

The Future of the Parole Board

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: paroleboardconsultation@justice.gsi.gov.uk Thank you.

Question 1.

How should the Parole Board's existing jurisdiction, functions and powers be clarified?

Comments: This response is based on the premise that the Parole Board will and should move beyond its current NDPB status to that of a court or tribunal. For as long as it remains an NDPB its scope and status will remain uncertain and vulnerable to challenge. We believe that continuing debate, uncertainty and litigation on these matters must hamper the Board's effectiveness and distract it and other policy-makers from the core of its work. We would therefore want to see the Board's powers defined in a way which is compatible only with court or tribunal status. In general that means that it should be a decision-making body, not a body which advises the executive on matters which ought to be decided by a court or tribunal. Nor should it have a role in managing the prison population. Decisions on which category of prison an inmate should be sent to should be a matter for prison management, with whatever advisory mechanisms the Ministry of Justice thinks are appropriate. However, a decision-making role does not mean that only a parole court or tribunal can release an inmate. The legal requirement is that only a court or tribunal can deprive someone of their liberty. A court or tribunal role would not be incompatible with a system of executive release.

Question 2.

Should there be alternative arrangements, other than judicial review in place to enable parties to proceedings to challenge Parole Board decisions? If so, what might those arrangements be?

Comments: As we believe that the Parole Board's functions should be those of a court or tribunal the presumption should be that its decisions are subject to appeal. This is discussed

further under Question 8.

Question 3.

Has the move of sponsorship of the Parole Board within MoJ gone sufficiently far to protect the Board's independence; and does it provide the best means for ensuring the Board's effectiveness and efficiency?

Comments: Although it cannot change the fundamental constitutional relationship between the Board and the Ministry of Justice, locating sponsorship of the Board in the Access to Justice Group is an improvement over previous arrangements. There are three main advantages: it separates the Board from the operational pressures on the prisons, it locates it closer to one of its key human resources, the Circuit Bench, and it contributes to improvements in efficiency and effectiveness by aligning the responsibility for the Board's sponsorship with sponsorship of the wide range of arm's length bodies under the Access to Justice Group, including Her Majesty's Courts Service (HMCS) and the Tribunals Service (TS). However, what is left untouched is the Board's NDPB status. So long as it retains that status it will be vulnerable to challenge both on its degree of independence and on its ability to manage resources with maximum efficiency and effectiveness at a time of considerable and universal resource constraints.

Question 4.

Do you think sponsorship by either HMCS or the Tribunals Service would provide the appropriate level of independence and sufficient access to judicial resource?

Comments: We assume "sponsorship" to mean decisions on the resources to be allocated to a body, and supervision of its performance to the extent that its supervision is compatible with the body's necessary degree of independence. Sponsorship by a particular Government Department also indicates which minister and which Departmental Accounting Officer answer to Parliament for the work of the body.

We do not think sponsorship by either HMCS or TS would be an improvement over sponsorship by the Access to Justice Group. In some ways it might be worse. HMCS and TS are delivery organisations and have no collective experience of or expertise in the sponsorship of NDPBs. Their formal status is that of an executive agency, that is, they have

no independent statutory existence. Their governance arrangements involve a close partnership between judiciary and civil servants which in the case of HMCS has been formalised. Adding a statutory body like the Board to this mix may well generate uncertainty over the respective roles of Ministers, civil servants in the Ministry's corporate centre, civil servants working in agencies in partnership with the judiciary, the senior judges in the courts and tribunals, and the Board itself.

Question 5.

In light of your views as to the jurisdiction, function, powers and place which the Board has within the Criminal Justice System, what is the appropriate mechanism for appointing members?

Comments: As we believe the Board's functions should be those of a court or tribunal it follows that the decision-makers should be appointed in the same way as judges and tribunal members. Appointment to an existing jurisdiction is currently through one of two routes: a selection exercise run by the Judicial Appointments Commission or deployment of existing judges and members by the senior judiciary. See the responses to Questions 6 and 8 for further discussion as to how this could work if the Board's functions were brought into the tribunal system, and what the issues would be if it were brought into the court system.

Question 6.

What should the tenure arrangements be for members?

Comments: Salaried judicial appointments are in practice indefinite in duration, subject to misconduct, inability and mandatory retirement. Fee-paid appointments are for fixed but automatically renewed terms, subject to the same conditions but also non-renewal so as allow for recruitment of new people. If the Board's functions were in the court or tribunal systems similar principles would apply but a distinction should be drawn between appointment to a judicial office and deployment into the parole jurisdiction. In practice we would not expect the jurisdiction to be exercised solely by judges and members working exclusively in that jurisdiction. We would expect that there would be a mix, with a small core working exclusively or for long periods, augmented by a much larger cadre of judges and members who work in more than one jurisdiction. This is broadly similar to present arrangements except that now all the Parole Board members are part-time. The period of

deployment into the jurisdiction would be determined by senior judges – the Lord Chief Justice or his delegate for the courts; the Senior President or his delegate for the tribunals - and in practice would vary according to preference and business need.

Question 7.

In light of your responses to the previous questions, what status should the Parole Board hold within the Criminal Justice System? Should it be a court, tribunal or hold some other status such as its current NDPB status?

Comments: We believe that the parole jurisdiction should be exercised by a court or tribunal and not by an NDPB. In constitutional terms there is no distinction between a court and a tribunal. Both are equally independent of the executive, as they need to be to secure compliance with Article 6 of the ECHR. We explore the choice between courts and tribunals in the response to Question 8.

We regard NDPB status as unsatisfactory for three reasons: first, there will continue to be issues about the role and the independence of the Board for as long as it is part of the executive arm of government, no matter how far it is distanced from Ministers. This is not an issue for courts and tribunals.

Secondly, the self-governing nature of NDPB status creates a need for the Board not only to consist of judicial or quasi-judicial decision-makers but to include people who can provide strategic direction and executive leadership of the kind one would expect to see in a genuinely executive body. These are very different skill sets from those required of a judicial decision-maker. There must be a danger, or at least a suspicion, that the Board does not have the right range of skills or the right structure to lead the organisation effectively or alternatively that the decisions in individual cases are in some way subordinate to the organisation's financial pressures or strategic or policy choices. Of course these pressures and issues exist in the courts and tribunal systems but in those systems there is a clear separation between the judicial role and the administrative role, albeit with a close partnership between the two.

Thirdly, there is a potential gap in accountability. Ministers are not clearly responsible either for the decisions the Parole Board makes in individual cases or for the way it is run. This is true for all executive NDPBs but for other bodies it is always open to Ministers to recall the powers they have given to the NDPB, subject where necessary to parliamentary agreement.

For the parole jurisdiction, however, this is not open to Ministers without breaching the ECHR. The effect is that they have less control over those things they can legitimately influence than they would if the function were fully judicial.

Question 8.

Do you think the type of work dealt with by the Parole Board would be compatible with becoming part of either the Tribunals or Courts structure?

Comments: We acknowledge and understand the perspective which sees parole decisions as essentially an extension of sentencing decisions in the criminal courts and we understand the importance of the links which exist between the Parole Board and other criminal justice bodies. We also understand the need for the parole function to call upon the services of experienced judges from the criminal courts. Whether parole is to be seen as essentially part of sentencing is a philosophical or policy issue on which we would not wish to comment. We note the counter-argument that parole should be seen as standing in some sense outside the criminal justice system. However, we do believe that the parole function could become part of the tribunal system with comparatively straightforward legislative change and minimum disruption, maintaining its current links successfully, and able to draw on judges with criminal court experience.

The statutory framework created by the Tribunals, Courts and Enforcement (TCE) Act 2007 was deliberately designed to accommodate any kind of jurisdiction. It already covers a wide range of subject-matter, including social security, child support, asylum support, tax and duties, criminal injuries compensation, mental health, care standards, rating and valuation, charities, special educational needs, war pensions and armed forces compensation and rating and valuation. In 2010 it will add asylum and immigration and a range of regulatory jurisdictions. The system is therefore used to new and diverse work and to working with a wide range of other government departments and public bodies. It is not generally regarded as part of the criminal justice system, but some parts of it have dealings with criminal justice system agencies and bodies, and in practice some of its cases, for instance in the forfeiture jurisdiction of the Upper Tribunal or the overpayment jurisdiction of the First-tier Tribunal, overlap with criminal proceedings.

The TCE Act created two new tribunals – the First-tier Tribunal and the Upper Tribunal –and the structure allows for the division of the tribunals into chambers so that broadly similar subjects can be dealt with by the same judges and members, subject to the appropriate training and “ticketing.” Existing tribunals can be brought into the new system through subordinate legislation. Ministers and Parliament would have to take a view as to whether these powers could be used to bring the parole jurisdiction into the new system without primary legislation. This depends on the meaning of the term “tribunal” in s37 of the TCE Act. It may be that Ministers would prefer to use primary legislation in any event. Whichever route is used the parole jurisdiction could become a separate chamber in the First-tier Tribunal or it could be aligned with the mental health jurisdiction, which is already part of the First-tier Tribunal.

There are already clear parallels between the parole jurisdiction and the mental health jurisdiction. Both are engaged in risk assessment (although against different legal criteria). Both use mixed panels of judges, medical experts and others. Both draw on courts judges. Currently about 85 Circuit Judges and 15 retired Circuit Judges sit in the mental health jurisdiction in England. The jurisdictions of the Board and the Tribunal already overlap - inmates serving a prison sentence who have been transferred to hospital because of a mental disorder and who are eligible for release on parole have their case considered first by the Tribunal, which makes a recommendation, and then by the Parole Board.

The qualifications for tribunal judges are set out in the TCE Act. Qualifications for appointment of non-legal members are determined by an order made by the Lord Chancellor under the Act, after consulting the Senior President of Tribunals, who is currently a Lord Justice of Appeal. The present Order (*The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008* SI 2008 No. 2692) includes medical practitioners and psychologists but it can be amended as necessary to bring in any other kind of relevant expertise. All judges and members of the Tribunals are selected by the Judicial Appointments Commission and can sit in any jurisdiction in their tribunal, subject to training and the agreement of the relevant Chamber President. Courts judges are also eligible to sit in the Tribunals at the request of the Senior President and with the agreement of the Lord Chief Justice (and the Chamber President in most instances). It would therefore be possible for all Circuit and High Court judges to continue to sit in parole cases but the jurisdiction would also be able to draw on the full range of tribunal judges and members, many of whom will have relevant expertise, without the need for external recruitment. This

would greatly enlarge the pool of judges and members available for parole work, and create a much larger pool of qualified and expert individuals than the present membership of the Parole Board. This larger pool of judges and members should also mean that peaks and troughs in workload can be more easily accommodated, and it would be easier to change the type of judges and members who deal with parole issues as circumstances and demands change. The numbers of those who make decisions in the tribunal system (eg whether a panel or an individual can make a decision) is governed by an order made by the Lord Chancellor under the TCE Act, with the concurrence of the Senior President.

Procedural rules for tribunals are made by the Tribunal Procedure Committee, a statutory body created by the TCE Act. The Lord Chancellor has power to disallow rules and to require the Committee make rules to achieve a specified purpose. The Rules are also subject to Parliamentary scrutiny.

The tribunal system is supported by the Tribunals Service, an executive agency of the Ministry of Justice. Judicial leadership is provided by the Senior President of Tribunals and by Chamber Presidents, who are either High Court judges deployed by the Lord Chief Justice, or judges at Circuit or senior Circuit judge level selected by the Judicial Appointments Commission. Together they, with certain other judges, form the Tribunals Judiciary Executive Board. The Board works very closely with the agency Chief Executive's senior administrative team.

The tribunal system has some 5000 judicial members, mainly part-time, and just under 3000 staff. Its combined caseload is in the region of 500,000 cases per year. Within that, the mental health jurisdiction deals with about 26,000 cases per year of which about 60% currently give rise to effective hearings, and about 10% are restricted patient cases. The Parole Board's caseload and size as an organisation is such that it would be manageable within the existing judicial and administrative framework. Like the mental health jurisdiction, parole would be a medium-sized jurisdiction in the tribunal system. The tribunals judicial and administrative leadership are well-used to the diverse specialist needs and demands of all types and size of jurisdiction.

The Tribunals Service has its own estate but only some of it is suitable for hearings which require secure accommodation. However, the judges and members in the mental health jurisdiction are used to sitting in hospitals, in the same way that the Board sits in prisons. HMCS and TS are working more closely together on the use of the whole MoJ estate and in

our view the relatively greater suitability of the criminal court estate for dealing with hearings with security requirements is not of itself a strong argument against the incorporation of the parole jurisdiction into the tribunal system.

Finally, the TCE Act structure has a review and appeal mechanism built into it. Unless excluded, all First-tier Tribunal decisions can be reviewed at that level and can be appealed to the Upper Tribunal, but appeals require the permission of the First-tier or the Upper Tribunal and must be on a point of law only. There is an onward right of appeal to the Court of Appeal but only in cases of significance. The existence of the statutory right of appeal removes the role of judicial review in the High Court. We see no reason to exclude parole decisions from these mechanisms and see advantages in a more direct form of review and appeal than judicial review in the High Court. There were 146 applications for judicial review against the Parole Board in 2008/09¹ so legal challenges to parole decisions are not an insignificant part of the workload of the Administrative Court. Experience in other jurisdictions, particularly mental health and special educational needs, since the introduction of the new system in November 2008 confirms that reviews and appeals are now substantially quicker and cheaper. Obvious errors can be reviewed on paper, decisions set aside and cases reheard in matter of weeks, whereas quashing a decision via judicial review would typically have taken four to six months, and incurred much unnecessary expense.

In our view placing the parole jurisdiction in the court system would involve more disruption and would be less flexible as a solution. Primary legislation would undoubtedly be necessary. There is no framework equivalent to the TCE Act in the court system. The courts have very specific jurisdictions. The consultation paper concludes that the parole jurisdiction would either have to constitute a new court in its own right or become an additional jurisdiction of the Crown Court. The Crown Court does not have a cadre of members appointed specifically for their medical or other expertise and except for the judges on the Parole Board little experience of operating the kind of mixed judicial/medical/expert panel characteristic of the tribunal system and the Parole Board. The expertise already present in the tribunal system would not be available unless there were changes to primary legislation to allow those judges and members to sit in the courts.

There would be a difficult issue around appeal routes. Appeal from the Crown Court lies to the Court of Appeal (Criminal Division) and judicial review is excluded from most Crown

¹ Parole Board Annual Report 2008/09 (HC775) p.22

Court decisions. An onward appeal framework which included both the Court of Appeal and the High Court, as suggested in the consultation paper, would be in our view be complex and disproportionate, especially as compared to the review and appeal process available under the TCE Act.

Our conclusion, therefore, is that the parole function could be moved into the existing statutory framework for tribunals in a relatively straightforward way. Its location in that system would enable it to respond more flexibly to demands and changing expectations, and so it will be able to provide equal or better protection both for the community and for the rights of applicants for parole.

Question 9.

Do you have any alternatives to the above models?

Comments: No.

Question 10.

Do you have any views on the initial impact assessment, including any potential adverse impact on any particular group of people, what steps should be taken to mitigate this, and anything else the full impact assessment should cover?

Comments: The only suggested addition is that if the jurisdiction is transferred to the tribunal system, and more of the cases come to be heard by existing tribunal judges and members, the full group of judges and members may prove to be more diverse than the current membership of the Parole Board. However, it is not possible to establish this with any certainty at the moment.