

## Howard League for Penal Reform submission to the Ministry of Justice consultation on the parole system

December 2020

### Summary

1. The Howard League works for safer communities. The parole process is designed to achieve just that by providing expert oversight as to when and how a person who has committed a serious offence can be released. That is and must remain the key focus for the parole process. That means getting the best evidence before the Parole Board.
2. The understandable desire for the public at large and victims of crime to have confidence in the process will not be met by opening up hearings to either of those groups. Rather, making hearings public is more likely to be retraumatising for victims and could undermine the risk assessment exercise by inhibiting frank and open evidence from witnesses.
3. There are other, better ways, to increase public knowledge and confidence in the process.
4. If the process is to be opened up, it should never be done without the informed consent of the person being assessed. The nature of the evidence will include incredibly personal information about a prisoner's health, thoughts, habits, private and family life that go far beyond the kind of information provided in a Court of first instance to make a finding of fact. It is neither necessary nor proportionate to force a person unwillingly to provide such information.
5. Even if the person being assessed by the Parole Board is willing, it may not be in the public interest to permit a prisoner to have a public hearing.
6. In high profile cases there will be temptation for the media to re-try the case, which will be retraumatising for victims and detract and distract from the task at hand.
7. The Parole Board is not a court but a court-like body. In its present form, it does not have the case management powers, resources or the legal framework to support and manage public hearings fairly. The recent tailored review did not take the opportunity to initiate a change to the structure of the Board.

## **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 investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
- 1.3 The Howard League legal team works directly with children and young adults in prison and has extensive knowledge and experience of the parole process. This submission draws on the legal work of the charity.

## **2. The purpose of parole hearings**

- 2.1 The Howard League works for safer communities. The parole process is designed to achieve just that by providing expert oversight as to when and how a person who has committed a serious offence can be released. That is and must remain the key focus for the parole process. That means getting the best evidence, in the best way, before the Parole Board.
- 2.2 Parole hearings are fundamentally different from criminal trials. Criminal trials determine the guilt or innocence of the accused, and thus it is just that they are heard in public as this is the point at which justice is and must be seen to be done. By contrast, parole hearings are all about the protection of the public and whether it is necessary for the person to be detained to protect the public from serious harm. By the time a person appears before the Parole Board, their punishment term has been served and their detention is preventative. The Parole Board determines whether or not someone can be safely released into the public by taking a wide ranging and inquisitorial approach, exploring both the internal changes a person has made as well as external plans to manage their risk and return to the community.
- 2.3 This will often involve delving into the psyche of the person before the Parole Board to determine their commitment to living a safe life. This may involve deeply personal and challenging questions about a person's childhood, private life, mental health, hopes, fears and innermost thoughts and habits. The parole hearing is already an intimidating environment. There is a real risk that opening it up further will have a chilling effect on the nature and extent of the evidence that the Parole Board receives and that cannot be good for public protection.
- 2.4 A hearing will also involve hearing evidence from professionals about how the person has responded to interventions over a long period of time. Whilst in prison, people will be offered courses and support to tackle the underlying issues which contribute to offending behaviour. The success or otherwise of these interventions is evaluated at the parole hearing. It is highly likely that the actual process of rehabilitation will be adversely affected if a person in prison is aware that anything they say in a therapeutic context could be

reported to the Parole Board in oral evidence and that could be made public. The focus will inevitably switch from developing frank and positive therapeutic relationships to how a comment may be interpreted in due course if reported to the world at large. This will have a negative impact on rehabilitation and would also make parole hearings far less effective as professionals and the Parole Board would be unable to accurately determine the risk posed by the prisoner. An inability to accurately determine risk would reduce public confidence in the parole system.

- 2.5 For a Parole Board to function at its best, it is essential that people being considered by the Board are able to trust that they can be completely open and honest with the Parole Board and the professionals who support them.
- 2.6 The most important thing is that the Parole Board gets the best evidence possible to make its decision. The prospect of hearings where the victim or the wider public are present is likely to inhibit both the evidence at the hearing and the evidence that can be gathered in preparation for it.

### **3. Open parole hearings are not the best way improve public confidence**

- 3.1 The understandable desire for the public at large and victims of crime to have confidence in the process will not be met by opening up hearings to either of those groups. Rather, making hearings public is more likely to be retraumatising for victims and, as noted above, could undermine the risk assessment exercise by inhibiting the frank and open evidence from witnesses.
- 3.2 Even if a prisoner does not feel inhibited from speaking frankly in the presence of a victim, there is a real risk that hearing all this information will be retraumatising for victims who may be exposed to hearing details of the offence, previous behaviour and reflections on the offence in minute detail. No victim can ever be fully aware of the nature of the evidence before it is heard so as to make an informed choice about whether to be exposed to it. There are well established systems of restorative justice that can run parallel to parole processes that can provide victims with better opportunities to engage in dialogue or better understand what has happened with appropriate support.
- 3.3 Simply opening up the process to victims and the wider public will not necessarily improve public confidence. If, in order to achieve fairness and comply with the requirements of confidentiality, certain aspects are withheld, it may damage confidence.
- 3.4 Providing better resources to ensure that victims are kept fully up to date with the process and understand the processes and mechanisms for release from the start of the sentence is a much better way to achieve public confidence. It is often reported that victims feel let down by the system when they come across some of the mechanisms for progression that are in-built into the sentence from the outset, such as pre-tariff reviews. Victims should be provided with better information about how the system works from the start. In high profile cases, it might be appropriate for a public protection advocate to be allocated at an early stage rather than when there is a hearing on the horizon.
- 3.5 The “open justice” arguments that apply to hearings at first instance simply do not apply to parole hearings. The purpose and focus are entirely different. As one young person told the Howard League after a parole hearing considering his release following recall to prison: “it took twenty minutes to sentence me to four years and a whole day to work out if I can be released a few months early.”

- 3.6 Public confidence in parole hearings is likely to be increased if the public has a better understanding of the process which can be achieved through public legal education, alongside the existing decision summaries which were introduced in 2018.
- 4. Safeguards in the event that hearings are opened to victims and/or the wider public**
- 4.1 If the process is to be opened up, it should never be done without the informed consent of the person being assessed. This is in line with the approach of the Upper Tribunal to mental health cases which asks the following key initial questions:
1. Is it consistent with the subjective and informed wishes of the applicant?
  2. Will it have an adverse effect on his mental health?
- 4.2 The nature of the evidence will include incredibly personal information about a prisoner's health, thoughts, habits, private and family life that go far beyond the kind of information provided in a Court of first instance to make a finding of fact.
- 4.3 The information that will emerge from an effective parole hearing will always engage Article 8 of the European Convention on Human Rights which is the right to a private and family life, including physical and psychological integrity and development. As such, it is difficult to see how it can ever be deemed both necessary and proportionate to force a person unwillingly to provide such information to people they do not want to provide it to.
- 4.4 It is proposed that parties could apply for a public parole hearing. The non-applying party could submit representations to the Parole Board who would ultimately decide if the hearing should be heard publicly or privately. These proposals add a further level of bureaucracy to the process. Even if it takes place at an early stage in the proceedings, it will be well after the core work therapeutic work has been done and therefore the on-going uncertainty about the nature of the proceedings is likely to cast a shadow over that work.
- 5. It may not in the public interest to hold an open hearing**
- 5.1 Even if the person being assessed by the Parole Board is willing, it may not be in the public interest to permit a prisoner to have a public hearing. The wider considerations taken into account by the Upper Tribunal in considering this question in mental health cases are also relevant:
1. Are there any other special factors for or against a public hearing?
  2. Can practical arrangements be made which are not disproportionate?
- 5.2 In addition to the chilling effect on the nature and quality of evidence and the potential for victims to be retraumatised outlined above, a public hearing may also pose difficulties in terms of the safe future management of people in the community.
- 5.3 Increased public information about the offences people have committed, their lives, thoughts and backgrounds may make it harder for them to form a safe and new life in the community under supervision or to progress through the sentence in prison. This could pose an additional strain on already stretched resources.

5.4 There is also the risk that social isolation as a result of increased publicity could increase risk of harm in the future given all the research that desistance is best promoted by enabling a person who has offended to become a valued member of the community.

## **6. The risk of trial by media**

6.1 In high profile cases there will be temptation for the media to re-try the case, which will be retraumatising for victims and detract from the task at hand.

6.2 The reality is that the newsworthiness of open parole cases will inevitably focus on the original crime and the harm caused, rather than the progress and change that has occurred since which is the key question for the Parole Board.

6.3 This is likely to be the case regardless of the wishes of victims and those being assessed.

6.4 The fact that it is anticipated that high profile cases would be most likely to be opened up risks creating added layers of complication in such cases that detract from the purpose of the hearing and will cause additional problems for risk management.

## **7. The Parole Board is not equipped for open hearings**

7.1 Currently, the Parole Board does not have the resources, case management powers or legal framework to hold a public hearing fairly.

7.2 The tailored review (2020)<sup>1</sup> has done nothing to solve this issue or to propose reform the structure of the Parole Board towards a properly constituted tribunal or court. In fact, it appears that this was contemplated but rejected due to the “root and branch” review that this consultation forms part of.

7.3 As the tailored review suggests, the government needs to first determine what it wants the Parole Board to be and what role it should fulfil:

“There is a strong principled argument to make in favour of the Parole Board being reconstituted as a tribunal or court: it makes inherently judicial decisions and should therefore be able to demonstrate that it does so entirely free of political influence. However, there are several operational issues, discussed throughout this report, that reconstitution would not resolve. As such, the case for and against reconstitution is finely balanced and, at this time, does not appear overwhelming in either direction. There is also a question about how the Parole Board should be held to account for its performance, and its accountability to the public through Parliament. This is all underpinned by a more fundamental question about what the government wants the Parole Board to be and what role it should fulfil.” (§34)

7.4 This question should surely be determined before hearings are opened up without appropriate safeguards in place.

7.5 It is not possible to simply transpose features, such as the possibility of open hearings, that are available within the tribunal system to the Parole Board. The Board simply does not have parallel resources in terms of case management powers and systems. The legal

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<sup>1</sup> Ministry of Justice (2020) The Parole Board for England and Wales: Tailored Review. London: HM Government.

safeguards that apply to mental health hearing are not present in parole hearings, although there is clearly a common law requirement for fairness.

## **8. Concluding observations**

- 8.1 For decades the parole system has developed in an ad hoc way, often in response to developing case law. As the tailored review suggests, it is essential that the government considers what the Parole Board should be and how that vision can be best implemented from a structural perspective. It is inappropriate to make further changes before that question is determined.
- 8.2 There are considerable risks in opening up hearings as proposed in the paper. These risks affect victims, the wider public, people in prison and the professionals charged with their care in prison and on licence.

**Howard League for Penal Reform  
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