Parole in England and Wales: Recent Reforms and Proposals for the Future

SENTENCING ACADEMY

Gavin Dingwall and Megan Millar

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Introduction

> 'The Parole Board is an independent body that works with other criminal justice agencies to protect the public by risk assessing prisoners to decide whether they can be safely released into the community.' (Parole Board, 2023, p. 28)

The Parole Board for England and Wales stipulates that the Board has five functions: (1) deciding whether prisoners serving indeterminate sentences should be released after serving their minimum term of imprisonment;[1] (2) deciding whether to release some categories of prisoners serving determinate sentences;[2] (3) deciding whether some prisoners who have been recalled to prison can be re-released; (4) advising the Secretary of State whether some indeterminate prisoners can be progressed from closed to open prisons; and (5) finally, and more broadly, advising the Secretary of State on any release or recall matters referred to it (Parole Board, 2023, p. 28).

Parole in England and Wales is in a period of flux following a series of government interventions which will be detailed in Chapter 1. Central to this is the way in which decisions of the Board, whether to release or not to release, can be challenged (see Chapter 2). However, the changes, and current proposals, do not affect the core functions of the Board. It is important to note at the outset that the Parole Board has no input in sentencing an offender. When a prisoner comes before the Board, the members are engaging in a risk assessment exercise. It is not their concern whether the period of time that the prisoner has served represents an appropriate punishment for their crime; if the prisoner is serving an indeterminate sentence, the minimum term is set by the sentencing judge.[3]

The central role played by the Parole Board in the criminal justice system is demonstrated by its caseload. In 2022/23, the Board made 29,252 case decisions and 4,053 prisoners were released from prison or moved from the closed to the open estate (Parole Board, 2023, p. 23). This work was undertaken by 292 members of the Board (as at 31 March 2023) (Parole Board, 2023, p. 80). If a prisoner who has been released or moved to an open prison is alleged to have committed a serious further offence, they are referred to the Review Committee; 28 of the 4,053 prisoners who had been released or moved to an open prison

[1] An indeterminate sentence is a prison sentence without a fixed release date. There is a minimum period of time that the prisoner must serve in prison, called the minimum term, which is set by the court. A comparatively high proportion of prisoners in England and Wales are serving an indeterminate sentence: life sentences; prisoners detained at His Majesty's pleasure; and imprisonment or detention for public protection. Although imprisonment and detention for public protection were abolished in 2012, there remain several thousand prisoners in the system. On 30 June 2023, 8,514 prisoners were serving indeterminate sentences. This represents 9.9% of the total prison population and 12.2% of the sentenced prison population.

[2] A determinate sentence is a prison sentence with a fixed end date. The determinate sentences considered by the Parole Board are extended determinate sentences and sentences for offenders of particular concern, including terrorists and serious child sex offenders.

[3] The minimum term is the minimum period that a prisoner serving an indeterminate sentence will serve in prison. This is the first point that the prisoner becomes eligible for parole and release after this period has been served in full is at the discretion of the Parole Board.

(0.7%) had been referred to the Review Committee as at 31 March 2023. Of those, 11 cases had led to a conviction for a serious further offence, two cases resulted in the individual receiving a conviction for a lesser offence, two cases resulted in an acquittal and 13 cases were awaiting court or the outcome was unknown.

For the categories of prisoners affected, everything rests on the decision taken by the Board. Victims may also have understandable anxieties about the possibility that the offender could be released. If the prisoner's offence(s) attracted media attention and / or were especially heinous, the concern may be more widespread.

This paper explores the current issues facing the system of parole in England and Wales and focuses on how the government has sought to amend the parole process. Review mechanisms have been central to this. The law is complex, as are the proposed reforms, and questions of principle arise as to the respective roles of the Board and the Secretary of State for Justice.

These reforms have taken place with little reference to research literature. But, as will be shown, there is a surprisingly limited research base to draw on, at least in England and Wales. Some thoughts are given towards the end of the paper as to why this may be the case and 10 areas are highlighted as particular knowledge gaps. At a time of rapid change to a politically contentious, legally complicated and, above all, highly impactful area of the criminal justice system, the need for further research is acute.

The Structure of the Paper

Chapter 1, 'Recent Reforms to Parole in England and Wales', describes the proposals announced in a series of reviews dating from 2018 until 2022. The reforms touch upon many aspects of parole, from the involvement of victims in proceedings to the role of the Secretary of State for Justice. Although the key functions of the Parole Board have not changed, the significance of these reforms should not be understated: the system of parole has taken a new direction over a short time span.

Chapter 2, 'Challenging a Parole Decision', warrants a separate chapter as the central reforms stem from the government's perception that the process for challenging a Parole Board decision is too restrictive. The impetus for these reforms can be traced to the initial decision to release John Worboys, a serial sex offender, in 2017. Most of the existing case law relates to challenges brought by prisoners whose applications for release were unsuccessful, but the focus of the reforms is to expedite the procedure for challenging decisions to release a prisoner.

Chapter 3, 'An Alternative Future for Parole' presents a brief overview of a report for the charity JUSTICE. The report, published contemporaneously with the government's reforms, contains some similar concerns about parole – but the reforms proposed differ radically.

Chapter 4, 'Knowledge Gaps and Research Priorities', serves two functions: (i) offering an explanation about why parole may have attracted little scholarly attention and (ii) listing 10 research priorities. A meaningful debate about the future of parole would benefit from this information.

Chapter 1: Recent Reforms to Parole in England and Wales

Since its establishment in 1968, the Parole Board, and the context in which it operates, has evolved significantly. The Parole Board was established by section 59 of the Criminal Justice Act 1967 as an advisory body of 17 experts to advise the government on the release of prisoners. In its first year of operation, it dealt with 2,562 cases (Ormerod, 2021). However, the Board's work has transformed since its inception; it currently deals with in excess of 29,000 cases (including conducting over 8,000 oral hearings) each year (Parole Board, 2023, p. 23). The Board's powers and responsibilities have also changed; it is now an independent body which, among other things, makes quasi-judicial decisions about the release of certain categories of prisoner.

In recent years, the parole system has been the subject of numerous reviews and reforms which were triggered, at least in part, by the case of John Worboys. This chapter charts the reviews undertaken by the government since 2018 and provides details of the key changes that have been made.

Review of the Law, Policy and Procedure Relating to Parole Board Decisions (2018)

In response to the Parole Board's initial decision to release Mr Worboys, the Secretary of State for Justice ordered a review of the law, policy and procedure relating to the Board's decision-making process. In particular, the government sought to make the process more transparent and improve the experience for victims. The review was published on 28 April 2018 and the following actions were undertaken as a result:

a) The removal of the blanket prohibition on disclosure of information about Parole Board proceedings and the provision of decision summaries. Where someone seeks disclosure of a summary of the reasons for a decision, the Board must produce a summary, unless the Board chair considers that there are exceptional circumstances why a summary should not be produced for disclosure (Parole Board Rules 2019, Rule 27). Decision summaries have been produced since 22 May 2018.

b) The launch of a consultation on a mechanism that would allow the Parole Board to reconsider its decisions in certain circumstances.

c) Improvements to the communication between victims and the government and providing access to the Victim Contact Scheme to a broader range of victims.

Reconsideration of Parole Board Decisions: Creating a New and Open System (2019)

Following the 2018 review, the government announced a public consultation in respect of the proposed reconsideration mechanism. The government's response to the consultation was published in February 2019 (Ministry of Justice, 2019a). The government explained that the purpose of the mechanism was to provide a more accessible way to review parole decisions than judicial review and provided details of how the mechanism would operate (para. 4).

Review of the Parole Board Rules and Reconsideration Mechanism (2019)

Alongside its response to the reconsideration mechanism consultation, the government undertook a review of the Parole Board Rules. Its findings were published in February 2019 (Ministry of Justice, 2019b) and set out the measures that had been taken and proposals for further reform, primarily to improve the transparency and efficiency of the parole system. This included:

a) An amendment to the Parole Board Rules to create a reconsideration mechanism. The new Rules came into force on 22 July 2019.

b) Procedures and standard practice documents being published by the Parole Board to explain how decisions are reached.

c) A new operational protocol between the Parole Board and HM Prison and Probation Service (HMPPS) to clarify roles and responsibilities within the system.

d) A new policy framework, published by HMPPS, to improve timescales in the decision-making process.

e) The creation of a Rules Committee to keep the Rules under review and enable changes to be made more quickly if considered necessary.

Tailored Review of the Parole Board (2020)

The Tailored Review fulfilled a standing requirement for government departments to review their arms-length bodies once every Parliament and was published in October 2020. The scope of the Tailored Review was to consider and build upon the findings of previous reviews.

The Tailored Review resulted in a number of recommendations, including the establishment of a new senior-level 'Parole System Oversight Group' which would assume responsibility and accountability for the parole system and the establishment of independent third-party scrutiny of the parole process to provide additional checks and assurance that the system is operating effectively.

The review also considered the possible reconstitution of the Parole Board as a court or tribunal. It concluded that this issue should be considered by the upcoming root and branch review and the Parole Board should retain its current operating model as a non-departmental public body in the short-term, while 'working to more clearly demonstrate the judicial nature of its decisions and its independence from government' (para. 14).

Root and Branch Review (2022)

In March 2022, the government delivered its 2019 manifesto commitment by publishing its root and branch review of the parole system. The review recommended further reforms, some of which require legislation before implementation. The key changes yet to be implemented are as follows:

(i) Amendment of the statutory test for release

At the outset of the review, the government expressed concern that the parole process had 'drifted from its original intention of public protection'. This concern appears to underpin a number of changes outlined in the review, including the proposed amendment of the statutory test for release.

The statutory test applied by the Board when deciding whether a prisoner should be released is whether 'it is satisfied that it is no longer necessary for the protection of the public that the person should be confined'.[4] The government considered that, instead of the Board approaching their risk assessment as a public protection test to be met in order to direct release, the courts have interpreted the Board's task as a 'balancing exercise', considering the competing interests of the prisoner and the protection of the public (para. 14).

The government proposed that a 'more precautionary approach' is necessary for the most serious cases, i.e. there should be a presumption that a prisoner should not be released unless there is evidence of a low risk to the public. This would shift the onus on to the prisoner to demonstrate that they can be released safely into the community. The government considered that this will make the system 'more robust' when dealing with the most dangerous offenders (para. 15).

(ii) 'Top-tier' cases

The government proposed a 'new precautionary approach' to the release of a 'top-tier' of the most serious offenders. This involves the introduction of a new decision-making model for cases involving 'top-tier' offences, namely murder, rape, certain terrorism or terrorism-related offences and causing or allowing the death of a child (para. 80).

In respect of these cases, where the Board 'cannot confidently say that the release test has been met', it must direct that the prisoner is not released or refer their case to the Secretary of State (para. 30). Where a case is referred to the Secretary of State by the Board or where the Board directs the release of a 'top-tier' prisoner, the Secretary of State will be able to review and refuse the release decision (para. 31). The government considered that 'this review power will enshrine the precautionary principle in law' (para. 31). Two alternative models for implementation have been proposed; for Ministers personally to take the decisions, with a route of appeal to the Upper Tribunal or to create a new review panel to take the decisions, comprising the Secretary of State and two independent panel members (paras. 31-34).

(iii) Victim engagement

As part of the proposed changes to the statutory test for the release of a prisoner, the government stated that there will be a list of criteria that the Parole Board will be required to consider which will include submissions made by or on behalf of the victim (para. 55).[5]

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[4] See, for example, section 28 of the Crime (Sentences) Act 1997.

[5] On the desirability of victim involvement in parole generally, see Padfield and Roberts (2010).

The government considered that victims should be able to make written submissions as part of their Victim Personal Statement or as a separate document and include their views on the prisoner's potential release and questions they have (para. 160). This was confirmed in the government's response to the consultation *Delivering Justice for Victims* which was published in May 2022.

(iv) Constitution and composition

The root and branch review also explored the question of whether the Board should be reconstituted to become a court or tribunal. The government's conclusion was that this was not necessary 'to achieve the improvements to the decision-making process that are necessary to better protect the public' (paras. 35-36).

In terms of its composition, the government expressed concern about the lack of Parole Board members with a law enforcement background. To achieve an increase in this number, it stated that changes will be set out in legislation to make clear that it is one of the professional backgrounds from which members should be drawn. In addition, the review proposes a new power to allow the Secretary of State to direct the composition of panels (para. 39). The government explained that it wants to ensure that a member with a law enforcement background is included on panels dealing with 'top-tier' prisoners (para. 38).

A number of reforms have been implemented since the root and branch review, primarily based on recommendations set out in the review. The key changes are as follows:

(i) Public hearings

The government had previously announced, in February 2021, that the requirement for all hearings to be heard in private was unnecessary and should be removed. The review set out details of how this would work in practice (paras. 134-158). Subsequently, the Parole Board (Amendment) Rules 2022 amended Rule 15 of the Parole Board Rules to remove the requirement and the first public hearing took place on 12 December 2022. The Parole Board has published guidance which sets out how to apply for a hearing to be public.

(ii) Oversight of moving indeterminate sentence prisoners to open conditions

In the root and branch review, the government stated that provision would be made for ministerial oversight in respect of decisions to transfer prisoners serving an indeterminate sentence for homicide, rape, serious sexual offences against a child or child cruelty to open conditions. In addition, a new threshold in respect of these cases would be applied in deciding whether a transfer would be appropriate (para. 43).

In June 2022, the Secretary of State published directions to the Parole Board to make provision in this regard. The Directions state that the Secretary of State will only accept a recommendation from the Board to approve a prisoner serving an indeterminate sentence moving to open conditions where:

a) the prisoner is assessed as presenting a low risk of absconding; and

b) a period in open conditions is considered essential to inform future decisions about release and to prepare for possible release on licence into the community; and

c) a transfer to open conditions would not undermine public confidence in the criminal justice system.

However, shortly thereafter, the Secretary of State issued new Directions to the Parole Board on the transfer of indeterminate sentence prisoners to open conditions, which came into effect on 1 August 2023. As a result, the Secretary of State will accept a recommendation from the Parole Board only where:

a) the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the prisoner in open conditions may be in the community, unsupervised under licensed temporary release); and

b) the prisoner is assessed as low risk of absconding; and

c) there is a wholly persuasive case for transferring the indeterminate sentence prisoner from closed to open conditions.

(iii) Single view presented to the Board

Previously, a range of individuals could provide recommendations or their opinion in respect of a release decision, including prison and probation staff and psychologists. However, the government explained in the root and branch review that it was developing a model in which 'one Secretary of State view' would be presented to the Board in relation to whether a prisoner was safe to be released. This view would reflect assessments made by probation officers and psychologists and present one view in respect of whether the prisoner was safe to be released (para. 98).

Subsequently, the Parole Board (Amendment) Rules 2022 amended the Parole Board Rules to remove the ability of prison and probation staff to recommend or give their opinions on a prisoner's suitability for release or transfer to open conditions. Instead, where it is considered appropriate, the Secretary of State will give a single view to the Board in respect of these issues (Parole Board (Amendment) Rules 2022, Rule 2(22)). The Justice Secretary explained that the purpose of this change was to prevent conflicting recommendations being provided from within the Ministry of Justice which he considered was inappropriate.

(iv) Setting aside and re-opening decisions

The Police, Crime, Sentencing and Courts Act 2022 included a provision to enable the Secretary of State to make rules giving the Board a power to set aside and re-open its own decisions in certain circumstances. The Secretary of State subsequently exercised this power and the process is contained in Rule 28A of the Parole Board Rules 2019. This provision is considered in further detail in Chapter 2.

Chapter 2: Challenging a Parole Decision

Decisions made by the Parole Board are not subject to appeal and, until recently, could only be challenged by way of judicial review. However, following recent changes, a Parole Board decision can now be challenged in one of three ways: (1) through the reconsideration mechanism; (2) by an application to set aside a decision; or (3) by way of judicial review.

The reconsideration mechanism

The reconsideration mechanism came into force on 22 July 2019. The Explanatory Memorandum to the Parole Board Rules 2019 states that Rule 28 introduces the 'reconsideration mechanism' which allows both parties (i.e. the prisoner and the Secretary of State for Justice) the opportunity to apply to the Parole Board for a decision to be reconsidered if they believe it was not legally sound (para. 7.6). Victims can request that the Secretary of State make an application on their behalf.

The mechanism applies to decisions made in respect of prisoners serving indeterminate sentences, extended sentences and certain determinate sentences (Rule 28(2)). The criteria for reconsideration are based on judicial review grounds, namely that the decision contains an error of law, is irrational or is procedurally unfair (Rule 28(1)). An application must be made within 21 days of the written decision being given to the parties (Rule 28(3)).

A reconsideration decision may be challenged by way of judicial review (see, for example, *R. (on the application of Stokes) v Parole Board for England and Wales*).[6]

Setting aside decisions

On 21 July 2022, a new process by which the Parole Board can set aside its own final decisions and directions came into force. This process is contained in Rule 28(A) of the Parole Board Rules 2019. The government's root and branch review explained that this process builds on the reconsideration mechanism by enabling the Parole Board to set aside and re-open its own decisions in a broader range of circumstances (Ministry of Justice, 2022, para. 214).

The prisoner or the Secretary of State can apply to have a decision set aside, or the Parole Board may do so of its own volition (Rule 28A(1)). In addition, in the same way as the reconsideration mechanism, a victim can request that the Secretary of State make an application on their behalf.

A decision may be set aside if it is in the interests of justice to do so and at least one of the following conditions are satisfied (Rule 28A(3)):

a) a decision to release or not to release would not have made but for an error of law or fact (Rule 28A(4)(a)); or

[6] [2020] EWHC 1885 (Admin).

b) a decision has been made to release, and the Parole Board determines it would not have made the direction if either:

(i) information that was not available to the Board when the direction was given had been available (Rule 28A(4)(b)(i)); or

(ii) a change in circumstances relating to the prisoner that occurred after the direction was given, had occurred before it was given (Rule 28A(4)(b)(ii)).

An application must be made within 21 days of the decision or, where the Parole Board initiates the process, before the prisoner is released (Rule 28A(5)). A decision to set aside a decision or direction may also be challenged by way of judicial review.

Judicial Review

A claim for judicial review is a claim to review the lawfulness of a decision, action, or failure to act by a public body, which includes the Parole Board. Broadly speaking, the grounds upon which a judicial review may be sought in the context of parole are:

a) where there is an error in law (for example the Board applies the wrong test for release, or acts outside its statutory powers, takes into account irrelevant factors or fails to consider relevant factors);

b) where there is procedural impropriety (for example where there is a failure to disclose documents to enable representations to be made, a refusal to call relevant witnesses or where the Board gives inadequate reasons);

c) where the Board's decision is irrational, i.e. *Wednesbury* unreasonable;

d) where the Board has breached the requirement to act compatibly with rights under the European Convention on Human Rights (ECHR).

The starting point for the courts in a judicial review is that the Parole Board is afforded a wide discretion in its decision-making. This is in acknowledgment of the importance and complexity of the role performed by the Board and that the evaluation of risk, which is central to the Parole Board's judicial function, is in part inquisitorial. As a result, the reviewing court is not an appellate jurisdiction and should be slow to interfere with the exercise of judgment in this domain.[7]

Examples of circumstances in which the Parole Board's decision not to release a prisoner has been challenged by way of judicial review are outlined below:

Irrationality

The classic test applied by the courts was formulated in *Associated Provincial Picture Houses v Wednesbury Cooperation*,[8] i.e. whether the decision was *Wednesbury*

[7] *R. (DSD & MVB) v Parole Board of England and Wales* [2018] EWHC 694, paras. 117, 118 and 133.

[8] [1948] 1 KB 223.

unreasonable or irrational.[9] When considering whether the decision of the Parole Board to refuse release was irrational, the approach of modern public law is to test the Board's ultimate conclusion, with anxious scrutiny, against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence. In other words, the question is whether the conclusion follows from the evidence or if there is an unexplained evidential gap or leap in reasoning that fails to justify the conclusion.[10]

As a result, it is not enough that the court considers that the decision in question is not one that it would have made. For example, in the Worboys case (*R. (DSD & MVB) v Parole Board for England and Wales*),[11] the fact that the Divisional Court considered that the Parole Board's original decision to release Mr. Worboys was 'surprising and concerning', did not mean that the decision was irrational. The reason why the decision was held to be irrational was because the Board failed to inquire further into a reference in the dossier to '80+ potential victims' (see further Dingwall, 2019).

In *R. (Wells) v Parole Board for England and Wales*,[12] the court held that the reasoning of the Board in concluding that the risk posed by the prisoner could not be safely managed in the community was irrational. The evidence before the Board was that there had been no allegations of violence for a number of years in respect of the prisoner, expert evidence assessed him as having a low to moderate risk of future offending, the offender manager and supervisor supported release and an earlier panel had recently directed release. In concluding that the decision was irrational, the court emphasised that there is a heightened duty to give reasons when rejecting or departing from expert evidence, and the departure from an earlier reasoned recent decision from another panel in this case required some explanation.

Inadequate reasons

A number of authorities have emphasised the requirement that the Board give adequate reasons for its decision.[13] In *R. (Holdsworth) v Parole Board*,[14] the court observed that the Board had not provided reasons which were sufficient to show that the prisoner's representations had been taken into account and what influence, if any, they had had on the Board when determining the issues in dispute. This gave rise to a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process which afforded a ground for quashing the decision.

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[9] At para. 229.

[10] *R. (on the application of Wells) v Parole Board* [2019] EWHC 2710 (Admin), para. 32.

[11] [2018] EWHC 694 (Admin).

[12] [2019] EWHC 2710 (Admin).

[13] See *R. v Parole Board ex parte Oyston* [2000] 3 WLUK 35; [2000] Prison LR 45; *R (Holdsworth) v Parole Board* [2011] EWHC 2924 (Admin); *R (Tinney) v Parole Board* [2005] EWHC 863 (Admin).

[14] [2011] EWHC 2924 (Admin).

Misdirection in law

The Board must correctly apply the relevant legal tests in making its decision whether to release a prisoner. Therefore, in *R. (on the application of Dich) v Parole Board for England and Wales*,[15] a decision not to release a prisoner was quashed as the Parole Board's amended guidance concerning the relevant test for the assessment of risk was based on a misunderstanding of parts of the relevant judgment of the Divisional Court.

Further, in *R. (on the application of Wells) v Parole Board*,[16] the Parole Board had misdirected itself when deciding not to direct the post-tariff release of a prisoner subject to an indeterminate sentence of imprisonment for public protection. The Board had wrongly considered whether there was any risk of reoffending, when it should have assessed whether any potential risk of reoffending was proportionate to the prisoner's continued detention.

Procedural unfairness

A decision may be successfully challenged on the ground that the Board has breached the requirements of procedural fairness. In *R. (on the application of Grinham) v Parole Board for England and Wales*,[17] the court quashed a decision by the Board not to grant the release of a prisoner who had been diagnosed with cancer. There were serious failings in the preparation of the case for the oral hearing which resulted in real difficulty for the prisoner and his representative on the day of the hearing. This included the late service of the report by the offender supervisor, that there was insufficient time available for the hearing and there was a failure by the offender manager to comply with the case management directions. The Court concluded these procedural defects meant that the hearing was unfair and the resulting decision was unlawful.

Mistake of fact

A mistake of fact giving rise to unfairness can constitute a ground of review in limited circumstances. In *R. (on the application of Shepherd) v Parole Board for England and Wales*,[18] the Court, having emphasised that judicial review proceedings primarily deal with law and not fact, considered that a material error of fact can provide an independent ground of review in circumstances where there is a mistake as to an existing and established fact for which the prisoner is not responsible and it played a material part in the Board's reasoning. In this case, the Court held that the Board was mistaken as to the evidence given by the prisoner during the course of the hearing and this appeared to have supported the conclusion that the prisoner had the 'risk profile of a stalker' and fed into the rejection of the assessment of risk of the offender supervisor. As a result, the decision was quashed.

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[15] [2023] EWHC 945 (Admin).

[16] [2019] EWHC 2710 (Admin).

[17] [2020] EWHC 2140 (Admin).

[18] [2019] EWHC 3256 (Admin).

Chapter 3: An Alternative Future for Parole

This paper is concerned with the recent reforms to, and the future of, parole. The changes were outlined, but one thing that is notable is what is *not* there: compelling evidence justifying radical overhaul. To some extent this was not the government's fault. For reasons suggested in Chapter 4, research is limited. The Parole Board welcome independent research so that they can '[take] a more evidence-based approach to informing continuous improvement of policy and practice related to parole, and this includes outcomes and recommendations from good quality research and thematic studies' (Parole Board, 2023, p. 19). The Board has five research priorities which are discussed in Chapter 4.

An alternative vision of the future of parole is offered by the charity JUSTICE (2022) who formed a Working Group to produce a detailed report. The Working Group met and reported at the same time as the government reports were published so they serve as a useful comparison. This chapter will outline JUSTICE's concerns and proposals. Although it will be seen that there are common concerns, the proposed reforms are often radically different. The report runs to 140 pages and what follows is inevitably a summary, and a subjective one, drawing on distinctive elements in their vision for the future of parole.[19]

Similarities: Procedural Flaws and Participation

Procedural flaws

The JUSTICE report is not a defence of the status quo; what we have is agreement that change – sometimes radical change – is necessary, but disagreement about which aspects cause concern and, critically, how these problems should be addressed. There is criticism of Parole Board practice,[20] but the flaws are seen to rest primarily with the government. Broadly, recent reforms have increased the involvement of the Secretary of State for Justice (see Chapters 1 and 2) whilst the JUSTICE Working Group seek to minimise executive interference, primarily by reconstituting the Parole Board as a Tribunal. Despite so fundamental a divergence, both JUSTICE and the government identify issues of delay, the complexity of dossiers, and the review process as areas in need of reform. JUSTICE though primarily see these procedural concerns as problematic as they compromise fairness to the prisoner. In contrast, the government perceive them to be impediments to public safety.

Participation

Both the government's changes and JUSTICE proposals raise questions about participation. JUSTICE concentrates on the ability of prisoners to contribute meaningfully,

[19] A full list of recommendations can be found on pp. 133-138 of the report.

[20] An example relates to the provision of training for new members and the opportunity for continual professional development (para. 3.11).

but do recognise the need for 'clear, accessible, timely and tailored information' for victims (JUSTICE, 2022, p. 135). More specifically, this would include:

(a) how the individual's specific sentence operates, how sentence planning maps onto their sentence as well as how parole fits in;

(b) what the parole process involves, how it should be prepared for, and what can be expected at each stage of the process, and

(c) an individual's right to parole reviews. (JUSTICE, 2022, para. 4.30)

JUSTICE do not perceive the need for a greater role for the Secretary of State for Justice.

Differences: Procedure and Purpose

Procedure

The most notable suggestion contained in the report is to reconstitute the Parole Board as a Tribunal (JUSTICE, 2022, p. 2). It will be recalled that the government rejected this idea. The Working Group, in contrast, felt that a revised status would ensure that the Tribunal had necessary procedural rules and case management powers. It is claimed that it is 'unsurprising' that currently 'multiple stakeholders' do not afford sufficient respect to Board directions. The suggestion made is that the Parole Board is reconstituted as a Tribunal and a dedicated chamber of the Upper Tier would hear appeals (JUSTICE, 2022, para. 2.13). A change to the recall process was also proposed. In order to initiate a recall, an offender manager would need to make an application to the magistrates' court who would make a finding of fact about whether the condition was breached. If a breach was found, the case would proceed to the Tribunal to consider risk and the need to recall (JUSTICE, 2022, para. 2.64).

The Tribunal's functions would not replicate the Board's current role. Notably, it is proposed that a Parole Caseworker section is established; each prisoner would have a caseworker who would explain the process from an earlier stage in their sentence (JUSTICE, 2022, para. 4.39). The Tribunal would also have a duty to update prisoners and victims about case progression as well as providing generic information about parole (JUSTICE, 2022, para. 4.38).

Another significant proposal relates to the test for release, and which party to the proceedings bears the burden of proof. The Working Group were emphatic: 'it should be incumbent on the [Secretary of State for Justice] to justify the continued detention of an individual beyond the minimum term and to show that any risk an individual poses after the minimum term cannot be managed in the community' (JUSTICE, 2022, para. 2.32).

Purpose

A theme stressed throughout the report is the dichotomy drawn between public protection and rehabilitation in penal policy is false. The test for release centres on a risk assessment,

and hence safety to the public. But rehabilitation (a statutory aim of sentencing) is relevant to reducing risk. The Working Group stress the importance of rehabilitation (both generally and in prison) and argue that the continued incarceration of a prisoner should not always be viewed as the optimum outcome. The Parole Board should actively engage in the rehabilitative process in order to reduce risk post-release:

> 'The decision not to release is often viewed as a success, rather than a failure for the individual prisoner, their victim, and the general public. This suggests a system oriented towards the punishment of an individual, rather than their rehabilitation… [Many] policy and legislative initiatives prioritise more and / or lengthier periods of incarceration. By contrast, limited attention is directed to the underlying sources of (re)offending, their solutions, and the role parole could play in facilitating rehabilitation.' (JUSTICE, 2022, para. 1.9)

Chapter 4: Knowledge Gaps and Research Priorities

Knowledge Gaps

Sentencing scholarship, at least in England and Wales, has not devoted the attention to parole that one would expect having regard to the frequency, complexity and impact of parole decisions. It seems that there are two possible explanations for this.

The first is definitional. Sentencing has traditionally been taken to mean the imposition of a sanction post-conviction. Release decisions – often taken many years after the sentence was imposed – have traditionally been seen as distinct and not associated with the sentence. On the one hand, this is correct in that the decisions are taken by different actors, at different times, for different purposes. But this fails to recognise the interrelation. Whether or not a parole decision takes place depends upon the sentence imposed. Parole Boards review the judge's sentencing remarks as evidence informing the risk assessment. And how long indeterminate prisoners serve in custody depends upon both an initial decision relating to the length of the minimum term and a subsequent decision (or decisions) taken by the Parole Board. A broader conception of sentencing which includes release (amongst other matters) is emerging. Expanding the enquiry is welcome, though it remains a moot point whether parole is best regarded as coming within a broader conception of sentencing or a distinct, and separate, form of penal decision-making.

A second reason why research is limited relates to the procedural nature of parole. The process might attract the attention of public lawyers, not criminologists. Legal developments have been frenetic and it is important to note that select – and not necessarily representative – legal decisions bring parole to the public attention. Outrage surrounding the Worboys case (see earlier) was instrumental to legal reform. Legal scrutiny is paramount. The challenge is to get researchers from other disciplinary backgrounds, versed in other methodologies, to add to and enhance the legal literature.

Research Priorities

Five research priorities have been identified by the Parole Board (Parole Board, 2022, p. 3):

- Small scale studies on outcomes for people from ethnic minority backgrounds or other minority group prisoners;
- Research into women's experience of the parole system;
- Efficacy of remote hearings / comparison with face-to-face hearings;
- Procedural justice and parole;
- The experience of vulnerable adults.

To these we would add:

- The changes proposed to the review process;
- AI, risk assessment and parole;
- The implications of the Covid-19 related prison lockdown on release decisions;
- Research into the membership of the Parole Board;
- Popular views of the parole process and, more broadly, the release of prisoners.

We expand on each briefly below.

Outcomes for people from ethnic minority backgrounds or other minority group prisoners

The Parole Board's annual report provides outcome data by ethnicity (Parole Board, 2023, p. 24).[21] Whether or not decision-making discriminates against people from ethnic minority backgrounds when they are sentenced has rightly attracted sophisticated and detailed analysis. The qualitative and quantitative approaches that sentencing scholars have used to analyse sentencing outcomes would lend themselves to assessing whether discrimination exists in parole. This, of course, is not to prejudge the outcome or suggest that the findings or explanations would be similar.

The JUSTICE report raised two further issues worthy of further research: recall decisions which displayed 'clear insensitivities around cultural specificities' and whether ethnic minority prisoners were given more stringent licence conditions (JUSTICE, 2022, paras. 4.49 and 4.48).

Although the Parole Board's focus relates to outcome, the Board's overarching aim is to use research to inform best practice (Parole Board, 2022, p. 3). Researchers could usefully input into how policy could reflect the findings of studies into ethnicity and decision-making. The Board goes wider, encouraging research into other minority prisoner groups. The outcomes and perceptions of foreign national prisoners would be especially worthy of study as the release process may raise particular issues of comprehension.

Women's experience of the parole system

It is suggested that research needs to be gender-specific to determine if processes could be better tailored to address the needs of female prisoners (Sanders, 2023). Outcome data is available in the Parole Board's annual report but many research questions remain (Parole

[21] Release: 50% Asian; 53% Black; 44% Chinese and other; 55% Mixed; 52% White. Remain in custody: 43% Asian; 37% Black; 44% Chinese and other; 39% Mixed; 41% White. Recommendation for open conditions: 8% Asian; 9% Black; 11% Chinese and other; 6% Mixed; 7% White. (Percentages may not always total 100 due to rounding.)

Board, 2023, p. 25).[22] Observational research, for example, could explore whether the Board's perception of a prisoner's testimony or demeanour is gendered. The views of staff working in the female estate could also be examined. Is there a perception that panels look for different evidence of progress for female prisoners? There is an evidence base about sentencing females in England and Wales. This is an area where comparisons between decision-making in respect of sentencing and decision-making concerning parole may be especially rich.

The experience of vulnerable adults

Particular attention needs to be given to vulnerable prisoners entering the parole process. Writing about the experience of prisoners in Scotland, Kelly, McIvor and Richard (2020) found considerable ignorance and anxiety about the parole process. There are issues of safeguarding, protection and participation which need to be fully explored. As the JUSTICE report notes, '[for] many prisoners opening a dossier is a daunting experience. This has a disempowering effect, particularly for those with a disability, learning difficulties, or where English is not their first language' (JUSTICE, 2022, para. 3.20). Allied to research with vulnerable prisoners about to go before a Parole Board or who have appeared before one, it would be valuable to find out from other stakeholders – Board members, legal advisers, prison staff – whether they think current procedures are suitable. The findings of such research may be beneficial in determining best practice.

Efficacy of remote hearings / comparison with face-to-face hearings

It was reported by the Parole Board in their review of research activity in 2021/22 that there was an ongoing study 'investigating the effect of setting on the structure of question in Parole Board hearings' comparing remote hearings with in-person hearings' (Parole Board, 2022, p. 4). A further study on the experience of remote oral hearings for residents in the women's estate was completed that year (Parole Board, 2022, p. 5). This study made an explicit link to parole procedure during the pandemic: '[how] can the pandemic adjustments shape future good practice for the Parole Board and witnesses from the perspective of service users'? The experience of remote hearings may not be uniform. Research with different categories of prisoner would test this. The JUSTICE working group also welcomed assessment into the efficacy of remote hearings, whilst noting their benefits (JUSTICE, 2022, para. 3.55).

The implications of the Covid-19 related prison lockdown on release decisions

In March 2020, following stark mortality predictions by Public Health England (O'Moore, 2020), prisons went into lockdown. The rationale was to restrict infection through strict social distancing. This was achieved by segregating prisoners in their cells (sometimes for 23 hours a day) and by severely restricting access into prisons (HMIP, 2021). Communal

[22] In 2022/23 the outcomes for females were 64% release (a significant drop from 74% in 2021/22), 6% recommendation for open conditions and 30% remain in custody. This contrasts with the following outcomes for males: 52% release, 7% recommendation for open conditions and 41% remain in custody. (Percentages may not always total 100 due to rounding.)

educational and vocational work, often cited as evidence of progress in custody, ceased as did group courses. Employment, a further opportunity to demonstrate progress, also ended or was heavily restricted. In-person visits no longer took place, potentially weakening ties with family and friends. The denial of opportunity was not the fault of prisoners, yet the Parole Board's task is to determine whether risk can be safely managed in the community. Parole hearings during lockdown were primarily heard virtually. This emphasises the need for research on the efficacy of virtual hearings; a large sample of cases now exist. For the foreseeable future, many prisoners coming before the Parole Board will have served some of their sentence under lockdown conditions. It is imperative to research the ramifications. The findings would not only benefit the Parole Board but prison staff working with prisoners to progress their sentence.

AI, risk assessment and parole

The implications of artificial intelligence (AI) in sentencing have been recognised (Ryberg and Roberts, 2022) and machine learning forecasts are used to help inform parole release decisions in other jurisdictions (Berk, 2017). AI has the potential to provide increasingly sophisticated algorithms for assessing individual risk which, in turn, could benefit parole decisions. There is nothing novel about using tools to assess risk in criminal justice; what has changed, and rapidly, is the technological sophistication. Questions of accuracy remain as risk-assessment is fraught with difficulty. But fundamental questions arise. To what extent should AI-generated predictions determine an individual's liberty? What factors should inform an algorithm? Parole decisions will remain driven by the evidence in an individual case, but, as AI plays an increasing role in criminal justice, research could also be undertaken to see how the public view this.

Procedural justice and parole

Research into procedural justice and parole requires ongoing engagement by public law and human rights specialists. The review reforms (see Chapter 2) and the issues that arise are considered as a separate knowledge gap. Few parole decisions are reviewed, so this section raises research questions concerning hearings. Lawyers should test current processes, ensuring there is compliance with domestic and international legal obligations and protections. This is no easy task as it requires monitoring case law (primarily from the High Court) as well as statute. Empirical work could test how Boards apply the legal framework. Each Board has a judicial member. Exploring their views and observing their practice would produce rich material.

An equally important issue relates to stakeholder perception of procedural justice. Questions of comprehension have been raised already. But do prisoners believe that they have had a 'fair hearing', even if the outcome was disappointing? The perceptions of particular categories of prisoner (for example, female prisoners or foreign national prisoners) should be analysed to see if their views differ. Victim participation constitutes a major procedural reform (see Chapter 1). It cannot be assumed that the possibility of observing a Board and expressing an opinion will lead to greater satisfaction. There is a risk of dissatisfaction if victims feel marginalised or that their views were not accorded sufficient weight. Expectation prior to the hearing could be compared with their experience

immediately after the hearing and then at a later date to assess their enduring sense of fairness.

The changes proposed to the review process

Empirical work is necessary to measure the ramifications of the changes to the review process described in Chapter 2. Data from the Parole Board's 2022/23 annual report show that limited use is made of judicial review: there were 100 pre-action claims for judicial review and 33 judicial reviews over the 12 month period (Parole Board, 2023, p. 25).[23] Will the new process lead to a rise in the number of applications for review, reviews, and successful challenges? Valuable work on stakeholder perception could also be undertaken. Do participants believe that the review procedure is transparent and appropriate, or is there a risk that it engenders false expectation given the legal tests employed (see Chapter 2).

Research into the membership of the Parole Board

The government has recently sought to attract individuals with law enforcement experience to join the Parole Board in the belief that their professional background gives them unique insight in determining risk in 'top tier' cases (Ministry of Justice, 2022, para. 38). It would be useful to see whether these members do approach risk assessment in a different way from other Board members. Allied questions would include whether the line of enquiry at hearings differ if a member has law enforcement experience. More broadly, research about the composition of the Board and the views of members on issues of policy and procedure would inform debate (see Ruhland, 2020). This would be particularly interesting if the results were compared to those of the public.

Public knowledge and perceptions of parole

Research, including by the Sentencing Academy, has shed light on the public's views of sentencing (Roberts et al., 2022). The results commonly document a lack of public insight into the sentences imposed by the courts. Similarly, there would be benefit in studying popular perceptions about when someone convicted of a serious offence should be released from prison. Is there genuine concern about the risk posed by released prisoners? Do concerns only surface when a decision to release a high-profile offender attracts media attention? Given that hearings were private until recently, it would be useful to test understanding of the parole process in order to assess whether there is popular support for the reforms. This exercise should not only capture opinion. It should prompt a debate about the gap between current practice and the popular perception of current practice, and between current practice and what the public want and expect from parole.

[23] There were an additional 18 private law claims and 177 pre-action claims for damages.

Conclusion

In comparison to similar jurisdictions, England and Wales makes extensive use both of custody and of indeterminate custodial sentences. The Parole Board, therefore, plays a vital (and under-appreciated) role in the administration of justice. The nature of cases that come before the Board may result in public alarm when a decision is taken to release a prisoner in some instances. This paper documents how the government has introduced a series of changes designed to facilitate challenges by victims and the Secretary of State for Justice. Whilst these developments are significant, it will be interesting to observe their practical impact. Given the number of decisions taken by the Board, it may be that only a small proportion will be challenged.

Research should inform parole policy and practice, yet the existing research base is limited. This paper lists a number of research priorities, some of which address enduring concerns about the process and others relate to emerging issues. It is apparent that the Parole Board is keen to engage with researchers and it is hoped that the research questions identified will receive proper consideration.

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