

Parole: Reflections and possibilities A discussion paper¹

By Professor Nicola Padfield, University of Cambridge

Summary

This paper explores current parole, and conditional release processes more generally. It suggests that the time is ripe for a fundamental re-evaluation of the concept of parole in England and Wales. The use of the term parole has evolved such that today it is normally used only to describe the limited range of decisions decided by the Parole Board. A description of the current release system, or processes, leads to an identification of what needs to change. The paper also briefly explores the history of parole in this country, since parole used to be available to a broader range of prisoners, and gives a few examples of how parole works in other jurisdictions. It argues that the system would improve **if** the prison and probation system prioritised helping prisoners come out of prison better equipped to avoid re-offending and **if** the parole process was focused on the rights of prisoners and not only on the protection of the public. The paper also imagines a somewhat different parole system that might emerge from answering a bigger, broader question: what if the sentencing process was seen to be dynamic and integrative, and if a Sentence Monitoring Court oversaw all release and recall processes?

1. Setting the context

England and Wales have the highest imprisonment rate in western Europe, and the highest number of people serving indeterminate sentences, by far.² It is easy to argue that prison is overused, not only for petty and persistent criminals, and but also for many *dangerous* offenders, whose stay in prison may be much longer than is necessary, fair or proportionate. It is more difficult to agree how we might turn back the tide. This paper starts with a focus on parole, but ends by arguing for a broader re-examination of the sentencing system or process.

1.1 A little history

The Criminal Justice Act 1967 made important changes in the law on the treatment of prisoners and the management of prisons. The Bill which became this Act was amended during its passage through Parliament to provide for a Parole Board, a small body of experts, to include a judge, a psychiatrist, a probation officer and a criminologist, to advise the Government on the release of prisoners, as a check on administrative release by the Home Office. Parliament's aim was both to reduce the prison population and to release prisoners at the 'best' time in their sentence to promote their rehabilitation.³ Local Review Committees were soon set up in every prison to review eligible cases (in essence, prisoners who had served a third of their sentence) and to report to the Home Office on their suitability for parole. The Home Office then referred the suitable cases to the Parole Board for advice before it, the Home Office, decided whether to release someone on licence earlier than the automatic release date (the two-thirds point of the sentence).

This new release system was frequently amended, and then fundamentally changed in 1991, when release became automatic at the half way point for those serving less than four years. The role of the Parole Board was thus reduced, and Local Review Committees were abolished. At the same time, Discretionary Lifer Panels (oral hearings) were introduced for the first time for post-tariff (the tariff is the minimum term imposed by the trial judge) discretionary life sentence prisoners. Over the next few years, the process was extended to other indeterminate, sentence prisoners. But the role of the Parole Board was further reduced by the Criminal Justice Act 2003, with release becoming automatic at the half-way point for all fixed-term prisoners.⁴ There have been many legislative changes since then, but, in essence, the Parole Board today is empowered to direct (and not merely recommend) the release of indeterminate life sentence prisoners once they have completed the minimum term or tariff imposed by the trial judge,⁵ and many of those recalled to prison during the licence (community) part of their sentence.

In the fifty years since 1967, so much has changed

- The prison population has risen enormously and continuously since 1967. It has doubled since 1993 (and on 9 March 2018, stood at 83,899 men women and children). This is in part because the criminal law has expanded, and more people are being sent to prison, but it is also because people are serving much longer sentences, and many are recalled to prison during their period on licence.
- In 1967, most prisoners were eligible to apply for discretionary parole after they had served one-third of their sentence.⁶ When the Criminal Justice Act 1991

removed discretionary parole for those serving less than 4 years, the Government estimated that there would be a reduction from 24,000 to 4,500 parole applications a year (see Wasik 1992:253). The Criminal Justice Act 2003 then removed discretionary parole for nearly all fixed term prisoners.⁷

- The number of prisoners serving a life sentence has increased enormously. In 1970, there were 566. By 1990, the figure had risen to 2,795. As at 30 June 2017, there were 10,600 (10,247 men; 353 women) indeterminate sentenced prisoners (serving life and Imprisonment for Public Protection (IPP) sentences) in the prison population.⁸
- In the last decade or so, the penal system has faced dramatic financial cuts. These have had a devastatingly negative effect on the extent to which the average prisoner can hope to access rehabilitative services and plan positively for their future.
- The Parole Board itself has expanded from fewer than 20 members to over 250, many of whom are not *experts*, but *independent* members. It is no longer simply an advisory body, but a body which also makes decisions on release. Forced in particular by decisions of the European Court of Human Rights and domestic courts,⁹ successive governments have made the Parole Board a little more court-like (oral hearings, written reasons), but they have also kept its role very narrow, focused on evaluating a prisoner's risk.

1.2 A discussion about parole or simply conditional release?

The term parole is normally used today in England and Wales in a narrow sense: the discretionary and conditional release by the Parole Board of prisoners, under probation supervision and on licence. Parole, in the sense of release by the Parole Board, only applies to a proportion of prisoners: mostly those sentenced to a sentence of life imprisonment (prisoners serving indeterminate sentences, including IPP). It also considers the burgeoning caseload of extended sentence prisoners¹⁰ and those recalled to prison during the licence or community part of their sentence.

There is also a need to explore parole in a second, wider, sense of the word. Everyone released from prison today, even those released automatically, is on parole in the sense that their release is only conditional.¹¹ They are being tested in the community and if their offender manager (OM, or probation officer) thinks that it is not working, they are liable to be recalled to prison. Recalls are either fixed (28 days) or standard term (see <https://www.gov.uk/guide-to-probation/being-taken-back-to-prison> for more information). In the case of standard recalls, these prisoners are usually imprisoned until the Parole Board directs release or in the case of a fixed term sentence, it comes to an end. It is also worth remembering that the Justice Secretary also has powers of executive release with regard to fixed term prisoners and that the number released is often higher than that by the Parole Board.

Thus, when the Parole Board was set up, it was required to give a view on most release decisions. Now most prisoners are conditionally released automatically at half time regardless of the progress that they may have made in prison. I shall argue that the parole system should be seen to extend to all conditional releases from prison (including those currently authorised by the prison authorities).

2. Where are we now? Current release processes

2.1 The parole process¹²

Today the parole board deals with lifers, release of extended sentenced prisoners and recalls of both fixed and indeterminate sentenced prisoners as well as advising the Justice Secretary on prisoners suitability for open conditions. Parole processes which involve the Parole Board are primarily governed by the Parole Board Rules 2016 and the *Generic Parole Process for Indeterminate and Determinate Sentenced Prisoners* (PSI 22/2015). The case of an Indeterminate Sentence Prisoner (ISP, or lifer) enters what is called the generic parole process (GPP) 26 weeks before the date on which the Parole Board expects to list the case for hearing. Six weeks before this period starts, the Public Protection Casework Section (PPCS) of Her Majesty's Prison and Probation Service (HMPPS¹³) completes the prisoner's core file, or dossier,¹⁴ and advises the prisoner of the start of their *parole process*, together with their right to instruct legal representatives. During this 26 week GPP period fresh reports are written and disclosed to the prisoner. Somewhat ironically, the efficiency of the process means that by the time a case comes to be heard, reports are very often 6 months out of date. So, dossiers have to be updated in the final weeks or days before the hearing.

It is unclear who really runs the process. Although the Parole Board is often described as an independent court or tribunal, and it is the Secretary of State who refers cases to it. In the case of indeterminate sentences in somewhat peremptory tones, the referral document reminds the Parole Board of the limits of its role: they may only direct release, or recommend that a prisoner be transferred to an open prison:

In any event, the Board is not being asked to comment or to make any recommendation about the security classification of the closed prison in which the prisoner may be detained; nor any specific treatment needs or Offending Behaviour work required; nor on the date of the next review.

This begs many questions. Why does the Government initiate a prisoner's review, and not the Parole Board or, indeed, the prisoner? Why is the Parole Board's role so limited?

Every case is reviewed by a single Parole Board member using the Member Case Assessment (MCA) process: in particular, the key decision is whether the prisoner should have an oral hearing. Where the case is decided on the papers, and the decision is that the prisoner remains in custody, the prisoner has 28 days to make representations (although again not in person) for a further review at an oral hearing. In 2016/17, only 536 (56%) of requests for oral hearings were granted. Oral hearings may be heard by one, two or three Parole Board members. The MCA member may specify the number, and whether the panel should be a face-to-face oral hearing or via video link with members at the Parole Board's London headquarters in the Ministry of Justice, and whether a specialist (usually a psychiatrist or psychologist) should be on the panel. Otherwise the panel will be assembled by administrative staff – some Parole Board members are keen to sit as much as possible, others (notably the judges¹⁵) have very limited availability.

Video-hearings are different in numerous ways, and, I would suggest, a poor substitute for a face-to-face hearing. They impose additional stresses on all parties; in part due to the constraints of often unreliable technology and by a rigid timetable. They are complex three-way videos: prisoner and their legal representative in prison; the OM/probation officer in their office; and, the panel in a small room in the Parole Board's headquarters. The video isolates members both from face-to-face contact with prisoners, and also from the context in which they are living. It may be that panel members who spend less time in prisons are less sensitive to the real difficulties that a prisoner has in proving they are a 'changed person' when surviving the reality of life on the wings.¹⁶

Parole hearings are not open to the public. They are more inquisitorial than the usual criminal trial, with witnesses (usually just the prisoner, his or her community-based OM and prison-based Offender Supervisor (OS)) questioned in turn, and often at length, by panel members each of whom is likely to ask questions. The prisoner's legal representative may then ask questions, but their questions are often few and brief, as the panel's questioning will have been exhaustive. The panel chooses the order of witnesses.¹⁷ The legal representative makes closing submissions. At the end of the hearing, if it has not been adjourned or deferred,¹⁸ the panel is likely to reach a quick consensus. They usually hear two cases per day. The chair later drafts the decision, in the form of a letter to the prisoner, sent within 14 days of the hearing.¹⁹

In 2016/17, the Parole Board held 7,377 oral hearings (of which only 5,165 were completed). 2,468 (48%) prisoners whose oral hearings were completed were released, the release rate being much higher for recalled prisoners (39% of cases) than for first time releases. But it is impossible to evaluate whether decisions are *right*. Undoubtedly many prisoners are hugely disappointed not to be released or recommended for a move to open conditions. Others, who are released, might have been safely released many years earlier.

All indeterminate sentence prisoners have a tariff fixed by the initial sentencing judge, and will not be eligible for release until they become post-tariff. There is no way that the minimum term can be reduced, once the initial appeal process, and any application to the Criminal Cases Review Commission, has been exhausted.²⁰ Even post-tariff, the threshold for release is very high, with the result that prisoners may face a series of hearings, often with several years between each of them. The main factors which result in a prisoner not being released on tariff are:

- **A weak release plan.** The Parole Board cannot confidently release someone if their OM, based in the community wherever the prisoner was originally sentenced (which may have little or no relationship to where the prisoner's family or social ties are to be found) has not prepared a realistic and robust release plan. OMs are often in a difficult position: they rarely know the prisoner well, and the prisoner may not be intending to settle in their area. It can be hugely difficult finding suitable accommodation for life sentence or prisoners whom the court has deemed to be dangerous and, a prisoner will not be released without it. Places in approved premises are in very short supply, may have long waiting lists and may not be the best place for someone seeking to avoid a criminal peer group.²¹ Prison based OSs, may or may not know the prisoner well, and they don't appear to have the

authority to drive forward sentence or release plans. They often content themselves with routinised (template) report writing.²²

- **The prisoner's behaviour.** Prisoners who fail to co-operate consistently with the authorities, and who fail to establish that they are seeking pro-social relationships are unlikely to impress the Parole Board. If illegal drugs are a risk factor, then a recent positive drugs test will be a strong negative. Proving that it is safe to release a long sentence prisoner in a difficult and unsafe environment (Chief Inspector of Prisons, 2017; Crewe, 2011; Crewe et al, 2017) is nightmarishly hard.
- **The Parole Board's governing rules.** The burden and standard of proof are critical tests. The Parole Board has to be satisfied that it is no longer necessary for the prisoner to be detained: it is not explicitly for the State to prove the necessity of detention.²³ The Parole Board is required to focus on questions of risk, and does so by looking at what happened in the index offence and on risk assessments based on past behaviour.²⁴ The threshold for release is very high.

Disappointed prisoners then start the long and unpredictable wait for another hearing. Soon after receiving the Parole Board's decision letter, the prisoner receives a more formal letter from Her Majesty's Prison and Probation Service's Public Protection Casework Section (PPCS) which both explains the Parole Board's decision, and informs them of what happens next. This letter lists key risk factors (up to 14, in my recent sample), stating bluntly that "The responsibility for addressing your risk reduction rests with you". It ends by identifying the next review period, stating that, for example, *your next parole review will start in December 2018 with a target for consideration by the Parole Board of June 2019*. Prisoners are well aware that this timetable routinely slips. Delays are unexplained: as prisoners commented:

"You wait two years and nothing happens"

"My target month for this up and coming Board was November 2016. As you can see that was 5 months ago and I've still not got a listing. My solicitor has informed me I was not on April's listings. She will be checking to see if I am on May's listing."²⁵

Alongside the uncertainties, perhaps the most shocking feature of the current parole process is the question of delay, particularly the high number of deferrals and adjournments (see endnote 17). The Parole Board's Annual Report 2016/17 reports that in that year there were 16,866 paper hearings, of which 3,127 were deferred or adjourned; of the 7, 2377 oral hearings, 2,212 were deferred. In February 2017, the National Audit Office published an investigation into the Parole Board.²⁶ This examined the backlog of outstanding parole cases, and how the Parole Board is addressing the problem. Of the 2,117 oral cases outstanding in September 2016, 13% were more than a year past their target date for a hearing. A further 16% were more than six months past their target date. The Parole Board listed 701 cases for oral hearings in September 2016, while the queue of cases waiting for a hearing date was 1,257. Once listed, 34% oral hearings were deferred, and more than half of these (21%) were deferred or adjourned on the day of the hearing. The oldest of the

outstanding cases in September 2016 had an original target date in 2009, with another 404 cases having target dates in 2015 or earlier.

What leads to deferrals and adjournments? The reasons are similar to the reasons which explain unsuccessful applications for release. It is easy to point a finger of blame in several directions:

- Report writers, particularly OMs and OSs (see above)
- Frequent changes in staff, the queue for courses, the lack of resources and failures to share information, both between staff and particularly with prisoners, all exacerbate the problem
- The Parole Board’s lack of authority to compel prison and probation staff to react more promptly to their requests and directions
- The prison and probation system, which appears to tolerate a culture of delay – no-one appears to be rewarded for helping a prisoner speed successfully through the system.

2.2 Non-parole release

Determinate (fixed-term) sentence prisoners are released at the half way point in their sentence: this includes any time spent remanded in custody prior to sentence, and some credit is available for time on bail on electronically monitored curfew. Release dates are calculated by the prison administration.²⁷ As well, and on top of this, prisoners may be released up to 135 days before that half-way point on Home Detention Curfew (HDC),²⁸ on a tag or electronic monitor. The HDC process is run administratively within whichever prison the prisoner is currently held.

All prisoners are now released on licence (with conditions). The numbers are not small. Table 1 (below) shows that 83,000 people were sentenced to imprisonment in 2016. A few will be released straight from court, having served the appropriate length of sentence whilst on remand.

Table 1: Numbers of defendants sentenced in 2016

	Crown Court	Magistrates Court
(Immediate) Custody	39,507	43,452
Suspended sentence of Imprisonment	20,794	33,938
Community order	6,598	95,789

Source: *Criminal Justice Statistics* (2017) taken from figure 1
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614414/criminal-justice-statistics-quarterly-december-2016.pdf

2.3 The realities of living on licence

Licence conditions are both onerous and vague. They vary a little according to whether the prisoner is on HDC or not, but in essence a standard licence looks like this:²⁹

1. Under the provisions of Sections 244-253 of the Criminal Justice Act 2003 you are being released on licence. You will be under the supervision of a probation officer or a social worker of a local authority social services department and must comply with the conditions of this licence. The objectives of this supervision are to (a) protect the public, (b) prevent re-offending and (c) achieve your successful re-integration into the community.
2. Your supervision commences on _____ and expires on _____ unless this licence is previously revoked.
3. On release you must report without delay to

Name:

Address:

4. You must place yourself under the supervision of whichever probation officer or social worker is nominated for this purpose from time to time.
5. While under supervision you must:
 - (i) be of good behaviour and not behave in a way which undermines the purpose of the licence period;
 - (ii) not commit any offence;
 - (iii) keep in touch with the supervising officer in accordance with instructions given by the supervising officer;
 - (iv) receive visits from the supervising officer in accordance with instructions given by the supervising officer;
 - (v) reside permanently at an address approved by the supervising officer and obtain the prior permission of the supervising officer for any stay of one or more nights at a different address;
 - (vi) not undertake work, or a particular type of work, unless it is approved by the supervising officer and notify the supervising officer in advance of any proposal to undertake work or a particular type of work;
 - (vii) not travel outside the UK, the Channel Islands or the Isle of Man except with the prior permission of your supervising officer or for the purposes of immigration deportation or removal;
 - (viii) additional licence conditions.
6. The Secretary of State may vary or cancel any of the above conditions, in accordance with Section 250 of the Criminal Justice Act 2003.
7. If you fail to comply with any requirement of your probation supervision (set out in paragraphs 3, 4 and 5 above), or if you otherwise pose a risk to the public, you will be liable to have your licence revoked and be recalled to custody until the date on which your licence would otherwise have expired. If you are sent back to prison and released before the end of the licence period, you will still be subject to supervision.

Signed:

Status:

Date:

for the Secretary of State

This licence has been given to me and its requirements have been explained.

Signed:

Date:

As well as the standard licence conditions, additional ones are common and may include:

1. electronic monitoring
2. drug testing
3. polygraph testing
4. residence at a specified place;
5. restriction of residency;
6. making or maintaining contact with a person;
7. participation in, or co-operation with, a programme or set of activities;
8. possession, ownership, control or inspection of specified items or documents;
9. disclosure of information;
10. a curfew arrangement;
11. freedom of movement;
12. supervision in the community by the supervising officer, or other responsible officer, or organisation.

The reality of supervision and support/rehabilitation in the community has long been subject to much criticism. In particular, the systemic failure to join up the implementation and management of the custodial part of a sentence with the period served in the community might be highlighted.³⁰ The coalition Government 2010-15 put a certain energy and investment both into through-care³¹ and into privatising probation services. Major changes took place in the spring of 2015, largely under the umbrella of the Offender Rehabilitation Act 2014.³² These have not yet proved to be anything which might be called a success. Many prisoners are now supervised on release not by the National Probation Service (NPS), but by a Community Rehabilitation Company (CRC), some of which are private companies, some owned by large international companies, others voluntary organisations (see Padfield, 2016). A 2016 HM Inspectorate of Probation and HM Inspectorate of Prisons *Inspection of Through the Gate Resettlement Services for Short-Term Offenders* was blunt: the “strategic vision for Through the Gate services has not been realised” and that CRCs’ efforts were “pedestrian at best” (HMIP 2016: 3).³³ The report raised concerns about high rates of reoffending and recall; that the needs of individual prisoners were not being identified in prison and not enough was being done to help prisoners get ready for release; the level of communication between staff in prisons and the community was poor; that prisoners had little sense of involvement in the plans for their resettlement; and, there was very little integration between services in prison and in the community. The message of the follow up inspection in 2017, *Through the gate resettlement services for prisoners serving 12 months or more*, was even more shocking:

Clearly there is more time for resettlement work with these prisoners, but CRCs are making little difference to their prospects on release. We found them no better served than their more transient fellow prisoners were some eight months ago. The overall picture was bleak. If *Through the Gate* services were removed tomorrow, in our view the impact on the resettlement of prisoners would be negligible... None of the early hopes for *Through the Gate* have been realised. The gap between aspiration and reality is so great, that we wonder whether there

is any prospect that these services will deliver the desired impact on rates of reoffending (HMIP 2017:3).³⁴

Short-term prisoners, sentenced for an offence committed on or after 1 February 2015 to a custodial term of more than one day but less than two years, are now subject to an additional period of statutory supervision in the community after their licence period ends. This post-sentence supervision period tops up the licence period to make a total of 12 months' supervision after release. Any sanctions (including breach action) during the post-sentence supervision period can only be dealt with by the courts.³⁵ This new system results in disproportionate sentences: the shorter the sentence, the longer the period of post-sentence supervision.

Living under supervision can be both hard and burdensome. It is not simply a question of accessing support: public protection lies at the heart of supervision. For example, thousands of ex-prisoners are subject to Multi Agency Public Protection Arrangements (MAPPA), the process through which the police, probation and prison services work together with other agencies to assess and manage violent and sexual offenders in the community. It is a system of sharing information and combining resources to maximise the risk management in place for each individual offender. The fragmentation of support services and the privatisation of probation services are unlikely to prove helpful.

2.4 Recall

Release on licence is far from unconditional. Those who breach their licence conditions, even for seemingly trivial matters, are liable to recall to prison. It is not necessary for there to be allegations of further offences, simply breach of the existing licence conditions, which includes the vague condition to be of *good behaviour and not behave in a way which undermines the purpose of the licence period*. Recall is initiated by probation service/CRC staff, and must be authorised by a senior manager. The recall documentation is sent to the Ministry of Justice's Public Protection Casework Section (PPCS), which ensures that the dossier is disclosed to the prisoner and that the recall is reviewed by the Parole Board (unless executive release is applied). PPCS is responsible for the re-release of fixed term (FT) recalled prisoners, who may be recalled for 14 or 28 days, and may also re-release standard recall (SR) prisoners, who are recalled until their sentence end date. In 2016/17, 2,595 recalled prisoners were subject to executive re-release by NOMS, and 1,891 recall cases were considered by the Parole Board (Parole Board 2017:25-6). In 2016/17, 39% of the Parole Board's oral hearings concerned recalled prisoners (compared with 24% in 2012/13). There have been no published studies on how PPCS exercises its power of re-release. It refers all extended and life sentence cases to the Parole Board for review, as well as all SR prisoners who have not been re-released by day 28 of their return to custody.

Where the risk of reoffending is imminent, recall may be understandable. Should there be reasonable suspicion that a further offence has been committed, remand to custody for this new offence may be required, but not necessarily a recall. Generally, recall should be a last resort. As the official advice puts it, recall "is a final option for cases where the RoSH (risk of serious harm) can no longer be managed in the community or where the offender is out of contact or presents an imminent risk of re-offending. As now, practitioners should be looking for creative and responsive ways

to secure compliance short of recall (whether in the form of additional restrictive measures or supportive protective measures)” (PSI 30/2014; para 2.3).

The number of prisoners recalled is very high. In the first quarter of 2017, 5,347 people were recalled to prison (a 3% increase compared to the same quarter in 2016). In the past year, the recalled IPP population has grown by 22% (to 760).³⁶ It is important to realise that even if (especially if?) the Parole Board continues to increase the number of prisoners it releases, the number who will be recalled is likely to increase.³⁷ Many of those who are recalled are serving short, fixed term, sentences: those who were released administratively.³⁸

The position has been made much more complex by the creation of CRCs. In theory, the NPS supervises high, and very high, risk cases, and the CRC, the medium and low risk cases. But risk is highly dynamic and may fluctuate. When someone is being supervised by a CRC, it is CRC staff who will take the decision to initiate recall, especially in those cases where there is no increase in the risk of serious harm to high, but they must also consult the NPS where appropriate. They forward the recall request and supporting documentation directly to PPCS. It appears a clumsy process.

2.5 Suspended sentences and community orders

So far the focus has been on parole or release for those serving custodial sentences. But widening the lens, perhaps it is pertinent to discuss the increasing number of custodial sentences which are suspended from the start: this has risen by 68% in the last decade (Ministry of Justice 2017). This facilitates a re-thinking of the way these sentences, as well as ordinary custodial sentences, are implemented and managed.

Table 1 (above) identifies the rising number of suspended sentence orders (SSOs). It is a curious sentence: as the Sentencing Council explains in its guideline to sentencers: “A suspended sentence MUST NOT be imposed as a more severe form of community order. A suspended sentence is a custodial sentence. Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available. If not, a non-custodial sentence should be imposed.”³⁹ Thus, even though convinced that the sentence definitely crosses the mysterious custody threshold (see Padfield 2011) the sentencer can still find reason to suspend the sentence. The Sentencing Council identified three factors that may make it appropriate to suspend a custodial sentence: a realistic prospect of rehabilitation; strong personal mitigation; or the fact that immediate custody will result in significant harmful impact upon others.

Whilst the number of SSOs is growing, the number of community orders has declined. To the sentencer, they may look very similar, in both cases the court can attach one or more of a long list of possible requirements or conditions. Both sentences seem to involve a mixture of punishment, help and control: they can be tougher than an immediate short prison sentence in that they last longer (normally two years) and require an offender to face up to the consequences of their crime. Those who fail to comply with the requirements can be taken back to court to be re-sentenced. Imprisonment is a possible sanction, more likely of course in the case of a suspended sentence than in the case of a community order.

2.6. What needs to change?

The following conclusions can be drawn from this analysis of the current system:

- Many prisons are disgraceful, unsafe places. There can be no doubting that imprisonment is a brutal assault upon human liberty and offers a poor training ground on how to behave on release⁴⁰
- Sentence lengths have grown significantly in recent decades for no apparent reason or clear purpose
- Life sentence prisoners, in particular those serving IPP sentences, face disproportionate sentences: long periods beyond the original tariff
- Similarly, prisoners recalled to prison often serve disproportionate, and what might be seen as unnecessary, time in prison
- The penal system has multiple, and often contradictory, aims: protection of the public (and security) does not sit comfortably with rehabilitation
- Prison and probation providers do not work well together, and are currently poor at providing rehabilitation services. The reality of post-sentence supervision, or supervision by the probation services, is often inadequate
- The current bureaucratic system appears to tolerate a culture of delay and inertia
- Prisoners face unclear pathways through the minefield of the prison system. They are powerless in the face of an apparently uncaring and unpredictable system. Their sentence is shaped by decisions made about them and imposed upon them. As well as the original decision of the sentencing court, important decisions affecting the course and length of a sentence are taken by distant, anonymous prison authorities (allocation, categorisation etc.), as well as more visible prison authorities (incentives and earned privileges, access to courses, release on temporary licence, adjudications, HDC etc.), the Parole Board (some releases, more re-releases), the courts (appeals, judicial review). There is little that is systematic in the hierarchy of decision making. Legal advice is often not available, and even practical advice may be hard to access. Luck plays a significant part in a prisoner's progress e.g. in whether they find staff who have the time and commitment to champion their progress. Widespread variations in treatment undermine perceptions of legitimacy and leave prisoners feeling both frustrated and disaffected
- The Parole Board's narrow role does not empower it to lead the parole process, even for life sentence prisoners.⁴¹ It does not feel court-like in the sense of having the authority of an independent court.^{42 43}

Additionally, costs of the system might be identified:

- (i) The (unaffordable) cost to taxpayers: when prisoners stay in prison unnecessarily or when too much money is spent on managing the system rather than on work with prisoners following release;
- (ii) Justice and fairness: the cost to prisoners, and their families and friends;
- (iii) Effectiveness: the cost to victims and to society in having a system which is not truly focused on rehabilitation and on reducing the risk of re-offending.

3. Where do we want to get to?

3.1 What is the system for?

The challenge is that the penal system has multiple, and often contradictory, aims. Thus s.142 of the Criminal Justice Act 2003 provides that a sentencing court “must have regard to the following purposes of sentencing”:

- (a) the punishment of offenders
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

The Prison Rules 1999 state that “the purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life”. This simple statement would have been changed by the recent Courts and Prison Bill 2017 (which died with the general election of 2017), suggesting the purpose of prisons to be:

In giving effect to sentences or orders of imprisonment or detention imposed by courts, prisons must aim to -

- (a) protect the public,
- (b) reform and rehabilitate offenders,
- (c) prepare prisoners for life outside prison, and
- (d) maintain an environment that is safe and secure.

If the Government is either not prepared, or not able, to resource prisons to deliver against the majority of these objectives, is it appropriate to adopt these objectives? If we accept that one of the most important purposes of prisons, and probation, is the preparation of prisoners for life outside prison, there needs to be an acknowledgement that the current system is not fit for purpose. It is also worth pointing out that the current system makes little sense in terms of reducing re-offending, and pathways out of crime, or desistance from crime. Evidence from the academic research literature suggests:

- Future dangerous offences are enormously difficult to predict (Crassiati and Sindall, 2009; Padfield, 2011c).
- Most ex-offenders (even most persistent offenders) eventually desist, and they do so largely on their own initiative.
- Desistance is often a gradual, fragile, obstacle-strewn process, with many false starts.
- Treatment needs to be individualised to be effective, providing understanding and supporting pro-social relationships (Halsey et al, 2017).

The current Parole Board (2017), on the other hand, announced that its primary aim as: to protect the public, “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.” This narrow focus, I would suggest, lies at

the root of many of the problems with parole today. Whereas prisons have objectives they do not come close to realising, the Parole Board is straight-jacketed into just one. There may be two additional priorities that the Parole Board might fruitfully add: the reduction of offending and re-offending and the safeguarding of the rights of those detained.

3.2 Learning from history and from abroad

History, and a changing political climate, explains where we are today. Early release prior to 1967 was in the hands of the executive and so it remained even after the 1967 Act. The original Parole Board had few members, and the main preliminary work of assessing prisoners was done by Local Review Committees (LRC), one for each prison. The LRC was made up of the prison governor, a member of the Board of Visitors (now the Independent Monitoring Board), a probation officer and after-care officer, and an independent member. It would report to the Home Office which would then refer cases to the Parole Board, which in turn would advise the Home Office.⁴⁴ Since then, the Parole Board has been buffeted by court decisions and Parliament and become an entirely different creature. History explains how we got here, but not where we want to be.

Lessons may be learned from other countries, as well as from history, about the wide variety of possible release processes (see, for example, Padfield et al, 2010, for different European models; Rhine et al, 2017, on different US models). Different systems have evolved, of course, because of their different historical and political contexts. Many European countries have a more judicialised process. Herzog-Evans and Padfield (2015) explored the advantages of the French system of *juges d'application des peines* (JAPs), a system which has seen an increase in the judicial supervision of the implementation of sentences. For example, a French prisoner sentenced to any lengthy custodial term is able, after a period of time, to ask the supervising court, the *tribunal d'application des peines*, to reduce his *periode de sûreté* (minimum term). Why is it absolutely impossible to shift the minimum term in England?⁴⁵ Judicial monitoring of sentences is rare in England apart from the few drugs courts or problem solving courts. Yet it has obvious advantages. There is some evidence that discussion of, and involvement in, the drafting of proposed conditions in a judicial forum can encourage a prisoner to engage with and sign up to release conditions. Regular judicial monitoring keeps both the ex-prisoner and the judge at the heart of the conversation about how resettlement is going. In England and Wales prisoners have little involvement in the drafting of their licence conditions, and usually nothing to do with recall, until after they find themselves back in prison.

There is also a strong rule of law argument to learn from France. Since judges impose the original sentence, they should be responsible for implementing, changing, and monitoring them. The prisoner's capacity and desire to change is likely to evolve; after a period of time, a court should have the duty to review the appropriateness of the original sentence. Problem-solving courts, and indeed JAPs in France, appear to be better at focusing on the positive, on encouragement and on building confidence and hope. In my experience, French judges appear to believe that offenders can change in a way that is less obvious in England's less personal courts (Padfield, 2011b; also Donoghue, 2014).⁴⁶

The consequences of a sentence may well hang over someone forever, and sentencing should be seen as an ongoing process, not as a one-off event. Different aims (values?) may take priority at different times in the process. In England and Wales, at the moment, it might be argued that the priority aim of front-door sentencing is consistent, proportionate sentences, a desert-based, offence-based, system, where the judge calculates the correct sentence, adding an unspecified amount for those with relevant previous convictions and reducing a small amount for personal mitigation. During the implementation stage of the sentence, the focus turns to more instrumental concerns: the risk posed in the community as well as their rehabilitation. These two priorities may clash and prison and probation officers struggle to balance the competing interests of public protection and reintegration. These matters should be debated openly, not behind closed doors. Although sentencing is a lengthy process, important decisions are key events that should be aired during a judicial hearing.

The involvement of the judiciary may also protect the sentencing system from undue politicisation. Certainly in England and Wales, sentencing is highly politicised: sentences have grown hugely in recent years and as Lord Woolf said in the House of Lords recently, “very powerful forces, coming largely from Parliament, continually drive up sentences and there is no equally powerful force which has the opposite effect of reducing them”.⁴⁷ Might stronger judicial involvement in the implementation of sentences do something to reduce the prison population (see Aitken and Samuels, 2017)? The current Parole Board is not empowered to speak out; it is simply asked to evaluate risk.

The Scottish Parole Board carries out similar functions to its English counterpart, and faces similar problems including a growing recall population (since those on licence face the same challenges in Scotland including poor accommodation, unemployment, poor health and poor healthcare and addiction to drug and alcohol); deferrals; and, adjournments. But the Scottish Parole Board appears to be a somewhat more court-like body than its English equivalent. All panel hearings are chaired by a lawyer and the prison is always represented at the hearing. Of the Scottish Parole Board’s 30 members, 13 appear to be experienced lawyers and the majority of the other members have impressive criminal justice experience, in social work, prisons or probation.

3.3 Where do we want to get to?

Judges (and magistrates) should continue to impose sentences, giving reasons for the sentence and explaining the implications in open court. These sentences should then be kept under review. This paper accepts the concept of conditional release from prison,⁴⁸ but only if that release is early, within the parameters of the sentence imposed by the judge. Release is a vital transition to another stage in the sentence. Judges should review sentences and reduce them where appropriate. Release is a major event, and early release should be a celebration of successful progress towards rehabilitation. Maruna (2011) calls for reintegration rituals to help offenders cut their way away (*knife off*) from their criminal past and to help them reconstruct their biography and their future. Judicial involvement, the congratulations of a judge, might be important symbolically and psychologically.⁴⁹

Those who are not granted early release deserve a fair and sympathetic hearing, a legal process, with legal representation and written reasons. No-one should face post-sentence supervision: any compulsory supervision has to be acknowledged to be part of the sentence, and must not be disproportionate to the original offence. Given that conditions are inevitably burdensome, release with conditions on licence, should be regarded as part of the sentence. There must be sanctions for failure to comply with the conditions of release. But recall should be a measure of last resort authorised by a judicial body. Anyone recalled to prison should be re-released as soon as possible, given the prisoner's fundamental right to liberty.

4. How do we get there?

In this section, I present three ideas for improving the current system.

4.1 First proposal: What if ... *the prison and probation system prioritised helping prisoners come out of prison better equipped to avoid re-offending?*

There appears to be a general acceptance that through-care is a suitable ambition for both prison and probation. Yet there are significant failings in through-care and support and indeed a culture of delay within both prison and parole processes which needs to be challenged by the pro-active 'progression' of prisoners through the system. This should be achieved by changing both the law and the culture. The law should be clear that prison and probation staff should give priority to helping prisoners come out of prison better equipped to avoid re-offending. How is this to be done?

First, is the law. The primary purpose of prison and probation should be to help people to *lead a good and useful life* on release. This should be announced loudly in primary legislation, with Parliament taking the lead.

Secondly, there is a need to drive the culture of penal institutions, and of the currently fragmented probation services, towards rehabilitation and reintegration. It is too easy for those who lead, and for those who work at the coalface, to get used to the limitations and frustrations of the current system. For example, it is clear that reducing reoffending and integrated offender management is really difficult in prisons which are dreadfully understaffed, and unsafe places. The Prison Service has recently introduced a new OM in custody model (NOMS Annual Report and Accounts, 2016-17: 8): the key principles are that:

- the resources available should be targeted relative to the risks and needs presented and duplication is removed, in particular reducing the number of assessments;
- offender management to be effective and prisons to be positive places in which to work with a strong rehabilitative culture;
- relationships between prisoners and staff must be developed in order that they are supportive, yet challenging offering hope, encouragement and empowerment enabling prisoners take responsibility for their lives and their futures. Prison officers should play a key role;

- in order for good quality offender management practice to be consistently delivered, staff need appropriate training, skills and motivation. This requires investment; and
- governors are responsible and accountable for the quality of offender management delivered in their prison.

This is easy to announce but will be difficult to effect. The OM in custody model requires “a minimum of one senior probation officer will be based in prisons as part of the new model and will focus on driving up the quality of offender management through professional practice” (ibid:8). The Prison Service also acknowledges the positive role that families can play in supporting prisoners through their sentence and after release. How this will be effected (and monitored) remains to be seen. Change in the Prison Service, especially when prisons are in the depressing state that they are, will not be easy. Strong leadership from the Ministry of Justice is essential, and that’s why legislative change might be necessary to show that the Minister means business: putting rehabilitative responsibilities at the forefront of what the prison and probation services do.

4.2. Second proposal: *What if ... the parole process was focused on the prisoners’ rights and not only on the protection of the public?*

How can the Parole Board (or a new, stronger, more independent, version) be empowered to drive change? It should be a problem-solving court which prioritises sentence review and prisoners’ rights as well as the protection of society. Much could be done quickly to achieve this if there is political will.

In the case of those serving indeterminate sentences, there should be a clear burden of proof imposed on the State to justify continued detention beyond the minimum term imposed by the court of first instance.⁵⁰ The Minister of Justice already has the power under s.128 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 to change the test for release on licence of IPP and extended sentence prisoners. The Minister of Justice should take immediate action to do this: making it transparently clear what the test is, the burden of proof and pointing out that the longer a prisoner has served post-tariff, the more convinced the Parole Board should have to be of the imminent danger presented by the prisoner, which is preventing their (post-tariff) release. There should be a (reversible) presumption of release for post-tariff prisoners. And no-one should be detained under an indeterminate sentence for longer than the statutory maximum sentence for their offence. All those serving IPP sentences should have their sentences reviewed *now*. If there is anyone still in prison with a tariff of less than two years, this should either be immediately converted into a determinate sentence or they should simply be released on licence.

Then there’s the question of recall. The Parole Board may be powerless to stop the huge surge in recalls (many of those recalled to prison are not arrested on suspicion of further offending, but for a breach of their licence conditions). The police should arrest those who are an imminent danger to others but they should be taken before a court without delay for a judicial decision on this arrest. The judicial decision relates here to the arrest and the necessity of pre-trial detention. Whether the facts justify recall is a separate question.

As soon as one seriously considers the advantages of a strengthened Parole Board, it is but a small step to consider going significantly further and suggesting a parole system which encompasses the monitoring and review of all sentences.

4.3. Proposal for significant, strategic reform to the implementation of all sentences: *What if ... the sentencing process as dynamic and integrative with a Sentence Monitoring Court to oversee all release and recall processes?*

A new parole system should allow the regular review of every sentence. What sort of review should that be? One thing currently lacking is positive thinking. Being granted parole is a huge event. So is moving to an open prison or being released on licence, even temporary licence, or reaching the end of a period of licence or supervision in the community. So, sentencing reviews should celebrate success quite as much as they recognise failures. How can a system be developed that recognises success and builds upon an ex-prisoner's determination to lead a law-abiding life?

A more judicialised system should be advantageous to the prisoner, the public and the State. A coherent sentencing structure should include the decisions made at the point of initial, front-door, sentence (e.g. whether a person is fined or given a community sentence or a custodial sentence) but also the crucial decisions which are taken throughout that sentence, and at the end of that sentence. Padfield (2016c) explored five implications of a more judicialised system, which are summarised here:

- (i) it would lead to fresh debate (and perhaps greater clarity and coherence) about the *aims and purposes of sentencing*
- (ii) it would lead to *greater understanding of the real meaning of the sentence*
- (iii) It would lead overall to a *more credible, orderly and efficient system*
- (iv) It is a moral imperative that *the penal system should be fair and just*. Human rights are basic
- (v) A greater focus on the process of sentence might provoke *significant reform* of our messy sentencing law, which is to be found in a number of frequently amended statutes⁵¹ and in PSOs and PSIs. The Prison Act 1952 says very little, and is not fit for purpose.

It might even save money. Since sentencing is, in effect, a whole series of inter-connected decisions, the processes which links them needs joining-up. This is hardly an original thought. For example, Halliday's influential review (Halliday, 2001) argued that courts should hold review hearings to the review progress of community sentences and the community part of custodial sentences, deal with breaches of conditions etc., with power to order custody or return to custody for non-compliance. Complaints about the failure of the penal system to join up sentences led to Lord Carter's proposals to re-structure prison and probation "to provide the 'end-to-end' management of offenders, regardless of whether they are given a custodial or community sentence" (Carter, 2003: 34). This led to the creation of the recently abolished NOMS. Samuels (2004) argued for a system of review courts which would allow an offender to be more actively engaged in sentence planning. In this vision, the prisoner would be able to influence the time which must be served in custody, as well as the time on licence in the community, by complying in all

respects with the requirements of the offender manager. Justice (2009), more modestly, proposed a new Parole Tribunal, within the Tribunals Service, with an appeal to a dedicated chamber within the Upper Tier. Aitkin and Samuels (2017) argue for a new system which would enable sentencers, both full time judges and lay magistrates, to play a full and increasing role in enabling those who genuinely wish to turn their lives around, to desist from offending and to lead useful, pro-social and law-abiding lives. They argue (convincingly, to me) that judicial oversight of release and recall decisions could contribute to the reduction of the prison population, thus liberating more resources for supporting those who most need it.

The role of victims in parole decision-making has not been explored in depth in this Victims need to be respected throughout the sentencing process. When it comes to release, it is vital that victim input does not become so important as to overwhelm the primary considerations of the releasing authority. But the decision to release is as important as the decision to imprison, and should be taken by accountable judicial bodies, acting under rules that are clear to all participants, including victims (see Padfield and Roberts, 2010). This is another argument for a Sentence Monitoring Court.

How can this argument be taken forward? How do we effect change? All prisoners, and especially those serving long or indeterminate sentences, deserve to have their sentences regularly reviewed and monitored. Something needs to be done urgently to improve the rights of life sentence prisoners. The public also need a system which is intent on keeping prisoners moving forwards. The culture that allows those who impose sentences to remain distant from their reality must be challenged along with that which allows prison staff to think sentencing is someone else's problem; that allows governments to avoid responsibility to fund a coherent and fair system; and, probation staff to take the easy option of recall. How can the law be used to force the prison and probation system to give priority to helping prisoners come out of prison better equipped to avoid re-offending? Let's put the spotlight on a fair sentencing and parole system. A Sentence Monitoring Court might set the system running smoothly at last, perhaps it is the missing piece of the train track?

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Endnotes

¹ I am very grateful to the Howard League for inviting me to think along these lines, and to Nick Hardwick and Laura Janes for responding to a paper I presented to an invited audience at the What if we rethought parole? event in June 2017. They are of course not responsible for what is written here, but their contributions have forced me to think longer and harder. Thanks are also due to Anita Dockley, John Samuels and Dirk van Zyl Smit.

² As well as studying the Ministry of Justice's Offender Management Statistics, readers are encouraged to think about the regular analysis of these statistics in the Bromley factfiles of the Prison Reform Trust at <http://www.prisonreformtrust.org.uk/Publications/Factfile>

³ The Parole Board was created by s. 59 of the Criminal Justice Act 1967 to advise the Home Secretary on the release on licence of prisoners serving determinate sentences after they had served one-third of their sentence (subject to a minimum of 12 months) (see s.60), on the release of life sentence prisoners (see s.61) and the recall (i.e. the revocation of licences) of prisoners on licence (see s. 62). For a brief history, see Walker (1968).

⁴ This Act also introduced the Indeterminate Sentence for Public Protection (IPP) and the extended sentence.

⁵ There are 63 people in prison today who have been told that they will never be released (see the latest Offender Management Statistics at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/633154/offender-managemen-statistics-bulletin_-_q1-2017.pdf). These are the whole life tariff lifers: people who were told by the sentencing judge that their crime was so heinous that they should never be released. It was an enormous disappointment to those of us who think that everyone should have the right to hope for eventual rehabilitation and release, that the Grand Chamber of the European Court of Human Rights in *Hutchinson v UK* [2017] ECHR 65 shrank back from its earlier decision in *Vinter v UK* (2016) 63 E.H.R.R. 1. The majority disappointingly accepted the opinion of the Court of Appeal in *Attorney General's Reference (No.69 of 2013)* [2014] EWCA Crim 188 that whole life tariffs do not violate ECHR Art.3 (the prohibition on torture or inhuman or degrading treatment or punishment), because the very vague compassionate release provision of s. 30 of the Crime (Sentences) Act 1997 gives a prisoner a prospect of release and a possibility of review of the sentence. The strong dissents of Judge Pinto and Judge Sajo are much more convincing.

⁶ The original qualifying period was a 12 month sentence, but this was reduced to 6 months in 1984.

⁷ The exceptions today are those few remaining prisoners serving determinate sentences imposed under the Criminal Justice Act 1991 release regime (Discretionary Conditional Release, or DCR, cases); extended sentence for public protection (EPP) prisoners sentenced before 14 July 2008; prisoners given an extended determinate sentence (EDS) after 3 December 2012; and prisoners given a sentence for "offenders of particular concern" (SOPC) on or after 13 April 2015, who have committed a qualifying offence. The rules are highly complex.

⁸ For the latest statistics, see endnote 2. The earlier statistics are taken from Padfield and Liebling (2000:12).

⁹ For example, *Thynne Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666; (*Smith*) v Parole Board; *R (West) v Parole Board* [2005] UKHL 1; [2005] 1 WLR 350 *Osborn and Booth v Parole Board* [2013] UKSC 61.

¹⁰ The number of prisoners serving extended sentences is growing fast, especially since the abolition of IPP: 2,949 prisoners were serving extended sentences as at 30 June 2016, up 50% in a year; by 30 June 2017 the number had reached 3,824, up 30% in that year: see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541667/prison-population-story-1993-2016.pdf. These prisoners have an opportunity for parole only once they have served 2/3rds of their sentence.

¹¹ This is closer to the original meaning of the word, which derives from the old French concept of *parole d'honneur* – prisoners are released on their 'word of honour', and if they break their word, they are back in prison or otherwise punished.

¹² Much of what follows is taken from two reports I wrote for the Parole Board in 2016 and 2017, the results of an exploratory study: in the summer of 2016, I observed 19 cases listed for hearing by video-link at the Parole Board headquarters, at their 'hub', where cases are heard by three-way video link: prisoner and his/her lawyer and Offender Supervisor (OS) in the prison, Offender Manager (OM) at their probation office, and the panel sitting in the Parole Board headquarters. As well as observing hearings, I was able to interview Parole Board members. Then, early in 2017, I observed a further 17 cases listed for oral hearings at 11 different prisons, where I was able to conduct further interviews with a variety of participants in the parole process, including prisoners. See *Padfield, N. (2017)*

Parole Board oral hearings 2016 – exploring the barriers to release: avoiding or managing risks? Report of a Pilot Study [University of Cambridge Faculty of Law Research Paper No. 62/2017](https://www.cambridge.org/core/doi/10.1017/9781108888888); <http://ssrn.com/abstract=3081035> and Padfield, N (2017) *Parole Board oral hearings 2016-2017 – exploring the barriers to release, Stage Two of an Exploratory Study* [University of Cambridge Faculty of Law Research Paper No. 63/2017](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081039) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081039

¹³ HMPPS is an executive agency of the Ministry of Justice. Until April 2017, it was known as the National Offender Management Service (NOMS).

¹⁴ Dossiers are long (between 132 and 666 pages long in my recent study) and are now only distributed electronically, except to the prisoner who gets it in paper form. It should include a risk management plan prepared by the Offender Manager (OM) and may include a victim personal statement. A prisoner's 'reputation' is built up through the dossier, since report writers will often have read earlier reports.

¹⁵ Serving judges are limited to 15 days annually, of which 6 qualify as reading days; retired judges often sit more frequently.

¹⁶ Video hearings are being used now in many areas, from criminal trials (where the prisoner's lawyer will be in court, not with the prisoner) to regulatory hearings. Despite the significant concerns raised in what little research has been carried out (see Terry et al, 2010; Howden, 2015), there has been worryingly little debate and analysis of the impact of this development.

¹⁷ A common order is, first, the OS, who reports on the prisoner's current prison behavior, then the prisoner, and finally the OM, who leads on the release plan. But there are many reasons why panels choose a different order.

¹⁸ A deferral occurs where a case is adjourned, but the panel does not retain conduct of the case. The next hearing will start afresh. An adjournment is where the same panel retains the case: it is adjourned part-heard. Deferrals might happen because it only became apparent on the day that key reports were late (or even lost); because of witness unavailability or illness; or because the legal representative had not been able to meet with their client in advance. Adjournments, where a hearing had started but was not completed on the day, were in prison hearings usually because the panel decided they needed an additional report or more details on a proposed release plan; in video hearings, it was usually because of faulty equipment or timing issues.

¹⁹ Decision-letters are sent to panel members in draft, and may go through a series of revisions before they are agreed. They can appear inappropriately informal and verbose. But less formality is being experimented with elsewhere: Jackson J has been presenting novel judgements in the family court: see [2016] EWFC 9 and [2017] EWFC 48, where the judgement was written in the form of a letter to a 14 year old boy, explaining in straight-forward language why his application to live with his father was unsuccessful. It starts, "Dear Sam, It was a pleasure to meet you on Monday and I hope your camp this week went well. This case is about you and your future, so I am writing this letter as a way of giving my decision to you and to your parents..." The impact of the style of judgements and of decision-letters should be evaluated.

²⁰ Only those sentenced for murder when under the age of 18 can apply to have their minimum term reduced, to reflect exceptional progress whilst in custody. I would suggest that such a review should also be available to all offenders serving very long minimum terms after, perhaps, ten years.

²¹ A recent inspection concluded (<https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2017/07/Probation-Hostels-2017-report.pdf>), approved premises are 'exceptionally good' at protecting the public (90% of residents are assessed as posing a high or very high risk of serious harm). But the inspectors were much less impressed by the quality of resettlement and rehabilitation services on offer. There are not enough hostels in the right places: about half of all residents were not placed in their local area. Out-of-area residents do not meet the criteria for accessing local resources and they are not motivated to make the best use of their time at the hostel.

²² Increasingly, the OS is a prison officer, not a probation officer, with a very large caseload and important duties relating to prisoner management and safety on the wings. Budgetary cuts may mean they have little time for report-writing.

²³ s. 28(6) of the Crime (Sentences) Act 1997 applies to all life sentence prisoners for whom a minimum term has been fixed: (6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless— (a) the Secretary of State has referred the prisoner's case to the Board; and (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. This paper argues that the default position for post-tariff lifers should be liberty: the burden should be on the state to prove

the need to detain the prisoner, and that the burden on the state should be higher the longer the prisoner is beyond his or her tariff.

²⁴ The threshold of risk remains fuzzy. The 2004 Directions which the Secretary of State gave to the Parole Board specify that “The test to be applied by the Parole Board in satisfying itself that it is no longer necessary for the protection of the public that the prisoner should be confined, is whether the lifer’s level of risk to the life and limb of others is considered to be more than minimal”.

²⁵ Correspondence from spring 2017. It is clear from the rest of the letter just how intensely this prisoner is awaiting his ‘day in court’ and the pain caused by the wait to hear from his solicitor about a date seems unacceptable.

²⁶ Available at <https://www.nao.org.uk/report/investigation-into-the-parole-board/>

²⁷ A challenging task, given the complexity of the current law: as Lord Judge said (in *R. (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30): “It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be, both for the prisoner herself, and for those responsible for her custody, the prison authorities, the simplest and most certain of questions--the prisoner’s release date” (para.87).

²⁸ Prisoners must meet the eligibility criteria and pass a risk assessment, including a home circumstances check: see PSO 6700.

²⁹ See the Criminal Justice (Sentencing) (Licence Conditions) Order 2015, SI 2015/337. HDC involves additional conditions.

³⁰ See, for instance, the Government commissioned reports by Halliday (2001) and Carter (2003).

³¹ Through-care has become the preferred term for the continuity of care/supervision from prison to the community. There have been many attempts over the decades to improve the co-ordination of the management of prisoners as they move from prison to the community with seemingly little success.

³² This led to the privatisation of massive parts of the probation service, see Padfield, 2016.

³³ <https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2016/09/Through-the-Gate.pdf>

³⁴ <https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2017/06/Through-the-Gate-phase-2-report.pdf>

³⁵ The post-sentence supervision requirements are set out in PI 29/2014 and Enforcement of the post-sentence supervision requirements are set out in PI 24/2014

³⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/633154/offender-managemen-statistics-bulletin_-q1-2017.pdf

³⁷ This is not the place to explore the recall system in detail, but it is vital to understand that prisoners are not only recalled because they reoffend. As many are recalled simply for being in breach of a licence condition, for example, the condition “to be of good behaviour and not behave in a way which undermines the purpose of the licence period”. Any behaviour which worries an OM may breach this condition. See Padfield (2013).

³⁸ For those sentenced to less than two years, recall by the Secretary of State only applies during the period the ex-prisoner is on licence and within the period of the custodial sentence. Any sanctions (including breach action) during the post-sentence supervision period can only be dealt with by the courts.

³⁹ *Imposition of Community and Custodial Sentences: Definitive Guideline* (effective from 1 February 2017): <https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf>

⁴⁰ See many of the recent reports of the Chief Inspector of Prisons, or the powerful debate in the House of Lords on 7 September 2017, when many retired judges and other experts debated prison overcrowding: see <https://hansard.parliament.uk/Lords/2017-09-07/debates/B1B642FA-F4EC-465C-881F-DB469CBF93C4/PrisonsOvercrowding#contribution-25D6834C-418D-4FD4-A457-6F7A82682F9C>

⁴¹ There are many questions to be explored about the constitution and membership of the Parole Board. For example, there are currently over 250 members, the majority of whom are independent (not judges, psychiatrists, psychologists or criminologists) – is this the right balance?

⁴² Article 5 (4) of the European Convention on Human Rights provides that: Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. In *R. (Brooke) v Parole Board* [2008] EWCA Civ 29; [2008] 1 W.L.R. 1950 the Court of Appeal held that the Parole Board did not satisfy the requirements of Art 5(4) ECHR. Nothing has changed since then.

Indeed, it could be said that the Parole Board appears less independent now housed within the Ministry of Justice Headquarters, and with its website firmly embedded within that of the Ministry of Justice.

⁴³ In my recent study, I was not convinced that the Parole Board was confident of its own legitimate authority. At the end of several months immersed in studying it, I remained unclear as to who really ran the process: a fog of ownership results from the fact that no one body appears to drive it. The Parole Board wears some of the authority of a court, but it also presents itself as an informal body working with partner organisations. The foggy relations between Parole Board, OM, OS, and PPCS raises questions not only of fairness and legitimacy (as raised in the case law, and academic literature) but also of power and authority.

⁴⁴ Many of the critiques thrown at the early parole system sound familiar today. For example, Hall Williams (1975) main complaints were: too few paroled; too short a licence; too much delay in processing applications; the failure to give reasons; lack of a right to a hearing, to be represented, and to appeal; the contents of the parole dossier; unsatisfactory recall procedures; unsatisfactory criteria for parole; and administrative deficiencies.

⁴⁵ Except for HMP detainees where there is a high threshold of “exception and unforeseen progress”. See Howard League (2017) Judging Maturity (<https://howardleague.org/publications/judging-maturity/>)

⁴⁶ French judges/magistrates have a broader education and training than their English equivalents. Convincing judges of the negative consequences of imprisonment is perhaps more difficult in England, where judges are trained simply in law and guidelines. Involving judges in sentence supervision educates them, and helps them understand what works and in what contexts, and what is available locally (Bowen and Whitehead, 2013).

⁴⁷ <https://www.theyworkforyou.com/lords/?id=2017-09-07b.2071.6>

⁴⁸ Of course, since many prisoners will not re-offend, there is a strong argument for unconditional release and it is also arguable that without the *burden* of supervision, many ex-prisoners might find it easier to find their way to a law-abiding life.

⁴⁹ Judges already do these positive rituals, for example, in adoption ceremonies, which take place after the court hearing that has granted an adoption order, and are a chance for adoptive families to celebrate with the judge the making of an adoption order.

⁵⁰ Section 28(6) of the Crime Sentences Act 1997 (as amended) provides:

The Parole Board shall not give a direction with respect to a life prisoner unless:

- (a) the Secretary of State has referred the prisoner's case to the Board; and
- (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

This appears to put a burden on the prisoner to prove that it is no longer necessary for the protection of the public that the prisoner should be confined. A clear burden of proof should be imposed on the State to justify continued detention. The Court of Appeal in *R (ex p H) v Mental Health Review Tribunal, North and East London Region and the Secretary of state for Health (interferon)* [2001] 3 WLR 512 declared that section 72(1) of the Mental Health Act 1983 was incompatible with the Human Rights Act 1998 in that it put the burden of proof on to a restricted patient applying to a Mental Health Review Tribunal to prove that he satisfied the criteria for release. The Government promptly amended the Mental Health Act 1983 by Statutory Instrument 2001 No 3712. Why has the question of the burden of proof at hearings of the Parole Board not come under a similar spot-light and been amended?

⁵¹ The Law Commission is doing sterling work trying to codify sentencing law – but this exercise reveals how much better a new Code would be than just an exercise in consolidating existing provisions.

Please note

Views expressed are those of the author and do not reflect Howard League for Penal Reform policy unless explicitly stated.