

the **Howard League** for **Penal Reform**



Parole 4 Kids

A Review of the Parole Process
for Children in England and Wales

1. Introduction

The law requires more exacting standards of fairness on the part of authorities dealing with children than would normally be necessary or appropriate in the case of an adult. This report sets out the reasons why special mechanisms for a child going through the parole process should be introduced.

It will set out both the evidential and legal arguments for making such a distinction and will recommend some solutions to ensure a more child centred approach to the parole process. There are strong arguments to support these changes to bring the parole board into line with duties to ensure a child centred approach to children in the criminal justice process generally. At the present time the parole board has an underlying adult emphasis, and as such does not have a structure that enables it to take into account the particular needs of children who require additional support in order to participate in the parole process successfully. The consequence of this is that children may, through no fault of their own, spend unnecessary time in custody. This contravenes our international obligations to ensure that children are detained for the shortest possible period of time.

The lack of a child centred approach within the parole process is an anomaly in the criminal justice system as such an approach has been adopted in almost every other area, from the entitlement of appropriate adults in police stations to the establishment of youth offending teams. The parole board remains one of the only elements of the criminal justice system without any specific procedures that recognise the need for a different method when dealing with children.

2. The Case for a Separate Process

International Obligations

It has long been accepted that children (under 18) in the criminal justice system should be treated differently from adults, with common law obligations of fairness towards children informed by reference to the United Nations Convention on the Rights of the Child (“the Convention”) and the Beijing Rules. Article 3 of the Convention provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (subsection 1). Article 37b of the Convention sets out that any detention of a child should be for the shortest appropriate period of time. Detention for the shortest possible period must include aspects of release - as well as sentence.

Domestic Requirements

Under English law, a distinct approach can be found in the Crime and Disorder Act 1998, which provides for an interagency approach, with a focus on prevention, for children involved in the criminal justice system.

The Venables¹ case established that child defendants are entitled to understand and “effectively participate” in criminal proceedings, and this principle should also apply to the parole process. If a child is not able to understand the parole process, it is unlikely that any application he or she makes will be successful or fair, as acknowledged in the case of K –v- The parole board².

Installing an adequate parole process tailored to fit the requirements of children would do much to advance both our international and domestic obligations and ensure that, if children are detained for serious offences, there are adequate mechanisms in the parole process in place to facilitate their release at the earliest opportunity.

¹ **Venables v UK (2000) 30 EHRR 121**

² **The Queen (on application of K) and the Parole Board [2006] EWHC 2413 (Admin).**

This case was brought by the Howard League’s legal team.

3. Types of Sentences for Children that Require the Consideration of the Parole Board

There are four types of sentences that children can receive that attract the attention of the parole board. These are detention during Her Majesty's pleasure³, detention for life⁴, detention for public protection⁵ and an extended sentence for public protection⁶. These sentences can only be given in the crown court and apply to serious offences only. In all of these cases, there will be a point at which the child or young person becomes eligible for parole. It is only after that point that the child or young person can be released.

The first three types of sentence are 'indeterminate sentences'. The child or young person will only be released when the parole board decides that his or her risk can be safely managed in the community:

1. Detention during Her Majesty's pleasure is the only sentence available to the courts for a person convicted of murder who was under 18 at the time of the offence. The sentencing court will fix a minimum term, after which the child will become eligible for parole. Once the young person is released, he or she will remain liable to recall for life. This sentence remains rare.
2. Detention for life is similar to detention during Her Majesty's pleasure but applies to serious offences other than murder. This sentence also remains rare.
3. Detention for public protection is a sentence introduced by the Criminal Justice Act 2003 and can be passed where the offence is not serious enough to justify a sentence of detention for life. It is similar to the life sentences in that there is a minimum term, after which the child or young person becomes eligible for parole. It is different from the above sentences in that the child or young person, once released, must comply with licence conditions until the parole board agrees that the licence can be cancelled. The licence conditions will be set for a minimum of ten years. This sentence is designed to protect the public and can only be imposed if the child is considered to pose 'significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences' and an extended sentence (see below) is not sufficient to deal with that risk.

The fourth sentence that may require the intervention of the parole board is the extended sentence. This sentence is also designed to protect the public from young people who are considered to pose a risk of committing further specified offences.

³ Powers of Criminal Courts (sentencing) Act 2000, s90

⁴ Criminal Justice Act 2003, s226

⁵ Criminal Justice Act 2003, s226

⁶ Criminal Justice Act 2003, s228

This is a fixed sentence made up of two parts. The first part is a custodial period, during which the child becomes eligible for parole half way through the sentence. The second part is an extended licence during which time the young person can be recalled to custody if licence conditions are breached. This is the most common sentence that attracts parole passed on young people. The custodial part can be as little as one year so that the child becomes eligible for parole after just six months. If parole is not granted, the child will be automatically released on licence at the end of the custodial part of the sentence.

4. The Current Position of the Parole Poard and Children

Since the introduction of sections 226 and 228 of the CJA, there has been an increase on the number of children going through the parole process. Between April 2005 and December 2006⁷ around 50 children were sentenced under s226 of the CJA and 190 were sentenced under s228. This total figure of 240 children potentially represents approximately 1.2% of a total number of 19,402 parole cases handled during that year⁸. It should be noted that not all of these children will necessarily be going through the parole process as children and that some children may choose not to apply for parole. As such the proportion of child applications could be less than this.

Of those children with sentences that attract parole, it will be those who have been sentenced under section 228 (the extended sentence) that are most likely to be applying for parole while they are still children. It is often the case that children receive short custodial periods followed by long extended licences. In these cases the child becomes eligible for parole half way through the custodial term that can be as little as just six months after sentence. It is difficult to see how the board will be able to manage these cases fairly without setting up special mechanisms. It remains the case that the parole board dossier is required to be submitted six months before the parole eligibility date. This means that professionals working with the child have not had a chance to review and monitor progress to enable the board to make an informed decision. Further, at the present time, very few youth offending team workers are trained and experienced in dealing with the parole process, and there is no formal structure in place that offers support and advice to children who are embarking upon it.

⁷ See Hansard, House of Commons, Written Answers 5 Jun 2007: Column 390W

⁸ According to the Parole Board Annual Report and Accounts 2005/2006. These accounts do not distinguish whether the cases involve children or adults.

The volume of children being sentenced under sections 226 and 228 warrants attention, especially when put in the context of a parole board that already appears swamped by adult applications. Following the House of Lords decision in *Smith and West*⁹, the number of resource intensive oral hearings undertaken by the parole board has risen by 42% to 1,900¹⁰. This is set to rise again as the indeterminate sentences for public protection brought in by the CJA (for both adults and children) begin to filter through. In its 2005-2006 report, the parole board acknowledges that case law and legislative changes are turning it into an 'increasingly tribunal based organisation with responsibility for dealing with the most serious and dangerous offenders'¹¹. As such, it appears imperative that this process be separated into different channels for adults and children, not only to protect the rights of the child, but also to provide some organisational structure to the heavily burdened parole board. This could enable greater efficiency in dealing with child applicants. At the current time, there is no referencing system for child applicants; caseworkers and panel members are often not familiar with the nature of child custodial establishments or the duties owed by mainstream services to vulnerable children. Wider trends show a larger number of young people being detained, which undoubtedly impacts the level of exposure that they may have to the parole process¹². For example 2005/2006 saw the highest number of young people in custody since 2002/2003¹³. The present number of children in custody is 2935¹⁴.

⁹ *R (West & Ors.) –v- Parole Board* [2005] 1 W.L.R.350

¹⁰ This follows an increase of 31% the previous year. Please note there is no current information as to how many of the oral hearings involve children.

¹¹ Parole Board, News Release, 6 November 2006

¹² Youth Justice Board, Annual Report and Accounts 2005/06, YJB 2006 p 33

¹³ Youth Justice Board, Annual Report and Accounts 2005/06, YJB 2006 p 33

¹⁴ Youth Justice Board, figures as of 30th November 2007

5. Recent Developments: The K Judgment and Procedural Steps in the Parole Timetable

Consideration of the parole timetable¹⁴ and the recent case of 'K', demonstrates the inadequacies and deficits apparent in the current parole system for children. The K judgment highlights the apparent alienation of children going through parole and the board's failure to give K a fair hearing, since he was not given the assistance of an adult in the preparing his application for parole, or advised that he could apply to have an oral hearing.

The K judgment sets out the inherent problems in applying an adult parole process to a child's application. As Mr Justice McCombe commented, K was only 14 years old at the relevant time, and yet his application was treated as simply routine, despite the fact this application concerned the liberty of such a young person. Throughout the K judgment it is repeatedly shown that, despite his young age, no reference was made to any possibility of the board holding an oral hearing or the availability of any assistance to the child applicant in making representations.

In fact, K had been given minimal guidance in understanding the parole dossier and was given absolutely no assistance at all in formulating his representations. K simply wrote out his letter to the parole board without any assistance at all, and as Mr Justice McCombe set out, this failure to assist him rendered his right (as a 14 year old) to make representations 'nugatory'. The judge went on to suggest that the Convention on the Rights of the Child must envisage that the opportunity to be heard be rendered effective by the provision of appropriate adult assistance where possible.

Another critical error highlighted by the K judgment was that the parole board considered that it could make a decision on the papers supplied by K and nothing else, despite his young age. Indeed, while the parole application form handed to K gave him the clear impression that a member of the board would visit him before a decision was taken, this never happened, and crucially no one explained to K the reason why. This signals a failure to involve a child as an active participant in the parole application and a failure to ensure that the child has a sufficient understanding of the process.

The judgment also addressed the failure of the board to indicate K's right to ask for an oral hearing. This right is summed up by Lord Slynn in the West¹⁵ case, who stated that "on any view the applicant should be told that an oral hearing may be possible¹⁶". The failure to ensure that a child is aware of his or her right to request an oral hearing and to assist that child in explaining why he or she meets the criteria for an oral hearing disadvantages young people going through the parole process. It is certainly arguable that, given the young age of the applicants, a face to face meeting is surely advisable if not imperative to ensure their application is properly considered and the board has an opportunity to deal with any particular points that may be troubling them.

¹⁴ As set out by the Timetable for determinate sentence parole review (PSO 6000 Chapter 5 Appendix B).

¹⁵ R (West & Ors.) –v- Parole Board [2005] 1 W.L.R.350

¹⁶ R (West & Ors.) –v- Parole Board [2005] 1 W.L.R.350

6. Additional Considerations for Children: the Role of Other Agencies and the Assessment of Risk

The parole board's primary consideration is always the risk that a child may pose in the community if released. It is often the case that a child's risk on release will be heavily dependent on the support that child will receive from family and/or statutory agencies in the community and whether or not the child has safe and suitable accommodation to live in. Therefore, it is essential that the board is fully aware of not only the support the child will receive from the youth offending team, but also from other agencies such as social services and health workers.

It is often the case that children in custody will be entitled to help and assistance from their home social services on release under the Children Act 1989. Unfortunately, it is also often the case that children in custody do not receive assistance from their home social services who should be in a position to assess the child prior to release and provide suitable accommodation and support under the Children Act 1989¹⁷.

Without rigorous representation or concerted efforts by panel members to ensure that other agencies are involved and engaged with the child by way of enforceable directions, there is a real danger that children whose risk could be managed in the community with additional assistance will not be granted parole. Urgent action is required to ensure that those involved with the parole process are fully aware of the potential role that statutory agencies can play in a child's resettlement plan.

It is also the case that the risk assessment tools for assessing children do not appear to be as developed as those for adults. It is well known that there is a problem with the Asset tool¹⁸ being completed inconsistently throughout the secure estate. While all children sentenced under sections 226 and 228 of the CJA should have a 'risk of serious harm' asset completed, this is not always done and the form does not appear to provide a risk score. The absence of a consistent and reliable risk assessment tool makes it harder for the board to grant parole on an informed basis. It is not the case that considerations as to risk posed by children parallel those posed by adults. As the case of Lang¹⁹ in the court of appeal reminds sentencers, children may 'change and develop...within a shorter time than adults' and that 'their level of maturity may be highly pertinent when assessing what their future conduct may be and whether it may give rise to significant risk of serious harm.' This suggests that the parole board will need to apply a different set of criteria when considering the risk posed by children as opposed to adults.

¹⁷ For a more considered study of this area, see **Chaos, Neglect and Abuse, The Howard League for Penal Reform, 2006**

¹⁸ **Asset is a structured assessment tool to be used by YOTs in England and Wales on all children who come into contact with the criminal justice system**

¹⁹ **R v. Lang & 12 others (2006) 2 All ER 410**

7. Possible Ways Forward

Given the issues highlighted above, it is clear that much needs to be done to ensure a child centred approach within the parole process. This could be achieved with the installation of special mechanisms, put into place to distinguish a child's application from those of adults.

i. Designated Caseworkers at the Parole Board to Deal with Child Applicants

The creation of designated caseworkers at the parole board to deal with child applications. This would reduce inequality that young people face coming through the parole process that is presently demonstrably inadequate and - as the K judgment indicates - possibly unfair. A designated reference system should also be introduced urgently.

The first stage in redressing the balance in favour of the child would be to minimise the extent that a child's parole application is hampered by maladministration. As this paper has shown, the parole board is currently swamped with adult applications and so there is a strong case for separating child applications from adult applications. This will not only have a beneficial impact upon the child, but assist the parole board by ensuring it complies with its obligations towards children.

Further, it is arguable that the current parole process is bogged down in delay, which is a grave concern where child detention is concerned. In order to uphold the maxim of the Convention whereby a child is only detained for the "shortest appropriate time¹" it is imperative that they are not subject to these delays within the system, but rather fast tracked through it.

ii. Training for YOTs Including Informing Children of their Right to Legal Representation

It is also essential that a child receives adequate adult support whilst making his or her representations to the parole board, so as to receive effective guidance. This should include specialist training for YOT workers to ensure that they understand what is needed at this key juncture. More resources should be channelled into training and development in this area so that every child who is going through the parole process can be confident that their YOT worker understands the parole process and is able to explain it to the child and complete the necessary paperwork properly and in time. However, the role of the YOT cannot be a substitute for legal representation as there could be an inherent conflict of interest given the YOT's role of reporting to the board as to whether parole is recommended. Having said this, YOTs could ensure that a child is aware of his or her right to legal representation and that assistance is provided in ensuring children can access legal advice. It is notable that a letter to the Howard League for Penal Reform from the parole board's chief executive dated 3rd August 2007 states that of 32 cases of children going through the parole process that had been traced, only four of these were represented. All four children were represented by the Howard League legal team.

²⁰ United Nations Convention on the Rights of the Child, Article 37b

iii. New Guidance for Children

Special guidance should be introduced for children to ensure that they are aware of their right to legal representation and their right to apply for an oral hearing. If the board is not going to visit children in detention prior to considering their application, they should not be sent notices stating that such a visit will take place. Given that the K judgement inferred that the parole board did not even address his suitability for an oral hearing, despite K being just 14 years old, it appears that the most vulnerable detainees are not in a position to take up opportunities that would benefit them the most. Guidance could be produced with the assistance of children who have been through the parole process to ensure that it is 'child friendly'.

iv. Training for Panel Members Considering Child Applications

Given the distinct difficulties faced by children going through the parole board process, and the distinct considerations that should be taken into account when considering a child's risk as opposed to an adult, panel members dealing with child cases should receive special training to ensure that child applications are appropriately dealt with. Training should include not only the legal test for considering a child's risk and an understanding of the risk assessment tools used for children, but also relevant aspects of the UN Convention on the Rights of the Child and duties owed to children under the Children Act 1989 (see above). Each panel considering the application of a child should include at least one member who has undergone the training

v. Procedural Changes for Children

Given the matters set out above, the parole board should produce internal guidance, setting out a presumption in favour of an oral hearing for children. Further, the manner in which these hearings are conducted should be child friendly - for instance, the hearing should comply with the guidance set out in the Venables case by ensuring that the child is able to take regular breaks and is able to understand the proceedings. For complex cases, if appropriate, it should be possible to convene a case management hearing to deal with problems concerning up to date reports and witnesses. Such a meeting could be chaired by one member of the panel that is to hear the case. A further advantage of setting a presumption that children are to have oral hearings would be that child applicants are less likely to be prejudiced by delay. A large number of child applicants are sentenced under the extended sentence and have an automatic release date. Deferrals for oral hearings will often bring the child extremely close to the automatic release date, thereby depriving the child of a timely and lawful consideration of his or her suitability for release. It is understood that the new intensive case management system has been designed to alleviate delays and deferrals – all the more reason that child applications should have a unique place within that system. Further, as children are entitled to legal representation, steps should be taken at an early stage to ensure that child applicants and their families are aware of this and assisted in finding a solicitor with sufficient expertise to represent them. This, in turn, should help to ensure that the process runs smoothly.

vi. Stronger Powers for the Parole Board to Make Directions

Given the issues outlined above and, in particular, the importance of the role of other statutory agencies in determining a child's risk on release, it would be sensible if the board were to be granted stronger powers to direct reports and attendance of relevant witnesses.

For example, where a child will require the help and assistance of social services if release is to be manageable in the community, the parole board should have powers to ensure that relevant reports are prepared and that the social worker attends any oral hearing. Although the board can currently make any directions it chooses, it has limited powers to ensure its directions are enforced.

vii. New and Consistent Risk Assessment Tools for Children, Combined with new Criteria for Considering Risk, Should be Developed

As set out above, the current risk assessment tools are not satisfactory and there is no transparent set of criteria that suggests that the board takes into account different factors when considering children to when considering adults. The relevant tools and criteria should be developed and piloted.

8. Conclusion

Collectively, if implemented, these measures could go some way to ensuring that child applications are appropriately dealt with and ensuring that the parole board complies with its domestic and international legal obligations towards children.

As statistics indicate a growth in the number of young people being detained, it becomes increasingly important to adapt our current parole procedure to meet their particular needs and demands, to ensure that young people are not discriminated against in this very important juncture in the criminal justice system. Special mechanisms exist in virtually every other area of the law concerning children, and as such it is imperative that the parole board formulate and implement equivalent procedures of its own, thereby strengthening due process and eradicating the anomalous procedure of treating children's applications as merely "routine".

Not only does the current system undermine the government's international obligations that children should be in custody "for the shortest appropriate time" but ultimately it undermines public protection. The safe resettlement of a child leaving custody is both safe for the community and safe for the child and therefore must be seen as a priority if the parole board is to properly fulfil its role of protecting the public.

The Howard League for Penal Reform works for a safe society where fewer people are victims of crime

The Howard League for Penal Reform believes that offenders must make amends for what they have done and change their lives

The Howard League for Penal Reform believes that community sentences make a person take responsibility and live a law-abiding life in the community

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