Written evidence submitted by the Prisoners' Advice Service (VPB39)

Part 3 Victims and Prisoners Bill

INTRODUCTION

1. The **Prisoners' Advice Service**, a national registered charity founded in 1991 provides free legal advice, assistance and representation to adult serving prisoners in England and Wales on the application of the Prison Rules 1999. We discharge this obligation through the provision of a free telephone advice line, outreach in a number of prisons around the country, a Letters Clinic, casework partially funded through contracts with the Legal Aid Agency, and dissemination of educational material such as the quarterly Prisoners' Legal Rights bulletin. We receive from prisoners about 35,000 calls to the advice line each year, and respond to just over 3,000 letters seeking advice and information.

2. The Prisoners' Advice Service takes on around 60 parole cases for prisoners each year. The Prisoners' Advice Service is a member of the Parole Board Users' Group which meets quarterly with interested stakeholders. We also sit on the Executive Committee of the *Association of Prison Lawyers.*

3. Our submission relates to **Part 3 of the Bill**.

SUMMARY

- **Section 32 and 33 – changes to the test for release**
  The current test is comprehensive and entirely focused on protecting the public from serious harm. The Bill introduces a new test to the same effect but then confuses the issue by requiring the decision maker to take into account specific risks and factors which may or may not be relevant to the risk of serious harm. This will not improve the quality of public protection decisions and may lead to reliance on

irrelevant matters and subsequent challenges to decisions. It will make the already lengthy and arduous process longer, more drawn out, and costly which ultimately will be distressing not just for prisoners but also for victims.

- **Sections 35 to 37 – new power and procedure to usurp the Parole Board's function in certain serious cases**

  The new power set out in these sections, which enables the Executive to revoke the decision of the Parole Board and replace it with his own decision, is contrary to the most fundamental democratic principle of the independence of the judiciary from the Executive. No criteria are given which would need to be met before the Executive could use this extraordinary new power. It appears that the Executive will be able to interfere with Parole Board decisions at will. This is a dangerous precedent and Parliament should not be asked to sanction this.

  Other aspects of these provisions are equally troubling. The Bill gives the Board the power to refer cases to the SS for decision- suggesting that there will be cases in which the judicial body, with its safeguards, skills and expertise will be unable to determine risk to public. In this unlikely event the correct course would be for the Board to adjourn the case for further information to enable the Board to do its job. The Board referring a case to the Executive is akin to a magistrate or judge referring a case back to the CPS to unilaterally determine the defendant's guilt. The provision also gives a less prescriptive test for release to the Executive than it does for the judicial body, and sets out a process that lacks almost any procedure other than giving the possibility of the prisoner being interviewed if the Executive so determines.

- **Sections 38 and 39 – new appeal route to the Upper Tribunal where the Secretary has replaced a judicial decision**

This is available on traditional judicial review grounds and where the release test is not met. Thus the only safeguard to protecting an individual's liberty is at the appellate stage- this is concerning and might be challengeable. The Tribunal has no expertise in risk assessment, and could release a prisoner who wins his claim on procedural grounds whilst he has not met the release test.

- **Sections 40 and 41 – new power to enable Upper Tribunal or Secretary to set licence conditions**

  The lack of any procedural safeguards conflicts with basic common law, and ultimately protracts further for all parties an already lengthy process.

- **Sections 42 to 45 – disapplication of s3 of the Human Rights Act to prisoners as a group**

  This disapplication is intended for indeterminate and fixed term prisoners seeking release. The Bill would remove the requirement of the HRA that this legislation (and any subordinate legislation) must be read and given effect such that it is compatible with the convention rights. No explanation or justification is given for this removal of rights which would only affect prisoners. The rights most likely to be infringed are the Article 5 and 6 rights. Human rights are intrinsically universal; any removal of protection for particular groups of people must be resisted. This is a dangerous precedent and Parliament should not be asked to approve it.

- **Sections 46 to 47 – requirement for those with law enforcement experience to be involved in the Parole Board and provisions to allow Secretary to remove Parole Board Chair**

  There is most unhelpfully no clear definition of the "prescribed description" for preferred Board members. While probation officers who have relevant experience of assessing and managing offender's

risk can be described as ‘people with law enforcement experience’ this could also apply to police officers. Those who have been involved with MAPPA will have some relevant experience but many will not. Narrowing the experience of Board members and replacing those with relevant experience with those without it will not improve the decision-making.

The Bill gives the Executive the power to remove the Chair. This runs contrary to the judicial determination following the *Wakenshaw* case which confirms that such a statutory power breaches the principle of judicial independence. Parliament should not be asked to sanction a power that interferes with a fundamental principle of democracy.

- **Sections 48 to 50 – whole life tariff prisoners to be stopped from marrying or entering civil partnerships**

  Prisoners who wish to marry or enter a civil partnership whilst in prison already require the Secretary’s approval to do so, thus he has the power to refuse such applications, within a procedure that has safeguards and some judicial oversight. The Bill would remove a basic human right from a small group of people. It is incompatible with Articles 8 and 12 of the ECHR. This is another attack on the universality of human rights and sets another dangerous precedent.

SUBMISSIONS

a. The title of the Bill is immediately a cause for concern. It is not clear why victims and prisoners have been considered together. Victims have been campaigning and waiting for a considerable number of years for a Victims’ Bill that places their needs at the centre; instead the majority of the Bill relates to prisoners and the press releases and subsequent media attention reflects this, which as victim groups have repeatedly warned, takes Parliamentary time and resources away from them. We are concerned that victims are not well served by a bill which is mainly focused on prisoners.

b. It is impossible to see how most of these provisions will do anything other than to make the parole process more complex and drawn out. Claire Waxman OBE, Victims' Commissioner for London views these proposals as having unintended consequences that will "cause more distress for victims and bereaved families and delay this important legislation". Her suggestion that such provisions should be wiped from the Bill is basic common sense.

c. Part 3 of the Bill gives cause for grave concern, not just for the rights of prisoners, but also for the integrity of the rule of law, the independence of the judiciary, procedural safeguards in legal processes, and the fundamental tenet of the universality of human rights.

d. Release test

This has not been thought through. It does not recognise that the current release test, in practice, is not a balancing exercise undertaken by the Parole Board and that the burden of proof is very much on the prisoner to demonstrate that they are safe to be released because the risk of serious harm (which should be no more than minimal – a low bar) can be safely managed in the community.

e. The new test is extensive but upon a full reading of the large number of components, they amount to only a superficial change, in direct contrast to the problems it throws up. It introduces "public protection decisions", as if the current release test is about something other than public protection. It is puzzling as to why the same test has been reworded slightly, and passed off as a new standard that better protects the public.

f. The Bill then requires the decision maker to consider specific offences which might be committed if released. This runs to seven pages. It includes several offences, like affray and ABH, which need not amount to serious harm. In practice, when considering the current release test and the attendant risk management plan, the Parole Board already considers any risk of harm; for example they would closely

examine the risk that if a former drug addict should relapse they might turn to serious crime to feed their habit and consider whether this risk is manageable or not despite the fact that drug addiction is itself not a criminal offence. It is particularly worrying that although the first element is about the risk of serious harm, subsequent clauses appear to dilute the test, by drawing attention to offences that need not cause serious harm. One group in prison most impacted by this will be recalled determinate sentenced prisoners who, if not released under supervision, may be released automatically at the end of their sentence with no supervision. This will perhaps be of more concern to victims rather than less.

g. The Bill then has a list of factors to take into account when considering release. These are similar to the directions to the Board that were withdrawn following LASPO, and for good reason. Not only does the Board already take these into account but it is anticipated that the process will now be more drawn out and complex, liable to challenge and this cannot be good for anyone, least of all a victim's family.

h. The Bill then stipulates that the Board must have regard to protecting "any victim" of the prisoner. The Bill says nothing about how this should be given effect. Again, this is unnecessary since the Parole Board already has protection of any member of the public at the centre of their examination of future risk.

i. <u>Blocking and usurping the Parole Board in certain cases</u>
This Bill empowers the Executive to replace the Parole Board, rather than just 'block' the release of a particular prisoner.

j. There are two routes available to the Executive to do this. First, where the Parole Board refers the case back to the Executive (who referred it to them in the first place for their expert and independent determination) in a case where it cannot adequately assess risk to the public and therefore is unable to make a decision, any decision. This is an extraordinary provision. Would it be entertained for a criminal defendant to be 'convicted' by the CPS or the Ministry of Justice because

the judge or the jury under the judge's directions was unable to convict the defendant on the available evidence? In that scenario, the judge would direct an acquittal or a mistrial which allows for the Crown to try the defendant again. Similarly, where there is insufficient evidence to conclude low or manageable risk, the Board will either adjourn for more evidence to be provided or simply refuse release and direct that the prisoner remain in detention in the absence of evidence demonstrating that the release test is met. The Board has always dealt with complex, difficult and challenging applications for release: they are expert at assessing risk. The Board has the role and function of a court and as such should remain independent from the Executive. The Executive does not have the experience and skills of the Board, or the role of a court or any procedural safeguards. The Executive compiles the parole dossier; the Executive has the right to be represented at the review; the Executive has the right to utilise the Reconsideration Mechanism therefore it has every opportunity to ensure that only prisoners who meet the public protection test are released. We think it unlikely that the Parole Board will refer a difficult case back to the Executive, thereby this power will hardly likely be used. Where it is so used, the Parole Board can expect to be mired in legal challenge.

This power of referral also raises the question whether there is an expectation that by ensuring that law enforcement personnel sit on Parole Boards and that the Executive can remove the chair, the Board will become a body less protective of its independence which will therefore be more inclined to refer any cases to the Executive which he or she expresses an interest in dealing with.

k. The second route by which the Executive can make the release decision instead of the judicial body, is where they simply quash a release decision made by the Parole Board so that he can then make his own determination on the prisoner's release. There is no similar provision for the Executive to override the Parole Board where it has not released a prisoner. No criteria must be met before the Executive can interfere with the Board's decision in this way. It appears to be a power he can use at will. Furthermore, this process has a release test for the Executive to apply which although similar to the test applied by the Parole Board, is *less* prescriptive.

There is no justification for not only allowing the Executive to usurp the powers of a judicial body, but in doing so to give him wider discretion than the court. The Executive is given a unilateral choice to decide if they want to interview the prisoner or not. This removes from the prisoner whose release will be decided by the Executive, any right to an oral hearing in front of the decision maker. There are procedural safeguards within the parole process before the Parole Board, but there appear to be none where the Executive uses these new powers. Nothing about legal aid, nothing about representation, and not very much about the test itself. If a case is so complex that even the expert Parole Board cannot assess it, why does it have far fewer safeguards? The Bill authorises the power to make further rules on this procedure in due course- and it is envisaged that the HRA will not apply- so procedural safeguards which might have been required to ensure compliance with Articles 5 and 6 will not be available. That is hardly sufficient or adequate. In the meantime effected prisoners, and the victims of their crime, will be subjected to a protracted procedure which is already beset with delays. Victims, prisoners and justice are all badly served.

l. The Parole Board is well established as a court-like body, and independent of the Executive. These provisions are a blatant and uncompromising interference with, indeed outright removal of, judicial independence. Prisoners are not popular with sections of the public and press, but the political advantage of playing to this audience should not lead Parliament to support such flagrant departure from the fundamental democratic principle of the separation of executive and judiciary, and the universality of human rights.

m. <u>New appeal route to Upper Tribunal</u>
This provision applies where the Executive has refused release, on traditional judicial review grounds or failure to meet the release test. If this is a safeguard, then it hardly qualifies because it is at appellate state. When one's liberty is at stake, it is surely a very poor safeguard if it appears only at appellate stage and only before a tribunal that has no expertise in risk assessment. This is not due process. Further there is no plan to involve the courts at any other stage in the process. This does not appear to have been considered sufficiently carefully.

What if a prisoner wins their judicial review not on substantive but procedural grounds despite the release test not being met? How is this mindful of victims? How is this 'public protection'? Should such a case come about, it will surely be followed by a frenzy of legislation to avert release which does not serve victims' needs.

n. There are provisions for the Executive and the Tribunal to set licence conditions where they direct release. However, it is unlikely the Executive will ever make a release decision with these new powers –since his involvement was prompted by disagreement with the Parole Board's decision to release the prisoner, he is hardly going to make a release decision. Thus it will be the Tribunal that is in reality possibly going to set licence conditions. The Tribunal has no expertise in this. There is nothing in the Bill about how these decisions will be made by an appellate court. Will they make findings of fact? Will they scrutinise probation services' assessments? Will they question a psychiatrist's findings of risk and risk management measures?

o. <u>Disapplication of s.3 of the Human Rights Act</u>

This would apply only to prisoners whose release is discretionary, and not automatic. It is intended to compel the Board or appellate court to place public protection at the centre of any risk assessment. They do this already, so this adds nothing. What it does instead is give the Executive its first success in disapplying a part of the Human Rights Act to a specific group of people in society. This is a dangerous precedent. It is worth remembering that when a Conservative Prime Minister proposed international legislation to protect fundamental human rights, even of those responsible for war crimes on an immeasurable scale, he did not seek to exclude any citizen because the notion of human rights is by its nature fundamental, universal and an inalienable right.

p. <u>Those with law enforcement experience to be involved in parole process</u>

This is envisaged for 'top-tier' cases ostensibly on the presumption that the new member's law enforcement experience would assist decision making. There is no

definition or criteria of what this 'law enforcement experience' comprises. Probation officers have extensive experience of assessing and managing the risk posed by offenders. Police involved in MAPPA will have some relevant experience – but most police officers will not. Other members of panels bring different experience and prevent the stagnation of 'group think'. It is concerning that the impact of this provision is likely to be a reduction in the diversity and depth of relevant experience. This provision is perhaps intended to increase the prospects of a refusal in 'top-tier' cases. It appears to demonstrate a view that the Parole Board gives insufficient weight to evidence pertaining to risk and risk management provided by the police- which is unfounded.

q. <u>Power for the Executive to remove the Chair</u>

The Executive is given the power to remove the Parole Board Chair if he deems it necessary for the maintenance of public confidence in the Board. This political interference with a judicial body is contrary to the principal of judicial independence. Furthermore, there is no clear or consistent framework from the Executive as to what constitutes public confidence and its relationship with public protection. The provision would allow arbitrary decision making, which will be readily challenged in the High Court.

r. Perversely the Bill prohibits the Chair from attending or playing any part in a parole review – this could mean a Chair that has never witnessed a parole hearing. Clearly this has not been thought through, and the writer may not be aware of the case of *Wakenshaw* following the pressure applied to the then Chair to resign after the Worboys case even though it was the Executive who has responsibility for compiling the dossier. The Court described the behaviour of the Executive as a breach of "the principle of judicial independence enshrined in the Act of Settlement 1701". This new power in the Bill obviously purports to legitimise the unacceptable interference with judicial independence and must not be sanctioned.

s. Whole life tariffed prisoners to be stopped from marrying

This provision is created in direct response to the unlawful refusal by the Executive under the current laws to permit Levi Bellfield, who is serving a whole life tariff for multiple murders, to marry in prison. Typically this has garnered massive headlines. Despite this, the provision would only affect a small handful of prisoners. A whole life tariffed prisoner will die in prison, and the nature of their crimes renders them unlikely to 'progress' to open conditions or to access resettlement facilities such as unescorted release on temporary licence from prison into the community. Thus any marriages or civil partnerships contracted by such prisoners, before or after their conviction leading to the whole life tariff, will in practice have little or no impact on the conditions of imprisonment- and would have no significant impact on victims or their families. It is a point of principle only, ostensibly to show the public that the Executive is not 'soft' on those who commit the worst crimes. Behind this flashy headline, is another attempt by the Executive to remove a basic human right from a group of people who are unpopular with sections of the population and the press, for political advantage. Human rights are enforced *against* the State. The State cannot be allowed to legislate for itself powers that are an assault on the rule of law and the universality of human rights.

CONCLUSION

t. Part 3 of the Bill has not been given due consideration and raises more problems than it purports to solve. It should be struck out of a Bill which purports to strengthen public protection and serving the needs of victims while in reality undermining fundamental principles of justice and the universality of human rights. It would also add procedural complexity, uncertainty and length to parole processes without any clear advantage. The use of authoritarian measures to gain political support from a small section of society who want to see prisoners made to suffer more, is regrettable and dangerous. This part of the Bill is not only grossly unfair to prisoners but also to victims. It has not kept victims at the centre of their objective at all, and those who have waited long and hard for better protection of their rights arising from the most excruciating trauma deserve much better.

Dated 29 June 2023

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