‘Root and Branch Review of the Parole System’

Public consultation on making some parole hearings open to victims of crime and the wider public

Ministry of Justice

JUSTICE response

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This consultation forms the Government's first action on its "root and branch review" of the parole system. We welcome this overarching review. As identified in the Government's Tailored Review, we consider there to be more immediate and pressing issues to resolve regarding the parole system and the Parole Board before tackling the difficulties posed by opening hearings, particularly in opening them to the public. Nevertheless, this first consultation exercise seeks views on whether, and in what circumstances, it could be appropriate to allow the public, victims and/or the media to observe parole hearings.[1] In 2018 the Government sought views on making reconsideration hearings open to the public, but in 2019 concluded that the option was not then viable due to the "significant privacy, security and practical barriers" posed.[2] The matter is now being revisited, to evaluate whether greater consistency is needed "with the principle of 'open justice' which is an important foundation of our criminal justice system".[3]

3. Over the years, the secrecy of the parole process has prompted debate around whether it should be made more transparent.[4] Particular decisions to release parolees have also been subject to rebuke, with questions raised as to whether members of the Parole Board

[1] Rule 15(3) of the Parole Board Rules 2019 introduced an effective ban on public hearings. While Rule 14 allows for parties to be accompanied by observers if authorised by the panel chair, JUSTICE understands that in practice this is used in limited circumstances (usually to allow access by relevant professionals, policy-makers and, on rare occasions, the media). It does not operate to allow victim or general public attendance. Furthermore, the Parole Board Observer Policy Guidance (2019, v 3) makes clear at para 4 that "Members of the public wishing to attend for general interest are not permitted" and para 2d, "the panel chair will have due regard to fairness to the prisoner and the effectiveness of the hearing, including the need for the prisoner and witnesses to feel at ease".

[2] Review of the Parole Board Rules and Reconsideration Mechanism: Delivering an effective and transparent system (February 2019) para 93.

[3] Root and branch review of the parole system: Public consultation on making some parole hearings open to victims of crime and the wider public", Root and Branch Review consultation (November 2020) para 4.

[4] *BBC News*, "Parole system in England and Wales 'secretive'", 20 October 2020.

pay undue attention to the rights of prisoners at the expense of public protection.[5] Particular criticism of the Parole Board being too secretive came to a head following the decision to release John Worboys, in which his victims had not been notified of the decision to release, and the subsequent quashing of that decision by the High Court.[6] Criticisms centred on the lack of transparency in how decisions were taken[7], as well as the fact decisions could, at that time, only be challenged through judicial review.[8]

4. Calls for victims' voices to be heard and taken into consideration have intensified since. Recent terror attacks, namely the London Bridge attack and following Streatham Hill attack, have also thrust the Parole Board into public discourse. Until earlier this year, many of those convicted of terrorism-related offences were automatically released and therefore did not go through the parole process.[9] Although public criticism, in fact, lay not with the Parole Board but with sentencing more generally, it was also subject to rebuke. The Parole Board has also been charged on a number of occasions, before both the domestic and Strasbourg courts, with lacking independence from the executive, namely the Ministry of Justice and the Secretary of State.[10]

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[5] Concerns came to a head in the Anthony Rice case: see Her Majesty's Inspectorate of Probation, An Independent Review of a Serious Further Offence Case: Anthony Rice (2006). See also HM Inspectorate of Probation, Joint Thematic Inspection Report: Putting Risk of Harm in Context (2006).

[6] *(DSD & Anor) v The Parole Board of England and Wales* [2018] EWHC 694 (Admin), para 199-200. See also: Matrix Law, Explanatory Note by Phillippa Kaufmann QC and Nick Armstrong who represented the claimants.

[7] See: The Chair of the Justice Committee, Bob Neill, who wrote to the Secretary of State for Justice following the Committee's inquiry into the transparency of parole decisions, surmising that: "We [the Justice Committee] believe that the presumption ought to be that the Board tells those victims who wish to be kept informed as much as they can, including some information about how the prisoner has progressed and what the licence conditions are", Justice Committee, 27 March 2018.

[8] The then Chair of the Parole Board, Professor Nick Hardwick, released a statement on 5 January 2018, stating: "I recognise there is a lack transparency of Parole Board processes and I have recently set out options for change. We currently have a statutory duty under the Parole Board Rules that prevents disclosure of proceedings. We will shortly be launching a public consultation about how we share our decision making with the public. I am very concerned some victims were not told about the decision, this must have been very distressing. There are robust arrangements in place for victims to be informed through The Victim Contact Service. We were told that had been done as usual in this case and released the decision on that basis."

[9] The Terrorist Offenders (Restrictions of Early Release) Act 2020. See also: *R (Khan) v Secretary of State for the Justice Department* [2020] EWHC 2084 (Admin), a judicial review challenge in which the claimant sought a declaration that s.247A of the Criminal Justice Act 2003, which was inserted by the 2020 Act, is incompatible with Articles 5, 7 and 14 of the European Convention on Human Rights (ECHR). The Court dismissed the application.

[10] See e.g.: *Hirst v United Kingdom* (2000) (App. No. 407 86/98); *R (Brooke and Others) v Parole Board* [2008] EWCA Civ 29; *R (Wakenshaw) v Secretary of State for Justice and Parole Board* [2018] EWHC 2089 (Admin).

5. In summary, JUSTICE recognises the call for greater transparency and firmly believes in the principle of open justice, which is a well-established tenet of the UK justice system and of our democratic values.[11] It is a hallmark and a safeguard for the proper operation of the rule of law and the fair administration of justice.[12] Open justice represents a cornerstone of our justice system, and is reflected within many countries' domestic legislation[13] and in international conventions.[14]

6. Notwithstanding, the principle is not absolute and must always be considered against the overarching aim of acting in the interests of justice and ensuring the fair administration of justice.[15] We have serious reservations that the most appropriate way to improve transparency is through allowing public access to parole hearings. We hold the view that the multiplicity of issues and challenges public hearings pose could lead to unintended consequences, namely:

    i. unjustifiable interference with privacy rights;
    ii. an increased risk of harm;
    iii. inhibition of procedural fairness; and, ultimately,

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[11] *"It is a cardinal principle of our justice system. It underpins the rule of law and our liberal democracy. It is a principle which requires the courts to engage with the public,"* per Lord Neuberger, 'Open Justice Unbound', para 58

[12] See for example: *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2015] 1 AC 588, 600; *Guardian New and Media Ltd v AB and CD* [2014] EWCA Crim (B1), para 2. See also: Thomas Bingham, *The Rule of Law* (Penguin, 2010), Ch 1, p 8: "*The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. I doubt if anyone would suggest that this statement, even if accurate as one of general principle, could be applied without exception or qualification*"; Master of the Rolls, Lord Neuberger, 'Open Justice Unbound?', Judicial Studies Board Lecture 2011.

[13] See for example: Articles 7 and 9 of the Declaration of the Rights of Man and the Citizen 1789; the Sixth Amendment of the US Constitution; Article 37 of the Japanese Constitution 1946; Article 111 of the Italian Constitution 1947; Articles 22 and 39A of the Indian Constitution 1948; Article 103 of the German Basic Law 1949; s7 of the Canadian Charter of Rights and Freedoms 1982; Article 55 of the Brazilian Constitution 1988; s25 of the New Zealand Bill of Rights Act 1990; Articles 46-51 of the Russian Constitution 1993; s35(2) of the South African Bill of Rights 1996.

[14] See for example: Article 10 of the Universal Declaration of Human Rights 1948; Article 6 of the European Convention on Human Rights 1950; Article 14(1) of the International Covenant on Civil and Political Rights 1966; and Article 47 of the EU Charter of Fundamental Rights and Freedoms 2000.

[15] See for example: Lord Neuberger, 'Open Justice Unbound?', *supra*, para 59: *"[Open justice] has limits and allows of derogations. In particular it is limited by the need to ensure that it does not undermine the proper administration of justice. An absolutist stance would undermine our justice system. In approaching our commitment to open justice it seems then to me that we need to ask ourselves one question: to what extent does our commitment to it secure the rule of law?"*

iv. Frustration of the Parole Board's ability to properly carry out its overarching, and statutory, function of assessing a parolee's risk of serious harm with a view to protecting the public – i.e. acting in the public interest.

7. In addition to those concerns are a barrage of practical, logistical and resource barriers which render the prospect of open hearings inappropriate, and unfeasible in the Parole Board's current set up.

8. It is important to note that there have been a number of reforms introduced over recent years which serve to improve transparency and public confidence in the system, namely the reconsideration mechanism, decision summaries, and improvements in victim services and their ability to have their voice heard by the Parole Board.

9. Having said that, we consider that there is a case to be made for victims and the media to be given further access to parole hearings: to make the process more transparent and to build confidence and legitimacy in the Parole Board's decisions. This should be done by application, with representations from the parolee and final decision taken by the Board. Any access should be from a public building (most likely a court or tribunal) via a video-link. Any wider public access would also require consent of both parolee and victim/victim's family.

Open Justice

10. A series of fundamental rules flow from the open justice principle: first, legal proceedings must be conducted in open court, with the public allowed access to observe[16]; second, evidence before the court must not be withheld from the public[17]; and, third, there must be a mechanism for communicating what happened in court to those who did not attend, namely by the media.[18]

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[16] *Scott v Scott* [1913] AC 417, 434–5.

[17] *A-G (UK) v Leveller Magazine Ltd* [1979] AC 440, 450.

[18] *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 603–4. Some jurisdictions include the judicial duty to furnish publicly available reasons (see for example: Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 MULR 482) and the right to record proceedings and broadcast them to the public (see for example: *Van Brenda v Media 24 Limited* [2017] ZASCA 97, para 72).

11. Its importance – in terms of its purpose and value – should not be understated. Public access to the justice system and its proceedings goes some way to fulfilling the paramountcy of justice not only being done but being seen to be done.[19] A hearing *in camera*, which allows for the parties to the proceedings to attend but excludes the public, victim and the press, raises concerns about fairness, transparency and legitimacy in decision-making. Open hearings contribute to transparency throughout the justice system, allow for effective scrutiny of its processes and ensure judicial accountability for decisions taken. It also helps to build confidence in and understanding of the system and how decisions are made, ultimately contributing to legitimacy of process and system. Crucially, it plays a pivotal role in ensuring the fair trial rights of those subject to the proceedings; and is a fundamental hallmark and safeguard to the rule of law.[20]

12. Nevertheless, the necessity of open justice in all circumstance should also not be overstated. Nor should it be conceptualised in isolation from nuances that arise in the particular proceedings in question and countervailing considerations. Like with the majority of legal principles and protections, open justice "may be abrogated if justice cannot otherwise be achieved."[21] The principle "*must … give way to the yet more fundamental principle that the paramount object of the Court is to do justice*"; meaning that a departure from open justice may be justified in circumstances where there is a "serious possibility that an insistence on open … would frustrate the administration of justice."[22] The European Court of Human Rights has accepted in the context of the Article 6 ECHR right to a public hearing that a whole class of cases may derogate from the general rule, "subject to the measure being reasonably necessary and the procedure adopted being appropriate."[23]

Q1. Do you agree that parole hearings should generally continue to be held in private but with the possibility of a public hearing in certain limited circumstances?

Q7. Do you think that conducting a hearing in public would make the examination of evidence and decision-making process better or worse – and why?

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[19] *Hobbs v Tinling and Company Limited* [1929] 2 KB 1, para 33, per Lord Sankey LC. See also: *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, para 259, per Lord Hewart CJ.

[20] See for example: *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2015] AC 588, 600; *Guardian News and Media Ltd v AB and CD [2014]*, para 2.

[21] *Al Rawi and others v Security Service* [2011] UKSC 34, para 27.

[22] *Guardian News and Media Ltd v AB CD [2014]*, para 5. Also see para 2.

[23] Lord Neuberger, 'Open Justice Unbound?', *supra,* para 55. See also: private proceedings under the Children Act 1989 addressed in *B and P v United Kingdom (2001) 34 EHRR 529*, para 39.

13. The primary aim for the Parole Board is to protect the public – i.e. to act in the public interest. It is recognised by the European Court of Human Rights as a "court" (and a body that exercises judicial decision-making functions) which must give effect to procedural safeguards for the purposes of Article 5(4) ECHR (the right to speedy review as to the lawfulness of detention)[24] and at common law.

14. As such any move towards greater public access to hearings inevitably raises concerns around:
    (i) Sensitivity of information
    (ii) Effective participation and open communication
    (iii) Security and accessibility of hearings

15. The correct balance must be struck between these considerations to ensure that the approach taken is in the interests of justice, adequately serves and protects the relevant parties' interests and, most importantly, ensures the fair administration of justice and upholds the rule of law. The ability of a parole panel to take accurate, properly reasoned and fair decisions is paramount, and must take precedence above all other considerations. Where this is achieved, all parties' interests are properly served.

Sensitivity of information

16. The right to privacy is an important protection. It applies to parolees, as well as victims, witnesses and others involved in proceedings, including those who may be mentioned in the evidence before the parole panel. Unnecessary and disproportionate infringement of the right does more than just breach the person's Article 8 ECHR rights; it can have implications for the right to a fair parole hearing, inhibit effective participation, and could lead to a risk of harm and, ultimately, the interests of justice being thwarted.[25]

17. The information that a parole panel will consider is often of a particularly sensitive and confidential nature. Extensive evidence may have been presented at open trial, of which the public would generally have been able to observe. However, in parole hearings, the

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[24] *Weeks v United Kingdom,* App. No. 9787/82 (1988) 10 EHRR 293; *A v United Kingdom* [GC] App. No. 3455/05 (judgment of 19 February 2009).

[25] *"[I]t would be in the interests of justice to protect a party to proceedings from the painful and humiliating disclosure of personal information about her where there was no public interest in its being publicised."* (*A v British Broadcasting Corporation* (Scotland) [2014] UKSC 25, para 41)

Parole Board is concerned with risk, which inevitably requires detailed evidence and testimony relating to that parolee's circumstances. Our consultees for this response, which included judges and current and former parole panel members and current and former parolees, have raised concerns at extremely private and sensitive information being open to the public and have made clear that discussions during the hearing goes far beyond what would be in the public interest to know.[26] This includes possible mental health, childhood trauma and abuse, and other highly private information, including about their family and relationships. Much of this information may not be known by family members and risks family rebuke and isolation during a period in which strong family support unit is key.

18. The panel is also likely to consider the original offence and how it then, and currently, impacted the victim and their families. Although calls have been made by victims' groups for greater consideration of this information, they would be unlikely to wish this to be discussed in public. Moreover, victims will have tried to move on with their life during the lengthy sentence served, and the rehearsing of the trauma they faced could lead to re-traumatising and victimising that person.

19. We take the view that a fully public hearing in all circumstances would not serve a legitimate aim, nor would it be necessary or proportionate.

Effective participation and open communication

20. It has been noted by many, including academics and lawyers, but, more importantly, parole panel members and parolees, that a significant proportion of parole hearings entails the prisoner responding to questions and relies on their honest replies. The ability to do this effectively is central to a panel being able to properly assess risk; consequently, a parolee's input can have a determinative effect on the Parole Board's ability to come to a safe and accurate decision. This could therefore result in someone being released when

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[26] Prisoners we consulted with told us:

> *"The prisoner may not feel comfortable to open up fully to the Parole Board, as it may affect his personal life and safety on release."*
>
> *"The prisoner's openness and honesty could lead to embarrassment which may have an adverse effect on his release."*
>
> *"A parole hearing in public would impact the participation in a hearing as they may be things that I may be ashamed of that may impact on my family structure."*

they in fact still pose a serious risk, or someone being refused release when they no longer actually pose a risk to the public.

21. Currently, hearings take place in a small room in the prison, where the panel, prisoner and other witnesses gather around a table. While it is a formal process, it has the nature of a conversation. Parolees and panel members alike have unanimously expressed to us their endorsement of the benefits of the hearing taking place in a setting which allows for open communication and rapport and trust building. A hearing where members of the public could attend would create a level of scrutiny that could, and more than likely would, inhibit the prisoner's candidness. This would impact on the prospects of rehabilitation, and ultimately public safety.[27]

22. The necessity for proceedings to allow a participant to communicate their views freely – without external factors impeding that free exchange of essential information – is recognised as a permissible justification to limit the openness of proceedings.[28] One prisoner we spoke with concerningly said that he "would not attend [the] hearing" if it were open to the public. This underlines the risk public hearings could have, not only on perceived procedural fairness, but also on access to justice.

Security and accessibility of hearings

23. Concerns have also been raised to us around the safety of the parolee, victims, witnesses (including psychologists, and prison and probation staff), particularly in cases that are high-profile. Articles 2 and 3 ECHR impose positive obligations on the State to protect the lives of those who may be subject to a real and imminent risk of harm, and to mitigate against inhuman and degrading treatment.

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[27] See for example: *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, para 63; *R (Osborn) v Parole Board* [2013] UKSC 6, para 70. In *Osborn*, the court referred to the following research: Attrill and Liell, "Offenders' Views on Risk Assessment", in N. Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007); and N. Padfield, '[Understanding Recall 2011](#)', University of Cambridge Faculty of Law Research Paper No 2/2013 (2013).

[28] In *B and Y v United Kingdom*, at para 37, the Court said that: *"it may on occasion be necessary under Art 6 to limit the open and public nature of proceedings in order … to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice."* See also: *Doorson v The Netherlands* (1996) (App. No. 20524/92) 22 EHRR 330; *Jasper v United Kingdom* (2000) (App. No. 27052/95) 30 EHRR 441; *Z v Finland* (1997) 25 EHRR 371; and *T v United Kingdom* (2000) (App. No. 24724/94)).

24. Parole hearings consider evidence that could be extremely upsetting and distressing. If the public were to attend a hearing in their current configuration – which as indicated is a small room, without security officers present - they may take a disliking to a parolee's oral evidence or professional witness's recommendation, which may result in emotions running high. The worst-case scenario is that an altercation could ensue between a member of the public and another person in the proceedings, which bearing in mind the close proximity of all those present, raises particular concerns around safety and security measures.

25. Moreover, hearings can discuss the nature and location of a parolee's future accommodation, which could expose them to potential risk from the public. Also, the risk of harm or threats to a witness who may be recommending release, or to the parole panel itself, which are contrary to public sentiments, must be given due consideration – not only in light of the safety risks posed, but for the impact it could have on their evidence or recommendations.

26. Apart from this, prisons are wholly unsuitable locations for members of the public to be visiting to attend hearings. They are not equipped for this purpose and are in geographically remote locations that are hard to reach. The feasibility of open justice being achieved from within the prison estate is questionable. The likelihood that the public would take the opportunity to attend a hearing is slim. The operation of open justice must be accessible; proceedings, if open to the public, must be conducted in a place and setting where the public would be able to attend.

27. It is also important to recognise that two measures recently introduced, and taken in response to the *Warboys* case, provide greater transparency, scrutiny and understanding of parole decisions, without requiring open hearings. Firstly, Parole Board Decision Summaries allow a victim or any other person to seek disclosure of a summary of the reasons for a decision.[29] In 2019/20, over 1,739 summaries of decisions were provided to victims.[30] Secondly, the Reconsideration Mechanism allows the parties to the proceedings – the prisoner, or the Secretary of State (sometimes on behalf of victims) – to challenge a

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[29] See Rule 27(1) of the Parole Board Rules, introduced in May 2018.

[30] Parole Board Accounts and Report 2019-20, p.10

parole panel's decision to grant or refuse release, on the grounds of irrationality and/or procedural unfairness.[31] All reconsideration decisions are published and freely available.[32]

28. For the above reasons, JUSTICE agrees that hearings should generally remain private, and considers that a hearing open to the general public would only be appropriate in extremely limited circumstances.

Q2. Which of these groups should be able to attend the hearing:

a. Should victims be able to attend the hearing?

29. JUSTICE considers that the status of victims throughout the criminal justice process, and beyond, must be respected and protected. Victims must be provided with relevant information about decisions that affect them and also be appropriately communicated with and supported. The importance of ensuring victims are not retraumatised is paramount to the fair administration of justice and is reflected in a host of statutory documents and support mechanisms.[33]

30. The majority of prisoners will never go through a parole process, as they will be automatically released without an assessment of risk by the Parole Board. Furthermore, many decisions are taken on the papers without an oral hearing. As such, the majority of victims will never be afforded the right to make representations in person or observe the process that leads to a parole decision. One of the prisoners we consulted expressed similar reservations to the Chair of the Parole Board, that a two-tier system may develop, with victims feeling excluded if their case doesn't involve an oral hearing."[34] Howard

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[31] *R (DSD and others) v the Parole Board* [2018] EWHC 694 (Admin), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para 116, *"the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."* As of March 2020, the reconsideration mechanism had been ordered in 20 cases; 18 of which were initiated by a prisoner and two by the Secretary of State, Parole Board Accounts and Report 2019-20, p.17.

[32] Accessed: https://www.bailii.org/ew/cases/PBRA/ As of November 2020, there were over 70 decisions published.

[33] See for example: Code of Practice for Victims of Crime in England and Wales 2020; Criminal Injuries Compensation Scheme; Criminal Injuries Compensation Authority; The Victims' Commissioner; CPS Victim's Right to Review Scheme; Victims' services National Probation Victim Contact Scheme; and Witness Care Units.

[34] Martin Jones, Chair of the Parole Board, giving evidence to the Scottish review of parole, "Transforming parole in Scotland" 2019.

League Scotland has also expressed concern that any move towards victims' direct participation in parole hearings and tribunals would allow victim information to override concerns for the individual seeking parole and may result in increased punitiveness towards them when they may present a low risk of recidivism.[35]

31. The Code of Practice for the Victims of Crime ("the Victims' Code") already entitles victims who have opted into the Probation Victim Contact Scheme (VCS) to be informed by the Probation Service if a Parole Board hearing is to take place. It also entitles victims to make representations to the Parole Board about licence conditions and to be provided with reasons for why a licence condition requested by the victim is not included in the parolee's release license, to make a Victim Personal Statement (VPS)[36] and apply to attend an oral hearing in order to read it to the panel, but not attend the whole of the hearing.

32. We accept that victims are in a different position to the general public and there are reasons for them to be afforded further access to parole decision-making and, potentially, the hearing itself. Given that the release of the prisoner may have a profound effect upon their life and they may fear for their safety and/or mental well-being, their views are important. Attending a hearing can for some serve as a restorative justice opportunity, to see justice being done, to feel involved and confident that proper and "correct" decisions are being made. It enables those affected by the issues the Parole Board will consider to be kept informed and understand how a decision is reached.

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[35] Howard League Scotland – evidence "Transforming parole in Scotland" 2019.

[36] A VPS if given by victims to the Parole Board (or any agency or organisation assigned to take the VPS on their behalf) is an important way that victims can assist others in understanding how the crime has affected them. It is the opportunity to tell the Parole Board about the crime they have suffered and the impact it has had on them and their family (physical, emotional, psychological, financial or in any other way.) The recent introduction of the Prisoners (Disclosure of Information About Victims) Act, more commonly known as "Helen's Law", which received royal assent in November 2020 places *"a legal duty on the Parole Board for the first time to consider the anguish caused by murderers who refuse to disclose the location of a victim's body when considering them for release",* Ministry of Justice press release, "Helen's Law received Royal Assent", 4 November 2020

33. It is worth noting that a number of jurisdictions, including Canada[37], South Australia[38], Scotland[39] and the USA[40], allow for victims to attend hearings.

34. However, in addition to the above reasons for why attending a prison in-person will generally be unadvisable, the welfare of the victim must be considered. The prison environment, as well as the close proximity to the perpetrator during the hearing could risk re-traumatising and victimising them.[41]

35. As such, we agree with the consultation paper that the Parole Board Rules 2019 should be amended to enable a victim to make an application to view the hearing. This would allow for representations to be made by the prisoner about that application, with the Parole Board deciding whether to grant the application. There should be a presumption against attendance in-person; instead, a video-link, should be provided.[42] Sufficient guidance would need to be published on how the Parole Board would decide whether to allow a victim access to the hearing, having particular regards to the victim's rights, and the prisoner's rights to a fair hearing, as well as the Parole Board's overall statutory duty to protect the public.

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[37] The status of victims and their involvement in proceedings has increased over the years. Victims have a right to attend hearings under the Corrections and Conditional Release Act (SC 1992).

[38] Under the Correctional Services Act 1982, the Parole Board must consider the impact of the release on the deceased victim's family and other co-victims as well any safety concerns they may raise (s. 67(4)(ca)). The reform solidified victim participation in the Parole Board's decision-making and further empowers the Commissioner for Victims' Rights to appeal a decision to release a murderer (s. 77E): "It is considered to be a rebalancing of the parole process, which was seen as slanted towards murderers at the expense of victims' families and the public's interest": M. O'Connell, and S. Fletcher, "Giving Victims a Voice in Parole Hearings: South Australia's Experience". Journal of Victimology and Victim Justice 2018, 1(1):42-62.

[39] Scotland recently consulted on victim participation and attendance and concluded that more can be done to involve victims in the process, which currently has fewer options for victim engagement and communication compared to England and Wales. After taking views on allowing victims to attend hearings, attendance by way of video-links was proposed, rather than in-person attendance: "Transforming parole in Scotland" 2019.

[40] The Department of Justice's website states that victims, their next of kin, or immediate family can attend hearings, either at the prison or via video-link from a United States Attorney's Office. Victims can also offer a statement during the hearing, or may submit a written or recorded statement beforehand. To attend, the victim (or other person(s)) must a go through the Victims Support Programme. Victims are also notified, on request, of the decision taken.

[41] Transforming Parole – Scotland consultation report: "*There were a number of respondents who were concerned about retraumatising or re-victimising people. Some felt participation could increase stress by opening up difficult memories or emotions. It was also felt this could lead to flash points at hearings particularly if the outcome of the decision was to release the prisoner*", para 33.

[42] The Scottish consultation concluded that: "*allowing victims to observe the hearing via video conferencing (if available) which could allow the sound to be muted when confidential matters were being discussed and provide some distance between the prisoner and the victim or family member*," p.11.

c. Should hearings be open to the media?

36. As noted above, the right to private and family life is not absolute and must be balanced against competing rights, including free speech and freedom of the press, protected by Article 10 ECHR. The media undoubtedly performs an important role as a mechanism for scrutinising decision-making and helping exact the function of open justice. In *Von Hannover* (2004) EHRR 1, para 11, the court emphasised the importance of the press in playing its "vital role of "public watchdog."[43] The media can, in circumstances where the public cannot attend, serve as the public's "eyes and ears."[44]

37. However, "trial by media" raises all the concerns we set out above in relation to public attendance. One of the prisoners we consulted said:

    "My sense is that more scrutiny could lead to more injustice towards those who have travelled the long journey of rehabilitation only to have it thrown back into their faces, not to protect the public, but to protect decisions makers from any negative, probably inevitable, kickback.

    "The media have been terrible throughout my time in prison, to both me and my family. This year I was recommended for open conditions. The newspapers got wind of this and within days I was all over the local media websites, which saw a lot of drama and criticism from the public. Next year I will go before the Parole Board for consideration of release and I fear the same will happen again."

38. This is a real concern and must be thought through carefully. The courts have stressed that the media should be given the necessary trust and respect to accurately and fairly carry out its role.[45] We consider that any media representatives would need to apply to observe the hearing, as with victims, over a remote video-link and that reporting restrictions would be necessary, clearly setting out what personal information about those referenced in the hearing could not be published.

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[43] See for example: *Bladet Tromsø and Stensaas v Norway* App. No. 21980/93, ECHR 1999-III, para 59 and 62; and *Pedersen and Baadsgaard v Denmark* App. No. 49017/99, ECHR 2004-XI, para 71. See also: *A v British Broadcasting Corporation* (Scotland) [2014] UKSC 25, para 26, which holds that access by the press to proceedings is "inextricably linked" to the principle of open justice.

[44] *Khuja v Times Newspapers Ltd & Ors* [2017] UKSC 49, para 16.

[45] See for example: *R v B* [2016] EWCA Crim 2692; [2007] EMLR 5, para 25.

d. Who else, in your opinion, should hearings be open to (if anyone)?

39. A blanket-ban on public access could disregard the wishes of those affected, who may present legitimate and cogent reasons for a public hearing being necessary and the most appropriate way to ensure a fair decision in their case.[46] Some prisoners we consulted expressed distrust in parole decision-making, which might be resolved by a more open process:

"In some cases, allowing the public to watch the hearing could give confidence and reassurance to the prisoner that the Parole Board will act fairly … I always speak to plenty of other guys who say their hearing was totally unfair and that if people on the outside could see the progress he's made they would also agree that he should be released"

"At present if MoJ KB [kick back] Parole Board decisions no one outside of the system can see it, fair or not. if opened up it would make it harder for MoJ to "cover up""[47]

"Some prisoners might feel the additional scrutiny would suit them if some of the seeming irrational and money-wasting decisions were aired publicly."

"The parole board process, which relies on the opinions of many professionals, is coming under increasing scrutiny. Decision makers have never been more exposed to being reprimanded, attacked in the press or at risk of losing their livelihoods. The response has been to either batten down the hatches with more red tape or air on the side of extreme caution by being 'risk averse', both of which, as far as I'm aware, has slowed down the release process or, in some cases, prevented release altogether. And it's not necessarily for reasons of public protection."

Q3. In what circumstances would a public hearing be appropriate or add value to the parole process?

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[46] In *Altay v Turkey* (No 2), App. No. 11236/09, (judgment 9 April 2019) (ECtHR), para77, the court took the view that: *"parties must at least have the opportunity to request a public hearing, even though the court may refuse the application and hold the hearing in private."* See also: *Martinie v. France* [GC], App. No. 58675/00, ECHR 2006-VI, para 42,

[47] Reference to being kicked back by MoJ relates to open condition recommendations by the Parole Board.

Q4. In what circumstances would a public hearing not be appropriate?

40. Those set out above.

Q5. What criteria should be used to decide whether a hearing should be heard in public?
Q6. How should victims' view be taken into account in deciding whether to hold a public hearing?

41. We understand that other jurisdictions, such as Canada, Australia, and many states in the USA, allow the public to attend hearings in certain circumstances. While their procedures and methods may vary, we consider that they could form useful templates for implementing any such changes here in the UK. For example, after much debate and calls for reform[48], in Canada members of the public may be entitled to attend if they request to observe.[49]

42. For a hearing to be open to the general public, we consider that the following requirements would be prerequisites:

    i) Consent of the parolee and victim(s)/victim's family

43. There may be circumstances in which both the parolee and the victim express that they consider that a public hearing would be the most suitable way to ensuring a fair hearing. If both are of this opinion, and provide cogent representations to support their position, then we do not consider it would be in the interests of justice to dismiss their wishes without careful consideration of why a private hearing is necessary. There may be circumstances in which there are no identifiable victims and so the prevailing consideration would be the wishes of the parolee.

    ii) The most appropriate place to view the hearing must be identified.

44. As the consultation notes – and as has been stressed to us by those we have consulted on the matter – the security concerns and practical and logistical barriers presented make the possibility of hearings in prison unfeasible. Likewise, the transportation of prisoners to

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[48] Office of the Federal Ombudsman for Victims of Crime (2010) Toward a Greater Respect for Victims in the Corrections and Conditional Release Act

[49] Observing Parole Board of Canada Hearings – Fact Sheet See also request form.

a public building located away from the prison would incur significant costs and security resources in transit and at the venue.

45. This could be resolved by using technology, such as a video-link. However, this is not without its issues – there is the potential that recordings of the proceedings may be unlawfully taken. While recording offences could be extended to the parole arena, and there is little evidence of unlawful recording from courts during the Covid-19 pandemic where these have been broadcast, the risk is a serious one. One of our consultees voiced his worry at the public being able to observe online:

> *"My case is pretty high-profile and has over the years attracted an astounding amount of public/media attention. My family have told me about the public spats that take place on local Facebook groups around whether I should be released. Allowing free access to those hearings by people who know little about you or what "risk" doesn't sit well with me."*

46. Given the potential implications for remote access, we agree with the consultation that "broadcasting the proceedings to a separate location … would be the most viable method of delivering public hearings … requiring observers to go to a particular location to view the hearing such as a court building or a conference centre" (para 54), whether they be victims, media representatives or members of the public.

Q8a. What measures or approaches would be needed to avoid or mitigate any adverse consequences of conducting a hearing in public?
Q8b.What impact will such measures have on the effectiveness or efficiency of the parole process?
Q9a. Which of the options for the location/methods for public hearings (i.e. face-to-face in prison or in a court building, broadcast to a separate location or streamed online) do you think would be the most suitable and why?
Q9b.Can you suggest any other alternative options to facilitate public hearings?

47. See answers above.

Q10. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform?
Please give reasons.

48. Options would need to take into account accessibility of hearings for any members of the public joining by remote video link, particularly if the venue will be a court or tribunal centre, in the same way as any other court users, in line with HMCTS guidance.[50]

Q11. Are there any key reasons or benefits of having parole hearings in public not already identified in this consultation that we should seek to achieve?
Q12. If a hearing were to be held in public, are there any risks or implications not already highlighted in this consultation that would need to be considered?

49. Not applicable.

JUSTICE
3rd December 2020

[50] HMCTS, "Equality and diversity: How HM Courts & Tribunals Service supports court and tribunal users with disabilities", at https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/equality-and-diversity