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Consultation Response

Transforming Parole in Scotland

27 March 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Transforming Parole in Scotland (the Consultation).

The Consultation examines the way in which the parole system works in Scotland. Parole¹ requires a decision to be made whether or not to release a person from custody and as to what conditions to impose on that release. Where that decision is made in error, the consequences can be very serious in respect of the protection of the public.

That decision-making process about parole must be as informed as possible to learn from what has happened in the past. The high-profile murder case of Craig McClelland by James Wright illustrates what can go wrong though that case has subsequently been subject to review by the then Cabinet Secretary for Justice.² There were a number of recommendations made; some of which have implications for the Parole Board, specifically, that those who offenders convicted of crimes involving violence or knives can no longer serve part of their sentence at home on electronic tag curfew.

We support the purpose of the Consultation which focuses on making the parole processes as open and transparent as possible. Members of the public need to understand what parole is. There is a need to raise awareness of the public and what parole is, how it works, the decision-making process and its accountability. Ensuring that the parole process is the best that it can be is vital given its role in the criminal justice system.

The committee has the following comments to put forward for consideration.

¹ Paragraph 1.5 of the Consultation

² in accordance with section 7(2)(d) of the Prisons (Scotland) Act 1989 as well as a coterminous review in terms of section 74(1) of the Police and Fire Reform (Scotland) Act 2010.

Strengthening the Voice of Victims in the Parole Process

Question 1: Do you think victims and their families should have a greater voice in the parole process?

At the outset, what is important is that everyone involved in the Scottish criminal justice system understands the process. The Consultation has indicated that feedback has been received from victims where they want to have a greater involvement in the parole process. Though the victims and their families can speak to a Parole Board member in cases where the prisoner is serving a life sentence, what seems to be proposed is to extend that access. Exactly what shape and form that should take is the question that needs to be answered.

What is meant as regards involvement in the parole process is crucial. Promoting a better understanding of the process for victims and their families is important. We support that, not only for victims and their families, but also for the wider public. By way of example, we refer to the public facing information available on the Scottish Sentencing Council's website of an interactive nature which seems to us to be the sort of proactive approach that could be adopted. There is also the potential for developing teaching materials to include within school modern studies teaching as part of that course is understood to involve crime and punishment. That proactive approach should consider the use of a range of mediums such a video information. Many of the concerns from the victims and families appear to stem from a lack of understanding of the process. This is reflected in the Consultation at paragraph 4.8.

A further problem which we anticipate is in defining who all would be included within the meaning of the victim and their family. From experience, that can be challenging in dealing with fragmented families. We wonder whether an approach along the lines of the statutory framework set out in sections 14- 18B of the Criminal Justice (Scotland) Act 2003 (2003 Act) could provide a template for any future legislation. For example, section 14 provides the victim or a family member from a statutorily defined group, the right to make a victim statement. Section 14(5) provides that:

“the court must in determining sentence have regard to so much of (i) that statement and (ii) any statement made by virtue of subsection (3) in relation to that statement, *as it considers to be relevant to that offence.*” (our emphasis is added).

If additional rights for victims and their families were framed in a similar way that would allow the person to make their contribution but for the Parole Board to act as appropriate, taking all factors into account. The process should be victim centric but needs too to respect the rights of the prisoner as well.

Section 17 of the 2003 Act already grants victims the right to receive information and make representations to Scottish Ministers or to the Parole Board where the accused is serving a life sentence. The section requires Scottish Ministers or the Board to inform the victim of the outcome. Our suggestions could add to

what already exists for the benefit of the victims and their families. That would improve and address the request for greater involvement.

Practical issues will arise as well as inevitably, parole decisions are made at a later stage which may be a number of years after the incident. There may be questions to ascertain how to ensure such rights for the victim and their families are and can be respected and can then implemented. Victims and their families may well have moved on physically and of course, emotionally, so as not to want to be reminded about the incident.

In respecting the victims' and their families' greater voice, proportionality needs to be maintained too in respect of the prisoner.

We would also expect that the victims and their families should have right to legal advice and assistance (legal aid) to allow them to be heard appropriately. We would suggest that such provision should not be means tested to make it accessible for all.

Question 2: Do you think victims and their families should be entitled to attend parole hearings in person?

Yes, in principle. Consideration would need to be given as to what part of the parole hearing they should attend. It may be inappropriate for them to be allowed to attend the whole hearing because it might result in the hearing failing to focus on the key point which is of course whether the prisoner should be released. Exactly how the Parole Board deliberates is a matter for them in private and that process should be maintained. There will presumably be aspects that should always be held in private. This equates with practices too in court where the sheriff may retire to consider matters in private before announcing a decision. For instance, we assume that the Parole Board considers the safety of victims and their families. That should be carried out in private.

We refer to our answer to question 1 in relation to the provision of legal advice and assistance for attendance at any parole hearing. Any formal process can be stressful for those who are unfamiliar with the terminology and formality of procedures. Making provision for legal advice and assistance needs to be available to support all involved.

We also query if the role of Victim Support services would be relevant to extend to these proceedings.

There are also considerations required where the victim is vulnerable where legal advice and assistance as well as support may be required to effect communication. Would that support role come from their family or an independent person?

Question 3: Do you think there should be clear criteria on the kinds of information

the Parole Board should consider in relation to the safety and welfare of victims and their families?

Yes

The victims' and their families' addresses should not be revealed. Consideration may be given to imposing conditions that would restrict any access, contact or approach being made to the victims and their families, similar to those imposed in relation to the bail processes at present. The victims and the families need to be informed of the terms of any conditions which are imposed.

The police should also be informed as soon as possible as to such conditions so that conditions can be enforced, if necessary.

There may also be a role in considering the extended use of electronic monitoring. This overlaps with Part 1 of the Management of Offenders (Scotland) Bill³ which considers the extension and use of electronic monitoring.

There may also be merit in setting criteria about what the Parole Board is permitted to consider and what it may not. For example, see section 16 of the 2003 Act which sets out the information contained in the victim statement that the court is permitted to consider. Setting out this properly would enhance the much-needed transparency which is a focal point underpinning the Consultation.

Ensuring transparency and improving support for decision-making

Question 4: Do you think more could be done to strengthen the Parole Board's current use of licence conditions (including conditions to exclude individuals from certain areas, or from certain individuals)?

Yes

We refer to our answer to Question 3 above.

Question 5: Do you think that victims and their families should receive information on the reasons for the Parole Board's decisions in their case?

³ [https://www.parliament.scot/S5_Bills/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27S052018\(1\).pdf](https://www.parliament.scot/S5_Bills/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27S052018(1).pdf)

The Parole Board should provide reasons for their decisions. A short-written judgement identifying the reasoning as to their decision with redaction of names etc. where necessary, could be produced and sent to the relevant parties. However, we would empathise that a lot of the information that might be supplied should be available publicly to inform about the role of the Parole Board as we identify in our answer to Question 1. Accordingly, any judgment could be short and pertinent to the case in point.

Consideration as to the information to be supplied as well as the judgment referred to above might include:

1. information regarding any conditions that had been imposed as set out in our answer to Question 3
2. clear and detailed information of where and when the prisoner is due to be released
3. what happens if they breach the conditions?
4. how to report any breach to the police

We query, while safety of the public and the need for recognition of the on-going suffering of the victim and their families must be paramount considerations, the Parole Board should also consider the safety of the prisoner following their release on parole. Publicising the address of the prisoner may be counterproductive. Though there should be greater consideration for victims and their families, there should be a need to avoid stigmatisation or encouraging any vigilantes to seek out those prisoners who may be released on parole. That would avoid problems as in the case involving Brian Taylor. Addressing and avoiding the families' greatest fear of "meeting him by chance" where "they say the system is stacked in favour of the criminals⁴ needs to be managed.

Another factor to consider would be the question of any appeal mechanisms that are available. Perhaps this should include advice on how to access to a solicitor as well.

As part of the Parole Board's work, consideration could be given to disclosing the reoffending rate and the nature of action taken to recall prisoners. This might tie in with the recommendations referred to above that came about as a result of the murder of Craig McClelland.

Questions on ensuring transparency

Question 6: Should others be routinely entitled to attend parole hearings?

No

⁴ Two Families United in Grief <https://www.bbc.co.uk/news/uk-scotland-45437477>

By others, we assume that this means those outlined in paragraph 4.9 of the Consultation which include the media and the general public. We consider that proceedings should only be open to those that have a direct or genuine interest being the victim and their families. Those having interest could be set out in any relevant legislation. Equality would include prisoners and their families.

Were the proceedings to be open more widely, then this would have a significant security impact on where these hearings are held and all who attend.

Question 7: Should information be routinely shared with others?

No

Court decisions are not generally shared more widely than those that require to have access to that information. Decisions that are appealed are published but that depends on the issues and the need to make them publicly available. That decision is taken on a case by case basis. There are significant risks that information shared in an unrestricted fashion would result in vigilantes pursuing action of their own or targeting those released.

Question 8: Do you feel that some information regarding parole decisions should be published proactively?

Yes

We do consider that some information regarding parole decisions should be published proactively. There should be a presumption in favour of publication except for details that need to be redacted. As an example, again, we would draw attention to the sentencing information that is published on the Judicial Office's website. That information is useful to inform others as well as the public of the judges' reasoning for imposing a particular sentence.

We would emphasise that careful scrutiny is required as to what is made available as not all information should be visible.

Question 9: Do you think the work of the Parole Board is sufficiently visible?

No.

We refer to our answers above regarding the need for transparency of process and decision-making. Proactive publication of information would assist visibility of the Parole Board.

There are, as we are aware, considerable differences between the Parole Board in Scotland and England and Wales; the latter of which has attracted considerable criticism recently with the case of Worboys.⁵ Any review of the Parole Board in Scotland needs to address these publicly voiced concerns to indicate where these do not apply to Scotland or if they do or could, how these will be addressed as a result of any reforms brought forward through this Consultation. The concerns were outlined in the resignation of the Parole Board's Chair's letter⁶ which included victim communication which is dealt with in the questions in part 1 of the Consultation. The disclosure of material relating to the case should be as full as possible which falls under the remit of Question 8 but general information being made available will enhance the Parole Board's visibility and promote understanding.

Even when the Parole Board's decision is justified, better management of the victim and their family's needs to be achieved. Managing their expectations is important too. This refers too to our comments at Question 5.

Information for prisoners on the parole process

Question 10: Do you think that consideration should be given to widening the information available to the Parole Board by establishing a function to investigate and collate information from other bodies?

Yes.

This should be a matter for the Parole Board, the prison and in certain limited circumstances, the victims themselves.

Question 11: Do you think that prisoners currently receive the information they need to enable them to participate in the parole process?

No.

The interests of justice should ensure that prisoners should have all the information that the Parole Board has. It should be provided in a manner that they can understand.

We understand that, though significant information is produced, it is not always received early enough for action to be taken. What may be better is to ascertain whether the prisoner has legal representation at an

⁵ <https://www.bbc.co.uk/news/uk-43568533->

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earlier stage of the process as this will allow early and full preparation to be undertaken rather than the last-minute process which may be the experience at present.

Question 12: Do you think that more could be done to make sure that prisoners understand their licence conditions and the consequences of breaching them?

Yes.

There is merit in appointing someone to assist the understanding of prisoners both pre and post the parole hearing. Some prisoners will have legal representation in which case that may not be necessary.

We are unsure exactly what information is routinely supplied to the prisoner regarding the parole hearing. No doubt this would benefit from revision as well as expansion to reflect some of the responses to the Consultation.

Supervision, Review and Recall

Question 13: Is there a requirement for an additional review process (at least initially)?

There may well be merit in having additional hearings. Please see answer to Question 14 which would tend to support the desire to have provision for additional hearings. If reviews are carried out on a regular basis, it may be possible to identify emerging problems and hopefully, to address them before the need for a full recall report arises. There will be resource implications but this is preferable than ultimately, any adverse cases where prisoners on parole commit further serious crimes. It would assist with risk management.

Question 14: In relation to revocation of licence and recall to custody. Do you consider social workers should be able to refer directly to the Parole Board?

Yes

It might be appropriate to allow social workers to refer matters directly to the Parole Board rather than seeking to revoke the licence. Logically, it might also be appropriate to allow the prisoner the opportunity to refer his licence conditions to the Parole Board to attempt to have them varied. It is important that any alleged breaches are dealt with as soon as possible. However, it is essential that the prisoner has full details, as early as possible, regarding any alleged breach and has a right to make representation to the Parole Board **before** any recall order is made.

Independence and Governance

Question 15: Do you agree that a transfer to the Scottish Tribunals would enhance the independence of the Parole Board?

Transferring the Parole Board to the Scottish Courts and Tribunals Service would clearly show its independence from the Scottish Government. This would allow for a more streamlined approach to Parole Board hearings.

Question 16: A review and appeal are available in the Scottish Tribunals. Do you consider these processes should be available for the Parole Board?

It is in the interests of justice that there should be an independent and impartial review/appeal process. This should include the right to legal representation, and where necessary, legal aid funding for that representation.

For further information, please contact:

Gillian Mawdsley

Policy Executive

Law Society of Scotland

DD: 0131476 8206

gillianmawdsley@lawscot.org.uk