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Recalling conditionally released prisoners in England and Wales

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***Abstract**:*

This article explores the recent enormous increase in the number of prisoners recalled each year to prison in England and Wales: prisoners who had previously been released, either automatically or on the direction of the Parole Board. It explores law and practice, focusing in the analysis on pre-release processes, the process of recall and on the prisoner's journey towards re-release. Having considered the role of the Parole Board and of the executive more generally, the paper concludes that there should be a review of whether 'sentence review courts' would work better to encourage offenders to earn their way out of prison and off supervision.

Keywords: Prisoners – England and Wales – Conditional release – Recall - Parole

Introduction

It is well known that the English and Welsh prison population is high by European standards. On 16 September 2011 there were 87,120 people in prison custody (82,876 men and 4,244 women). The majority of these prisoners are serving determinate sentences, but a growing number face indeterminate (life) sentences. Custodial sentences are designed nowadays, in the main, so that prisoners serve part of their sentence in prison, and part in the community. A significant part of the explanation for the rising prison population is the number of prisoners recalled to prison, and the length of time they then spend back inside (before being re-released). In this article, I review the law and practice on sentence implementation which is resulting in an increasing number of prisoners serving more of what might have been the community part of their sentence in prison: a practice which is both expensive, and often, I argue, unfair.

A *determinate* sentence has a fixed end point: a four year sentence finishes after four years. But most prisoners are released at half time, and many are eligible to apply for release up to 135 days before the half way point, on 'HDC' (Home Detention Curfew, subject to electronic monitoring). The published 'prison population' figures give the number of prisoners on HDC (2,745 on 16 September 2011) in addition to the prison population, but they do not mention the number of prisoners who have been conditionally released, but who are not on HDC. This is presumably because the 'system' considers the HDC offenders still to be part of the 'custodial population'. It

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is difficult therefore to say when someone is rightly described as a 'prisoner' in English law. Normally an offender is not referred to as a 'prisoner' once he or she has been released, even when released conditionally, unless, perhaps, when he or she is on HDC, prior to reaching the half way point. A prisoner who has been recalled to prison will be a prisoner: within the prison system, there is no distinction between those who have been released and then recalled, and those who have not yet been released. Those who have been allocated to less secure (open) prisons and who may work outside the prison on daily 'ROTL' (release on temporary licence), remain 'prisoners'. The overlapping categories are reflected, too, in the deaths in custody statistics: some of the prisoners counted in these statistics also appear in the 'deaths under supervision in the community': an offender who dies in prison having been re-arrested and remanded in custody, or having been recalled to prison, may be counted twice. Does this question whether someone is considered to be a 'prisoner' matter? I return to this question in the final section of this paper.

Determinate sentence prisoners[2] are released on a licence which contains a number of conditions, including one that they "be well behaved, not commit any offence and not do anything which could undermine the purposes of supervision, which are to protect the public, prevent you from re-offending and help you to resettle successfully into the community". This is one of the six standard conditions, but licences are individualized: some licences may have 15 or 16 licence conditions. Those who are released on HDC have many additional requirements imposed on them, as well, as do those released to live at Approved Premises or hostels. These conditions may be discussed with prisoners prior to release: they are required to sign a copy of the licence before leaving prison, and will discuss them with their probation officer or offender manager[3] at their first meeting after release. It is a source of much concern to offenders that they may have little say in the conditions. It is also of course of serious concern from a rehabilitative perspective: the literature is clear that prisoners are more likely to comply if they feel they have been treated fairly. As Wood and Kemshall (2007) explain:

> 'offenders displayed a greater readiness to comply when they felt that the restrictions imposed upon them were clearly explained by supervision staff, and were reasonable in relation to their offending behaviour. Those offenders who felt a strong reluctance to comply tended to report a lack of understanding about the reasons for the restrictions imposed' (14).

Indeterminate sentences include those sentenced to life (which is mandatory for those convicted of murder, and a possible sentence for many other serious violent or sexual offences) and 'imprisonment for public protection' (IPP, a sentence which is virtually identical to life). There are also several categories of 'extended sentences': as the name suggests, prisoners serving these fit somewhere between the indeterminate and determinate sentence prisoner since the period of time they serve on licence may be very significantly longer than someone serving a determinate sentence: it may be up

[2] The position is different for those serving less than 12 months who are not released on the standard licence, but are still 'at risk' of recall.

[3] Probation officers are increasingly referred to as offender managers: they may have on their list offenders who are ex-prisoners, those released on licence, as well as those serving community penalties. The term 'offender manager' has not yet appeared in statutes (Acts of Parliament), and was first used explicitly in delegated legislation in the Polygraph Rules 2009/619. However, the internal management documents of the National Offender Management Service and indeed of Probation Trust nowadays routinely talk of Offender Managers rather than probation officers. Legislation and delegated legislation (including the new Criminal Procedure Rules 2011) mention 'probation officers'.

to an additional five years for a specified violent offence and an additional eight years for a specified sexual offence.
Lifers and IPP prisoners are only released on the direction of the Parole Board, having served the entirety of the 'minimum term' specified by the trial judge and often many years in addition. The extended sentence prisoner comes out (like determinate sentence prisoners) at half time. So, a repeat sex offender convicted of a relatively minor sexual assault might well be sentenced to a two year custodial sentence, with an additional 5 years supervision in the community. He will be released after one year, but liable to recall for the next six years.

Recall: the Law

Major changes were introduced to the system of recall by the Crime and Disorder Act 1998, which extended executive recall to medium-term sentences of 12 months to less than 4 years, making it much easier for probation officers to get their 'clients' recalled (previously they could only be recalled by the Probation Service through the courts). The position is now basically as provided by s. 254 of the Criminal Justice Act 2003, which applies to all prisoners sentenced since 4 April 2005:
(1) The Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison.
(2) A person recalled to prison under subsection (1)
(a) may make representations in writing with respect to his recall, and
(b) on his return to prison, must be informed of the reasons for his recall and of his right to make representations.
[...]
(6) On the revocation of the licence of any person under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, is to be treated as being unlawfully at large.
(7) Nothing in this section applies in relation to a person recalled under section 255.
The provisions of the Criminal Justice Act 2003 were in fact very complex, and have been much changed by the Criminal Justice and Immigration Act 2008 (which further complicated the law[4]).
In essence, decisions to recall are taken *administratively*. The current law means that a prisoner may be recalled by the executive (the initiative is taken by a probation officer or offender manager, who requests the recall by seeking authorisation from his or her senior manager, and then sends a form to the Public Protection Casework Section of the National Offender Management Service in the Ministry of Justice). Once the recall has been authorised, the police arrest the offender. They are taken to the police station from where the private company contracted to deliver prisoners between police stations, courts and prison will deliver him or her back to a local prison. The licence is revoked in the name of the Secretary of State for Justice (the Minister for Justice).

The recall may be either for a Standard Recall or Fixed Term Recall (28 days)[5]. The

[4] The law has also been made very much more complex by the piecemeal way in which legislation has been brought into force: we have now had 25 different commencement orders bringing the Criminal Justice Act 2003 into force, and 14 different commencement orders relating to the Criminal Justice and Immigration Act 2008!
[5] For an analysis of this complex area of law see, for example, Padfield (2010) or Arnott and Creighton's excellent book, a very useful guide for both prisoners and their lawyers. The Criminal

prisoner should be informed within 24 hours of the reason for their recall and their right to challenge it. They then receive a lengthy 'recall pack' or 'recall dossier' after they have been returned to prison. The recall may be challenged before the Parole Board, which has complicated rules on whether a case will be considered on the papers only by a single member, or by an oral hearing with two or three members. There is no formal appeal from the decision of the Parole Board, though it may be challenged by way of 'judicial review' in the High Court, from which there is the possibility of further appeal to the Court of Appeal and exceptionally to the Supreme Court. Judicial review is a hugely important route by which the *legality* of decisions of the executive may be reviewed, but it is costly and no substitute for a 'real' appeal structure. For those interested in studying how the system works the case law is, of course, revealing. However, from the perspective of the prisoner, these applications are often unrewarding. Thus, simply by way of example, in *R (Bektas) v Secretary of State for Justice, Probation Service* [2009] EWHC 2359 (Admin) a prisoner, serving 8 years for conspiracy to supply Class A drugs, was remanded in custody a few months after his release on licence when he was charged with threatening to kill his wife. His licence was not immediately revoked, but it had been by the time the Crown Prosecution Service (CPS) had dropped the charges against him. The judge hearing his application to challenge the legality of the decision to recall him to prison as a 'standard' case, and not a 'fixed term' recall, held that this decision was one which the Secretary of State was entitled to take. Some nine months later, by the time this application for judicial review was heard in court, the allegations had been dropped: yet the prisoner was still in prison, awaiting an oral hearing before the Parole Board. The judicial review, which held that the decision to recall him was neither unlawful nor irrational, did not help!

Many recalled offenders are recalled because they are arrested and charged with a fresh offence. One important question in practice concerns why they are returned to prison on recall, and not as unconvicted prisoners awaiting a fresh trial (unconvicted prisoners have more privileges in prison than convicted prisoners). Of even more concern, is what happens when the police decide to drop the charge, either on the advice of the CPS or on their own initiative. Once recalled, there is no presumption that if the charges are dropped (or indeed if the prisoner is later acquitted at trial) that he will be re-released. Once recalled, the prisoner awaits the decisions of both Parole Board and the Ministry of Justice with no control over the timetable of their decision-making. From the prisoners' perspective this is often outrageously unfair: they were perhaps arrested because they were 'set up' by someone (a rival drug dealer, for example, or angry ex-partner). The police may readily agree, having made further investigations, to drop the charges, but the prisoner remains in prison. Some time later, when the Parole Board considers the case, the prisoner may still remain in prison, as the Parole Board will be considering the 'risks' of further offending, not the grounds for recall.

But offenders are not recalled simply because they re-offend. Many are recalled simply because they are in breach of other conditions, in particular the rather unclear standard condition: "To be well behaved, not to commit any offence and not to do anything which could undermine the purpose of your supervision, which is to protect the public, prevent you from re-offending and help you to re-settle successfully into

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Justice and Immigration Act 2008 introduced Fixed Term Recall but it is only available to a limited group of prisoners: for example anyone convicted of a sexual or violent offence is ineligible.

the community". These offenders are likely to feel particularly angry about their recall: they are not usually warned in advance that the police will be arriving soon to arrest them (perhaps for obvious reasons). Once in prison they are informed in writing for the reasons for their recall, and given the 'recall pack' or dossier. Their recall will be reviewed by a one-member 'panel' of the Parole Board, who will consider the case on the basis of the papers only. In many ways this review of the initial recall appears to be little more than a rubber stamp. The Annual Report of the Parole Board 2010-11 provides the following data on recommendations made for determinate recall cases considered under the Criminal Justice and Immigration Act 2008 for 2010/11:

Agree to release immediately	642
Agree to Release at future date	1,095
Make no Recommendation	12,251
Send to Oral Hearing	171
Total decisions:	14,159

It is not surprising that 86.5% of the reviews were unsuccessful: the prisoner has at this point only recently been recalled, and there is usually no paperwork submitted by the prisoner available to the busy single member of the Board to review (even though the prisoner may well have signaled their desire to make representations to the Board). In fact, perhaps it is surprising that there are so many recommendations for re-release. Perhaps the 642 who were ordered to be released immediately should not have been recalled in the first place? There are strong arguments for bringing this first review forward, to pre-date the actual recall (except in the case of 'emergency' recalls). Alternatively, the review should not happen until the prisoner's representations have actually been received. I return to this issue in the final section of this paper.

Once the Parole Board makes no representation as to re-release, the prisoner awaits the next stage. The Ministry of Justice has the power to re-release prisoners, or to refer a case back to the Parole Board, who should review every case annually. Many offenders may reach the end of their sentence before the next review. Those serving longer sentences or life may well spend several years back in prison before the Parole Board decides it is safe to release them. Some will stay inside until the end of their sentence. But data remain scarce: we turn now to look at the statistical data.

Numbers

The recall population began to grow significantly in 1999, reflecting the changes introduced by the Crime and Disorder Act 1998. The Criminal Justice Act 2003, as we have seen, included further changes to the recall process, which came into force in April 2005. It also extended the licence period for determinate sentences of 12 months or more to the end of sentence, whereas previously it had ended at the three quarters point. This meant that recalled offenders were now liable to serve 100% of their original custodial sentence (previously this had been 75%). Because of this, and the Parole Board's low rate of re-release, the numbers have shot up[6]. The Parole Board's low release rate can be explained in part by exploring issues arising from

[6] See Her Majesty's Inspectorate of Prisons (2005) and Prison Reform Trust (2005) for two 'wake-up calls' about this increasing category of the prison population; and Ministry of Justice (2009) for the Government's explanation for the huge rise of 5,300 in the recall population between 1995 and 2009.

'risk aversion'[7].

The number of determinate sentence prisoners who were recalled to prison in 2009-10 was 13,919 (as compared with only 2,457 prisoners recalled in the year 2000-01)[8]. The numbers of lifers recalled, compared with the number released, is even more striking. In 2009, 124 lifers (and 21 prisoners serving IPP) were recalled. Given that the Parole Board only directed the release of 172 of the 1,530 eligible lifers whose cases were considered, it is clear that it is not only difficult to 'earn' release, but that, once out, it is difficult to resist recall to prison. In 2006, more lifers were recalled to prison (164) than were released (135): see Appleton (2009). In 2009, 21 IPP prisoners were recalled (a total of only 52 IPP prisoners had ever been released by the end of 2008, although by that time there were already 4,500 offenders serving IPP).
The numbers still seem to be rising: during the quarter ending March 2011, 3,821 offenders had their licence revoked and were recalled to prison (Offender Management Statistics, Quarterly Bulletin). But these statistics do not tell us any details about who exactly is recalled, for what reason, and for how long they stay in prison.

Practice
There has not been a lot of research carried out into the practice of recall in England and Wales (see Padfield and Maruna 2006). Two small studies perhaps stand out: Collins 2007, Digard 2010. Both raise important concerns about procedural fairness. Thus, Digard, having interviewed 20 recalled sex offenders, found offender views of the system focused almost exclusively on the procedural fairness of the process. He concluded that:

> 'disregard for procedural fairness may decrease offender's levels of mental well-being, engagement in their management, motivation to forge new lives, and respect for authorities and the civic values they represent. It may inhibit the maintenance of an effective probation/client relationship and increase resistance' (7-58).

In May and June 2011, I carried out a small research project in two local prisons in England and Wales (the report is as yet unpublished, though it is with the Ministry of Justice). The two specific research questions were

- Are the reasons for recall clearly understood (both by prisoners and those who work in the criminal justice system)?
- What can be done to reduce the number of prisoners recalled to prison?

Forty-six prisoners (36 men and 10 women) were interviewed about their experience of being recalled to prison. These prisoners were serving a wide variety of sentences, from life (3), extended sentences (9), to less than 2 years (10). At the same time, a wider 'snap-shot' of recall was obtained by reviewing 129 prisoners' files, and by carrying out context-setting interviews with a number of probation and NOMS staff.
The research raised many questions which need to be explored much more publicly in England and Wales. These can be divided into three main areas of concern. First, *pre-release processes*. This is consistent with the widespread criticisms which are made of the way sentences are currently managed. Thus, the influential House of

[7] For several essays discussing this, including the impact of various high profile murders by people on licence, and the *Independent Review of A Serious Further Offence Case: Damien Hanson and Elliot White*, HM Inspectorate of Probation, 2006, see Padfield (2007).
[8] See Table 9.10, National Offender Management Caseload Statistics (this excludes Home Detention Curfew which in 2009-10 amounted to another 1,441 recalls: see Table 9.9)

Commons, Justice Committee concluded its recent review of the *Role of the Probation Service*:

> ‘ There needs to be a better, more seamless, approach to managing offenders. Prisoners are shunted between one establishment and another, in an attempt to avoid overcrowding, and the need to ensure continuity of their sentence plan is not a priority. This is unacceptable. The MoJ and NOMS need to devise and implement a strategy to ensure that the end-to-end management of offenders is a reality and not just an unachieved aspiration.
>
> If NOMS is to work effectively through the two services, there does need to be an enhancement in prison of offender management skills. This could be achieved through better training for prison officers or the appointment of probation officers or probation service officers to work in prisons on sentence management and to follow the prisoner ‘through the gate’. Unfortunately, neither of these scenarios is likely given the current prison population and funding restraints’ (paras 110-111).

The case law has also illustrated the problem for prisoners of ‘moving through the system’. In *Wells v Parole Board* [2009] UKHL 22, [2010] 1 A.C. 553 the Minister for Justice conceded that he was in breach of his public law duty to prisoners by not providing enough courses in prisons. The House of Lords (then about to become the Supreme Court) were damning in their condemnation (although they held that the continued detention of these prisoners was not unlawful[9]). For example:

> ‘there is no doubt that the Secretary of State failed deplorably in the public law duty that he must be taken to have accepted when he persuaded Parliament to introduce indeterminate sentences for public protection (“IPPs”) by section 225 of the Criminal Justice Act 2003. He failed to provide the systems and resources that prisoners serving those sentences needed to demonstrate to the Parole Board by the time of the expiry of their tariff periods, or reasonably soon thereafter, that it was no longer necessary for the protection of the public that they should remain in detention’ (Lord Hope, para.3).

Thus, sex offenders, for example, are unlikely to be released until they have completed the Sex Offenders Treatment Programme, and those convicted of crimes of violence may well be expected to complete anger management courses. But the availability of courses varies from prison to prison and there are often long waiting lists. However, in my recent interviews, prisoners were not so much critical of the prison system, but more often they felt ‘set up to fail’ by the conditions imposed upon them on release. They told powerful stories about the difficulties of building law-abiding lives when on licence. They felt that these difficulties were often acerbated by unreasonable licence conditions imposed and enforced inflexibly by their probation officers.

The second area of concern is *the process of recall*. When it came to discussing the process of recall, many interviewees felt let down. Some accepted why they had been recalled, but most seemed to think that their probation officer had far too much power, and many argued for a more judicialised process. Thirty-three of the 46 prisoners (including the 7 ‘fixed term’ recalls) interviewed had been recalled for allegations of fresh offences. For some this was a ‘fair cop’, but many strenuously denied the offences, some suggesting that they had been ‘stitched–up’. Several of those who had been recalled for fresh allegations were not subsequently charged, or had had the charges dropped. Others were acquitted at court. None of these could

[9] See my analysis of this case at (2009) 9 Archbold News 6-9

understand why they remained in prison as recalled offenders. Even those who had pleaded guilty, or intended to do so, were angry at some of the perceived injustices of the process: the fact they did not have remand prisoner status, and sometimes the lengthy periods spent on recall after a short fresh sentence had been served in its entirety.

Thirteen of the 46 had been recalled for breaching one or more of the conditions of their licence, not for allegations of further offending. These 'unacceptable failures' included being expelled from Approved Premises, failing to demonstrate motivation to deal with drug addiction, associating with known offenders, using a computer, and not making contact or losing contact with their probation officers. The question of Approved Premises is an important one, which underlines some of the uncertainties which surround the re-release process. A prisoner may be released at the half way point, but only on the condition that he or she does not go home, but spends a period in Approved Premises or a hostel. These premises have strict rules, often rules which feel stricter in practise than those enforced in prison: for example, initially an offender may have to report to, and sign in hourly with, staff. It does not feel to the offender so much that they have been released into the community, but rather that they have arrived in a different sort of 'prison in the community'. Recall, for some prisoners, felt almost like a relief.

The third area of concern is *their journey towards re-release*. For many, their 'recall pack', the dossier which they are given soon after their return to prison, was too complicated. Many were irritated by the negative and outdated account of them given in the dossier, and by the reliance on risk predictors, which seemed impossible to challenge. Even worse, for them, was the waiting for something to happen. The overwhelming impression given by the prisoners was that they had little knowledge or understanding of what was being done to progress their case. The invisibility of those empowered to make the decision to release them, and the uncertainty which surrounds the release process were both enormously debilitating. Parole Board panels were perceived simply as part of a distant bureaucracy which takes unreasonable and uncertain time to reach decisions. The different roles of the Ministry of Justice and the Parole Board were not understood. Prisoners felt that they were not given reliable information. Prison staff were seen as uninformed or, at worst, deliberately unhelpful. There was widespread misunderstanding of the process: for example, the criteria for the somewhat rare 'fixed term' recall; or whether a 'standard' recall is for a fixed or indefinite term. Even those who understood the process were deeply frustrated by it.

Many of the offenders interviewed in this study did not appear to need to be in prison for public protection, certainly not in the sense of being a vivid 'danger' to society (see Padfield, 2011a). Whilst there was a risk of them re-reoffending, for many this risk seemed to be exacerbated, rather than reduced, by some licence conditions and particularly by further imprisonment.

The Parole Board

The Parole Board was created in 1967 as an advisory body to the Home Secretary. Born at a time when there was some confidence in the 'rehabilitative' ideal and a belief that there was a 'right' time to release offenders, there was little concern that what amounted to a 'sentencing' function was to be performed by an executive advisory board (but see Hood, 1975). The Board has today become much more 'court-like' for some cases, pushed in that direction by court decisions, not by any desire on the part of Governments to introduce judicialised 'review courts'. So first

discretionary lifers, then HMPs and then mandatory life sentence murderers won the right to an oral hearing (see Padfield, 2002). Recalled prisoners were not allowed an oral hearing until the very important decision of the House of Lords in *R (Smith) v Parole Board; R (West) v Parole Board* [2005] UKHL 1, [2005] 1 WLR 350, [2005] PL 406, (2005) 64 Cambridge Law Journal 276: this decision was pivotal in recognising that it is not only lifers seeking post-tariff release who deserve an oral hearing. A determinate prisoner on licence is entitled to an oral hearing by the Board to consider his recall where there are significant disputes of fact:

> 'In his representations against revocation the appellant West offered the Board explanations, which he said he could substantiate, of his failure to keep an appointment with his probation officer and of the incident at his ex-partner's hostel. The Board could not properly reject these explanations on the materials before it without hearing him. He admitted spending one night away from his approved address, staying (he said) with a cousin. While this was a breach of his licence conditions, it is not clear what risk was thereby posed to the public which called for eight months' detention. His challenge could not be fairly resolved without an oral hearing and he was not treated with that degree of fairness which his challenge required' (per Lord Bingham, at para 45).
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> 'The resort to class A drugs by the appellant Smith clearly raised serious questions, and it may well be that his challenge would have been rejected whatever procedure had been followed. But it may also be that the hostels in which he was required to live were a very bad environment for a man seeking to avoid addiction. It may be that the Board would have been assisted by evidence from his psychiatrist. The Board might have concluded that the community would be better protected by encouraging his self-motivated endeavours to conquer addiction, if satisfied these were genuine, than by returning him to prison for 2 years with the prospect that, at the end of that time, he would be released without the benefit of any supervision. Whatever the outcome, he was in my opinion entitled to put these points at an oral hearing. Procedural fairness called for more than consideration of his representations, on paper, as one of some 24 such applications routinely considered by a panel at a morning session' (per Lord Bingham, at para 46).

But convincing the Board that an oral hearing is necessary is very difficult: doubtless mindful of the significant costs of such hearings, the Board remains reluctant to grant them (see Parole Board Annual Reports for detailed statistics).

This is perhaps not the place to discuss in detail the role and status of the Parole Board (the best practical guide to Parole Board law and practice is Arnott and Creighton (2010)). But it has to be said that in *R. (Brooke) v Parole Board* [2008] EWCA Civ 29; [2008] 1 W.L.R. 1950, the Court of Appeal held that the Parole Board did not satisfy the requirements of Art 5(4) ECHR. The then Lord Chief Justice, Lord Phillips, concluded:

> 'Neither the Secretary of State nor his Department has adequately addressed the need for the Parole Board to be and to be seen to be free of influence in relation to the performance of its judicial functions. Both by Directions and by the use of his control over the appointment of members of the Board the Secretary of State has sought to influence the manner in which the Board carries out its risk assessment. The close working relationship between the Board and the unit acting as its sponsor has tended to blur the distinction between the executive role of the former and the judicial role of the latter ' (at para.78).

The Ministry of Justice's Consultation paper *The Future of Parole* (Consultation Paper 14/09) set out options for the future status and functions of the Parole Board.

Acknowledging that the Board is no longer just a body advising the executive (the Crown) on the exercise of its prerogative, but has evolved into a more court-like body that makes decisions about the safe release of offenders back into the community, they asked whether the Board should be a court, a tribunal or hold some other status. Sadly, the debate seems to have frozen with the last election (see Padfield, 2011c).

Conclusions

Recall is a big issue in England and Wales today: not least because of the costs involved in this expansion of the prison population, and in the costs associated with the Parole Board and other legal processes. It also raises important theoretical and practical issues, which have been inadequately discussed:

What should be the criteria for recall?

How should these decisions be supervised?

What are the criteria for re-release?

The Government seems committed to trying to reduce the number of recalled prisoners in prison by expanding the discretionary powers of the executive to re-release, in order to relieve the burdens on the hard-pressed Parole Board (there is a Bill currently before Parliament, the Legal Aid, Sentencing and Punishment of Offenders Bill 2010 which will extend the executive power of re-release; see also Ministry of Justice (2010b)). However, in my view, this is not the appropriate direction in which to move. In England and Wales, we need to reconsider the role of the courts in the management of offenders. First, the law and practice on bail and recall, in the light of what is clearly inconsistent current practice, needs review. Secondly, priority should also be given to the codification of sentencing law, to include the law on release and recall, including the powers and practice of the Parole Board. Should there be a court hearing before a prisoner is recalled? Should a court supervise all decisions to detain people beyond the 'usual' release date? A fundamental review should consider whether sentence review courts would work better to encourage offenders to earn their way out of prison and off supervision (as well as to encourage NOMS to provide swift, well prepared support packages): see Padfield, 2011b for a comparison of English and French practice.

There are enormous human rights and fairness issues (Padfield, 2007, 2009). Prisoners should be provided with better general advice on recall (leaflets, video etc), as well as with better individual advice (oral practical advice on the wings, as well as confidential legal advice, perhaps by way of 'champions' on the wings); they should receive reliable and regular updates on the progress of their applications for re-release.

There is also a need for much more research. For example, my recent small study focussed on the perceptions of prisoners. A study of recall by other criminal justice professionals and participants, including other offenders, and not only those currently in prison would raise fresh questions. We need to explore in more detail the current use of recall, including the use of different forms of recall (standard, fixed term, and emergency recall), the use of non-disclosed 'intelligence', and the use of other 'sanctions' apart from recall. The whole system of 'resettlement' of prisoners needs to be reviewed in the light of the developing criminological literature on desistance from crime. There may be much better ways to encourage 'good behavior' than our current system. This raises important questions about the role of the probation officer, as licence enforcer. Not only has the role of the probation officer changed immensely in the last fifty years, the context in which they work is also constantly evolving. Particularly important has been the development of inter-agency supervision (multi-agency public protection arrangements or MAPPA, PPO or prolific and other priority offender schemes, for example). More work should explore the changing role of both the police and the probation service in the supervision of offenders. And, of course, comparative research (particularly in European jurisdictions) can cast significant light on understanding both the law and practice in this country. The current processes governing recall to prison of released offenders, and their subsequent re-release, have remained largely invisible in public and academic debate.

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