Written evidence submitted by the Prison Reform Trust (VPB07)

Written evidence to the House of Commons bill committee on the Victims and Prisoners Bill

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. Our written evidence focuses mainly on the provisions of Part 3 of the bill on the proposed changes to the parole system. The briefing is structured as follows:

- An introduction to the key provisions of part 3
- An analysis of the impact assessment of, and evidence base for, the provisions
- Commentary on specific clauses
- What is missing from the bill

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1. Introduction

2. The Prison Reform Trust is very concerned by the proposed changes to the parole system put forward in the Victims and Prisoners Bill. Part three of the bill takes forward proposals in the government's root and branch review of the parole system.[1] This includes provision for the creation of a "precautionary approach" to the release of a "top tier" of prisoners convicted of murder, rape, certain terrorist offences or who have caused or allowed the death of a child. For these prisoners, the bill provides for:

    - A new power and procedure to usurp the Parole Board's decisions in certain serious cases (sections 35 to 37).
    - A new appeal route to the Upper Tribunal where the Secretary of State has used the new decision-making power (Sections 38 and 39).

[1] Ministry of Justice. (2022). *Root and Branch Review of the Parole System*. https://www.gov.uk/government/publications/root-and-branch-review-of-the-parole-system**Error! Hyperlink reference not valid.**

- A new power to enable the Secretary of State or the Upper Tribunal to set or direct licence conditions (sections 40 and 41).

3. This briefing focuses primarily on the implications of these new powers. It also touches on the following additional provisions within the bill:
    - Disapplication of section 3 of the Human Rights Act to prisoners as a group (sections 42 to 45).
    - A new power for the Secretary of State to remove the chair of the Parole Board if the Secretary of State considers it necessary to do so for the maintenance of public confidence in the Board (section 47).
    - New provisions to stop whole life tariff prisoners getting married or having a civil partnership (sections 48 to 50).

4. Several of the measures raise significant constitutional questions regarding the independence of the judiciary and compliance with human rights obligations. If enacted, they are also likely to be subject to further legal challenge. Many victims' representatives have publicly expressed concern about the introduction of controversial parole measures into the bill, as an unhelpful distraction from provisions elsewhere to improve the rights and entitlements of victims.[2][3][4]

5. ***We share the view expressed by many victims' representatives and other organisations in the wider criminal justice sector that the majority of the provisions of part three should be removed and the bill returned to its original purpose as a victims bill.***

6. Impact assessment and evidence base

7. Prison population and regimes

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[2] *The Domestic Abuse Commissioner responds to Victims and Prisoners Bill*. (2023, March 29). Domestic Abuse Commissioner. https://domesticabusecommissioner.uk/the-domestic-abuse-commissioner-responds-to-victims-and-prisoners-bill/**Error! Hyperlink reference not valid.**

[3] *Victim Support responds to the Victims and Prisoners Bill*. (2023, March 29). Victim Support. https://www.victimsupport.org.uk/victim-support-responds-to-the-victims-and-prisoners-bill/

[4] Waxman, C. (2023, March 23). *Comment on the Victims and Prisoners Bill*. Twitter. https://twitter.com/LDNVictimsComm/status/1641016895716327425**Error! Hyperlink reference not valid.**

8. The provisions of part three will further inflate the prison population – possibly by as much as 1,900 additional places by 2034. This is at a time when the prison population is predicted to rise from about 85,500 today to 94,400 by March 2024.[5] The prison system is already struggling to meet the current and anticipated rise in numbers and is currently in emergency measures to address the crisis in capacity.[6] It is reckless of the government to legislate for unnecessary and unevidenced measures which will pile further pressure on the system.

9. The government's impact assessment of part three estimates that the creation of a top tier of offenders will require an additional 640 prison places by March 2034, based on the central scenario, with an additional annual running cost of £28.7m. Under this scenario, additional prison capacity will be needed with an estimated construction cost of £238.3m over the next 10 years.[7]

10. However, the impact assessment admits that "given the limited evidence and high degree of uncertainty", it has been necessary to capture "a broad range…across the High and Low scenarios." While the low scenario estimates a transition cost over the next 10 years of £23.8m, the high scenario estimates costs of £702.6m over the same period. The transition cost of the high scenario is nearly three times the amount of the central scenario. The impact assessment does not spell out the increase in prison capacity under the high scenario. However, we estimate that under the high scenario the provisions of the bill would require an additional 1,900 prison places by March 2034.

11. The changes that have resulted from the new criteria for transfer to open prison conditions may provide an indication of which scenario is the most likely outcome. Under the new criteria introduced in June 2022, the Secretary of State is currently rejecting around five out of every six Parole Board recommendations for a transfer to an open prison.[8] Therefore, it is not unreasonable to expect a similar percentage of refusals for release into the community. That would both vastly inflate the capacity requirement and create a population of long-term prisoners with no realistic hope of release, regardless of the period set for punishment (tariff) having expired. This looks

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5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138135/Prison_Population_Projections_2022_to_2027.pdf

6 https://hansard.parliament.uk/Commons/2022-11-30/debates/520966EF-BB43-4380-8800-21C46222BE00/PrisonCapacity

7 Ministry of Justice. (2023). *Victims and Prisoners Bill – Parole Clauses: Impact assessment*. https://publications.parliament.uk/pa/bills/cbill/58-03/0286/VictimsandPrisonersBillParoleImpact_Assessment_March23.pdf

8 https://prisonreformtrust.org.uk/blog-house-of-lords-declares-open-season-on-raabs-open-conditions-criteria/

alarmingly like a repeat of the mistake that created the IPP sentence, which all parties have rightly condemned.[9]

12. The experience of the IPP sentence should act as a warning to ministers regarding the unanticipated consequences of ill-considered changes to the use of preventative detention. The impact assessment acknowledges the potential negative impact the bill could have on levels of overcrowding, the quality of prison regimes and rates of violence and self-harm:

13. *"In recent months there has been an increase in the adult male prison population creating acute short and medium-term population pressures. Since the changes in this Bill are expected to increase the prison population over time, there is the possibility that this could impact further upon crowding. Although crowding is not in and of itself a cause of prison violence, it could impact upon the ratio of staff to offenders and the ability to provide a full regime of activities including time out of cell, a factor which is associated with increased levels of violence and self-harm. If this were to result, it could also have an associated impact on prisoners' rehabilitation and cause additional costs for the HMPPS prison service."*

14. The disproportionate impact on Black and Asian prisoners, and young adults (aged 18–20).

15. The equality impact assessment[10] of the bill finds that the provision for the creation of a "top tier" of prisoners will disproportionately impact Black and Asian prisoners, and young adults (aged 18–20):

    24. *Of those top-tier offenders, there is a greater proportion of Asian and Black individuals, representing 9% and 21%, respectively, compared with 7% and 16% of those who were given a parole-eligible sentence for all offences.*

    25. *There was a higher proportion of those aged 18-20 in top-tier cases sentenced to a parole-eligible sentence than for those receiving those sentences for all offences, 15% compared with 9%, largely offset by a decrease in those aged 30- 49 (23% compared to 29%).*

    26. *There is therefore a higher proportion of Asian, Black, and those aged 18-20 in those sentenced to a top-tier offence in the year to June 2022, compared to*

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[9] House of Commons Justice Committee. (2022, September 28). *Justice Committee finds IPP sentences "irredeemably flawed" and calls for comprehensive re-sentencing programme*. Parliament.uk. https://committees.parliament.uk/committee/102/justice-committee/news/173280/justice-committee-finds-ipp-sentences-irredeemably-flawed-and-calls-for-comprehensive-resentencing-programme/

[10] Ministry of Justice. (2023). The Victims and Prisoners Bill: Equality statement. *Gov.uk*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1146909/victims-and-prisoners-bill-equality-statement.pdf**Error! Hyperlink reference not valid.**

all of those sentenced to a parole-eligible sentence in that year. This may be not representative of those who are currently eligible for parole.

16. The government's own impact assessment therefor shows that the provision will result in indirect discrimination on the basis of both race and age, but it makes no provision to mitigate or prevent that discriminatory impact.

17. Lack of evidence for a 'precautionary approach' to 'top tier' offenders

18. Any dispassionate analysis of the parole process shows that it is already overwhelmingly focused on public protection and that the Parole Board takes a very cautious approach. The Parole Board's serious further offence rate is consistently around 0.5% and only one in four prisoners reviewed by the board meet the legal test for release. In any given year, the majority of decisions are that the prisoner should remain in custody for the protection of the public.[11]

19. Nonetheless, the provision for a new power to usurp Parole Board decision-making is justified by the government on the grounds of the need for "a precautionary approach to the release of the most dangerous offenders".[12] Neither the root and branch review nor the explanatory notes to the bill make explicit the evidence on which a "precautionary approach" is necessary, nor why the Secretary of State is better qualified to make release decisions based on an assessment of risk than an expert Parole Board panel.

20. In its letter to the justice secretary of the provisions of the bill, the justice committee raised concerns as to whether the provisions of part 3 are justified, given their significant cost and resource implications and the lack of evidence that they would lead to any improvements in the operation of the parole system:

21. A central question raised by the far-reaching provisions of Part 3 of the Bill is whether they will result in any improvement to the way that the Parole Board operates and make the public any safer. It is far from clear from the evidence we received that they will. Martin Jones, Chief Executive of the Parole Board, raised concerns over the costs of the proposals in Part 3 of the Bill. The Impact Assessment for the Parole

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[11] Parole Board. (2022). *The Parole Board for England & Wales Annual Report and Accounts 2021/22*. https://www.gov.uk/government/publications/the-parole-board-for-england-wales-annual-report-and-accounts-202122**Error! Hyperlink reference not valid.**

[12] Ministry of Justice. (2022). *Root and Branch Review of the Parole System*. https://www.gov.uk/government/publications/root-and-branch-review-of-the-parole-system

clauses in the Bill sets out the best estimate is that the changes will result in annual additional costs of £32 million a year arising from the requirement for additional prison places, as well as the costs to the Parole Board and Ministry of Justice of operating the new process. The Ministry of Justice's Main Estimate for 2023-24 shows that the total expenditure of the Parole Board is just over £27 million a year. We would question whether it represents good value for the taxpayer to introduce changes to parole that will result in costs that are greater than the entire Parole Board budget without any strong evidence that the changes will keep the public safer.[13]

22. Commentary on specific clauses

Clauses 32 and 33: The release test

23. These clauses would introduce a list of criteria the Board must take into account when applying the statutory release test and would introduce a "new public protection threshold", that, when making a public protection decision: "The decision-maker must not be so satisfied unless the decision-maker 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."

24. Members of the committee will want to be sure that a revised release test is necessary and that it does not lead to increased confusion and uncertainty in the way in which the test is applied.

Clause 35 and 36: Referral of release decisions

25. These provisions enable discretionary and directed referrals of Parole Board release decisions for "top tier" prisoners to the secretary of state. They are among the most controversial provisions of part three and raise significant constitutional questions regarding the independence of the judiciary and compliance with human rights obligations.

26. Clauses 35 and 36 would create a power to enable the secretary of state to call in a decision made by the Parole Board to release a prisoner in the top-tier cohort (a

[13] https://committees.parliament.uk/publications/40270/documents/196547/default/

'directed referral'). If the secretary of state triggers this power it automatically quashes the Parole Board's original direction "and accordingly, the secretary of state is not required to give effect to it". This new power can be applied retrospectively to people in prison whose sentence was imposed before, as well as after, this section comes into force.

27. This provision would constitute a fundamental attack on the independence of the Parole Board and its function as a court-like body. The board's independence and court-like function are underpinned by common law as well as the UK government's obligations under the European Convention on Human Rights. The Parole Board has made clear that in its view Article 5 of the European Convention on Human Rights requires decisions on release to lie with a court or court-like body.[14] Commenting on the new power when it was originally proposed in the root and branch review, the board explained the basic problem in domestic law of anyone being "judge in their own cause". In other words, the secretary of state cannot be both a party to the panel's proceedings and then act as the decision maker as well. As such, this provision raises significant constitutional questions regarding judicial independence and the UK's compliance with human rights obligations, which are liable to eat up much of the parliamentary debate on the bill, as well as be subject to further legal dispute and controversy if and when the bill becomes law.

28. The former prime minister Sir John Major raised concerns regarding this provision at a PRT lecture at the Old Bailey on 9 May 2023:

29. The problem with this [new power] is that I do not see how (or why) the Justice Secretary would be able to reach a more just decision than the Parole Board. Any single Government Minister – however able or well-meaning – would be far more vulnerable to public campaigns and, under pressure, to make a harsher decision to appease them. This is a very slippery slope. I do not think that any politician should have that power, and I hope the new Justice Secretary will reconsider or – if he does not – that Parliament will deny it.[15]

30. PRT agrees with the former prime minister that this provision should be removed from the bill. The bill is also unclear on a number of practical questions regarding how the new power will be exercised. We would welcome further scrutiny of the following during the committee stage:

- ***The criteria the secretary of state will follow in exercising the new power***

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[14] Letter from the Parole Board to the Ministry of Justice, dated 10 May 2022, https://prisonreformtrust.org.uk/wp-content/uploads/2022/08/5.-Document-FOI.pdf

[15] Major, J (2023, May 29). Prison Reform Trust lecture. The Old Bailey. https://prisonreformtrust.org.uk/sir-john-major-we-over-use-prison-and-under-value-alternative-sentences/

- ***Whether the new power would be exercised directly by the secretary of state or under delegated authority to an official***
- ***The timeframe within which the secretary of state would be expected to make a decision***
- ***Expectations around the transparency and fairness of the secretary of state's decision-making***

31. Clauses 35 and 36 would create a power for the Parole Board to refer a top-tier prisoner's case to the Secretary of State instead of taking the release decision itself (discretionary referrals). The Chair of the Justice Committee Sir Bob Neill MP has said that "this power is misconceived".[16] In his letter to the justice secretary on the provision so the bill, Sir Bob Neill highlights how concerning it would be if the Parole Board, "a body that is dedicated to making public protection decisions on the release of prisoners, would ever decide that the Secretary of State is better placed to take a release decision. The use of this power would, in effect, be an abrogation of the Parole Board's principal function."

32. We share the view of the Justice Committee that this provision serves no useful purpose and should be removed from the Bill.

Clause 37: Procedure on referral of release decisions

33. For those prisoners made subject to the secretary of state's new powers there are a worrying lack of procedural safeguards in place to ensure a fair and just process. For instance, there is no reference to legal representation or a right to be interviewed following a referral to the secretary of state. The only procedure explicitly specified within this clause is an option to interview the prisoner if "the secretary of state thinks it necessary". Subsection (5) confers a widely defined power to make further rules on the procedure in future.

34. At a minimum, the Secretary of State's process would need to meet the same standards of procedural fairness as the Parole Board, otherwise it would be impossible to see how a minister could make a different decision fairly. In his evidence to the Justice Committee, the chief executive of the Board Martin Jones has suggested that the Secretary of State's process would need to be even more robust than that used by the Parole Board if it was to withstand the inevitable legal challenges that would ensue.[17]

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[16] https://committees.parliament.uk/publications/40270/documents/196547/default/

[17] https://committees.parliament.uk/publications/40270/documents/196547/default/

35. We urge members of the committee to support any probing amendments which seek clarification on the procedural safeguards that will be introduced to ensure a fair and just process in the operation of the secretary of state's new powers.

Clause 38 and 39: Appeal to Upper Tribunal of decisions on referral

36. These clauses provide a new appeal route to the Upper Tribunal where the secretary of state has used the new decision-making power to refuse the release of a life sentenced prisoner.

37. A prisoner can appeal the decision on two separate limited grounds: (1) that the proposed release test has been met or (2) that the secretary of state's decision was flawed because it was illegal; irrational (that no reasonable Secretary of State could have ever made the decision); that they did not follow proper procedure; and/or made a fundamental error of fact.

38. In evidence to the Justice Committee, Simon Creigton expressed concern that the appeal mechanism had been introduced largely to ensure compliance with Article 5 of the ECHR, but that because the appeal was not automatic it was still not likely to be ECHR compliant.[18] He also raised concerns that the appeal mechanism as it was currently constituted would lead to significant delays in final decisions being made. Furthermore, unlike criminal courts or the Parole Board, the Upper Tribunal has no experience in assessing the risk of harm to the public. Therefore, it is unclear why the government believes that the Upper Tribunal would be best placed to make such assessments. The Justice Committee has said that "there could be a case for a merits based appeal mechanism from the Parole Board, but in our view that should be to the Court of Appeal criminal division rather than to the Upper Tribunal."[19]

39. We urge members of the committee to support any probing amendments which seek clarification from the government on the compliance of these clauses with the ECHR and the reasons why the Upper Tribunal provides an appropriate and sufficiently expert mechanism for merits-based appeals.

[18] Ibid.

[19] Ibid.

Clause 40 and 41: Licence conditions of prisoners released following referral

40. Clauses 40 and 41 introduce a new power for the secretary of state to set or amend licence conditions following a decision to release. In cases where release has been directed on appeal to the Upper Tribunal, the secretary of state must also include any licence conditions specified by the Upper Tribunal.

41. As we have highlighted above, we have concerns as to the appropriateness of the Upper Tribunal in making such decisions given its lack of experience in administering these cases. Furthermore the legislation currently lacks any procedural safeguards to clarify how the Secretary of State or the Upper Tribunal should set or direct licence conditions following a release decision. This has the potential to negatively impact victims as well as prisoners, given that victims can make representations to the Parole Board on the content of licence conditions which the board must have regard to.

42. We urge members of the committee to support any probing amendments which seek clarification on how the Secretary of State or the Upper Tribunal should set or direct licence conditions following a release decision.

Clause 42: Section 3 of the Human Rights Act 1998: life prisoners
Clause 43: Section 3 of the Human Rights Act 1998: fixed term prisoners
Clause 44: Section 3 of the Human Rights Act 1998: powers to change release test

Clause 45: Application of certain Convention rights in prisoner release cases

43. Clauses 42–44 disapply section 3 of the Human Rights Act 1998 so that if incompatibilities do arise with the new parole measures, or any of the other release measures, courts (and others) will not be under the obligation to interpret the provisions' compatibility "so far as it is possible to do so".

44. Clause 45 provides that, where a court is considering a challenge relating to a relevant convention right, in relation to application of any of the release legislation, the court must give the greatest possible weight to the importance of reducing the risk to the public from the person convicted of a criminal offence.

45. The introduction of specific carve-outs of human rights legislation for people given custodial sentences contradicts one of the fundamental principles underlying human

rights – their universality and application to each and every person on the simple basis of their being human. Moreover, it is precisely in custodial institutions such as prisons that human rights protections are most vital, because individuals are under the control of the state.

46. It is deeply troubling that despite this, the bill includes a statement of compatibility with the Human Rights Act on the first page, while simultaneously disapplying a critical aspect of that act to a whole group of people, making it highly controversial.

47. We oppose these measures and urge members of the committee to remove them from the bill.

Clause 46: Parole Board rules

48. Clause 46 gives the Secretary of State the power, through the Parole Board Rules, to prescribe that particular cases be dealt with by a panel including members of a particular background experience (i.e. law enforcement). This provision is an unnecessary interference in the independence of the board and could lead to practical problems, including delays, if there were problems with the availability of parole members with specialist backgrounds. This would add to the distress of both prisoners and victims.

49. ***The government has not presented any evidence for the necessity of the provision, and it should be removed from the bill.***

Clause 47: Parole Board membership

50. Clause 47 creates a new power for the secretary of state to remove the Parole Board's chair from office before the end of their term if it was considered necessary to maintain public confidence in the Board. The clause also prohibits the Chair from being involved in individual parole cases and from trying to influence the outcome of the Board's decision in such cases.

51. We are concerned about the unnecessary interference in the independence of the Board this clause represents. The question of whether the chair should be involved in individual cases is matter for the board; it should not be the subject of statutory prescription. We are further concerned about the wide latitude afforded to the secretary of state under the new power to remove the chair on the grounds of public

confidence. As the chair of the Parole Board Caroline Corby highlighted in her evidence to the Justice Committee, the power to remove the Chair could see them dismissed if the Board made an "unpopular decision".[20] Given the sensitive nature of the Board's work, she argued that "the chair of the Parole Board needs more protection than pretty much any other chair of any arm's length body". Additionally, Caroline Corby pointed out that at present there is already a termination protocol which means that the Chair of the Parole Board, or any other member, can be removed. It is not clear therefore why a statutory power is needed.

52. We oppose this clause and urge members of the committee to support any probing amendments which seek to understand what governance, oversight and accountability mechanisms would accompany the new proposed power.

Clause 48: Whole life prisoners prohibited from forming a marriage

Clause 49: Whole life prisoners prohibited from a forming a civil partnership

Clause 50: Power to make a consequential provision

53. Clauses 48–50 of the bill create provision for whole life tariff prisoners to be barred from getting married or having a civil partnership.

54. As we highlight earlier in this briefing we are deeply concerned about the introduction of specific carve-outs of human rights legislation for people given custodial sentences. This contradicts one of the fundamental principles underlying human rights – their universality and application to each and every person on the simple basis of their being human.

55. We oppose these provisions and urge members of the committee to support any probing amendments seeking to understand how the government maintains that these measures are compliant with its obligations under the European Convention on Human Rights.

[20] Ibid.

56. What is missing from the bill

Reform to the Sentence of Imprisonment for Public Protection (IPP)

57. While we oppose the majority of provisions in part three, the bill presents an opportunity to introduce much needed reform to address the injustice faced by people serving the IPP sentence. In particular, it is an chance for the government to review its inadequate response[21] to the justice committee inquiry on the IPP[22] and introduce amendments to the bill to take forward the recommendations of the committee's report. In a debate on the committee's report in Westminster Hall on 27 April, the chair of the committee Sir Bob Neill MP promised to bring forward an amendment to the bill to enact the recommendations of the committee for a resentencing exercise.[23] ***We urge members of the committee to support the amendment. In addition, we would welcome an amendment which takes forward the committee's recommendation to reduce the qualifying period for a licence review from 10 to five years. PRT supported an amendment to this effect in the House of Lords stages of the police, crime, sentencing and courts bill 2021.***[24]

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[21] https://committees.parliament.uk/publications/33927/documents/185861/default/

[22] https://publications.parliament.uk/pa/cm5803/cmselect/cmjust/266/summary.html

[23] https://hansard.parliament.uk/commons/2023-04-27/debates/e48be1a1-4c7b-4109-b93a-d2974eb00d4e/WestminsterHall

[24] See amendment 208E in the following briefing https://prisonreformtrust.org.uk/wp-content/uploads/2021/11/PCSC-Bill-Joint-Briefing-IPP-amendments.pdf