

# **THE DILEMMA OF MAINTAINING INNOCENCE**

## **Joint Conference Organised by the Association of Prison Lawyers (APL) and Progressing Prisoners Maintaining Innocence (PPMI)**

**Hosted by Matrix Chambers, London, 25, January 2011**

***Reported by Gabe Tan, University of Bristol***

### **Introduction**

*The Dilemma of Maintaining Innocence*, jointly organised by the Association of Prison Lawyers (APL) and Progressing Prisoners Maintaining Innocence (PPMI), was held at Matrix Chambers on the 25 January 2011. The conference consisted of sessions presented by a range of speakers, including prison lawyers, psychologists, academics, and representatives from the Parole Board and the National Offenders Management Service (NOMS).

This report presents the findings from the first seven sessions of the conference. A summary of the key findings is as follows:

- 1) Despite the ongoing debate on the issue of prisoners maintaining innocence in the last few years, the prison service and the Parole Board have made little progress to resolve the issue and indeterminate-sentenced prisoners who maintain their innocence continue to be confronted with the same problem: either admit to their guilt and comply with their sentence plans, or face the prospect of possibly never achieving parole.
- 2) There is a need for a different way of assessing prisoners maintaining innocence to ensure that they can progress through the prison system and achieve parole.
- 3) Whilst PSO4700 acknowledges, for the first time, that some prisoners might be factually innocent, the issue of how potentially innocent prisoners should be dealt with remains sidestepped.
- 4) False confession is an established phenomenon. Just as there are prisoners who maintain innocence when they are not, there might be prisoners who admit guilt but are in fact innocent.
- 5) Current methods of risk assessment utilised by the Parole Board, probation service and prison psychologists are highly limited. There is increasing evidence that many risk-assessment indicators currently influencing the Parole Board's decisions are neither reliable nor valid. This cannot contribute to good decision making and puts society at risk.
- 6) Denial is not a valid measure of risk. In fact, research has shown that prisoners who openly admit to their crimes have the highest risk of re-offending.
- 7) It is an unrealistic view that prisoners maintaining innocence can achieve parole by undertaking non-offence related courses or targeting previous convictions since this is unlikely to provide evidence that demonstrates that they have addressed their index offence.
- 8) The introduction of Pre-Tariff Sift Reviews under PSI 33/2009 takes away the previous practice for prisoners to have their cases referred to the Parole Board to consider their suitability for transfer to open conditions. This has an impact on all indeterminate sentenced prisoners but is especially detrimental to prisoners maintaining innocence who are prevented from undertaking offending behaviour programmes.

# MORNING SESSION I

**Chaired by Alison McDonald, Barrister, Matrix Chambers**

## **Session 1: Assessing and Addressing the Problem**

**Dr Michael Naughton, Senior Lecturer, University of Bristol; Director, Innocence Network UK (INUK)**

Despite years of ongoing debate, the prison service and the Parole Board have made little progress to resolve the issue and indeterminate-sentenced prisoners who maintain their innocence continue to be confronted with the same problem: either admit to their guilt and comply with their sentence plan, or face the prospect of never achieving parole.

Contrary to the Parole Board's thinking, maintaining innocence is not just a principled stance. It is reinforced by prisoners' families telling them to not admit guilt to a crime they have not committed; and, by their lawyers telling them that if they admit guilt it will jeopardise their chances of achieving a successful appeal against conviction. At the same time, our research in 2005 highlighted the intense pressure to comply and admit guilt put on prisoners maintaining innocence by prison governors, probation officers, prison psychologists and the Parole Board. Many prisoners also reported that they do not get privileges or enhanced status as a result of maintaining their innocence and refusal to comply. We came up with a number of solutions, including more research, alternative means to assess prisoners maintaining innocence, an independent review panel, and a policy statement on the Incentives and Earned Privileges Scheme.

In 2005, Terry McCarthy, Head of Casework at the Parole Board, published an article in the SAFARI newsletter entitled 'How to Maintain Innocence and Get Parole'. The main gist of the article is that prisoners must cooperate in order to achieve parole. A problem, however, is that many prisoners maintaining innocence are simply unable to cooperate over something they have not done. The Sexual Offenders Treatment Programme (SOTP), for instance, requires prisoners to give a full and frank account of the crime. Some prisoners reported that they tried to do the SOTP, but were caught out lying as they were unable to give a consistent account of the crime they claim they did not commit. Guilty or innocent, prisoners should not be encouraged to jump through hoops to achieve parole. These courses should have some meaning beyond just boxes prisoners have to tick in order to achieve parole.

Most campaign groups do not tend to ask people much about their claims of innocence. Grass root groups tend to work on the basis that those who say they are innocent are innocent. On the opposing side, the Parole Board and the prison system tend to work on the basis that everyone is guilty. In 2008, an article entitled 'Factual Innocence versus Legal Guilt' was published in the Prison Service Journal (available on the INUK website). The aim was to clarify the stance of prisoners maintaining innocence and the stance of the prison service and the Parole Board. In short, when prisoners say that they are innocent, they are saying that they are factually innocent whereas when prison officers tell prisoners that they are guilty, they are operating on the currency of legal guilt. The article asks for clarification to prisoners, acknowledging that whilst they are legally guilty, they might be factually innocent.

At the end of 2004, the Innocence Network UK (INUK) and the first innocence project was set up at the University of Bristol and since then INUK has actively assisted around 30 other innocence projects to be created in universities. Innocence projects were established to do something practical to help prisoners maintaining innocence. The idea is that if we are unable to help prisoners maintaining innocence achieve release through the parole system, we may be able to help by proving their innocence.

To assist with deciding which cases to investigate, INUK started to ask for detailed narratives of innocence by prisoners seeking assistance. These narratives are then assessed by applying the *typology of claims of innocence* (first detailed in the article *Confronting an Uncomfortable Truth*, published in *FACTION* in 2007 and available on the INUK website) as

part of the eligibility assessment. We have found that many prisoners maintain innocence even though they are clearly not. They maintain innocence because they misunderstand or disagree with the law. Out of 221 requests for help last year, only 31 were deemed to be eligible, meaning that these are prisoners who may, indeed, be factually innocent. This is a tiny proportion of prisoners which the Parole Board and the prison service should be able to deal with more adequately.

In 2008, following a PPMI Conference, a report by Judge Anthony Thornton was published in the Parole Board magazine (available on the INUK website) acknowledging that prisoners maintaining innocence are disadvantaged. At the end of the report, Judge Thornton contended that the Parole Board SHOULD take the matter forward. He suggested more research and a working group to look into the issue. These recommendations have not happened.

About six months ago, we submitted a proposal for a points-based system to assess prisoners maintaining innocence to the Parole Board. Although this came about in response to calls from the Parole Board itself for practical solutions to the problem, this proposal did not get the blessing from the Parole Board. The underlying premise of this proposal is that if someone is innocent, they are not a risk to society. It comprises three main steps.

Step 1: Application of the typology of claims of innocence to sieve out those prisoners who may be innocent from those who are clearly not. Bearing in mind that the INUK have narrowed down 800 claims of innocence to 200 potentially genuine cases, this method is proven as effective as a first-stage filter.

Step 2: This step consists of further assessment of the credibility of a claim of innocence by looking at the extent that a prisoner has sought to challenge his/her conviction by way of appeal and through the Criminal Cases Review Commission; and assessing the prisoner's risk by looking at his/her overall behaviour in prison, previous convictions and attempts to undertake any offending behavior programmes, whether related to the index offence or not.

Step 3: This requires a deeper look into the evidence that actually led to the conviction in the first place and objectively assessing its reliability.

In summary, if a prisoner is maintaining factual innocence, has exhausted every means of appealing against his/her conviction, has no previous convictions for similar offence(s), and the evidence that led to the conviction is tenuous, there might be a genuine case of wrongful conviction to which the prison service and the Parole Board should not turn a blind eye.

Finally, in 2009, Tony Macgregor from NOMS came to the University of Bristol to discuss MiSAR, which is now exactly mirrored in the PSO4700. The first part of PSO4700 draws from INUK's typology of claims of innocence which acknowledges, for the first time, that some prisoners might be innocent.

The main problem with MiSAR/PSO4700, as detailed in the article 'Does the NOMS Risk Assessment Bubble have to Burst for Prisoners Maintaining Innocence to Make Progress' (published in the Howard Journal of Criminal Justice and available on the INUK website), is that it completely ignores what happens to prisoners who might be innocent. In fact, it uses the typology to bolster the argument that many prisoners maintaining innocence are not innocent, but sidesteps the issue of how to deal with those who might be, which was the rationale for creating the typology in the first place.

There is a serious point to this official acknowledgment that some prisoners might be innocent. This acknowledgment comes with a moral duty to do something about it. It is not tenable for the prison service and the Parole Board to say yes, there are innocent people in prison, but yet do nothing about it.

## **Session 2: The Research on False Confessions (& Memory Distrust Syndrome)**

**Professor Gisli H. Gudjonsson, Forensic Psychologist, Institute of Psychiatry**

The objective of this session is to review the current knowledge about disputed confessions and memory distrust syndrome. I have been involved with disputed confessions since the 1980s when I first worked with Jim Mackeith on cases such as the Guildford Four and Birmingham Six. I have assessed over 800 cases including several high profile miscarriages of justice.

Memory Distrust Syndrome (MDS) is a condition where people develop profound distrust of their memory recollections, as a result of which they are particularly susceptible to relying on external cues and suggestions. A classic case is that of Andrew Evans who did not deny committing the crime until he was nearing his parole (he spent 25 years in prison until he won his appeal). In other words, false confessions do not always result from abuse or pressure by the police.

There are three distinct psychological types that could lead to false confessions identified by Kassin and Wrightmans (1985). These include first, voluntary confessions that stem from individuals who seek attention or a need to 'be somebody'. An example is the case of Ian Lawless, an attention seeker who falsely confessed to murder and overturned his conviction in 2009 after serving over a decade in prison. The second type of false confession stems from what can be conceptualised as (coerced) compliance when an individual may falsely confess to put an end to the situation they are in. An example would be drug addicts who falsely confess so that they can get out of the police station to get more drugs. Finally, there is what can be termed internalised confession when people actually convince themselves that they have committed the crime.

Hostility towards the notion that innocent people might falsely confess to crimes has largely gone in the UK and there has been fundamental changes in the way in which police interviews are conducted. Without this change in mindset by the criminal justice system, cases such as the Guildford Four and the Birmingham Six might still be in prison today. This poses a sharp contrast to the situation in the USA. Out of 243 DNA exonerations (26.10.2009), 60 (15-20%) involved false confessions and some additional false pleas. Despite evidence and knowledge that false confessions happen in the United States, this problem remains largely neglected by the criminal justice system.

Cases of proven false confessions have demonstrated a combination of factors (custodial, interrogative, situational, psychological vulnerability) that can lead to false confessions even where the individual has no psychiatric issues. These reasons include:

- To protect someone else. This is prevalent amongst youths, particularly if they are leading a criminal/delinquent lifestyle and/or are part of a criminal gang/ peer group.
- To escape custody or detention
- Because they cannot cope with the interrogative pressure.
- Taking revenge

*Norwegian Case Study:* Brigitte Tengs who was found murdered in May 1995. More than two years after her murder, her cousin was convicted when he confessed after 170 hours of interrogation by the police. I gave evidence at the appeal in 1998, stating that the confession was unreliable. The prosecution expert, however, disagreed and considered the confession true. The cousin was acquitted although the judges considered him to be guilty on the balance of probability and ordered him to pay compensation. A few years later, following re-investigation of the case, he was entirely exonerated by DNA. The case changed the legal system in Norway. The Norwegian CCRC was set up and active training programmes in police interviewing were established based on the UK's PACE model.

## MORNING SESSION II

### Chaired by Andrew Sperling, Solicitor Advocate, Association of Prison Lawyers

#### Session 3: Reliability & Validity in Risk Assessment of Prisoners

**Robert A Forde, *Independent Psychologist***

The terms 'reliability' and 'validity' are not synonymous. The former is a term used by psychologists and statisticians. A measure is reliable if it consistently measures the same thing. In this sense, a measure can be deemed to be highly reliable even if it measures the wrong thing, as long as the results are consistent. On the other hand, a measure is only valid if it actually measures what it claims to measure. In order to be valid, a measure must be reliable.

Key factors that limit the *reliability* of risk assessment:

- Assessors differ in personality, attitudes, professional knowledge etc; some of these differences may influence the assessments they make of people.
- Assessors may be pressured by issues of allegiance, organisational standards, etc.
- Prisoners may be pressured to give particular answers (suggestibility, etc.)
- Both assessors and prisoners vary in mood and other characteristics from day to day.

Key factors that limit the *validity* of risk assessment:

- Many influences on behaviour are situational and thus inherently unpredictable.
- Things are often assumed to be risk factors on the basis of clinical wisdom or plain folklore.
- We cannot foretell the future, thus, risk assessment procedures cannot provide any certainty, however much it is demanded.
- We only know that released offenders have committed offences when they have been charged or convicted.

On the specific issue of the validity of denial as a measure of risk, this is based purely on clinical wisdom rather than a scientifically founded measure of risk. Research by Hanson et al shows that denial in sex offenders is not a risk factor for re-offending. However, sex offenders who deny their offences are perceived as higher in risk by the Parole Board (Hood et al, 2002). Similarly, a ten year longitudinal study of 180 sex offenders by Harkins, Beech and Goodwill shows that those who denied their offences had the lowest re-conviction risk. On the contrary, offenders with the highest risk were those who admitted everything and recidivism tended to prevail in those who are strongly motivated to undertake treatment programmes.

The PCL-R is a score-based system originally devised to measure psychopathic traits but it is now used as an element in other risk assessment instruments. Although the PCL-R has generally been found to be reliable by researchers, in the last decade studies have demonstrated factors that could affect its reliability. In particular, research by Murrie, Boccaccini, Johnson, Janke demonstrated how PCL-R measurements can be influenced by what is termed the 'allegiance effect' - prosecution psychologists tend to obtain higher scores than defence psychologists, sometimes exceeding the level expected from the known margins of error.

In conclusion, risk can only be calculated to a limited extent. Due to increasing pressures on the prison and parole system to do more to predict prisoners' risk of re-offending, many factors are added into the mix of risk assessment, such as denial of guilt, attitudes to treatment, 'odd' personality characteristics which are not at all related to risk, but sound plausible. There is increasing evidence that many factors currently influencing parole decisions are neither reliable nor valid. This cannot contribute to good decision making and overall, it can lead to the continued incarceration of those who are in fact of low or no risk,

and the release of those with high risk of re-offending, inadvertently putting society and the public at risk.

## **Session 4: PSO 4700, Chapter 4**

**Simon Creighton, Solicitor, Bhatt Murphy**

The issue of prisoners maintaining innocence has become more problematic in recent years due first, to the increase in Imprisonment for Public Protection (IPP) sentences and, second, a move towards an idea that all risk can be measured by the prison service and reliance on offending-behaviour courses.

There is no mechanism to allow the Parole Board to look behind the court's verdict. This is not going to change and we have to try to operate within this framework. However, there is something of a double standard in relation to this stance taken by the Parole Board. Whilst it maintains that it cannot go behind the court's verdict, it often takes into account in its decision making process factors pertaining to the conviction that have not been tried beyond reasonable doubt. For instance, I recently represented a man who was convicted of downloading child pornography and was sentenced specifically for downloading and not trafficking. Although police evidence included him chatting in chat rooms, this was not brought up or included in his trial. The prison service, however, took this into account and worked on the basis that he was a contact offender.

About 50% of Cat A reviews raise the issue of denial. However, only a small percentage will fall into the category of potentially genuine innocence cases described by Dr Naughton earlier. The PSO4700 draws from the typology of claims of innocence that was devised by INUK to assess claims of innocence by alleged victims of wrongful conviction. The first 3 categories in 4.14.1: (i) they may not be able to accept what they have done; ii) they may be trying to protect others; and, iii) they may not want someone close to them (friend or family) to know the truth, are classic cases of denial. The 4<sup>th</sup> category i.e. prisoners may maintain innocence because they may not see what they did as an offence is more complex. It includes cases such as mercy killings or those convicted of joint enterprise offences. The 5<sup>th</sup> category - they may refute some or all the evidence feature in around 90% of denial cases. It comes up time and time again. Prisoners, for instance, may admit to murder but deny the alleged sexual motivation. Many convicted of armed robbery say that their role is something different than what was asserted against them. This poses a problem for the Parole Board which requires a full and frank account before they can decide what the motivation of the crime is and assess whether the motivation has been adequately addressed.

Getting a full account of a prisoner's claim of innocence is really important. The real difficulty of the PSI 4700 is the lack of a sensible approach to those who might be a genuine miscarriage of justice. Such individuals are just left out in the cold. It also has an unrealistic view that prisoners can achieve progression or parole by undertaking non-offence related courses. These courses are unlikely to get prisoners anywhere as they will not be able to demonstrate through these courses that their 'risk factors' have been addressed. Similarly, the idea that prisoners maintaining innocence can target their previous offences rather than the index offence they are maintaining innocence of is perhaps another myth since addressing previous, minor offences is not going to demonstrate a reduced risk of a more serious index offence, such as murder. In addition, there are courses such as the SOTP and CSCP which are impossible for prisoners maintaining innocence to undertake as they require a full account of the crime they claim they did not commit.

The Parole Board's decision making process is centered on a formulaic approach of quantifying and measuring risk. It is therefore crucial that prison lawyers get an expert, such as an independent psychologist to breakdown the prison or probation risk analysis.

For a detailed critique of the MISaR course that is equally valid as a critique of PSO4700, see the article on the INUK website - Michael Naughton (2009) 'Does the NOMS Risk Assessment Bubble Have to Burst for Prisoners Who May be Innocent to Make Progress?' *Howard Journal of Criminal Justice*, 48(4): 357-372.

## **Session 5: PSI 33/2009**

### **Nick Armstrong, *Barrister, Matrix Chambers***

The PSI 33/2009 which introduced Pre-Tariff Sift Reviews came into force on the 1 January 2010. A major effect of this is that some prisoners will not be considered by the Parole Board for open conditions which usually happens two years before the prisoner reaches his/her tariff date.

The current process involves a Sentence Planning Review Meeting 2 months before commencement of what would be the pre-tariff parole process. Undertaken by prison governors, prison and probation staff, the purpose of PSI 33/2009 is to target Parole Board and NOMS resources effectively, by referring only those pre-tariff cases to the Parole Board where there is a reasonable prospect of the Board making a positive recommendation. This process looks only at existing materials/reports and considers the following factors:

- Static risks
- OASys
- Absconding risk
- Offending Behaviour Programmes undertaken/completed
- Custodial behaviour
- Outstanding treatment needs
- Completion dates for any ongoing Offending Behaviour courses
- Security information available

A number of factors/presumptions will be used against the prisoner in the Pre-Tariff Sift Review including:

- The prisoner remains in Category A.
- OASys assessment is high or very high
- The prisoner has escaped or attempted to escape in the last 2 years
- Previous abscond or attempted abscond whilst on an escorted visit or whilst in open conditions in the last two years
- Proven adjudication for serious violence in the last 2 years

The test applied is whether there is a reasonable prospect or 'is there a case for consideration' for open conditions by the Parole Board. Borderline cases or cases with a strong case for recommendation to open conditions should go to the Parole Board.

Reasons for decisions of the review must be given to the prisoner concerned. If it is decided that the prisoner should not go before the Parole Board, consider arranging for a further review, apply for a judicial review or consider appealing the decision by way of complaint.

PSI 33/2009 impacts on all prisoners, not just those maintaining innocence. However, the impact on prisoners maintaining innocence who are not undertaking offending behaviour programmes is evidently greater as in such cases, the need to go beyond a paper review and the opportunity for an oral hearing before the Parole Board is crucial.

# **AFTERNOON SESSION I**

**Chaired by HHJ John Samuels**

## **Session 6: The Parole Board Amendments Rules & Compatibility with the Convention**

**Flo Krause, *Barrister, Meritz Chambers***

It was mentioned this morning that little progress has been made to resolve the difficulties confronting prisoners maintaining innocence. In actual fact, the system has gone backwards. The Pre-Tariff Sift Reviews that Nick Armstrong mentioned earlier are done by prison governors and probation officers, many of whom used to be prison officers themselves.

The impact of the Pre-Tariff Sift Review is another move away from full judicialisation. There was a time when the Parole Board made the decision on issues pertaining to re-categorisation, gave advice on which prison to go to, set review dates etc. All of these have been taken away.

The new Generic Process involving the ICM Sift has worsened the situation by making administrative what is supposed to be judicial and prisoners no longer have an automatic right to oral hearings. The intractable position that prisoners maintaining innocence are currently in (i.e. if they deny guilt, they cannot undertake offending behaviour courses and as a result, they are, generally, unable to progress) stems from the current mode of assessing risk through offending behaviour courses introduced in the mid-1990s. Prior to this, prisoners were judged on a more human level, based on their interaction with prison and probation officers and the way they conduct themselves with other prisoners. It did not matter whether the prisoner was maintaining innocence or not. The system then had a much more holistic approach to risk assessment. The present system based on psychological assessments and offending behaviour courses not only does nothing to reduce the rate of re-offending, prisoners are being incarcerated for a longer period of time, there is a higher rate of re-call and it is costing the public a fortune.

Amendments such as the new Parole Board [Amendments] Rules have taken away the right to an oral hearing. For discretionary lifers, the right to an oral hearing was granted by the European Court of Human Rights in 1992. This was followed shortly after by the granting of oral hearings to young offenders in custody under Her Majesty's Pleasure and mandatory lifers. The rules have now changed. Basically, unless an oral hearing is likely to lead to a recommendation for open conditions, a direction for release, or, if there is a dispute concerning factual evidence concerning risk to be resolved, prisoners are not going to be granted an oral hearing.

This process substantially impacts upon prisoners maintaining innocence whose dossiers are unlikely to reflect positively on them due to their refusal or inability to undertake offending related courses. Prisoners maintaining innocence are reliant on oral hearings as it is the only chance they have to put their case forward and present their side of the story to the Parole Board.

There are two recent cases on the issue of oral hearing – Michael Osborn & John Booth v The Parole Board [2010] EWCA Civ 1409 and Gerald Roose v The Parole Board and The Secretary of State for Justice [201] EWHC 1780 (Admin).

What can prison lawyers do for clients who maintain innocence? If you have a client who is struggling because he maintains his innocence, you can make a difference by challenging the risk assessment and putting the client in a different, more human light.

## **Session 7: The Parole Board's Perspective On "Denial"**

### **Terry McCarthy, *Head of Casework, Parole Board***

The Parole Board is a body created by Parliament which only gave it one power, which is to decide whether or not to release a prisoner. The Parole Board cannot step outside this remit unless invited to do so. The statutory test in deciding whether or not to grant parole to an indeterminate-sentenced prisoner is his/her risk to the public. In this process, risk to the public is the Board's overriding concern, and there is no balancing of risks against benefits.

This should not be a problem if we have full and complete information about a prisoner. Prisoners who deny their offences cause us problems as their risk assessment reports are often full of gaps. Frequently, the assessment reports conclude that they have no risk of re-offending, or breach of licence, but cannot recommend release as they have not undertaken offending behaviour courses.

Prisoners Maintaining Innocence should not be pigeon-holed. There are no two prisoners who are the same and claims of innocence are different too. There are some who say 'I did not do it' but refuse to talk to everyone. By saying that prisoners maintaining innocence should cooperate, we mean that prisoners should open up, talk to us, to help us fill the gaps.

Are deniers at a disadvantage? Of course they are. However, there are a lot of other groups who are similarly disadvantaged – prisoners with disabilities; prisoners who speak a foreign language, and so on. The Parole Board has to be cautious about promoting the interest of one particular group over another.

### **Acknowledgements**

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