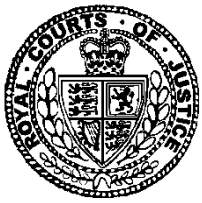

Neutral Citation Number: [2023] EWHC 1438 (KB)

Case No: CO/2724/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2023

Before :
LADY JUSTICE MACUR
and
MR JUSTICE CHAMBERLAIN
- -

Between :

THE KING **on the application of** **(1) ADRIAN JOHN BAILEY** **(2) PERRY MATTHEW MORRIS**	**Claimants**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**
- and -	
PAROLE BOARD FOR ENGLAND AND WALES	**Interested Party**

- -
- -

Philip Rule KC and Michael Bimmler (instructed by **Luke and Bridger Law**) for the **Claimants.**

James Strachan KC, Myles Grandison and **Scarlett Milligan** (instructed by **Government Legal Department**) for the **Defendant**.

Ben Collins KC and **Nicholas Chapman** (instructed by the **Parole Board**) for the **Interested Party.**

- -

Approved Judgment No. 3

Lady Justice Macur and Mr. Justice Chamberlain:

1 This is our third judgment arising out of this claim. In the first (neutral citation [2023] EWHC 555 (Admin)), we gave our reasons for concluding the Secretary of State for Justice had acted unlawfully in making rule 2(22) of the Parole Board (Amendment) Rules (SI 2022/717: "the 2022 Amendment Rules") and in promulgating two sets of guidance about the effect of that rule ("the July Guidance" and "the October Guidance"). In the second ([2023] EWHC 821 (Admin)), we addressed certain ancillary questions, including as to the applicability of the law of contempt.

2 The effect of our analysis of the law was that "a refusal to answer an oral question could… amount to a contempt of court, provided that the question was relevant and necessary, the witness had a view to give, and the witness could not assert a legally recognised privilege against answering" and that "[i]f such a contempt were committed, the person giving the instruction not to comply or not to answer could also be guilty of contempt of court": see [62] of the second judgment. At [63], we said this:

> "…the obligation in CPR 81.6 to consider whether to initiate proceedings for contempt of court arises whenever the court considers that a contempt of court "may have been committed". The fact that the contempt may have been committed by Ministers or officials does not attenuate the obligation: *R (Mohammad) v Secretary of State for the Home Department* [2021] EWHC 240 (Admin), [26], and the authorities referred to there. However, the Court is not required to initiate proceedings for contempt where a formal explanation of the breach, supported by witness statements, has been given and where it concludes that the breach was not intentional and that measures have been put in place to avoid any recurrence: see *ibid.*, [27]."

3 We noted that the material then before us did not make clear the process by which the July and October Guidance was drafted, nor what had been done since we handed down our first judgment to ensure that the illegality we identified is addressed. We therefore gave the Secretary of State a further opportunity to file evidence on these matters.

4 The Secretary of State filed a witness statement from Gordon Davison, Head of the Public Protection Group in the Directorate for Wales and Public Protection in the Ministry of Justice ("MOJ"). That statement records that the MOJ has taken the view that it cannot properly set out the facts without some waiver of legal professional privilege. The statement was accompanied by written submissions. We have also received written submissions on behalf of the claimants and reply submissions on behalf of the Secretary of State. The Parole Board has not filed submissions but has disclosed one document, an internal email dated 13 July 2022 from Martin Jones, its Chief Executive, to other members of staff, referring to a meeting or discussion he had had with Mr Davison ("Martin Jones's email").

5 We have considered all this material with care and have decided as follows:

(a) The witness statement of Mr Davison contains a commendably comprehensive and detailed explanation of the circumstances in which the July and October Guidance documents were drafted and promulgated, with relevant documents exhibited.

(b) The July Guidance was prepared by officials on the basis of their understanding of the logic behind the policy instructions of the then Secretary of State, the Rt Hon. Dominic Raab MP. It was not approved by him.

(c) Although the MOJ had draft legal advice from February 2022 that the law of contempt applied to the Parole Board, no-one raised this point at the time of the promulgation of the July Guidance. As Martin Jones's email shows, he expressed his and the Parole Board's deep dissatisfaction with the substance of the July Guidance and the thinking behind it (including that it might lead to the release of prisoners who would otherwise not have been released), but he did not suggest that it would or might amount to a contempt of court.[1]

(d) The October Guidance was prepared with input from lawyers, who in due course advised that the risk of successful challenge to it was medium high, but it could be properly argued that it was lawful. Again, it was not approved by the Secretary of State. Again, no-one considered whether it might encourage witnesses to commit contempts of court.

(e) Once our first judgment was handed down, prompt steps were taken to revoke the July and October Guidance and explain to staff that they should answer questions from the Parole Board if they were able to do so.

(f) Mr Davison has apologised unreservedly to the court for the errors made in the decision-making that led to the court's judgments in this case. He says, and we accept, that the MOJ has considered with care how these came about with a view to ensuring that proper lessons are learned. We also accept Mr Davison's evidence that it was not his intention, nor that of any other official, to "step outside the boundaries of a proper and lawful position" and that legal advice was taken to that end.

(g) More importantly, paras 79-89 of Mr Davison's statement contain a nuanced, candid and thoughtful analysis of what went wrong in the development of policy in this case. It may be questioned whether Mr Davison accepts, on his own behalf and that of other officials and advisers, too much of the blame for decisions taken to implement a policy instigated and insisted upon by the then Secretary of State, which he was advised against adopting and which we found to be unlawful. At any rate, Mr Davison's statement offers considerable reassurance that the defaults identified in our judgments are unlikely to be repeated.

(h) In these circumstances, proceedings would be likely to engage difficult questions of fact and law about the mental element for a contempt of this kind. In any event, in the light of Mr Davison's statement, and consistently with the approach in *Mohammed* (see [2] above), we do not consider it would be in the public interest to initiate proceedings for contempt of court.

6 For these reasons, there will be no further action in this case. However, the matters contained in Mr Davison's witness statement and Martin Jones's email raise issues of legitimate public interest and concern. Both would have been public documents had

[1] Martin Jones was not provided with a copy of the July Guidance, but with a copy of a prior draft of guidance which was later subsumed into the July Guidance: see §§27-30 of Gordon Davison's witness statement.

they been referred to at a hearing. Although it has not been necessary to hold such a hearing, we have decided that they should be made public as an annex to this judgment.

Annex A:

Email from Martin Jones

From: Martin Jones
Sent: 13 July 2022 09:35
To: [redacted]; Michael Atkins; [redacted]; [redacted]; [redacted]
Subject: Conversation with Gordon

Just so you all are sighted.

I have just had what felt like a long and tense conversation with Gordon re recommendations…

He is adamant that SSJ witnesses will be instructed not to give panels any assistance on whether a prisoner is safe to be released. They will say that is a decision for the panel. They will even attempt to block our work around questions on manageability of risk…

I said that was an extraordinary position to take. But it stems from the SSJs unwillingness to be seen to in any way support release. I thought that the SSJ was looking at this through the wrong end of the telescope; what about the huge number of people who were previously judged too dangerous to release, where SSJ officials would now be neutral?

I made clear that our panels would be expected to ask these questions and that report writers should expect to be closely questioned and would no doubt feel unfairly pressurised – that was unavoidable and the inevitable result of the decisions taken.

I thought that the way MOJ were proceeding was going to cause huge uncertainty, confusion and the potential release of people who would have not been released under the previous system.

Gordon expressed concern that in some cases he had reviewed report writers were recommending release in extraordinarily serious cases. I said that was precisely the point I was making, rather than blaming the PB for its decision, MOJ needed to look at how and why report writers were making these recommendations.

Martin Jones CBE
Chief Executive of the Parole Board for England and Wales
10 South Colonnade
London E14 4PU
[Redacted]
[Redacted]

Business manager: [Redacted]
For diary matters please contact: [Redacted]

Annex B:

First witness statement of Gordon Davison

I, GORDON DAVISON, of the Ministry of Justice, 102 Petty France, London, SW1H 9AJ, **WILL SAY AS FOLLOWS:**

Introduction

1 I am a Senior Civil Servant (SCS) and the Head of Public Protection Group (PPG) within the Directorate of Wales and Public Protection in His Majesty's Prison and Probation Service(HMPPS). I have held this role since 2009. My line manager is Chris Jennings, Executive Director for Wales and Public Protection. Indeed, he was my line manager throughout the period covered by the witness statement. My responsibilities include discharging the Secretary of State's responsibilities in relation to the reviews by the Parole Board to which life and other parole-eligible prisoners are entitled; overseeing the use of the Secretary of State's executive power to recall offenders on licence to custody; developing and maintaining operational policy for the statutory Multi-Agency Public Protection Arrangements (MAPPA) and for the Probation Service in managing offenders who present risks of sexual offending, domestic abuse and to children and vulnerable adults; and developing and maintaining other key operational policies. One of those key operational policies is the 'Generic Parole Process', which sets out in detail the processes which HMPPS and others will follow in relation to the reviews conducted by the Parole Board (Supplementary Bundle/134-203 in these proceedings).

2 I led the team which was tasked with ensuring that the policy in question was deliverable in an operational setting. I commissioned and subsequently approved for issue the final version of the guidance documents which were sent to HMPPS staff, which the Court has ruled were unlawful.

3 This statement is primarily based on my own recollection of events and, where necessary, contemporaneous documents. However, in order to provide as full and accurate an account as possible, I have made enquiries with colleagues within the Ministry of Justice (MoJ) and HMPPS specifically, with whom I have worked closely on the matters set out below. Where information has been provided by others, I have made this clear. Insofar as the contents of this statement are within my personal knowledge and experience, they are true. Where matters are not within my personal knowledge or experience, they are true to the best of my knowledge, information and belief.

4 Where legal advice is referenced in this statement, it was provided by Ministry of Justice Legal Advisers (Advisory Division, GLD), the Ministry of Justice Public Law and SASO Team (Litigation Division, GLD) or Counsel instructed on behalf of MOJ. Legal advice in relation to policy development, operational decisions and litigation is given in accordance with the Attorney General's Guidance on Legal Risk (Exhibit GD1/2). GLD lawyers, and Counsel, advise within the matrix of risk of likelihood of a challenge being brought, likelihood of that challenge being successful, and impact of that challenge. The risk assessment is presented for each head as follows: low (less than 30%); medium low (30-50%); medium high (50-70%); high (70%+); or unlawful

(no respectable legal argument exists). The guidance is designed to allow GLD lawyers to practically support Ministers' objectives practically with clear advice on legal risk and prospects. Any proposed action where no respectable legal argument can be found in justification raises propriety issues which are dealt with by escalation through GLD line management to the Attorney General's Office.

5 In this statement, I provide a full account to the best of my knowledge and according to my recollection of the steps taken in relation to the changes in policy initiated by the former Secretary of State for Justice, the Rt Hon Dominic Raab MP (referred to below as 'the SSJ', despite the subsequent change in Secretary of State) which led to the Parole Board Rules 2019 ("the 2019 Rules") being amended by the Parole Board (Amendment) Rules 2022 ("the 2022 Amendment Rules") and to the production of associated guidance documents, both of which were the subject of this litigation. I have done so seeking to draw out the key facts, and without naming every individual involved. I have taken that course because much of the work and the decision making involved a variety of individuals in MoJ, both on the policy and on the legal side. I have not sought to attribute blame or particular responsibility for failings (which, as I acknowledge in the final section of this statement, were serious and deeply regrettable, and for which I sincerely apologise to the Court) at each of the key stages in the events that led to this Court's judgments, because these were failings of the Department. I stand ready of course to seek to assist the Court in any way it considers appropriate by the provision of further detail or explanation.

6 The Department has taken the view, given the seriousness of the issues raised by the Court and the nature of the events leading up to the Court's judgments, that it cannot properly set out the facts without some waiver of privilege. Again, the approach has been to seek to identify key aspects of the legal advice at the time which bear most directly on the explanations which the Court has sought. I emphasise that the waiver is intended to be limited to matters falling within that characterisation and is confined to that. Again, if the Court considers that it requires more detail I stand ready to seek to assist.

The Facts

The change in policy and the July 2022 rule amendments

7 There were discussions with the SSJ, involving a range of officials including me, between April and June 2022 in relation to his role as a party to Parole Board proceedings. The SSJ queried how the requirement for report writers to make a recommendation related to his role as a party to the proceedings when he had not agreed their recommendation, and indeed might not agree with it. He sought advice on how he, as SSJ, might formulate and provide a single Secretary of State view on whether the statutory release test was met in the case of a given prisoner. Whilst this advice was being formulated, I recall specific discussions with the SSJ about the case of Tracey Connelly. The SSJ was deeply concerned that views which were not his about release and risk had been advanced in his name in the reports and then at the Parole Board's oral hearing.

8 These discussions initially centred on the documentation which HMPPS provided to the Parole Board in accordance with the provisions of the 2019 Rules.

9 In a submission to the SSJ on 19 April 2022 (SB/1307), I proposed that we could develop a policy whereby we identified relevant cases to the SSJ to seek a "single" Secretary of State view which could then be presented to the Parole Board. The SSJ agreed with this proposal.

10 10.The focus turned first to changes to the 2019 Rules. In a submission to Ministers dated 18 May2022 (SB/1312), which was cleared by Claire Fielder, Director of MoJ's Youth Justice &Offender Policy Group, advice was given as to how the 2019 Rules might be amended to conform to this proposal. The advice recommended that the 2019 Rules should remove the requirement that report writers must include a recommendation on suitability for release in their reports, and instead should contain no mention of report writer recommendations at all. As the2019 Rules defined the minimum information that the SSJ must provide when referring a case to the Parole Board, that approach would give flexibility on what written evidence would be provided in each case over and above the minimum requirements.

11 This advice was discussed at a meeting which I attended with the SSJ on 26 May 2022. The SSJ favoured an approach by which the 2019 Rules should positively state that report writers would not provide recommendations (exhibit GD1/5). Some concerns were expressed from this early stage as to how such an approach would work, having regard both to its practical delivery and in practice. For example, as noted in a readout of that meeting, Naomi Mallick, the Director of MoJ Legal Advisers:

> *"Urged against this, explaining consistency here is important. All these report writers work for the MoJ, would be reluctant to include this in the SI. Would be uncomfortable with preventing the Parole Board for interrogating the witnesses. The DPM's point is more about how the SOS presents his view through officials you do not need legislation for this. Raised a concern about using the Parole Board Rules to constrain the Parole Board's function to illicit [sic] information.'*

12 In addition, immediately following this meeting, Stephen Bailey, the Head of Release Strategywithin the Bail, Sentencing, and Release Policy Unit at the MoJ1 provided an informal readout of the SSJ's intention to MoJ lawyers by email in order to receive advice on possible drafting options to amend the Rules (exhibit GD1/11). In this he stated:

> *"It occurred to me that there is a real contradiction between, on the one hand, saying the parole process is a fact-finding exercise and that report writers should just provide factual evidence and offer no view on release and, on the other, having some cases where the SoS will put in a, presumably, quite robust view opposing release – which goes against the idea that the PB should just be provided with facts and evidence and make up its own mind about the conclusion to draw from that.*
>
> *Anyway, that is what we have been instructed to do."*

13 Further advice was then provided in a submission dated 31 May 2022 (SB/1316), also cleared by Claire Fielder. This advice focused on the type of case in which the new prohibition on recommendations might apply. Changes to the 2019 Rules were proposed which would have stopped report writers from providing written recommendations in cases where a single SSJ view was provided, or the offender was serving a sentence for murder, rape, certain terror-related offences, causing or allowing the death of a child (these four offence types were designated as the 'top tier offences' by the Government's Root and Branch Review of the Parole System, published in March 2022, "the Root and Branch Review"). The SSJ considered this advice at a meeting with officials (including myself) on 15 June 2022, where there was a detailed discussion about whether the provisions should apply to just the top tier offences and single view cases or to all cases. The SSJ decided that there should be a prohibition on report writers making a recommendation in all Parole Board cases.

14 The issues around delivering the basic SSJ policy intent (a single Secretary of State view and no recommendations from others) in the light of the Parole Board's role, and especially when oral hearings occurred, were coming increasingly into focus. For example, the readout from the 15 June meeting, dated 20 June 2022, (exhibit GD1/12) shows that Amy Rees (Director General of Probation, Wales and Youth in HMPPS) advised the SSJ that the Parole Board could still elicit recommendations from report writers during oral hearings.

15 From a policy perspective, the logic of that policy intent strongly suggested to me that it may require some limitations to be placed on the ability to provide oral recommendations in Parole Board oral hearings. That is because I, and I believe others, understood that the intention of the SSJ's policy was to ensure that HMPPS witnesses provided factual evidence and risk assessments, rather than recommendations.

16 On 20 June 2022 I sent an email to senior staff explaining the proposed changes which had been decided at this meeting (SB/1346).

17 My understanding of the SSJ's instructions on the policy was, first, that no view should be presented to the Parole Board by an HMPPS employee or agent on the topic of suitability for release (or moving to open conditions) which he had not personally authorised. Secondly, the report writer should, as far as possible, avoid giving a view, whether in the form of a report or verbally at an oral hearing. I understood the thinking behind this policy to be to reinforce that witnesses were experts in risk, but that their role was not to answer the question of suitability for release, i.e., whether the statutory release test was met, which was ultimately and solely for the Board to resolve. I, and I believe others, had understood that the policy was intended to ensure that the witnesses focused on giving evidence related to the prisoner's risk within their remit of expertise, with the Board then answering the 'ultimate' question (whether to direct release or recommend a move to open conditions).

18 There remained the difficult issue as to how this policy might be achieved. It was recognised that the Board could ask questions as to suitability of release directly in oral hearings of all witnesses (as noted in the meeting of 15 June 2022). However, we also recognised that this would place report writers in a very difficult position; and, moreover, that if they provided answers containing recommendations, it risked undermining the central objective of the policy. Whilst it was agreed that the SSJ

could not actively stop the Parole Board from asking questions as part of an oral hearing, we considered that detailed guidance, which reflected the intention behind the policy and suggested possible solutions to the difficulty posed to staff, might represent an acceptable course.

19 Following a ministerial submission dated 24 June 2022 (SB/1322), the 2022 Amendment Rules were made by the SSJ on 28 June 2022 and laid before Parliament on 30 June 2022. They came into force on 21 July 2022. As this Court is aware, the effect of those rules in relation to reports submitted to the Parole Board was to prohibit report writers from expressing a view on suitability for release in initial reports prepared for the Parole Board dossier.

20 Separately, between 24 and 29 June 2022, various discussions occurred between Public Protection Casework Section ("PPCS"), my policy team, MoJ legal advisers and I, concerning how to deal with transitional cases (i.e., cases where reports had already been served, but that would go to oral hearing after the 2022 Amendment Rules came into force). This approach involved the setting of a cut-off date for report writers to submit reports containing a view or recommendation one week ahead of the formal policy being implemented, which would allow for processing of reports by PPCS and the Parole Board. This interim approach was subsequently added to the Guidance (see below).

The July 2022 Guidance

21 To different extents, I was involved in drafting two communications concerning the rule changes: a notice of the changes which was sent to senior and middle managers in probation, entitled 'Parole Reports: Important Changes to the Parole Board Rules' (SB/424) ("the July 2022 Management Communication"); and the guidance entitled 'Changes to the open test for Indeterminate Sentence Prisoners (ISPs) and changes to recommendations in parole reports, oral hearings and recall reports Parts B and C' (referred to throughout these proceedings as "the July 2022 Guidance", Core Bundle/168).

22 Following the readout of the SSJ meeting held on 15 June 2022, which I received on 20 June 2022, I started to produce a first draft of the July 2022 Management Communication, which was an over-arching high-level guidance document, on which other contributors would build. On the 28 June, I sent a draft of the July 2022 Management Communication (Exhibit GD1/14) to the following people for their comments and contributions:

i) Head of Public Protection Operational Policy and Support, PPG, HMPPS;

ii) Ian York, Head of the Public Protection Casework Section, PPG, HMPPS;

iii) Deputy Head of Public Protection Operational Policy and Support, PPG, HMPPS;

iv) Head of Parole Eligible Casework, Public Protection Casework Sections, PPG, HMPPS;

v) Chief Psychologist, Psychology Services Group, HMPPS;

vi) Delivery Manager, Offender Management in Custody Team, HMPPS;

vii) Lawyer, MoJ Legal Advisers.

On 29 June, I received a collated response on my first draft from all of the above (Exhibit GD1/19), except from Ian York, the Head of the Public Protection Casework Section, who was not available at the time.

23 On 6 June 2022, a significant change to how indeterminate sentenced prisoners were considered suitable for open conditions was introduced at pace ('the open conditions test'). In the light of the complexity of that change, as well as the changes relating to the 'no recommendations' policy, I sought the assistance of the Effective Practice & Service Improvement Group("EPSIG") in HMPPS in the production of materials to inform and guide staff about the new rules and approach. It was decided that we needed to develop a detailed guidance document to support staff in understanding and implementing both of these changes (this guidance document would become the July 2022 Guidance which would be sent to all staff, and would be in addition to the July 2022 Management Communication). It was also agreed that briefing sessions for staff would be organised for those directly affected by the changes.

24 My policy team and EPSIG discussed the approach and proposed content of the July 2022Guidance to staff from about 24 June 2022 onwards. EPSIG were tasked with preparing a first draft based on these discussions and the drafting process was coordinated by a member of EPSIG staff. We wanted to provide sufficient guidance and support so that staff understood the changes in their role and what was now expected of them. We were clear, based on the Statutory Instrument which had by that time been laid in Parliament, that report writers would from 21 July be prohibited from offering a view or recommendation on a prisoner's suitability for release or for transfer to open conditions in their initial reports prepared for the Parole Board dossier, and considered that the logic of that prohibition extended to offering a view at any stage of a prisoner's parole review. We understood that this would represent both a significant change in the previous approach to report writing and would present a challenge for staff as to how they were able to articulate their assessment of risk. The initial draft of the July 2022 Guidance therefore suggested alternative options in terms of the language that staff might use when expressing their assessment of risk, without offering a view or recommendation. This would include not offering a view on whether a proposed community risk management plan would, for example, be sufficient to manage the risks posed by a prisoner on release.

25 There was a collaborative effort involving EPSIG, my policy team, MoJ Legal Advisers, PPCS, and Probation Quality Development teams, to develop the draft of what became the July 2022 Guidance into a near final version over approximately two weeks. As part of this process, the member of EPSIG staff coordinating the drafting process engaged with a variety of HMPPS staff affected by these changes, and used their feedback and queries to inform the content of the July 2022 Guidance.

26 I understand that there were queries from probation staff and other professionals regarding whether the changes proposed in respect of written reports applied equally to answers given at oral hearings and, if so, what should be said in response to a request for a view or recommendation at a hearing. These queries were raised with me and my team and we confirmed that the policy was intended to extend to oral

hearings. This indication was based on our understanding of the rationale behind the policy (explained at §17 above), which required that staff were no longer permitted to offer a view or recommendation at any stage of a prisoner's parole review. These queries led to the inclusion within the July 2022 Guidance of suggested alternative responses, which staff could be assured were permitted under the changes, if asked to provide a view or recommendation at a hearing. These were included in response to the queries we had received from HMPPS staff, and were only intended to assist them and provide them with some guidance regarding how to implement these changes in practice.

27 On 7 July 2022, the Chief Executive of the Parole Board emailed me with comments on a draft version of the July 2022 Management Communication. These communications with the Parole Board were not identified in the disclosure process by either myself, others within MoJ, or indeed the Parole Board. I exhibit the covering email as GD1/25 and the comments on the draft July 2022 Management Communication as GD1/29. By way of overview, he expressed, broadly, the following:

i) The need for further clarity on the rationale of the change, and for a specific reference to the provision in the relevant Rules;

ii) Comments on the accuracy of the document's articulation of the judgment in *R (Parole Board) v Johnson*;

iii) The need for further nuance on the requirements of a report writer's risk assessment;

iv) Concerns about the lawfulness of including 'victim confidence' as a factor in the Secretary of State view section, including a recommendation that this be checked with lawyers; and

v) Of particular relevance to these proceedings, the Parole Board noted the following in relation to oral hearings, which I have copied in full below:

> *"Oral Hearings:*
>
> *We have focused most comments here and feel this section needs to be revisited.*
>
> - *The format of oral hearings are a matter for the Board. This should be clearly stated to avoid confusion.*
> - *The second paragraph relating to returning to inquisitorial hearings is misleading and inaccurate and should be removed.*
> - *There needs to be greater emphasis in the guidance that panels will probe report writers on their evidence; there still needs to be risk management plan in every case and they can expect to be questioned on this.*
> - *We think witnesses can and should expect panels to question them even more closely on their risk assessment now they are adopting a*

neutral stance, not less. We are under a positive duty to do this.

- *We suggest making it clear that prisoners reps (who don't have to be legally qualified) will ask whatever they like and report writers need to continue to bep repared for that.*

- *The guidance should also make clear that whilst report writers in for [sic] HMPPS are no longer required under the rules to give a recommendation in their reports, independent report writers for the prisoner still can and will give recommendations."*

28 Whilst the Parole Board's CEO did express dissatisfaction with the policy and with the July 2022 Management Communication, the Board did not at this stage, nor in subsequent correspondence, raise concerns that the rule change or guidance could amount to a potential contempt of court.

29 I considered the Parole Board's comments, incorporating many of them into a revised version of the July 2022 Management Communication: exhibit GD1/35. Although the Parole Board commented that the prohibition in the 2019 Rules on including a recommendion [sic] in the initial mandatory reports for the dossier did not extend to oral evidence, the Parole Board did not object to the statement at GD1/31 (5th paragraph) that where asked by the panel or a legal representative for a recommendation, the witness should state that it is not their role to provide a recommendation, but instead to provide an assessment of risk. Further, as I have explained, I and others involved in producing the guidance understood that the policy intention was to ensure that witnesses should not make a recommendation at any point in a prisoner's parole review, including in an oral hearing, unless it had been authorised by SSJ.

30 Whilst we provided the Board with a draft of the July 2022 Management Communication for comment, we did not provide the Board with a draft of the July 2022 Guidance as we considered that the points raised by the Parole Board and taken on board in the July 2022 Management Communication could also be incorporated into the July 2022 Guidance.

31 The revised version of the July 2022 Management Communication was circulated by the Head of Public Protection Operational Policy and Support, for clearance to the Head of the Public Protection Casework Section, Delivery Manager Offender Management in Custody Team, Deputy Head of Public Protection Operational Policy and Support, the Chief Psychologist for HMPPS, Head of Parole Eligible Casework and MoJ legal advisors. Further comments and tracks were provided on 7 July 2022 by Ian York (Head of the Public Protection Casework Section) (Exhibit GD1/41) and on 8 July 2022 by MoJ legal advisors (exhibit GD1/46).

32 On 11 July, the Head of Public Protection Operational Policy and Support sought my advice on aspects of the July 2022 Guidance as he, along with EPSIG and other members of my team, had been working on a revised draft. The advice sought my view on certain specific examples of what witnesses could say at parole hearings, given our understanding of the nature of the policy being pursued. I made small amendments to the proposed additions and cleared them for inclusion in the draft: exhibit GD1/51.

33 Both the July 2022 Management Communication and the July 2022 Guidance were published on 11 July 2022, in preparation for the changes to the 2019 Rules (as amended by the 2022 Amendment Rules) which came into effect on 21 July 2022. As explained above, their production was a collaborative process involving a large number of officials. I signed off the final versions, thereby agreeing for them to be disseminated to staff.

34 On 19 July 2022 the SSJ received a letter sent jointly by three unions: NAPO, the Prison Officers Association and GMB (Exhibit GD1/54). In their letter, the unions expressed their concerns about "the recent decision to prevent Probation staff from making recommendations, in written reports and oral evidence, to the Parole Board under any circumstances". On 27 July a reply was sent on behalf of the SSJ dealing with the changes to the rules but not the July Guidance (Exhibit GD1/56). The letter sent on behalf of the SSJ "emphatically reject[s] the assertion that they place the public at risk".

35 I should make clear that the SSJ was not consulted on either the July 2022 Management Communication or the July 2022 Guidance. I did not consider at the time that it was necessary to consult him. That is because I considered that the documents conformed to the policy that he wished to be implemented, including the logic of changes to the 2019 Rules. As indicated above, I considered (and my understanding was that the SSJ also intended) that that logic required some restrictions on the answers that could be given by witnesses at Parole Board oral hearings, or the policy risked being undermined.

36 Following the July 2022 Guidance being issued on 11 July 2022, it quickly became clear that there remained a high level of uncertainty and concern from HMPPS staff about how they could or should now approach an oral Parole Board hearing. We sought to address this through the staff awareness sessions that followed. The first of these was held on 12 July 2022. 22 sessions were held in total, attended by significant numbers of staff (3,926). A particular concern emerging from the sessions was that staff sought guidance on examples of how they might respond to specific questions at the hearing from Panel Members seeking to elicit a view or recommendation on the statutory release test. We sought to respond to these as best we could during the sessions. We did not add to the July 2022 Guidance.

The Issuing of Mr Bailey's Judicial Review Claim

37 On 8 August 2022, Mr Bailey's urgent application for interim relief was heard by the High Court.

38 In my experience, litigation places a particularly intense spotlight on legal issues relating to legislation, policy and guidance. Moreover, litigation can, and here did, raise issues or a perspective which has not previously been considered. However, it is right that I should emphasise that my uniform experience has also been that everyone involved in the development of legislation and policy, from policy officials to departmental lawyers and instructed external counsel, seek to the best of their ability to identify practical and especially legal issues in advance and provide acceptable and lawful solutions to them. That involves seeking to assess the degree of risk of a successful legal challenge (including, where necessary, identifying that the policy or action proposed is such that there is no respectable argument that it is lawful) and,

especially as litigation progresses, seeking to re-evaluate previous assessments of that risk and reacting accordingly, whether by making changes or by re-involving Ministers, or both. That is the process that was followed in relation to the changes which were the subject of this litigation.

39 As Mr Bailey's interim relief application progressed, it became clear to us during the hearing that some of the FAQs within the July 2022 Guidance (CB/179) were too prescriptive in guiding Department witnesses in what to say. As soon as that internal view had been reached, a tracked version of the July 2022 Guidance was prepared for the High Court, to demonstrate what the Department was immediately offering to remove from the guidance to rectify this (Exhibit GD1/57).

40 The following day, the High Court ordered the July 2022 Guidance to be disapplied only in Mr Bailey's parole proceedings, deferring to the substantive hearing in relation to the July 2022 Guidance's overall legality. Unsurprisingly, in those circumstances, legal advice was sought on the universal disapplication of the guidance in all cases. In the meantime, in ongoing 'no recommendation' cases instructed on in mid to late August, a 'wait and see' approach was adopted, based on the fact the High Court would be ruling on the July 2022 Guidance and changes could be made following that ruling where and if necessary.

41 On 16 August 2022, an advice note was prepared by MoJ Legal Advisers and others for the SSJ informing him about the outcome of the interim relief application and that the claim would proceed to a full hearing. This note advised that the risk of successful ultimate challenge to the July 2022 Guidance was at 50-70%. The note was 'for information' only (not requiring a decision), and there is no record of the SSJ or his office having provided a response. Thereafter, in mid-August, the Counsel team advised in conference that the July 2022 Guidance should be universally disapplied. Written advice to this effect was received by the Department on 31 August 2022. This advice was not shared with ministers.

42 In those circumstances, it was decided that change was needed. As a result, September was spent seeking urgently to arrive at acceptable new guidance. The development of this guidance is dealt with in the next section. It was titled 'Prohibition on report writers making a recommendation to the Parole Board as to whether the statutory release test is met: Guidance for oral hearings' ("the October Guidance") and was published on 3 October 2022, and came into effect on 5 October. The July 2022 Guidance was revoked on 4 October 2022.

The October Guidance

43 In the first two weeks of September, my team worked on producing revised guidance. Additionally, they worked with EPSIG to provide a short FAQ document to accompany it. The intention was to replace all previous guidance documents and communications.

44 On 14 September 2022 I shared with the Government Legal Department the new draft guidance for Counsel review. I recognised that significant change was needed. However, it was not clear how far that change had to go, and the substantive hearing of the Bailey litigation was being prepared for, and was to be listed on an urgent basis (though in the end was not listed until March 2023, which was later than expected).

45 At a consultation with Counsel on 22 September 2022, Counsel reiterated that it was difficult to defend the existing guidance alongside the 2019 Rules (as amended by the 2022 Amendment Rules) for two main reasons: first, it appeared to give a direct instruction to witnesses, which could be interpreted as obstructing the ability of the Parole Board to obtain evidence from individuals, and could be an interference with its inquisitorial function; and, second, in prescribing ways that witnesses should answer questions it could be an interference with their professional duties as quasi experts in Parole Board proceedings. Counsel advised that since it was difficult to defend the content of the July 2022 Guidance, no defence had been proposed in the draft detailed grounds.

46 Counsel advised that they were attracted to the idea of providing new guidance because: (i) it might make a challenge to the former guidance academic because that guidance would no longer exist as guidance; and (ii) new guidance could be made more defensible, remaining closer to the rule change whilst not prescribing the way a witness would answer questions in away that might interfere with the Parole Board's inquisitorial function. I therefore confirmed that the MoJ would issue new guidance once the version sent to GLD litigation had been considered by Counsel, and that the July 2022 Guidance would be revoked.

47 On the draft guidance that had been provided to GLD litigation, Counsel were keen on the notion that the guidance ensured consistency with the prohibition in the 2019 Rules (i.e. on providing a recommendation in the initial report prepared for the dossier), but that there was vulnerability in the Court deciding that the latest draft guidance went too far. Counsel also advised that there was sensitivity in making it clear that a witness should not be volunteering a recommendation if the witness was not in a position to do so, in light of the prohibition in the2019 Rules; although that was what the guidance was trying to bring out, Counsel stated that they would baulk at someone being prohibited from answering a question from the Parole Board. Counsel advised that the revised guidance therefore needed to explain why the prohibition in the 2019 Rules existed, and that if someone was in a position to be able to make a recommendation on release they needed to make it clear that the recommendation was the witnesses's own view and not that of the SSJ.

48 I expressed concern that allowing a recommendation to be made at oral hearings was inconsistent with the rule change, and queried why the draft revised guidance was not acceptable in navigating this dilemma, by making it clear that witnesses could give their views on risk, but could not offer a view as to whether or not the statutory release test was met. Counsel advised that there is no property in a witness and there is therefore no ability to tell a witness what to say or not to say, and that the Department's guidance could not contain an instruction to a witness not to offer a personal view, if a personal view was what was required by the Parole Board. Counsel advised that the revised guidance as drafted was overstepping the mark, but that the Department's guidance could instead identify sensible reasons as to why a witness may not be in a position to proffer a view or recommendation, and also identify or clarify that any view given would be personal, rather than a recommendation from the SSJ (given that one of the origins for the rule change was a concern that the SSJ's name was being taken as recommending release when that was not the SSJ's position).

49 Counsel ultimately advised that it was a question of getting the balance right, and that the more prescriptive or restrictive the guidance was, the riskier it would be. Counsel advised that the prospect of defending revised guidance would depend upon the final version.

50 50.I gave instructions to GLD and Counsel that the MoJ's position was that it did not want simply to state in this new guidance that witnesses should answer all questions posed by the Parole Board. I was concerned to see if there was a solution that would address the key concerns that had emerged at the interim relief stage but still leave the key policy fundamentals in place. We wished if possible to strike a balance between this policy aim and the right of the Board to ask questions and receive answers in order to assess whether the statutory test had been met. Counsel agreed to review a revised version of the guidance which sought to strike that balance. I agreed that the MoJ would consider Counsel's comments on a revised version of the guidance, but that if the changes did not strike the balance that the Department sought, that Counsel maybe instructed to defend the revised guidance as it had been drafted.

51 51.On 27 September 2022, Counsel changes to the guidance were received. A few days later, we received suggested changes to the covering FAQ document. I approved these proposals.

52 52.I took some comfort from the fact that the draft October Guidance, in light of Counsel's comments, sought to clarify that it was 'not intended to contradict or detract from a report writer's legal or professional duties or obligations when appearing as a witness before a Panel or the need to comply with any lawful requirement or direction imposed by the Panel'. Moreover, it excluded the examples of how to respond to questions that were contained in the July 2022 guidance, and instead instructed witnesses to conduct themselves in a way that was consistent with the statutory prohibition in relation to reports.

53 On 28 September 2022, the draft October guidance documents were shared with Martin Jones CBE (Chief Executive of the Parole Board) by email, sent by Ian York (Head of the Public Protection Casework Section). Mr Jones replied on the same day, noting that the new drafting guidance was less prescriptive but that:

> "'*...the Board remains of the view that the no recommendation policy is problematic in that members will be less clear on who the professionals believe are, or are not, safe to be released. We think this ambiguity may impact on the quality of decisions, particularly for finely balanced cases where a clear recommendation would carry significant weight. .... It is still unclear to me how report writers will be able to express reservations about release if they are essentially adopting a neutral position.*"

54 In response to this email, I telephoned Mr Jones and sought to explain the core of the policy and the proposed changes. I did so considering at this time that the new position was one which was properly legally defensible – recognising of course that the Court would imminently be ruling on the issues.

55 The Departmental approval process for the October Guidance was the same as for the July Guidance. The new draft was written collaboratively by me and our legal team in an effort to achieve the outcome of retaining the SSJ's intended policy but doing so in

a lawful way in the light of the focus that had been created by the interim relief proceedings. That balance continued to be a very difficult one.

56 On 5 October 2022, an MoJ legal adviser sought urgent advice from Junior Counsel by telephone: she emailed Myles Grandison (junior counsel) a further updated version of the FAQ document which accompanied the October Guidance and asked, inter alia, the following question:

> "*'Is it the intention that, if the Board push very hard on a view on release, this guidance is intended to permit staff to answer the question, noting the release test itself is not for them? Not to do so would likely put us back in the position we were in pre-Bailey, but it is not entirely clear from the drafting that this is the intended outcome. If we are right in our interpretation of what the words 'legal and professional obligation to assist the Board' are supposed to achieve (to corralle staff into avoiding the question and attempting to uphold the spirit of the Rules as far as possible, but not precluding them actively from answering a question if Board push them), are we able to adjust this in the Guidance for clarity (ie, state yes, you can answer any question to the best of your ability if the Board are insistent they want your personal opinion?*"

57 Myles Grandison was unavailable, but arranged for Scarlett Milligan (co junior counsel) to telephone the legal adviser. The legal adviser explained that staff had described the draft October Guidance as confusing,2 and asked Ms Milligan whether the intention behind the October Guidance was to permit witnesses to answer questions posed by the Parole Board in oral hearings, noting that if the guidance did not allow witnesses to do so, it would be subject to the same flaw as the July 2022 Guidance. Ms Milligan confirmed that the October Guidance was intended to permit witnesses to answer questions. The MoJ lawyer queried why this permission could not be stated more clearly in the October Guidance, to which Ms Milligan explained that the MoJ had provided the legal team with instructions that it was not acceptable for the revised guidance to explicitly state that witnesses should answer all questions posed by the Parole Board, as this would undermine the MoJ's policy objectives, and that the current drafting was restricted by that instruction.

58 The MoJ lawyer said that she now understood the tension in the drafting of the guidance, and highlighted that, although it was not ideal drafting, the guidance was intended as a short-term measure until guidance was received from the High Court in the Bailey litigation, and that the drafting could be amended thereafter. Ms Milligan and the MoJ lawyer agreed that if any Departmental witnesses were confused and asked the Department whether or not they should answer Parole Board questions on recommendations, the MoJ would have to advise witnesses that they were required to answer the Parole Board's questions, but that the client did not want to actively promulgate that position.

59 The MoJ lawyer also asked Ms Milligan to review a revised draft of the FAQ documents, which had been amended since the Counsel team had provided their comments. Ms Milligan advised that there was a typographical error in the new additions, but that the additions did not have any bearing on the legal challenges in the ongoing litigation and so did not require amendment from the Counsel team's perspective.

60 On 6 October 2022, the MoJ lawyer followed up the conversation with Ms Milligan with an e-mail sent to MoJ Legal Advisers and GLD litigation, briefly outlining what they had discussed. A concern with this approach was then raised to MoJ Legal in an email from a lawyer within GLD litigation. It was noted that there was an apparent tension between issuing new guidance with the intention of clarifying that witnesses should answer questions as to suitability for release if pushed by the Board, but not saying this explicitly. The lawyer advised that this could mean that '*the SSJ is not clearly saying one thing or the other thereby exposing the SSJ to risk of further challenge*'. The MoJ lawyer replied, agreeing that such a tension existed, and advised that this point was taken up with me and my team. I was not made aware of this advice.

61 As before, the SSJ was not consulted on or sent the October Guidance for clearance. Although changes had been made, I considered that the October Guidance sought lawfully to preserve the core of the policy. I thus did not consider at this stage that it was necessary to elevate it to the SSJ.

62 On 3 October 2022, the October Guidance was issued to Regional Probation Directors. It was sent out with a covering email which stated that the July Guidance would be revoked at 6pm on 4 October and the October Guidance would take effect from 9am on 5 October, which I address further below. Relevant to these proceedings, that email stated "*The aim of the fresh guidance is identical to the aim of the original guidance"*: Exhibit GD1/79.

63 On 18 October 2022, Lord Bellamy, the Department's Minister in the Lords, participated in a regret motion debate (tabled by Baroness Prashar) as against the 2022 Amendment Rules 2022. Regret motions are an informal method of raising concerns regarding negative statutory instruments with the House which give Members the opportunity to record their dissent, but does not stop or amend the instrument. The grounds of regret were, relevantly, lack of consultation, and no clear basis for the change of position. The Minister explained to the House that the change was very limited, reports still contained all the previous risk information they did before the change, including stating a person poses a risk to the public, but simply prevented them from expressing an opinion on the question for the Board as to whether the prisoner should be released. He noted the change was intended to avoid the usurpation or delegation of the decision-making role and to bring the Board in line with the rest of the criminal justice system. He noted the change does not prevent the witnesses presenting any risk assessments or any observations they wish to make, with the exception of making the recommendation as to release or not. At the conclusion of the debate, Baroness Prashar withdrew the motion.

64 Following the publication of the October Guidance, further specific guidance documents were produced on 28 October 2022 by Psychology Services (HMPPS) titled 'Changes to Psychological Risk Assessments' and 'HMPPS Parole Reform: Practice Guidance for Psychological Risk Assessment (PRA) Reports'. The original guidance produced by Psychology Services in July was also revoked on 2 October 2022, in line with the main guidance documents, as it had been derived from them. I was not responsible for signing off those guidance documents. That was the responsibility of Jo Bailey, the Chief Psychologist for HMPPS. I understand that Psychology Services shared the new version via a group email to Psychologyleads and it was uploaded to their digital platform on 3 November 2022. As the High Court

isaware, subsequently an error was identified, where a line was inadvertently included from theprevious guidance which advised staff that they could not give a verbal recommendation inhearings (discussed below). This was not correct, and the offending line was removed as soonas it was identified, with both documents being reissued on 22 February 2023.

65 On 20 January 2023, Counsel were requested to give their advice on the prospects of a successful challenge to the October Guidance. This issue had become more pressing as a result of the case in Bailey having been amended to encompass a challenge to the October Guidance. On 26 January 2023 the Counsel team provided us with further advice in writing by email concerning the merits in the present case. We were advised that the prospect of a successful challenge to the revised guidance was medium high (50-70%), and toward the upper end of that bracket. The prospect of successful challenge had not decreased as hoped due to:

i) the (erroneous) inclusion of a prohibition on making a verbal recommendation in the guidance issued by the Psychology Services;

ii) the lack of explanatory communications to staff in relation to the October Guidance; and

iii) the lack of the training which had been undertaken by the Department in respect of the revised guidance.

66 In terms of training and communications, the concern from Counsel was that Department witnesses had been trained on the July 2022 Guidance, and that no training had been given on the October Guidance to 'overrule' the previous guidance. Counsel were also concerned that this issue was exacerbated by the communications that promulgated the October Guidance which did not highlight the change in position and instead suggested that there was no change in practice as a result of the October Guidance replacing the July 2022 Guidance, which I recall as having been said to reinforce to staff that the underlying policy was still intact. We were advised to attend to both aspects. In the event, for a number of reasons including that the issues were likely to be resolved at the upcoming hearing in Bailey, the advice in relation to additional training and communications was not taken forward at that time.

67 The hearing in Bailey took place on 1-2 March 2023. Prior to the Court notifying the parties that it wished the parties to consider the possible issue of contempt of court shortly before the hearing, there had been no consideration given to the possibility of the rule change or the guidance documents being contrary to the law of contempt. The claims themselves had not contended that the guidance constituted a contempt of court, nor had the Parole Board suggested this (whether in the proceedings or in its correspondence with the MoJ prior to the proceedings).

68 At the end of the first day of the hearing (1 March 2023) an urgent consultation took place at which we were advised by Leading Counsel that we may lose both elements of the case (the Rules and the guidance), and there was a significant risk that the Court may issue an immediate judgment that one or both are unlawful. We decided that Ministers needed to be notified. A submission was prepared and sent up on 2 March 2023. I and other officials met the SSJ on the evening of 2 March 2023. He asked for further advice on the options if the judgment went against the MoJ.

69 On 6 March 2023 we received a written advice from Counsel which was pessimistic as to prospects following the hearing. We were advised to give urgent consideration to providing immediate clarification as to the need for witnesses to comply with the Parole Board's directions, both as to further reports or answering questions.

70 On 9 March 2023, the Department received a copy of the Court's embargoed judgment, and we discussed it on the morning of 10 March 2023 in a consultation with Counsel. This was followed up by written advice, received on 13 March 2023, which advised that it would be 'advantageous and preferable for the SSJ to issue revised guidance which takes into account the court's rulings and has immediate effect, rather than attempting to defend the legality of the guidance which may be protracted and give rise to an intermediate period where no guidance is in place.'

71 The judgment was issued on 15 March 2023. My line manager Chris Jennings took immediate action (as I was absent), to communicate it via a 'global email' (which goes to all senior leaders directly) on the same day, confirming the immediate revocation of the October Guidance: exhibit GD1/81. An update was also communicated to senior leaders for dissemination to operational staff on 16 March 2023, via a Senior Leaders Bulletin, which outlined that:

i) all previous guidance (in whatever form) on giving recommendations had been revoked;

ii) reports prepared for the parole dossier should not contain any recommendations on suitability for release, in accordance with the 2019 Rules as amended by the 2022 Amendment Rules;

iii) the above prohibition did not apply to any reports written to comply with a direction by the Parole Board, meaning that whilst staff should not include recommendations in the parole dossier as a matter of course, if the Parole Board directed such a report, that direction must be complied with; and

iv) HMPPS report writers and witnesses should answer any questions asked by the Board that they feel able to answer, having regard to all of the circumstances of the case, including their knowledge of the case and area of expertise. This included questions that the Parole Board may ask on whether or not the witness recommends release, or whether someone can be safely managed in the community, if the witness feels able to answer those questions.

72 In addition, Public Protection Casework Section took steps to contact individual staff who were due to give evidence to parole panels over the following two weeks in an effort to ensure that they were fully aware of the impact of the Court's judgment mentioned above.

73 The October Guidance was formally revoked on 16 March 2023.

The March 2023 Rule change and the March 2023 Guidance

74 A new Statutory Instrument was signed by the SSJ at 13:20 on 30 March 2023. It made changes to the 2019 Rules which came into effect on 3 April 2023.

75 A new guidance document entitled 'Guidance on giving an opinion' was produced on 31 March 2023 ("the March 2023 Guidance") and sent to all Regional Probation Directors on the same day, who were asked to cascade the guidance to their staff by 3 March 2023. The March 2023 Guidance was also published on EQUIP on 3 April. Similarly, following the court's second judgment in Bailey relating to contempt of court (dated 5 April 2023), an e-mail which explained the judgment and the next steps was sent to Regional Probation Directors, who were again asked to disseminate the note to staff (Exhibit GD1/83).

The March 2023 Rule Change and the March 2023 Guidance speak for themselves. Given that they are current, and given the issues with which this statement deals, it is neither appropriate nor necessary to set out the detail of their production, and (for the avoidance of doubt) there is no waiver of LPP in relation to those matters.

My statement to the Court

76 I apologise to the Court unreservedly for the errors that were made in the decision making that led to the Court's judgments in this case. I and others in the MoJ have considered with care how these came about with a view to seeking to ensure that the proper lessons are learned.

77 I can state that at no stage was it my intention, or, so far as I am aware, anyone else's intention, to step outside the boundaries of a proper and lawful position in relation to the changes that were made. On the contrary, we sought from the outset to ensure that legal advice was taken and that it properly fed into the decisions that we took. It is right to note that there is a well-established GLD grid for analysing legal risk in a way that bands the degrees of legal risk by reference to the prospect of a challenge being successful. Both policy and legal officials (and Counsel) are very familiar with this grid and with the nature of the judgements that it requires to be made. We all sought conscientiously to abide by it in this case. At no stage during the policy development, guidance drafting and circulation, or litigation, was it considered that there was no respectable legal argument for the Rule or October Guidance being lawful; in addition, once we were advised by Counsel that the July Guidance was hard to defend and that no draft defence had been proposed in the Detailed Grounds of Defence, we took immediate steps to revoke and replace that guidance, rather than to defend it.

78 If advice had been given that the legal risks were not within proper bounds, I have no doubt whatever that the decisions would have been different and that no step falling outside those bounds would have been taken. As I note below, it may also be that different steps would have been taken if the issues relating to contempt had been to the fore. I do not mean by this to cast an undue share of the responsibility here on the lawyers involved; I accept that this set of events involved a shared departmental responsibility. But I do emphasise that I, and every other person involved, take our legal responsibilities very seriously indeed and seek (and would have sought) to comply properly and fully with those responsibilities.

79 Looking back, there are a number of points that have come sharply into focus for me, and from which both I and the Department have learned lessons to avoid any repetition of an incident of this kind.

80 I consider that the heart of the problem was that we did not analyse correctly, or with the thoroughness required, the fact that the new policy which the SSJ was seeking to introduce simply could not extend to the limits of its logic. It is one thing to require that reports do not offer a recommendation or view on the ultimate issues before the Parole Board (the statutory release test), and it is another to seek to require or encourage witnesses not to assist the Board in answering direct, relevant questions including on those ultimate issues. I, and others, thought that the logic of the new policy required, and could lawfully require, more constraint on the latter than the Court has found was permissible; and that was an error. If the correct legal position was that such answers could not lawfully be constrained to such a degree (as the Court's judgment makes clear) and that fact risked undermining aspects of the new policy, so be it – that was simply the consequence of there being lawful limits to what could be done in this context.

81 As appears from the earlier sections of this statement, the set of issues around what we perceived as being this fundamental dilemma was assessed and re-assessed. We sought conscientiously, and with appropriate legal advice, to grapple with it; and to strike a proper balance within acceptable legal risk parameters and seeking within proper limits to maintain and advance what we conceived to be the SSJ's policy position. We did not ignore the problems; nor did we ignore the legal advice we received which was always considered carefully by reference to appropriate risk boundaries, the relevant stage of the Bailey proceedings, and the SSJ's policy objectives. However, we thought we had room for manoeuvre in seeking faithfully to deliver the SSJ's policy, which as the Court's judgments make very clear, we did not.

82 This Court's judgments have raised the issue of a potential contempt of court. We did not identify this potential, or consider the potential of the law of contempt of court applying, nor was this potential raised by any of the parties in the claim or pleadings (though the Claimant did identify in a footnote the criminal offence of perverting the course of justice).

83 MoJ legal advisers have previously advised – in other workstreams - on whether the law of contempt applies to the Parole Board, including in the context of the management of open hearings and the Board's powers to ensure compliance with its directions.

84 That advice, at different times, was that the Board might be a body before which a contempt could be committed by a witness; that the Department could potentially commit a contempt of court under the 1981 Act by commenting in certain manners on extant Board decisions, and explored generally what powers the Board had to regulate its own proceedings. In particular, as a result of searching our records to provide this statement to the Court, we have discovered that in February 2022 draft legal advice that the Board would be protected by the law of contempt. A draft submission to the SSJ had been prepared to this effect. However, the submission was never sent to the SSJ as this issue was overtaken by the Root and Branch Review, which included a

consideration of the Board's enforcement powers. As such, prior to making submissions to the Court on this point, the Department had never reached a settled position on whether the Board is a contemnable body. I was not aware of that draft submission until now. However, the relevance of that advice, and the application of the law of contempt to the rule change and guidance documents, were not considered in the context of this policy, rule change, or in the creation of the guidance documents. There was no appreciation that the exercise of the Department's statutory functions in relation to the Board could lead to an incitement or procurement of a contempt by a witness.

85 Only following the Court's request for submissions on whether the Secretary of State or anyone else in the Department incited or committed a contempt, did it become clear to me and others that the promulgation of the guide might encourage witnesses to commit contempt of court; and indeed that those responsible for the guidance might themselves be at risk of committing contempt of court. The sheer seriousness of that possibility is a matter that would undoubtedly have affected the decision making, had we known of it at the time that the guidance documents were produced and promulgated. The analysis of legal risks around decision making takes into account an assessment of the prospects of successfully defending a decision, in the particular circumstances of the decision. The possibility that contempt might be in the picture is something that I would have wished to ensure was avoided if at all possible, for obvious reason.

86 I also consider, on reflection, that it may well be that matters could and should have been elevated back to the SSJ at an earlier point or points in time. I consider that this is linked to the core problem noted at §69 above. We did not recognise that the July (and indeed the October) Guidance involved a significant step beyond the Rule change and what we understood to be the underlying policy intention (on the basis that the Guidance was dealing with the answers that witnesses might give in response to direct, relevant questions from the Parole Board), and so raised a set of different and additional legal and policy issues. Whether the steps that we in fact took would have been different if that elevation had occurred is a moot point. However, it is clear to me now that it would have been advisable to re-escalate to the SSJ, with a full and clear explanation of the different risks, including legal risks, involved.

87 I am also very conscious that the Court has held that, even when it was clear that the July Guidance would have to be altered and the October Guidance was formulated and promulgated, we did not go far enough. I acknowledge that the email sending out the October Guidance did not make clear but should have done, that the July 2022 Guidance was being revoked and replaced and should have been immediately disregarded. This should have been done. It is right however to note in relation to the October Guidance that it was not clear at that stage precisely where the line should be drawn; and all concerned were seeking to do their best to arrive at an acceptable balance. We had not received advice that the October Guidance could not properly be defended; and I considered that it should be, recognising the risks that that would not be successful and also recognising we would of course comply fully with the Court's judgment which would provide a definitive answer. The application of the law of contempt in the manner the Court has drawn to our attention did not form part of any considerations at any stage, either within the Department or in external discussions

with the Parole Board or Counsel I emphasise again that it was always our intention to stay within the law.

88 I hope that that fact is apparent from the chronology set out above. As the Court will have seen, the band of legal risk (pursuant to the AG's guidance) was assessed and re-assessed in the light not merely of the Court's judgments but also of the fact that issues and concerns emerged, or emerged more clearly, as the litigation progressed. We sought to take those matters on board and to react appropriately to them, including by reaction with real urgency to take the necessary steps to deal with the Court's main judgment.

89 It is my and the Department's intention to look carefully at what happened in this case, with the aim of ensuring that any future secondary legislation and/or associated guidance documents do not unlawfully interfere with the Board's judicial functions or the law of contempt of court. I apologise to the Court for the mistakes that have occurred.

STATEMENT OF TRUTH

90 I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

DATED: 12 May 2022