



**Bar Council response to the Ministry of Justice consultation**  
**“Reconsideration of Parole Board decisions: creating a new and open system”**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation *“Reconsideration of Parole Board decisions: creating a new and open system”*.

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

**Overview**

4. The consultation is premised upon the basis that some additional reconsideration mechanism for Parole Board release decisions is required. However, we are not persuaded that the case for reform has been made out. There are already in existence mechanisms by which decisions of the Parole Board can be challenged, and while the scope for challenge may be limited, the flexibility of judicial review provides a considerable safeguard.

5. That a review of Parole Board processes was thought necessary following the widespread public interest provoked by the *Worboys* case is perhaps understandable.

However, those proceedings were unique for a considerable number of reasons, and would not by themselves provide a justification for remodelling Parole Board processes - not least because, among other things, the *Worboys* case demonstrated the flexibility of the current review jurisdiction, being the first case in which victims successfully challenged a decision of the Board to order a prisoner's release. While that case is plainly exceptional on its facts, it nonetheless provides a clear example of one potentially effective route of review that already exists.

6. Despite our reticence about whether reform is required, we are alive to the fact that a number of those who responded to the Government Review have made the case for reform, and that the present consultation is directed towards what any reformed system should look like. Accordingly, we have considered it appropriate to respond to the consultation questions on the premise that reform is indeed required. We note, however, that the consultation is somewhat light on detail, and we consider that there would be value in seeking further practitioner input if the proposals are progressed.

**Question 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?**

7. Release decisions are the decisions at the sharp end of the Parole Board's activity, being the ones with the greatest immediate consequences for the liberty of the prisoner. Furthermore, as noted in paragraph 33 of the consultation, there already exist other means by which intermediate decisions and decisions on licence conditions may be challenged. Accordingly, to the extent that any new reconsideration mechanism is required, we agree that its focus ought to be firmly on such decisions.

8. We do not however agree that the profile of a case ought, without more, to place it in a category of cases which fall for "*automatic reconsideration*". The high profile of a case ought not to affect the quality of the decision-making by the Parole Board, and there will therefore be no heightened justification for reconsideration in such cases.

**Question 2 - Which individuals or groups should be able to make an application for a decision to be reconsidered?**

9. We are in favour of limiting the category of persons who could make an application to trigger the reconsideration process to the prisoner and an impartial representative of the public interest such as the Secretary of State. Decisions as to the release of prisoners concern the safety of the public at large so ought to be the concern of a senior and accountable officer in a public-facing role. A reliable

precedent is found in the power vested in the Attorney General to refer criminal sentences that are considered to be unduly lenient to the Court of Criminal Appeal.

10. Should victims be allowed to request the reconsideration of a decision? We note that, at paragraph 20 of the consultation document, it is expressly stated that “[t]his document does not consider victim involvement in Parole Board hearings”. However, at paragraph 44 the suggestion is made that victims could have some involvement falling short of becoming a party to proceedings. As with other aspects of the reforms proposed in this paper, this aspect requires further consideration. For example:

- A release decision will consider the index offence(s) but also a range of other factors including the personal circumstances of the offender, the causes of offending and any progress made whilst in custody. Important information of this nature would not necessarily be available to a victim; there might be very good reasons for withholding it;
- Victims are provided with an effective voice at the sentencing stage of criminal proceedings, most notably through a Victim Impact Statement, which is likely to be relied upon by a judge when assessing the harm caused by an offence. Events at that stage are likely to be fresh in the memory and proper support from the police will be available, unlike when a Parole Board makes its release decision (often years later);
- The consultation paper does not explain what relevant additional information a victim might be expected to provide to the Parole Board to supplement that which was made available to the original sentencing judge;
- Some victims might take the wholly understandable view that offenders should be incarcerated for a period considerably longer than that imposed by the sentencing judge. The opportunity to participate in Parole Board decisions might be seen by some as an opportunity to prolong the period of imprisonment;
- The welfare of victims should be a primary consideration. Informing a victim that, for example, her rapist or the murderer of her child is being considered for release into the community may have a significant adverse effect on her. Inviting her involvement, without proper representation or support, would be acutely distressing;
- Accordingly, if victim input is to be invited, it is right that he/she should have public funding available for meaningful representation. However, the consultation paper contains no real consideration of such potential resource implications.

11. Similarly, the consultation does not spell out the rationale for granting the Parole Board the power to self-refer. We can see, however, that unlikely as this may be, it is conceivable that the Parole Board may, shortly after the making of a release

decision, come into possession of information that it determines requires that that decision be reconsidered. In such circumstances it would be undesirable if it were debarred from the reconsideration mechanism on the ground of standing, particularly in circumstances where the fresh information could potentially found a claim of judicial review against the Parole Board.

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

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

12. We are of the view that any new reconsideration mechanism should not simply consist of a rehearing of the merits of a case. A careful and reasoned decision of the Parole Board ought not to be subject to successful challenge simply because a different constitution would have reached a different conclusion.

13. Equally, however, there would seem to be little point in introducing a model based on judicial review grounds, as that mechanism already exists, with provision for expedition in appropriate cases. As is apparent from the consultation, grounds of appeal from the FTT to the UT overlap with judicial review grounds to a significant extent. Appeal lies to the UT from the FTT "*on a point of law*", but this provision has been interpreted relatively broadly by the courts, and it is not clear from the consultation paper how the two methods of review would be distinguished from each other. It would in our view be undesirable to simply introduce another stage of quasi-judicial review into the jurisdiction, as this could well lead to confusion as to the tests to be applied at the various stages of the process, as well as increased delay.

14. Whatever mechanism – if any – is decided upon, a tight timescale should be adopted. It will be necessary to minimise the impact of a challenge upon any release plan and to ensure that prisoners are not kept in custody for any longer than is necessary. To assist with this, we would suggest that consideration is given to the introduction of a paper-based filter stage - so that, for example, the materiality of any failure to give reasons or to resolve conflicts of fact could be determined at the earliest possible opportunity.

15. We have not conducted an extensive study of comparative jurisdictions, but we respectfully suggest that this might be of assistance to the MoJ before any final decision is taken as to the need for and form of any new reconsideration mechanism. We understand, for example, that a process exists in Germany whereby certain release decisions may be challenged, but that this process is paper-based and does not include the option of a hearing. There are obvious advantages to such a course – the principal advantage perhaps being expedition. However, there are also

disadvantages to a paper-based exercise, including possible concerns over the level of scrutiny that is likely to be applied to the original decision in the absence of oral argument, and what may risk being perceived by the appellant as a lack of transparency in any new decision-making process. We suggest that consideration of such other models as exist in other common law jurisdictions may help to inform the MoJ's consideration of this area.

**Question 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?**

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

16. We agree that a summary of the reasons for Parole Board decisions relating to the release of or the refusal of parole to an offender should be publicly available. Such reasons must be sufficient to allow persons affected by the decision to make an informed response, either through the existing procedures or through the new reconsideration mechanism.

17. There are arguments in favour of providing a victim with direct information about the decision and the reasons underpinning it. Equally, however, the receipt of information about an offence to which they have been subject or the offender who perpetrated the misdeed may be acutely distressing. Aside from being reminded of the offence and the offender, victims may also fear the public attention that could accompany a widely available Parole Board decision. We therefore suggest that victims should be routinely anonymised in judgments that are made available to the wider public.

18. We are not persuaded that anything more than this is needed in terms of transparency. It is vital that the decision-making of the Parole Board is not affected by the prospect of scrutiny of its decisions. Plainly, properly made decisions would be expected to stand up to scrutiny. However, in common with the restrictions on public access to applications for bail, there are compelling arguments against opening up Parole Board hearings to the press or public. Sensitive information will be provided to the Parole Board, including in relation to release location and licence conditions, which ought not to be easily accessible to the public. Any interference with the privacy of the offender must be no more than is necessary and proportionate.

19. If further access / transparency is thought appropriate, one potential solution would be to make Parole Board hearings open to the press but to include provision

for reporting restrictions to be determined at the end of each hearing. That would potentially help to balance the public interest in understanding the processes and decisions of the Parole Board while minimising the opportunity for risk posed by any hostile factions to the offender.

**Question 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.**

**Question 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.**

20. First, as to impact, it is worth making the overarching point at this stage that without proper training and investment, any new reconsideration mechanism will simply not be workable.

21. The Impact Assessment conducted as part of the consultation indicates that offenders and victims are likely to be particularly affected. In relation to *victims*, the impact is assessed as arising from ambiguity about the outcome of any reconsideration mechanism. This would be mitigated by a short timeframe for any such reconsideration to take effect.

22. The same applies to *offenders*, in relation to whom the impact is said to take effect in the following ways:

- *Parole Board decisions will not be made as final until a period has elapsed during which an application for reconsideration may be lodged. This creates ambiguity for the offender and potentially some resultant delay in release. This should be mitigated wherever possible.*
- *This resultant delay may impact prisoner/offender wellbeing and potentially behaviour.*

23. We are firmly of the view that, where the Parole Board has reached a determination that a prisoner should be released, actual release should follow promptly thereafter. There is an obligation on the courts, when sentencing, to impose the shortest term that is commensurate with the seriousness of the offence(s), and the Parole Board plays an important role in ensuring the release of a prisoner who has served the requisite period in custody. Any delay impacts on the liberty of the detainee, and accordingly should be kept as short as possible.

24. The stated aim of the consultation paper to achieve a “*manageable and proportionate*” review mechanism will only be achieved if the system as a whole is properly resourced. Suitable courses must be made available to prisoners; information made available to the Parole Board must be sufficiently detailed to allow an informed decision; and representatives (whether for the Secretary of State or for the prisoner by way of public funding) must be properly trained and remunerated. The principle of ‘getting it right first time’ must apply to Parole Board decisions as well as to other participants within the Criminal Justice System but will only be achieved by proper investment. Failure in this respect, coupled with greater transparency, may only result in a wave of further challenges. We are therefore firmly of the view that it is vital that any new system has the ability to process initial assessments and challenges in a timely manner in light of the clear Article 5 and Article 6 implications.

**Bar Council**  
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