Prison Reform Trust response to the Ministry of Justice consultation on reconsideration of Parole Board decisions – July 2018

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families.

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Introduction

On 19 March 2018, PRT submitted a detailed response to the review of parole announced by the Secretary of State for Justice in January 2018 as a consequence of the decision of a parole board panel to release John Worboys. In that response (PRT response to Parole Review March 2018), we argued that the confidence in the parole system of both the general public and prisoners would most effectively be restored by adopting a proposal canvassed and widely supported in an earlier and thorough review in 2009. This was that the Board should be reconstituted as an independent tribunal under the auspices of the Tribunals, Courts and Enforcement Act 2007.

Just 9 days after we submitted that response, the Secretary of State dismissed the supposedly independent chair of the Board, Professor Nick Hardwick. That decision starkly illuminated the fundamental issue of the Parole Board's actual lack of independence, and the threat to the equitable and just treatment of those whose liberty is at stake which the current statutory arrangements represent.

The government has provided no reasoned response to our proposal, and its rejection of it appears to be based on nothing more than a reluctance to make time for the primary legislation required to give it effect. It follows that our response to this specific consultation on an internal reconsideration mechanism is that the proposal rests on a false premise: confidence cannot be restored by merely mimicking the attributes of an independent tribunal, especially when the political willingness not to interfere with its professed independence has been so recently and brutally demonstrated.

It is a matter of great regret that the government has set its face against a necessary reform. Nevertheless, acknowledging that it seems unlikely to change its view, we

respond below to the detailed proposal it has made. We suggest that there is a simpler, cheaper and much less damaging response open to it on the specific issue of reconsideration of parole board decisions to release.

The case for change

The executive summary of the consultation document describes the reasoning behind the government's decision to create a reconsideration mechanism. It is brief, as is the passage in the "Review of the law, policy and procedure relating to Parole Board decisions" CM (9611) published in April 2018. It rests on the argument that "many people" supported the idea during the first review, and that there should be a way of avoiding the "onerous step" of applying for judicial review.

On the first argument, PRT would have been amongst those supporting a reconsideration mechanism, but only on the basis that this is a characteristic of a statutorily independent tribunal. Given the many far more serious criticisms made of the parole process in the Divisional Court's judgement in the Worboys case, it would be hard to argue that the establishment of a reconsideration mechanism was at the top of the list of problems to solve.

On the second argument, we question why seeking to appeal a decision which has been subject to the intense and detailed scrutiny of a parole board panel should be anything other than an "onerous step". Indeed, much of the rest of the consultation document is devoted to establishing the tests which any request for a reconsideration should have to meet, and they are – unsurprisingly – very similar or identical to those required to lodge a successful application for judicial review. We think it is misleading to both prisoners and anyone else who might in due course be permitted to seek a reconsideration of a decision to imply that the process will be anything other than onerous and, in the great majority of cases, unlikely to succeed.

The document goes on to say that "after careful consideration" the conclusion has been reached that a reconsideration mechanism should be part of the current structures. As noted above, the only part of that careful consideration which is described is that an external review mechanism would require primary legislation, and therefore not be capable of rapid implementation. We do not accept that this amounts to careful consideration. Alternatives to an internal appeal mechanism should be part of this consultation rather than excluded from it, and we conclude with just such an alternative proposal.

The decision to exclude external appeal mechanisms from this consultation does not take account of the more important reasons for a lack of confidence in the current parole process as a whole. In our view, these reasons relate overwhelmingly first to delay, and then to the failure of the prison and probation system to provide a framework in which most prisoners whose release is discretionary could expect to secure that release at the first moment that they become eligible. In relation to delay, the Board had been making substantial progress in reducing its backlogs under the leadership of its previous chair. We think it is inescapable that that progress will be put in jeopardy by the proposals in this consultation, and note that that is the view of the Board itself.

In relation to the failings of the prison and probation system, the detail of the Worboys judgement reveals a hugely concerning confusion at the heart of the process about the actual basis on which future risk of serious harm should be assessed. The Divisional Court very carefully stressed the highly unusual nature of the particular case, but it is clear that different views prevailed at every stage of Mr

Worboys' journey through custody and the parole process about the significance or otherwise of both the extent of his remorse, and of unproven allegations of serious offending for which he had not been convicted.

In short, we think the resources of both policy capacity and cash which are being devoted to this consultation and the implementation of any decisions that follow would be infinitely better directed to the plight of prisoners whose liberty depends on a prison and probation system that should operate consistently and on time. It does neither at present, and hundreds of prisoners are detained unnecessarily as a result.

The executive summary of this consultation document describes some litmus tests for a reconsideration process. It says it should be:

- judge-led
- as open and transparent as possible
- open to the public
- with information publicly available about the identity of its members

As the process in the Worboys case amply demonstrated, judicial review satisfies all of those tests. In our view, it also satisfies some other, arguably more important, tests because it is:

- demonstrably independent of government and political influence; and
- capable of drawing on broader principles of relevant public law and in turn establishing relevant caselaw that binds the practice of the public bodies affected, including the prison and probation services.

The divisional court's willingness to accept cases of obvious public importance and concern is amply demonstrated in its approach to the issue of the standing of various parties in the Worboys case; and judicial review has over the years provided an important means of holding the state to account for its treatment of those most vulnerable to a careless or improper exercise of its duties. That has included both prisoners and victims of crime.

In summary, this consultation does not explain why the availability of judicial review, enhanced by the Board's willingness to provide reasons for decisions and the divisional court's readiness to admit victims as parties to the proceedings in the Worboys case, should not continue to provide an adequate reconsideration process. We are concerned that the creation of a prior appeal mechanism, lacking independence and likely to cause delay, would in reality serve to restrict access to a genuinely independent court with the power in law to require changes affecting future practice and decisions.

Our alternative proposal, therefore, is simply to recognise the availability of judicial review as an existing remedy which meets the objectives set out in this consultation. It imposes sensible and proportionate tests at the application stage to ensure that reconsideration does not become simply a process of rehearing the merits of the original case, nor a cause of further delay in a system already failing to meet the reasonable expectations of many whose future depends upon it. We also support the Parole Board's proposal (in its response to this consultation) for "a simple power for the Chair of the Board to re-open a case where it appears necessary for the protection of the public; or following a procedural error." This power could be exercised following a request from the Secretary of State who in turn might make that

request on behalf of a victim who has received a statement of the reasons for a decision. It would not preclude the possibility of judicial review should the request to reopen be turned down, and any request for the power to be exercised would have to be made in the short interval between the decision to release a prisoner and his or her actual release from custody. But it would put beyond doubt the Chair's ability to intervene in an exceptional case where there appeared to be strong grounds to do so.

The remainder of this response is provided in response to the specific questions asked, but not in support of the proposal to which they relate.

1. **Do you agree that decisions where the Parole Board directs a prisoner be released or prohibits them from being released should be in the scope of the proposed reconsideration mechanism?**

   From a prisoner's perspective, any of the Board's possible decisions or recommendations, and any actions taken or not taken in response to them by the Secretary of State may carry immense significance, affecting their liberty for years to come. Judicial review provides a means to challenge across the whole scope of that official activity, subject to the grant of leave to do so.

   The argumentation in the consultation document relating to the scope of an internal appeal with criteria in the gift of the Secretary of State reveals the dangers of such an approach. It is worrying, to put it mildly, that a document of this sort should contemplate automatic re-consideration of "very high profile" cases. Given the offences for which the prisoners concerned have been sentenced, every case is immensely significant to the victim and those close to them. The public profile of a case, by contrast, invariably owes more to the media's appetite to cover it than to anything else, and that in turn can depend on considerations wholly irrelevant to the justification for reconsideration. The mere inclusion of this proposal reinforces a suspicion that this exercise is concerned more with avoiding political embarrassment than with the just and equitable treatment of the individuals affected, whether prisoners or victims.

2. **Who should be able to apply for reconsideration of a decision?**

   It is striking that the divisional court on the Worboys case found little difficulty in justifying the standing of the eventual participants in the judicial review, including both the Secretary of State and the victims. By contrast, and unsurprisingly, the administrative implications of opening an internal appeal process to anyone who is concerned about a parole decision fill the Parole Board with alarm. In the other jurisdictions cited, the appeal route is open only to the offender, no doubt with practical considerations in mind. But of course to take such a pragmatic approach in response to this consultation would be to disappoint the very expectations amongst victims and the media that the government has created in its response to the Worboys judgement.

   What is clear, including from the Worboys judgement, is that the concerns of the victim or victim's family, and certainly the concerns of the media, cannot provide grounds for altering the punitive element of the sentence passed for the offence. Furthermore, it appears now to be an orthodox interpretation of the science of predicting serious harm that expressions of remorse or victim empathy are not predictive of future risk. So the basis on which a victim's representations are likely to

justify reconsideration is certain to be narrow, as the Divisional Court made clear. The government's wish to appear sympathetic to the situation that victims face risks raising expectations that cannot possibly be met. In any event, any access to an appeal procedure is unlikely to compensate for the impact of an under-resourced system for keeping victims informed and supported throughout the sentence. The improvements needed to the treatment of victims are real, and require resourcing, but are not to be found through this consultation.

3. **Do you agree that any reconsideration mechanism introduced should consider grounds similar to those used within judicial review?**

4. **Do you agree that the ground used within First-tier Tribunal provide helpful parameters for the grounds of a reconsideration mechanism?**

   We are clear that the grounds and threshold for reconsideration by way of judicial review are appropriate for the system as it stands, and that the judgements made on that basis are made by a body genuinely independent of the Secretary of State. The Parole Board as currently constituted fails that test. Unsurprisingly, given our support for a change in status for the board, we would expect it, once reconstituted as a tribunal, to operate on that basis in relation to its reconsideration mechanism. The ministry's current proposal falls comprehensively between those two stools.

5. **How could we increase public access to reconsideration hearings in some circumstances and provide more information about reconsideration decisions whilst also making sure that the process remains robust and protects victims?**

6. **What more could we do to make the reconsideration process as open and transparent as possible?**

   As the Worboys case demonstrated, judicial review proceedings satisfy every possible reasonable demand for openness and transparency. It is difficult to see how any internal appeal mechanism of the kind proposed could match that standard practically,and would inevitably suffer by comparison.

   The more important challenge, to which the Parole Board has shown an admirable commitment despite the reticence of previous ministers, is to make the process of consideration at first instance more transparent. That includes prisoners, for whom the "rules of the game" appear to be almost completely fluid. Their confusion reflects a confusion at the heart of the parole system, with different interpretations of the relevance of different aspects of behaviour and attitude, a new and profound uncertainty about the relevance of unproven allegations of previous offending, and in practice from day to day a succession of different sources of advice about what they should do to enhance their prospects for release.

   PRT's previous response recommended the publication of a parole compact, setting out in clear and accessible terms what prisoners, victims and the general public should expect from the Parole Board and its partner agencies. It is not the reconsideration process that is in desperate need of transparency, but rather the practice and expectations of the prison and probation service, and the parole hearing that receives the product of their many years of work with the prisoner.

7. **What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.**

As the equalities impact assessment that accompanies this consultation paper points out, there is clear evidence of indirect discrimination against BAME prisoners in the proportion who receive decisions to release. We are bemused by that paper's conclusion that an appeal process vested in the same body whose decisions have produced that disproportionality would be likely to reduce it. It is plainly more likely, in our judgement, that such a process would be likely to entrench the existing pattern of discriminatory outcomes. That is not to say that the board is at fault – the treatment over many years of prisoners whose release is discretionary is more likely to be the cause of systematic unfairness than the brief and objective process of a panel hearing. But the current situation cries out for the "explain or reform" approach described in the Lammy review, and the different conclusion of the assessment for this consultation smacks of complacency at best.

We also note with concern the absence of any statistical analysis relating to gender, age or religion. In each instance, we suggest there is a need to gather data given what we already know about the risks of inequitable treatment within the criminal justice system on those grounds.

8. **Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.**

The estimates provided in the impact assessment can only be best guesses and are likely to be on the optimistic side. For example, we think it is inevitable that prisoners would need access to legal aid for specialist legal support. The potential for substantial additional delay is obvious, and the consultation paper provides nothing by way of reassurance on this, with timeframes left uncertain. There will be inevitable appetite within the media to generate publicity around particular cases, and in doing so complicate the release arrangements of prisoners who may very well be put at risk themselves as a consequence.

Given the other pressures the ministry faces, and the interruption to what had been a successful process of administrative improvement under its previous chair, the prospect of the delay and disruption associated with these proposals will fill prisoners awaiting their parole dates with dread. There is a fundamental crisis with the system's treatment of indeterminate and extended sentence prisoners, but it does not relate to the reconsideration process, nor even predominantly to the operation of the Parole Board. As the Worboys judgement made plain, it is those aspects of the system for which the Secretary of State has personal and direct accountability in the prison and probation service which most urgently require investment.

Conclusion

Parliament has legislated repeatedly at the behest of successive governments to create very long sentences in which release is dependent on an assessment of future risk. The number of prisoners serving such sentences in England and Wales is twice as many as in France, Germany and Italy combined. The confusion and delay which characterises the treatment of those prisoners is wasteful of both their lives and the public's money. It provides no comfort to victims and little reassurance to the

general public that people are being prepared for a safe and successful re-entry to society at large. A determined effort to reform the process by which prisoners are given the opportunity to secure their release at the first opportunity would pay a substantial human and financial dividend. It would represent a much better use of the ministry's treasure and attention than pursuing this proposal.