance to the legal issue to be determined), and to promote decision-making based on the best possible available evidence.

114 There is evidence that the vast majority of those falling into the high and very high categories do not reoffend violently/sexually, even though as a group they have a higher rate of violent/sexual reconviction than the medium or low categories. J Craissati and A Beech, ‘Risk Prediction and Failure in a Complete Urban Sample of Sex Offenders’, (2005) *Journal of Forensic Psychiatry & Psychology*, 16, pp24-40.

115 G Szmukler ‘Risk assessment: “numbers” and “values”’, (2003) *Psychiatric Bulletin* 27, pp205-207.

116 The base rate here being the ‘naturally’ occurring rate of reconviction for grave offences in a release lifer group (which varies from about 1-5%).

117 P Maurutto and K Hannah-Moffat, ‘Assembling Risk and the Restructuring of Penal Control’, (2006) *British Journal of Criminology* 46, pp438-54 at p440.

118 MAPPA – THE FIRST FIVE YEARS: A National Overview of the Multi-Agency Public Protection Arrangements 2001–2006, p11. This is also true of risk assessment, for example, variables previously thought to be important (such as denial of the offence and poor victim empathy) are now shown to be of much less importance in accurately predicting risk.

119 Such an advisory body would also be of interest to the mental health tribunal where many of the same issues arise. One model is provided by some of the work currently undertaken by the Risk Management Authority in Scotland, which has produced both an audit and rating document of risk assessment tools and also standards for judging the effectiveness and fitness for purpose of risk management plans prior to release under an Order for Lifelong Restriction. For references to the work of the RMA see appendix E.

120 For example, the application of group statistics to an individual, the small size of some of the samples relied upon, the use of tools not validated for the community in which they are used, the use of factors in actuarial risk assessment which can be seen as discriminatory, and the fact that risk assessment tools use factors which are not causative of recidivism or harm but are merely associated with such behaviour.

4.27 Recommendation

A risk assessment advisory group, independent of government, should be established with the aim of providing the Parole Tribunal with expert advice on general issues relating to offender risk assessment and management. Consideration should also be given to its providing independent advice to the Ministry of Justice on the use of risk assessment by the probation service, and to other authorities and tribunals.



Chapter 5

Procedure, guidance and rules

The tribunal

- 5.1 As mentioned above, one of the advantages of the Parole Tribunal's joining the Tribunals Service is that tribunals typically have a multi-disciplinary membership. We recommend that appointments to the Parole Tribunal include members with the following expertise: judicial/legal; psychiatric; psychological; expertise in probation; and other relevant expertise. We do not believe that appointments to the Parole Tribunal should be widened to those applicable to the First-tier and Upper Tribunals generally (which includes nurses; dentists; accountants; etc)¹²¹ as in our view more specialised expertise is required. Within appointees to the Parole Tribunal, however, the composition of the tribunal could vary according to the type of hearing, although we believe that a judicial/legal member should always chair the tribunal as a safeguard for the legal tests applied and for procedural fairness. For procedural hearings, directions setting, etc, the judicial/legal member sitting alone could suffice; substantive hearings regarding the possibility of release or recategorisation should have a tribunal of three members (or if necessary in a particular case, even more). Other than the judicial/legal member, the composition of the panel would depend on the individual case and be determined at the time of listing.

Decision-making

- 5.2 It is widely accepted that, if it is to be effective, guidance on suitability for release should be based on a sound analysis of those factors associated with the success or failure of previous release decisions on similar offenders.¹²² Such information has not always been available, and it is likely that in the past many decisions were taken on the basis of subjective impression. For example, in the criteria for selection for parole applied by the Board in 1986, it was said that in undertaking the balancing exercise 'common sense and general experience will best guide committee members in identifying cases where the danger is grave'.¹²³
- 5.3 Over the years, different parole systems have developed detailed guidance to assist decision-makers. Typically it will include what is, in effect, a statement of policy. This is the case with the power currently conferred upon the secretary of state to give the Parole Board directions¹²⁴ having

¹²¹ See The Qualifications for Appointment of Members to the First-Tier Tribunal and Upper Tribunal Order 2008 (SI 2008/2692).

¹²² See chapter 4, above.

¹²³ Report of the Parole Board 1986, (HMSO) Appendix 1 para 23.

¹²⁴ Either under s32(6) Criminal Justice Act 1991 or s239(6) Criminal Justice Act 2003.

particular regard to: '(a) the need to protect the public from serious harm from offenders; and (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation'. In addition, there may be a list of factors on which to base decisions. Such lists may be more or less explicitly directive. For example, they may contain definitions of the terms used, the information to be considered, the risk assessment instruments to be taken into account and the appropriate weighting to be given to the factors listed. The secretary of state's directions (set out in appendices A, B and C), though giving primacy to risk, do not specify what level of risk it is acceptable for the Parole Board to take, or how the balance between risk and benefit should be struck in the individual case.¹²⁵

- 5.4 Further, while there has been research both in the UK and abroad on the factors associated with parole decisions,¹²⁶ the impact of variations in procedure on parole outcome in England and Wales has not been effectively evaluated. While any procedure must satisfy the requirements of procedural fairness, beyond this the optimal procedure for best parole outcomes has not been properly investigated.
- 5.5 The secretary of state's power to give directions as to the matters to be taken into account by the Board in discharging its functions has been controversial. Apart from the impact of this power on the appearance of independence of the Board, this is likely to be due in part to concern that the power to issue directions provides the secretary of state with a mechanism to influence the Board's release rate, albeit sometimes by coded means. For example, when the directions for release and recall of determinate sentence prisoners were revised in 1996, the aim was said to be to tighten the framework. This was done by providing a 'more explicit' statement about the need to protect the public, as well as 'making clear' that the nature and circumstances of the original offence can be taken into account and placing 'emphasis' on the need to take into account previous convictions for violence or for sexual offences.¹²⁷ The revision also involved inserting: '[t]he Board shall take into account that safeguarding the public may often outweigh the benefits to the offender of early release' despite the fact that the directions already specifically stated that primacy should be given to risk. Changes in emphasis like this are intended to, and do, have a chilling effect.¹²⁸
- 5.6 In *Girling*,¹²⁹ it was held that there could be no objection in principle to a statutory power to issue directions since it was to be construed as a power to give guidance on matters to be taken into account only insofar as they were legally relevant. The directions issued in August 2004, which concerned the release of life and indeterminate sentence prisoners, had failed to do this insofar as they restated the statutory test in a way that would have narrowed the criterion for release.¹³⁰ This ultimately went to the Board's independence. As noted by the Divisional Court in *Brooke*, the 'erstwhile advisory body' status of the Parole Board and the 'direction-giving power' vested in the secretary of state presented a temptation to modify the statutory test in life and indeterminate sentence cases in pursuit of policy. This created a lack of independence, both in appearance

125 See R Hood and S Shute, *The Parole System at Work: A Study of Risk Based Decision-Making*, (2002) Home Office Research Study No 202, p4.

126 In the UK this would include Hood and Shute, n125 above, N Padfield and A Leibling with H Arnold, *An exploration of decision-making at Discretionary Lifer Panels*, (2000) Home Office Research Study 213, and DW Fitzgibbon, 'Fit for Purpose? OASys assessments and parole decisions', *Probation Journal* 55(1) (2008), pp55–69.

127 See *Hansard*, HC 10 May 1996, vol 277 col 308, Written Answers.

128 R Hood and S Shute, n125 above, p4.

129 *R (on the application of Girling) v Parole Board and another* [2006] EWCA Civ 1779 (CA); [2005] EWHC 5459 (Admin) (DC).

130 Paragraph 4 of the directions states that the test to be applied by the Parole Board in satisfying itself that it is no longer necessary for the protection of the public that the prisoner should be confined is **whether the lifer's level of risk to the life and limb of others is considered to be more than minimal** (emphasis added). Whether or not this stated the relevant principle correctly, it was not appropriate for the secretary of state to restate the statutory test.

and in fact, ‘the more so when the arm of the Executive in question is a party to the court’s proceedings’.¹³¹

- 5.7 While currently the secretary of state can issue directions, there is no requirement for him to do so. The Parole Board also issues policy and practice manuals for use by its members. Following a recommendation by the National Audit Office, it has also adopted a structured framework for writing reasons.¹³²
- 5.8 In our view, is it inappropriate for the secretary of state to issue directions to the Parole Board or its replacement body. The Parole Tribunal may be expected to develop its own practice and guidance, but the secretary of state should no longer be responsible for its formulation. One reason for having such guidance is that, together with published procedural rules, such information increases both the transparency and the consistency of the decision-making process. It also promotes decision-making which is as accurate as possible about the nature of the risk. This raises a number of difficult issues, some of which are dealt with in chapter 4, above.
- 5.9 The present directions relate to the release of determinate sentence prisoners (May 2004); the release and recall of life sentence prisoners (August 2004); and the recall of determinate sentence prisoners (April 2005). This raises questions about the extent to which different considerations are required for determinate and life or indeterminate sentence prisoners. If different considerations do apply, may they not also be required when considering the case of persistent, violent or sex offenders, or offenders with personality disorder or other mental health problems, or offenders who are children or young people? There are also questions about the weight to be attached to institutional factors (such as behaviour and programme attendance) and the non-custodial environment (such as past revocation of licence and the existence of protective factors). If the Parole Board, and any successor body, is to be entrusted with making decisions based on an understanding of questions such as these, it should also be given responsibility for formulating its own guidance, unhampered by executive interference.

5.10 Recommendation

The secretary of state should not issue guidance to the Parole Board or its successor body.

Rules

- 5.11 The Parole Board (Amendment) Rules 2009¹³³ are the first Parole Board rules to be made subject to the negative resolution procedure. Earlier versions, including those that the 2009 Rules amend, were not exercisable by statutory instrument but were made under an enabling power in the Criminal Justice Act 1991 and, therefore, not subject to Parliamentary scrutiny. In *Brooke*, the

¹³¹ *R (on the application of Brooke & ors) v the Parole Board & ors* [2007] EWHC 2036 (Admin) at 44. The court also took pains to point out that the law would be the same if the policy objective were to widen rather than to narrow the test for release, for example, because of pressure on prison places.

¹³² The framework is based on the secretary of state’s directions and utilises headings which reflect the issues that panels currently consider in their decision-making, including the evidence considered by the panel, an analysis of offending, factors which increase or decrease risk of reoffending and harm, evidence of change during sentence, the panel’s assessment of current risk of reoffending and serious harm, plans to manage risk (where release or open conditions are being considered), the level of risk, suitability for release/open conditions and, where required, licence conditions.

¹³³ The stated purpose of the proposed amendments to the 2004 Rules is to maximise the Board’s capacity to deal with its increased volume of cases and allow for more flexible working practices, in particular in determining the size of panels (currently three members) and extending the period in which the Board must issue its decision from seven to 14 days.

Divisional Court held that, taken by itself, the rule-making power does not create an appearance of lack of independence because of the Parliamentary procedure that now applies to it.¹³⁴

- 5.12 The Tribunals, Courts and Enforcement Act 2007 created a Tribunals Procedure Committee to make and amend rules governing the practice and procedure in the First-tier Tribunal and Upper Tribunal. The terms of reference¹³⁵ for the Committee require the power to make rules to be exercised with a view to ensuring, in proceedings before the First-tier Tribunal and Upper Tribunal, that justice is done, that the tribunal system is **accessible and fair**, that proceedings before the First-tier Tribunal or Upper Tribunal are handled **quickly and efficiently**, that the rules are both **simple and simply expressed**, and that the rules, where appropriate, confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled **quickly and efficiently**. All the rules drawn up by the committees are subject to the negative resolution procedure.
- 5.13 The Committee, which was created in May 2008 and headed by Mr Justice (now Lord Justice) Elias, has developed generic rules of procedure for the various chambers of the First-tier Tribunal and further rules of procedure for the Upper Tribunal. According to the explanatory memorandum provided with the published rules, their purpose is not to radically overhaul the existing processes but to allow best current practices to be maintained. This means that a tribunal like the mental health tribunal no longer has its own rules and instead will apply the rules of procedure governing the Health, Education and Social Care Chamber.¹³⁶ Part IV of those rules applies specifically to first-tier (mental health) tribunals. The generic rules of each chamber can be supplemented by practice directions as required.¹³⁷
- 5.14 A new Parole Tribunal joining the Tribunals Service should, similarly, have procedural rules generated by an expert rules committee independent of government. In particular, the Parole Tribunal should have the power to compel witnesses to appear before it and to give orders for the production of documents¹³⁸ and directions as to matters such as disclosure.
- 5.15 The Parole Board rules provide for the giving, varying or revoking of directions but contain no means by which to enforce them.¹³⁹ By contrast, under the generic rules produced for the chambers of the First-tier Tribunal¹⁴⁰ a tribunal may ask the Upper Tribunal to exercise its contempt jurisdiction under s25 Tribunals, Courts and Enforcement Act 2007 in relation to any failure by a person to comply with a requirement imposed by the tribunal—
- (a) to attend at any place for the purpose of giving evidence;
 - (b) otherwise to make themselves available to give evidence;
 - (c) to swear an oath in connection with the giving of evidence;
 - (d) to give evidence as a witness;

¹³⁴ *R (on the application of Brooke & ors) v the Parole Board & ors* [2007] EWHC 2036 (Admin) at 43.

¹³⁵ See the Tribunals Service website. Before the Committee makes rules it must consult such persons (including such of the Chamber Presidents) as it considers appropriate. Once made, rules must be submitted to the Lord Chancellor, who may allow or disallow them. The Committee will also be consulted on Practice Directions received from the Senior President or Chamber Presidents.

¹³⁶ The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699).

¹³⁷ S23 Tribunals, Courts and Enforcement Act 2007 provides the Senior President with the statutory authority to supplement Tribunal Procedure Rules by means of Practice Directions.

¹³⁸ Such as now appear in The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, n136 above, r16.

¹³⁹ In *R (on the application of Brooks) v Parole Board* [2004] EWCA Civ 80, it was confirmed that a witness summons can be sought from the county court or High Court.

¹⁴⁰ The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, n136 above, r38.

- (e) to produce a document; or
- (f) to facilitate the inspection of a document or any other thing (including any premises).

A first-tier tribunal may also make an order against a party's lawyer or representative in respect of wasted costs under s29(4) of the 2007 Act.¹⁴¹

5.16 Recommendations

An expert rules committee, independent of government, should generate rules for the Parole Tribunal.

The Parole Tribunal should have the power to compel witnesses to appear before it and to give orders for the production of documents and directions as to matters such as disclosure.

Case management

- 5.17 It is proposed in chapter 7 that the secretary of state be required to provide information to the Parole Tribunal about each life and indeterminate sentence prisoner, which will then form a dossier held by the Tribunal. This requirement, together with comprehensive procedural rules, should improve the efficiency of the existing system.
- 5.18 The present Parole Board is limited in its capability either to improve the quality of information that is provided to it or to reduce its high deferral rate. Although it introduced an intensive case management (ICM) process in January 2008, it has little clout when it comes to improving the timeliness of delivery of the dossier except by sending out reminder letters and issuing directions to the prison if no dossier has been received by a set date.¹⁴² Other case management mechanisms, such as listing cases only where the full dossiers exist and all directions have been complied with, listing more intelligently, sharing information and giving as much notice as possible to the parties of the listed hearing date are matters of good practice rather than innovation. There is no sanction available for non-compliance with the Board's directions, despite the Board's duty under Article 5(4) ECHR to decide speedily the lawfulness of continued detention.¹⁴³
- 5.19 An earlier 'sift' procedure operated by the Board has also been formally replaced by that part of the ICM process which allows for a single member (who has been trained and accredited to undertake ICM assessments) to issue a negative decision: that is, a decision that neither directs release nor, in life and indeterminate sentence cases, recommends open conditions. In these circumstances, a letter will be sent to the prisoner giving reasons for the decision. The prisoner then has 28 days to consider the paper decision and decide whether or not to appeal. If the prisoner appeals the decision, an oral hearing will be considered, provided the prisoner submits a statement explaining why an oral hearing is being requested.¹⁴⁴ It is noted that the Board has adopted a similar paper procedure for extended sentence prisoner (ESP) annual reviews¹⁴⁵ and no longer automatically grants an oral hearing when requested to do so by a determinate sentence prisoner seeking

¹⁴¹ 'Wasted costs' are defined as any costs incurred by a party – as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or which, in the light of any such act or omission occurring after they were incurred, the relevant tribunal considers it is unreasonable to expect that party to pay.

¹⁴² The process does not change the time frame set out in the relevant Prison Service Orders (see generally PSO 4700 and PSO 6000).

¹⁴³ See, for example, *Craig Smith v Secretary of State for Justice, Parole Board* [2008] EWHC 2998 (Admin).

¹⁴⁴ See generally The Parole Board, *Independent Case Management, Oral Hearings, General Guide* (July 2008).

¹⁴⁵ *Ibid*, p 11.

to challenge a recall to custody.¹⁴⁶ We believe that these procedures fail to respect the right to a hearing. Even in the life and indeterminate sentence cases where a hearing is available on appeal, literacy, mental health and capacity issues may compromise the defendant's ability to appeal and submit a statement. Making decisions 'on the papers' is also likely to compromise the quality of decision-making. Such responses to a heavy caseload should not be necessary if the recommendations in this report are adopted; the Parole Tribunal will have ongoing oversight of cases and control over timing of reviews.

Secret evidence and special advocates

- 5.20 Under the Parole Board Rules, the secretary of state can withhold from the prisoner any information or reports relevant to that prisoner's review on the grounds of national security, the prevention of disorder or crime, or the health or welfare of the prisoner or others (such withholding being a necessary and proportionate measure in all the circumstances of the case). The secretary of state may send the information/reports separately to the Board, together with his reasons for believing that disclosure would have the relevant effect. It is then for the Board to decide whether withholding such documents is a necessary and proportionate measure in all the circumstances of the case.¹⁴⁷ Typically, where a direction is given by the Board that information should be withheld, it may be shown to the prisoner's legal representative on the understanding that it should not be disclosed, directly or indirectly, to the prisoner.¹⁴⁸ However, it is a principle of professional conduct that the lawyer may not keep secret from the client things that affect the client's interests, and for this reason lawyers should refuse to look at material on these terms, unless their client consents. In most cases, the type of information withheld relates to statements made by those who fear their safety would be put in jeopardy should their identity be revealed. This may be someone close to the offender (for example, partners, ex-partners and associates) with whom they have had ongoing or recent contact, or someone who has had little or no contact with the offender (for example the victim of an offence) but who is fearful of any future contact, even if unintended.
- 5.21 A departure from this procedure was made in 2002 when Scott Baker J (as he then was and sitting as a judicial member and vice-chair of the Parole Board) decided to withhold relevant information not only from the prisoner but also from his legal representative and proposed instead to disclose it to a specially appointed advocate. When this was done, the claimant sought judicial review of the decision on the ground that the procedure violated Article 5(4) ECHR and was not authorised by domestic law. The case, *Roberts*,¹⁴⁹ subsequently went to the House of Lords where it was held (by a majority) that the Parole Board was able, within the statutory powers granted to it and compatibly with Article 5 ECHR, to appoint a special advocate. However, the House could not say whether the adoption of such a procedure would be justified in Mr Roberts' case, because the decision was fact-sensitive and could only be made once the proceedings had been concluded. While further procedures might be available to help ensure fairness – for example, informing the prisoner of the gist of the case against him or her, showing the prisoner documents that had been redacted or edited, or by disregarding the withheld material – the key issue of balancing the

¹⁴⁶ See the recommendation at para 8.15 of this report.

¹⁴⁷ See Parole Board Rules 2004 (as amended), r6(2) and r8(2)(d).

¹⁴⁸ *Ibid*, r6(3).

¹⁴⁹ *R (Roberts) v Parole Board and another* [2005] UKHL 45, [2005] 2 AC 738. The decision was by a bare majority of 3 to 2. The principled dissent of Lords Bingham and Steyn ought not to be overlooked by those concerned with reform of the system.

triangulation of interests between the prisoner, the public and informants was for the Board. Lord Woolf observed:¹⁵⁰

Procedural rules cannot be devised that anticipate all the situations that can arise where a tribunal has to exercise its discretion to determine its own procedure in order to reconcile conflicting interests of [this] nature...

- 5.22 The concept of the ‘triangulation of interests’ was again applied in a case where the prisoner sought to challenge the decision of a panel made under rules to exclude him from the hearing while his ex-wife, whose allegations of abuse had led to his recall, gave evidence.¹⁵¹ Munby J, at first instance, found that in all the circumstances of the case Mr Gardner had the fair hearing guaranteed to him by Article 5(4) ECHR. He also considered that the ex-wife’s interests under Article 8 ECHR were engaged because the matters about which she was called to give evidence fell within the ambit of Article 8 as matters relating to both her ‘private’ and her ‘family’ life. It was also engaged by the possible effect on her of having to testify in circumstances where she was too frightened to give evidence in the prisoner’s presence. The Court of Appeal dismissed the prisoner’s appeal.¹⁵² In our view, this case was one that may have called for the use of special measures to assist the witness to give evidence, of the type that would be available under the Youth Justice and Criminal Evidence Act 1999 in criminal proceedings; however, there can be no justification for excluding the prisoner from a hearing in his or her case unless it is a purely procedural hearing (eg listing, etc) or a public interest immunity hearing where sensitive material is discussed.
- 5.23 Rule 14 of the current First-tier Tribunal rules provides that the tribunal may make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings if the tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm, and it is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction. The party seeking the direction provides the material to be excluded to the tribunal, which must then decide whether or not it should be disclosed to the ‘second party’. There is also provision for disclosure to the ‘second party’s’ representative if the tribunal is satisfied that this would be in the interests of the party and that the representative would abide by the requirement not to disclose the material either directly or indirectly without the tribunal’s consent.
- 5.24 JUSTICE believes, as set out in our recent report on *Secret Evidence*,¹⁵³ that information that is not disclosed to one of the parties and, therefore, cannot be challenged by them, should not be used against them, particularly when the right to liberty is engaged. The use of secret evidence, in addition to contravening the procedural rights of the party to whom it is not disclosed, compromises the quality of decision-making – since for example, in the context of parole, the prisoner cannot offer evidence in return that would provide a different or legitimate explanation for, or correct inaccuracies in, evidence which on first examination seems to show that he or she presents a high risk of harm.
- 5.25 Further, as the facts of *Roberts* also show, the use of secret evidence may be far less effective than other more conventional methods to achieve its objectives (for example, witness protection, which could have been better accomplished by police protection measures in that case). *Roberts* was

150 Ibid, para 48.

151 *R (on the application of Robert Gardner) v Parole Board* (2005) EWHC 2981 (Admin).

152 *R (on the application of Robert Gardner) v Parole Board*, CA (Civ Div) (Lords Justice Mummery, Tuckey, Wilson), 5 September 2006.

153 JUSTICE, 2009.

an example of the spread in the use of special advocates in an unsuccessful attempt to maintain procedural fairness while using secret evidence. The system of special advocates was introduced in the UK Special Immigration Appeals Commission Act 1997 and is used in other statutory contexts, for example, to provide advocacy in control order proceedings under the Prevention of Terrorism Act 2005. In its investigation into terrorism, counter-terrorism and human rights, a panel of eminent jurists of the International Commission of Jurists (ICJ) recorded that it had:¹⁵⁴

... heard considerable scepticism about the adequacy of the special advocates system. Many participants at the Hearing in London – including a serving special advocate – argued that the system was incapable of allowing individuals to effectively challenge the allegations made against them. In particular, many considered it problematic that once served with the ‘closed material’, the special advocate is, as a rule, forbidden from communicating with the appellant or their lawyer.

- 5.26 We do not believe that special advocates should be used in this way. They might be used legitimately to facilitate the disclosure process in a public interest immunity hearing (analogous to those used in criminal cases) where material is too sensitive to be disclosed to the prisoner or his or her legal representative. However, any material found to be too sensitive to be disclosed should not be relied upon by the Parole Tribunal.

Recommendation

- 5.27 Secret evidence should not be used by the Parole Board or Parole Tribunal. Substantive proceedings should take place in the presence of the prisoner and his or her legal representative. Public interest immunity hearings should be used to decide whether sensitive material can be disclosed and if it cannot be disclosed, it should not be relied upon by the tribunal.**

Publicity of proceedings

- 5.28 Cases heard in court are ordinarily open to the public and decisions are reported. In some jurisdictions, parole authorities have provision for members of the public to attend some types of parole hearing. In Canada this is done ‘in the spirit of openness and accountability, and to contribute to better understanding of the parole process’.¹⁵⁵ In some states of the USA the public can not only watch but also be directly involved, influencing parole decision-makers by attending the hearing and speaking in support of, or in opposition to, release.¹⁵⁶ In others, for example Connecticut, hearings are transmitted on networks such as ct-n, a state public affairs television and streaming network that enables citizens to follow and monitor state government and public policy through live webcasts and video-on-demand. The workings of the Parole Board in England and Wales have received little publicity:¹⁵⁷ hearings are held in private and decisions are not published.¹⁵⁸

¹⁵⁴ International Commission of Jurists, *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights: Assessing Damage, Urging Action* (2009), p100.

¹⁵⁵ National Parole Board website at www.npb-cnrc.gc.ca.

¹⁵⁶ For example, Massachusetts and Tennessee.

¹⁵⁷ In November 2006, the BBC ran a three-part observational documentary ‘Lock Them Up or Let Them Out’, which followed a number of prisoners applying for parole. BBC Radio 4’s ‘Law in Action’ programme also featured a recorded lifer hearing in April 2003.

¹⁵⁸ According to the chief executive of the Parole Board, legal advice was obtained by the Board that it could not publish the reasons it gave on its website, even in a suitably anonymised form. See C Glenn, ‘Pulling together the threads – public confidence and perceptions of fairness’ in *Who to Release? Parole, fairness and criminal justice*, N Padfield (ed), 2007, Willan, at p233.

- 5.29 The shift towards the grant or refusal of parole by a court or similar body makes it appropriate to bear in mind that a fundamental characteristic of courts is that, save where there is compelling reason not to do so, they sit in public and publish their decisions with the reasons for them.¹⁵⁹ However, there are special characteristics of the parole jurisdiction that make it very difficult for fully public hearings to take place. Chief among these is the fact that parole hearings are held in prisons. Transporting prisoners to a tribunals service building where public hearings could be held would be extremely resource-intensive and would also necessitate the holding of the tribunal in a building with appropriate security apparatus (cells on site; custody staff; etc). Further, many witnesses will be on-site at the prison and would have to travel to attend a hearing elsewhere.
- 5.30 While public hearings would represent our ideal option, we accept, therefore, that in relation to hearings where the prisoner is in custody, the Parole Tribunal, at least at first, will continue to sit in prisons. In a prison environment security concerns make it difficult to admit members of the public; however, consideration should be given to admitting journalists, who would then be able to report proceedings and provide a measure of transparency. Post-release reviews, which would be held at a tribunals service building rather than in a prison, could be open to the public except where this would not be in the interests of justice, or where the offender was a child or young person under 18 or otherwise mentally vulnerable so that his or her ability to participate in the proceedings would be compromised by the presence of the public.
- 5.31 If the Parole Board becomes an independent Parole Tribunal, we see no reason why its decisions and the reasons for them should not be published, with appropriate anonymisation if necessary. Reasons for decisions should, for similar reasons, be published; in the case of children and young people and in other appropriate cases the case can be anonymised.

5.32 Recommendations

Parole Tribunal hearings should, at least initially, continue to be held in prisons, but consideration should be given to admitting journalists in the interests of transparency. Post-release hearings should be held in public unless this would not be in the interests of justice or the offender is a child or vulnerable adult. Parole Tribunal decisions and the reasons for them should be published, with appropriate anonymisation if necessary.

Victims of crime

- 5.33 The Parole Board, like other parts of the criminal justice system, has been affected in recent years by the political emphasis upon putting victims at the heart of the system. In the context of parole, JUSTICE recognises the importance of the timely provision of appropriate information to victims of crime – in particular, it will usually be appropriate for the victim to be informed in advance that a decision as to release or transfer to open conditions is to be made. Even where the victim was not known to the prisoner, the former will often have relevant representations to make regarding licence conditions relating to their own fears of seeing the prisoner again – in particular regarding exclusion of the prisoner from certain areas. Care needs to be taken, of course, in cases where retribution is feared (for example, in the context of inter-gang violence).

¹⁵⁹ *Scott v Scott* [1913] AC 417.

- 5.34 A Code of Practice (in the form of a statutory instrument introduced under the Domestic Violence, Crime and Victims Act 2004) setting out the roles and minimum level of service which different agencies within the criminal justice system, including the Parole Board, are required to provide to victims of crime came into force in 2006.¹⁶⁰ The Code states that:¹⁶¹

The Parole Board must consider any representations that victims have offered to the Probation Service on the conditions to be included in the release licences of prisoners serving sentences subject to consideration by the Parole Board and reflect these considerations in the parole decisions. Conditions relating to the victim should be disclosed to the victim through the Probation Service, and where a licence condition has not been included, the Parole Board should provide an explanation for the non-inclusion.

The Parole Board must consider any information regarding the victim that relates directly to the current risk presented by a prisoner in deciding whether or not to grant or recommend release and reflect this in the parole decision.

- 5.35 Much of this section is in substance uncontroversial, but, as an independent tribunal, we would expect these matters to feature, implicitly or explicitly, in the Parole Tribunal's own rules/guidance rather than in this Code, which also applies to government agencies, including the police and Crown Prosecution Service.
- 5.36 Since 2001, the Probation Service has had a statutory duty to contact the victims in qualifying cases to let them know when a release decision might be made.¹⁶² Qualifying cases are those in which the person was the victim of a violent or sexual offence for which the offender has been sentenced to imprisonment for a period of twelve months or more.¹⁶³ 'Victim' means the actual victim of an offence, or, in the case of murder or manslaughter or where the victim is a child, the victim's family.¹⁶⁴
- 5.37 Once it has been established that the person concerned wants to stay in touch with the Probation Service throughout the offender's sentence,¹⁶⁵ he or she must be provided with general information about the criminal process, how sentences are managed and the key stages of the offender's sentence. There is also a specific statutory entitlement to be given information about licence conditions or supervision requirements to which the offender may be subject in the event of his or her release.¹⁶⁶ If the victim has indicated that he or she wants to know this information, reasonable steps must be taken to inform him or her of any licence conditions or supervision requirements that relate to contact with the victim or his or her family.

160 Other agencies include all police forces in England and Wales, Crown Prosecution Service, Her Majesty's Courts Service, Witness Care Units, Criminal Injuries Compensation Authority, Prison Service and Youth Offending Teams. See the Code of Practice for Victims of Crime, produced by the Office for Criminal Justice Reform, October 2005.

161 See *ibid*.

162 S69 Criminal Justice and Courts Services Act 2000 (renewed and extended to the victims of certain mentally disordered offenders by ss35-45 Domestic Violence, Crime and Victims Act 2004).

163 The Domestic Violence, Crime and Victims Act 2004 refers to the specific list of sexual and violent offences given in Schedule 15 to the Criminal Justice Act 2003. Louise Casey in *Engaging Communities in Fighting Crime* (Cabinet Office, June 2008) proposes that the victims' code should be widened to cover civil proceedings where these are linked to defined acts of crime, like domestic violence, or anti-social behaviour.

164 Under the Criminal Justice and Court Services Act 2000, a victim is defined as 'an appropriate person', ie any person who in relation to an offence who appears to the local Probation Board to be, or to act for, the victim of the offence (s69(3)).

165 All victims who are eligible for the scheme can choose to opt to take up contact at any time.

166 S35(5) Domestic Violence, Crime and Victims Act 2004.

5.38 According to the Victim Liaison Policy Guidance Manual, this provision applies to release on temporary licence (ROTL) and home detention curfew (HDC) as well as to release recommended or directed by the Parole Board. The wording of the statute also allows for the provision of such other information 'as the relevant local probation board considers appropriate in all the circumstances of the case'.¹⁶⁷ However, it is anticipated that only information which directly relates to an ongoing risk to the victim or victim's family and not personal details about the offender or his or her management and progress during sentence will be provided.¹⁶⁸

5.39 At present there are two routes by which representations made by crime victims can be brought before the Parole Board. The first is through information provided in the offender manager's report prepared for the Board. This information will have been submitted by the victim liaison officer to the offender's case supervisor after consultation with the crime victim, who will have been told that unless an application for non-disclosure is made and accepted by the Board this information will be shown to the offender. The second means of bringing representations before the Board is through a victim personal statement.

5.40 According to the Parole Board's own guidance to victims, the statement should include views on:¹⁶⁹

The impact of the offence both at the time it happened and afterwards. This could include information about the physical, emotional medical and financial impact of the crime on you or your family. This could include information you have put forward in your previous VPS or new information.

The impact which the offenders release may have on you or your family. This can include an explanation of why you believe the offender may be a risk to you or your family

5.41 The type of hearing at which a victim statement (either one made directly or indirectly) would be considered include:

- the release of determinate sentence prisoners (where the offender is serving a sentence of four years or more for an offence committed before 4 April 2005); or
- the release or transfer to open conditions of life or indeterminate sentence prisoners; or
- the consideration of representations from recalled licensees where the reason for the recall was related to either the offender breaching victim-related licence conditions, or demonstrating unacceptable behaviour towards the victim, or, where the offender has been assessed as presenting an ongoing risk to the victim.¹⁷⁰

If the victim statement is provided in a case that will be decided on the papers, it becomes part of the dossier considered by the Board. At a hearing where there is the potential for oral evidence to be received, the statement may either be presented by a member of the NOMS advocacy team or by the victim in person.¹⁷¹

¹⁶⁷ S35(7) Domestic Violence, Crime and Victims Act 2004.

¹⁶⁸ New Victim Liaison Guidance Manual at para 1.2.4 (under cover of Probation Circular PC11/2008), although it is stated that a change in security classification may go to risk in some cases.

¹⁶⁹ See the Parole Board website. Victims are also advised that the statement should not offer an opinion about the offender's release as this is a matter for the panel after they have considered all the evidence relating to the offender's risk.

¹⁷⁰ New Victim Liaison Guidance Manual at para 5.4.2.

- 5.42 There are two important principles to recall when considering the use of information provided by victims. The first is that while in some cases (for example, domestic violence) the victim may have a great deal of relevant information regarding risk to impart, in others they may have no information relevant to risk, or none beyond information regarding the index offence. In this context, it is important to remember that others, including the victims of past/superseding offences may have similarly or more relevant information than the victim of the index offence. Secondly, procedural fairness must apply – in particular, the prisoner must be able to challenge the information provided if it is disputed. Particular difficulties arise where the victim's information goes behind the facts of the index offence given at conviction – for example where a basis of plea has been accepted by the prosecution which is at odds with the victim's version of events.
- 5.43 The tension here is between ensuring that the Parole Tribunal has access to relevant information which may bear upon risk, and ensuring that information admitted into evidence against the prisoner is both relevant and capable of being challenged. It may also cause distress to some victims to be asked to appear to give oral evidence at a tribunal hearing and perhaps to be cross-examined upon it.
- 5.44 In some jurisdictions, for example, New Zealand,¹⁷² a broad approach has been adopted. Here, while there are special provisions for victims who are registered on the Victim Notification Register, anyone can make a written submission to the Parole Board about an offender's case and there are no restrictions on the type of information that may be included. The written submission may include not only any personal safety concerns of the writer but also any information about the risk the offender might pose to the safety of the community should he or she be released. The writer may also suggest how the offender could reduce his or her risk of reoffending, for example, by completing a particular rehabilitation programme. However, while the Board can consider any information that it has received about an offender's case, it is not required by law to do so unless the information comes from a registered victim,¹⁷³ who will be automatically contacted by the Board and provided with a written submission form on which he or she may comment prior to the hearing. While registered victims have a right to do so, any victim may ask to meet with the members of the Board that will be considering the case of the offender who offended against him or her. The purpose of the attended hearing 'is for the victim to convey to the Board the same sort of concerns that might be contained in a written submission but it also allows two-way communication'.¹⁷⁴ Most hearings take place shortly before the 'offender hearings'. The victim and the offender do not appear before the Board at the same time unless both have agreed that this should happen.
- 5.45 We do not recommend this approach in England and Wales. Instead, while some information provided by victims may be uncontroversial, such as that going to exclusion areas and the ongoing impact of the offence upon the victim, other evidence – in particular, factual allegations against the prisoner that go beyond those that formed the basis of the conviction – will need to be examined in open proceedings.

171 Any issues relating to non-disclosure then will be dealt with according to the procedural rules. See chapter 4, above.

172 For an outline of the New Zealand parole system, see appendix D.

173 Registered victims are also entitled to request information from the Department of Corrections about an offender (serving a long-term prison sentence) in order to help them prepare a submission to the Board, including a list of any programmes completed, the offender's current security classification, and any subsequent convictions since the offender began their sentence.

174 See www.paroleboard.govt.nz.

- 5.46 It is recommended in chapter 7 below that the Parole Tribunal be empowered to hold a 'pre-tariff' or a 'post-release' hearing in the case of any life or indeterminate sentence prisoner. Such hearings, held separately from consideration of the prisoner's release, provide an opportunity for any concerns that victims might have to be ventilated prior to release or recall respectively. In appropriate cases, pre-tariff hearings could also be useful for setting in train the oversight of mediation and reparation, including apology.¹⁷⁵ Post-release hearings would provide an opportunity to renegotiate licence conditions in order to ensure that victims and their families can go about their lives with the minimum of anxiety and without undue restrictions of their own movements.

5.47 Recommendation

Victims should normally be informed in good time by the Parole Tribunal of forthcoming hearings and offered the opportunity to attend. Information provided by victims and others should be considered by the Parole Tribunal if it is relevant to the issues to be determined; if disputed, it should only be relied upon if it can be challenged, if necessary by cross-examination.

Legal representation

- 5.48 At the time of writing, the funding of prison law work¹⁷⁶ by the Legal Services Commission (LSC) is under review. The main reason for the review is that expenditure on prison law legal aid has increased rapidly in recent years: according to the Ministry of Justice website, it has risen from just over £1 million in 2001/2 to £22 million in 2008/9, with projections indicating that this is likely to increase to over £44 million by 2011/12 if the current arrangements are maintained. However, in its February 2009 consultation paper, the LSC produced markedly different figures: £3.3 million in 2002/3 and £19 million in 2007/8.¹⁷⁷ Whichever figures are correct, the increase in spending, particularly in the light of financial constraints, is considered to be unsustainable. The LSC consultation paper therefore sets out a two-phase approach to combating increased spending. During the first phase it is proposed that controls would be put in place to address rising costs and volumes and introduce minimum quality standards. These changes would be introduced in the next unified contract in 2010. The second phase would be to scope the feasibility of changing the way services are delivered to clients. Examples of different methods of delivery include a telephone advisory service and the possible introduction of a duty solicitor scheme. The LSC acknowledges that changes under Phase 2 may need to be piloted.¹⁷⁸
- 5.49 There are at least two reasons why the government needs to approach this issue with great caution. The first is that, whether or not Article 6 or Article 5(4) ECHR apply to all parole hearings, the common law has always insisted that a fair hearing is the right of anyone whose liberty is in issue. The second is that prisoners, a high proportion of whom have poor literacy skills¹⁷⁹ and/or

¹⁷⁵ According to the chair of the New Zealand Parole Board, Judge David Caruthers, it is not uncommon to see as a part of parole conditions a provision requiring an offender to attend a restorative justice conference with his or her victim if they are agreeable.

¹⁷⁶ Prison law work funded under legal aid covers a wide range of issues, including not only parole matters and factors affecting a prisoner's progression through the prison system but also issues relating to treatment or discipline.

¹⁷⁷ See Legal Services Commission, *Prison Law Funding: A Consultation Paper*, February 2009, at para 1.19. Para 1.21 states that '[I]n 2007/8, the LSC funded approximately 10% of the Parole Board's total workload of 31,172 cases. The previous year the Parole Board (the Board) had considered 25,436 cases, which is a substantial increase of 22% in workload. By 2011/12, we are forecasting the need to fund around 8,000 parole cases, based on the potential volume increases and increases in recent years of publicly funded prison law cases'.

¹⁷⁸ At the time of writing the LSC had not yet published a post-consultation response.

¹⁷⁹ A Social Exclusion Unit Report published in 2002 recorded that 80% of prisoners have the writing skills, 65% the numeracy skills and 50% the reading skills of or below the level of an 11-year-old child. See Social Exclusion Unit, *Reducing Re-offending by Ex-prisoners*, 2002.

have mental health problems,¹⁸⁰ are a group that has particular need of legally competent advice and advocacy if the right to be heard is to mean anything. To this may be added the fact that tribunals that have the help of competent advocates work far more efficiently and are less error-prone than those that have to grapple with irrelevant submissions and chaotic documentation. The government thus has an interest, going wider than the remit of the Legal Services Commission, in ensuring that prisoners who need competent representation before the Parole Tribunal are able to obtain it.

5.50 Recommendation

Publicly funded legal advice, assistance and representation should be available to all prisoners in relation to Parole Tribunal proceedings.

¹⁸⁰ Research has shown that up to 90% of prisoners have at least one mental health problem and that levels of distress are higher among IPP prisoners than among either the general population or prisoners serving life sentences. See *In the Dark: The Mental Health Implications of Imprisonment for Public Protection* (2008) Sainsbury Centre for Mental Health and HMP Inspectorate of Prisoners (October 2007), *The mental health of prisoners – A thematic review of the care and support of prisoners with mental health needs*.



Chapter 6

Determinate sentence prisoners

- 6.1 The various conditional release schemes that apply to determinate sentence prisoners¹⁸¹ in England and Wales are set out in appendix A.¹⁸² They include not only release on parole licence (which applies to a diminishing number of what were formerly referred to as 'long-term' prisoners and some extended sentence prisoners) but also other discretionary schemes, like home detention curfew (HDC), where decisions are made on behalf of the secretary of state by prison governors (or their equivalents) and do not involve the Parole Board.
- 6.2 One defining difference between parole and those conditional release schemes subject to the exercise of executive discretion alone is that the Parole Board has no involvement in decisions relating to prisoners conditionally released before 'automatic release'. For other categories of case, where prisoners are detained beyond the halfway point of their sentence, the Parole Board still has a role to play, albeit a dwindling one.
- 6.3 The Parole Board retains authority (under powers delegated by the secretary of state) to direct the release on parole licence of the following categories of determinate sentence prisoner:
- those sentenced to four years or more but less than 15 years for a specified sexual or violent offence committed before 4 April 2005 (ie an offence specified in Schedule 15A Criminal Justice Act 2003);
 - those sentenced to an extended sentence (if under the Criminal Justice Act 1991 for offences committed before 4 April 2005 and if under the Criminal Justice Act 2003 for offences committed on or after 4 April 2005 but before 14 July 2008).

It is estimated that the number of determinate sentence cases considered by the Board will shrink rapidly. According to the head of the National Offender Management Service (NOMS), it is expected to drop below 1,000 within the next 18 months to two years.¹⁸³ By contrast, the Board considered 7,594 such cases in 2007-8.¹⁸⁴

¹⁸¹ That is, those serving sentences imposed with a fixed maximum term.

¹⁸² For a comprehensive overview, see also N Padfield, 'Criminal Justice and Immigration Act 2008 changes in context' [2009] Crim LR 166-187.

¹⁸³ House of Commons Public Accounts Committee, *Protecting the public: the work of the Parole Board*, Ninth Report Session 2008-09, Report, together with formal minutes, oral and written evidence, (2009) Q127. According to information provided by the secretary of state to the Court of Appeal in October 2008, there were 440 prisoners serving determinate sentences of 15 years or more whose release still depends upon the secretary of state agreeing to act on a favourable recommendation from the Parole Board (350 of the 440 being excluded from automatic release under the provisions of the 2008 Act and having, therefore, already been the subject of adverse decisions either by the Parole Board or the secretary of state; 90 of the 440 being excluded because of the sexual or violent nature of their offending): *R (on the application of Black) v Secretary of State* [2009] UKHL1 para 65.

- 6.4 What constitutes the proper administration of other types of determinate sentence depends in large part on whether or not Article 5 ECHR is engaged. In *Black*,¹⁸⁵ the House of Lords was required to consider whether it is compatible with Article 5(4) ECHR for the secretary of state to have the final say on the conditional release of prisoners serving a determinate sentence longer than 15 years. Hitherto the domestic courts had been divided in their findings about the relationship between Article 5(1)(a) and Article 5(4) ECHR in circumstances involving determinate sentence cases.
- 6.5 Having reached his parole eligibility date and been recommended for conditional release by the Parole Board, Mr Black remained in custody because the secretary of state refused to accept the Board's recommendation. The Court of Appeal found that leaving the decision in the hands of the executive did not comply with Article 5(4) ECHR and declared that s35(1) Criminal Justice Act 1991, which provided that 'after a long-term prisoner has served one-half of his sentence, the Secretary of State may, if recommended to do so by the Board, release him on licence' was incompatible with the Convention.¹⁸⁶ The secretary of state appealed this decision.
- 6.6 The majority of the House of Lords, after analysing both the domestic case-law and the Convention jurisprudence, concluded that the administrative implementation of the sentence of the court, which could include decisions regarding early or conditional release from a determinate sentence, did not require that any decision of the Parole Board must be the final and determinative one. In Lord Brown's view:¹⁸⁷

There was no need for the Parole Board to have been involved in the process at all: a state could perfectly lawfully, and consistently with the Convention, leave the entire question of release, whether absolutely or on licence, and whether throughout the sentence or only after a given period, solely to the executive.

- 6.7 In determinate sentence cases, it was said to be the openness of the executive to judicial review that provided the necessary safeguard against arbitrary or irrational decision-making. The majority was also of the view that the analogy between a life sentence, where the 'new issue affecting the lawfulness of the detention' is the need to assess dangerousness in the post-tariff period, and the position of a prisoner whose sentence is determinate is a mistaken one.
- 6.8 Further, the 'evident incongruity' that arose between the position of a prisoner serving a term of 15 or more years' imprisonment and the position of a life or indeterminate sentence prisoner, where the second could be released by the Parole Board but the first could not, although anomalous, was not a ground for holding the difference in treatment unjustified.¹⁸⁸ The Court of Appeal's declaration of incompatibility was set aside, and any extension of the reach of Article 5(4) ECHR to encompass determinate sentence prisoners eligible for conditional release was left to the developing jurisprudence of the European Court of Human Rights (ECtHR).
- 6.9 In a dissenting opinion, Lord Phillips adopted a purposive approach. Noting that the ECtHR had not yet considered the question of whether, under the English sentencing regime, the possibility of

184 *R (on the application of Black) v Secretary of State* [2009] UKHL1, para 8.

185 *R (on the application of Black) v Secretary of State* [2009] UKHL1.

186 *R (on the application of Black) v Secretary of State for Justice* [2008] EWCA Civ 359, para 17.

187 *R (on the application of Black) v Secretary of State* [2009] UKHL1, para 82.

188 Since the court was presented with no good reason why the secretary of state should retain his power in relation to a relatively small and now dwindling number of long-term prisoners, and, as was conceded on his behalf, there could be no legitimate political input into such a decision, their Lordships expressed the hope that the secretary of state might think it right to relinquish it. *Ibid*, paras 50, 58, and 76.

release on licence gave rise to rights relevant to the lawfulness of detention under a determinate sentence,¹⁸⁹ he suggested that:¹⁹⁰

It requires no great leap of reasoning to adopt the same approach to that latter part of a life sentence in which, the tariff having been served, the prisoner is entitled to be considered for release under licence and that latter part of a determinate sentence in which, in a case such as that of the respondent, the prisoner is eligible to be released on licence.

If the ECtHR does find that a ‘new issue affecting the lawfulness of the detention’ has arisen since conviction and sentence in the circumstances of Mr Black’s case, other conditional release schemes, like HDC, may be vulnerable to challenge.¹⁹¹

6.10 If the reach of Article 5(4) ECHR does properly extend to the administration of all determinate sentence cases, the question that arises in relation to the conditional release schemes set out in appendix A of this report is: what counts as a new issue affecting the lawfulness of detention? One interpretation would be that all determinate sentences are now served in two parts, the first part in custody and the second part on licence in the community. The division is underscored by the existence of automatic release at the halfway point. It is also reflected in the obligation of the court when sentencing to explain how a sentence will be served.

6.11 The rationale for the division is that the entire sentence is imposed as, inter alia, punishment but that the part which is served in the community is particularly important for the anticipated fulfilment of some of the other purposes of sentencing:¹⁹²

The licence period is important; it fulfils a key purpose of sentencing – the reform and rehabilitation of offenders. The licence period reduces the risk to the public and reduces re-offending. The probation service supervises the offender and uses the time to work on the factors which underlie criminality. It also provides an opportunity for the effective resettlement of offenders (finding and maintaining employment and housing, and sustaining family ties), which is fundamental to reducing re-offending. If offenders remained in custody until the end of their sentence and were then released with no supervision and no opportunity to assess their risk in the community it could potentially be very dangerous in terms of public protection.

6.12 Does the existence of such a division create a justiciable issue for those determinate sentence prisoners eligible to be considered for conditional release? In his dissenting speech in *Black*, Lord Phillips remarked that:¹⁹³

A sentence of imprisonment will not be conclusive of the lawfulness of imprisonment if the law under which it is imposed makes provision for the release, either unconditionally or subject to the satisfaction of certain criteria, of the person detained before the sentence

189 The Strasbourg cases that deal with determinate sentences include: *Mansell v United Kingdom* (Application No 32073/96) (unreported) 2 July 1997; *Gunusauskas v Lithuania* (Application No 47922/99) (unreported) 7 September 1999; *Brown v United Kingdom* (Application No 968/04) (unreported) 26 October 2004.

190 *R (on the application of Black) v Secretary of State* [2009] UKHL1, para 10.

191 Cf *Mason v Ministry of Justice* [2008] EWHC 1787 (QB); *R v (Benson) v Secretary of State for Justice* [2007] EWCA Civ 427, 9 May 2007.

192 Home Office, *Making sentencing clearer: a consultation and report of a review by the Home Secretary, Lord Chancellor and Attorney General* (2006), para 2.2.

193 *R (on the application of Black) v Secretary of State* [2009] UKHL1, para 4.

has been served in full. In such circumstances, when the point is reached where the person detained is entitled to release or where the relevant criteria fall to be considered, there will be a justiciable issue as to whether the continued detention of that person is lawful. Article 5.4 entitles the person detained to the determination of that issue by a court. If that determination concludes that the criteria for release do not apply, the lawfulness of the detention will remain attributable, under article 5.1(a), to the original sentence.

- 6.13 It may be said, broadly, that while the approach of the majority in *Black* was to give effect to the irreducible minimum of requirements so far established as arising from Article 5 ECHR, the approach of Lord Phillips was to look to the trend and likely development of Strasbourg jurisprudence on the article. On the latter analysis, the existence of statutory rules providing for early release which, it is argued, include the conditional release schemes set out in appendix A of this report, may provide a right for prisoners to seek early release and, where not released, to bring proceedings to challenge the lawfulness of their continued detention.
- 6.14 Chapter 2 has proposed that a new Parole Tribunal be set up by primary legislation. In considering the extent of the Parole Tribunal's involvement in the conditional release of determinate sentence prisoners, there are a number of possible options. These include:
- accepting that there is no need for any independent court-like body to be involved in the conditional release of determinate sentence prisoners;
 - preserving the status quo so that the Parole Tribunal (as a replacement for the Parole Board) continues to exercise administrative discretion in the granting of conditional release in those cases where prisoners are kept in prison beyond the halfway point;
 - creating an independent tribunal empowered to decide on specified grounds on the conditional release of any determinate sentence prisoner;
 - providing an appellate jurisdiction for any prisoner refused conditional release.
- 6.15 The difficulty with the first option is that the ECtHR may incrementally extend, as it did with life and indeterminate sentences, the reach of Article 5(4) ECHR to include all manner of determinate sentences. It is also an option which lacks the transparency of process which a Parole Tribunal would afford. Retaining the status quo is likely to result in the role of the Parole Board in determinate sentence cases continuing to diminish, perhaps to vanishing point. The main problem with this would be that the only judicial determination available to determinate sentence prisoners who could properly claim to be eligible for conditional release but find their detention continued would be judicial review. Judicial review is axiomatically a remedy of last resort, and the Administrative Court exercises a 'hands off' jurisdiction that will not re-determine the merits. The third option would involve, given the extent of the non-parole schemes now operating, a body able to process large numbers of cases, sometimes on a very short time scale.¹⁹⁴ The fourth option would put in place a tribunal with the experience and expertise required to determine appeals expeditiously and on their merits. It would also create a jurisdiction which satisfied Article 5(4) ECHR. It is this option which we, therefore, recommend.
- 6.16 The diminishing number of determinate sentence prisoners entitled to consideration for release on parole licence would continue to be considered at 'first instance' by the Parole Tribunal. However, in keeping with the recent legislative initiatives which have sought to focus the work of the Parole

¹⁹⁴ For example, in 2005 a total of 17,296 prisoners were released on Home Detention Curfew.

Board in determinate sentence cases on those offenders who are assessed as presenting a risk of serious harm, it is proposed that the test for release in those cases be the same as it is for life and indeterminate sentence prisoners.

6.17 Recommendations

The Parole Tribunal should be authorised to decide upon the conditional release of those determinate sentence prisoners whose cases are currently considered by the Parole Board. The test for release should be the same as that for life and indeterminate sentence prisoners.

We recommend a new appellate structure whereby prisoners who have grounds for doing so can appeal to the Parole Tribunal against any executive decision refusing conditional release.



Chapter 7

Life and indeterminate sentence prisoners

- 7.1 An overview of the Parole Board's jurisdiction in respect of life and indeterminate sentence prisoners is provided in appendix C. The proposals in this chapter address the need to develop a new, more comprehensive jurisdiction that begins at the time of sentence and formally concludes only when the licence is terminated.¹⁹⁵
- 7.2 In order to direct release the Board must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. Under the present scheme the Board is limited to making a 'snapshot' risk assessment at the moment when the secretary of state refers a case to it. If the panel does not direct release, it is explicitly told in the secretary of state's referral notice that it is not being asked to comment on or to make any recommendation about whether the prisoner should be assessed for or participate in any particular course or programme, or to comment about the prisoner's suitability for temporary release or transfer to conditions of lesser security (except when asked for a view about transfer to open conditions), or to fix the date of the next review.
- 7.3 The Board's limited remit encourages a reactive culture that fails to reflect its inquisitorial potential. Inflexible and tariff-focused review dates diminish the likelihood of reviews taking place at the optimum time for either transfer to open conditions or release. This is likely to lead to frustration on the part of both prisoners and those involved in offender management.
- 7.4 There is also a danger that risk assessments which are undertaken on a timetable over which the Parole Board has little or no control encourage decision-makers to opt for keeping prisoners in custody or for deferring any decision about release. In addition to their impact on liberty, these approaches have cost implications for the system, and add to the perception, not dispelled by the statistical evidence, that the Board is increasingly risk-averse.

The provision of information

- 7.5 Except where the prisoner initiates the production of information for his or her review, it will be either the prison or probation service (now NOMS) that is responsible for creating the reports and documents required by the Board. These agencies are often described as the Parole Board's 'criminal justice partners'. However, this should not dilute the responsibility of the secretary of state

¹⁹⁵ In 2007/8, there were 1,751 life sentence prisoners under active supervision in the community of whom 114 or 6.5% were recalled. In 2006/7, the figure was 178 or 10.8% out of 1,622 prisoners: *Parole Board Annual Report 2007/8*.

(through NOMS officials) to compile the dossier and make copies available to the prisoner and the Board in good time.

- 7.6 Reliance on the secretary of state to provide it with the complete dossier, without which the case cannot proceed, has hampered the Board's performance in the past. It also undermines the Board's ability to comply with the requirements of procedural fairness (by hampering the decision as to what information it needs to make its assessment and on the timetable it should adopt for conducting its review) and with Article 5(4) ECHR (in conducting reasonably regular and speedy reviews).
- 7.7 A National Audit Office (NAO) report, published in March 2008, revealed both the extent and the administrative cost of the failure to provide timely and complete data to the Board. It found that although the Board had performance targets for each of the main types of case it considers, only 32 per cent of oral hearings for indeterminate sentences were being held on time. Two-thirds of oral hearing cases examined by the NAO had been deferred at least once, including 45 per cent deferred on the day of the hearing. Sixty-five per cent of the cases deferred were not recorded on the Board's database. The report commented that while the Board was working hard to improve its performance, it was not able to handle its own workload. The additional cost of the administrative delays had been nearly £3m in the nine months to 1 June 2007.¹⁹⁶
- 7.8 The number of cases delayed while the Parole Board sought further information between April 2004 and March 2008 (including determinate, indeterminate and recall prisoners)¹⁹⁷ was:

	<i>Number of deferrals</i>
2004-05	299
2005-06	414
2006-07	682
2007-08	540

In 2006/07, the deferral rate for lifer oral hearings panels was 28 per cent. In January 2008, the Board formally introduced new intensive case management (ICM) procedures. One aspect of the ICM system is that, subject to appeal within 28 days, negative decisions can be taken by a single member on the papers. By the end of 2008, this initiative was said to have removed the 'need' to hold over 150 oral hearings.¹⁹⁸ However, we retain concerns about this process; a properly resourced Parole Tribunal, with the power to issue directions as outlined in chapter 5 above, would, we hope, be able to deal efficiently with these cases and reduce delay and deferral, while retaining regular oral hearings.

- 7.9 Where there has been very limited opportunity for progress, for example, in the case of IPP prisoners who have undertaken no offence-focused work or of prisoners recently transferred to a therapeutic community or severe personality disorder unit located in the high security estate, there is an increased perception that oral hearings have little or no constructive purpose other than to note progress. This perception, together with the pressure on the Board to improve the

¹⁹⁶ National Audit Office, *Protecting the public: the work of the Parole Board*, 5 March 2008.

¹⁹⁷ Answer to PQ, *Hansard*, HC 4 June 2008, col 1942.

¹⁹⁸ See The Parole Board, *Independent Case Management, Oral Hearings, General Guide* (July 2008).

management of its burgeoning caseload, leads to increased numbers of determinations ‘on the papers’. This operational adaptation, while it tackles one of the symptoms of an overburdened system, should not be allowed to cover up the cause, which is that the Board is a jurisdiction that is denied adequate means of self-management. It also fails to take sufficient account of the need for procedural fairness satisfied by regular oral hearings, and the improved scrutiny that they provide.

7.10 To facilitate the proper conduct of the cases that fall within the life and indeterminate sentence prisoner jurisdiction, we propose that information be made available about each prisoner that spans the period from the time of sentence until the licence is discharged. This will include information that has already been identified as relevant to Parole Board hearings.

7.11 It is proposed that the secretary of state should be required to make available to the Parole Tribunal, **either at the time of sentence or soon thereafter:**

- the full name and date of birth of the prisoner;
- the prison in which the prisoner is detained;
- any period spent on bail;
- the date when the prisoner was given the indeterminate sentence;
- details of the offence and any previous convictions (anywhere in the world); any pre-trial and pre-sentence reports examined by the sentencing court on the circumstances of the offence;
- the comments of the trial judge in passing sentence, including a note of the minimum term imposed;
- the conclusions of the Court of Appeal in respect of any appeal by the prisoner against conviction or sentence;
- the attitudes and concerns of the victims of the offence as disclosed to the offender at the time of sentence and/or trial;
- the individual OASys; and
- the sentence plan.

7.12 The secretary of state should also be required to make available to the Parole Tribunal information relevant to the prisoner’s **ongoing behaviour and progress in custody**. This information should include:

- post-programme reports;
- notification of transfer to hospital under s47 Mental Health Act 1983;
- the date and reasons for any prison transfer;
- the date and reasons for changes in security classification;
- proven adjudications;
- ROTLs, including home leaves; and
- periods of employment within the community.

There should also be a requirement to provide, on request, updates and specialist reports (for example, from those with responsibility for managing the prisoner in custody and in the community, psychological and psychiatric assessment reports, and home circumstance reports) prior to a scheduled review.

7.13 Recommendation

There should be a statutory duty on the secretary of state to provide specified information to the Parole Tribunal as soon as it becomes available.

Custody and post-release reviews

7.14 It is proposed that the jurisdiction of the new Parole Tribunal include power for it to hold a review of the prisoner's case that is not connected with either an application for transfer to open conditions or release. These hearings would not be convened in every case, but the rules would include the possibility of holding, at the tribunal's own discretion, a 'custody review' and a 'post-release review'. It is proposed that a direction to hold such a review may either be issued on the Tribunal's own initiative or on the application of one of the parties.

7.15 A 'custody review' might be appropriate in the following circumstances:

- where a long-term intervention is proposed, for example, transfer to one of the prison estate's therapeutic communities or severe personality disorder units, or where there has been a recent return to custody following a prisoner transfer under the provisions of the Mental Health Act 1983;
- where a victim of the index offence or another member of the public with specific knowledge of the prisoner has requested an opportunity to put forward relevant evidence about the risk that the prisoner presents.

7.16 A 'post-release review' might be appropriate when:

- it is considered by those responsible for supervising the offender in the community that the risk management plan needs to be adjusted in the light of changing circumstances, including risky behaviours that might lead to recall if left unaddressed;
- a victim wants to make representations about the need for, or need to change, licence conditions;
- the Parole Tribunal wanted to follow up the implementation of risk management plans directed at the time of release, for example if an unexpected move from approved premises to independent accommodation was anticipated.

7.17 Recommendation

The Parole Tribunal should be given authority to hold, at its own discretion, further pre-tariff and post-release reviews.

Timing of reviews

7.18 Prior to the Criminal Justice Act 1991, the decision whether to release any life or indeterminate sentence prisoner was a matter of executive discretion. Over a period of time responsibility for determining release of such prisoners has shifted to the Parole Board. However, it remains the case

that responsibility for referring the case to the Board lies with the secretary of state (formerly the Home Secretary and now the Secretary of State for Justice). As Walker J commented:¹⁹⁹

Under our domestic law, s 28(6) of the [Crime (Sentences) Act] 1997 Act makes the Home Secretary a necessary “gateway” to reach the Parole Board, and s 28(7) imposes an obligation to open the gate in certain circumstances.

At present, life and indeterminate sentence prisoners are entitled to a Parole Board review at least every two years.

7.19 In the past, the Board routinely gave guidance to the secretary of state in discretionary life sentence cases as to the date of the next review, although the advice was not always accepted. Much of the case-law on the timing of reviews, which to comply with Article 5(4) ECHR requires not only that decisions must be reached ‘speedily’ but also that, ‘where an automatic review of the lawfulness of detention has been instituted’ decisions must follow at ‘reasonable intervals’,²⁰⁰ concerns failure on the part of the secretary of state to follow such guidance. While the question whether a particular interval is reasonable may properly depend on the circumstances of each case, it is unsatisfactory that any flexibility in the timing of reviews should depend on a single assessment by the secretary of state. In the present situation, not only is there no formal opportunity for the applicant to apply for a review within the two-year period, but the Parole Board itself is specifically directed not to comment on the timing of the next review.

7.20 Apart from potential unfairness to the prisoner, whose only remedy is judicial review, it is anomalous that the body responsible for assessing the lawfulness of a prisoner’s continued detention should have no control over the timing of reviews and, as a consequence, find itself in the invidious position of being, on the one hand, under an obligation to obtain necessary information after a referral is made by the secretary of state, and, on the other, of being answerable for the delay if the information is not provided expeditiously.

7.21 Recommendation

The Parole Tribunal should be authorised to set the timing of reviews either of its own motion or on application by one of the parties to the proceedings. At the minimum, sufficiently regular reviews must be held so as to comply with Article 5(4) ECHR.

Transfer to open conditions

7.22 The possibility of spending a period of time in open conditions prior to release on life licence clearly provides a valuable opportunity to test any prisoner in less secure conditions. In some cases, the experience may lessen the impact of having been in closed conditions for many years. In others, particularly those with a short tariff, institutionalisation may not be an issue and similar benefits may be obtained in other ways – for example, by the grant of extended periods of release on temporary licence or by the imposition of post-release licence conditions which provide for regular contact

¹⁹⁹ Walker J in *R (on the application of Gilling) v Parole Board and Home Secretary* [2005] EWHC 546 (Admin), para 62.

²⁰⁰ See *Oldham v United Kingdom* (36273/97) (2001) 31 EHRR 34, para 30.

with specialist staff and residence in an environment where close monitoring can take place (for example, regular drug testing).

- 7.23 At present, the Parole Board may only make a recommendation to the secretary of state about a life or indeterminate sentence prisoner's suitability for transfer to open conditions.²⁰¹ In many cases that recommendation is not accepted.²⁰² The secretary of state may take into account further information that was neither available to the panel nor fully disclosed to the prisoner.²⁰³
- 7.24 The statutory authority for the Board to make such a recommendation is provided by the Criminal Justice Act 2003, which requires the Board to advise the secretary of state on matters relating to the early release of prisoners where the secretary of state has requested advice.²⁰⁴
- 7.25 Since February 2007, the Parole Board has adopted a policy that pre-tariff paper decisions that would otherwise recommend transfer to open conditions should be referred to an oral hearing. The change in practice from holding a 'paper lifer' panel once a week to consider cases where the secretary of state had asked for advice came about following comments made by HM Inspectorate of Probation in 2006 that the move from closed to open conditions was one of the 'key decision making points' of the release process.²⁰⁵ The report identified what it considered the weakness of the phased decision-making process, which puts the Parole Board in a somewhat 'constrained position' when it comes to deciding about release, since the decision has been 'half-made' at an earlier stage when the prisoner was recommended for open conditions:²⁰⁶

For all its strengths, which we would not wish to see taken away, the phased approach breaks the release decision into (at least) two parts, meaning that the Parole Board has two separate limited decisions to make, instead of one 'whole' one. The phasing also has the effect of creating a momentum towards release between the two parts so that at the end one has to find a good reason to stop release rather than have to find a good reason to justify it.²⁰⁷

Assessing suitability for open conditions, like assessing suitability for release, involves an assessment of risk. If the decision to transfer to open conditions is treated as an integral part of any decision to release a life or indeterminate sentence prisoner, the decision should be made by the same body.

7.26 Recommendations

The role of advising the secretary of state on matters relating to the early release or re-release of prisoners should be abolished.

201 As pre-tariff reviews are not formally concerned with the liberty of the subject, they do not engage Article 5 of the Convention.

202 See appendix C.

203 See *R (on the application of Faulkner) v Home Secretary* [2006] EWHC 563.

204 S239(2) Criminal Justice Act 2003.

205 'The key decision-making points are the decision to move to open prison conditions and the decision to release on temporary licence (ROTL), as well as the decision about final release on Licence'. See Her Majesty's Inspectorate of Probation, *An Independent Review of a Serious Further Offence case: Anthony Rice* (2006), n18 para 10.1.10.

206 Ibid, para 10.2.2.

207 Ibid, para 10.2.14. It is significant that the authors of the report chose to treat the entire period of open prison conditions as being part of the 'release decision' phase rather than the 'period in custody' phase of the case (see para 10.2.17).

The Parole Tribunal should be authorised not only to determine the release of life and indeterminate sentence prisoners but also to decide, on specified grounds, whether such prisoners are ready to be transferred to open conditions.

Variation and cancellation of licence

- 7.28 At present, prisoners serving indeterminate sentences for public protection (IPPs) can apply to the Parole Board to have their licence terminated after ten years of supervision in the community. The Board may terminate the licence only if it is satisfied that it is no longer necessary for the protection of the public.²⁰⁸ If it is not terminated, the Parole Board is expected to consider termination at yearly intervals thereafter. The Board is also consulted before other types of life licence are varied or cancelled.²⁰⁹ For example, consideration may be given to cancelling the supervision element of the life licence after a minimum of four years of 'trouble-free existence in the community'.²¹⁰ This is an existing function of the Board that should be continued by the Parole Tribunal.

7.29 Recommendation

Any variation, cancellation or termination of a life or indeterminate sentence prisoner's licence should require authorisation by the Parole Tribunal.

Compassionate release

- 7.30 Any prisoner may be released permanently (as opposed to being granted a special purpose licence)²¹¹ on compassionate grounds.²¹² Although the advice of the Parole Board is sought before release (unless the circumstances are such as to render such consultation impracticable), the final decision rests with the secretary of state.
- 7.31 According to the Court of Appeal in *Spinks*,²¹³ the statutory structure is that first the secretary of state considers whether, in principle, the prisoner should be released on compassionate grounds. If he decides he should not, the Parole Board has no role at all to play. If he decides that he wishes to release the prisoner, he is obliged (if practicable) to consult the Parole Board, which acts as a check on the secretary of state's power of release. Between 2002 and 2008, there were only 16 compassionate releases of life or other indeterminate sentence prisoners, no doubt reflecting the fact that it is only intended to occur in the most exceptional circumstances.²¹⁴
- 7.32 In New Zealand, the Parole Act 2002 provides that the Parole Board may, on referral by the chairperson, direct that an offender be released on compassionate grounds if the offender has

208 S31A(4) Crime (Sentences) Act 1997 (as amended).

209 Ibid, s31(3).

210 Lifer Manual, PSO 4700, para 13.9.2.

211 A special purpose licence allows for short temporary release in the event of exceptional personal circumstances and is granted under Rule 9 of the Prison Rules.

212 See s36 Criminal Justice Act 1991 and s248 Criminal Justice Act 2003 for determinate sentence prisoners, s30 Crime (Sentences) Act 1997 for life and indeterminate sentence prisoners and s102(3) Powers of Criminal Courts (Sentencing) Act 2000 for those serving detention and training orders. The criteria governing early release are set out in PSO 6000, chapter 12.

213 *R (Spinks) v Home Secretary* [2005] EWCA Civ 275 at 28.

214 See *Hansard*, HC 3 Feb 2009, col 1175W, Written Answers; and s36 Criminal Justice Act 1991.

215 S41 Parole Act 2002. It would appear that this is also an exceptional jurisdiction because, as of March 2009, only 10 compassionate releases have been granted.

given birth to a child or is seriously ill and unlikely to recover. Offenders are then released on licence and liable to recall if they breach the conditions of their licence.²¹⁵

- 7.33 The question arises whether the power of compassionate release should remain, in principle, a matter of executive judgment and discretion or should become a matter within the Parole Board's sole jurisdiction. The chief argument in favour of such a shift is that the power in its present form is an aspect of the prerogative of mercy, albeit regulated in part by statute, which is not generally regarded as a satisfactory mode of government in a modern democracy.
- 7.34 We believe that appeals against governors' refusals of special purpose licences to those eligible for release on temporary licence²¹⁶ and applications for permanent release on compassionate grounds should be heard by the Parole Tribunal. Notwithstanding the decision on the facts of *Spinks* (where the court found that the refusal to grant release on compassionate grounds did not breach Article 3 ECHR),²¹⁷ failure to release a prisoner in sufficiently compelling compassionate circumstances is capable of constituting inhuman treatment contrary to Article 3. In this situation, there is much to be said for putting compassionate release, apart from special purpose licences, in the hands of the Parole Tribunal.
- 7.35 As to the criteria, there seems no reason to modify the broad test of exceptional circumstances. To refine this with more specific criteria, such as are found in the Prison Rules, risks shutting out deserving cases that happen not to fit the categories but are capable of engaging Article 3 ECHR.

7.36 Recommendation

Permanent release on compassionate grounds should be transferred from the competence of the secretary of state to the jurisdiction of the Parole Tribunal, with a single criterion of exceptional circumstances calling for compassionate release. To this should be added appeals against governors' refusals to grant special purpose licences.

²¹⁶ See Prison Rule 9, as amended by the Prison (Amendment) (No 2) Rules 2005 (SI 3437/2005). Category A and most Category B prisoners are ineligible.

²¹⁷ Distinguishing *Mousiel v France* (2004) 38 EHRR 34.



Chapter 8

Recall and re-release

- 8.1 An outline of the existing procedures for the recall and re-release of determinate, life and indeterminate sentence prisoners is set out in appendix B. According to a Ministry of Justice Circular:²¹⁸

Recall is not designed to be punitive. It is intended to be preventative, in other words to protect the public. The purpose of the fixed term recall is to remove offenders from often rapidly deteriorating situations and place them in a secure environment. The period of imprisonment gives the Probation Service the opportunity to review supervision arrangements and if need be apply for additional restrictions. The enforcement of the licence through recall underlines to the offender the importance of future compliance.

- 8.2 According to a Ministry of Justice document published in December 2007,²¹⁹ the second largest increase in the prison population (16 per cent of the total) was due to the number of prisoners recalled to prison for breaking the conditions of their release (an increase of over 35 times between 1995 and 2007). The increase is attributed in large part to two pieces of legislation: the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. The 1998 Act extended executive recall to medium-term prisoners (12-48 months) when formerly such prisoners could only be recalled by the Probation Service through the courts. The 2003 Act lengthened the licence period from 75 per cent to 100 per cent of determinate sentences for offenders serving sentences of 12 months or over; made recalled offenders liable to serve 100 per cent of their original custodial sentence (as opposed to 75 per cent as it was previously); and required the Parole Board to review all recall cases (the release rate of recalled offenders by the Board has been lower than anticipated).²²⁰
- 8.3 It has also been suggested that the formal processes now in place for sharing information have led probation officers (responsible for initiating the recall process) to reassess the risk of reoffending or serious harm that a licensee might pose and then go on to initiate a 'preventative' recall.²²¹ Whatever the precise cause, 'the source of the change in recall rates is more likely to be found in enforcement procedures rather than relevant behaviour'.²²²

218 Ministry of Justice Circular 2008-01, para 23.

219 The government first set out a commitment to speeding up the recall process in Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Reoffending and Protecting the Public* (2006), para 2.45.

220 See Ministry of Justice, *Story of the Prison Population 1995-2007* (December 2007), pp15-16.

221 See J Thompson, 'The recall and re-release of determinate sentence prisoners' in N Padfield (ed) *Who to Release? Parole, fairness and criminal justice*, Willan, 2007, p152.

222 See N Padfield, and S Maruna, 'The revolving door at the prison gates: exploring the dramatic increase in recalls to prison', (2006) *Criminology and Criminal Justice*, 6(3), pp329-352.

- 8.4 The overall effect has been increases in both the recall rate of offenders on licence and the average length of time spent in prison on recall. Since 14 July 2008, subject to certain criteria and provided the secretary of state is satisfied regarding risk of serious harm to the public, those serving a sentence of 12 months or more who are recalled will be released again after a fixed period of 28 days.²²³ Those who are not will be referred to the Parole Board. What impact this will have on the workload of the Board, the prison population or the reoffending rate remains to be seen.
- 8.5 Recall is initiated as a result of the licensee's failure or alleged failure to comply with any of the conditions of his or her licence. In practice, offenders who are unable to provide an acceptable explanation for instances of 'unacceptable conduct' (for example, failing to keep appointments, attend courses, or refrain from drink or drugs where specified as a licence condition) will be served first with a 'Final Warning' then a 'Formal Warning' and, finally, a 'Notification of Breach'. The existence of a criminal charge is not in itself sufficient to warrant recall but may be taken into account when assessing whether there has been a breach of the 'good behaviour' condition.²²⁴ According to a 2007 Probation Circular:²²⁵

The 'good behaviour' condition is designed to be a catch all condition that covers a pattern of behaviour or incident, whether foreseen or unforeseen, which gives rise to an increase in risk of serious harm or likelihood of reconviction and where no specific additional conditions have been included on the licence. It will include those issues covered by civil orders imposed at sentencing and the licence conditions do not need to repeat those contained in a court order. Similarly the 'good behaviour' condition negates the need for an additional condition requiring an offender residing in Approved Premises (for example) to abide by hostel rules. A failure to comply with hostel rules and regulations jeopardises the purposes of supervision and clearly breaches the 'good behaviour' condition and deems the offender unsuitable for residency at approved premises.

- 8.6 Prior to implementation of the Criminal Justice and Immigration Act 2008,²²⁶ life and indeterminate sentence prisoners could be recalled to custody on either a standard recall or an emergency recall. For a standard recall, the secretary of state was required to refer the matter to the Parole Board for consideration. The requirement to consult the Board has been removed on the ground that because almost all recalls were initiated on an emergency basis, ie in circumstances where the secretary of state considered it 'expedient' to do so in the public interest, consultation was not required. The criteria under the old system for determining whether recall should be undertaken on a standard or an emergency basis would suggest that the only life licence offenders who are currently recalled (as opposed, for example, to those given a formal warning) are offenders on licence who present an imminent risk of harm to a specific individual or individuals or to members of the public generally where there is evidence that the risk posed cannot be managed in the community.
- 8.7 The new 'post-release' review proposed in this report (see chapter 7 above) will enable those cases where there are concerns but not an imminent risk of harm to a specific individual or individuals to be considered without a recall to custody taking place. In those cases where the review concludes that risk can no longer be safely managed in the community, it is proposed that the Parole Tribunal should be able to recommend to the secretary of state that the offender's

223 The new procedure for review and release after recall is now contained in ss255A to 256A Criminal Justice Act 2003 (as amended).

224 *R (Broadbent) v Parole Board* [2005] EWHC 1207.

225 PC29/2007 – Post Release Enforcement – Licence Conditions at para 7.

226 See s31 Criminal Justice and Immigration Act 2008.

licence be revoked either immediately or, should the behaviour or circumstances not improve, within a stated period of time.

- 8.8 In relation to the recall of determinate sentence prisoners (which is now undertaken by dedicated NOMS caseworkers acting on behalf of the secretary of state), the Parole Board currently plays no part in approving the decision to recall before recall is effected; no change to this practice is recommended.

Re-release decisions

- 8.9 The case for there being a body with authority to review the secretary of state's decision to return a licensee to prison is made out by Judge LJ (as he then was):²²⁷

The supervisory responsibility provides a valuable check on the original decision-making process. The recall order is examined by an independent body, the Parole Board. This provides a discouragement for the slovenly or the cavalier or the corrupt. It may very well be that in such cases, if they arise, the very fact that the process has been so characterised may lead the Parole Board to conclude that the risk to public safety is not established. Nevertheless, in the end the decision required of the Parole Board must depend on its assessment of public safety. I doubt whether it is possible to envisage any circumstances in which the Parole Board can recommend release, where it would otherwise refuse to recommend release on public safety grounds, merely because of deficiencies in the revocation and recall process.

There may, of course, be exceptional cases where the revocation decision process is so subverted that the prisoner may seek a different or separate remedy, by way of judicial review or, indeed, habeas corpus. In such cases the court may be satisfied that the Parole Board may not be able to provide an adequate or sufficient remedy. If so, it will deal with the application accordingly.

- 8.10 In one such case, where it was necessary to seek the remedy of habeas corpus, Hale LJ (as she then was) stated:²²⁸

... recall has very serious consequences for the person recalled. Sometimes those consequences will be out of all proportion to the events which have led to recall. Hence one member of the Court of Appeal in the case of R (on the application of West) v The Parole Board [2002] EWCA Civ 1641 considered that the decision amounted to the determination of a criminal charge for the purpose of procedural safeguards in Article 6 of the European Convention on Human Rights. The other members of the court disagreed with that proposition, but all considered it sufficiently serious to require more by way of procedural safeguards in the Parole Board than is their current practice. This reinforces the view that it is incumbent upon those making these decisions to take particular care in both making and explaining them. There clearly is a distinction between recalling for breach of supervision and recalling for unacceptable risk.

²²⁷ *Gulliver v Parole Board* [2007] EWCA Civ 1386, paras 44-45.

²²⁸ *R (on the application of Rodgers) v Governor of HMP Brixton* [2003] All ER 156.

- 8.11 Even though the Parole Board has no role in initiating a revocation of licence, it can hear representations about the justification for recall. In order to do this, the report detailing the circumstances of the breach, the history of compliance with supervision and the risk assessment that explains the offender's risk of offending and level of risk of harm must be made available at the earliest opportunity. Subsequent information, such as the risk management plan and any other information not available at the time of recall but relevant to the question of suitability for re-release, should also be available to enable the offender to make informed representations on review.²²⁹ What remains theoretically controversial is whether the test for immediate re-release in such cases should be simply whether recall was justified or whether, regardless of that, the prisoner in fact presents an unacceptable risk.²³⁰ The courts have, however, held that latter to be lawful, and no alteration to this is proposed.
- 8.12 In the conjoined appeals of *Smith* and *West*,²³¹ the House of Lords found that, while the Parole Board's procedures on the recall of two determinate sentence prisoners were capable of satisfying the requirement of Article 5(4) ECHR, it had not satisfied the requirements of fairness when it failed to afford them an oral hearing when considering their re-release. Lord Hope noted that procedural fairness is:²³²

... built into the Convention requirement because article 5(4) requires that the continuing detention must be judicially supervised and because our own domestic law requires that bodies acting judicially, as a court would act, must conduct their proceedings in a way that is procedurally fair.

- 8.13 These judgments were given before the development of the fixed-term recall provisions described in appendix B. As a result of the changes made, only some categories of recalled determinate sentence prisoners will be automatically referred to the Parole Board by the secretary of state to determine suitability for re-release. This will include, apart from those wanting to make representations against recall, those cases where the secretary of state could not be satisfied that it was not necessary for the protection of the public that the offender remain in prison. The test for deciding when to re-release this category of prisoner remains that set out in the existing directions, ie that the Board is satisfied that the risk can be safely managed in the community. Arguably, the test in these cases should be risk to the public, since the prospect of reoffending has been addressed by the determinate sentence itself.
- 8.14 As Hale LJ (as she then was) commented in her dissenting judgment in *West* in the Court of Appeal when considering the procedural standards to be adopted in recall decisions: '[t]he problem lies in a system which imposes fixed terms of imprisonment and then entitles the prisoner to be released half way through irrespective of whether or not he is at that stage thought to be at risk of committing further offences'.²³³ This raises the question of how many prisoners would be considered suitable for release at the halfway point if the same criteria were applied to their release as are now applied to their re-release. Whatever the answer to this question, it is not an acceptable

²²⁹ The effect of this information gathering process is that the Parole Board exercises a degree of supervisory responsibility not only over the secretary of state's decision but also over the process which led to it: *Gulliver v Parole Board* [2007] EWCA Civ 1386, para 43.

²³⁰ The pre-2008 Act directions to the Parole Board under s239(6) Criminal Justice Act 2003 on the recall of determinate sentence prisoners state that in determining when to re-release such a prisoner, the Board should satisfy itself that the prisoner presents an acceptable risk to public safety and that adequate risk management arrangements are in place. In determining whether recall was appropriate, the Board is asked to consider risk of further offending or whether supervision has been effectively undermined by non-compliance.

²³¹ *R v Parole Board, ex p Smith; R v Parole Board, ex p West* [2005] UKHL 1.

²³² *Ibid*, at para 75.

²³³ *R (on the application of West) v The Parole Board* [2002] EWCA Civ 1641, para 56.

quid pro quo of any system of automatic release that prisoners so released can be recalled to prison because of their subsequent behaviour without any form of hearing to defend themselves – particularly since, as has been widely acknowledged by the courts, there will be cases where the recall decision turned on disputed questions of fact.

8.15 Recommendations

The secretary of state should be empowered to recall life or indeterminate sentence prisoners who have breached their licence, either on grounds of risk of imminent harm to a specific individual or individuals or to members of the public generally, or following a recommendation by the Parole Tribunal.

There should be an opportunity for an oral hearing within a short time frame as of right in every case where a prisoner is recalled.

The test for re-release in all cases should be that the Parole Tribunal is satisfied that it is not necessary for the protection of the public that the offender remains in prison.



Appendix A

Existing conditional early release schemes

- A.1 Current conditional early release schemes can be divided into three categories: automatic conditional release; schemes that allow release before the automatic release date; and schemes which allow for some prisoners to be kept in prison for longer than those who are released automatically.²³⁴ The majority of determinate sentence prisoners will be released either automatically at the halfway point of their sentence or earlier. An overview of the release of life and indeterminate sentence prisoners is dealt with in appendix C.

Automatic release

- A.2 Under the Criminal Justice Act 1991, release provisions for offenders depended upon the length of sentence. Automatic unconditional release (AUR) applied to those sentenced to under 12 months, automatic conditional release (ACR) to those sentenced to 12 months to four years, and discretionary conditional release (DCR) to those sentenced to more than four years. AUR prisoners were released at the halfway point and were not subject to statutory supervision. ACR prisoners were released at the halfway point and then remained on licence to the three-quarter point of their sentence. DCR prisoners could be released at any point between halfway and two-thirds (the 'parole window') if considered suitable by the Parole Board, and remained on licence from that point to the three-quarters point of their sentence. All categories of prisoner remained 'at risk' when, although not subject to licence, the sentence had not yet expired. This meant that the unexpired part of their sentence could be added to any new one if they committed a further offence.
- A.3 The provision of automatic release for those serving under four years' imprisonment followed the recommendations of the Carlisle committee, which specifically did not favour differential treatment depending on the nature of the offence.²³⁵ The committee thought that questions of deterrence and punishment were for the court when deciding what sentence should be imposed and that the test of whether the prisoner, if released, could be a danger to the public should apply to all without differentiation. This was in tune with the basic principle that it was the severity of the sentence that reflected the seriousness of the offence. The Halliday report, published in 2001, urged a restructuring of the sentencing framework to ensure, inter alia, that it focused more on the serious and dangerous offender.²³⁶

²³⁴ Young offenders serving a determinate sentence may be sentenced to detention in a Young Offenders Institution (if aged 18-21); detention under s91 Powers of Criminal Courts (Sentencing) Act 2000 (if aged under 18) or a detention and training order (if under 18).

²³⁵ *The Parole System in England and Wales*, Report of the Review Committee chaired by Lord Carlisle of Bucklow QC (Cm 532, 1988).

²³⁶ *Making Punishments Work: Report of a review of the sentencing framework for England and Wales*, July 2001.

- A.4 The Criminal Justice Act 2003 adapted the automatic release provisions that applied to ACR and DCR prisoners under the 1991 Act by providing that all prisoners serving 12 months or more, now known as standard determinate sentences (SDS), should be automatically released at the halfway point. However, in contrast to those sentenced under the Criminal Justice Act 1991 provisions, prisoners would remain on licence until the end of their sentence. Dangerous offenders were to receive indeterminate sentences or extended sentences, and their cases would be considered by the Parole Board before release.²³⁷

Pre-automatic release – home detention curfew

- A.5 Home detention curfew (HDC) was introduced by the Crime and Disorder Act 1990 and initially applied only to adults, but was extended to include young offenders in 2003. It enables the secretary of state, through the prison governor, to release standard determinate (SDS) prisoners and automatic conditional release (ACR) prisoners up to 135 days in advance of their normal release date. On release, prisoners are subject to an electronically monitored curfew for a minimum of nine hours a day.
- A.6 For adult prisoners there are, in effect, two HDC schemes in operation, with slightly different eligibility criteria depending on whether they were convicted of offences before or after implementation of the Criminal Justice Act 2003 or are prisoners who received a sentence of imprisonment of less than 12 months (irrespective of when the offence was committed). Presumptive HDC applies to short-term prisoners (three months to under 12 months) who do not have a history of violent, sexual or drug-related offending.²³⁸ Unlike Criminal Justice Act 1991 prisoners, Criminal Justice Act 2003 prisoners are not statutorily ineligible for HDC if they are serving a determinate sentence of four years or more. However, such prisoners are, as a matter of policy, presumed unsuitable for release on HDC unless exceptional circumstances exist. There are statutory exceptions to eligibility for HDC.²³⁹
- A.7 The purpose of the curfew is to ‘impose a structure and discipline upon the offender on release’. The scheme allows offenders to live at home or at an alternative approved address and is designed to ‘manage more effectively the transition of offenders from custody back into the community’. It is also intended to ‘address the temptations of recidivism by providing a managed transition back into the community’.²⁴⁰
- A.8 Breach of curfew alone can result in a return to custody. If the prisoner is subject to probation supervision upon non-HDC release, those supervision conditions will apply as well as additional HDC conditions. However, for many prisoners released on HDC there is little overt support beyond the deterrent effect of an immediate return to custody for breach.

²³⁷ The ‘dangerous offender’ provisions are found in ss224-236 Criminal Justice Act 2003 (now amended by the Criminal Justice and Immigration Act 2008). The 2008 Act also amended s247 of the 2003 Act so as to remove the role of the Parole Board in directing the release of extended sentence prisoners.

²³⁸ Introduced under PSI 19/2002.

²³⁹ See s246(4) Criminal Justice Act 2003. Exclusions include violent and sexual offenders serving an extended sentence; prisoners serving a sentence for failing to return to custody following a period of temporary release; prisoners subject to a hospital order, hospital direction or transfer direction under the Mental Health Act 1983; prisoners serving a sentence imposed for failing to comply with a curfew requirement of a community order; prisoners subject to the notification requirements of the Sexual Offences Act 2003; prisoners liable to removal from the United Kingdom; prisoners who have been released on HDC during the currency of the sentence and have been recalled to prison for breaching a HDC curfew condition; prisoners who have been released on compassionate early release from custody during the currency of the sentence, and have been recalled to prison; prisoners who have less than 14 days remaining between the date of sentence and the date on which they will have served the requisite period, ie now four weeks.

²⁴⁰ Prison Service Order governing Home Detention Curfew, PSO 6700.

- A.9 As can be seen from the information provided to Parliament (PQ dated 12 September 2007), HDC has been used to cover a range of different offending categories:

<i>Home detention curfew release by offence group</i>					
<i>Offence Group⁽¹⁾</i>	<i>2001</i>	<i>2002</i>	<i>2003</i>	<i>2004</i>	<i>2005</i>
Violence	2,854	3,693	3,564	3,159	3,204
Sexual offences	17	20	8	1	2
Robbery	631	916	1,257	961	901
Burglary	1,072	2,022	2,066	1,677	1,298
Theft and handling	1,771	2,797	2,817	2,629	2,107
Fraud and forgery	1,149	1,262	1,133	1,226	1,287
Drug offences	2,219	2,683	2,782	2,422	2,509
Motoring offences	1,500	3,801	4,158	3,877	3,046
Other ⁽²⁾	2,464	3,331	3,438	3,343	2,942
(1) Offence recorded on Prison Service IT system. Investigations suggest that around five per cent of offence types recorded on this system do not relate to the offence for which they were released on HDC but relate to offences committed after release from prison and before the licence expiry date for their sentence.					
(2) Includes the offence of bigamy.					

- A.10 In April 2003, at the same time as increasing the maximum curfew period from three months to four and a half months, a presumption was introduced that prisoners convicted of certain serious offences would not be suitable for release unless exceptional circumstances existed.²⁴¹ These included offences involving the death of a victim, attempted murder or threats to kill, serious offences involving possession of firearms or offensive weapons, child cruelty, all racially aggravated offences and all non-specified sexual offences.²⁴² Following consultation with ministers in 2004, the chief executive of NOMS advised that the following features may amount to exceptional circumstances: the likelihood of reoffending on HDC is extremely small, the HDC applicant has no previous convictions and the applicant is infirm by reason of disability or age or both.²⁴³ It might be thought that such a combination would be not merely exceptional but unique.
- A.11 These and other measures like them are taken on the basis that it is 'extremely important to maintain public confidence in the HDC Scheme'.²⁴⁴ Similar caution has been expressed about cases involving offenders who have been involved in notorious crime or a crime of particular concern to the public, either at national or local level. In such cases governors are advised to refer the case through their area manager or director to the chief executive of NOMS for a final decision.²⁴⁵
- A.12 Prisoners may request not to be considered for HDC, but if they are considered and refused they must be given reasons. Guidance suggests that substantive reasons for retaining a prisoner in custody until after his or her HDC release date should fall under one of the following headings:

²⁴¹ See *R (Cross) v Governor HM Youth Offender Institution Thorn Cross* [2004] EWHC 149 (Admin).

²⁴² PSI 2003/21, para 23.

²⁴³ PSI 2006/31, para 19.

²⁴⁴ See, for example, the ministerial statement by the Parliamentary Under-Secretary of State for the Home Department (Hilary Benn), *Hansard*, HC 10 April 2003, col 32WS.

²⁴⁵ PSI 2006/31, para 20.

an unacceptable risk to the victim or to members of the public; a pattern of offending which indicates a likelihood of reoffending during the HDC period; a likelihood of failure to comply with the conditions of the curfew; lack of suitable accommodation for HDC; or shortness of the potential curfew.²⁴⁶ Where HDC is refused, a prisoner must be informed of his or her right to see the reports and other documentation on which the decision was based and the right to make oral or written representations to the governor dealing with any appeal.²⁴⁷

- A.13 The Halliday Report was critical of HDC, arguing that it should not be available before the halfway point of the sentence. Indeed, the report was critical of any use of a discretionary scheme to reduce the prison population, arguing that discretion should be reserved for those cases where it was considered necessary to keep prisoners in prison for longer.²⁴⁸
- A.14 In 2005, of a total of 84,300 prisoners discharged from prison, 17,296 were released early on HDC. In 2006, of a total of 78,400 prisoners discharged from prison, 13,666 were released early on HDC. In 2007, of a total of 77,000 prisoners discharged from prison, 11,428 were released early on HDC.²⁴⁹

Pre-automatic release – early removal scheme (ERS)

- A.15 The ERS is ‘designed to closely resemble the HDC scheme’. It was introduced in June 2004.²⁵⁰ The scheme allows for prisoners who may be removed under immigration legislation to be released to their country of origin up to 135 days (extended in 2008 to 270 days) before their normal release date. The Criminal Justice and Immigration Act 2008 added a new category of eligibility so as to include those prisoners who have satisfied the secretary of state that they have a settled intention of residing permanently outside the UK following removal.²⁵¹
- A.16 Unlike with HDC, the length of the sentence does not affect eligibility. Also unlike HDC, eligible prisoners may not opt out of the scheme. However, as with HDC, certain prisoners are statutorily excluded.²⁵² A prisoner who is otherwise eligible for ERS and who is not serving a sentence of four years or more for a violent or sexual offence will usually be presumed suitable for removal under ERS.²⁵³ The process of appeal is similar to that for HDC.²⁵⁴ At the end of December 2008, it was estimated that just under 15 per cent of the prison population (11,283 prisoners) were foreign nationals.²⁵⁵

²⁴⁶ PSO 6700, para 5.13.3.

²⁴⁷ Ibid, para 7.12. In *R (Price) v Governor HMP Kirkham* [2004] EWHC 461 (Admin), a prisoner successfully sought judicial review of the decision to withhold information which had been used to assess his risk of reoffending as medium.

²⁴⁸ *Making Punishments Work. Report of a review of the sentencing framework for England and Wales*, July 2001.

²⁴⁹ *Hansard*, HC 2 Dec 2008, Written Answers, David Hanson MP, Minister of State, Ministry of Justice.

²⁵⁰ Sched 20 Criminal Justice Act 2003.

²⁵¹ By insertion of a new s46ZA to the Criminal Justice Act 1991.

²⁵² Those serving a sentence for being unlawfully at large whilst on temporary release; those subject to a hospital order, hospital direction or transfer direction under the Mental Health Act 1983; those who would serve a period of less than 14 days between the eligibility date for removal under ERS and the halfway point in the sentence.

²⁵³ Examples of exceptional and compelling reasons for not releasing a prisoner on ERS include clear evidence that the prisoner is planning a further crime, including plans to evade immigration control and return to the UK illegally; evidence of violence or threats of violence, in prison, on a number of occasions; evidence of dealing in Class A drugs in custody; or other matters of similar gravity relating to public safety: PSO 6000, para 9.6.3.

²⁵⁴ See PSO 6000, PSI 19/2008.

²⁵⁵ On 23 July 2008, the chief executive of the UK Border Agency advised the Home Affairs Select Committee that the Agency is removing or deporting around a fifth of all foreign prisoners subject to deportation action direct from prison an average of 180 days before their release date. See D Hanson, n249 above.

Pre-automatic release – end of custody licence (ECL)

- A.17 ECL was introduced in 2007 following an announcement by the then Lord Chancellor on 19 June 2007. Its aim is not only to 'assist prisoners with resettlement, for example by allowing them to seek employment/training earlier than their conditional release date from custody' but also, perhaps more pertinently, to 'provide relief to the prison population'.²⁵⁶ Prisoners eligible for ECL can be released from prison up to 18 days earlier than would otherwise be the case. It applies to those serving a sentence of between four weeks and four years, providing they do not fall within one of the listed exceptions. Exclusions include registered sex offenders, those serving sentences for serious violent crimes, those who have broken the terms of temporary release in the past and those who do not have a release address.
- A.18 ECL can apply to those not released on HDC. For example, of the 28,879 prisoners released under ECL between 29 June 2007 and 31 May 2008, around 5,300 had previously been refused release on HDC.²⁵⁷ The scheme makes use of Prison Rule 9 and YOI Rule 5, which allow for the temporary release of prisoners.
- A.19 The Probation Service is not required to conduct either a risk assessment or an accommodation check before ECL takes place, although a release address must have been provided. However, those prisoners who will be subject to probation supervision upon normal release from custody (ie all young offenders, and adults serving sentences of 12 months or more) must have their supervision arrangements brought forward to begin from the point of release on ECL. These prisoners will be issued with two separate licences: one to cover the period on ECL, the other for their statutory period of licence supervision.
- A.20 The Lord Chancellor and Secretary of State for Justice, Jack Straw, has consistently said that as soon as there is sufficient prison capacity to do so he will phase out the ECL scheme.²⁵⁸ Statistical information provided by the Ministry of Justice suggests that around 2,500 prisoners are released on ECL each month. The cumulative total since the scheme began to the end of December 2008 is 47,515 early releases.

²⁵⁶ See PSI 2207/42, para 2.11.

²⁵⁷ *Hansard*, HC 1 Sept 2008, Written Answers..

²⁵⁸ Most recently on 3 February 2009 in an oral answer to a question in the House of Commons.

²⁵⁹ *Hansard*, 10 July 2008, col 1791W, Written Answers. The answer contains the disclaimer that '[t]hese figures have been drawn from administrative IT systems, which, as with any large scale recording system, are subject to possible errors with data entry and processing'.

²⁶⁰ S44 Criminal Justice Act 1991.

²⁶¹ S44A Criminal Justice Act 1991 and s85 Powers of Criminal Courts (Sentencing) Act 2000.

²⁶² Parole Board for England and Wales, *Annual Report 2006/7*.

²⁶³ As specified in Sched 15 Criminal Justice Act 2003.

A.21 The offence groups for prisoners released under the ECL scheme from 29 June 2007 to 31 May 2008 show:²⁵⁹

<i>Offence group</i>	<i>Releases</i>
Violence against the person ⁽¹⁾	5,468
Sexual	8
Robbery	668
Burglary	2,609
Theft and handling	6,563
Fraud and forgery	551
Drug offences	1,218
Motoring offences	3,529
Other offences	7,778
Offence not recorded	487
Total	28,879
(1) Violence against the person includes assault occasioning bodily harm. Prisoners serving sentences for more serious violent offences are excluded from the scheme.	

Post-automatic release – parole

A.22 As stated above, the Criminal Justice Act 1991 provided that prisoners serving less than four years should be automatically released at the halfway point of their sentence. With the exception of prisoners sentenced to 15 years or more (where the Board's power is limited to making a recommendation to the secretary of state), those prisoners sentenced to four years or more could be released at the halfway point under powers delegated to the Board by the secretary of state. Extended licence²⁶⁰ and extended sentence²⁶¹ prisoners (whose custodial term was more than four years) were eligible for release at the halfway point in line with the procedures for DCR prisoners, and annually thereafter until the expiry of the custodial term. In 2005, prior to implementation of the relevant provisions of the Criminal Justice Act 2003, the Parole Board considered 7,528 such applications. Parole was granted in 49.4 per cent of cases.²⁶²

A.23 The Criminal Justice Act 2003 removed the distinction between long-term and short-term prisoners, so that where offences were committed after the Act came into force, long-term prisoners could also be released at the halfway point. However, those prisoners who had been sentenced to four years or more for sexual or violent offences²⁶³ committed before 4 April 2005 were separated out and the involvement of the Parole Board in their release retained.

A.24 Directions issued by the secretary of state under s32(6) Criminal Justice 1991 (issued in May 2004) state that:

1. *In deciding whether or not to recommend release on license, the Parole Board shall consider primarily the risk to the public of a further offence being committed at a time when the prisoner*

would otherwise be in prison and whether any such risk is acceptable. This must be balanced against the benefit, both to the public and the offender, of early release back into the community under a degree of supervision which might help rehabilitation and so lessen the risk of re-offending in the future. The Board shall take into account that safeguarding the public may often outweigh the benefits to the offender of early release.

2. Before recommending release on parole licence, the Parole Board shall consider:
 - a) whether the safety of the public would be placed unacceptably at risk. In assessing such risk, the Board shall take into account:
 - (i) the nature and circumstances of the index offence including any information provided in relation to its impact on the victim or the victim's family;
 - (ii) the offender's background, including the nature, circumstances and pattern of any previous offending;
 - (iii) whether the prisoner has shown by his attitude and behaviour in custody that he is willing to address his offending behaviour by participating in programmes or activities designed to address his risk, and has made positive effort and progress in doing so;
 - (iv) behaviour during any temporary release or other outside activities;
 - (v) any risk to other persons, including the victim, their family and friends;
 - (vi) any medical, psychiatric or psychological considerations relevant to risk (particularly where there is a history of mental instability);
 - (vii) if available, the indication of predicted risk as determined by a validated actuarial risk predictor;
 - (viii) that a risk of violent or sexual offending is more serious than a risk of other types of offending;
 - (b) the content of the resettlement plan;
 - (c) whether the longer period of supervision that parole would provide is likely to reduce the risk of further offences being committed;
 - (d) whether the prisoner is likely to comply with the conditions of his licence and the requirements of supervision, taking into account occasions where he has breached trust in the past;
 - (e) the suitability of home circumstances;
 - (f) the relationship with the supervising probation officer;
 - (g) the attitude of the local community in cases where it may have a detrimental effect upon compliance; and
 - (h) representations on behalf of the victim in respect of licence conditions.

A.25 The 2003 Act also introduced a new scheme of sentences for offenders assessed as 'dangerous' and who had committed a specified sexual or violent offence. The new extended sentence²⁶⁴ comprised the 'appropriate custodial term' and the 'extension period' during which the offender was subject to a licence 'of such length as the court considers necessary for the purpose of protecting the public from serious harm occasioned by the commission by him of further specified offences'. As originally implemented, the first half of the appropriate custodial term is served in custody, with release

²⁶⁴ Prior to the Criminal Justice Act 2003, there were two types of determinate sentence meant to offer enhanced protection to the public from individuals who had committed violent and sexual offences. The 'longer than commensurate sentence' was imposed where the court considered that an additional custodial term more than commensurate with the gravity of the offence was necessary to protect the public from serious harm. The 'extended sentence' enabled a released prisoner to be kept on licence beyond the expiry of the commensurate sentence, with a power of recall if that was necessary for the protection of the public. The 2003 Act abolished the 'longer than commensurate sentence'.

during the second half of that term being solely on the recommendation of the Parole Board. The maximum extension that can be imposed is eight years for a sexual offence and five years for a violent offence.²⁶⁵

- A.26 Changes brought about by the Criminal Justice and Immigration Act 2008 mean that those prisoners given an extended sentence after 14 July 2008 will be subject to automatic conditional release at the halfway point of the custodial sentence. Only extended sentence prisoners sentenced before that date will continue to be subject to the parole process.²⁶⁶

²⁶⁵ S227 Criminal Justice Act 2003 (and s228 for children and young people under 18).

²⁶⁶ ie, those sentenced to extended sentences with a custodial term of four years or more under the Criminal Justice Act 1991 for offences before 4 April 2005 and for those sentenced before 14 July 2008 under the Criminal Justice 2003 for offences committed on or after 4 April 2005.



Appendix B

Existing procedures for recall and re-release

Determinate sentence prisoners

- B.1 The power to revoke the licence and re-detain determinate sentence prisoners released before their sentence expiry date has always been exercised by, or on behalf of, the secretary of state (first the Home Secretary and since May 2007 the Secretary of State for Justice) although at various legislative moments there has been a duty to consult the Parole Board first where it was practicable to do so.²⁶⁷ However, some mark of the significance of a return to custody for a released prisoner was the unique provision made in the Criminal Justice Act 1967 that, at least as far as the immediate re-release of recalled prisoners was concerned, the Home Secretary was bound to accept recommendations made by the Parole Board.
- B.2 The subsequent layering of the various statutory provisions meant that prisoners sentenced under the Criminal Justice Act 1991 were processed differently depending on whether the alleged breach of licence occurred before or after the Criminal Justice Act 2003 came into force. Prisoners sentenced under the 2003 Act again fell into two sub-groups: those whose alleged breach occurred, and whose recall was requested, before the Criminal Justice and Immigration Act 2008 came into force; and those whose recall occurred after that date.²⁶⁸ The 2008 Act provides that all cases in which recall took place on or after the 14 July 2008 are to be treated in the same way irrespective of when the sentence was passed.²⁶⁹ Insofar as the 2008 Act simplifies matters, it does so at the expense of those prisoners sentenced under the provisions of the 1991 Act who, if recalled to prison after 14 July 2008 and subsequently re-released, will remain on licence until their sentence expiry date rather than the licence expiry date anticipated at the time of sentence.
- B.3 The new recall provisions contained in the 2008 Act are said to be designed to 'enhance the use of recall as a flexible risk management tool; focus prison and Parole Board resources on recalled offenders who are assessed as presenting a high risk of serious harm; and facilitate the swift determination of recall requests in respect of indeterminate sentence prisoners'.²⁷⁰ The provisions

²⁶⁷ Since 4 April 2005, all determinate sentence prisoners are recalled under s254 Criminal Justice Act 2003 without recourse to the Parole Board.

²⁶⁸ An ambiguity in the drafting of the Criminal Justice Act 2003 in respect of prisoners released under the Criminal Justice Act 1991 but recalled under the 2003 Act was dealt with in *R (Buddington) v Home Secretary* [2006] 2 Cr App Rep (S) 715. However, the proper position of so-called 'existing prisoners', ie those sentenced under the Criminal Justice Act 1991 (prior to the Crime and Disorder Act 1998 amendments) remained problematic. In *R (Stellato) v Home Secretary* [2007] 2 AC 70, the House of Lords held that the power of recall utilised under the 2003 Act could only be used during the licence period provided for under the regime in force at the time of sentencing; cf the amending provision in s32 Criminal Justice Act 2008.

²⁶⁹ S50A Criminal Justice Act 2003 (as amended by s32 Criminal Justice and Immigration Act 2008).

²⁷⁰ Post-release enforcement – recall and further release, PC14/2008.

define three groups of determinate sentence prisoners for whom different re-release procedures are to apply: fixed-term recall, standard recall and emergency recall.

- B.4 The main innovation is the introduction of 'fixed-term recall'. This has the effect of returning eligible offenders to custody for a fixed period of 28 days following which they must be released automatically by the secretary of state. The secretary of state is required to refer to the Parole Board the case of any recalled prisoner who does not qualify for fixed-term recall and is in custody for 28 days or longer. Fixed-term recall prisoners also have the right to make representations to the Board to consider release before the end of the 28-day period.
- B.5 All cases not dealt with as fixed-term recalls will be dealt with as either a standard or as an emergency recall. Recalled determinate sentence prisoners are ineligible for a fixed term recall and thus become standard recall cases if they are serving an extended sentence, or a sentence imposed for a specified offence (contained in Schedule 15 to the Criminal Justice Act 2003). They are also ineligible if they have been recalled under the 2003 Act, having been released early on HDC or compassionate grounds, or have previously been recalled on the current sentence and released either on fixed-term recall or executively by the secretary of state. Once eligible, they will be suitable for re-release if the secretary of state is satisfied that they will not present an identifiable risk of serious harm to members of the public if released at the end of 28 days. Serious harm is defined as meaning death or serious personal injury, whether physical or psychological. The guidance indicates that no offender assessed as presenting a high or very high risk of serious harm will be considered suitable for a fixed-term recall.
- B.6 Once the initial recommendation has been made, usually by the Probation Service, enhanced casework teams within the NOMS Public Protection Unit at the Ministry of Justice will be responsible for identifying those recalled prisoners suitable for a fixed-term recall, considering the cases of standard recall prisoners and, where appropriate, arranging executive release, referring to the Parole Board those standard recall offenders who have not been released by day 28 of return to custody and referring to the Board cases where representations in respect of recall have been made.²⁷¹
- B.7 The options available to the Parole Board following review have been reset. There is no longer a power to set a date for further review (which was not always properly followed up under the previous system). Now the Board must recommend either immediate release or release at a specified future date. Where the Board determines that it can make 'no recommendation as to release', the casework team will be responsible for managing the case in terms of executive re-release or referral back to the Board (if the prisoner has not already reached sentence expiry date within the succeeding 12 months). The new procedure focuses the attention of the Board on the offender's re-release rather than the appropriateness of the recall.
- B.8 For standard recall cases (excluding extended sentence cases), the secretary of state has executive power to direct re-release at any point following recall, providing that he is satisfied that it is not necessary for the protection of the public for the offender to remain in prison. According to the Ministry of Justice, the decision will be taken having very careful regard to the up-to-date risk assessment provided by probation staff.²⁷²

²⁷¹ See s255B(4) and (5) Criminal Justice Act 2003. As now if the Parole Board recommends immediate re-release on licence, the secretary of state must give effect to that recommendation.

²⁷² Ministry of Justice Circular 2008-01, para 26.

- B.9 The Parole Board's decreased involvement in determining the re-release of determinate sentence prisoners is expected to reduce its caseload. In future it is anticipated that, as least as far as post-July 2008 recalls are concerned, the Board will be limited to considering those cases where executive re-release has not occurred by the end of day 28 following return to custody. These cases will include all extended sentence cases; cases where there is a high risk of harm at the time of recall and re-release was not authorised by the secretary of state; cases where there is a low/medium risk of harm but where the prisoner is not re-released by the secretary of state for the protection of the public (including repeated recalls); cases where the risk management plan is not in place before day 28; cases referred back to the Board by the secretary of state (including extended cases once the risk management plan is in place); annual reviews; and cases referred as a result of representations having been made by the recalled prisoner. At the time of writing, the secretary of state has yet to issue directions in relation to the new recall provisions or amend PSO 6000 to reflect these new provisions.

Extended sentence prisoners

- B.10 It has been said that the extended sentence is a hybrid between a determinate and an indeterminate sentence.²⁷³ Like most long-term determinate sentence prisoners, whose cases were formerly considered by the Parole Board, extended sentence prisoners are (since implementation of the Criminal Justice and Immigration Act 2008) entitled to automatic release at the halfway point of their sentence.
- B.11 In *Sim*,²⁷⁴ the court held that the power to detain a recalled extended licence prisoner in custody after recall during the extended licence period (whether sentenced under the Powers of Criminal Courts (Sentencing) Act 2000 or the Criminal Justice Act 2003) could only be exercised to achieve the purpose for which the extended sentence had been imposed. The so-called *Sim* test establishes a presumption that the prisoner will be released unless the Board is satisfied that there exists a risk that the offender will commit offences of a type for which he or she was sentenced, or that the licence had broken down to a point where supervision has become impossible. As Article 5(4) ECHR is engaged after recall, the Parole Board's decision in extended sentence cases is a direction to the secretary of state rather than the recommendation (albeit binding on the secretary of state) made in all other determinate sentence cases. If immediate re-release is not directed then the Board must fix a date for the next review, which cannot be more than 12 months from the decision.²⁷⁵

Life and indeterminate sentence prisoners

- B.12 Following release on life licence, all licensees are liable to be recalled to custody at any time if their risk is deemed to be unacceptable. The Parole Board's role in recommending the recall of a prisoner on a life licence has been subject to recent change. Prior to implementation of the Criminal Justice and Immigration Act 2008, the secretary of state could recall a prisoner released on life licence to prison on the recommendation of the Parole Board, or without such a recommendation where the secretary of state considered this to be expedient in the public interest. The new provision simply states that the secretary of state may 'revoke his licence and recall him to prison'. The removal

²⁷³ H Arnott and S Creighton, *Parole Board Hearings: Law and Practice*, LAG, 2007, para 13.37.

²⁷⁴ *R (Sim) v Parole Board and Home Secretary* [2004] QB 1288.

²⁷⁵ S256(2) Criminal Justice Act 2003.

of the requirement to consult the Parole Board prior to recall was considered to be in line with operational practice:²⁷⁶

In practice virtually all recalls were instigated under the 'expedient' process. Life and indeterminate sentence prisoners can only be recalled to prison if their behaviour suggests they present an increased risk to life and limb. Inevitably, in cases where recall was considered necessary, public protection required that the recall should be given immediate effect.

B.13 Guidance, in the form of directions issued to the Parole Board under the old system, required the Board in assessing the level of risk presented by a life licensee to address the following, rather more discerning, factors:

- the extent to which the licensee's continued liberty presents a risk of harm to a specific individual or individuals, or to members of the public generally;
- the immediacy and level of such risk which the life licensee presents, and the extent to which this is manageable in the community;
- the extent to which the licensee has failed previously to comply with licence conditions or the objectives of supervision, or is likely to do so in the future, and the effect on this of the immediacy and level of risk presented by the licensee;
- any similarity between the prisoner's behaviour and that which preceded the index offence.²⁷⁷

B.14 A life or indeterminate sentence prisoner whose licence has been revoked has the right to make representations to the Board and to have those representations considered at an oral hearing. The test for re-release, ie whether it is still necessary for the protection of the public that the prisoner should remain confined, is the same as that used to determine original release.

²⁷⁶ Ministry of Justice Circular 2008/1, para 35.

²⁷⁷ Directions to the Parole Board under s23(6) Criminal Justice Act 1991 – Release and recall of life sentence prisoners, para 11.



Appendix C

Life and indeterminate sentence cases – an overview

- C.1 Prisoners sentenced to life imprisonment or indeterminate sentences must serve the ‘minimum term’²⁷⁸ set by the sentencing court before their suitability for release can be considered by the Parole Board. This minimum term is said to constitute the period of imprisonment necessary to satisfy the requirements of retribution and deterrence. The statutory test for the release (or re-release) of life or indeterminate sentence prisoners is that ‘the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined’.²⁷⁹
- C.2 Directions issued by the secretary of state in August 2004 under s32(6) Criminal Justice Act 1991²⁸⁰ state:
5. *Before directing a lifer’s release under supervision on life licence, the Parole Board must consider:-*
 - a) *all information before it, including any written or oral evidence obtained by the Board;*
 - b) *each case on its merits, without discrimination on any grounds;*
 - c) *whether the release of the lifer is consistent with the general requirements and objectives of supervision in the community, namely; protecting the public by ensuring that their safety would not be placed unacceptably at risk; securing the lifers successful re-integration into the community.*
 6. *In assessing the level of risk to life and limb presented by a lifer, the Parole Board shall consider the following information, where relevant and where available, before directing the lifer’s release, recognising that the weight and relevance attached to particular information may vary according to the circumstances of each case:*
 - a) *the lifer’s background, including the nature, circumstances and pattern of any previous offending;*
 - b) *the nature and circumstances of the index offence, including any information provided in relation to its impact on the victim or victim’s family;*
 - c) *the trial judge’s sentencing comments or report to the Secretary of State, and any probation, medical, or other relevant reports or material prepared for the court;*

²⁷⁸ The Sentencing Advisory Panel recommended replacing the expression ‘the tariff’ with the expression ‘minimum term’ as more clearly conveying that release at the end of this period was not automatic but dependent on risk being adequately reduced. See: *Advice of the Sentencing Advisory Panel to the Court of Appeal on the setting of the tariff in murder cases* (April 2002).

²⁷⁹ S28(6)(b) Crime (Sentences) Act 1997.

²⁸⁰ Now s239(6) Criminal Justice Act 2003. The directions are now considered advisory following the decision in *R (on the application of Girling) v Parole Board* [2007] 2 WLR 782, CA.

- d) *whether the lifer has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence;*
- e) *the nature of any offences against prison discipline committed by the lifer;*
- f) *the lifers attitude and behaviour to other prisoners and staff,*
- g) *the category of security in which the lifer is held and any reasons or reports provided by the Prison Service for such categorisation, particularly in relation to those lifers held in Category A conditions of security;*
- h) *the lifer's awareness of the impact of the index offence, particularly in relation to the victim or victims family, and the extent of any demonstrable insight into his/her attitudes and behavioural problems and whether he/she has taken steps to reduce risk through the achievement of life sentence plan targets;*
- i) *any medical, psychiatric or psychological considerations (particularly if there is a history of mental instability);*
- j) *the lifer's response when placed in positions of trust, including any absconds, escapes, past breaches of temporary release or life licence conditions and life licence revocations;*
- k) *any indication of predicted risk as determined by a validated actuarial risk predictor model, or any other structured assessments of the lifers risk and treatment needs;*
- l) *whether the lifer is likely to comply with the conditions attached to his or her life licence and the requirements of supervision, including any additional non-standard conditions;*
- m) *any risk to other persons, including the victim, their family and friends.*

7. *Before directing release on life licence, the Parole Board shall also consider:-*

- a) *the lifer's relationship with probation staff (in particular the supervising probation officer), and other outside support such as family and friends;*
- b) *the content of the resettlement plan and the suitability of the release address;*
- c) *the attitude of the local community in cases where it may have a detrimental effect upon compliance;*
- d) *representations on behalf of the victim or victims relatives in relation to licence conditions.*

How cases come to be considered

C.3 There is no statutory requirement for the secretary of state to refer to the Board any life or indeterminate sentence prisoner's case at the pre-tariff stage. In practice, the secretary of state normally makes the first referral to the Board approximately three years before tariff expiry and then again just prior to the tariff expiry date.²⁸¹ The earlier review allows an assessment of whether the prisoner should be transferred to open conditions.²⁸² A pre-tariff review is also required because the Board would otherwise not be in a position to decide the lawfulness of a prisoner's continued detention at tariff expiry.²⁸³ Once the tariff has expired, statute provides that cases should be referred at intervals of no more than two years.²⁸⁴

²⁸¹ When the tariff is set for six years or more. Where the tariff is less than three years, the policy is for the first review to take place shortly before tariff expiry to consider suitability for release on the expiry date. In cases where the tariff is between three and six years, the first review will begin at the halfway point. See PSO 4700, para 5.1.3.

²⁸² Following the publication of HM Inspectorate of Probation's report into the Anthony Rice case, which identified one of the 'key decision-making points' as being the move from closed to open conditions, the Parole Board changed its policy in February 2007 so that all pre-tariff paper decisions that would otherwise recommend transfer to open conditions are referred to an oral hearing. This ended the Board's practice of holding weekly 'paper lifer' panels to consider cases where the secretary of state asked for advice only.

²⁸³ As required by Article 5(4) ECHR.

²⁸⁴ S28(7) Crime (Sentences) Act 1997.

- C.4 Two years, however, will not be adequate in all cases to meet the requirements of Article 5(4) ECHR that there should be a regular review. The ECtHR has declined to prescribe a maximum period between reviews, leaving the question of what constitutes compliance to be determined in light of the circumstances of each case. Thus, the ECtHR held that a two-year period between reviews was compatible with Article 5(4) when it had been recommended by the Parole Board on the ground that it considered that considerable further offence-related treatment/work programmes still needed to be undertaken.²⁸⁵ In contrast, where a prisoner had made good progress and the Board had not suggested that more than 12 months would be needed to conduct further testing in open conditions, the Divisional Court found that the secretary of state's decision to hold the next Parole Board hearing 18 months after the previous one violated Article 5(4).²⁸⁶
- C.5 Where the secretary of state seeks to justify an interval between reviews after the completion of offence-focused work on the ground that there is a need to further monitor the prisoner and make reports on his or her progress, he must be prepared to identify the need and to specify the nature and duration of the process.²⁸⁷ Further, both the secretary of state and the Parole Board must ensure that systems are in place which enable review hearings to be arranged speedily in accordance with Article 5(4).
- C.6 In *Craig Smith*,²⁸⁸ the Board's failure actively to manage a case was found to constitute a breach, even though it was noted by the Divisional Court that the panel had no power to enforce its directions. After a deferral in November 2007, directions were issued as to the steps to be taken to put the panel in a position where it could reconvene in order to assess the case. The information requested was to be provided by 28 February 2008. However, despite enquiry being made by the prisoner's representatives, this date passed without any further action being taken. In the view of Mrs Justice Slade:²⁸⁹

It is not for this court to specify the steps which the Parole Board could have taken. However in my judgment it failed in its duties to actively case manage Mr Smith's case and to proceed with reasonable despatch. The Parole Board allowed the deferred hearing of Mr Smith's case to drift.

- C.7 The purpose of requiring speedy and periodic reviews by a court is to eliminate, as far as practicable, the possibility of a prisoner remaining in custody when there is no longer a legal justification for detention. In tension with this requirement, the Parole Board also has an obligation to ensure that it has the material necessary for it to reach a proper decision on whether such a legal justification exists.²⁹⁰

Whilst the need for hearings to be arranged speedily is acknowledged, it is also important to bear in mind that there is an overriding need that the first defendant's [the Parole Board's] hearings should be fair. Fair to the claimant and fair to the public. The latter is of no less importance than the former, since it is for the first defendant to be satisfied that it is no longer necessary for the protection of the public that the prisoner should continue to

285 *Dancey v United Kingdom* [2002] ECHR 852. In *Hirst v UK* (App 40787/98) [2001] Crim LR 919, it was held that indeterminate sentence reviews were analogous to the review of a patient detained under the Mental Health Act as both concerned reviews of factors that were susceptible to change over time. In mental health cases there is a one-year review requirement.

286 *R (on the application of George Loch) v Secretary of State for Justice* [2008] EWHC 2278 (Admin).

287 *Oldham v UK* (2001) 31 EHRR 34.

288 *Craig Smith v Secretary of State for Justice, Parole Board* [2008] EWHC 2998 (Admin).

289 *Ibid*, para 57.

290 *R (Cawley) v (1) Parole Board and (2) Secretary of State for Justice* [2007] EWHC 2649, para 24.

be confined. Thus the Board should not be discouraged from requesting more information where it considers that it is necessary to do so in order to obtain a proper appreciation of any potential risk factors.

- C.8 The present referral system was put in place when many life and indeterminate sentence prisoners received fairly long tariffs. However, with the introduction of the automatic life sentence and indeterminate sentences imposed for public protection, a new category of prisoner, many of them with only a short tariff, came to join the existing and relatively stable ‘lifer’ population.²⁹¹ For such prisoners the expectation that they will progress through the prison estate in the same manner as traditional ‘lifers’ can be acutely unrealistic.²⁹² For example, in *Walker and James*,²⁹³ the Court of Appeal upheld a declaration of the lower court that the secretary of state had acted unlawfully by failing to provide measures to allow IPP prisoners to demonstrate to the Parole Board that they were no longer dangerous by the time their tariff had expired.²⁹⁴ The House of Lords in *James (formerly Walker and another) and Lee*²⁹⁵ held that post-tariff detention in such circumstances was not unlawful at common law, nor had there been a breach of Article 5(1) or Article 5(4) ECHR. However, as found by the Court of Appeal, the secretary of state was in breach (even systemic breach) of his public law duty to provide such courses as would enable IPP prisoners to demonstrate their safety for release.²⁹⁶

Transfer to open conditions

- C.9 A life or indeterminate sentence prisoner can normally only be transferred from closed to open conditions when a positive recommendation on his or her suitability for such a move is made by the Parole Board and then accepted by the secretary of state.²⁹⁷ When the recommendation is accepted, the holding prison is informed of any outstanding risk reduction work and asked to arrange a suitable ‘third stage’ allocation. Once authorised, the move must normally be implemented as quickly as possible.²⁹⁸
- C.10 The policy of both the Home Office and now the Ministry of Justice has been to discourage directions for release directly from closed conditions.²⁹⁹ Paragraph 1 of directions issued by the secretary of state in August 2004 under s32(6) Criminal Justice Act 1991³⁰⁰ states:

A period in open conditions is essential for most life sentence prisoners. It allows the testing of areas of concern in conditions which are nearer to those in the community than can be

²⁹¹ The impact of the IPP population on the prison estate was the subject of a Service Review: Ministry of Justice/NOMS, *Indeterminate Sentence Prisoners (ISPs)* (the Lockyer Review), August 2007.

²⁹² The policy relating to the treatment and management of life sentence prisoners is primarily contained in the ‘Lifer Manual’, PSO 4700. PSI 07/2008 has instituted a presumption that IPP prisoners with short tariffs are suitable for Category C prison to avoid them being held for lengthy periods in Category B ‘first stage’ lifer prisons.

²⁹³ *R (Brett James and others) v Secretary of State for Justice* [2008] EWCA Civ 30.

²⁹⁴ In evidence the court was told that on 20 April 2007 there were 2,547 prisoners serving IPP (the median tariff for IPP prisoners at April 2006 was 30 months): see *ibid*, para 18.

²⁹⁵ *Secretary of State for Justice v James; R (on the application of Lee) v Secretary of State for Justice* [2009] UKHL 22. The court referred to the number of life sentence prisoners being up from 5,807 on 31 March 2005 to 10,911 on 31 March 2008: see para 24.

²⁹⁶ *Ibid*, para 36.

²⁹⁷ There is no statutory duty on the secretary of state to seek advice from the Parole Board on transfer of life sentence prisoners to open conditions, although it is the practice to request such advice when a life sentence prisoner is referred to the Board on the question of release. For the duty of the Board to ‘advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners’, see s239(2) Criminal Justice Act 2003.

²⁹⁸ PSO 4700, PSI 26/2006, paras 24–25.

²⁹⁹ Exceptions are likely to be limited to those with short tariffs, deportees, and recalled lifers who have experienced a successful period in open prison before their initial release and have undertaken further offence focused work in closed conditions.

³⁰⁰ Now s239(6) Criminal Justice Act 2003.

found in closed prisons. Lifers have the opportunity to take home leave from open prisons and, more generally, open conditions require them to take more responsibility for their actions.

The Parole Board's own guidance to users (available on its website) states:

Core risk reduction work is not generally available in open conditions and is not expected to be undertaken there. Rather, the purpose of open conditions is to test the efficacy of risk reduction work that has already been completed.

C.11 Risk factors that need to be evaluated against the benefits of transfer, therefore, include establishing whether the prisoner has made sufficient progress towards tackling offending behavior while in closed conditions and whether the prisoner is trustworthy enough not to abscond or to commit further offences. Directions issued by the secretary of state in August 2004 under s32(6) Criminal Justice Act 1991³⁰¹ state:

5. *The Parole Board must take the following main factors into account when evaluating the risks of transfer against the benefits:-*
 - a) *the extent to which the lifer has made sufficient progress during sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the lifer in open conditions would be in the community, unsupervised, under licensed temporary release ;*
 - b) *the extent to which the lifer is likely to comply with the conditions of any such form of temporary release;*
 - c) *the extent to which the lifer is considered trustworthy enough not to abscond;*
 - d) *the extent to which the lifer is likely to derive benefit from being able to address areas of concern and to be tested in a more realistic environment, such as to suggest that a transfer to open conditions is worthwhile at that stage.*

6. *In assessing risk in such matters, the Parole Board shall consider the following information, where relevant and where available, before recommending the lifers transfer to open conditions, recognising that the weight and relevance attached to particular information may vary according to the circumstances of each case:-*
 - a) *the lifer's background, including the nature, circumstances and pattern of any previous offending;*
 - b) *the nature and circumstances of the index offence and the reasons for it, including any information provided in relation to its impact on the victim or victim's family;*
 - c) *the trial judges sentencing comments or report to the Secretary of State, and any probation, medical, or other relevant reports or material prepared for the court;*
 - d) *whether the lifer has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence;*
 - e) *the nature of any offences against prison discipline committed by the lifer;*
 - f) *the lifer's attitude and behaviour to other prisoners and staff;*
 - g) *the category of security in which the lifer is held and any reasons or reports provided by the Prison Service for such categorisation, particularly in relation to those lifers held in Category A conditions of security;*

301 Now s239(6) Criminal Justice Act 2003.

- h) *the lifers awareness of the impact of the index offence, particularly in relation to the victim or victim's family, and the extent of any demonstrable insight into his/her attitudes and behavioural problems and whether he/she has taken steps to reduce risk through the achievement of life sentence plan targets;*
- i) *any medical, psychiatric or psychological considerations (particularly if there is a history of mental instability);*
- j) *the lifer's response when placed in positions of trust, including any outside activities and any escorted absences from closed prisons;*
- k) *any indication of predicted risk as determined by a validated actuarial risk predictor model or any other structured assessment of the lifer's risk and treatment needs.*

7. *Before recommending transfer to open conditions, the Parole Board shall also consider the lifers relationship with the Probation Service (in particular the supervising probation officer), and other outside support such as family and friends.*

C.12 Article 5(4) ECHR does not preclude the secretary of state from taking a different view from that of the Parole Board as to whether the applicant should be moved to open conditions, since the decision is said to relate to the conditions of imprisonment and not directly to engage liberty.³⁰² The approach taken by the secretary of state to the exercise of his discretion as to whether or not to follow the Board's recommendation was criticised by the court in *Hill*³⁰³ when it was held that not only had the rejection of the Board's recommendation in Mr Hill's case been unlawful on the individual facts but also that the secretary of state was operating a policy that failed to be even-handed, in that he always accepted advice from the Parole Board which was unfavourable to prisoners and in the year 2006/7 adopted a demonstrably more restrictive approach to following those recommendations which were favourable to transfer without articulating or justifying it.³⁰⁴

³⁰² See *Blackstock v United Kingdom* (59512/00) 12 May 2004 and in the domestic courts: *R (on the application of Spence) v Home Secretary* [2002] EWHC 2717 (Admin); *R (on the application of Clough) v Home Secretary* [2003] EWHC 597 (Admin).

³⁰³ *R (on the application of Hill) v Secretary of State for the Home Department* [2007] EWHC 2164 (Admin). See also *R (Burgess) v Home Secretary* (DC) 3 November 2000 approved in *R (Williams) v Secretary of State for the Home Department* [2002] WLR 2264. Also *R (on the application of Day) v Secretary of State for the Home Department* [2004] EWHC Admin 1742.

³⁰⁴ In the year to 31 March 2005, out of a total of 475 cases where advice was given for transfer, the secretary of state rejected transfer in 29 cases (6%). In the year to 31 March 2006, out of a total of 444 cases, the advice for transfer was rejected in 40 cases (close to 9%). However, in the year to 31 March 2007, out of a total of 273 cases, the secretary of state rejected the advice in 106 cases (39%). See: *R (on the application of Hill) v Secretary of State for the Home Department* [2007] EWHC 2164 (Admin), para 47.



Appendix D

Two other systems: New Zealand and France

- D.1 Over the last 30 years, most particularly in the United States of America, there has been a marked acceleration in the practice of issuing sentencing guidelines; the enactment of mandatory minimum sentences that give the executive greater control over sentence length; and legislation that restricts or removes the possibility of parole. Such developments typically arise in the context of a political stance of being 'tough on crime' and/or the movement to bring about 'truth in sentencing'. For example, parole at federal level in the United States was abolished by the Sentencing Reform Act 1984. In addition, various financial incentives are offered to states that require persons convicted of serious or violent offences to serve not less than 85 per cent of their prison sentence.³⁰⁵ Some states have abolished parole altogether while others limit its grant to non-violent offenders.³⁰⁶ The debate about the effect of the abolition of parole on the length of prison sentences is unresolved.³⁰⁷
- D.2 Mandatory release for some categories of prisoner can produce a parole abolition effect. For example, in England and Wales the automatic release of 'long-term' determinate sentence prisoners at half time has supplanted a large part of the parole work that the Parole Board of England and Wales was specifically set up to do. As is detailed elsewhere in this report, the emphasis of the Board's work has shifted to consideration of cases involving more serious offenders. While we welcome this move in principle, it may be a missed opportunity in some cases since international research has found that managed release on parole is at least twice as successful in preventing reoffending as automatic release.³⁰⁸
- D.3 In some countries, the power to release lies with a Parole Board, while in others it belongs to the courts. What follows is an overview of the work of the Parole Board in New Zealand, which, although said to be modelled on the Canadian system, is in many respects similar to the Parole Board of England and Wales. One obvious similarity is the challenge currently being faced by the

305 The Violent Crime Control and Law Enforcement Act 1994 (Public Law 103-322) authorises the Violent Offender Incarceration and Truth-In-Sentencing Incentive (VOITIS) Grants, which provide funds to states to build or expand correctional facilities to increase the bed capacity for the confinement of persons convicted of a Part 1 violent crime or adjudicated delinquents for an act, which if committed by an adult, would be a Part 1 violent crime, or build or expand temporary or permanent correctional facilities, including facilities on military bases, prison barges, and boot camps, for the confinement of convicted nonviolent offenders and criminal aliens, for the purpose of freeing suitable existing prison space for the confinement of persons convicted of a Part 1 violent crime. To qualify for VOITIS, states must require persons convicted of serious or violent offences to serve not less than 85% of their prison sentence. Typically, prisoners can still earn up to 15% 'good time' credit on their sentences.

306 By the end of 2000, 16 states had abolished discretionary release by a Parole Board. In 1980, just over 55% of all releases were made by paroling authorities; by 1999 this figure had dropped to 25%. US Department of Justice, Bureau of Justice Statistics, *Trends in State Parole, 1990-2000* (October 2001), p4 cited by the Association of Paroling Authorities International, *Handbook for New Parole Board Members* (April 2003), Chapter 1 p1.

307 For background history of the American experience see Senate Research Center, *Parole: Then and Now*, (May 1999).

308 See New Zealand Parole Board, *Annual Report 2007/2008* at p4.

New Zealand Parole Board as to whether it is sufficiently independent of the executive.³⁰⁹ The other jurisdiction is France where, since the introduction of the law of 15 June 2000, conditional release is determined solely by specialist judges.³¹⁰

New Zealand

- D.4 The New Zealand Parole Board was created by the Parole Act 2002.³¹¹ Prisoners serving a sentence of under two years are released automatically at half time. Prisoners serving sentences of more than two years are eligible to be considered for parole after serving one-third of their sentence.³¹² While the Criminal Justice Act 1985 (which the Parole Act 1992 replaced) required prisoners to be released after serving two-thirds of their sentence, prisoners sentenced under the 1992 Act can be kept in prison for their entire sentence or until the Board directs their release. Prisoners serving sentences of life or preventive detention are eligible for parole once they have reached the minimum or non-parole date set by the sentencing judge.
- D.5 Under the Act, the Board can also consider applications for release on compassionate grounds;³¹³ set conditions for offenders released at their statutory release date; monitor compliance with release conditions;³¹⁴ vary or discharge release conditions; consider applications from the Department of Corrections³¹⁵ to have offenders recalled to prison;³¹⁶ make postponement orders;³¹⁷ make and review non-release orders (under s107 of the Act);³¹⁸ review Board decisions;³¹⁹ and consider variations or discharges of conditions of extended supervision orders.³²⁰
- D.6 The Parole Act empowers the Board to release an offender on parole only if it is 'satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or to any person or class of person within the term of the sentence'. In making its decision, the Board is required to have regard to 'the support and supervision available to the

309 See *Miller and Carroll v The New Zealand Parole Board and The Attorney General* (2008) CIV 2004-485-1460.

310 According to the International Centre for Prison Studies website (when last modified on 1 September 2008), the prison population in the USA was 760 per 100,000; in New Zealand it was 185 per 100,000; in England and Wales 152 per 100,000 and in France 96 per 100,000.

311 The Parole Act 2002 (together with the Sentencing Act 2002) substantially replaced the Criminal Justice Act 1985. Prisoners sentenced under the 1985 Act are still subject to that legislation. The Parole Board replaced 17 District Prison Boards and the national Parole Board.

312 In exceptional circumstances the chair of the Board may refer an offender who has not yet reached his or her parole eligibility date for consideration for parole (s25 Parole Act 2002).

313 Under s41 Parole Act 2002, the grounds for compassionate release are terminal illness or the prisoner having given birth to a child.

314 Since 1 October 2007, the Board has had the power to vary, or add to, release conditions at a Compliance Hearing held under s29B(5) (a) Parole Act 2002.

315 The Department of Corrections is responsible for managing offenders in the community on a range of sentences and orders imposed by the courts, including offenders who have been released on parole.

316 From 1 October 2007, the police have been able to apply for a recall order on the basis that the offender poses an undue risk to the safety of the community.

317 The Board may postpone an offender's parole hearing for up to three years if it is satisfied that, in the absence of a significant change in the prisoner's circumstances, he or she will not be suitable for release at the time when he or she is next due to be considered for parole (s27 Parole Act 2004). Unless a postponement order is made, the Board is required to conduct a parole hearing at least once in every 12 months after the offender's last parole hearing.

318 The chief executive of the Department of Corrections may apply to the Board for an order that a prisoner be kept in prison beyond his or her final release date (s107 Parole Act 2002). Prisoners subject to orders under s107 (or s105 Criminal Justice Act 1985) must have the order reviewed at least once every six months. In 2007/08, there were 21 s107 hearings, of which 95% (or 20) were approved. There were 102 reviews of s107 orders, of which 98% (or 100) were approved. See New Zealand Parole Board, *Annual Report 2007/8*, p25.

319 Under s67 Parole Act 2002, a prisoner may, within 28 days of the Board's decision, apply in writing for a 'review of that decision'. Grounds for an application for review are that the Board: failed to comply with the Act; made an error of law; failed to comply with a policy of the Board; based its decision on erroneous or irrelevant information; or acted without jurisdiction.

320 Under s107F Parole Act 2002, the chief executive of the Department of Corrections can apply to the sentencing court to have certain child sex offenders made the subject of an extended supervision order. If an order is granted, an application for special conditions to be imposed on the offender can be made to the Board.

offender following release’ and ‘the public interest in the reintegration of the offender into society as a law abiding citizen’.³²¹

D.7 A number of guiding principles are set out in the Act, including a statement that the paramount consideration for the Board in every case is the safety of the community. Other principles include:

- That the rights of victims are upheld, and that victims’ submissions and any restorative justice outcomes are given due weight.³²²
- That offenders must not be detained any longer than is consistent with the safety of the community.
- That offenders must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community.
- That offenders must be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them.

It is also a requirement that the Board’s decision must be based on all the relevant information that is available to it at the time.³²³

D.8 An offender can be recalled if he or she poses an undue risk to the safety of the community, or has breached release conditions or detention conditions, or has committed an offence punishable by imprisonment.³²⁴ New legislation gives the Board power to require an offender to come back before the Board for a compliance hearing. Such hearings are intended to enable the Board to monitor the offender’s progress in complying with their conditions of release. The Board has the power to recall an offender at such a hearing if it deems there is an undue risk to the safety of the community.

D.9 For determinate sentence prisoners, the Board³²⁵ sits in panels of three (generally two non-judicial members with a judge as convenor). For other categories of prisoner the panel will comprise at least five members (‘an extended panel’) including a psychiatrist member. These will be cases involving offenders serving life sentences, preventive detention or other long-term determinate sentences sent on to the extended panel by other panels of the Board for special reasons and for the involvement of the psychiatrist member.

France

D.10 In contrast to the multi-disciplinary approach typically adopted by New Zealand and other parole boards, the French system, which is court-based, is highly judicialised. While the role of experts is clearly valued, such experts do not participate directly in the decision-making process. Further, prisoners who wish to progress towards early release do well to focus on gaining temporary release from prison and obtaining accommodation and employment. This is because, while risk

321 S28(2) Parole Act 2002.

322 The Parole Act 2002 specifically requires the Board to give due weight to victims’ submissions. Victims fall into two categories: those registered as part of the victim notification system (who are entitled to have input into the Board’s considerations of a case) and those who, while not registered, can still make submissions and be told of the Board’s decision.

323 Ibid, s7(2)(c).

324 Under ss59-61 Parole Act 2002, the Department of Corrections may apply to the Board to have an offender recalled. There are specific provisions relating to the recall of offenders released subject to residential restrictions.

325 The Board is made up of 20 judges and 18 non-judicial members. Members are appointed by the Governor General on the recommendation of the Attorney General.

of reoffending is relevant, the emphasis under the French system has traditionally been on the prisoner's prospective rehabilitation in the community.

- D.11 France provides a working example of a court-based system under which all early release decisions are taken either by a single juge de l'application des peines (JAP) who is a judge of the Tribunal de Grande Instance, or by a three-member Tribunal de l'Application des Peines (TAP), which is composed of a president and two juges de l'application des peines. The TAP is not a court of appeal from the juge: they have separate but parallel jurisdictions. From both, an appeal on questions of law lies to the criminal division of the Court of Appeal. The single juge deals with prisoners serving a sentence of less than ten years' imprisonment,³²⁶ while the three-member tribunal deals with those prisoners serving a sentence of ten years or more. The supervision of conditions of release set by the TAP is, however, the responsibility of a JAP.
- D.12 For fixed-term sentence prisoners with no previous convictions, early release can be directed at the halfway point of the sentence. For those with previous convictions the opportunity for early release comes at the two-thirds point. Long-term prisoners in France fall into two main classes: those who have committed a capital offence, which is now automatically commuted to a life term, and those given indeterminate sentences.³²⁷ A longitudinal study³²⁸ in 2008 of all such prisoners released between 1995 and 2005, after an average of 20 years in gaol, showed that 14.5 per cent of them had reoffended in some way and been returned to prison within 13 years of release. At the mid-point of this period, June 2000, the criteria for release were relaxed without any appreciable rise in the rate of recidivism. In principle, the minimum term (période de sécurité) for a prisoner serving an indeterminate sentence is 18 years, although the sentencing court can extend or reduce this period, providing it does not exceed 22 years. An exception to the 22-year limit is cases involving crimes considered particularly egregious, for example, homicide involving aggravated circumstances or acts of terrorism, where the minimum term is set at 30 years.
- D.13 The role of the juge de l'application des peines provides an interesting example of a post-conviction review jurisdiction and one that is closely involved in monitoring the prisoner's progress not only towards early release but after it. For example, each juge will have a link to a prison in his or her geographical area and may be consulted about decisions concerning not only an individual prisoner's progress but also his or her behaviour, including the use of segregation and the imposition of some disciplinary measures. He or she will also meet with personnel working within the prison as well as with lawyers and prisoners to discuss cases. Once released the juge will follow the progress of the prisoner in the community, receiving reports from probation officers (conseillers d'insertion et de probation). He or she can also issue warrants of arrest to have licensees brought back to prison. In exceptional cases a juge de l'application des peines may also modify the prison term imposed by the sentencing court, for example, by adding an extra year to a prisoner's licence, reducing the minimum période de sécurité set by the sentencing court or even, in cases of sentences of under one year, deciding whether to substitute a non-custodial sentence.
- D.14 Since its reforms in 1999 and 2004, the French probation service has had responsibility both for reintegrating prisoners in the community and for their rehabilitation while still in prison, as well as

326 Prior to 15 June 2000, the JAP could grant early release only to prisoners sentenced to a term of five years and under. For a sentence over five years the decision was taken by the Minister of Justice.

327 There are about 580 lifers in the French prison system with a release rate of about 20 a year and an entry rate of about 25 cases a year. On 31 March 2008, there were 10,911 prisoners serving an indeterminate sentence in prisons in England and Wales. 10,577 of the total indeterminate sentence population were men; 334 were women. 818 of the total were young offenders. See Ministry of Justice statistics.

328 *Cahiers d'études pénitentiaires et criminologiques*, August 2008, no 24.

for the implementation of non-custodial sentences. Sentencing courts can also use probationary supervision as an interim measure while considering sentence. TAPs and JAPs are required by law to give reasons for their decisions. The criminal division of the Cour de Cassation, the highest appeal court, in 2004 held that appraisals of the index offence and of the prisoner's personality were sufficient to meet this requirement.

- D.15 French commentators have remarked on the absence from the governing law of 9 March 2004 of any reference to risk on release. It is generally assumed that the legislature has provided for it by setting the protection of society as the uniform objective. That this centrally includes the prevention of reoffending, and, therefore, the assessment of risk, is assumed not only by commentators but also by a series of statutory regulations implementing the legislation. It was also postulated by the Conseil Constitutionnel as an objective of release from imprisonment.³²⁹
- D.16 The Cour de Cassation is considered to have introduced into the parole process the requirement of Article 8 ECHR that any interference with private life (which is taken to include continued incarceration) must be not only lawful but also proportionate to the requirements of public safety.³³⁰ The leading textbook summarises the JAP's function as being to ascertain whether, within the prescribed or accepted criteria, the prisoner has taken steps towards social rehabilitation and is no longer dangerous or a threat to society.³³¹ In conducting this assessment, the JAP may, and for prisoners serving sentences of 10 years or more must, obtain a report from the probation service on (a) continuing dangerousness and (b) risk of reoffending.
- D.17 If a prisoner has committed one of the offences listed in the champ d'application de suivi socio-judiciaire (post-release follow-up offences) a psychiatric report will usually be obtained before release is considered. The list, begun in 1998, was initially limited to sexual offences but now includes offences of violence, including domestic violence.³³² For prisoners serving a prison term of 10 years or more, the tribunal takes advice from a special commission (pluridisciplinaire des mesures de sûreté).³³³ Both the JAP and the TAP have power to recall prisoners whom they have released on licence and who either breach the conditions of their licence or commit any other form of misconduct.

329 Decision 93334, 20 January 1994.

330 Cass crim 13 March 2001.

331 M Herzog-Evans, *Droit de l'Application des Peines*, 2nd ed, Dalloz, 2005, para 211.82.

332 Such prisoners may be obliged to undergo treatment or risk losing remission – currently up to a maximum of three months a year.

333 The same commission may also give advice about electronic tagging, which can be applied as a release condition to those serving sentences of seven years or more, as well as for those who have committed a 'listed' offence.



Appendix E

Examples of risk assessment tools found in parole/life and indeterminate sentence hearing reports

RATED

- E.1 The Risk Management Authority (RMA) is the centre of expertise in risk assessment and risk management in Scotland.³³⁴ There is no equivalent of the RMA in England and Wales. One of the RMA's main purposes is to set standards and issue guidance for those involved in the assessment of risk.³³⁵ In 2006, the RMA published its first directory of approved risk assessment tools (RATED). A second version was published in 2007. The directory provides details on the type of recidivism each tool assesses, its characteristics, validation history and current use, as well as an appraisal against the RMA assessment framework. There are additional sections providing information about the appropriateness of tools for use with young people, female offenders and those with mental health problems, as well as the qualifications necessary for their individual use.³³⁶ It contains the following 'health warning':

It is of critical importance that assessors and other stakeholders understand that the RMA considers the use of all risk assessment tools to be only of one of the elements of a holistic risk assessment and management process. When conducting a detailed risk assessment for any offender, the use of tools based upon static assessment items – actuarial tools – is permissible only when it forms part of a structured professional assessment, identifying risk and protective factors specific to the individual; and formulating risk in an analytical manner. This is due to the limitations of actuarial tools in the crucial tasks of both identifying risk and protective factors specific to the individual and also guiding practitioners in the formulation of risk leading to tailored risk management plans.

³³⁴ The RMA was established by the Criminal Justice (Scotland) Act 2003, which also introduced a new sentence: the Order for Lifelong Restriction. The RMA accredits risk assessors for the assessment of offenders under a Risk Assessment Order or an Interim Compulsion Order, potentially leading to an Order for Lifelong Restriction, and approves and monitors risk management plans for offenders subject to such orders. It also contributes to policy and carries out and reviews research in the fields of risk assessment and management, and provides training programmes and other educational initiatives for the promotion of best practice in risk assessment and minimisation in Scotland.

³³⁵ The RMA was created following the recommendations of the MacLean Committee on Serious Violent and Sexual Offenders, which highlighted the need for an independent body to ensure that statutory, voluntary and private sector agencies worked together systematically to minimise the risk posed by serious offenders.

³³⁶ See Risk Management Authority, *Risk Assessment Tools Evaluation Directory, RATED Version 2* available from www.RMAScotland.gov.uk. The RMA also published (April 2006) *Standards and Guidelines for Risk Assessment Version 1* (from the same source).

OASys

- E.2 The risk assessment tool OASys (the Offender Assessment System) was jointly developed in the late 1990s by the Home Office Probation Unit and HM Prison Service for use in England and Wales. It was created during a period when the Probation Service was focused on What Works principles. These principles were formulated following meta-analytical studies which supported the view that, contrary to the 'Nothing Works' approach,³³⁷ rehabilitation of offenders could reduce re-offending.³³⁸ OASys is a structured clinical tool that enables assessors to 'gauge the likelihood of an offender being re-convicted; the criminogenic factors that need to be addressed if their behaviour is to change; any risk of serious harm they pose; and it provides an initial sentence plan'.³³⁹ In order to provide this range of functions, OASys combines actuarial and dynamic risk factors across a number of domains.
- E.3 The system is separated into forms covering: offending-related factors (which produce a score for each identified criminogenic need;³⁴⁰ these are weighted and summed to produce an overall score); risk of harm (which assesses the risks that offenders may pose to themselves and to others); supervision and sentence planning (which provide a standardised format for recording recommendations and plans for interventions, such as accredited offending behaviour programmes); a summary sheet (which draws together scores from each section and provides an overall predictor of the risk of conviction); and a self-assessment questionnaire (which gives the offender an opportunity to have a direct input into the assessment and also provides information to the assessor about the offender's level of self-awareness). It is applicable for offenders aged 18 or over.³⁴¹
- E.4 OASys is designed to be administered repeatedly and, in its e-version, to be readily exchangeable between probation and prison staff using ICT.³⁴² Risk of serious harm ratings are Low, Medium, High or Very High and are related to risk in the community to children, known adults, public and staff.³⁴³ As priorities have shifted towards preventing serious offending, and because OASys could not predict risk of future violence, there is now an OASys violence predictor (OVP). OASys reports are mandatory for both determinate sentence prisoners and, since May 2007, indeterminate sentence prisoners.³⁴⁴

337 The nickname given to an article published in 1974 by the American sociologist Robert Martinson entitled 'What Works? Questions and Answers About Prison Reform', and the doctrine espoused thereafter that the sole purpose of incarceration should be to remove risk from society.

338 See *Home Office Guide to Effective Practice* (1998). The Crime Reduction Programme also provided resources for the establishment of the Joint Prison and Probation Accreditation Panel (now called the Correctional Services Accreditation Panel), which aims to ensure the quality of programme design and delivery.

339 P Howard, D Clark and N Garnham, *An Evaluation of the Offender Assessment System (OASys) in three pilots 1991-2001* (February 2006), foreword by Christine Knott, National Offender Manager.

340 A criminogenic need is generally defined as a problem that has a significant impact on offending (see *ibid*, Executive Summary xvi.)

341 The standard assessment tool for under-18s in the criminal justice system is Asset. For further information on Asset and other tools used for children and young people in England and Wales see <http://www.yjb.gov.uk/en-gb/practitioners/Assessment/>.

342 The flow of E-OASys has sometimes been problematic: see DW Fitzgibbon, 'Fit for purpose? OASys assessments and parole decisions', *Probation Journal* 2008:55 at p63.

343 Early analysis of risk of harm levels from OASys indicated a noticeable variation between areas in how these thresholds were applied. For high and very high risk of harm levels the range was between 16% and 2%, the median of the sample being 8%. See PC 10/2005, para 2.

344 National Audit Office, *Protecting the public: the work of the Parole Board*, 5 March 2008, para 2.13.

Offender Group Reconviction Scale (OGRS)³⁴⁵

- E.5 The first version of OGRS was launched in 1996 with the aim of establishing a uniform national score that could be used by all Probation Services in England and Wales. OGRS calculates the probability that a convicted offender (18 years plus) will be convicted at least once within two years of his or her release from custody or from the start of his or her community sentence for any type of offence. Initially it contained only six demographic and criminal history factors and was used to provide probation officers with guidance in writing pre-sentence reports. The latest version (OGRS 3) is based on age at the date of the current caution, non-custodial sentence or discharge from custody; gender; the type of offence for which the offender has currently been cautioned or convicted; the number of times the offender has previously been cautioned and convicted; and the length in years of their recorded criminal history.
- E.6 OGRS is now used as part of the NOMS' programme testing criteria to help providers identify risk levels. The aim is to ensure that the more intensive interventions are targeted at high and medium risk offenders. Unlike OASys, it does not identify 'needs' or target interventions. Like all actuarial risk assessment tools, probability is generated by comparing the characteristics of an individual with those of an aggregated sample of convicted offenders who have been followed up over a specified period.³⁴⁶ OGRS is used as part of the OASys risk assessment suite and is often referred to in reports before the Parole Board.

Risk Matrix 2000 (RM2000)³⁴⁷

- E.7 Risk Matrix 2000 (RM2000) (also known as the Thornton Matrix) is an evidence-based risk assessment tool, using static factors, for men over 18 with at least one conviction for a sexual offence. It should be included in all parole assessment reports involving sexual offenders. According to guidance issued by the Probation Service, when it is used in parole reports to inform risk assessment and referred to by name, a fuller explanation of what it is and what it does should be given.³⁴⁸
- E.8 RM2000 has three different components: the S scale, which predicts the risk of sexual recidivism; the V scale, which predicts the risk of non-sexual violent recidivism; and the C scale, which combines the two. The matrix includes the nature and extent of sexual deviance, general criminality, age, and marital status. RM2000 assesses risk as falling into four bands: very high, high, medium and low, with different reconviction rates within each risk category at five years, 10 years and 15 years. Individuals can fall into only one of the categories: the band predicts likelihood of reconviction for a sexual offence on the basis that in long-term follow-up research 60/40/20/10 per cent of men falling into this category were reconvicted of a sexual offence over a period of up to 15 years.
- E.9 The static structure of RM2000 means that it cannot measure changes in risk. For this reason it has been superseded to some degree by specialised tools designed to assess and track changes in risk

³⁴⁵ J Copas and P Marshall, 'The offender group reconviction scale: a statistical reconviction score for use by probation officers', *Applied Statistics* (1998) 47, pp159-171.

³⁴⁶ For an account of the problems associated with actuarial tools, including the transfer of generalised information from a population to an individual, see H Kemshall, *Understanding Risk in Criminal Justice*, OUP, 2003, pp64-67.

³⁴⁷ D Thornton, RE Mann, S Webster, L Blud, R Travers, C Friendship and M Erikson, 'Distinguishing and combining risks for sexual and violent recidivism', in RA Prentky, ES Janus and MC Seto (eds), *Sexually coercive behaviour: Understanding and management*, Annals of the New York Academy of Science, 2003, vol 989, pp225-235.

³⁴⁸ See PC 17/2007.

status over time by assessing changeable dynamic risk factors. These tools, called STABLE 2007 and ACUTE 2007,³⁴⁹ are in common use in Scotland, and are now being used and piloted in England and Wales by police and probation. STABLE 2007 examines the enduring dynamic risk factors amenable to intervention; ACUTE 2007 assesses factors suggestive of sexual recidivism taking place within a short period of time. Some factors may be both stable and acute. These tools may be used in conjunction with a static risk assessment instrument, such as Static-99³⁵⁰ which, like RM2000(S), is designed specifically to predict sexual recidivism or, as suggested by a recent Probation Circular, with OASys.³⁵¹

Structured Assessment of Risk and Need (SARN)³⁵²

- E.10 SARN is a structured risk assessment procedure, which involves a static risk assessment (RM 2000) and a consideration of treatment needs or dynamic risk factors (sexual interests, offence promoting thinking patterns, social and emotional functioning and self-management). SARN reports are now provided on completion of accredited sex offender programmes undertaken in either the community or in prison. The SARN report will provide a summary of progress in treatment followed by an indication of remaining treatment that needs to be addressed by offender managers. If not available it may be requested by the Parole Board panels.

HCR20³⁵³

- E.11 HCR20 is a standard assessment used within forensic psychiatry. It utilises the structured professional judgement approach to the evaluation of risk of violence. Its 20 items include historical data (eg past behaviour, personality, and mental illness), clinical variables (eg current mental state and behaviour) and case management elements (eg predicted functioning in the future). Each of the items (which are defined) is scored as definitely present, probably present or partially present. HCR20 can be used to indicate key areas for treatment and intervention. In the parole context, it is likely to be undertaken and referred to in the context of an expert report. Practitioners prefer HCR20 to the Violence Risk Appraisal Guide (VRAG),³⁵⁴ which is a purely actuarial device designed to predict violent recidivism among mentally disordered offenders and has embedded within it the PCL-R.³⁵⁵

349 See RK Hanson and A Harris, 'Where should we intervene? Dynamic predictors of sexual offence recidivism', (2000) *Criminal Justice and Behaviour* 27: 6-35.

350 RK Hanson and DM Thornton, *Improving Actuarial Risk Assessments for Sex Offenders* (1999) Ottawa, Canada: Public Works and Government Services Canada.

351 PC 02/2008.

352 SD Webster, RE Mann, AJ Carter, J Long, RJ Milner, MD O'Brien, HC Wakeling and NL Ray, 'Inter-rater reliability and dynamic risk assessment with sexual offenders' (2006) *Psychology, Crime and Law* 12, pp439-452.

353 CD Webster, KS Douglas, D Eaves, SD Hart, *HCR-20. Assessing Risk for Violence, Version 2* (1997) Vancouver: Mental Health, Law and Policy Institute, Simon Fraser University.

354 V Quinsey, G Harris, M Rice, C Cormier, *Violent Offender: appraising and managing risk* (1998) Washington DC: American Psychological Association.

355 DP Farrington, D Jolliffe, L Johnstone, *Assessing Violence Risk: A Framework for Practice*. Final Report, May 2008.

Psychopathy checklist (PCL-R)³⁵⁶

- E.12 The Hare Psychopathy Checklist-Revised is not a risk assessment tool but a tool for identifying psychopathy. It is considered useful in contributing to the formulation of risk and risk management, as the presence of certain personality and behavioural traits (which the checklist rates) has been found to correlate with violence in many populations.
- E.13 According to Hare (who devised the 20-item checklist), psychopathy has a characteristic pattern of interpersonal, affective and behavioural symptoms. The PCL-R is divided into two factors. The first factor focuses on affective and interpersonal features (including glibness/superficial charm, grandiose sense of self-worth, pathological lying, cunning/manipulative, lack of remorse or guilt, shallow affect, callousness/lack of empathy, failure to accept responsibility). The second factor reflects those features associated with lifestyle and behaviour (including need for stimulation/proneness to boredom, parasitic lifestyle, poor behaviour controls, early behavioural problems, lack of realistic long-term goals, impulsivity, irresponsibility, juvenile delinquency, revocation of conditional release). Additional items include promiscuous sexual behaviour, many short-term marital relationships, and criminal versatility. Overall PCL-R ratings are arranged on a scale from 0 to 40. However, scores on the PCL-R obtained in the UK are not directly comparable with those obtained in North America and, therefore, have to be assessed with care. As the PCL-R is based on the individual's lifespan functioning it cannot be used as a measure of change.

356 RD Hare, *The Psychopathy Checklist Revised* (1999) Toronto: Multi-Health Systems.

This JUSTICE report is a timely contribution to the debate over the future of the parole system in England and Wales. Case-law has called into question whether the Parole Board is sufficiently independent from government, and whether it has the powers and resources necessary to make its decisions with all the relevant information and without unnecessary delay. Meanwhile, the system has come under considerable strain during a time of rising custody rates and new indeterminate sentences. It has been suggested that the Parole Board might become a court or – like the Mental Health Review Tribunal – form part of the new Tribunals Service. The Ministry of Justice has now launched a major consultation into the future of the Parole Board, considering these options, amongst others.

JUSTICE's report *A New Parole System for England and Wales* responds to these issues, covering:

- Conditional release
- The constitutional status of the Parole Board and the need for reform
- Judging risk – predicting recidivism and harm
- Procedure, guidance and rules
- Determinate sentence prisoners
- Life and indeterminate sentence prisoners
- Recall and re-release
- Existing conditional early release schemes
- Existing procedures for recall and re-release
- Life and indeterminate sentence cases – an overview
- Two other systems: New Zealand and France
- Examples of risk assessment tools found in parole/life and indeterminate sentence hearing reports

It calls for a new, independent Parole Tribunal, to form part of the Tribunals Service, that will combine improved decision-making and greater transparency and command public confidence while upholding the principles of access to justice, human rights and the rule of law.



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