Written evidence from the Association of Prison Lawyers about the Victims and Prisoners Bill

Submitted for consideration by the House of Commons Public Bill Committee on 29th June 2023

1. About the Association of Prison Lawyers (APL)

1.1 The Association of Prison Lawyers was formed in 2008 by a group of specialist lawyers, to provide a voice during the Legal Aid Agency's funding consultation process that led to the 2010 prison law contract.

1.2 We continue to represent and provide training for our members, comprising specialist barristers, solicitors and legal representatives across England & Wales, and endeavour to represent our members' views in policy development.

2. Introduction and Summary of Evidence

2.1 The APL is deeply concerned about the proposals in Part 3 of the Victims and Prisoners Bill. Introduced without consultation,[1] they make dramatic and far-reaching changes to the Parole process in ways that we believe will have negative consequences for prisoners, the justice system, victims and wider society.

2.2 In summary, and as set out below, the changes in the Bill are damaging and/or unnecessary:

a. The introduction of a 'ministerial veto' fixes a problem that does not exist, while introducing significant cost and complexity in the process and threatening people's fundamental rights.

b. Changes to the release test are no more than a reflection of the existing case law and are thus unnecessary.

c. The disapplication of s.3 of the Human Rights Act 1998 is unprincipled. It undermines the animating purpose of human rights legislation, which is to protect all of us.

2.3 The unavoidable conclusion following close examination of Part 3 of the Bill is that it should be discontinued in its entirety. We urge the new Secretary of State for Justice to take this course of action.

[1] As noted at Second Reading on 15th May 2023 (see, for example https://www.theyworkforyou.com/debates/?id=2023-05-15b.583.0#g602.0)

3. Reform-by-Reform Analysis

The 'Ministerial Veto'

3.1 The Bill asks Parliament to confer on the Secretary of State the power to decide to take a Parole decision himself in some cases, rather than leaving it to the Parole Board. The Secretary of State is a party to Parole proceedings. This change would therefore permit a party to proceedings to decide to act as the judge in what is currently recognised to be a judicial process. It is therefore clear that there are questions of deep principle at stake.

3.2 However, there are also real concerns as to how the proposals in the Bill would operate in practice. The strong indication from the draft clauses is that they would make an already complicated system more complex, adding layers in a context where procedural rules already provide adequate checks and balance.

3.3 These concerns are dealt with in reverse order: first, questions of practice, and second, questions of principle.

Problems of practice: A five-layer system

3.4 At present, a first-instance decision on release is taken in a Parole review in front of a panel of the Parole Board. The panel hears evidence and questions witnesses. The prisoner can participate in the process. The panel gets the richest and most direct exposure to the crucial evidence underpinning the review and is able to test it. They hear directly from a prisoner. The Secretary of State is a party to proceedings and has the right to be represented at such hearings.

3.5 The reconsideration mechanism is the second layer. Introduced in 2019, and set out at Rule 28 of the Parole Board Rules 2019, the effect of the reconsideration mechanism is that the Parole Board's decisions are provisional for 21 days. Within this period, prisoners and the Secretary of State can apply to have a decision reconsidered. If the application for reconsideration is successful, a panel has to reconsider their decision. If the application for reconsideration is dismissed, the provisional decision becomes final.

3.6 The 'set aside' process represents the third layer. Since 2022, this procedure has provided a further opportunity to challenge a release decision. Any party can apply for a decision to be set aside and the Parole Board can also review a decision under this procedure of its own initiative. There is no permission stage. For set aside applications based on new information or circumstances made by the Secretary of State, there is no time limit. If a panel upholds a set aside application and directs that a decision should be set aside, they will make directions for the decision to be taken again.

3.7 In other words, the current process already involves two further, recently introduced mechanisms that allow for the re-opening of decisions made by a panel (after which a Parole Board decision can still be challenged by an application for judicial review)[2]. The reforms would change this situation by adding two further 'layers' into the Parole process over and above the three already in existence, as follows.

[2] As happened in the case of *R (Secretary of State for Justice) v Parole Board* [2022] 1 WLR 4270

3.8 For 'top-tier' prisoners, the reforms provide that the Secretary of State may direct that the cases are referred to him to make the release decision, either before the Parole Board reaches a decision or after it has been made. The Bill is silent on the procedural safeguards applicable to this process, which fall to be set out in secondary legislation. Nonetheless, this appears to be an alternative forum in which a full Parole review may be conducted, with evidence considered and a decision to release or not release taken. This is effectively a fourth layer and would require the same standards of procedural and substantive fairness as a review conducted by the Parole Board.

3.9 The appeal mechanism then acts as a further overlay on this, and a fifth setting in which a different group would consider the prisoner's case – this time, in the Upper Tribunal, upon appeal. Again, this should prompt concern as to whether this is an appropriate venue for the decision-making currently undertaken by the Parole Board. The Tribunal is not used to doing the job of the Board, which is highly specialist and in cases involving a re-hearing, would once again have to adhere to the same procedural safeguards as the Parole Board.

3.10 A further element of complexity arises from the fact that the process allows for full re-hearing by the Tribunal, as well as challenges upon judicial review grounds. Moreover, the former will not be subject to a permission stage while the latter will. It is unclear what motivates this bifurcation at the fifth layer of the proposed new system, except an attempt to escape a situation in which the reforms inevitably fail to comply with Article 5(4) (as set out below).

3.11 In summary, these changes will add complexity to an already complicated, multi-stage system which has already undergone significant procedural reform in the past few years. Inevitably, the convoluted nature of the new process will lead to delays, with predictable risks for the rehabilitation and wellbeing of prisoners going through the process, as well as victims. Inevitably, the changes would lead to uncertainty, and most likely to litigation. It is unclear what benefit would be obtained through this process.

3.12 One notable feature of the proposed reforms is their very substantial cost. This reflects the fact that the new process means more hearings, and necessitates more prison places. The Impact Assessment published with the draft Bill estimates that the annual cost of these changes will be £32 million. This is more than the entire budget of the Parole Board, which is £23 million a year.[3] Moreover, these running figures exclude the transitional costs. Overall, the Impact Assessment's best estimate of the total cost of the Parole measures in the Bill over a ten-year horizon is a little over £496 million. This vast figure should not be overlooked, particularly given the wider context in which the Parole system operates (as set out in more detail below at section 4).

Problems of principle: Human rights protections

3.13 Article 5 of Schedule 1 of the Human Rights Act 1998 requires post-tariff detention to be speedily reviewed by a court. The Parole Board acts as a court for the purposes of Article 5(4) when deciding whether to direct a prisoner's

[3] See the evidence of Caroline Corby (Chair of the Parole Board) to the Justice Committee on 9th May 2023, available at https://committees.parliament.uk/oralevidence/13109/pdf/, at Q64.

release.[4] This means that it must be independent of the executive and the parties.[5]

3.14 The introduction of a 'ministerial veto' involves the power to direct release for 'top tier' prisoners being taken away from a judicial body and given to the Executive. As such, it is impossible to see how the Parole Board's new role in the parole process would, alone, satisfy the review requirements of Article 5(4).

3.15 It is claimed in the memorandum on human rights compliance published with the Bill that the provision of a full merits review in the Upper Tribunal renders the new proposals compliant with the requirements of Article 5(4). Indeed, and as noted above, it is difficult to understand the newly drafted clauses on the bipartite appeal process as anything but an attempt to side-step the non-compliance that would otherwise result from this new veto power.

3.16 Does the full merits review succeed in achieving this aim? The proposed process would require a prisoner to initiate an appeal to the Upper Tribunal themselves. This would be a separate hearing before an entirely new tribunal.

3.17 Against this backdrop, it is vital that those scrutinising the legislation appreciate that the European Court of Human Rights has stated that the 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*" (emphasis added).[6] In other words, simply appending the Upper Tribunal mechanism to the reforms very arguably fails to solve the central vice, which is that decision-making has been taken away from a judicial body. In short, APL's concerns around Article 5(4) compliance remain, even with these updated proposals.

3.18 In summary, the APL is concerned that the integrity of the Parole system, which is founded on judicial independence in Parole cases, will be vitally undermined by these changes – which also risk breaching the fundamental rights of people whose liberty is at stake. A foundational principle of our legal system is that decisions about the liberty of citizens are made independently by a judicial body. Parliament is being asked to sanction an exception to this. A process which allows a party to proceedings to also be the decision maker in the context of a decision about the liberty of the subject is a worrying departure from this fundamental principle.

New release test

3.19 The Bill will also implement a new release test for the Parole Board when making decisions about whether to release an offender. Currently, the board must be satisfied that it is no longer necessary for the protection of the public that the prisoner should remain detained.[7] It is a simple, but clear, 20-word test.

[4] See, for example, *R (Pearce) v Parole Board* [2023] UKSC 1, at §5); *R (Giles) v Parole Board* [2004] 1 AC, at §10.
[5] See *R (Girling) v Parole Board* [2007] QB 783, at §13
[6] *Hussain v UK* (1996) 22 EHRR 1
[7] The statutory test which the Board must apply is the same in all cases, albeit written in several different places in the statute book, as discussed in *R (Pearce) v Parole Board* [2023] UKSC 1, at §7. See, for example, section 28(6)(b) of the Crime (Sentences) Act 1997.

3.20 The new test outlined is long and complex. It runs over many clauses and includes an express requirement that there must be no more than a minimal risk that a prisoner would commit serious harm if released. The new test would also require the Parole Board to consider the risk of a list of specific offences being committed if a prisoner is released.

3.21 Finally, the Bill sets out a list of factors decision-makers should take into account when making a public protection decision about a prisoner. These include elements such as the nature of their offence, the conduct of the prisoner while serving a sentence and the risk of not complying with any licence conditions.

3.22 The reality is that the board already takes many of these elements into account when making decisions. Adding these elements into legislation may make the process more complex and drawn out, while having little practical impact. A more drawn-out process will likely have a negative impact on victims and prisoners alike, as they are forced to wait for decisions to be made. Put another way, this reform is either unneeded, or harmful.

3.23 It is also of note that the introduction of a list of factors bears a strong resemblance to the Directions that the Secretary of State used to issue to the Parole Board. This approach, of giving Directions to the Board, was discontinued to reflect its independent, judicial status.

3.24 This is therefore a further aspect of the Bill which undermines the Parole Board's independence and discretion The changes requiring law enforcement personnel on panels also fall into this category and warrant close scrutiny.

Disapplication of s.3 of the Human Rights Act 1998

3.25 The clause disapplying section 3 of the Human Rights Act 1998 is effectively a proposal from the Bill of Rights, but applied to a targeted group of people instead of universally.

3.26 At the point of writing, the Secretary of State for Justice has just confirmed in the Commons that the Government has decided not to proceed with the Bill of Rights. It would therefore be consistent with that approach to remove any equivalent attempt to implement a s.3 disapplication via this Bill.

3.27 This is particularly the case when one considers the animating purpose of human rights legislation, namely to protect all people. To single out a sub-set of society as worthy of a lower level of rights protection when cases involving them reach the courts, runs contrary to the spirit in which Parliament enacted the Human Rights Act 1998 and also to the common law's protection of fundamental rights.

4. The Wider Context

4.1 It is essential that legislators, civil servants and those scrutinising the Bill consider its clauses and impact in their wider context.

4.2 Prison law has been excluded from the Government's 15% increase to criminal law legal aid rates, a move that runs against the advice of Lord Bellamy, who conducted an independent report for ministers that recognised the economic case for funding it sustainably. Prison lawyers are dealing with increasingly

lengthy, complicated cases. The long-term prison population is set to increase to a range in the region of 100,000 by 2027.[8]

4.3 However, between 2008 and 2022 there was an 85% decrease in prison law legal aid providers.[9] The reforms in the Bill represent substantial changes to the Parole system that would add complexity, uncertainty and length to the work of prison lawyers, who are already under significant strain. The risk in terms of access to justice is obvious.

4.4 More broadly, the presence of the clauses within Part 3 in a Bill about victims should prompt critical reflection on the ultimate function of our Parole system and the evidence available to Government as to what assists in rehabilitation.

4.5 When people in prison are supported to achieve rehabilitation from offending, reintegration into society and desistance from crime, society benefits. A crucial part of this process for some prisoners is their progression through the Parole system. It is crucial that this process is fair, and seen to be fair, by prisoners, victims and wider society.

4.6 The current system is far from perfect, but the reforms proposed in this Bill would not address pressing structural issues around delay and resourcing. Moreover, there are other areas that could be explored to improve the Parole system for all of its participants. Consideration could be given to increasing the Board's powers in keeping with its court-like status, for example by giving it the power to compel the attendance of witnesses and/or the production of documents.[10]

4.7 There are also potential reforms and improvements which would not require any legislative energy, nor imperil the Parole Board's independence, and which are far less costly. Examples might be focused upon Parole Board Member recruitment and performance appraisal procedures, complaints and feedback mechanisms and Member training. The APL would be happy to meet with officials to share its experience and thoughts on what kinds of changes might improve the Parole process.

5. Conclusions

5.1 APL's considered view is that Part 3 of the draft Bill raises significant problems on every level:

a. Principle: These changes strike at the heart of a Parole system that has developed incrementally over decades, influenced by the jurisprudence of the European Court of Human Rights as interpreted by our domestic

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

9 For 2022 data, see https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2022, at table 9.1, which shows 130 providers doing prison law as of June 2022. For 2008 data, see the Legal Services' Commission's report on 'Prison Law Funding: A Consultation Response', dated 15th July 2009, at §5.4 on p.64, which shows that in 2008/2009 there were over 900 firms doing this work.

10 At present, the Board cannot do this: see, for example, the discussion at §53 of *R (Bailey) v Secretary of State of Justice* [2023] EWHC 821 (Admin)

Courts. In the process, it has come to be recognised that the Parole Board, when directing release, acts as a Court and that its expertise is to be respected. The changes in this Bill wind back the clock in an ad hoc manner, undermining human rights and common law constitutional principles.

b. Process and procedure: A fundamental principle of our legal system is that decisions about the liberty of citizens are made independently by the judiciary. The exception to this is where Parliament expressly provides to the contrary, which it is now being asked to do. This follows a complete lack of consultation, nor any advance sight of draft clauses. The Bill, and the veto clauses in particular, must now be subject to particularly intense scrutiny.

c. Practice: The changes proposed would make the Parole system more complicated. They would invariably make it slower. They would come at great cost. Inevitably, they would give rise to litigation and uncertainty. They would exacerbate existing risks around access to justice.

5.2 Two members of APL's Executive Committee have recently given evidence to the Justice Committee about the Bill. The APL endorses their evidence and asks the Bill Committee to take it into account.[11]

5.3 The APL has commented on Part 3 of the draft Bill, since this is the area in which the Association has particular experience. However, the Bill falls to be considered holistically by the Bill Committee. In this regard, the APL notes the trenchant criticism of Part 3 by Claire Waxman, the Victim's Commissioner for London, to the Public Bill Committee. She noted the vast cost of the Parole reforms and risk that the process will become more drawn-out.[12]

5.4 Against this backdrop, the APL considers that the only appropriate approach is for Part 3 of the Bill to be discarded in its entirety. We urge the new Secretary of State for Justice to take this course of action. The proposals, initiated by his predecessor, largely represent purported solutions to problems with the Parole system that do not exist. To that extent, they are either risky or unnecessary.

5.5 The APL would be happy to meet with the Secretary of State or his officials to discuss the Bill and share our experience, if this would assist.

ASSOCIATION OF PRISON LAWYERS

29th June 2023

[11] See the evidence of Simon Creighton (Solicitor at Bhatt Murphy) and Andrew Sperling (Solicitor at SL5 Legal) to the Justice Committee on 9th May 2023, available at https://committees.parliament.uk/oralevidence/13109/pdf/

[12] Comments of 20th June 2023, available at: https://hansard.parliament.uk/commons/2023-06-20/debates/cf5c3cf1-a23d-4a46-bd9d-ff9e93ff372f/VictimsAndPrisonersBill(FirstSitting)