Reform of the Parole Board: Open Justice and Rehabilitation

On 3 July 2018 Matrix Chambers hosted the Human Rights Lawyers Association panel discussion on *Reform of the Parole Board: Open Justice and Rehabilitation* with leading figures in the field: **Professor Nick Hardwick, Phillippa Kaufmann QC and Dr. Laura Janes** providing valuable insight into the key topics.

The Ministry of Justice has placed reform of the Parole Board on the agenda, and in particular proposes new provision for challenges to parole decisions. The speakers explored the potentially competing interests of transparency, openness, accountability and rehabilitation, and the continued independence of the Board, and its willingness and ability to release prisoners where the statutory conditions are met. Also, the event considered the changes to the parole board system that are implemented by the change to rule 25 and practical implications of the new Parole Board (Amendment) Rules 2018 (S.I. 2018/541), as well as predictions for the wider reform, including the system of reconsideration of decisions proposed by the consultation.

Parole Board Overview and Transparency

The panellists begun by discussing Nick Hardwick's role as the former Chair of the Parole Board; someone who was not legally qualified which was at first considered advantageous but would perhaps better suit a judge. The challenge to rule 25 was particularly welcome in that it now puts the Parole Board in a position where they have to at least partially explain decisions and this is good for transparency. It is inevitable that some hearings will be held in public and that panel members will be named, however this arguably does not go far enough as there will be people who will want to see the full decision and hold all hearings in public. There are logistical issues and risks with transparency; privacy issues and a candour problem for prisoners who can currently speak candidly about their behaviour but may become more cautious and there will be more pressure on panels.

Parole Board members should have the same powers as a court system, and the same privilege and protection that applies to the judiciary. For this to happen its status would need to change to that of an upper tribunal or court, where victims and prisoners are able to challenge decisions through judicial review. Such a proposal has significant resource implications; there is a potential four-month review period being mooted, the more people ask for a review the higher the workload and there will need to be money to fund more people writing summaries and explanations of decisions.

The resignation of Nick Hardwick following the judgment raises two issues; the independence of the Parole Board members in the sense that the tenure of individuals is dependent on reaching a popular decision and secondly the issue of the Board's structural independence that was first raised in *R (Brooke and Others) v Parole Board* [2008] EWCA Civ 29. *Brooke* is a judgment that highlighted need for structural differentiation from role of the Home Office/Ministry of Justice in terms of producing the dossier on which Parole Board decisions rest. The dossier on Worboys did not contain the information it should have done (in terms of new evidence in relation to his wider offending) and those responsible were not properly held to account. It was the Ministry of Justice who produced the dossier and arguably the responsibility in fact fell upon them to first and foremost gather the relevant material. The judicial review challenge fell back on the Parole Board's inquisitorial powers for gathering evidence and the Board was challenged as a matter of *necessity* due to the Secretary of State's blanket ban on releasing *any* information about parole proceedings being made public. There was no knowledge of how the decision came about and thus how the material had not come to the Parole Board. The judicial review might have challenged the Secretary of State as defendant if that had been known at the start.

There were differing views as to the reliance on psychologists, on the one hand it was noted that, in Worboys there were four psychologists involved in the case who arose to the similar conclusion that there was a low risk of reoffending and this begs the question as to whether they were all truly naïve and duped or whether there are features to the case relating to information in the public domain. The very issues that concerned the public was his denial and the apparent failure to admit to all crimes so then did the psychologists get it wrong in terms of the assessment applied - a flawed theory? Is

there too much reliance on their findings? Or were they right to conclude that there was indeed a low risk. Perhaps too much weight is put on psychologist evidence and it medicalises the issue in the sense that offending is something to apply a cure to which takes away the agency of the individual and their ability to change. Also, caution is taken in terms of placing weight on behaviour inside of prison because this is not regarded as a good indicator of behaviour outside, but perhaps ought to be considered more. There is scope to argue that regardless of the re-offending risk if the case continues to cause stress to the victims as in Worboys, then this should be a key factor in the decision-making process. Reliance on forensic psychology does not bear the ethical or practical weight that is put on it.

Lawfulness and Accountability

On the other hand, it was recognised that there had been a distinct improvement in Parole Board decision-making over the years in terms of risk assessments using a proper evidence based process, whereas in the early days a psychiatrist based decisions on the individual's background and there was no test to consider aspects such as a person's characteristics including static factors and those which can change. The problem in Worboys was that the Parole Board decision makers did not stick to actuarial decisions but got stuck with moral imperatives such as whether the person recognises their offending, have they accepted responsibility, are they sorry, can they take responsibility/accountability for what they've done. It was said that Worboys had taken 'full responsibility for [his] offending', and was 'open and honest' and this was what allowed the claimants' representatives a way in to argue that there was substantial evidence showing the contrary – that for example he had raped more than once and his offending predated the breakdown of his relationship in 2005.

All efforts need to be put into making the risk assessment more scientific and to educate the Parole Board properly on risk assessment and what is or is not relevant so as to achieve a uniform approach to decision- making, as the existing process is inconsistent, indefensible and subjective. Similarly, there needs to be a massive public education programme about relevant risk assessment factors. In so far as the law is concerned the only reason for keeping prisoners detained is that they continue to be a risk, this is the only relevant criteria and for this to be expanded or other there be other considerations then it is something for parliament to consult on.

The consultation set up following the Worboys decision which aims to increase victim participation is unnecessary, costly and detrimental to the Parole Board – which is already under untold pressure. Instead we ought to look to the principle of standing within judicial review as a more appropriate avenue for victims to challenge decisions. Worboys was the first case where victims had ever tried to judicially review a Parole Board decision, and the Mayor of London also decided to judicially review the decision. The Court applied a pragmatic solution looking at how the law had evolved, and said that the standing rule had become more liberal. The test the Court applied is that if there was nobody who had a clear direct interest then you needed to expand standing to allow someone who might otherwise not have standing (see *R v Foreign Secretary, ex parte Rees-Mogg* [1994] QB 552). In Worboys the Secretary of State had obvious standing but did not challenge the release decision, there were fortunately victims who were already involved in a case against the police (*Commissioner for Police of the Metropolis v DSD & Anor* [2018] UKSC 11). If there had been no victims, then that would've left only the Mayor of London to challenge the case and one view is that undoubtedly the court would've allowed the case to proceed given there was such a strong public interest.

Proposals for a second-tier system within the Parole Board, to review decisions on the basis of jurisdiction that is exercised in an upper tribunal are flawed in that these principles are indistinguishable to those applied in judicial review and would thus be no different to what an administrative court does. The new process would apply to prisoners as well as victims, meaning that prisoners would first need to go through this system to challenge a decision and only then if they are still dissatisfied they can go to the Admin Court. Given that the same legal test is applied the Admin Court would be less amenable to reaching a different decision and thus the proposal actually takes away access to the High Court judiciary for prisoners. The costs implications for this are massive, since the Worboys case there have been 600 review requests, which will prove incredibly

time consuming - this could be reduced if there were access to lawyers however this would require a lot of money so that everyone involved can be paid and there is no confidence that this system would be properly funded. This response seems to further political capital instead of looking at what is wrong with the system. The Parole Board simply needs to be brought into the tribunal system and operate as a proper court or tribunal with the power to summon witnesses and commission evidence.

Rehabilitation and Balance

Observations were made about the general prison system in the UK, which is starting to fall for the first time in many years but remains in a state of crisis. There are 82,000 people in prisons, 2999 people died in custody in the last 12 months, and almost 360,000 additional days have been imposed on prisoners for rule breaking. The system is particularly bad for children and in 2017 HMP Chief Inspector of Prisons observed that no prison was safe to hold children and a third of young adults were in solitary confinement.

Presently the Parole Board system can be commended for its clear process which has been defined and re-defined over the years, there is due process, an oral hearing during which live evidence can be given from probation, prison staff and the prisoners; there is a clear and transparent system for release, certainty, training and development of the board; policies for juveniles, young adults and prisoners with mental health sections. Nevertheless, there are also many weaknesses in terms of its ad hoc and reactive development following judicial decisions. It is court-like but without the powers of a court; and there is a problem with diversity, BAME children make up 46% of the prison population, but there is only one black Parole Board member. Post-Worboys the decision-making process is likely to become more vulnerable to political concerns and there is an existential risk of diluting key functions in favour of public confidence. Instead the question to ask when considering release is whether the decision would better protect the public and is it sufficiently fair given the liberty at stake.

The proposals put forward appear to be time consuming and out of kilter with the rest of the criminal justice system and there is a sense of reflecting a shared wrong with the community, thus making the process highly subjective. Instead, the Worboys decision should be a new opportunity to think more vividly, and create an independent more court-like structure within the Parole Board. The impact assessment for current proposals suggest £30 million would be needed and this does not include the cost of extended stays in prison, the figure alone is more than the whole prison legal aid budget. There was a suggestion from the audience that this money would be better used by being invested in current legal aid structures than creation of the new reconsideration scheme that replicates the judicial review scheme.

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