Victims and Prisoners Bill

House of Commons

Second Reading

Briefing

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Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This Briefing outlines JUSTICE's views concerning the Victims and Prisoners Bill (the "**Bill**"), which is scheduled to have its Second Reading on 15 May 2023. The Bill was originally conceived, and presented to the Justice Committee for pre-legislative scrutiny, as the Victims' Bill. In that form, it contained just 13 clauses, focusing on defining "*victims*"; providing for the Victims Code; fostering collaboration in the provision of support services; and addressing the roles of Independent Domestic Violence Advisors ("**IDVAs**"), Independent Sexual Violence Advisors ("**ISVAs**"), and the Victims' Commissioner.[1] Following the receipt of evidence during mid-2022, the Justice Secretary reported on the Victims Bill in September 2022 and the Government's response was published on 19 January 2023.

3. When presented to Parliament at the end of March 2023, however, the Bill contained not only Part 1, addressing the position of victims of criminal conduct, but two further Parts. Those deal in turn with victims of major incidents, and reforms aimed at prisoners, in particular the parole process. At the outset, JUSTICE has two concerns: first, both of these new subjects are significant ones, deserving of scrutiny and testing against the evidence, in terms of need for and effectiveness of reforms, before being addressed in primary legislation; and secondly, the addition of provisions concerning parole decision-making in particular is likely to overshadow the victims of crime measures which are ostensibly the Government's core concern, as well as risk violating the ECHR and common law principles regarding the Parole Board's independence.

4. JUSTICE's primary position on the Bill is therefore that Parts 2 and 3 should be removed so that legislators may give full and undivided attention to making Part 1 fit for purpose.

[1] JUSTICE provided evidence to the Justice Committee, both orally and in writing: see https://committees.parliament.uk/work/6730/prelegislative-scrutiny-of-the-draft-victims-bill/publications/.

Part 1 – Victims of Criminal Conduct

5. Currently, too many people affected by crime[2] feel let down by a criminal justice system that seems complex, alienating, and ineffective. In consequence, many disengage with the process, causing trials to collapse or otherwise hobble along without key evidence. This is not news, but rather a long-standing problem and, as a result, nearly six years ago, the Conservative Party's manifesto promised to "*enshrine victims' entitlements in law*". More recently, in 2021, the Queen's Speech announced a draft Victims' Bill, which would put the Code of Practice for Victims of Crime on a statutory footing, improve victims' experience of the criminal justice system, and set expectations for the standard and availability of victim support for victims of domestic abuse and sexual violence. Then, from December 2021 to February 2022, the Government consulted on how this might be achieved. Part 1 of the Bill represents the culmination of those efforts.

6. The major focus of Part 1 is the Victims' Code. In terms of who this would apply to, it is positive to note that the Government has adopted the recommendations put to the Justice Committee that this should include bereaved family members of deceased victims, children who have witnessed domestic abuse, and individuals born of rape. The Government also accepted the Justice Committee's recommendation that the Victims' Commissioner should retain an oversight duty at a national level, where in the original draft, this responsibility was placed on local criminal justice bodies and Police and Crime Commissioners alone. Again, JUSTICE sees this change as a positive development.

7. Beyond this, however, the Bill does little to aid people affected by crime in any meaningful sense. The issuing of a Victims' Code is already mandatory pursuant to section 34 of the Domestic Violence, Crime and Victims Act 2004 (albeit that less detail as to the Code's content is identified there). According to a 2021 Survey conducted by the Victims' Commissioner,[3] 71% of victims were unaware of their entitlements under that existing Code, while only a quarter of respondents agreed that they were kept regularly informed

[2] This is a helpful term used by Victim Support Scotland to encompass both victims and witnesses of crime, acknowledging the different experiences that people have and the potentially disempowering effect of more common language: see Victim Support Scotland, "Mind My Experience: The VSS Language Guide" (February 2022), available at https://victimsupport.scot/wp-content/uploads/2022/02/Mind-My-Experience-VSS-Language-Guide-6.pdf.

[3] This survey obtained responses from individuals who said they had been a victim of crime or had reported a crime of which they had been a victim in the three years to September 2021: see Victims Commissioner, "Victims' Experience: Annual Survey" at https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/6/2021/12/VC-2021-survey-of-victims-_amended-27_9_21-1.pdf.

or received all the information they needed about the police investigation.[4] It is unlikely that altering the legislative source of the Victims' Code will change that situation. Moreover, in presenting the Bill, the Government have not put forward a draft Victims' Code for review. It is therefore impossible to assess what substantive changes, if any, will be made at that level.

8. In any event, what is ultimately required to ensure that people affected by crime are properly supported through the criminal justice process is adequate funding of the criminal justice system. Reforms seeking to improve processes for engagement by people affected by crime must be accompanied by real commitments to invest in the criminal justice system as a whole. Without this, complainants, witnesses and defendants alike will continue to face delays, confusion, and uncertain or missed trial dates. Meanwhile, opportunities to address risks of reoffending will be missed where probation and custodial rehabilitation programmes and mental health services remain vastly under-resourced. Similarly, if the Government's aim is for people affected by crime to have confidence in the criminal justice system, then the first step is for that system to function effectively, without the current backlogs and resource restrictions that afflict the criminal courts and the Crown Prosecution Service (the "**CPS**") in particular.

9. In a similar vein, if the entitlements of people affected by crime are to be meaningful, then they must also be enforceable. Clause 5 of the Bill expressly removes the possibility of civil or criminal liability for a breach of the Victims' Code, and no other sanctions are available against public bodies who fail to comply with their duties. Instead, it is simply for "*criminal justice bodies*" – that is, chief officers of police, the CPS, and the Secretary of State, among others – to collect and review information about the services that they provide. Pursuant to clause 10(1), this information is then to be published to the extent that the Secretary of State "*considers will enable members of the public to assess the code compliance*" of local criminal justice bodies. Data collection and review is an important means of monitoring compliance. However, it is no substitute for a substantive route of recourse where an individual's entitlements have been neglected or denied.

10. The one avenue open to individuals in this position is to make a complaint to the Parliamentary Commissioner for Administration. This may be pursued on the individual's behalf by the Victims' Commissioner. However, what flows from such a complaint is an investigation and a report which, although potentially useful in preventing future failures,

[4] ibid, p.1.

do nothing to secure the rights of the individual concerned, who may still be struggling to engage with the criminal justice process.

11. JUSTICE equally endorses the submission on behalf of Victim Support that people affected by crime must be able to access support which is independent of police and statutory services. Many people affected by crime can be reluctant to come forward owing to concern that other state agencies, such as the Home Office, may become involved. It is for this reason that JUSTICE recommended to the Justice Committee that there should be a 'firewall' between criminal justice and victim support agencies on one hand, and the Home Office and immigration enforcement on the other.

12. This recommendation, taken forward by the Justice Committee, was rejected in the Government's response. The view expressed was that existing police guidance on sharing information with the Home Office, and a protocol and code of practice applicable to migrant victims being developed by the Home Office, were sufficient to address concerns. In reality, however, those measures are unlikely to reassure people affected by crime with irregular immigration status, leaving them vulnerable to exploitation and unlikely to engage with the criminal justice process. We would therefore urge that this position be reconsidered, in the interests of supporting all people affected by crime. For similar reasons, JUSTICE endorses Victim Support's position that the independence of IDVAs and ISVAs from police and criminal justice system be guaranteed.

13. The other point which must not be overlooked in all this is that every criminal defendant remains innocent until proven guilty. Without wishing to detract from the experience of people affected by crime, there is a careful balance to be struck between providing for those who come forward with allegations, and protecting the right of criminal defendants to a fair trial in which their guilt is not pre-judged. Moreover, unlike in civil law jurisdictions, complainants have no formal role in the UK's criminal justice processes: although in the very earliest days of the English criminal law, victims were responsible for bringing criminal proceedings themselves, that role has long since been taken over by the State, which consequently bears the burden of prosecution. It is of course heavily reliant in this on the co-operation of complainants and witnesses; the *quid pro quo* is that the State must provide adequate support and information to them.

14. People affected by crime must be assisted to understand their position in the overall criminal justice process, as well as its shortcomings. That process relies on the State having sufficient evidence to satisfy a jury beyond reasonable doubt – so that they are sure – of a defendant's guilt, before they may convict. That is a high bar and one that,

despite best intentions and the full code test[5] being met, will not be satisfied in every case. It is just as important that services provided to victims, complainants, and witnesses aim to support them in this respect as much as to keep them engaged with the criminal justice system, so that they are able to move forward regardless of the outcomes.

15. For all of these reasons, it is JUSTICE's view that Part 1 does not go far enough in providing for adequate and appropriate support for victims of criminal conduct. **We emphasise that greater thought, budgetary commitments, and enforceability mechanisms are required if any meaningful change is to be achieved.**

Part 2 – Victims of Major Incidents

16. Part 2 of the Bill contains provisions that would introduce an independent public advocate to act on behalf of victims of major incidents. A "*major incident*" is defined in the Bill as an incident which occurs in England or Wales, and appears to the Secretary of State to have caused the death of, or serious harm to, a significant number of people.[6] "*Victims*" under this Part include both individuals who have been harmed by a major incident, as well as close family or friends of such individuals.[7]

17. As envisaged by the Bill, the role of an independent public advocate would be to help victims of major incidents understand the actions of public authorities, direct victims to sources of support, communicate with public authorities on behalf of victims, and assist victims in accessing documents.[8] Part 2 of the Bill would also amend the Coroners and Justice Act 2009 to make an independent public advocate an Interested Person at an inquest into a death following a major incident,[9] meaning that they would be able to ask questions of witnesses and receive copies of evidence relevant to the inquest. According to the Government, the introduction of the independent public advocate role reflects its recognition of the difficulties faced by those affected by the Hillsborough Disaster, and its commitment to ensuring that "*families and communities never again have to struggle in anguish against a system created to help them*".[10]

[5] See Crown Prosecution Service, "The Code for Crown Prosecutors" (26 October 2018), available online at https://www.cps.gov.uk/publication/code-crown-prosecutors.
[6] Clause 24(2).
[7] Clause 24(7).
[8] Clause 27.
[9] Clause 28.
[10] HC Deb 1 March 2023, vol 728, cols. 791-792.

Concerns regarding the Independent Public Advocate provisions

18. JUSTICE is supportive of measures to increase support for survivors of major incidents. As we highlighted in our report *When Things Go Wrong: the response of the justice system* (2020), to avoid retraumatising those affected by catastrophic events, the inquest and inquiries processes must be responsive to their needs.[11] This sentiment has been echoed by the Government, which has vowed to "*put victims and bereaved at the heart of* [its] *response to large-scale public disasters*".[12] It is therefore disappointing that the provisions relating to victims of major incidents in the Bill will fall far short of the commitments called for over the years by survivors and the bereaved, and by organisations working with them.

19. JUSTICE has signed a detailed briefing jointly with INQUEST and the Hillsborough Law Now Campaign ("**HLNC**") on our specific concerns with the independent public advocate provisions of the Bill.[13] Broadly speaking, these concerns are as follows:

    a) Under clause 24 of the Bill, the appointment of an independent public advocate would not be mandatory. Instead, the Secretary of State "*may*" appoint one for victims of major incidents. This would mean that some bereaved families and victims may receive additional support that others are not entitled to, further exacerbating existing inequalities in the post-death investigation system.[14] For the advocate position to be fair and effective, it should be a mandatory appointment with the duties and functions of the advocate arising in the event of a major disaster, rather than at the discretion of the Secretary of State.[15]

    b) Moreover, clauses 24 to 26 of the Bill provide the Secretary of State with broad discretion over who to appoint as an independent public advocate and how they would be resourced. This risks undermining the independence of the advocate, as they are instructed by, and answerable to, the Secretary of State, rather than victims of major incidents. To guard against this, provisions for an independent public advocate should make explicit that while the advocate would sit within the Ministry of Justice for administrative purposes, it would be independent with respect to its functioning and decision making.[16]

[11] JUSTICE, When Things Go Wrong: The response of the justice system (2020).
[12] HC Deb, above n 10.
[13] JUSTICE, INQUEST and Hillsborough Law Now, Victims and Prisoners Bill: Briefing for House of Commons Second Reading (April 2023).
[14] ibid, para. 8.
[15] ibid para. 8; see also provisions for an independent public advocate in the HLNC's Public Advocate and Accountability Bill, Part 1.
[16] ibid, para. 9; see also HLNC, Public Advocate and Accountability Bill.

c) Clause 29 provides that the Secretary of State can require the advocate to produce a report on the investigation processes, but that the report can be redacted by the Secretary of State on public interest grounds. This provision further undercuts the independence of the advocate's role, and the transparency that it is supposed to foster. [17] Greater transparency and accountability could be achieved by narrowing the public interest grounds under which the Secretary of State can redact such reports, to include, for instance, only real and current national security risks. Requiring the Secretary of State to lay reports submitted by a public advocate before Parliament would also increase accountability.[18]

d) The role of the independent public advocate as envisaged in the Bill is extremely weak. Pursuant to clause 27, the role will include providing information, communicating with authorities, directing victims to other sources of support, and assisting in accessing documentation. This list is by way of example, rather than being exhaustive. Nonetheless, the Bill does not give the advocate any powers to require the production of documentation, and there is no duty on public authorities to assist the advocate in anyway. This lack of power to compel the provision of information calls into question to extent to which the advocate will be able to combat the institutional defensiveness that these provisions ostensibly seek to address.[19]

e) We are unconvinced of the need for the advocate to be made an Interested Person at an inquest into a death, as provided for in clause 28. Bereaved families at inquests should be represented by lawyers, not legally untrained individuals who are expressly prohibited by the Bill from providing legal services.[20] It is unclear what added value an advocate would bring to inquests as an Interested Person given that legal representatives already have powers to facilitate engagement with the legal process by, for example, requesting documentation. Without further clarification on the role of the advocate in this context, their position as another Interested Person at an inquest is likely to create duplication and confusion.[21]

[17] ibid, para. 12.
[18] ibid; see also HLNC, Public Advocate and Accountability Bill, Part 1, clause 5.
[19] ibid, para. 10.
[20] Clause 27(6).
[21] ibid, para. 11.

20. Given the above issues, **we urge the Government reconsider the provisions of the Bill establishing an independent public advocate.** In order for an independent public advocate to be effective, it must, at a minimum, be a mandatory appointment and be sufficiently independent of government. For the advocate role to fulfil the government's aim of ensuring that victims of major incidents are never again "*blocked at every turn in their search for answers*," it must have more robust functions and duties than those currently provided for in the Bill.

21. More broadly we join INQUEST and HLNC in **urging the government to introduce provisions in Hillsborough Law, also known as the Public Authority (Accountability) Bill**.[22] Hillsborough Law would establish a duty of candour: a codified requirement on public servants, public authorities and other adjacent corporations to assist investigations, inquests and inquiries of all kinds proactively and truthfully, at the earliest possible opportunity. This could occur by the early provision of position statements and the disclosure of all relevant documentation.[23] As our 2020 report highlighted, a statutory duty of candour would significantly enhance the participation of bereaved people and survivors, by guarding against institutional defensiveness and fostering a 'cards on the table' approach.[24] Further, by directing the investigation to the most important matters at the outset, a statutory duty of candour would facilitate earlier findings and, in turn, reduce costs.[25]

Extending the Victims' Code to victims of major incidents

22. Furthermore, we consider that the Bill represents a missed opportunity to extend entitlements of the Victims Code to victims of major incidents. Victims of major incidents will have suffered serious harm, often at the hands of State or corporate bodies. However, they do not receive the same recognition from Government as victims of crime and so are not entitled to the same minimum level of support and services. Instead, they are often expected to navigate complex legal processes with little recognition of the harm they have suffered or the trauma they have faced.[26]

[22] JUSTICE, INQUEST and Hillsborough Law Now, Victims and Prisoners Bill: Briefing for House of Commons Second Reading (April 2023).
[23] ibid, para. 14.
[24] JUSTICE, When Things Go Wrong: The response of the justice system (2020), p. 2.
[25] ibid, para. 4.49.
[26] JUSTICE, When Things Go Wrong: The response of the justice system (2020).

23. Whilst the position of victims in the criminal justice system is far from perfect, as outlined above, organisations working with bereaved families have flagged a distinct lack of support for victims in the context of inquests and inquiries. In written submissions to the Angiolini Review, INQUEST noted that:

> "*as soon as police officers were charged with criminal offences the families of Azelle Rodney and Thomas Orchard were assisted by Victim Support with transportation and accommodation around the trial. This is in sharp contrast to how families in death in custody cases are generally treated.*"[27]

24. A further example cited by INQUEST concerned a suicide in custody. In the week before the death, the mother of the bereaved had had her car stolen; within 24 hours she had received a telephone call and been provided with a leaflet from Victim Support. She received no such support the following week from the coronial system.[28]

25. As recognised by the Government and underscored in relation to Part 1 above, the criminal justice system has a long way to go in providing proper support to victims of criminal conduct. However, what the above examples show is that the inquests and inquiries system has, in certain respects, even further to go. There is no principled reason to focus on improving the experience of victims in one context, whilst failing properly to recognise the needs and experiences of victims in another.
26. It is also worth remembering that inquests and inquiries, particularly those relating to the major incidents as defined by the Bill, often run concurrently with or prior to criminal investigations. Allowing certain minimum entitlements in one process and not the other risks undermining the confidence of victims in both. There is little use in trying to ensure that individuals are supported through and engaged with the criminal process, when they are at risk of being, or have already been, let down by a separate legal process addressing the same events. This provides an additional justification for affording victims in the inquests and inquiries context similar minimum entitlements to those in a criminal justice setting. Failing to do so is not only unfair, but also runs counter to the Government's stated aim of ensuring victims have confidence that they will be treated "*in the way they should rightly expect*".[29]

27. Some secondary legislation and guidance does exist which sets out, to an extent, the entitlements of bereaved people and survivors in inquests and inquiries. However, as the examples above demonstrate, these provisions are insufficient to secure effective

[27] The Rt Hon Dame Elish Angiolini DBE KC, Report of the Independent Review of Deaths and Serious Incidents in Police Custody (2017), para 15.5 as quoted in JUSTICE, When Things Go Wrong: The response of the justice system (2020), para. 3.3.
[28] ibid.
[29] Ministry of Justice, Victims and Prisoners Bill Policy Paper (April 2023).

participation, and do little to ensure survivors and the bereaved are properly supported. Indeed, many of those that JUSTICE consulted for our 2020 report expressed feeling alienated and retraumatized by the inquest and/or inquiry process, and found that little was done to address their needs.[30] It is our view that extending the provisions of the Victims Code to victims of major incidents and bereaved interested persons at inquests would go some way to mitigating this.

28. Under clause 2 of the Bill, the Victims Code as applicable to the criminal justice context would reflect the principles that victims should:

    a) be provided with information;
    b) be able to access support services;
    c) have the opportunity to make their views heard; and
    d) be able to challenge decisions which have a direct impact on them.

29. Applying these principles to victims of major incidents and interested persons in inquests would have significant practical and symbolic benefits, consistently with the Government's pledge to place victims at the "*heart of its response*" to public tragedies.[31]

30. From a practical perspective, the introduction of a statutory code guided by the above principles would require investigators, coroners and inquiry teams to reconsider their protocols in line with certain minimum entitlements. This could include making provisions to conduct needs assessments to identify what support is required; interviewing without unjustified delay and limiting the number of interviews to those that are strictly necessary; arranging court familiarisation visits; providing expenses for travel to inquests, subsistence and counselling; and affording a route for administrative complaints, with a full response to any complaints made.[32]

31. Beyond these substantive benefits, extending the Victims Code to the inquiries and inquests context would also raise the status of victims within these processes. Affording victims of major incidents and Interested Persons entitlements under the Victims Code would represent a recognition of their status as victims of significant, and often wrongful, harm who should be treated in a manner that is dignified and promotes participation.

[30] JUSTICE, When Things Go Wrong: The response of the justice system (2020); see also INQUEST, 'Family reflections on Grenfell: No voice left unheard (INQUEST report of the Grenfell Family Consultation Day)' (May 2019) p. 6.
[31] HC Deb, above n 10.
[32] JUSTICE, When Things Go Wrong: The response of the justice system (2020), para. 3.5.

32. **We therefore urge the Government to extend these principles to the treatment of victims of major incidents and interested persons at inquests**, bearing in mind the recommendations in relation to Part 1 about how those measures should be strengthened**.** This could be achieved by introducing a requirement in the Bill for the Secretary of State to issue a separate Victims Code relating specifically to victims in the inquests and inquiries context. Such a code would be guided by the same principles and have the same weight and legal status as its criminal justice counterpart. Before issuing a draft of the code, the Secretary of State should be required to consult with survivors of major incidents and the bereaved. Further consultation should be required before any changes to a Victims Code, or provisions of a Victims Code relating to victims in the inquests and inquiries context, are made.

Part 3 – Prisoners

33. Through the parole system, the State exercises one of its most important functions – the protection of the public from serious criminal offending – as well as its most coercive power – the deprivation of individual liberty. It is therefore vital that the process operates effectively and that the decision-making body responsible for deciding upon release or continued detention can carry out its role fairly and independently. JUSTICE is concerned that the measures proposed in Bill would not result in a parole system that is effective, fair, or independent. To the contrary, these reforms would make the system much more complex, to the detriment of victims faced with increased uncertainty; to those in prison, who may lose hope of release and withdraw from rehabilitation; and to the rule of law, by allowing the Secretary of State, as a member of the executive, to usurp the function of a quasi-judicial body, namely the Parole Board.

34. From a parole perspective, the Bill's objective is to "*ensure public safety is always the primary factor in parole decisions*".[33] The Bill ostensibly achieves this by giving more weight to public safety considerations in parole decisions and removing any human rights protections that might otherwise expedite a prisoner's release. In practice, the measures outlined in the Bill neither substantively update nor strengthen public safety considerations in parole decisions; they simply put existing common law principles into legislation. Moreover, there is no evidence of any need for parole decision-making to be made more stringent in the interests of public safety: according to the Explanatory Notes published alongside the Bill,

> "[o]f *the total cases* [reviewed by the Parole Board and] *concluded in any given year, fewer than one in four prisoners reviewed are judged to meet the statutory test for release. Less than 0.5% of prisoners released by the Parole Board are convicted of a serious further offence within three years of the release decision having been made*".[34]

35. Nonetheless, the Bill proposes to empower the Secretary of State to supersede parts of the Parole Board's decision-making functions, thereby undermining the Board's independence and, by extension, infringing upon Article 5 of the European Convention on Human Rights ("**ECHR**"), as protected (at present) by the Human Rights Act 1998 ("**HRA**").

36. Before turning to the reasons in law for JUSTICE's concern about these provisions, legislators may be given pause for thought by some of the practical implications as well.

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[33] See Ministry of Justice, above n. **Error! Bookmark not defined.**.
[34] Victims and Prisoners Bill Explanatory Notes, available at https://publications.parliament.uk/pa/bills/cbill/58-03/0286/en/220286en.pdf, para. 404.

It bears noting that pursuant to the relevant provisions (clauses 35-37), the Parole Board would be permitted to refer a case to the Secretary of State "*for any reason it considers appropriate, including where it considers that, in the particular circumstances of the case, it is unable adequately to assess the risk to the public were the prisoner no longer confined*". This is a fairly extraordinary provision: a court (or similar), once seized of a matter to be determined, cannot merely decline to decide those issues within its jurisdiction. The essence of judicial power, which the Parole Board presently exercises, is making decisions on the evidence before them on the questions that need to be determined. There cannot be an 'escape clause', as these provisions seek to introduce; it would undermine the court-like nature of the Parole Board in its current form, raising questions as to its competence more broadly. And not only would the Parole Board be declining to decide the issues, it would be referring that decision-making to a member of the executive, far less equipped to give appropriate consideration to the material issues and consequently, more susceptible to challenge.

37. The Secretary of State would additionally be permitted by the new provisions to direct referral, but only in cases where the Parole Board would otherwise be recommending release. Taking direct responsibility for release decisions, even in a minority of cases, places the Secretary of State at risk of personal criticism and a loss of political credibility in the event that something goes wrong – for example, further offending on release, or a prisoner's suicide on refusal. A benefit of requiring such decisions to be taken by a quasi-judicial body independent of the executive is to ensure that they may be made freely according to evidence, away from political pressures. Insofar as the Secretary of State is not so insulated, there is potential for decision-making to be overly cautious and affected by extraneous considerations.

38. This carries the consequent risk of more refusal decisions being reviewed before the courts – more specifically, by the Upper Tribunal. Litigation is, of course, costly, and particularly so to the State where it is both a party to the case and funding the appellant's legal aid. This is in addition to the ever-rising costs of incarceration, as the prison population continues to increase – to the extent that it is presently a factor to be taken into account during sentencing.[35] In short, the changes to the parole system proposed under the Bill could put further resourcing pressure on the prison system, as well as increase the political costs of perceived errors in decision-making.

[35] Lord Justice William Davis, "The application of sentencing principles during a period when the prison population is very high – statement from the Chairman of the Sentencing Council" (March 2023), available online at https://www.sentencingcouncil.org.uk/news/item/the-application-of-sentencing-principles-during-a-period-when-the-prison-population-is-very-high-statement-from-the-chairman-of-the-sentencing-council/

Public Protection Decisions

39. The Government has expressed the aim of ensuring that the focus in parole decisions is on the potential risk of harm posed by a prisoner. It is not to be a balancing exercise, where the risk to the public is weighed against the benefits of release to the public or prisoner – an approach which the Court of Appeal already rejected in *R (King) v Parole Board* [2016] EWCA Civ 51.[36] The test which the Parole Board is presently required to apply in the majority of cases is as follows:

> *"The Board must not give a direction* [for release] *unless... the Board is satisfied that it is no longer necessary for the protection of the public that* [the prisoner] *should be confined"*.[37]

40. Former Secretary of State for Justice, Robert Buckland MP explained that, in practical terms. the parole process requires "***offenders to clearly demonstrate that they no longer pose a threat to the public*** *and where this is not the case, it requires them to remain in prison for the full duration of the sentence handed down by the courts.*[38]

41. The existing test is therefore a demanding one, and the evidence does not establish a need for change. Regardless, clauses 32(2) and 33(2) of the Bill provide that, in any case where a decision falls to be made as to whether it is not necessary for the protection of the public that a prisoner should be confined (that is, a "*public protection decision*"), the following should apply:

> "*The decision-maker* ***must not*** *be so satisfied* ***unless*** *the decisionmaker considers that there is* ***no more than a minimal*** *risk that, were the prisoner no longer confined, the prisoner would commit a further offence the commission of which would cause* ***serious harm***." [Emphasis added]

42. While the courts have of course interpreted the existing test over time, this appears to be a significant narrowing of the terms on which parole may be granted.

Concern

43. We are concerned that the proposed release test, which would likely increase the complexity of release decisions, could result in fewer people serving fixed-term sentences being released on licence. Instead, they would be automatically released once their sentences end. Not only is this unfair to those who might otherwise have been released

[36] Victims and Prisoners Bill Explanatory Notes, above n 34. See also *R (Secretary of State for Justice) v Parole Board* [2022] EWHC 1282 (Admin)
[37] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 125(6) and Schedule 17. A single statutory test for all release cases, determinate or indeterminate, was introduced on 3 December 2012 under Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[38] Ministry of Justice, 'The Parole Board for England and Wales: Tailored Review', (2020), p.4.

earlier, but it also creates public safety concerns: if not released on licence, prisoners will return to the community without supervision, rehabilitative oversight, and/or any involvement with statutory services. This may be particularly concerning for victims of crime and so contrary to the intended aims of Part 1 of the Bill.

Referral of release decisions to the Secretary of State

44. The most important substantive change proposed in Part 3 of the Bill concerns *who* would make parole decisions. Under the Bill, substantive decision-making authority would transfer from the Parole Board to a member of the executive, namely the Secretary of State. Clauses 35 and 36 of the Bill would create a "*top-tier*" cohort of offenders. Prisoners who have committed the offences of murder, rape, serious terrorism or terrorism-connected offences, and caused or allowed the death of a child would fall into this category.[39] The Secretary of State would have the ability to supersede any release decisions made by the Parole Board for these top-tier prisoners, and would have the ability to do so by two different means:

    a) First, the Parole Board has a broad discretion to refer a prisoner's case to the Secretary of State instead of taking the release decision itself for any reason it considers appropriate, including if the Board is unable to make an adequate assessment of a prisoner's risk to the public.

    b) Secondly, where the Parole Board determines to release a 'top-tier prisoner', the Secretary of State may direct the Parole Board to refer the prisoner's case to the Secretary of State . The Parole Board's own decision is thereby quashed and the Secretary of State becomes entitled to make the decision afresh, on information then available.

45. The Bill's accompanying Equality Statement asserts (in reliance on the Government's own Root and Branch Review) [40] that there is a "*need for a more precautionary approach to releasing offenders who have committed the most serious offences and who may go on to commit another offence that causes serious harm if released*".[41] These two referral

[39] Clauses 35 and 36 introduce Sections 327ZAB(1) and 256AZBB(1), which specify the complete list of offences that comprise the new "*top tier*".
[40]Available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1064480/root-branch-review-parole-system.pdf
[41] Victims and Prisoners Bill Equality Statement, available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1146909/victims-and-prisoners-bill-equality-statement.pdf, p. 23. The Root and Branch Review does not identify where this "*need*" has arisen from, however it is also clear from the Foreword (at p. 3) that this was a personal objective of the former Justice Secretary, Dominic Raab.

pathways are intended to provide "*greater safeguards whenever the Parole Board determines that any of these prisoners* [are] *suitable for release*".[42]

46. Clause 37 of the Bill makes provision for the test that the Secretary of State should apply when such a referral is made: that is, if the Secretary of State is satisfied that the public protection test (as also applied by the Parole Board) is met, they must release the prisoner on licence. If the So Secretary of State S is not so satisfied, they must decide that the prisoner will remain confined. Given that the test is the same for both Secretary of State and the Parole Board, it is unclear how the referral pathways would practically offer "*greater safeguards*". Indeed, whereas the Parole Board is subject to well-defined procedures as a quasi-judicial body, it appears that the only procedure set out for the Secretary of State in reaching a release decision is that they *can* decide to interview the prisoner if they want; there is no right to be interviewed. Nor is there any reference to the prisoner being legally represented in relation to the Secretary of State's decision.

47. The Bill authorises the Secretary of State to make further rules on the referral procedure in due course It is to be hoped that such rules would provide for a fair and transparent process in which a prisoner is able to participate (in accordance with Strasbourg authorities and common law principles). If the Bill is passed, the Secretary of State, as non-judicial body, should not be subject to less stringent procedures than apply to the court-like Parole Board. That is particularly so given the lesser expertise which the Secretary of State is likely to bring to decision-making, as compared with members of the Parole Board who are selected for their relevant subject-matter knowledge and experience. Moreover, there is no principled reason why decisions concerning 'top-tier' prisoners (whose cases may be particularly complex and serious) should have fewer procedural safeguards than others.

Concerns

48. JUSTICE is concerned that giving the Secretary of State parole decision-making powers for top-tier prisoners will violate Article 5 ECHR and so undermine the UK's commitment to the universal protection of human rights.

49. Pursuant to Article 5(4) ECHR, all post-tariff detention of prisoners must be speedily reviewed by a court.[43] Reflecting consistent Strasbourg jurisprudence, in *R (Girling) v*

[42] ibid.
[43] ECHR, Article 5(4).

Parole Board[44] the Divisional Court made clear that for a body to be considered a court within the meaning of Article 5(4), it must:

> *"exhibit the necessary judicial procedures and safeguards appropriate to the kind of deprivation of liberty in question, including most importantly* ***independence of the executive*** *and the parties.*" [emphasis added]

50. Although the Parole Board is a body corporate,[45] in its current form, it "*is accepted to be a judicial body*" in its capacity to decide whether to direct a prisoner's release.[46]

51. However, this has not always been the case. Under the Criminal Justice Act 1967, ultimate decision-making authority for release remained with the Executive, and the Parole Board's role was purely advisory.[47] The Parole Board was still an advisory body in 1988 when the European Court of Human Rights ("**ECtHR**") first addressed the question of whether review by the Parole Board met the requirements of Article 5(4). In *Weeks v United Kingdom,* the Parole Board was found not to satisfy the requirements of Article 5(4) because, among other reasons, its function in relation to release on licence was purely advisory. It lacked the competence to decide whether detention was unlawful and, if it was, to order the release of the prisoner forthwith.[48] In 1991, the Parole Board was made independent,[49] in part to ensure compliance with the EctHR ruling in *Weeks*. The EctHR has not diverged from that line of authority.

52. Under the Bill, the Parole Board's role in the parole process would no longer, by itself, appear to satisfy the "*independence requirement*" of Article 5(4). At least in respect of 'top-tier' cases, it would remove the Parole Board's decision-making capacity. This appears to have been the personal goal of former Justice Secretary, Dominic Raab. When pressed on this point by the Justice Select Committee, the Mr Raab commented: "*I think that the Parole Board's function is mischaracterised as judicial*."[50] Such a remark sits in stark opposition with the status of the Parole Board as a court and its task of making decisions in individual cases, independently and impartially, based on the evidence before

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[44] [2007] QB 783, para. 13.
[45] Criminal Justice Act 2003, section 239(1).
[46] *R (Giles) v Parole Board* [2004] 1 AC, para. 10.
[47] The only exception to the Board's purely advisory role was in connection with a prisoner recalled to prison following the revocation of his licence. In this situation, if the Board recommended immediate re-release, the Secretary of State had to follow this recommendation.
[48] *Weeks v United Kingdom* (1988) 10 EHRR 293, para. 64. This was later affirmed in *Thynne v United Kingdom* (1991) 13 EHRR 666.
[49] Criminal Justice Act 1991, section 34.
[50] See Justice Committee, "HC 883 Oral evidence: The work of the Lord Chancellor" (22 November 2022), available online at https://committees.parliament.uk/oralevidence/11598/pdf/, Q77.

it. Far from building confidence in the parole system, this measure would appear to politicise the decision-making process and undermine the separation of powers between the judiciary and the executive.

Appeal to the Upper Tribunal of decisions on referral

53. Under clauses 38 and 39, a prisoner whose release is refused by the Secretary of State can appeal that decision to the Upper Tribunal. There are two forms of appeal: first, with permission, on judicial review grounds; and secondly, without permission required, on the basis that the proposed release test is met. If an appeal on judicial review grounds is successful, the Upper Tribunal must remit the case back to the Secretary of State to take the decision afresh. However, if the Upper Tribunal is satisfied that the proposed release test has been met, then it must direct the prisoner's release.

54. It is to be noted that the Root and Branch Review suggested that only judicial review grounds would be available on appeal from a decision of the Secretary of State. However, it appears that by including a form of merits review, for which permission is not required, the drafters have attempted to circumvent the Article 5(4) issue.[51]

Concerns

55. JUSTICE is concerned that the proposed route of appeal to the Upper Tribunal will not ensure ECHR-compliant decision-making in top-tier cases. In *Hussain v United Kingdom* the ECtHR explained why the availability of an appeal mechanism – in that case, also limited to judicial review grounds – could not cure an independence deficit:[52]

> "*It is not an answer to this* [independence] *requirement that the applicant might have been able to obtain an oral hearing by instituting proceedings for judicial review* […] *Article 5(4) presupposes the existence of a procedure in conformity with its requirements without the necessity of instituting separate legal proceedings in order to bring it about."*

56. That is, the original decision-maker in every case is expected to meet the minimum requirements set out in Article 5(4). An appeal or review mechanism should exist to check for any procedural or substantive errors, but the original decision should be capable in itself of being valid. Applying this explanation to the measures proposed in the Bill, it is clear that the proposed route of appeal to the Upper Tribunal – even on merits – cannot remedy the fact that the Secretary of State's lack of independence. Independent and

[51] Victims and Prisoners Bill Explanatory Notes, above n 34, para. 645.
[52] (1996) 22 EHRR 1, para. 61.

expert decision-making should apply at the outset, not as a last resort. Moreover, it is yet to be seen whether this appeal mechanism will be practically accessible, as Strasbourg jurisprudence also requires.[53]

57. These concerns are exacerbated by the fact that, unlike criminal courts or the Parole Board, the Upper Tribunal has no experience in assessing the risk of harm to the public.[54] JUSTICE acknowledges that decision-making in relation to parole can be challenging, involving consideration of numerous factors, and with serious consequences if assessments of risk are flawed. Such decisions are therefore best made by individuals with a sophisticated understanding of the various factors that may give rise to risks of re-offending, which can often be multifaceted and so, in being assessed, draw upon different areas of expertise. At present, the Upper Tribunal seems unlikely to be able to meet these challenges, in view of its different focuses and concomitant resourcing. As a result, it is clear this appeal mechanism is neither a sufficient safeguard of the rights of prisoners or the public.

Disapplication of Section 3 Human Rights Act 1998

58. Clauses 42, 43 and 44 of the Bill would disapply section 3 HRA from all provisions (and subsequent legislation) relating to the release, licences, supervision, and recall of indeterminate and determinate sentence offenders. Section 3 requires primary and secondary legislation to be read and given effect in a way that is compatible with the ECHR "*so far as it is possible to do so*". The Government has said the disapplication of section 3 is necessary to ensure that the intention of Parliament with respect to prisoners who may be or have been released is maintained. It has explained that section 3 has previously required courts to adopt interpretations which depart from "*the unambiguous meaning of […] legislation*".[55]

Concerns

59. On introduction of the Bill into the House of Commons, former Justice Secretary Dominic Raab made a statement pursuant to section 19(1)(a) of the HRA that, in his view, the provisions of the Bill were compatible with rights secured under the ECHR. The proposed disapplication of section 3 appears to be wholly contrary to such a view, indicating instead that a preference for legislation to be interpreted in a manner that gives priority to the Government's desired outcomes, regardless of the human rights implications.

[53] *Khlaifia and others v Italy* (App. no. 16483/12)
[54] JUSTICE, "The parole system of England and Wales", available online at https://justice.org.uk/parole-system-england-wales/.
[55] Victims and Prisoners Bill Explanatory Notes, above n 34, paras. 651-655.

60. Under the Bill, if section 3 is disapplied, it will remain possible for the courts, pursuant to section 4 HRA to make declarations of incompatibility with respect to provisions of primary or subordinate legislation found to be incompatible with the ECHR. However, a declaration of incompatibility does not affect the validity, operation, or enforcement of an incompatible law. Instead, it merely prompts Parliament to decide whether to amend the law. Given the tone and intention of the Bill, JUSTICE is concerned that the Government would not legislate to rectify such incompatibility. In any event, the Parliamentary process takes time, and in the intervening period, a rights-infringing instrument would remain on the statute book and in effect.

61. Clauses 42-44 of the Bill therefore represent a very troubling development. Prisoner release, supervision and recall is perhaps a 'very specific and limited' area of disapplication. However, the strength of human rights protections lies in their universality and setting of minimum standards. Any form of exceptionalism which excludes certain individuals or groups from the protection of human rights is both impermissible and, owing to its unprincipled nature, opens the door to further derogations. JUSTICE is therefore concerned that these provisions would effectively strip an entire group people – that is, prisoners who have been or will be subject to a parole decision – of their human rights protections. Prisoners in custody are very vulnerable in this context, insofar as they are entirely dependent on the State to secure their rights. It must also be recalled that to reach this position, prisoners will have been sentenced by a court and so have received the lawful penalty for their offending. There is no justification for a further, punitive approach to parole decision-making, which ought to be focussed on future risk and public safety.

62. By disapplying section 3, the Bill also raises the possibility that the UK will be faced with further, costly litigation before the ECtHR – and again, increased uncertainty for victims of crime. This is the consequence of legislating in contravention of the ECHR, including by means of clauses 32-37 considered above, and removing the major domestic remedy that section 3 provides. Not only does this raise financial implications, but such litigation only serves to jeopardise the UK's international standing as a protector of human rights.

JUSTICE

12 May 2023