the Parole Board

working with others to protect the public

Reconsideration of Parole Board decisions: creating a new and open system

Question 1

Do you agree that decisions where the Parole Board directs a prisoner be released or prohibits them from being released should be in the scope of the proposed reconsideration mechanism?

The Parole Board accepts the case for the introduction of a mechanism whereby decisions to release or not should be open to a proportionate internal appeals process. We would also expect the extension of this process to a decision on whether to recommend or not the move to open conditions.

We would further propose that any new internal appeals process be open to all such decisions and not, as proposed in the consultation, be limited to a small defined category of case or offender. If there are concerns about volume, there may be value in initially excluding from the mechanism some determinate sentence recall prisoners with a short period to serve (perhaps less than 6-12 months). There may also be merit in introducing the mechanism for indeterminate cases in the first instance.

The Board undertakes a key role in the process whereby offenders transition from a secure custodial environment to open conditions. Whilst our recommendation in these cases is not determinative it has considerable weight and can result in significant disquiet to victims. It is for this reason that we would like these decisions to also be subject to an internal appeals process.

Public confidence in the way this is undertaken is fundamental, not only to the trust the public have with the Board but the trust and confidence they have in the criminal justice system. So while we support the proposal for an internal appeals process, it is imperative that any new mechanism is designed to enhance public confidence and offer all those involved in the parole process certainty.

Any new mechanism must be managed in a cost effective and timely way. Adding delay to the parole process will inevitably add cost, emotional and financial, for all those involved in the process.

Who should be able to apply for reconsideration of a decision?

The Board strongly takes the view that only the parties to a parole hearing, the prisoner and the Secretary of State, should be permitted to apply for an internal appeal. We do not envisage or intend this to prevent victims and others from being able to

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initiate an appeal but there needs to be a filter to ensure that there is a proper legal basis for an appeal.

Our view is, to adequately support victims through such a process they should only be able to raise a concern through the Secretary of State's office, who would then decide whether or not to take forward the challenge on their behalf if it had merit. This avoids the need for a victim to use their own time, effort and financial resources to navigate the process and argue why the original decision is wrong. We do not wish to place that responsibility on the shoulders of an individual when it is best placed within the responsibilities of the Secretary of State in managing offenders. It would be an obvious extension of the current duties to prepare and present the dossier at hearings.

We know of no other system where anyone other than the parties to a hearing has a right to directly appeal. We propose that the system should be modelled on the procedure for appealing an unduly lenient sentence under s. 36 of the Criminal Justice Act 1988. In many ways similar considerations apply. The Attorney General takes into account representations made by victims and the concerns of the public and decides, on advice, whether to make a reference to the Court of Appeal, if he/she considers there is merit in the application. This system works well by providing an effective mechanism for reconsidering cases that cause significant concern but ensures legal certainty at an early juncture; and should act as a model.

Furthermore, this model has the added advantages that the Secretary of State can draw together information from a variety of different sources, including information that may not be available to third parties, before reaching his/her decision as to whether or not to pursue an application for an internal appeal.

We do not agree with the suggestion of an automatic appeal in very high-profile cases or certain categories of case. The mere fact of public interest may be a factor for the Secretary of State to take into account in deciding whether or not to seek to bring an appeal. We also do not favour restricting the power to certain offences or sentence lengths. That cannot be fair to prisoners or victims.

If the Chair of the Board is able to exercise the power of his/her own motion, the Board itself will be able to identify and develop its own processes to identify exceptional cases which may merit referral to internal appeal.

To avoid the possibility of repeatedly disappointing victims, we believe that victim liaison officers should provide advice to victims on the way in which the process works so as to avoid appeals which have little prospect of success.

Question 2

Which individuals or groups should be able to make an application for a decision to be reconsidered?

As we have stated at question 1, we believe that the Secretary of State should make the application to instigate an internal appeal process. With respect to the prisoner, we believe they should be able to bring an application as of right, and make an appeal direct to the Board.

On what basis should a decision be reconsidered?

We believe the decision should be open to challenge if there appears to be a case that the original decision of the Board was made irrationally, illegally or involved some procedural unfairness. In addition, if important new evidence comes to light following the original decision then this too could be a trigger for an appeal.

Further to these four grounds we would seek a fifth ground relating to an administrative error or mistake. By this additional ground we would seek to establish in the rules the ability of the Board to correct errors which come to light following the conclusion of the original case. We have looked to the ability of both the Magistrates' Court and the Crown Court to, of its own motion or by application, correct errors. These procedures are designed to be quick and avoid cases going to an appellant court.

Building into any new mechanism a similar way to correct errors would provide the Board with the same benefits experienced by both the above jurisdictions.

Question 3

Do you agree that any reconsideration mechanism introduced should consider grounds similar to those used within judicial review?

We agree that the internal appeal mechanism should be limited to judicial review grounds. Doing so establishes a clear set of principles for applications to be reviewed against. Clarity as to how and on what basis an application can be put is essential.

As set out in question 2 our view is that an appeal should argue one of the following judicial review grounds applies to the original decision namely illegality, irrationality or procedural unfairness, or argues that new evidence has come to light since the original hearing or demonstrates that an administrative error or mistake has occurred.

The decision-making process in respect of whether an application is granted or refused should always be determined as a paper exercise. There is no justification to hold an oral hearing for this part of the process and, in our view, this sits outside the considerations that applied in Osborn and Booth -v- Parole Board [2013] UKSC 61. Building in an oral hearing at this stage would be a disproportionate use of resources and cause unnecessary delay to the whole internal appeals process.

Finally on who should make the determination at this stage, our proposal is that this is undertaken by a distinct cohort within the Board drawn from members with experience of determining applications based on the grounds specified above. Although it is for the Board to decide, we would anticipate that this cohort would be judge led although there may be cases in which other experienced/expert members may play a role. We would expect any members who are in this cohort to also be active members in Board hearings.

Question 4

Do you agree that the ground used within First-tier Tribunal provide helpful parameters for the grounds of a reconsideration mechanism?

Though helpful, our position is as set out under question 2.

How can we make the new mechanism transparent?

The Board has welcomed the rule change allowing for a sharing of the panel's reasons following a hearing. Our aim is to build on this and open up to public scrutiny each stage of any new internal appeal process.

Our proposed mechanism would be completely transparent subject to protecting privacy where it is proportionate to do so. While we suggest an entirely paper procedure for the first stage, the decision to grant or otherwise an application, would be made public. Similarly, the arguments on both sides would be made public (subject only to protecting the privacy rights of the prisoners, witnesses and victims) subject to the balance between those rights and open justice.

Following the granting of an application, the decision maker would decide if the case needs to go before the original panel or be considered by a new panel. Whether this new hearing is a paper or oral exercise, we would provide a written summary of the decision including the names of those adjudicating on the internal review mechanism.

Question 5

How could we increase public access to reconsideration hearings in some circumstances and provide more information about reconsideration decisions whilst also making sure that the process remains robust and protects victims?

We have set out in question 4 our proposal to provide summaries of the decision and the names of those making that decision for each stage of the internal appeals process. This we believe creates an open and transparent system while still protecting the privacy of those engaging with the process.

Our desire is to establish an internal appeals process that protects victims but is fair to prisoners, is robust and supports our aim of working with partners to protect the public. We have concerns that certain parts of the process as envisaged by the consultation document do not support that aim but risks creating uncertainty, frustration and delay for both the victim and prisoner.

For example, we do not agree with the proposal for a 'provisional decision'. The decision made by the panel should be a final decision but subject to the right for there to be an application for an appeal. Which, unlike a judicial review, would act as an automatic stay on release which would continue until the process was completed.

Question 6

What more could we do to make the reconsideration process as open and transparent as possible?

Our view is that any desire to create a more open hearing environment for parole hearings should be part of the wider Board rule review proposed by the Ministry of Justice. Any change to how accessible a hearing is to the public needs to be seen in the context of all parole hearings, from the initial decision of a panel at an oral hearing to the concluding hearing as triggered by an internal appeal. The mere fact that a case is to be reheard, possibly for technical reasons, is not of itself a justification.

Equalities Questions

Question 7

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.

The Board is concerned about the potential for these reforms to have impacts on protected characteristics. Previous published data [Race in the Criminal Justice System] indicates that people from BAME backgrounds are over-represented as victims of crime and over-represented in the prison population.

We are concerned to ensure that these groups are given assistance and advice to ensure that they understand any new system in order that they can exercise their rights. Whilst prisoners are likely to be entitled to legal aid for these cases, victims may need additional assistance from victim liaison officers.

Question 8

Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.

The Board is concerned that any new mechanism should be properly resourced at all stages. However configured, the new process will create additional work.

We believe that victims need support and advice in considering whether to seek an appeal against a decision.

There is a need to recruit and retain sufficient Board members with the experience and skills needed to ensure cases are reheard in a timely and effective manner; and to ensure that those members have access to legal support where needed. This support will require additional resources.

As stated above, the Board would accept a new internal appeal process. The Board is confident in the decisions its members make. Whilst the Board accepts there is a case for the introduction of a new power to reconsider a case, we are concerned that a single problematic and complex case has precipitated a radical reform which has the potential to cause considerable uncertainty, delay and significant cost to the public purse and unfairness and unnecessary incarceration of prisoners who are no longer assessed to be a risk to the public.

It is hard to anticipate how many applications we might get each year under this new process. The internal appeals process provides a mechanism for a significant number of cases to be appealed, and even where that request is unsuccessful, it is highly likely that it will lead to the release of many prisoners being significantly delayed for weeks or months longer than is necessary for the protection of the public. This creates a real litigation risk. The Board has seen HMPPS data that suggests the median number of days between a parole decision and release is currently just 16 days. A new process will inevitably increase this. It may also lead to increased compensation payments.

As an alternative it may be worth considering introducing an exceptional discretionary scheme for legal aid to victims; and providing a simple power for the Chair of the Board to re-open a case where it appears necessary for the protection of the public; or following a procedural error. We understand that the Parole Board in Scotland has a similar power.

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The Parole Board for England and Wales