RESPONSE OF THE FACULTY OF ADVOCATES to the consultation on Transforming Parole in Scotland

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Q1. Do you think victims and their families should have a greater voice in the parole process?
If Yes, what more could be done to help victims and their families be heard? If No, why not?

The Faculty recognises there is a range of views on this question, and that was reflected on the sub-committee preparing this response. We have been unable to come to a common position on this question.

If victims and their families were to have a greater involvement in the parole process, any changes to the current system would require to balance victim involvement with a fair, just and proportionate system. The primary function of Parole Board decision making is assessment of risk, and that should remain central in consideration of any reform.

In making a decision on a prisoner, the Parole Board will have access to the evidence set out in the dossier which will include information about the original offence from the trial judge's report. This may include information regarding the impact on the victim if a victim impact statement was submitted to court prior to sentencing. However, much will depend on the circumstances of each individual case and whether a victim impact statement was in fact submitted.

In our opinion, victims and their families who have opted in to Part 2 of the Victim Notification Scheme should be given the opportunity prior to each parole hearing to submit a written Victim Personal Statement to the Parole Board for their consideration. This could include an option to ask the Parole Board to consider

adding certain conditions to the prisoner's licence if they are released such as imposing an exclusion zone or prohibiting contact with certain individuals directly affected by the original offence. We consider that this Victim Impact Statement should form part of the dossier before the parole board for consideration. It is important to recognise that some victims and family members are likely to be as keen to put the events behind them as others will be to participate in the parole process, and this part of the process must be managed sensitively.

Q2. Do you think victims and their families should be entitled to attend parole hearings in person?

If Yes, what wider considerations would be necessary to manage this process, what support should be available and who should be responsible for providing that support?

If No, why not?

The Faculty recognises that there is a range of views on this question, and that was reflected on the sub-committee preparing this response. We have been unable to come to a common position on this question.

If there were to be a mechanism to allow victims and their families to request to attend an oral hearing, the decision whether or not to allow such a request should remain with the Parole Board. Those supportive of victim participation in person at Parole Board hearings consider that this should be restricted to allowing victims and their families to read out their Victim Personal Statement at the start of the hearing, whether in person or by alternative measures such as by video link or video recording. Victims or their families should not be allowed to provide additional information at the hearing not contained in their Victim Personal Statement. There should be no requirement that the prisoner is present during the reading of the Victim Personal Statement. We do not consider it appropriate that victims or their families are present throughout the remainder of the hearing. This is to allow the prisoner the best opportunity to provide open and honest answers to the Parole Board.

A role similar to that of a Victim Liaison Officer in England could be created to manage this process and provide support to victims and their families.

Those not supportive of in-person participation point to the real practical challenges in facilitating this, which are elaborated in our answer to question 6. Of more

significance is the reality of the limited nature of such participation, where this amounts to reading an updated victim impact statement.

We are agreed that any more extensive in-person participation would be problematic, given the range of matters the Parole Board quite properly requires to balance in its overall assessment.

Q3. 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?

If Yes, in your view what should that criteria be? If No, why not?

In our opinion this is a very difficult question to answer. Knowledge, understanding, experience, and common sense all have parts to play in appropriately identifying the kinds of information the Parole Board should consider in relation to the safety and welfare of victims and their families. Each case will be different and decisions made on the basis of information unique to that case.

We do not consider it necessary that there be written criteria on the kinds of information the Parole Board should consider in relation to the safety and welfare of victims and their families.

Q4. 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)?

If Yes, what would the implications be of extending this and how could this be managed in the community? If No, why not?

Yes.

In our opinion, there is scope for strengthening the Parole Board's current use of licence conditions to include conditions to exclude individuals from certain areas or from certain individuals. However, any such conditions would require to be necessary, proportionate and manageable. They must not infringe the free movement of the individual unnecessarily. An exercise in the balancing of the respective Convention rights of the prisoner, their families and the victims and their families would require to be carried out when considering the imposition of such conditions.

In our opinion, in respect of exclusion zones, any such condition must be clear and

necessary and the size of the exclusion zone reasonable and proportionate. The zone should be no bigger than is reasonably necessary to achieve the objective sought. The area of exclusion must be clear and precise so that there is no doubt where the exclusion zone begins and ends. There should be a mechanism by which permission could be sought from the supervising officer to cross any exclusion zone in certain circumstances. There should be a mechanism for reviewing such conditions at reasonable intervals.

Any such conditions imposed would require to be capable of being enforced and managed by the probation service and the police in the community.

Q5. Do you think that victims and their families should receive information on the reasons for the Parole Board's decisions in their case? If Yes, what kind of information would be most helpful and how should that be provided? If No, why not?

We do not consider it appropriate that anything other than the decision itself (not including the statement of reasons) should be communicated to the public or the media due to the nature of the personal information the statement of reasons will almost certainly contain.

There is a range of views within the sub-committee about whether it would be desirable to make information about the reasons for the Parole Board's decision available to victims and their families. We have been unable to come to a common position on this question.

If reasons were to be made available, care would have to be taken to ensure that, for example, information about other victims, or information about where a prisoner was being released to, was not included in the material made available to victims or family members. That information would engage those persons' (i.e. the subjects of the information) rights under Article 8 ECHR.

If reasons were to be made available, the responsibility for this could be given to an individual similar to a Victim Liaison Officer in England who would be responsible for advising victims and their families what the decision was and for providing them with an outline of the reasons behind the decision. This could include reasons why it was not possible to impose any specific licence conditions requested. Again, care would require to be taken to exclude personal information about other victims, and sensitive material relating to the prisoner.

Question 6: Should others be routinely entitled to attend parole hearings? If Yes, who should be able to attend, in what circumstances and for what part of the proceedings? If No, why not?

The Faculty has no concluded view on the correct answer but would observe that there are a number of practical reasons why wider participation at Parole Board hearings may well be undesirable.

As a matter of principle it is perhaps difficult to see what would be gained by wider attendance at hearings. The purpose of such hearings is the assessment and management of risk. It is difficult to see how this task would be improved by the greater involvement of others. Information from victims can be of assistance but it is difficult to see how this would be improved upon by those individuals being present, as opposed to providing considered victim statements prepared in a less pressured setting than a tribunal hearing. Moreover, if individuals were only to be present for part of the proceedings or are to be excluded from parts then questions of fairness may well arise.

Further, the practicalities of an extended range of attendees would also seem to militate against it. At present, parole hearings take place in accommodation within prison. Unless a whole new suite of facilities were to be provided, attendance at a prison would be necessary for anyone attending. In addition to the obvious practical considerations of hosting victims and those supporting them in prison, it seems to us there are risks of heightened emotion for at least some participants. The presence in the same room of the perpetrator of an offence and the victim or victims has the potential to produce conflict, and that is in the interests of no-one.

Question 7: Should information be routinely shared with others?

If Yes, what level of information should be shared or what more could be done? If No, why not?

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

If Yes, what level of information do you feel should be published? If No, why not?

The Faculty recognises that there is a range of views in relation to how open proceedings before the Parole Board for Scotland should be: at one end publicising the detail of all decisions taken by the Parole Board while maintaining the status quo, with little or no publicity at the other. There is a balance to be struck. That balance is, essentially, a policy-decision, based on information about risk assessment. It should be appreciated, however, that greater openness in Parole Board proceedings may not be a welcome step for all victims. At the moment if victims do not wish to hear about their original case it is relatively easy for them to avoid doing so. With a few exceptions, cases attract media attention for the time that they are in court and then fade from the public eye. Publicising parole decisions might well result in renewed attention for the original offences. For victims who wish to try to put the offence behind them, this may not be desirable.

Moreover it should be appreciated that any given prisoner may have a number of victims who may know little about each other. Those victims may not wish information about themselves shared with the other victims.

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

If Yes, why do you think that? If No, what more could be done?

The Faculty has no views on whether the work of the Parole Board is sufficiently visible.

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?
If Yes, who should provide that function and in what circumstances? If No, what other options are there to improve information gathering?

No.

In the Faculty's view, the Parole Board ought to have better case management powers in relation to witnesses and documents.

However, giving the Parole Board further functions more generally would seem to us undesirable. There are some occasions when cases require to be continued at the moment. If that is appreciated ahead of time, then the hearing can be discharged ahead of time. It may however be that the need for a particular report only becomes apparent at the hearing. It is difficult to see how giving the Parole Board a function

of investigating and collating would add anything; indeed, it might well be thought to run counter to the philosophy of a neutral assessment of risk.

Moreover if the Parole Board had a function of investigating evidence there would undoubtedly be disputes and probably appeals about the manner in which the Board went about its task. At the moment the dossier can be criticised before the Parole Board, and the Board make decisions about it, including seeking more information if necessary. If the Parole Board were to be responsible to some extent for the dossier then making criticisms of the dossier may well need to be done in an appeal from the Parole Board decision. Moreover, making investigation a function of the Board may very well jeopardise the fairness of the proceedings. Having a decision-maker also investigate would seem to be generally an unwelcome innovation, particularly in proceedings where an individual's liberty is at stake.

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

Yes.

Generally, prisoners receive the information they need to enable them to participate in the parole process, and, particularly where they are represented, they are generally able to do so. We have more concerns about unrepresented prisoners. We doubt whether all unrepresented prisoners fully understand the information provided to them or, equally importantly, the way in which that information is likely to be relevant to the risk assessment process that underlies the system of parole. Accordingly, we consider that further work could usefully be done to identify ways in which the communication of information about the process could be improved, rather than, necessarily, increasing the volume of information.

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.

However, we are unsure the extent to which any problems with breaching licence conditions are caused by a failure to understand those conditions rather than being attributable to other causes. To the extent that the problems are caused by a lack of understanding of licence conditions, then obviously steps should be taken to explain those conditions to prisoners. However, we doubt that it would be appropriate for such explanations to be provided by a member of the Parole Board. The written reasons given by the Parole Board ought to make clear what conditions have been

imposed, why they have been imposed, and what the prisoner must do in order to comply with them. If the Parole Board feels that any clarification is necessary in order for the prisoner to understand it, then that clarification ought to appear in the written reasons. In our view, it would be more appropriate for any further clarification or explanation, perhaps in response to particular questions from the prisoner, to be provided through the LLO or ERLO or similar.

Question 13

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

No.

In our view there is no such requirement, at least not in the way envisaged. The parole system is a form of risk assessment. The risk posed by an individual prisoner is unlikely to be static and therefore must be kept under review to ensure that it remains acceptable and manageable in the community. In our view any system of parole ought to be able to detect and deal with developing difficulties before they escalate, preferably by addressing the issues causing the increase in risk but where appropriate by returning the prisoner to custody before the risk manifests itself. While we can see the theoretical benefit in an additional review hearing being conducted by the Parole Board, we doubt that such hearings could be arranged in sufficient time to deal proactively with such developing difficulties. In our view it is more likely that developing issues can be detected and dealt with in a timely manner in regular meetings between the prisoner and his or her social worker than at a formal hearing. In this regard, we observe that particular thought needs to be given to management of higher risk long-term determinate sentence prisoners sentenced after 1 February 2016.

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?

No.

But if the measure were to be supported by social workers, then we would support it. There is obvious sense in this proposal in that it cuts out a link in the chain and that might potentially allow the case of a prisoner whose risk has become unacceptable to be recalled to custody more quickly. The question is whether the additional link in the chain serves a useful purpose. Our concern about the proposal is that it might run the risk of undermining the relationship between prisoner and

social worker. It might serve to emphasise the imbalance in the relationship, and that in turn might discourage the sort of open and honest relationship that is most likely to ensure that a prisoner's risk remains acceptable and manageable. However, we think the answer to this question must be determined by the experience of those who would be tasked with making the reference. Accordingly, if the measure were to be supported by social workers, then we would support it.

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

If Yes, what do you consider the advantages and disadvantages would be with such a transfer? If No, Why not?

No.

The Faculty does not consider that transferring the Parole Board to the Scottish Tribunals would enhance the independence of the Parole Board. As the consultation document notes at paragraph 7.4, the Parole Board meets the criteria for a 'court' in terms of the European Convention on Human Rights jurisprudence. It is independent already.

We recognise that there is an argument which can be made along the lines in paragraph 7.5 that transferring the Board to the tribunal structure would make the position about independence beyond argument. There is some merit in the proposal for that reason, but it would be inaccurate to describe that as enhancing independence.

It is not clear from the consultation whether it is intended that existing members of the Parole Board would transfer to a new tribunal chamber, were one to be created. The Faculty considers that to be desirable. Schedule 2 paragraph 2 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 requires that amongst its members, the Board should have people from the groups there listed. The reasons for those classes are obvious because of their experience of different aspects of the criminal justice system. It seems to us that similar experience will be required in any new tribunal chamber. It would be unfortunate to lose the accumulated experience of existing members.

Further, the Faculty recommends caution in the idea of transferring in members from other chambers (paragraphs 7.13 & 7.14). Such transferring members should only be drawn from groups with appropriate experience. The risk assessment-based decision making by the Parole Board is different from the nature of decision making

by other tribunals, except perhaps for some of the decisions made by the Mental Health Tribunal for Scotland.

Having regard to the nature of the Parole Board's proceedings, we consider it unduly optimistic to think that SCTS buildings might be used (paragraph 7.15), save as a location from which victims might participate by remote link, in the event that forms part of a new structure. In our answer to questions 7 & 8 we have already expressed concerns about expanding the range of such participation.

Question 16: A review and appeal are available in the Scottish Tribunals. Do you consider these processes should be available for the Parole Board?
If Yes, what are the benefits of having these processes available? If No, why should these processes not be made available in the case of the Parole Board?

The Faculty considers that if the Parole Board is transferred to the Scottish Tribunals, there should be a right of appeal from its decisions, but not a provision about review along the lines set out in paragraphs 7.16 and 7.17.

We consider that, as a matter of principle, the rule of law generally requires a right of appeal from a judicial decision making body. That is a feature of the existing components of the Scottish Tribunals, and also of currently self-standing tribunals such as the Mental Health Tribunal for Scotland. As the consultation document recognises, the legal test in an appeal is different from that in a judicial review (the current route for challenging decisions of the Parole Board).

We consider it is reasonable to anticipate a somewhat larger number of appeals than the current level of applications for judicial review. That is because there is generally more room for argument about whether there has been an error of law or misapplication of the evidence (which are typically the grounds on which an appeal may be brought), than the public law grounds on which judicial review proceeds.

We have serious reservations about the review mechanism discussed in paragraphs 7.16 and 7.17. We recognise that there is something to be said for having a straightforward process for correcting "administrative" errors, where that means an error of expression, or a mistake in operative dates, or the like. However, it seems to us that the decisions which the Parole Board requires to take involve matters of very great moment to the prisoners who are the subject of the decisions, that there may be a temptation to seek in effect to appeal by the review route and then the appeal route.

There is a further complication which in our view is more significant. It is that risk assessment is a dynamic process, in that a prisoner's progress towards release is one which occurs over a period of time. Each decision of the Parole Board relating to the prisoner is taken at a point on that journey, and the range of factors present will change, sometimes in a short period. This is also a live issue with proposals to introduce a mechanism for review into the Mental Health Tribunal for Scotland, where the situation of any given patient is even more dynamic. In that respect, the position may be contrasted with, for example, the Housing Chamber, where a factual determination is made on facts which are unlikely to change save in response to the tribunal's determination.