

THE FUTURE OF THE PAROLE BOARD RESPONSE OF THE CRIMINAL SUB COMMITTEE OF THE COUNCIL OF HM CIRCUIT JUDGES

- 1 The Council of Her Majesty's Circuit Judges represents the Circuit Bench in England and Wales. Circuit Judges sit in the Crown Court and deal with the majority of work passing through that Court. Circuit Judges deal with the sentencing of criminal offenders across a very wide range of offences. Many Circuit Judges, both serving and retired, are members of the Parole Board. Our comments and observations are based upon a great deal of practical experience in relation to the levels and the patterns of crime and the sentencing of those convicted of crime. We have drawn upon the knowledge and practical experience of those Circuit Judges actively engaged in the work of The Parole Board. We express views after reflecting upon our experience and we reach conclusions based upon that experience.

- 2 There can be no doubt that the significance of the role of the Parole Board has grown substantially in recent years but the development of that increased role has not had the benefit of a coordinated approach nor the provision of commensurate funding. This has resulted in what we consider to be an unsatisfactory state of affairs. We welcome the opportunity to engage constructively in this review of the future of the Parole Board.

- 3 The Parole Board is an integral part of the criminal justice system playing an important role in the implementation of the overall sentencing process. In exercising its functions it acts as part of the overall criminal justice system and is perceived as such notwithstanding that it is currently outside the judicial family and thus does not enjoy the independence of the Courts. There is no necessity for us to set out again herein those functions that the Parole Board currently discharges. Those are dealt with in detail in the consultation paper. We have, of course, noted the impact of Article 5(4) of the European Convention on Human Rights and the approach to Article 5(4) adopted by the European Court. Much of the work undertaken by the Parole Board is such that the requirements of Article 5(4) must be satisfied. There is a clear need to establish independence from the Executive and nothing to be gained by splitting the Parole Board's functions when performing that exercise. Thus we believe that all of the Parole Board functions should remain within the remit of a body that is demonstrably independent of the Executive. The opportunity should now be taken to restructure the Parole Board so that it may meet and discharge its obligations in an independent and judicial fashion.

- 4 In achieving the aim set out above the powers, rules and procedures of the Parole Board should be reviewed. As indicated in paragraph 2 above the somewhat piecemeal way in which the jurisdiction and procedures of the Parole Board have developed creates a need for clarification and restructure. We believe that would be achieved by the approach we adopt below. We consider that the present three constituent panel member structure should remain. That mix of expertise and experience is essential. We are of the view that the administrative support necessary to ensure the functioning of the Parole Board could build upon the structure already in place. Others will no doubt draw attention to current and projected workloads and the real need to address the problems that result.
- 5 We are firmly of the view that Option B, incorporating the Parole Board into HM Court Service, is the sensible way forward. The functions exercised by the Parole Board are very clearly a fundamental part of the criminal justice system. A significant proportion of the Parole Board's work needs to be carried out by panels chaired by Judges as a result of the long standing policy that the release of those subject to life sentences should be determined by panels which include a Judge. Whilst the way in which the Parole Board exercises its functions reflects the need for flexible procedures and approach and, in some senses, a departure from the formal aspects of procedure we do not consider that to be any obstacle to inclusion within the Court Service. Courts already adopt a more informal approach to procedure and evidence in, for example, small claims cases. We firmly believe that the mix of judicial and non judicial or quasi-judicial experience is essential but that does not detract from the significance of the functions of the Board as a part of the criminal justice system concluding the legal proceedings in those criminal cases that are dealt with by the Parole Board. As we have indicated above the principles enshrined in Article 5(4) require a legal justification where any person is deprived of their liberty. Whether there is such a legal justification must be a question addressed by a Court. If the Parole Board is to function within the framework and spirit of Article 5(4) its jurisdiction should be exercised within the Court structure.
- 6 We emphasise the need to preserve public confidence in the criminal justice system. The exercise of the functions of the Parole Board as a part of that system and within the Court Service will achieve that aim. Indeed public perception of the Parole Board and its role is likely to be enhanced.
- 7 It is our view that the Parole Board should be treated as a separate Court within the sponsorship of the Court Service and subject to the supervision of the Lord Chief Justice. In general terms the Court Service already provides support for Courts exercising different disciplines within the judicial framework. Many Circuit Judges already exercise jurisdiction in different areas of judicial work. It is not at all unusual for Circuit Judges to sit in crime and civil and/or

family matters. Whilst some specialist Judges sit in particular specialist jurisdictions it is not unusual for those Judges to sit in another jurisdiction when the need arises. Currently Judges are authorised to sit in appropriate disciplines and are thus available to work and patterned to sit in those disciplines. We believe that the inclusion of the Parole Board on the basis set out above would have the effect of introducing an additional jurisdiction in which Judges might sit subject to suitability and training needs. Sitting on the Parole Board would come to be regarded as part of a Judge's normal career pattern and thus a more attractive prospect than at present. The sort of appointment process which has inhibited recruitment in the past would be avoided. The provision of sitting days and reading time might be better organised to the advantage of all. In the long term such an arrangement would facilitate the availability of serving Judges to sit on the Parole Board. Such sittings would be regarded as part of the general sitting patterns of "authorised" Judges and accommodated accordingly. There are very obvious practical advantages.

- 8 If the suggestion at paragraph 7 above was accepted there would be a need to consider the way in which expert and lay members are appointed. If the principles of independence are to be followed no ministerial involvement in the appointment process would be appropriate. It is ministerial involvement that contributes to undermining independence at present. Since the Judicial Appointments Commission will already have approved the appointment of the majority of serving judges, whose subsequent deployment will be a matter for the Lord Chief Justice and arrangements delegated by him, it would be logical to invite the Judicial Appointments Commission to oversee the process for the appointment of non-judicial members, but to leave the detailed arrangements for the recruitment and appointment of such members with the Parole Board, where they belong.
- 9 We accept, of course, that the arrangements set out above would not resolve the immediate need for increased numbers of judicial members. There will remain a need for retired Judges to sit as judicial members. The movement of the Parole Board into the Court Service will not affect that directly although we consider that the arrangements necessary may progress more smoothly than at present. It is a matter of common sense that the need for judicial membership will continue and that need is best met by the Parole Board coming within the Court Service. Others will no doubt draw attention to the fact that the current arrangements for the remuneration of retired Judges are in urgent need of reform if that pool of judicial members is to continue to provide Parole Board members.
- 10 In addition to the obvious and important links between the Court Service and the Parole Board detailed above there are very good practical reasons for placing the Board's functions within the Court

system. Sentencing and sentencing policy are influenced and in many instances laid down by the Courts. Whatever sentencing policy results from the consideration of guidelines the body responsible will have a predominance of judicial representatives and will be chaired by a senior Judge. The inclusion of the Parole Board within the judicial family would have the advantage of developing mutual understanding of both policy and outcome. Judges are, of course, engaged in risk assessment at the time of sentence. The nature of the hearings before the Parole Board is strikingly similar to proceedings before the Courts. Whilst that on its own would not be a determinative factor taken along with the other points herein it is significant.

- 11 We appreciate that we are in a period of financial restraint and that there are often difficulties in balancing budgets. We regard “ring fencing” the budget for the Parole Board as a priority however it is eventually structured. Others will no doubt draw attention to perceived under funding in the past and the problems consequent upon that. If the Parole Board is to come under other sponsorship its funding within that sponsorship must be guaranteed.

QUESTION 1 – How should the Parole Board’s existing jurisdiction, functions and powers be clarified?

- 12 Currently there is a lack of clarity in functions and a number of anomalies are apparent. The jurisdiction and function of the Parole Board should be specifically identified as including: the determination of questions as to the appropriateness of release of prisoners sentenced to life imprisonment, imprisonment for public protection, extended sentences of imprisonment, and the remaining categories of prisoners subject to determinate sentences where the board continues to have a statutory jurisdiction, questions as to the appropriateness of recall and release after recall, and decisions in relation to transfer to open conditions.
- 13 In order to carry out these functions, the Parole Board should have the power to make enforceable orders not only as to release, but also as to transfer to open conditions. It seems to us that those powers that are “advisory” and require approval of a member of the Executive would not comply with European jurisprudence and should become exercisable by the Parole Board. Procedurally, it should have the power to make enforceable orders as to the attendance of witnesses, the provision of reports and other written material and to determine appropriate timetables for the provision for any material which it considers necessary for the purpose of making a decision. It should also have the power to determine the extent to which any material should be disclosed to any relevant participant in the procedure. There should be the power to determine the nature and the extent of the involvement of any victim, and the nature and extent of any evidence or material which

a victim wishes to put before the body. Jurisdiction and powers may require legislative action once decisions are taken.

- 14 Within the Court structure the Civil Procedure Rules and the Criminal Procedure Rules govern the way in which proceedings are regulated in those Courts. The Rules are made by Rules Committees acting under statutory powers and consulting widely where necessary. It seems to us that the Parole Board Procedure Rules could be promulgated and applied in the same way and published by the Court Service.

QUESTION 2 – Should there be other alternatives other than judicial review in place to enable parties to proceedings to challenge Parole Board decisions? If so what might those arrangements be?

- 15 We consider that a review procedure within the Parole Board should be put in place. Where any person affected by a decision, whether procedural or substantive, wishes to challenge such a decision, an appellate structure should be provided. The provision of appropriate routes where decisions may be subject to challenge should remove the need for judicial review particularly where another route to the High Court becomes available.
- 16 We believe that any appeal from procedural decisions of the Parole Board should be by way of review in the first instance by another member, if it was a decision by a single member, and by the Chairman or President where there has been a first review by a single member, or where the original decision was made by a panel. There should be no further appeal other than on a point of law raising an issue of importance, and then only with leave, to the Court of Appeal Criminal Division.
- 17 As far as appeals against substantive decisions are concerned, an appeal, including an appeal on the merits, should be brought, but only with leave, to a panel consisting of the Chairman or President, and two other members on paper only. If successful, and that decision does not determine the review, the case will be remitted for rehearing by a new panel. Thereafter there should be an appeal, again only with leave, on a question of law raising an issue of importance to the Court of Appeal Criminal Division.
- 18 The procedures would be set out in the proposed Parole Board Rules to which we refer in paragraph 14 above.

QUESTION 3 – Has the move of sponsorship of the Parole Board within the MoJ gone sufficiently far to protect the Board's independence and does it provide the best means for ensuring the Board's effectiveness and efficiency?

- 19 No.

QUESTION 4 – Do you think sponsorship by either HMCS of the Tribunal Service would provide the appropriate level of independence and sufficient judicial resources?

- 20 We support Option B and the Parole Board coming into the Court Service under the supervision of the Lord Chief Justice as a part of the criminal justice system. We have set out the reasoning for that above.

QUESTION 5 – In light of your views as to the jurisdiction, function, powers and place of the Parole Board within the Criminal Justice System what is the appropriate mechanism for appointing members?

- 21 It is clear that ministerial involvement in appointment must cease if the Parole Board is to be independent. We have considered the appointment of members in paragraphs 7 and 8 above. In the case of judicial members sitting on the Parole Board should be regarded as sitting in a jurisdiction in the same way as other jurisdictions are viewed. Judges already pass through the Judicial Appointments Commission before appointment and have demonstrated the appropriate levels of judicial skills. In order to be authorised to undertake Parole Board work judicial members would require the support and authority of their Presiding Judges, who would be familiar with their work and abilities, and would be interviewed by Chairman or President of the Parole Board. Expert and Lay members should be appointed by the Judicial Appointments Commission in consultation with the Chairman or President.
- 22 We have dealt with this at paragraph 8 above.

QUESTION 6 – What should the tenure arrangements be for members?

- 23 We favour a 5 year term with an option for renewal for a further 5 years.

QUESTION 7 – In light of your responses to the previous questions what status should the Parole Board hold within the criminal justice system? Should it be a court, tribunal, or hold some other status such as its current NDPB status?

- 24 We believe it should be a Court.

QUESTION 8 – Do you think the type of work dealt with by the Parole Board would be compatible with becoming part of either the Tribunals of the Courts structure?

- 25 The use of the word compatible must be approached with some caution. Whilst there are patent similarities between the informality

of a Panel hearing, designed to assist the prisoner, and that of a Tribunal, for all the reasons set out above the work of the Parole Board should most appropriately be accommodated within the sponsorship of the Court Service and as an integral part of the Criminal Justice system.

QUESTION 9 – Do you have any alternatives to the above models?

26 We do not advance any other alternatives. We firmly support Option B.

QUESTION 10 – Do you have any views on the initial impact assessment, including any potential adverse impact on any particular group of people, what steps should be taken to mitigate this and anything else the full impact assessment should cover?

27 No.

HH Judge David Swift
Chairman
Criminal Sub Committee
Council of HM Circuit Judges

18th November 2009