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50 Years of the Parole System for England and Wales

Observational research into oral hearings:

1999 and 2017 compared

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In 1999 Alison Liebling, Helen Arnold and I carried out the first observational study of Discretionary Lifer Panels of the Parole Board.[1] In 2016-17, I carried out further research into what have now become 'oral hearings'.[2] In this article, I compare the two projects. In many ways, the process and style of the panels has changed remarkably little, with the result that most of the conceptual issues raised in 1999 remain pertinent today. But other changes also repay reflection — not least the membership of the Board, which is very different.

Background

The Parole Board was created in 1967 to advise the Home Secretary on the release of longer-term prisoners. Today, it is no longer advisory: it has the power to direct the release of certain prisoners, particularly those serving indeterminate sentences (including several thousand post-tariff IPP prisoners), and those recalled to prison during their period on license, as well as a smaller number of determinate and extended sentence prisoners.

Another big change has been the move towards oral hearings. In the early days, an individual member of the Parole Board would interview a prisoner and report to the panel who then considered the case on the papers in London. Discretionary Lifer Panels were introduced in 1992 following the decision of the European Court of Human Rights in *Thynne, Wilson and Gunnell* (1990) 13 EHRR 666.[3] This decision established the right of those subject to discretionary life sentences to regular and independent review once the tariff (punishment) part of their sentence had ended. This right was extended to prisoners convicted of murder when children (under 18) in 1997, and to adults convicted of murder in 2003.[4]

In this time, the prison population has grown enormously. Between 1993 and 2012 it more than doubled, to over 86,000. The number and proportion serving indeterminate or life sentences has also increased: there were 566 indeterminate sentence prisoners in 1970, 2,795 in 1990 and 11,359 in 2016.[5] Although Imprisonment for Public Protection (IPP), a form of life sentence, was abolished in 2012, in September 2017, there were still 3,162 IPP prisoners in prison serving the sentence.[6]

The number of hearings has grown as much as the size of the prison population. In the 1990s, the Parole Board considered about 200 discretionary lifer cases every year. In 2016, the Board completed 5,165 oral hearings.[8]7

The oral hearing process in 1999

Discretionary Lifer Panels (DLPs) in 1999 were governed by s. 28-34 of the Crime (Sentences) Act 1997 and the Parole Rules 1997. They were always chaired by a judge, someone 'who holds or has held judicial office' (Rule 3). The second member was generally a psychiatrist (unless there was conclusive medical evidence that there was no serious concern about the prisoner's state of mind, when a psychologist or probation officer could be appointed instead), and the third a lay member, a criminologist, or a psychologist or probation officer (where he or she was not already the second member). Once a case had been

1. See Home Office Research Study No 213 (2000), available at http://library.college.police.uk/docs/hors/hors213.pdf
2. Available at http://ssrn.com/abstract=3081035 and http://ssrn.com/abstract=3081039
3. See s. 34 of the Criminal Justice Act 1991.
4. Attempts to roll back the right to an oral hearing by the Board have been largely resisted by the Supreme Court: see *Smith and West* [2005] UKHL 1; *Osborn and Booth* [2013] UKSC 61.
5. There are probably prisoners today serving at least 11 different sorts of life sentence (see Padfield, N (2016) Justifying Indeterminate Detention – on what grounds? *Criminal Law Review* 795-820, but figures are not easily found: see Padfield and Liebling (2000) at footnote 2 above; HC Briefing Paper (2017) UK Prison Population Statistics; annual Offender Management Statistics; Ministry of Justice (2013) Story of the prison population 1993-2012, England and Wales (at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218185/story-prison-population.pdf)
6. The number had decreased by 48% since the June 2012 peak of 6,080. But the number of IPP prisoners who have been recalled to custody continues to increase; in the past year, the recalled IPP population has grown by 20% (to 792).
7. See Parole Board Annual Report 2016-17 (at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631425/Parole_Board_Annual_Review_Web_Accessible_Version.pdf)

listed for a hearing, the dossier had to be served on the prisoner within eight weeks, and both parties had to submit names of witnesses within 12 weeks; the prisoner had to serve any documentary evidence at least 14 days before the hearing. The Chairman of the panel could give directions for the conduct of the case, and these directions could be appealed to the Chairman of the Parole Board. The parties had to have at least three weeks' notice of the actual date of the hearing.

In 1999, there were, of course, no hearings by way of video link. The panel attended the prisoner's prison, always accompanied by an administrator, a panel secretary. Their job was 'to ensure that all panels are conducted effectively by the due date, in accordance with internal instructions, and provide sound, considered and thorough advice and guidance to the panel members, particularly in respect of drafting their decisions and recommendations…ensure panel decisions adhere to current guidelines and directions and are circulated within the required time-scale'.[8] The panel secretaries we observed were successful in achieving the logistical demands of their job, arranging rooms, lunch and so on. However, there was wide variation in the way in which they interpreted the other parts of their role. It is perhaps not surprising that they no longer feature, victims of 'austerity justice'.

The extent to which (and competence with which) the Lifer Governors fulfilled the role varied enormously.

As well as a panel secretary, each panel was also attended by the 'Secretary of State's Representative' (a lifer governor) who would present the Secretary's view, often recommending release. The Lifer Governor has also disappeared from the process today. He or she was then expected to question witnesses, including the prisoner, sum up to the panel with a closing speech, remind the panel of their duty to protect the public, etc. The extent to which (and competence with which) the Lifer Governors fulfilled the role varied enormously — some clearly hated it. It had not originally been the Prison Service's expectation that the lifer governor, as the Secretary of State's representative, would have to be 'the legal representative' for the State. In 1999, we concluded that they had had this role forced upon them largely because of the expectation of the judges, who were used to an adversarial court room. Interestingly, the Secretary of State is only occasionally represented nowadays (never in my recent study), and only in high profile cases, when someone from Ministerial headquarters will represent the Secretary of State.

The process in 1999 was more 'adversarial' than today — 'witnesses were normally examined first by the person who had asked them to attend, then by the other party, and then by the panel' (p.59). We commented then that 'sometimes the panel was encouraged by the legal representative to lead the questioning'. This has become normal practice. In 1999, the prisoner was told that they would get the decision within 7 days. Drafting happened on the spot. The judge would begin and the other panel members chipped in. The panel secretary took it away at the end, to tidy it up and to post it off.

The 1999 research

We observed 52 different cases over a six-month period. This involved 30 different panels, all chaired by a judge (we observed 15 different judges) in 22 different prisons. Of the 52 cases, there was only one woman; 8 were recalled prisoners, 11 were detained during Her Majesty's pleasure (i.e. convicted of murder under the age of 18), and 33 were discretionary lifers. Follow-up interviews were carried out with 40 participants.[9] The aim was to explore, amongst other things, whether the process was fair, effective and consistent. To help our analysis, we identified seven key conceptual issues or concerns, which I simply mention here since all remain relevant today:

(i) The significance of a prisoner being 'post-tariff'.
(ii) Giving proper recognition to competing rights.
(iii) The Parole Board as court.
(iv) The relationship between the Parole Board and the Prison and Probation Services.
(v) Burdens of proof.
(vi) An inquisitorial or an adversarial process?
(vii) The status of 'risk factors' as indicators of risk.

Discussion of these seven key conceptual issues helped us towards our conclusions. 'The power of the Parole Board to direct release was seriously constrained by powers and inertias lying elsewhere. If a narrow view of the process is taken, then the DLP process is fair. The quality of the decision-making process was high and

8. Job description cited in Padfield and Liebling (2000), p.100.
9. Five judges, four psychiatrists, four independent members, two panel secretaries, seven prisoners, four legal representatives, five lifer governors/liaison officers, two probation officers, two psychologists and five others involved in the process.

decisions were reached carefully and after thorough consideration of all the available information. Yet when seen in its fuller context, it seemed less fair. The significance of a prisoner being post-tariff and the dual task of the DLP needed emphasising'.

The recall process raised particular concerns: 'Whilst recall hearings were conducted similarly to ordinary DLPs, the issues raised were very different. In a recall case, the panel was being asked not only to assess risk, but to confirm the recall of someone who had previously been deemed safe to release if managed adequately in the community. The reality of power in recall cases seemed to lie with the Probation Service. The human rights implications of this are too easily ignored. The management of risk needs carefully distinguishing from the assessment of risk'.

We also considered 'value for money': 'Given the human rights obligations of the Parole Board, the relative expense of the process is justified. Resources are wasted in delays and deferrals, but if the positive duty on the Prison Service to move post-tariff prisoners swiftly towards release were acted on, this would save money. Whilst Parliament seems to have tipped the scales in favour of protecting the public, the competing rights of the prisoner need all the more protection'.

The management of risk needs carefully distinguishing from the assessment of risk.

The 2016/17 research

In the summer of 2016, I observed 19 oral hearings at the 'hub' at the Parole Board headquarters, where cases are heard by three-way video link: prisoner and his/her lawyer and Offender Supervisor(OS) in the prison, Offender Manager (OM) at their probation office, and the panel sitting in the London Hub. As well as observing hearings, I interviewed several Parole Board members. Then, early in 2017, I observed a further 17 oral hearings at 11 different prisons, and was able to conduct further interviews with a variety of participants in the parole process, including prisoners. The 36 cases all involved male prisoners. Ten prisoners were serving mandatory life sentences for murder (one of whom had previously been released and had then been recalled to prison); 24 were serving imprisonment for public protection (IPP, of whom 6 had been recalled), and 2 were determinate sentence prisoners.

As in 1999, it was impossible, of course, to know whether decisions were 'correct'. In practice, 'success' in being 'moved on' appeared to be related less to a prisoner's personal characteristics, and more to overcoming a bureaucratic system which seemed to tolerate delays and inertia as 'normal'. Luck played a significant role, for example, in whether prisoners found staff who had the time and commitment to 'champion' their progress. Of course, the process should not depend on luck. Prisoners spoke of repeat cancellations, of a system in which the left hand often didn't know what the right was doing.

One feature was the high number of on-the-day deferrals and adjournments. My study is not untypical: in February 2017, the National Audit Office published an investigation into the Parole Board.[10] *Of the 2,117 oral cases outstanding in September 2016, 13 per cent were more than a year past their target date for a hearing. A further 16 per cent were more than six months past their target date. The oldest of the outstanding cases in September 2016 had an original target date in 2009, with another 404 cases having target dates in 2015 or earlier*.

The 2017 research asked whether it was fair to identify a *culture* of delay within both prison and parole processes. As in 1999, it felt in 2017 as though the Board was not sufficiently 'powerful' or indeed 'independent' to drive the process. There needed to be a much clearer commitment to avoid delays and to create a culture of urgency (to keep the prisoner 'moving on', both within the prison and probation system and within the Parole Board. I concluded that the Board's leadership (of the parole process) and independence within the broader penal system needed to be strengthened. The relationship between the Prison Service's headquarters (the Public Protection Casework Section or PPCS) and the Parole Board, and between PPCS and Offender Management Units (OMUs) in individual prisons needed to be reviewed; and the constitution of the Parole Board as a court, outside the Ministry of Justice, giving a proper priority to safeguarding the prisoner's right to liberty (a clear burden on the state to prove the necessity of detention) was proposed. Other 'process' improvements were recommended:

- a clear burden on the state to prove the necessity of detention;
- a commitment to avoid delays and to create a culture of urgency: all adjournments and deferrals should be subject to critical review;
- a review of the style and content of dossiers;

10. Available at https://www.nao.org.uk/report/investigation-into-the-parole-board/

- ❒ a review of the style of decision letters, ensuring greater formality and that the names of panel members appear on the face of the record.

1999 and 2017 compared

Whether or not the Parole Board is 'successful' in its mission depends on the criminal justice system which surrounds it, on the powers and inertias which lie elsewhere. The prison system in 2016-17 seemed to be much more disordered that it was in 1999 and desperately underfunded. How can a prisoner prepare convincingly for release in a prison which is basically unsafe?[11] The prison population is too large, and/or the system too under-staffed, to achieve its rehabilitative ambitions. Parole hearings are but one stage in a long and multi-stage process.

Some process concerns remain unchanged in 20 years:

- The assessment of risk: the 'status' of risk factors in the decision to release. Panels today focus on 'risk' quite as much as they did in 1999, despite the fact that there is greater understanding of the impossibility of predicting with any certainty the likelihood of future dangerous acts. Hence the suggestion in 1999 that decisions on risk should be separated from decisions about the management of the prisoner.
- The rights of prisoners: these could be swamped by the focus on 'risk'. Hence our seven key conceptual concerns in 1999 and my concern in 2017 that the Board gave too much weight to the protection of the public, and not enough to the rights of post-tariff offenders.
- The status of the Parole Board: in many ways, it felt less court-like in 2017. For example, the Government still initiates reviews, issues directions and now houses the Parole Board within the Ministry of Justice. Judges are much rarer. Whilst the process has become more inquisitorial, this has not focused attention on the burden of proof — the balance remains firmly in favour of public protection. It seemed obvious to us then, and to me now, that there should be a presumption of release for post-tariff lifers. Denial of release should be clearly explained.

Parole processes remain private, and have opened up very little. But it seems to me right that victims should be largely invisible at the hearing, as long as those victims (or their relatives) who wish to be kept informed are both informed and supported, their expectations of the parole process carefully 'managed'. The process is far from transparent — there needs to be a review of the format and distribution of decision 'letters', for example.[12]

So, what are the key differences between 1999 and today? Perhaps the most obvious was the make-up of panels. Then they were always chaired by a judge and nearly always involved a psychiatrist member. All members of the Board appeared to have some criminal justice expertise. Nowadays panels are only rarely chaired by a judge, and psychiatrists are even rarer. Three leading US experts have recently called for the composition of US Parole Boards to be reconstituted to ensure members possess a relevant criminology, social science or law degree, and at least five years of experience in corrections or criminal justice.[13] I was surprised in 2016 at the shrinking use of judges, psychiatrists and other criminal justice experts and would welcome a review of the skills required of Parole Board members (including a study of the impact on the process of the background of panel members).

How good is good enough? I was unimpressed by hearings held by video link for a variety of reasons — but these are probably 'fairer' than decisions taken on the basis of papers only. A question raised in both studies was whether it is 'efficient', given the thorough and resource-intensive system of review involved in oral hearings, that panels should be discouraged from making broader recommendations about a prisoner's progress. In 1999, there was always a senior member of staff (normally a 'Lifer Governor') present to present the case for the Secretary of State for Justice. By 2016, this role had been abolished in the vast majority of cases. Was it a waste of time/money? It is perhaps symptomatic of a degrading of the parole process that the prison's senior management team is no longer involved in parole hearings.

Today the 'stop-start' nature of the process is particularly obvious. Prisoners were often in the dark about delays, with little idea of how their case might be progressing. After an 'unsuccessful' Parole Board hearing, it would appear that a prisoner's case then sinks back into the background — the hard-pressed system moves on to the next case. Prisoners were resigned to a system which they could not control. Would more independent support and advice, maintained throughout their sentence, help? Or should the Parole Board actively monitor cases between hearings? The occasion of the Parole Board's 50th anniversary is a timely occasion to conduct a major review of what is a fundamentally important part of the criminal justice system.

11. See, for example, the Chief Inspector of Prisons' statement that many prisons are unacceptably violent and dangerous places – and getting worse, Annual Report 2016-17, at p.7: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629719/hmip-annual-report-2016-17.pdf
12. They are somewhat informal, often much longer nowadays and less likely to be used to attempt to push forwards a 'stuck' prisoner (see p. 72-73 of the earlier Report, see fn 2).
13. Rhine, E, Petersilia, J and Reitz, K (2017) 'The Future of Parole Release' 46 *Crime and Justice* 279.