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Victims and Prisoners Bill: Second Reading
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Howard League Briefing

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 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* (MoJ, 2021 & 2022). The key measures in the Bill in its current form will:

Part I: Victims of Criminal Conduct

- Introduce measures to improve support for victims, including through strengthening transparency and placing 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;
- Bring the circumstances under which a Domestic Abuse Related Death Review is considered in line with the Domestic Abuse Act 2021 definition of domestic abuse.

Part II: Victims of Major Incidents

- Establish an Independent Advocate to support victims of major incidents.

Part III: Infected Blood Compensation Body

- Establish a compensation scheme for the victims of the infected blood scandal.

Part IV: Prisoners

- Allow the Secretary of State to refer release decisions involving 'top tier' offences (such as murder, terrorism and serious sexual offences) to the Upper Tribunal;
- Allow the Secretary of State to remove the Parole Board's Chair in the name of maintaining public confidence, and make rules prescribing the composition of certain Parole Board panels;
- Disapply section 3 of the Human Rights Act 1998 regarding legislation concerning prisoner release.

This briefing focuses on Part IV of the Bill concerning prisoners. The Howard League welcomes some provisions in Part IV relating to Imprisonment for Public Protection (IPP) sentences but is concerned that they do not go far enough to tackle what ministers have repeatedly called a stain on our justice system. Beyond the measures relating to IPP sentences, the Howard League is opposed to the changes in Part IV. The provisions relating to the Parole Board in Part IV are, notwithstanding recent government amendments, unclear, unworkable and undermining of the Parole Board's independence. The proposals concerning the disapplication of fundamental human rights laws to prisoners are dangerous and unnecessary. The provisions of Part IV will have a disproportionate impact on Black, Asian and Minority Ethnic people in prison, who are already overrepresented in the criminal justice system. The Bill ultimately falls short of its original goal – and laudable aim – to strengthen and secure victims' rights.

The Bill does not go far enough to resolve the plight of IPP prisoners

The IPP sentence was introduced in 2005. Under the sentence people were given a minimum tariff which had to be served in custody in full. At the end of the tariff, they can only be released if the Parole Board is

satisfied that they are safe to be released on licence. People released from prison while serving the IPP sentence currently must wait a minimum of 10 years before they can have their licence reviewed by the Parole Board and terminated. If the Parole Board does not terminate the licence, it continues indefinitely, with annual reviews. The sentence was intended for a small number of people convicted of serious crimes. In practice, however, it was used widely and inconsistently, and given to some people who had not committed serious crimes at all. As a result, IPPs were abolished 11 years ago, but nearly 3,000 people remain in prison today serving these sentences. Nearly half have never been released; the remainder have been released on licence but later recalled to custody (MoJ, 2023). Many Howard League members in prison are serving IPP sentences and tell us they feel abandoned by the system. Most suffer very poor mental health and the sense of hopelessness caused by IPP sentences is causing higher levels of self-harm and suicide within the cohort.

The Justice Committee held a year-long inquiry that concluded in September 2022 and found that IPP sentences were "*irredeemably flawed*" (UK Parliament, 2023). The committee's main recommendation from the inquiry – that everyone subject to an IPP should be re-sentenced – has not been taken forward by the government. The committee Chair, Sir Bob Neill MP, tabled an amendment to the Bill during its third reading in the House of Commons, calling for an expert group to carry out the committee's main recommendation, but it was not moved. With almost 700 people 10 years beyond their tariff, the Howard League believes a re-sentencing exercise will be the most effective route to ending the uncertainty for those serving IPPs and would recommend that this amendment is supported when tabled in the Lords.

The government has made changes to the Bill through clause 48 to make some people serving sentences of IPP eligible to have their licence period terminated sooner; they will qualify for review by the Parole Board three years after their first release, reduced from 10. If a licence is not terminated at the three-year mark, it will end automatically after a further two years, if the person is not recalled to prison in that time. This change will apply retrospectively, meaning that about 1,800 people should see their licences end immediately when the legislation comes into force.

While this is a significant and welcome change – and reflects many of the changes to IPP sentences that the Howard League has previously advocated for – it offers little practical benefit now for the 1,200 people in prison who have never been released, or the 1,600 people who are in custody who were released on licence but since recalled. They will first need to overcome the barrier of proving their risk has been reduced for (re-)release by the Parole Board, and then remain out on licence for a further two years, before the provisions to automatically cancel their licence will apply. One man serving an IPP recently wrote to the Howard League and said, after seven years of living successfully in the community – with a wife, children, and small business – he had been recalled to prison after police were called to a party he attended where drugs were found. He had not used any drugs and no charges were laid against him, but he was recalled nonetheless. He has now been waiting for a Parole Board hearing for more than two and a half years. Although there is now hope for him that, once re-released, his sentence can have a known end date, there remains a long road ahead.

The clause also removes the right to an annual review of licence termination. This means that those who have been recalled and released will have to wait two years in the community for their licence to be automatically cancelled, instead of waiting one year from their last review for the Parole Board to consider their licence termination.

There is therefore more to do for the almost 3,000 people serving IPPs who remain in custody. The most effective and immediate way to restore justice to those incarcerated as a result of this saga would be to reconsider and adopt the Justice Committee's recommendations on IPPs. The UN's Special Rapporteur on Torture, Alice Jill Edwards, echoes this in her recent remarks: "*while the adopted new changes will provide great relief to many, bolder action is still needed from the UK government to fully repair the injustice done to many more by the IPP system"* (UN, 2023). Edwards also recommends that all IPP sentences should be reviewed.

The Bill interferes with the independence of the Parole Board, while the new mechanism for referral to the Upper Tribunal or High Court is unclear and unworkable

The government made amendments during the Bill's third reading to clauses 44 and 45 to remove the measure giving power to the Secretary of State for Justice to override Parole Board decisions to release certain 'top tier' prisoners. It has been replaced with a new power for ministers to have such cases referred to the Upper Tribunal, or the High Court where sensitive material may be relevant, for reconsideration. Cases will be referred where the Secretary of State considers "*the release of the prisoner would be likely to*

undermine public confidence in the parole system" and the relevant Court "*might not be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."*

The original measure, providing for an effective ministerial veto over Parole Board decisions, raised significant constitutional questions about 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 of an effective Executive veto was difficult to reconcile with these fundamental legal principles. Granting of ministerial powers to overrule decisions was unjustified, inappropriate, and likely unlawful and it is therefore right that the government has taken action to remove this provision from the Bill.

However, although the new provision – giving the Secretary of State a right to refer Parole Board decisions for reconsideration by a relevant Court – is preferable to the original proposal of a ministerial veto, the Howard League's view is that it is an unclear and unworkable solution in search of a non-existent problem. There is little evidence that the Parole Board decision-making falls short when it comes to public safety. As the explanatory notes to the Bill explain, "*[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"* and "*[l]ess than 0.5 per cent of prisoners released by the Parole Board are convicted of a serious further offence within three years of the release decision having been made"* (UK Parliament, 2023a). One of our members currently serving in a Category C prison asks: "*why fix something that isn't broke?"*

Instead, the government is proposing to add complexity and delay to a system that is already complicated and overburdened. Inevitably, these changes will bring further delay and uncertainty for both victims and prisoners and will add yet more pressure to a prison estate that is bursting at the seams. The lack of specificity of the proposals prompts many more questions than are answered by the accompanying explanatory note, not least about the Upper Tribunal's capacity and expertise to re-take decisions concerning such a vital question as risk to the public.

The Howard League is also concerned about the inappropriateness of introducing a 'public confidence' test as a filter for deciding which cases should be referred to a relevant Court. A similar 'public confidence' criterion was introduced by the previous Secretary of State, when seeking to reduce the number of indeterminate prisoners being moved from closed to open conditions. When Alex Chalk MP became Secretary of State, this provision was dropped. In the words of the Director General Operations of HMPPS, the Secretary of State directed the removal of the consideration of whether "*a move [to open conditions] would undermine public confidence in the criminal justice system"* because "*this is highly subjective and, as a result, has been difficult to apply in practice."* The High Court had also criticised the provision, observing in the case of *Zenshen* [2023] EWHC 2279 (Admin) that "*this policy criterion…adds nothing".* The Howard League is particularly concerned that, however tightly the rationale of 'public confidence' is initially drawn, ministers will be left open to future lobbying to broaden the scope of referrals to the relevant Court. Public opinion should not form the basis for ministerial interference in an independent judicial process. If anything, it is this newly proposed mechanism that will do the most harm to public confidence in the parole system.

Although the changes referred to above remove the most egregious attempt to undermine the independence of the Parole Board, clauses 53 and 54 giving the Secretary of State authority to remove the Chair of the Parole Board in the interest of public confidence, and enabling executive interference with the composition of particular Parole Board panels, remain of real concern. In particular, allowing a politician such direct influence over the leadership of the Parole Board raises significant questions as to its independence. As the High Court noted earlier this year, 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*" (Bailey and Morris [2023] EWHC 555 (Admin)).

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

Clauses 49-52 of the Bill concern the application of human rights protections in relation to the release of prisoners. Specifically, they 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 explanatory notes provide that "*these provisions span the legislative framework in England and Wales relating to release, licences, supervision, and recall of indeterminate and determinate sentenced offenders*" (MoJ, 2023c, p. 54). If there are

incompatibilities between the new parole measures, or any other 'release measures', these clauses provide that 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. This change is proposed despite the fact that those in custody – whose lives are entirely controlled by the state – may be seen as among those *most* in need of protection against the abuse of state power. This targeted attack on the fundamental rights of a vulnerable group is wrong on its own terms, but should also be resisted as the inevitable 'thin end of the wedge' when it comes to the integrity and universality of our human rights framework.

The Bill disproportionately affects Black, Asian and Minority Ethnic groups

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

The Bill's impact assessment equality statement confirms that the creation of a 'top tier' of offences will disproportionately impact Black and Asian prisoners (MoJ, 2023d). 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. While 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 are more likely to be serving long sentences than other groups (UK Parliament, 2020 & 2021). This Bill will only exacerbate existing disproportionality in the system.

The Bill does nothing to prevent crime by failing to utilise community rehabilitation efforts

While introduced in the name of public protection, the Bill will increase risk to the public by reducing post-custody rehabilitation activity. Although the impact assessment of the Bill has not been updated to reflect changes to Part IV, the original assessments indicated that the proposed changes "…*will result in some offenders spending less time under licence supervision in the community"* and predicted up to 1,870 fewer prisoners will be placed under licence supervision by 2034 (MoJ, 2023e).

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, 2023e). 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 November, there were 87,930 people in prison – just 994 short of the system's usable operational capacity (MoJ, 2023a). As the number of long-term sentences rise, so too does the prison population - as of September there were 8,819 people serving sentences of 10 years or more, compared to 8,674 the year prior (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 reach up to 106,300 by March 2027 – an increase of 21 per cent (MoJ, 2023b). Falling rates in officer recruitment and retention are stalling operation of prison services and rehabilitative efforts, with HMIP and IMB reports consistently citing staff shortages as a major cause of regime restrictions, lack of access to education, failure to meet keyworker targets and issues with medication provision – to name a few. The recent HMPPS annual report shows 22,288 band three to five prison officers currently in post, compared to 22,630 five years prior – a reduction of nearly 350 officers, despite the increase in prison population (HMPPS, 2023).

By restricting the criteria around Parole Board release decisions and allowing for delay through the new referral mechanism, the Bill seeks to keep people who could otherwise be released in prison for longer, unnecessarily. Such measures are inappropriate for the reasons described above, but are also misguided given the pressures facing the system.

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. While the reduction in IPP licence periods and an automatic termination clause is welcome, more is needed to help nearly 3,000 people who remain in prison serving this scandalous sentence. The Justice Committee's recommendations offer the most effective mechanism in ending the ongoing indeterminacy of IPP sentences. While the proposed changes to the reconsideration of Parole Board release decisions are an improvement on the original ministerial veto, they remain a complex and unnecessary measure that will lead to greater delay and significant cost, both financial and human. Moreover, there remain provisions which seek to interfere unacceptably in the Parole Board's leadership and composition, undermining its independence. Ministers need to provide answers to the many questions that surround these changes. Lastly, provisions seeking to undermine the universality of our human rights regime by removing some of its protections for prisoners are of deep concern and should be rejected.

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