

**Howard League for Penal Reform's response to the Ministry of Justice's consultation:
'Reconsideration of Parole Board decisions: creating a new and open system'**

July 2018

Executive summary

1. The consultation is narrow in focus: it seeks views on the practical operation of a reconsideration scheme but provides insufficient detail as to how the scheme would work in practice to allow for meaningful consultation.
2. The proposed scheme is flawed. It seeks to mirror the tribunal appellate process without offering the safeguards of that process but will reduce access to the High Court by way of judicial review.
3. Aspects of the proposed scheme, such as automatic reconsideration for certain types of cases and the possibility of appeals by non-parties and, are unlawful or contrary to standard legal practice.
4. The scheme will mean people who have served their punishment term and been assessed as safe for release will be deprived of their liberty for longer than necessary. This will compound existing bias against ethnic minorities in prison.
5. The costs, estimated by the Ministry of Justice as being up to £3.7 million per year, are disproportionate given the concerns about the proposed scheme. They are also a gross underestimate: they do not include the additional cost of people staying in prison for longer, extra work for victim liaison officers or the cost to statutory agencies, such as probation and social services, when release plans cannot be affected due to the reconsideration process. The real cost is likely to be at least over £10 million a year.

1. About the Howard League for Penal Reform

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and policy work aimed at revealing underlying problems and discovering new solutions to issues of public concern, as well as through direct legal and participation work.
- 1.3 Our legal team works directly with children and young adults in prison and we represent young people before the parole board.
- 1.4 We have drawn on our policy and legal work in preparing this response.

2. The consultation is too narrow and contains insufficient detail to be meaningful

- 2.1 The consultation is narrow in focus: it seeks views on the practical operation of a reconsideration scheme but provides insufficient detail as to how the scheme would work in practice to allow for meaningful consultation.
- 2.2 It is clear from the consultation document that the Ministry of Justice has decided to proceed with implementing a reconsideration mechanism and is consulting simply on how it should operate within the existing structure of the parole board. Given that this may have an impact on the liberty of thousands of people in prison, the Howard League considers that a full and meaningful consultation is required.
- 2.3 The prison system is in crisis. The latest safety figures, released on 26 July 2018, show 46,859 recorded incidents of self-injury in the 12 months to the end of March 2018 – a 16 per cent increase on the previous year. Recorded assaults rose by 16 per cent – to 31,025 – over the same period. Both of these figures are record highs.¹ Meanwhile, over half the prisons in England and Wales are currently holding more people than the level considered by Her Majesty's Prison and Probation Service (HMPPS) to be safe and decent.
- 2.4 Changes to the release arrangements for prisoners need to be seen in this context. For the first time in many years, the prison population is falling. Measures that will reverse that trend and keep prisoners in the conditions described above require anxious scrutiny. At a time when the Secretary of State is thinking about radical change to ensure that short and ineffective sentences are not used, small changes to one aspect of the parole process that could have a contrary effect make little sense.

¹ The Ministry of Justice statistical bulletin, *Safety in Custody: quarterly update to March 2018*, can be found online at: <https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-march-2018>

- 2.5 In any event, the consultation is insufficiently clear to enable meaningful comment. The scheme is described at paragraphs 28 to 30 of the consultation document. However, there are many important aspects that remain undecided. For example, it is anticipated that all decisions will become provisional but the time frame when a decision will become final is “yet to be decided” (paragraph 28 (c)). It is also “envisaged” that initial applications will be filtered by judicial members (paragraph 28 (f)). Paragraph 28 (h) refers to the possibility of hearings being held in public if they are held at all, casting doubt on the availability of oral hearings as part of this mechanism: the guidance does not appear to reflect the Supreme Court’s ruling in the case of *R (Osborn and Booth) v The Parole Board* [2013] UKSC 61 as to what fairness requires in this context. In order to respond to this consultation in a meaningful way, it is necessary to know precisely what options are being proposed.

3. The proposed scheme is flawed

- 3.1 In as far as it is possible to discern what the proposed scheme is, it appears to be flawed. It seeks to mirror the tribunal appellate process. However, that process is governed by specific rules designed to ensure justice and due process (*The Tribunal Procedure (Upper Tribunal) Rules 2008*). This process will not have the benefit of tribunal rules or the infrastructure of the tribunal.
- 3.2 The allocation of judicial members to filter applications for reconsideration and conduct internal reviews is not realistic given the lack of such members at present and the concerns raised by His Honour Judge Samuel’s in his response to this consultation. The parole board’s view that oral hearings may not be required runs contrary to established and settled law as to what fairness requires as set out in *Osborn*. It is not clear how applicants will be adequately represented in this process: there is no reference to legal representation for any potential applicant, including prisoners and victims, in the consultation document. The impact assessment refers to some funding for this. Given the Court of Appeal decision last year in the challenge brought by the Howard League and the Prisoners’ Advice Service that fairness required legal representation for pre-tariff reviews, there can be no question that representation will be required as part of any reconsideration process (*R (Howard League for Penal Reform and The Prisoners’ Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244).
- 3.3 It is also highly likely that the development of the process will reduce access to the High Court by way of judicial review. This is because judicial review is a remedy of last resort and the criteria for reconsideration will be similar to the criteria for judicial review. It will therefore become much too hard for any applicant to challenge a parole board decision by way of judicial review to the High Court. As the *Worboys* case demonstrates, judicial review plays a decisive, open and transparent means to deal with important issues that arise.

4. Aspects of the proposed scheme are unlawful or contrary standard legal practice

- 4.1 Aspects of the proposed scheme, such as the automatic reconsideration for certain types of cases and possibility of appeals by non-parties, are either unlawful or contrary to standard legal practice in other legal appellate mechanisms.

4.2 The consultation document states that “there may also be some cases where there is strong public interest in automatic reconsideration. In such cases there would be no need for an application to be made – the case would be automatically referred for reconsideration. Such an approach could be taken, for example, where a prisoner’s release is directed straight from closed conditions rather than them progressing from closed, to open and then release, or in very high-profile cases” (paragraph 36). This is plainly unlawful as it would create a different legal structure for certain cases that would interfere with the administration of justice and the independence of the parole board. It would effectively build a high risk of bias into the system even though there is no change to the statutory test for release and the powers of the parole board.

4.3 The Howard League strongly believes that the whole of the criminal justice system must be focused on creating fewer victims of crime. However, the potential for victims to access the reconsideration process even though they are never party to parole proceedings does not accord with any other mechanism that we are aware of in this jurisdiction (paragraph 44 of the consultation document). Even in the most analogous situation, such as unduly lenient reviews, where a member of the public including victims of the offence, may ask the Attorney General to make a referral to the Court of Appeal, the individual does not become a party to the proceedings at the Appellate stage. He or she simply requests the Attorney General to consider a referral. As the Worboys case demonstrated, victims may have standing to bring a judicial review if appropriate. The reference in the consultation papers to the cost of judicial review for victims could easily be rectified by appropriate changes to the legal aid system.

5. The risk of increased incarceration and discrimination

5.1 The scheme will mean people who have served their punishment term and been assessed as safe for release will be deprived of their liberty for longer than necessary. This will compound existing bias against ethnic minorities in prison.

5.2 In its response to this consultation dated 6 July 2018 the Parole Board raised concerns that the scheme, could “*cause considerable uncertainty, delay and significant cost to the public purse and unfairness and unnecessary incarceration of prisoners who are no longer assessed to be a risk to the public.*” The Howard League is extremely concerned that this scheme will increase the time people spend in prison for the reasons set out in paragraph 2 above.

5.3 The equality assessment states that: “With respect to the outcome of Parole Board hearings, offenders who are White are more likely to be approved for release than those from any other ethnic background. This is the case for both review cases and recall hearings. Should this likelihood maintain for cases that are to be reconsidered, this may compound the adverse situation that is already present for those from non-White ethnic groups. There is a tension here. Those from non-White ethnic groups are overrepresented in the prison population. Therefore, any positive impact of the reconsideration mechanism recommendation is to their advantage. However, in terms of the operation of that mechanism, non-White offenders may be proportionately less advantaged than their White peers. On balance, we consider that the recommendation will have a net- positive impact on non-White offenders.”

5.4 It is unclear why, on balance, the Ministry has concluded that the new mechanism will have a net-positive impact on non-white people affected given that white people are more likely to be released by the parole board. The review mechanism will be

internal, thereby removing the possibility of an independent review by a more diverse tribunal. There is nothing in the proposed new mechanism that would actively seek to redress the initial problem and prevent the review process from compounding it. This is an important and serious issue that needs to be fully considered in light of the findings of the Lammy report in 2017.

6. Disproportionate cost

- 6.1 The costs, estimated by the Ministry of Justice as being up to £3.7 million per year, are disproportionate given the concerns about the proposed scheme. They are also a gross underestimate: they do not include the additional cost of people staying in prison for longer, extra work for victim liaison officers or the cost to statutory agencies, such as probation and social services, when release plans cannot be affected due to the reconsideration process. We do not attempt to rectify this here but instead present some thoughts and estimates focused on one issue: the potential cost impact of keeping people in prison for longer. Even starting to quantify this one potential set of costs highlights how the likely impact of the policy change would be many multiples of the Ministry of Justice's number.
- 6.2 These cost-related concerns are shared by the Parole Board. In its response to this consultation, the parole board has stated: *"It is hard to anticipate how many applications we might get each year under this new process. The internal appeals process provides a mechanism for a significant number of cases to be appealed, and even where that request is unsuccessful, it is highly likely that it will lead to the release of many prisoners being significantly delayed for weeks or months longer than is necessary for the protection of the public. This creates a real litigation risk. The Board has seen HMPPS data that suggests the median number of days between a parole decision and release is currently just 16 days. A new process will inevitably increase this. It may also lead to increased compensation payments."*
- 6.3 The cost of keeping people in prison while Parole Board decisions remain provisional has not been quantified in the Ministry of Justice's impact assessment, but could be substantial. The Ministry has not included in its calculations the actual further costs of on-going detention as a result of the reconsideration mechanism. The Howard League believes these could be in the region of at least £9 million a year (and likely more).
- 6.4 The Ministry of Justice's method for calculating the cost of the actual process of reconsideration uses the number of paper hearings as a proxy for relevant volumes (see impact assessment paragraphs 18-20 on page 7).² It envisages an engagement scenario of between 5 and 15 per cent and a success rate of between 10 and 30 per cent.
- 6.5 In 2016/17, there were 13,739 paper hearings completed by the Parole Board.³ If one takes the highest engagement scenario and lowest success rate for meeting the threshold, 206 cases per year will be "affected": presumably in those instances the prisoner will either:

² The paragraph numbers in the impact assessment are duplicated.

³ Parole Board Annual Report p. 35.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631425/Parole_Board_Annual_Review_Web_Accessible_Version.pdf

- have a favourable decision reversed and therefore spend longer in prison than he or she would under the present arrangements and will go on to spend up to a further two years in prison or
- will have a negative decision reversed and will spend the period of the reconsideration process in prison but will be released before their sentence end date or next review (i.e. earlier than under the present arrangements)

- 6.6 Given that the proposed criteria will mirror judicial review, it is anticipated that the latter category will be very small in line with the present number of successful judicial reviews in the courts brought by prisoners. If the former category represents the vast majority of cases (say 200) the following additional costs of imprisonment apply based on the Ministry of Justice's average annual cost of a prison place in 2016/7 was £38,042, which equates to £3,170 per prisoner per month.⁴ If even just one quarter of those prisoners spend a further complete review period in prison when they would under the present arrangements have been released, then that will cost an additional £2 million.
- 6.7 However, these figures do not factor in the proposal that all decisions to release will become provisional to enable the possibility of reconsideration. No time frame is given for that provisional period. The following potential costs are modelled on the 28 day period currently provided for by Rule 15 of the Parole Board Rules where a "no release" decision is currently provisional for 28 days unless a prisoner makes an application for an oral hearing. In 2017/2018, there were 2861 release decisions made (see pages 33 and 34 the Parole Board annual report).⁵ This would result in a cost of £9 million simply to keep the person in prison who could otherwise be released for an additional 28 days, regardless of whether the mechanism is actually activated, let alone successful. This figure alone would **increase** the estimated costs per year identified in the impact assessment from almost £4 million to almost £13 million – more than three times the current estimate.
- 6.8 There are other costs that are associated with this process that do not appear to have been either costed or considered. This includes the costs to probation officers, not only in respect of victim liaison work but the knock on effect on approved premises.
- 6.9 Many questions remain unanswered that could have a significant impact on these costs and the people involved. For example, for those who go through the reconsideration process but are unsuccessful, will the year-long period before their next hearing be counted from the original Parole Board decision or the point at which this decision ceases to be provisional?
- 6.10 The Howard League is also concerned that the volume estimates used in the Ministry of Justice Impact Assessment could in fact be far too low. That method considers scenarios in which up to 15 per cent of the Parole Board's decisions result in someone attempting to engage the reconsideration mechanism. At a conference at Cambridge University on 2 July 2018, the Chief Executive of the Parole Board noted that 643 request for summaries had already been requested by

⁴ Source:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/653972/costs-per-place-per-prisoner-2016-2017-summary.pdf

⁵ This figure has been calculated by adding up the number of release decisions itemised for paper and oral hearings on pages 33 – 34 of the 2017/18 annual report

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727619/Parole Board Annual Report Accounts 2017-18.pdf

victims and the expected uptake of that was 40 per cent. It is therefore feasible that if 40 per cent of victims are engaged sufficiently to seek a summary, more than 15 per cent of victims will seek reconsideration if they are permitted to.

- 6.11 The take up by prisoners is not fully considered. In 2017/18, 7,698 hearings resulted in no release decision (see pages 33 and 34 of the Parole Board annual report).⁶ As a prisoner whose release has been denied, why would one not try to engage with the reconsideration process? If even half of those receiving a negative decision sought to do so, volumes of people seeking reconsideration could massively exceed the estimates provided so far. Even if most do not meet the threshold, processing these requests could be problematic and would likely stretch timelines even further.

7. Conclusion

- 7.1 The proposed changes are a reactive move specified in insufficient detail. They carry substantial risks of being expensive and unjust, and sit uneasily alongside other legal appellate mechanisms.
- 7.2 Any changes to the release arrangements for people who must go through parole need to be considered in the wider context of the penal landscape.

**The Howard League for Penal Reform
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⁶ This figure has been calculated by adding up the number of no release decisions itemised for paper and oral hearings on pages 33 – 34 of the 2017/18 annual report
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727619/Parole Board Annual Report Accounts 2017-18.pdf