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To Release or not to Release?

A study of Parole Board decision-making at paper hearings for recalled determinate sentence prisoners

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Introduction

For several years the Parole Board's re-release rate at paper reviews of determinate sentence recalled prisoners has been falling, currently standing at 3.8 per cent. Historically, little attention has been paid to this aspect of Parole Board work, despite the fact that nearly 10,000 prisoners who have been recalled on determinate sentences are dealt with by the Parole Board each year, the majority at a paper review. This article details the findings of a research project which set out to explore some of the reasons behind this falling re-release rate.

The research methods consisted of individual semi-structured interviews with 20 Parole Board members, and two focus groups with a total of 7 members. The data was analysed using a grounded theory approach. Illustrative quotes from interviewees are included throughout. The research process also involved observation of Parole Board and PPCS administrative teams looking at processes around recall. The research aimed to answer two questions:

- ❑ How do Parole Board members understand risk when making decisions about the re-release of determinate sentence recalled prisoners on paper reviews?
- ❑ How does Parole Board members' understanding of risk shape their practice?

The 27 members who participated accounted for over 40 per cent of the membership who undertook paper reviews of determinate sentence prisoners at the time of the research.¹

The rates of re-release for determinate sentence recalled prisoners at oral hearings are significantly higher (over 50 per cent) than at paper reviews. The paper seeks to argue that present arrangements may give rise to a tension between pressure to achieve an early review on the papers and the lack of information available to the single member at that time. This tension may contribute to decisions not to release. It considers whether re-release decisions on the papers are currently

being taken at the optimum time and with the right information to give assurance that risk assessment is being undertaken most effectively by the Parole Board.

The Parole Board is an independent body that works with its criminal justice partners to protect the public by risk assessing prisoners to decide whether they can be safely released into the community²

Context

The headline above is both the mission statement of the Parole Board and a description of what it does. The job of the Parole Board is twofold: firstly, to review the cases of indeterminate sentence prisoners to decide whether they should remain in custody, should progress to open conditions or are safe to be released; and secondly, to review the cases of indeterminate and determinate sentence prisoners who, having been released, are recalled from the community back into custody to decide whether they should be re-released. Traditionally, the focus of the Parole Board, of society and of academic research has been on the decisions made about the release or progression of indeterminate sentence prisoners and/or practice at oral hearings. There has been little attention paid either to Parole Board practice in relation to decision-making about recalled determinate sentence prisoners or to decision-making at paper reviews. Yet every year nearly 10,000 of these cases come before the Parole Board for decision following recall and the vast majority of them are decided at a paper review by a single member of the Board.

Prisoners are returned to custody for a variety of reasons including allegations of further offending or failure to abide by licence conditions. If they receive a negative decision from the Parole Board following review of their recall, they will not be referred back to the Board for further review unless at least 12 months remain until their sentence ends. As a result, many determinate sentence prisoners will have only one

1. At the time of the research only about 60 Parole Board members regularly undertook paper reviews. Since the research a further 104 Parole Board members have been appointed, all of whom will carry out this work.
2. Parole Board Annual Report and Accounts 2016/17.

opportunity for review before the expiry date of their sentence.

As well as the personal impact of the decision to release or not on individual prisoners and their families and the effect on local communities and wider society, the work of the Parole Board plays an important part in the management of the prison population. England and Wales has the highest imprisonment rate of any country in Western Europe at 145 prisoners per 100,000 population.³ With the prison population currently standing at 84,550⁴ and with 'startling increases in all types of violence'⁵ evident in prisons in England and Wales, the role of the Parole Board in directing the release of those who it considers to be safely manageable in the community is of increasing relevance.

Following the recall of a determinate sentence prisoner, the Secretary of State, through the Public Protection Casework Section of the Ministry of Justice (PPCS), has 28 days to refer a case to the Parole Board for a decision about re-release unless an order for executive re-release has been made. All cases sent to the Parole Board for consideration commence with a paper review conducted by a single member. The decision regarding the re-release of a recalled determinate sentence prisoner can be made solely on the basis of the recall dossier which is prepared by PPCS following application for recall from the supervising Offender Manager. The Parole Board member who reviews the case has a number of options open to them at that point:

- ☐ to release, either immediately or at a future date
- ☐ to make no direction for release
- ☐ to send the case to an oral hearing
- ☐ to adjourn or defer for further information to be provided to make one of the decisions above

The vast majority of the determinate sentence recall cases are concluded at the paper review with no direction for re-release.⁶

The issue

The size of the recalled prisoner population has risen every year from 1993 to 2015.⁷ Although falling slightly over past two years,⁸ there were 6,186 recalled prisoners in England and Wales in September 2017. More recently, there has been a slight drop in the number of recalls of those sentenced to over 12 months imprisonment.

The re-release rate of recalled determinate sentence prisoners at a paper review has been falling over recent years and currently stands at 3.8 per cent —

in 2011 the re-release rate was 10 per cent.¹⁰ The re-release rate at oral hearings for this group of prisoners is significantly higher at over 50 per cent.¹¹ On the face of it, two main issues seem to account for the falling re-release rates at paper reviews — the first is the introduction of fixed term recalls in 2008 and the increasing use of executive re-release by the Secretary of State since 2012 which means that a large number of 'straightforward' recalls are dealt with in advance of referral to the Parole Board.¹² The effect of these two initiatives is that

increasingly the Parole Board deals only with those recall cases which show greater complexity or where the risk of serious harm is judged as high and re-release is not supported by the Probation Service.

The second issue is the impact of the 2013 Supreme Court ruling in the case of *Osborn, Booth and Reilly (OBR)*¹³ which states that, amongst other factors, fairness requires that prisoners should have an oral hearing where they request one. Following OBR there was a sharp increase in the number of cases sent to oral hearing by the single member as the Parole Board sought to understand and apply that ruling properly.

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3. Bromley Briefings 2017.

4. Ministry of Justice *prison population figures* 5th January 2018.

5. HM Chief Inspector of Prisons (2017) Annual Report 2016-17 HMSO p 7.

6. Parole Board Annual Report and Accounts 2016/17 p 33 6873 negative decisions were issued.

7. Ministry of Justice *'The story of the prison population 1993 – 2012'* HMSO January 2013.

8. Ministry of Justice *Offender Management Quarterly statistics April – June 2017* 26 October 2017.

9. Ministry of Justice *Offender Management Quarterly statistics April – June 2017* 26 October 2017.

10. Parole Board Annual Report and Accounts 2016/17.

11. Parole Board Annual Report and Accounts 2016/17.

12. Some 1000 prisoners were executively released by the Secretary of State in 2016 (National Offender Management Service Recall and Release project report 2016).

13. *Osborn, Booth and Reilly* [2013] UKSC 61.

Prior to this ruling, it was very unusual for a Parole Board to send a recalled determinate sentence prisoner to an oral hearing.¹⁴ It is possible that members may be increasingly sending those cases to oral hearings which they think might have a realistic option of release rather than making that decision on the papers. Cases can also be sent to oral hearing on request from a prisoner following a decision not to direct re-release on the papers. The most recent Parole Board figures show that of the cases receiving a negative decision on papers, just over 11 per cent of those cases requested an oral hearing (and 55 per cent of those requests were granted).¹⁵

Other factors may also be at work. One is the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in 2012 which confirmed that the same test for release should be applied across all categories of prisoner assessed by the Board namely, *'that it is necessary for the protection of the public that (the prisoner) remains confined'*. Prior to this the Parole Board was able to balance the safe manageability of risks in the community with the benefits of continued supervision. By removing consideration of benefits to individual prisoners, this narrower focus on public protection is itself likely to have had a negative impact on re-release rates.

The process

Recall dossiers generally consist of Part A Recall and Part B Risk Management reports completed by the Offender Manager; previous convictions; a copy of the licence and the OASys risk management plan. Information from the prison is seldom received and representations against recall from the prisoner are infrequent. As a result, the information in the dossier is limited and the only view put forward is generally that of the Probation Service, which is the enforcing agency.

The Part B report is submitted by the Offender Manager only 14 days after the recall has been authorised by PPCS — in practice this timescale means that the Offender Manager has often not been able to make contact with the prisoner since his/her return to

custody and has no further information to add to the Part A Recall Report. Hence there is frequently no updated information available on the recall events which means that in many cases Parole Board members are making decisions based only on the allegations which have led to the recall. Not only do most recall dossiers lack personal or legal representations from the prisoner against the recall — in some cases it appears that the prisoner only knew that a review of their recall had taken place when they received the negative decision.¹⁶

The findings

The findings of the research drew out three main areas:

- ❑ Risk and public protection
- ❑ The independence of the Parole Board and decision-making based on evidence and the information in the dossier
- ❑ Process and practice issues

Risk and public protection

It was clear from the interviews that Parole Board members took their responsibilities very seriously and were acutely conscious that they were making decisions which affected the liberty of another human being and of the consequences for the individuals concerned. Without exception

interviewees considered that the role of the Parole Board was to protect the public.

The test for release being — is it necessary for the protection of the public that you should stay in custody — well that means exactly what it says on the tin Member 58.

Whilst this clear focus on public protection outweighed considerations of the rehabilitation of the offender, members also showed a strong awareness of the developing theories regarding desistance. When asked if they had any worries in their decision-making, at least as many members identified not releasing someone who could have been safely managed in the community as releasing someone who went on to commit a serious offence.

It is possible that members may be increasingly sending those cases to oral hearings which they think might have a realistic option of release rather than making that decision on the papers.

14. In 2012/13 42 cases were sent to oral hearings; in 2017, it was 1,757 p33 Parole Board Annual Report and Accounts 2016/17.

15. Parole Board Annual Report and Accounts 2016/17.

16. Padfield, N, 2011 Understanding Recall. *University of Cambridge Faculty of Law Research Paper*, (2).

...definitely the best way not to protect the public is to keep people in custody who don't need to be there Member 12.

The public is finally best protected if we can help people who pose a risk get better at managing and reducing their own risk... Member 30.

They're stuffed — if they've only got a year left they are not going to get looked at again. I am a firm believer that if you can get supervision to work, they are better out than in Member 20.

This is an important area for the Parole Board which must balance competing concerns of individual discretion, independence and public confidence in decisions made. In 2007 Mulgan¹⁷ pointed out that 'the big dilemmas are not between right and wrong, but between right and right', in other words there are competing claims for justice.

In terms of understanding risk some common themes emerged. Members identified harm, likelihood and imminence as the key factors in their decision-making. Members were universally clear that risk of harm was more important than risk of reoffending in their decisions. Hence, they were able to tolerate the prospect of releasing prisoners who might go on to reoffend where that re-offence was unlikely to involve harm. However, wide variation was apparent among interviewees in the identification of and importance given to key factors in decision-making. Whilst all identified past patterns of behaviour as key in understanding current behaviour, for some interviewees this could result in an emphasis on looking back rather than looking forward. A number of interviewees used the adage 'the best predictor of future behaviour is past behaviour' However, some noted that holding this view could preclude consideration of the possibility of change for individuals. None of the members interviewed felt that risk could be eliminated, only that it could be managed.

The independence of the Parole Board and decision-making based on evidence and the information in the dossier

It was clear that members felt that the work of the Board was poorly understood in wider society and there was little tolerance for errors.

The Parole Board only gets attention when someone reoffends after being released from prison. The mission statement is about protecting the public Member 53.

Another member, reflecting on their sense of needing to be more careful, referred to 'the Daily Mail effect' in terms of poor tolerance in society for prisoners' failure to comply with licence requirements, echoing the view of Clear and Cadora (2001)¹⁸ that even small evidence of risk provokes an overwhelmingly punitive response within society in general.

However, some members saw recall for breach of licence conditions not as evidence of failure but as evidence that the risk management plan had worked by detecting rising risk and therefore that it was sufficiently robust to support re-release. Other members took the

opposite position that the recall was of itself evidence that the risk management plan had failed; these members wanted to see more or tighter licence conditions put in place to ensure further compliance.

It was apparent that most members follow the recommendation of the Offender Manager in making their decision, seeing them as the expert in risk assessment and the professional with the responsibility for managing the risk in the community. This is confirmed by the other studies into Parole Board decision-making practice.^{19, 20} Whilst this may signal confidence in the Probation Service, it begs the question about the independence of the Parole Board's decision-making, an independence of which members were highly conscious and on which they placed great value. Members spoke of the importance of making decisions based on evidence. However, reflecting on going against an Offender Manager's recommendation not to release, a member said:

It was clear that members felt that the work of the Board was poorly understood in wider society...

17. Mulgan, G. (2007) *Good and Bad Power: The ideals and betrayals of government*. Penguin UK.

18. Clear, T.R. and Cadora, E., 2001. Risk and correctional practice. *Crime, risk and justice: The politics of crime control in liberal democracies*, pp.51-67.

19. Ministry of Justice The decision-making at parole reviews *Research summary 1/12* February 2012.

20. Forde, R (2014) Risk Assessment in Parole Decisions: A study of life sentence prisoners in England and Wales. *PhD submitted to Birmingham University*.

it would be a brave Parole Board member who would release someone on the papers in those circumstances Member 72.

Another interviewee said,

It would be very rare for me to release someone on the papers against an OM's decision Member 74.

Members were very conscious of a fine balance between the need for a timely review of detention following recall and the provision of sufficient information to make a decision. The high premium placed on the independence of the Parole Board was also expressed in a feeling that in some cases it was this independence that was instrumental in moving a prisoner forward. The perception of prisoners, noted in Padfield's 2011 study,²¹ however, is that far from being independent the Parole Board is seen as part of a remote and faceless bureaucracy and that prisoners were unsure of how or indeed when their review process was being conducted. In the absence of an oral hearing the perception is reinforced that 'the Parole Board is merely part of an administrative system'.²²

Practice and process issues

Members were familiar with the formal risk assessment tools used by Prison and Probation Services (OASys),²³ and were aware that they are group based actuarial measurements rather than individualised risk assessments. Whilst previous research suggests that these tools enhance Parole Board decision-making,^{24,25} Mehta (2008)²⁶ noted an over reliance on actuarial risk assessment tools. Some members expressed a preference for the professional judgement of the Offender Manager. Overall interviewees were conscious of the limitations of the risk assessment tools used throughout the dossiers.

You cannot ignore those risk assessments but OASys is only as good as its input Member 20.

Members were very conscious of a fine balance between the need for a timely review of detention following recall and the provision of sufficient information to make a decision.

All interviewees were clear that they ideally wanted more information and a fuller picture of the individual they were considering but that if they were in any doubt, they would send the case to an oral hearing. It was apparent that some members saw the ability to direct a case to an oral hearing as a safety net.

Members all understood that the much higher release rate at oral hearings for this group of prisoners was due to a number of factors. First, more information tends to be available to a Parole Board panel at the point that the hearing takes place, which will be some months after recall. This includes information from the prison based Offender Supervisor about the conduct of the prisoner since recall. Secondly, both prisoner and Offender Manager are likely to have met and to have

had chance to reflect on the recall 'event' — an event which may have resolved itself by the time of the hearing. Thirdly, there is a greater chance that the Offender Manager will then support re-release and have a risk management plan in place. Finally, where an Offender Manager was still not in support of re-release, the ability to ask questions of both Offender Manager and the prisoner at an oral hearing gives the members greater confidence in a decision not to follow the recommendation of the Offender Manager.

In interview a number of members acknowledged that they did not feel enough information was provided to them at paper reviews but the response to this varied. Some adjourned the review to get more information, sometimes several times — leading effectively to a significant delay in the review being concluded. Others took the view that the Secretary of State was responsible for providing the information required and that they would make the decision on the basis of the information given. Amongst those members who did report adjourning for more information to be provided, significant frustration was expressed about the failure of PPCS to provide that information in the time scales requested. Some members reflected that this frustration was a factor in causing them to change their

21. Padfield, N, 2011 Understanding Recall. *University of Cambridge Faculty of Law Research Paper*, (2).

22. Padfield, N, 2011 Understanding Recall. *University of Cambridge Faculty of Law Research Paper*, (2) p.41.

23. Offender Assessment System.

24. Harding, J. (2006). Some reflections on risk assessment, parole and recall. *Probation Journal*, 53(4) pp. 389-396.

25. Wendy Fitzgibbon, D., 2008. Fit for purpose? OASys assessments and parole decisions. *Probation Journal*, 55(1), pp.55-69.

26. Mehta, A (2008) Fit for purpose: OASys assessments and parole decisions – a practitioner's view. *Probation Journal*, 55 (2), pp 189-194.

behaviour in this regard that is not to adjourn so frequently or perhaps not at all. It is arguable that in those circumstances members may be less inclined to release on the papers.

An interesting finding from the research is that members were not generally aware of the rates of re-release from paper decisions (although these are published in the Parole Board Annual reports). When asked to estimate it, nearly all significantly over estimated the re-release rate and were surprised to discover that it is so low. When then asked to reflect on their own practice, members acknowledged that their own re-release rates were in fact in line with these overall rates although most went on to express that they felt they were 'risk averse' in relation to their colleagues. Given that members do not routinely have access to colleagues' written work nor do they get feedback on the results of their decisions, the basis for this view was unclear.

An unexpected finding was that whilst Parole Board Rules state that 14 weeks is allowed for the determination of a referral to the Parole Board from the Secretary of State,²⁷ in practice a working agreement between the Parole Board and the Secretary of State has developed over time which allows only 14 days for the decision to be completed. It is not clear that any analysis has been undertaken to assess what impact, if any, this much shorter time scale has had on the decision-making process at paper reviews.

It also became apparent during the research that the Parole Board does not routinely gather information on determinate sentenced recall prisoners and therefore analysis of the characteristics, trends or patterns in this group of prisoners and in the decisions made about their re-release on the papers has not been possible.

Conclusion

The study finds that the short time scale allowed for a paper review to be completed means that frequently, insufficient information may be available for the single member to make fully informed assessments

of risk. The findings suggest that the effect of this lack of information is twofold: fewer directions for release are made on the papers and more referrals to oral hearings are made. If more time was given for a paper review to be completed and more information provided, this may enable single members to make a more accurate assessment of risk. In turn this could result in a higher level of re-release at paper reviews and reduce the need for oral hearings.

Making a decision to release on less information than would be available at an oral hearing is itself a risk. It is arguable that without sufficient time and information on which to base decisions, Parole Board members are over reliant on the view of the Offender Manager and do not feel able to defensibly go against a recommendation not to re-release from the professional who will be managing the risk in the community. They may therefore be less able to exercise their independence. Given that the cases which are now referred to the Parole Board are those where the Offender Manager does not recommend release, and where there is little other information put before the member to allow them to form a different view, it is not perhaps of surprise that there is a high correlation with the Offender Manager's recommendation.

There is no doubt of the independence of the Parole Board from other parts of the criminal justice system. However, in the absence of information apart from that provided by the Offender Manager in recall cases, the question arises as to whether members are able to exercise their independence fully. It is at least possible that as a result of this the process issues currently in place are driving the decision-making at paper reviews.

Summary

This was a small-scale research project and the topic under exploration would benefit from further research. In light of the falling re-release rates for determinate sentence prisoners at paper reviews, there is value in increasing understanding of Parole Board decision-making in this area.

27. Parole Board Rules 2016 (*Rule 14 (4)*) Statutory Instruments 2016 No 1041 HMSO.