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## **Victims and Prisoners Bill**

Government Bill, Session 2022-23, Second reading 15 May 2023

### **Howard League Briefing**

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*The Howard League for Penal Reform is a charity working for less crime, safer communities and fewer people in prison. Established in 1866 and named after the prison reformer John Howard, the charity was, among other initiatives, at the forefront of the campaign to abolish capital punishment and helped to create the probation service. Today, through research, campaigning and legal work, and with the support of our members, including members in prison and their families, we promote solutions that deliver better justice and minimise the harms of prison, for prisoners, victims and society at large.*

#### **Introduction to the Bill**

The Bill was first published on 29 March 2023. It is the culmination of the government's [public consultation on justice for victims](#) and the [Root and Branch Review of the Parole System](#).

The key measures in the Bill will:

#### Part I

- Place the principles of the Victims' Code into law
- Place a duty on local commissioners in England to work together when commissioning support services and introducing guidance around domestic violence

#### Part II

- Establish an Independent Advocate to support victims of major incidents

#### Part III

- Allow ministers to overrule the Parole Board in release decisions involving 'top tier' offences (such as murder, terrorism and serious sexual offences)
- Allow the Secretary of State to remove the Parole Board's Chair and Vice Chair in the name of maintaining public confidence, and enable the Secretary of State to make rules prescribing the composition of certain Parole Board panels
- Disapply section 3 of the Human Rights Act 1998 ('HRA') in relation to legislation concerning the release of prisoners

This briefing focuses on Part III of the Bill concerning prisoners. The Howard League is concerned that the provisions in Part III raise fundamental issues of constitutional significance, concerning the separation of powers, the independence of quasi-judicial bodies like the Parole Board and the UK's compliance with human rights laws. In particular, the granting of ministerial powers to overrule decisions and interfere with the composition of the Parole Board is unjustified, inappropriate and may well be unlawful. Such proposals should attract rigorous Parliamentary scrutiny. If these measures are enacted in their current form, the likelihood of legal challenge seems high.

The Howard League is further concerned that these measures will have a disproportionate

impact on Black, Asian and Minority Ethnic prisoners, who are already overrepresented in the criminal justice system.

The inclusion of Part III has already, and will continue, to detract from the original goal – and laudable aim – of this Bill to strengthen and secure victims' rights. **We propose therefore that Part III of the Bill concerning prisoners is removed, so that this legislation is refocused on victims, as was initially intended.**

### ***Key concerns***

#### **The Victims and Prisoners Bill wrongly allows for ministerial interference with the independent parole process**

The Bill will create a new 'top-tier' of offenders, such as those convicted of murder, terrorism and serious sexual offences, and will allow the Secretary of State for Justice to quash Parole Board decisions to release those within this high-risk category. The Justice Secretary will also be given new authority to remove the Chair and Vice Chair of the Parole Board in the interest of public confidence, and to introduce new rules that would enable the Secretary of State to create a "requirement for ex-police officers and detectives to sit on parole panels for... 'top-tier' cases" (MoJ (2023d)).

The government masks the Bill as legislation introduced to improve public safety. However, in reality it will create an environment in which prisoners are vulnerable to life-changing decisions being made about their future, with the primary intent of serving a political agenda. Allowing a politician an effective veto over release leaves the key decision-maker as one who is vulnerable to public or party opinion and risks decisions being made because they are politically or publicly expedient, not because they are properly considered and fair.

Even more concerning are the significant constitutional questions the Bill raises around the independence of the Parole Board, and its vital function as a "court". It is required both under the common law and pursuant to Article 5(4) of the European Convention on Human Rights that decisions about a person's liberty should be determined by a body which has the essential attributes of a court – being a body which is both impartial and independent (see e.g. Pearce [2023] UKSC 13). The introduction in the Bill of an effective veto power – whereby the Executive is empowered to overrule the decision of the Parole Board – is difficult to reconcile with these fundamental legal principles.

The High Court already found, in March 2023, that former Justice Secretary Dominic Raab acted unlawfully when he sought to prevent expert witnesses from including in their reports to the Parole Board a view or recommendation as to a prisoner's suitability for release or transfer to open conditions, finding that his efforts were an "impermissible interference with a judicial process" (Bailey and Morris [2023] EWHC 555 (Admin)). As the High Court noted, it is "well established that, when exercising powers in relation to the [Parole] Board, the Secretary of State must not do anything that undermines or would be perceived as undermining the independence of the Board or that encroaches upon or interferes with the exercise by the Board of its judicial responsibilities".

It is clear, therefore, that Parliament ought to scrutinise with rigour such provisions of this Bill that seek to disrupt the balance of the separation of powers as between the Executive and the Parole Board as a quasi-judicial body, and over which there are serious questions about compatibility with the European Convention on Human Rights. If the Bill is enacted in its

current form, we consider it very likely that legal challenges would follow.

### **The Bill disapplies human rights protections to a specific cohort of people**

Clauses 42-45 of the Bill concern the application of human rights protections in relation to the release of prisoners. The explanatory notes provide that these provisions would “bring forward” reforms in the Bill of Rights Bill to “guide the interpretation of” the new parole clauses and other legislative provisions relating to release, licences, supervision, and recall of indeterminate and determinate sentenced offenders.

Specifically, the relevant clauses seek to disapply section 3 of the HRA, which requires that all legislation should be read and given effect in a manner that is compatible with the rights guaranteed by the European Convention on Human Rights “so far as it is possible to do so”. The draft provisions in the Bill provide that if there are incompatibilities between the new parole measures, or any of the other ‘release measures’, then the Courts (and others) would not be under an obligation to interpret the provisions in this way.

Attempting to exclude a cohort of people from the protections of our human rights regime is completely at odds with one of the fundamental principles underlying that regime: that human rights are universal. Although it has been widely reported that the Bill of Rights Bill has been shelved, this draft legislation (and, similarly, the draft Illegal Migration Bill in its application to refugees and migrants considered to have entered the country ‘illegally’) forges ahead with this controversial approach. This is despite the fact that those in custody – whose lives are entirely controlled by the state – may be seen as amongst those *most* in need of protection against the abuse of state power.

### **The Bill disproportionately affects Black, Asian and Minority Ethnic groups**

Racial disproportionality in the criminal justice system has been a longstanding concern for the Howard League, as we frequently see examples of discrimination through our legal work to support children and adults in prison.

The Bill’s impact assessment confirms that the creation of a ‘top tier’ of offences will disproportionately impact Black and Asian prisoners. Black prisoners represent nine percent, and Asian prisoners 21 per cent, of this cohort – compared respectively with seven per cent and 16 per cent of those who were given a parole-eligible sentence for all offences. Whilst the majority of the prison population as a whole are from White backgrounds, people from racially minoritised communities are significantly overrepresented, with 27 per cent of prisoners from a minority ethnic group. Black and Asian people in prison are more likely to be serving long sentences than other groups (UK Parliament, 2020/21). This Bill will only exacerbate existing disproportionality in the system.

### **The Bill does nothing to prevent crime by failing to utilise community-based rehabilitation efforts**

While introduced in the name of public protection, the Bill will increase risk to the public by reducing post-custody rehabilitation activity. Impact assessments of the Bill show the changes “...will result in some offenders spending less time under licence supervision in the community.” It predicts up to 1,870 fewer prisoners will be placed under licence supervision by 2034 (MoJ, 2023d).

Crucially, there is no evidence that keeping people in prisons for longer improves penal aims, making it even more difficult to justify the cost to the taxpayer. Indeed, in their recent report on the effectiveness of sentencing, the Sentencing Council concluded “*the current evidence does not suggest that increasing the length of immediate prison sentences is an effective way to reduce reoffending*” (Sentencing Council, 2022, p. 6).

### **The Bill will exacerbate existing staffing and population pressures on the prison system**

The impact assessment predicts that up to 1,870 new prison places will be needed by March 2034 as a direct result of tightening criteria around parole decisions (MoJ, 2023c). This is unfeasible in the current prison overcrowding crisis. The system as a whole has been overcrowded in every year since 1994. At the end of April 2023, there were 84,658 people in prison – just 1,197 short of the system’s usable operation capacity (MoJ, 2023). As the number of long-term sentences rise, so too does the prison population, with the number sentenced to four years or more (excluding indeterminate sentences) increasing by eight per cent over the past five years, to 31,683 (MoJ, 2023).

Prisons are under intense pressure and there are insufficient staff to manage the current population as it stands, let alone with a population projected to rise by a fifth in the next few years (MoJ, 2023a). The most recent annual report from HMPPS (2021-22) describes how “recruitment and retention rates have posed a significant risk to our ability to operate prison services and rehabilitative activity at the desired level”. While the report shows an increase in recruitment of band 3 to 5 prison officers by 52 per cent the previous year, the number of band 3 to 5 officers leaving HMPPS increased by over 60 per cent the previous year. Retention is a key problem – half of officers who left the service in the last year had stayed in the role for less than three years. Over a quarter left after less than a year (HMPPS, 2022).

With such pressures facing the system, the Secretary of State for Justice should rely on the skilled risk assessment body of the Parole Board to make trusted decisions to release those who do not pose a risk of serious harm to the public. Instead, the Bill seeks to keep people who could otherwise be released in prison for longer, unnecessarily.

### **The Bill undermines the strengthening of rights for victims**

Victim-based organisations are – rightly – disappointed that the Bill does little to address their key asks. Despite its name, the Bill is heavily focused on measures around prisoners. The Domestic Abuse Commissioner for England and Wales, Nicole Jacobs, has publicly said the measures will detract attention from real challenges faced by victims (DAC, 2023). The London Victims’ Commissioner, Claire Waxman, has said the Bill “does not centre the needs of victims or the rights of victims. It actually undermines the strengthening of rights for victims” (Sandhu, 2023).

### **Conclusion**

The Howard League echoes concerns that the Bill does not go far enough to support victims of crime, and instead takes an unhelpful and overly punitive approach to prisoners’ rights. Part III of the Bill has been included without adequate scrutiny – indeed, several of its provisions were not included in the root and branch review. As such, the Howard League proposes that part III, which concerns prisoners, is removed, so that this legislation becomes one focused on victims, as was initially intended.

## **References**

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