50 years of the Parole Board: a personal perspective

Speech by the Rt Hon Sir Brian Leveson, President of the Queen's Bench Division

Given at the Parole Board for England & Wales Members' Strategy Day on 18 July 2018

Introduction

1. It is a privilege to be asked to come along and address you today in this, your 50th year. I know that during your anniversary year, speeches have already been made and articles written by many, including Professor Hardwick. These have looked at where the organisation has come from and where it is going. Those erudite speeches and articles have added to our knowledge and understanding and I don't wish to go over the same ground. Instead what I wanted to do today was to give you a personal perspective.

2. I imagine some of you may have raised an eyebrow when you saw that I was a speaker today. Some of you may think in the light of a recent judgment that you know what I will say. While it would not be proper for me to discuss the reasoning in Worboys, or to get drawn into political discussion, there are themes and issues I think are important to address today.

3. I was asked to speak some considerable time ago, long before Warboys. After the decision, I did offer to stand aside on the grounds that, given the judgment, my presence could attract publicity or even opprobrium. The Parole Board is, however, made of sterner stuff and I was told that to turn the invitation down then would not be acceptable. In truth, however, I had very little hesitation in accepting the offer because

I thought any adverse reaction would, I hope, be far outweighed by the opportunity to shine a light on the difficult, important and – I am going to add the word brave – work that you do.

4. Locking people up – taking criminals off the street – is certain to make any judge the darling of the press and of large swathes of the public. Taking the difficult decision to release someone will not get you the same plaudits or pats on the back. These are always difficult, often thankless and sometimes controversial decisions you take; you are to be applauded for each and every one. When I became a judge, I took the judicial oath, that every judge takes, that I "will do right to all manner of people after the laws and usages of this Realm without fear or favour, affection or ill will." This resonates with what is asked of you and I will return to the importance of fear or favour later.

5. I did, however, want to start by talking about my personal experience of the Parole Board and the work you do. The Parole Board and I have grown up together. My career has not yet quite hit the "Golden Anniversary" mark but it is not very far removed. When I was called to the Bar in 1970 the Parole Board was in its infancy having been created by the Criminal Justice Act 1967 – beginning its work in April 1968. I would like to think that in the intervening years we have both grown, maturing as we have been exposed to the hard knocks that come when you are part of the criminal justice system (but I will let you judge who has aged better!).

6. Between 1992 and 1995 I sat as a member of the Parole Board: I was one of the last to be appointed as a judicial member of the Board holding only the part time rank of Recorder. It was very different in scope. We met at Abell House in John Islip Street. A panel of three dealt with the longer determinate sentences and everything was conducted on paper. The prisoner could make written representations but there was no oral hearing and reasons were not provided. We were provided with the dossier, came with our views and discussed them: I think we did some 14 cases in a day. Decisions could be by majority and I vividly remember the first occasion when I disagreed with the view of my colleagues and required my dissent to be recorded. Indeterminate sentences were assessed by panels of four (comprising a judicial member who chaired, a psychiatrist, a probation officer and an independent member – although we were all independent). The dossier was much fuller than for the determinate sentences and a helpful detailed summary was provided by the Home Office. Again, there were no oral hearings.

7. I have fond memories of my time on the board, and the difficulties of decision making which affects people lives. In particular, I recall discussing one lifer and turning to the psychiatrist and asking him to provide a view about risk. He said he was not in a position to do that: he could say how the relevant mental illness might develop but he could not say whether or not the prisoner would reoffend. That underlined a very important message that has stayed with me throughout my career. Neither a sentencing judge nor a parole panel employs or engages Mystic Meg and we simply can't see into the future. The Board will only be criticised when somebody who has been released (however

modest their offending) does something horrible. Nobody will count the times that the panel has made a decision and the offender has not re-offended – a success. You are not alone in this: judges who take a calculated risk and grant bail or do not imprison will not be lauded for those occasions when the defendant turns up without breaching his bail or, having been given a non-custodial option, does not reoffend.

8. You will have noted that I called it a success when an offender is released and does not re-offend. It is obviously a success for the panel that took the decision. I think, however, it is important for us to bear in mind that success, or failure, for the panel is not the real issue. Success is success for the individual offender. It means that they have been rehabilitated; that following their release they are playing a fuller, law-abiding role in society. It is also a success in a wider sense; one for our commitment, as a Society, to the rule of law.

9. By the end of my time on the board, oral hearings had become mandatory for discretionary indeterminate sentences and one member of the board would have interviewed the prisoner in private before the hearing. Reasons became compulsory – but they were expressed in a few sentences rather than with detailed analysis that you now provide. So the system developed and thereafter panels became compulsory for all indeterminate sentences and then, with a change to the remission provisions, for all sentences in excess of four years. It does not need me to explain how the system has evolved since then but it has developed so that there can be no argument but that the Parole Board exercises the judicial power of the State. There is, in truth, little difference

between the state deciding that an offender should be deprived of his liberty and the state deciding, within the parameters set by the court, that the risk to the public does not require that offender's continued detention.

10. Now that I have looked back – from a personal perspective – so that you can see how far the Parole Board has come in the last 25 years what about going forward? Some of the recent discussions have made me mindful of a couple of areas I think we need to guard and to ensure the public and media understand.

11. The first of these is the importance of the way in which the Parole Board make decisions. By this I do not prejudge the outcome of the Government's current consultation on the Parole Board. Matters of policy in this area are not for judges. At a fundamental level, however, Parole Board decisions should be treated with the same respect for integrity and independence as any other judicial decision. Independence is the bedrock of all that you do and should be the bedrock of the Parole Board. There should be no improper influence or interference, whether from the media, the public, or politics, in your decision-making process. Decisions should be, as I said earlier, made without fear or favour.

12. The second is that yours is an inquisitorial role and it always was. You are not confined to judge the respective merits of the cases put before you as in an adversarial system. You can and should, where you have concerns, call for such additional material as you believe will assist you to fulfil your statutory duty. When you have all the evidence you

require, however, you must take decisions as to credibility and all other features of the case in the light of the evidence that is before you.

13. This decision-making calls for judgment, for the weighing of evidence, the application of reason, and – perhaps most importantly, moral courage – the courage to take difficult, often very difficult, decisions. These are not administrative decisions that can be overturned by other areas of the executive. They should not be criticised because they are uncomfortable or inconvenient. We need to ensure that people understand the importance of your independence and I call on you to shout loudly if it ever appears to be under threat.

14. This takes me on to my third point. You take decisions which are, as you are now very well aware, justiciable. As we know, your decisions can end up before me or other judges sitting in the Administrative Court. Given that fact, it is important that the Board has the legal support it needs. You should not be afraid of asking for such resources to place your panels in the best possible position to take their decisions.

15. The final issue I want to talk about is transparency. Again I reiterate I do not intend to talk about how this issue should be addressed as I know that the consultation being undertaken by the MOJ is live until the 28 July and transparency is one of the issues. It is, however, a matter of public record that in Worboys I stated, when upholding the claimant's challenge to the vires of Rule 25(1) of the Parole Board Rules, I saw no obvious reasons why the open justice principle should not apply to the Parole Board in the context of providing information on matters of public concern to the very group of individuals who harbour such concern, namely the public itself. I believe that the

information can be readily provided in a manner which in no way undermines the Article 8 rights of the prisoner and the confidentiality which attaches to some of what is passed before you.

16. As a result of the judgment, legislation was quickly brought forward to remove the blanket prohibition against disclosure of information about Parole Board proceedings.

17. I know that for many of you, transparency will feel like a challenging step, in what is an already challenging environment. I think it would be strange if some of you did not feel resistant. I believe, however, that whatever people's view are on transparency care must be taken that we are not resisting this because it is uncomfortable. Let me quote Nick Hardwick who made a contribution to the Parole Board that should not be underestimated by anyone. In his lecture to the Butler Trust, *Parole 50 years and counting*, he put it like this:

> *"I don't accept that a good reason for not opening up the system is that the public or media might not like what they see. Even at present some of the decisions we make are subject to ill-informed criticism – but how could it be otherwise when we do not provide information about why we made a decision? If all the media have to go on are lurid accounts of a crime many years ago, and do not hear how a man or woman had changed or how their risk can be managed, we cannot complain if they do not understand the decision we have made."*[1]

18. Once again – fear or favour – do not be frightened of how you might stand up to the scrutiny that you think increased transparency might bestow upon you. In this we should

[1] Professor Nick Hardwick *The Butler Trust Lecture Parole 50 years and counting (*6 November 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657898/Butler_Trust_-_6-11-17_-_Nick_Hardwick_Speech.pdf

recall something I mentioned earlier in the context of decision-making: moral courage. Its importance goes beyond that. It underpins everything that a judge does. Lord Judge CJ described it this way,

> "*Judges must also have moral courage – it is a very important judicial attribute – to make decisions that will be unpopular whether with politicians or the media, or indeed the public, and perhaps most important of all, to defend the right to equality and fair treatment before the law of those who are unpopular at any given time, indeed particularly those who for any reason are unpopular.*"[2]

19. I have spent much of my career taking the risk that the public or the media might not like what I do. But I do it because I believe that it is the right thing to do, in the same way that you make your decisions. And I know that as I do it, I am open to scrutiny and public and media comment, whether informed or ill informed, because it such transparency and its consequences that are a fundamental aspect of our constitutional arrangements. Open justice and the scrutiny it gives both helps secure the integrity of decision-making but equally and essentially in a country committed to the rule of law enables the public to understand, engage with and debate what is being done. Bentham once said that transparency was the great antiseptic. It is. It is also a great promoter of the rule of law. It is something to be embraced. I well know from my experience serving on the Parole Board that moral courage – the courage to take difficult decisions – is never lacking. That same moral courage will, I have no doubt, come to the fore when the outcome of the consultation is known.

[2] Judge, *Diversity Conference Speech*, (London) (March 2009) (http://www.judiciary.gov.uk/docs/speeches/lcj-speech-diversity-conf.pdf) at 2.

20. The scrutiny levelled at the Parole Board post Worboys has been intense for you all and I am sorry about that. However unwelcome, such scrutiny is important. As individuals taking difficult decisions, it is important that the right level of scrutiny can be brought to bear on those decisions. And it is just as important that you demonstrate – as you all do – the moral courage to undergo such scrutiny. And as an organisation, the Parole Board is one of which you should all be proud. It is one of which we should all be proud; the service that you provide is of the greatest public importance.