IPRT
Irish Penal Reform Trust

IPRT Submission on

Parole Bill 2016 [PMB]

Report stage

8 February 2018

Who we are

The Irish Penal Reform Trust is Ireland's leading independent charity campaigning for a penal system that is just and humane; protects and promotes human rights, equality and social justice; and uses prison as a last resort.

This report was written in conjunction with Dr Diarmuid Griffin.
Thanks also to Aoife McNicholl for her assistance.

Contents

Introduction

IPRT has long campaigned for a fully independent Parole Board to be established on a statutory basis.[1] IPRT believes that the early prison release system in Ireland should be coherent, transparent and fair. To this end, the establishment of a statutory parole system, which is fully independent of political control, will help to achieve clarity in the law and support a proper balance between the protection of the public and the rights of sentenced persons to a fair and balanced system of release. Furthermore, a more transparent and structured system of release for prisoners will incentivise meaningful engagement with services and regimes inside prison and support more successful reintegration of prisoners back into the community.

IPRT welcomed the introduction by Deputy Jim O'Callaghan of the Private Member's Bill, *Parole Bill 2016*, which aims to "[place] the concept of parole on a clearer statutory footing under the remit of an independent expert body." While acknowledging that the Bill represents a move towards reform, IPRT is concerned in relation to a number of the provisions of the Bill and its likely impact on those subject to the process. IPRT believes that the Bill, as currently drafted, could potentially cause difficulties in relation to our compliance with legal obligations both domestically and with the European Convention on Human Rights.

The current parole process has attracted criticism from human rights organisations, academic commentators and legislators.[2] A key issue in terms of the current parole process relates to the lack of procedural justice due to the informal, discretionary and political nature of the process. A further issue revolves around the lack of consistency in parole outcomes in terms of time served by life sentence prisoners. The average time served by life sentence prisoners prior to release has increased from 7.5 years in the 1970s to 22 years in 2016.[3] The Bill seeks to remove the Minister as a decision-maker in relation to the release of these offenders and a newly constituted Parole Board will be empowered to make the decision on release.

The creation of a statutory Parole Board independent of the Minister is indicative of a more human rights based framework. However, IPRT has concerns as to whether the provisions of the Bill delivers substantively in this regard. In addition to enhanced procedural justice, reform of the parole process should address issues surrounding the inconsistency in parole outcomes in terms of time served. IPRT believes that the Bill should focus on bringing about a more consistent approach to parole outcomes and the provisions should enhance the quality and consistency in decision-making. The discussion in the *Oireachtas* thus far indicates a focus on process with little debate surrounding the potential of the Bill to impact positively on parole outcomes. The following examines the key proposals in relation to parole that are matters of concern and require careful scrutiny.

1 See, for example, IPRT Position Paper 9: Reform of Remission, Temporary Release and Parole (Oct 2012) and IPRT Briefing: Parole and Temporary Release of prisoners serving long sentences (Oct 2016).

2 Griffin, D. (2015). The release and recall of life sentence prisoners: Policy, practice and politics. *Irish Jurist*, 53, 1-35.

3 Griffin, D. (2018). *Killing time: Life imprisonment and parole in Ireland.* Basingstoke: Palgrave Macmillan.

Membership – Section 7

The new Parole Board is to have 15 members including: a Chairperson (a judge, academic, barrister or solicitor); a psychiatrist; a psychologist; a representative of the Prison Service; a current or retired member of the *Gardaí* (Irish police); a Probation Officer; a representative nominated by the Irish Penal Reform Trust; four members selected through the public appointments process; and other persons deemed by the Minister as suitable for appointment.[1] The Bill continues the practice of including Department of Justice officials in the decision-making process. Further, although the Minister is not involved directly in decision-making, the discretion in relation to appointing some of the members of the Parole Board is retained. IPRT believes that this approach to appointing the Parole Board is problematic and unsatisfactory.

7(1) (a) (iii) provides for monitoring of prisoners under section 23 if *appropriate*. Neither section specifies how long said monitoring will continue, what must be considered in determining whether it is 'appropriate' or what kind of monitoring may be imposed. It leaves the door open for a non-judicial body to impose restrictions on a person's liberty without any checks or balances.

7(1) (a) (v) empowers the board to issue warrants under section 26 for the purposes of apprehending and returning to custody persons the subject of parole orders where there are grounds justifying the suspension or revocation of the parole order. A parole order is not a judicial order. The power to issue warrants to deprive a person of their liberty and place them in custody should be a solely judicial function and the inclusion of this section raises constitutional concerns.

1 s.8(2).

Panel Convenor – Section 11

Similar to membership, having a panel convenor be a judge of the DC or CC may raise the perception that the Panel is drawn directly from the criminal justice ranks. Guidelines about these appointments and membership of the board must be provided.

Parole Panels – Section 13

Parole panels of three or five members of the Parole Board will be formed to conduct reviews and hearings.[4] A parole panel is to be led by a panel convenor (a District or Circuit Court judge or a barrister or solicitor).[5] This requirement means that a significant portion of those appointed will need to have a legal background as six of the fifteen members will not have these legal qualifications due to their backgrounds in other professions. The Bill's focus on a profession-based rather than a skills-based appointment process is ill conceived. For example, it is possible that a parole panel could be made up of a judge, a Probation Officer and a Prison Service representative. This could be perceived as overly representative of state agencies. Similarly, a parole panel could be overly representative of the legal profession with a panel made up of a judge, solicitor and barrister. The members of a parole panel are central in ensuring that decision-making is balanced and that there is little room for bias.

4 s.13.

5 s.11.

IPRT recommends examining the Canadian model of appointment whereby a skills-based approach is adopted. Members of the Parole Board are appointed following a rigorous selection process. Eligibility is based on a number of factors including: passing a written exam on analytical thinking; demonstrable skills in written communication; a university degree in the field of human sciences; five years' experience in a decision-making environment; and knowledge of the criminal justice system.[6] IPRT believes that the proposed membership of the Parole Board and the appointment process may not facilitate balance in decision-making. It has concerns in relation to the political role in the appointment process and questions the benefit of this approach. It has the potential to undermine the independence of parole decision-making from politics, one of the aims of this Bill.

s.13(5) - It should also be added that such decision and reasons must be provided to the prisoner and their legal representative within 5 working days of the decision being made.

Powers of the Parole Panel – Section 14

IPRT has concerns about the interview/hearing element to a Parole Board review. It is absolutely necessary to involve the prisoner in the process and they must have a chance to be heard, but there must be sufficient safeguards in place to ensure the process is fair and transparent.

14(2) - A key concern relating to the current process is the lack of formality surrounding the review process and the limited capacity of the offender to have meaningful input into the process. The Bill does little to remedy this situation. Of most significance is the failure of the Bill to provide legal representation to those engaging with the review process. This is central to providing greater procedural fairness and it is difficult to understand the rationale for exclusion in the Bill. Reviews are to be the main mechanism of determining parole outcomes and thus it would seem crucial that legal representation be provided at this stage of the process. This would ensure that the parole candidate would have effective input into the review process. Further, given that the Bill intends to formalise parole and put in place a range of new procedures it will be difficult for a parole candidate to navigate this process without the assistance of a legal representative.

14(3) – The power to conduct an interview also appears to be discretionary. At present, most recommendations by the PB are that the prisoner be reviewed in the next 2/3 years. It is not satisfactory that a review could be carried out after 2/3 years (or perhaps more) without the prisoner being heard. It is only appropriate for a paper reviewed to be carried out where the previous review was carried out less than 12 months previously and the prisoner was heard on that occasion. Ideally the prisoner will be heard on each occasion.

The issue of interview/hearing also needs to be addressed. At present the PB conduct what they call interviews which in practice may be closer to a hearing. What may be asked of a prisoner at such a review/hearing must be prescribed. The safeguards around interviews/hearings for prisoners are not sufficient. Information gathered from these 'informal chats' is used to decide whether a prisoner is released on parole. Legal representation is not permitted and no independent parties are present. Interviews should be videotaped and legal representation should be permitted, not least to ensure that the prisoner understands all of what has been asked of them and that no questions are asked of the prisoner that contradict the presumption of innocence.

6 Parole Board of Canada (2013) *Selection Criteria for PBC Board Members (Part-Time and Full-Time).* Available at: http://www.pbc-clcc.gc.ca/employ/gicqual-eng.shtml#3

14(5)(c) – A transcript of the sentencing comments of a Judge in respect of the person seeking parole is not relevant to the granting of parole. The essence of the criminal justice system is, ostensibly, to encourage rehabilitation. It is the conduct and behaviour of the prisoner now that must be considered. The parole process should not be a re-sentencing exercise.

14(13) - Victims may appear and make submissions at a hearing for the purpose of assisting the board to reach a decision and they may be legally represented. It is not clear whether this hearing is the same as the one where the prisoner is present. It is also not clear what safeguards will be in place. Such a hearing should be video recorded or attended by a representative of the prisoner. What a victim is permitted to say should be provided for. It is questionable whether it would be permissible for a victim to go beyond the contents of any victim impact report given at the trial. Again, this process should not be a re-sentencing exercise.

Reviews – Section 15

If dissatisfied with the outcome of a review, a parole candidate is entitled to a hearing. Legal representation is to be provided for the purpose of that hearing. It is unclear if a new parole panel will be drawn from different members of the Parole Board or whether members of the review can deliberate for the same parole candidate at the hearing. This needs to be clarified in the Bill. It should not be possible for a panel for both a review and the hearing to be drawn from the same group of individuals. The Bill is also moot on appealing a decision of a hearing and the Bill should provide for effective judicial oversight, similar to that of the Mental Health Tribunals. Decisions will continue to be subject to judicial review but the scope of judicial review tends to be narrow and is concerned with process rather than outcomes.

15(3) – 14 days is not enough time for a prisoner to make a decision about appeal in circumstances where they are in custody. The particular practical difficulties of a prisoner meeting with their legal representative and reviewing the decision of the Board must be taken into account when determining the time allowed for an appeal. The time period for appeals to the Court of Appeal Criminal (28 days) should be influential.

Hearings – Section 16

s.16(3) - The Bill provides for input from victims at the hearing and review and that the perspective of victims should be taken into consideration in the decision-making process. Where a hearing is conducted, a parole candidate will be entitled to make a submission and attend while others make submissions.[7] If the victim is present, the candidate may not attend unless the victim, the candidate and the Parole Board agree. IPRT supports the need for victims to receive information on the parole process as provided for by the Criminal Justice (Victims of Crime) Act 2017.[8] IPRT notes that victim

7 s.16.

8 s.8(2)(m)(i). See also: European Parliament (2012) *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims' Directive)*. Brussels: European Parliament. (Article 6.5 and 6.6).

input in the parole process has been problematic in other jurisdictions.[9] At a European level, there is little by way of settled practice in terms of victim input in parole decision-making, although many civil law European jurisdictions only facilitate information provision and do not permit input at parole hearings or reviews.[10] Where input is permitted data indicates that there is a correlation between victim participation and parole denials.[11] IPRT supports the provision of information to victims and victims' families but is concerned about the potential impact of victim input on parole outcomes. IPRT believes that parole decision-makers should be focused on matters relating to risk and that this will afford the victim and the public at large with the greatest level of protection.

It is to be welcomed that this section provides for the sending of the parole decision to the prisoners legal representative and also the provision for legal representation at the hearing.

Guiding Principles – Section 18

s.18(1) - The 'paramount consideration' for the Parole Board is 'the safety of the community' when deciding on the release or further detention of a parole candidate.[1] The Bill does not provide much detail on the procedure to be followed in ensuring that decision-making is focused on public protection and the risk of reoffending. Similar to current practice, risk assessments will be provided to the parole panel from agencies such as the Probation Service. Research on existing parole decision-making indicates that while parole decision-makers identify public protection as the key factor in the deliberative process there are other competing factors that significantly influence parole outcomes. These factors include, for example, personal interpretations of the purposes of punishment, public opinion and the rise in lethal violence.[2] In order to reduce the potential of external factors influencing parole outcomes in the new process, it is important to have a clear decision-making matrix for parole decision-makers to follow. Other countries that focus on risk in decision-making provide frameworks to ensure consistency in decision-making (see Canada for example).[3]

The Bill does not require members of the Parole Board to have professional expertise in risk and risk assessment. If decision-making is to become more representative of risk in the quantifiable sense then professional expertise on the parole panel should be central. A useful parallel in this context is the membership of the Mental Health Tribunals. The tribunal makes determinations on individuals involuntarily admitted to hospital as a result of a mental disorder. Given its remit, each tribunal must have a legal professional and a consultant psychiatrist as a member. The Bill requires a legal professional to be a member of a parole panel but a professional with expertise in the field of risk is not required. Given the importance of risk, this seems to be at odds with the key

1 s.18(1).

2 Griffin, D. (2018). *Killing time: Life imprisonment and parole in Ireland*. Basingstoke: Palgrave.

3 Serin, R. (2011) *Parole Board Canada: Pre-Reading Material (ATRA and Decision Framework)*. Available from: http://www.ct.gov/bopp/lib/bopp/SDM.pdf

9 Roberts, J. V. (2009). Listening to the crime victim: Evaluating victim input at sentencing and parole. *Crime and Justice*, 38(1), 347-412; Ashworth, A. (2000). Victims' rights, defendants' rights and criminal procedure. In A. Crawford & J. Goodey (Eds.), *Integrating a victim perspective within criminal justice* (pp. 185-204). Aldershot: Ashgate; Ruhland, E.L., Rhine, E.E., Robey, J.P. and Mitchell, K. (2017). *The continuing leverage of releasing authorities: Findings from a national survey.* Minnesota: Robina Institute of Criminal Law and Criminal Justice.

10 Snacken, S., Beyens, K. & Beernaert, M. A. (2010). Belgium. In N. Padfield, D., D. van Zyl Smit & Dünkel, F. (Eds.), *Release from prison: European policy and practice* (pp. 70-103). Devon: Willan.

11 Morgan, K.D. & Smith, B. (2005). Victims, punishment and parole: The effect of victim participation on parole hearings. *Criminology and Public Policy*, 4(2), 333-60.

principle driving decision-making and it is recommended that the make-up of a parole panel should be reconsidered. On a general note IPRT is concerned that the Bill does not provide the necessary detail outlining how risk-based decision-making will operate in practice. IPRT believes that the Bill should set out in greater detail the role of risk and public protection in the decision-making process.

s. 18(2) - The Bill details a range of other principles and criteria that parole decision-makers should take into consideration. The Bill sets out a number of 'principles' that are to guide decision-making and these include: the reasons and recommendations of the sentencing judge; the nature and gravity of the offence; the degree of responsibility of the person whose parole is being considered; the position of victims; and any relevant information from the trial or sentencing process.[4] The current parole process has been criticized for the perception that the Minister is engaged in a form of executive resentencing as the Minister decides at what point a life sentence prisoner is released.[5] IPRT is concerned that the 'principles' in the Bill will sanction the Parole Board to engage in a form of resentencing. The Law Reform Commission in 2013 noted that formalising the parole process through statute should address the danger of the Parole Board taking into consideration factors ordinarily associated with sentencing such as the nature and gravity of the offence.[6] The principles in this Bill permit this approach and this is deeply concerning. It is appropriate for parole decision-makers to take offence seriousness into consideration when deliberating on the level of risk posed. This is a risk factor that features in most risk assessments. However, the Bill indicates that the principles are additional to the issue of public protection and appear to be more closely associated with the principles of sentencing. This could potentially facilitate a retributive or punitive approach to parole decision-making, rather than a focus on a risk-based approach. IPRT questions the appropriateness of a parole panel making determinations based on these principles. In light of this, the *Oireachtas* should consider removing these principles.

In addition to the principles, the Bill also sets out criteria to be applied by parole panels. They are, for the most part, a replication of the existing statutory criteria for temporary release that the Minister must have regard and the Parole Board have adopted as their framework.[7] These criteria have been criticized for affording wide discretion to decision-makers. The Bill is vague as to how these criteria are to operate with the overarching principles in a decision-making context. This Bill will require parole panels to determine outcomes based on the safety of the community, while also balancing a range of other principles and criteria. These principles and criteria may be poorly related to public protection. For example, a life sentence prisoner that is being reviewed by the Parole Board may be categorised as low risk but has committed a serious crime that has impacted significantly on the victim or victims' family. It is difficult to see how a parole panel would reconcile this type of scenario given the range of principles and criteria that fall for consideration. Research indicates that this type of life sentence prisoner frequently appears before the current Parole Board.[8]

18(2) (iv) – We query the relevance of this information if the point of custody is to rehabilitate. At the very least, it should be included in this section that the prisoners legal representative is entitled to review the information before it goes to the board to ensure it is not prejudicial. A party who is not part of the decision making process should be the one to gather the information.

4 s.18(2).

5 Griffin, D. and O'Donnell, I. (2016) 'Confusingly compliant with the ECHR: The release of life sentence prisoners in Ireland.' In D. van Zyl Smit and C. Appelton, *Human rights and life imprisonment.* Oxford: Oñati International Series in Law and Society, Hart.

6 Law Reform Commission. (2013). *Report on mandatory sentences.* Dublin: Law Reform Commission. (p.124).

7 Criminal Justice (Temporary Release of Prisoners) Act 2003.

8 Griffin, D. (2018). *Killing time: Life imprisonment and parole in Ireland.* Basingstoke: Palgrave.

Criteria for Parole – Section 19

19(1) (a) - What is undue risk? There should be some form of definition of this so it is not abused.

19(2) (e) - This should be restricted to any 'similar' offence.

19(2) (j) – Preventative detention? Again, who is assessing this risk?

Eligibility – Section 20

Section 20(2) - Under the scheme, a life sentence prisoner will not be eligible for parole until a minimum of twelve years has been served in prison. This represents a significant increase from the current practice of prisoners becoming eligible for parole after seven years. The data on average time served by life sentence prisoners in recent years indicates that life sentence prisoners serve sentences far in excess of the minimum term. Life sentence prisoners are reviewed every three years until they are recommended for release. The seven-year minimum term is the beginning of a review process and not the point of release. The interpretation of the proposed increase in minimum term by decision-makers is crucial in terms of its potential impact on time served. Is the twelve-year minimum term to operate as the default point at which a life sentence prisoner is to be released? Alternatively, will the current process of multiple reviews continue?

There is evidence in the Bill that the latter may be the approach that is envisaged, as the Bill permits the Parole Board to make recommendations in relation to the sentence management of an offender.[12] IPRT is concerned about the potential impact of increasing the minimum term on the point at which a life sentence prisoner will be released back into the community. The Bill needs to be clearer on the role of the minimum term in the decision-making process. Increasing the minimum term from seven to twelve will require a significant shift in practice in terms of the sentence management of life sentence prisoners. Currently, many life sentence prisoners only begin sentence management at the seven-year point of their sentence.[13] Given the proposed increase in the minimum term by five years, it is key that sentence management begins prior to reaching the minimum term of twelve years. It is important that offenders are preparing for release while serving the minimum term and that a programme of sentence management is put in place at the early stages of the sentence.

Section 20(5) - In addition to the minimum term, the Bill also proposes to introduce a tariff-based system akin to the practice in England and Wales. In England and Wales the court imposes a tariff representing the punitive element at sentencing with further detention on completion of the tariff being based on public protection considerations as determined through the parole process.[14] The Bill provides that a judge at sentencing may impose a specified period during which a person shall not be eligible for parole.[15] The Bill does not provide detail as to how this provision will operate with the twelve-year minimum term. There may also be significant legal implications arising as a result of this provision that require careful consideration by the *Oireachtas.* Enacting a tariff-based system has implications in relation to the executive's power to remit and administer a sentence. As noted by the Law Reform Commission 'any judicial indication at sentencing that an offender sentenced to

12 s.7(2)(e).

13 Griffin, D. (2014). The politics of parole: Discretion and the life sentence prisoner. Unpublished PhD Thesis. University College Dublin. (p.148).

14 Arnott, H. and Creighton, S. (2006) *Parole Board Hearings: Law and Practice*. London: Legal Action Group.

15 S.20(5).

life imprisonment should serve a minimum term is subject to the power of remission of the Executive under Article 13.6 and therefore would constitute a recommendation only that the offender serve such term'.[16] There needs to be clarification of these provisions particularly in relation to the legal basis surrounding the imposition of a tariff at sentencing.

The legal implications arising from centralising matters of public protection in the parole process are of particular constitutional significance in Ireland. The Irish Supreme Court and European Court of Human Rights noted that the life sentence in Ireland is 'wholly punitive' with considerations of preventive detention by the Minister in the exercising of his power of temporary release as 'incidental'.[17] The proposals in the Bill bring considerations of public protection to the fore as well as creating a tariff-based system. Incorporating considerations of risk, dangerousness or anything akin to preventive detention in legal decision-making presents specific issues of compatibility with the Irish constitution.[18] The foregrounding of public protection in parole decision-making is of legal significance. Under these proposals, the minimum term and tariff could be interpreted as the punishment component with the Parole Board making an assessment on release based primarily on public protection. This brings Ireland closer in practice to that of England and Wales, a jurisdiction that has been subject to a number of adverse decisions by the ECtHR.[19] Such proximity in procedure requires careful scrutiny to ensure the Bill is in compliance with the provisions of the Constitution and the ECHR.

Parole Orders – Section 22-26

This Bill proposes to confer significant legal powers on the Parole Board. These include: the power to determine the release and revocation of offenders; the monitoring of individuals granted parole; and the issuing of warrants. These powers have both legal and financial implications. In relation to the legal implications, the legal status of the Parole Board is somewhat unclear. Is it a judicial body, a quasi-judicial body or an administrative body? The powers conferred on it are far reaching yet there is little to indicate that the Parole Board will be held to the procedural standards applicable to a court or court-like body.

The parole panel is empowered to make a parole order authorising the release of the offender from custody. The Parole Board will have the power to monitor a person granted parole and can require a progress report to be provided and order a person on parole to attend a hearing. The Parole Board may also vary an order of its own volition or on the application of the Minister, the Gardaí or the person subject to the order. Similarly, it can revoke a parole order at its own behest or on the application of the Minister or the Gardaí. The grounds for revocation are that the person poses an undue risk to society or has breached their conditions of release. If the order is revoked a life sentence prisoner will not be eligible to be considered for parole until two years has passed since the revocation. The inclusion of the Minister in the various stages here and facilitating changes to orders at the Minister's request is problematic in terms of the independence of the parole process from politics. Of further concern is the ability of the Parole Board to issue warrants authorising the Gardaí to apprehend a person released on parole and return an offender to prison. A warrant may be issued where there is 'reasonable cause' to suspect there are grounds for suspension or revocation. This power may be

16 Law Reform Commission. (2013). *Report on mandatory sentences*. Dublin: Law Reform Commission. (p.124).

17 *Lynch and Whelan v Minister for Justice* [2012] 1 IR 1 (p.26). *Lynch and Whelan v Ireland* Application nos 70495/10 and 74565/10, 18 June 2013. *Lynch and Whelan v Ireland* Application nos 70495/10 and 74565/10, 8 July 2014.

18 O'Malley, T. (2016). *Sentencing law and practice*. Dublin: Thomson Round Hall. (pp.41-43).

19 *Stafford v United Kingdom* Application no 46295/99, 28 May 2002; *Hirst v United Kingdom* Application no 40787/98, 24 July 2001.

exercised without the holding of a review or hearing. A hearing must be scheduled 21 days after the person is returned to prison affording the prisoner the 'opportunity to be heard'.

IPRT is concerned about the powers that are being conferred on the Parole Board in this Bill. They have the potential to seriously impact on the right to liberty of offenders being released or on release in the community. The Bill goes into significant detail on the powers of the Parole Board, but there is little by way of detail on the protections to be provided to the individual subject to these powers. IPRT is particularly concerned about the discretionary nature of these powers to be exercised by the Parole Board and other agencies. This is especially concerning as the Bill does not provide any detail on the independent oversight of the operation of the Parole Board. IPRT believes that there is significant potential for these provisions to be subject to judicial review. In light of these concerns, the proposed powers to be conferred upon the Parole Board require revision. Further, these provisions will have significant financial implications. The Parole Board will not simply be making determinations on the release or further detention of offenders but it will be empowered to deal with the process of releasing, monitoring and recalling offenders. The Bill proposes that the powers of the Parole Board will be adequately supported by a staff of five people. IPRT believes that this is inadequate given the volume of work that will be generated through these proposed powers.

25(2)(a)(i) – Who decides if the person is an undue risk to the safety of the community and what does this mean? What is an undue risk?

25(3)(b) – This section must be removed – it ignores the presumption of innocence and may be unconstitutional.

25 (5) & (6) – The issuing of warrants should be a judicial function only and 35 days is too long for a person whose liberty has been suspended.

25(7) – This is disproportionate. Note that a person may be imprisoned for driving without insurance.

Warrants – Section 26

This section should be removed. It is draconian and gives the PB powers that are reserved for a judicial body. If a compromise must be reached, the PB could be given the power to apply for a warrant to a judge – much like the power of probation officers.

Conclusion – Legal and Constitutional Implications

To date, long-term and life sentence prisoners have been largely unsuccessful in securing greater procedural rights in the parole process through the mechanism of judicial review.[20] This is due, in large part, to the legal mechanism by which they are released. Life sentence prisoners are released using temporary release provisions albeit that the release is not temporary in nature. Common examples of the use of temporary release include releasing a prisoner to receive medical attention at a hospital or release over the Christmas period. The courts have characterised temporary release as a privilege rather than a right and a function of sentence administration that rests largely with the executive.[21] The Minister enjoys wide discretion in the exercise of these powers and the Parole Board is simply an advisory body to the Minister. As a result, those subject to the process have limited means of challenging the process. However, the Bill aims to put in place a distinct statutory power of release for long-term and life sentence prisoners and this is separate from the temporary release provisions. As a result, formalising the process for long-term and life sentence prisoners has the potential to facilitate greater scrutiny through judicial review.

The Bill proposes to impose a minimum term and tariff, prioritise public protection and references the need to take the trial, sentencing and culpability of the offender into consideration. In addition, the Parole Board will have significant powers in the discharging of its functions. These could all provide solid grounds for judicial review. The legal implications arising from centralising matters of public protection in the parole process are of particular constitutional significance in Ireland. The Irish Supreme Court and European Court of Human Rights noted that the life sentence in Ireland is 'wholly punitive' with considerations of preventive detention by the Minister in the exercising of his power of temporary release as 'incidental'.[22] The proposals in the Bill bring considerations of public protection to the fore as well as creating a tariff-based system. Incorporating considerations of risk, dangerousness or anything akin to preventive detention in legal decision-making presents specific issues of compatibility with the Irish constitution.[23] The foregrounding of public protection in parole decision-making is of legal significance. Under these proposals, the minimum term and tariff could be interpreted as the punishment component with the Parole Board making an assessment on release based primarily on public protection. This brings Ireland closer in practice to that of England and Wales, a jurisdiction that has been subject to a number of adverse decisions by the ECtHR.[24] Such proximity of practice requires careful scrutiny in relation to the Bill's compliance with the provisions of the Irish Constitution and the ECHR. IPRT fully supports formalising the parole process but is conscious that the reforms adopted should enhance the decision-making process for all stakeholders and is compliant with our legal obligations, both domestically and at a broader European level.

20 *Grogan v Parole Board* [2008] IEHC 204; *Barry v Sentence Review Group* [2001] 4 IR 167.

21 *Ryan v Governor of Limerick Prison* [1988] IR 198; *Murray v Ireland* [1991] ILRM 465.

22 *Lynch and Whelan v Minister for Justice* [2012] 1 IR 1 (p.26). *Lynch and Whelan v Ireland* Application nos 70495/10 and 74565/10, 18 June 2013. *Lynch and Whelan v Ireland* Application nos 70495/10 and 74565/10, 8 July 2014.

23 O'Malley, T. (2016). *Sentencing law and practice*. Dublin: Thomson Round Hall. (pp.41-43).

24 *Stafford v United Kingdom* Application no 46295/99, 28 May 2002; *Hirst v United Kingdom* Application no 40787/98, 24 July 2001.

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