



Justice Committee

**The Right Honourable
Alex Chalk MP
Lord Chancellor & Secretary of State for Justice**

By email only

7 June 2023

Dear Alex,

I am writing concerning the Victims and Prisoners Bill. Since its introduction on 29 March 2023, the Committee has held two evidence sessions on the Bill. The first session on [9 May](#) focused on the reforms to the Parole Board and the parole process in Part 3 of the Bill and the second session on [16 May](#) considered the proposals in Part 2 of the Bill to introduce an independent public advocate. We held these sessions in order to compensate for the fact that the Committee's pre-legislative scrutiny of the Draft Victims Bill, on which we reported in [September 2022](#), was solely concerned with the measures that are now in Part 1 of the Bill.

The Parole Board

Part 3 of the Victims and Prisoners Bill contains a far-reaching set of provisions which will fundamentally change the way that the Parole Board operates. They deserve careful scrutiny and we believe that there is a real risk they might not get the attention they deserve during the passage of the Bill through Parliament. We were concerned to hear from Caroline Corby, the current Chair of the Parole Board, that your predecessor had limited engagement with the Parole Board in the development of these proposals. Accordingly, it is vital that the Government engages with the expert evidence we have received.



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The release test

The changes to the release test in clauses 32-34 of the Bill 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.

Simon Creighton, a solicitor with Bhatt Murphy, and Professor Nicola Padfield KC, from the University of Cambridge, both thought that an expanded statutory test would create a risk of confusion and uncertainty. Andrew Sperling, a solicitor from SL5 Legal, told us he could not see the value in the expansion of the existing statutory release test: “It does not have any significant difference with the test, other than it makes it a lot longer and a lot more complicated”. Cassie Williams, an independent member of the Parole Board, told us that the changes will simply reflect existing practice. Professor Stephen Shute, from the University of Sussex, did see some value in the proposed expansions of the statutory release test. He argued that using primary legislation to clarify the factors that should be taken into account could help to improve consistency. He also argued that the provisions on risk are not complicated. On balance, our view is that the changes proposed to the release test, although not strictly necessary, could have a positive effect on the consistency and transparency of Parole Board decision-making on the release test. Further, by codifying existing practice in primary legislation, the provisions will serve to enhance the democratic legitimacy of the current approach.



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Ministerial role in release decisions for "top-tier" prisoners

The provisions in the Bill that would enable discretionary and directed referrals of release decisions for "top tier" prisoners to the Secretary of State are by far the most significant changes in the Bill. They raise a number of constitutional concerns and also have significant practical consequences for the operation of the parole system in England and Wales.

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). All of our witnesses, including those from the Parole Board, struggled to think of examples of when the Parole Board would use this power. Martin Jones, Chief Executive of the Parole Board, said "in the seven years I have been in charge of the Parole Board, I have never seen a situation in which the Parole Board has said, 'I can't make a decision on this case'". In our view, this power is misconceived. It would be concerning to us if the Parole Board, which is 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. We believe it serves no useful purpose and should be removed from the Bill.

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 'directed referral'). Once a decision was called in by the Secretary of State this would have the effect of quashing the original decision to release and the Secretary of State would then re-take the decision. Granting this power to the Secretary of State will fundamentally change the application of the constitutional principle of the separation of powers in respect of the parole system. Andrew Sperling explained it in the following terms:



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What you have here is a system being set up that says that there needs to be a three-tier system, and that the Parole Board should not be capable of making decisions in the most serious cases. There isn't any evidence of the need for that change.

Caroline Corby, Chair of the Parole Board, told us that this power will change the status of the Parole Board, and by detracting from its "court-like" status it could have "an unintended consequence of making it more difficult for us to recruit judicial members". As a matter of principle, we are not convinced that the Government has provided sufficient justification for undermining the court-like status of the Parole Board by allowing the executive to call in the most serious release decisions. At present, the Secretary of State is, rightly, a party to Parole Board proceedings and as a result it cannot be right that the Secretary of State should be able to be a judge in his or her own cause.

Many of the witnesses who gave evidence to the Committee drew attention to the lack of clarity in the Bill on the process that the Secretary of State would use to make a release decision on a top-tier prisoner. Simon Creighton said this was a "a shocking omission from the Bill". Mr Creighton stressed that he would expect that 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. Mr Creighton also emphasised that the Parole Board is a specialist body dedicated to making multi-factorial, complex risk assessments when taking release decisions. Martin Jones suggested to us 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. We cannot understand how a Secretary of State sitting in Whitehall can be better placed to make a release decision than the Parole Board which has had the opportunity to hear evidence from the



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prisoner first hand. The only way to make the process work would be to effectively create a shadow Parole Board within the Ministry of Justice. The Bill does not contain enough detail on the process to be used so it is impossible to make an assessment on whether the process will be adequate.

Appeal to the Upper Tribunal

Clauses 38 and 39 create an appeal mechanism for prisoners that are refused release by the Secretary of State under the new referral mechanisms. An appeal can be made on public law grounds or on the merits. Simon Creighton explained that in his view this appeal mechanism was in the Bill to ensure compatibility with Article 5 of the European Convention on Human Rights. Mr Creighton argued that although the mechanism would mean that in law the final decision on release could be made by an independent body, the fact that the appeal was not automatic, and that instead it relied on the prisoner deciding to appeal, meant that it would not be sufficient to ensure compatibility with Article 5. Furthermore, the combination of the Secretary of State's review and an appeal to the Upper Tribunal would inevitably create a serious delay before a final decision could be made. Mr Creighton pointed out that to challenge the Secretary of State's decision on judicial review grounds, a prisoner must first secure permission to appeal from the Upper Tribunal, whereas no permission is required to challenge the decision on the merits. This means that in practice every prisoner whose release is refused by the Secretary of State will make an appeal on the merits, enabling them to circumvent the requirement for a permission stage and will go straight to a full appeal before the Upper Tribunal.

Mr Creighton also questioned whether the Upper Tribunal was equipped to deal with merits-based appeals of a Secretary of State's decision to refuse release. His Honour Peter Rook KC, Judicial Member and Vice Chair of the Parole Board told us that the Court of Appeal criminal division would be much better suited to considering appeals of release decisions than the Upper Tribunal. While there is no doubt that it is right that the final



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decision on release should lie with an independent court or tribunal, the proposed appeal mechanism in the Bill is flawed. We can see 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. It was pointed out to us that the appeal, particularly on merits, will logically have to be by way of a re-hearing and may frequently involve taking oral evidence. The Upper Tribunal has no experience in or procedures for dealing with this, whereas the Court of Appeal criminal division does. Equally, that may cause additional work burdens for that Court, the practical implications of which should be discussed with the senior Judiciary.

The composition of the Parole Board

Clause 46 of the Bill also 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). Caroline Corby told us that this would encroach on the independence of the Parole Board and that it could result in practical problems, such as delays, if there were issues of availability of particular types of Parole Board members. Martin Jones also stressed that the Board carefully scrutinises the panelling of serious cases. He also warned against assuming that those with law enforcement backgrounds would take a particular approach to release decisions. Andrew Sperling made the same point. We would welcome having more members from law enforcement background available to the Parole Board. However, we do not believe that the Secretary of State should be able to prescribe when certain cases be dealt with by members of a particular type. It would be inconceivable that the Government would be able to prescribe the composition of any court or tribunal. We recognise that the Parole Board is a unique body but nevertheless the Government has failed to justify this interference with its independence.



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The Bill would also introduce a statutory power for the Justice Secretary to remove the Parole Board's Chair from office before the end of their term of office if it was considered necessary to maintain public confidence in the Board. Clause 47 would additionally expressly state that the Chair was prohibited from being involved in individual parole cases and from trying to influence the outcome of the Board's decision in such cases. Professor Shute said that "it is very hard to lead the board unless you have experience of sitting on panels". In fairness, some recent Chairs have chosen not to sit on panels but we believe this should be left to their discretion rather than constrained by statute. Caroline Corby told us that the power to remove the Chair could see them dismissed if the Board made an "unpopular decision" and that 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.

Therefore, we conclude that there should not be a statutory power to enable the Secretary of State to dismiss the Chair of the Board in the manner and terms proposed. Our principal objection is that the Parole Board is an independent body that exercises quasi-judicial functions and is comparable to a court. At present there is a protocol in place that allows the Chair of the Parole Board to be removed, and so it is unclear why a statutory power is needed. Furthermore, prohibiting the Chair from sitting on cases would potentially undermine their leadership of the Board, and make the role less attractive to suitable candidates in the future.

Overall assessment of Part 3

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.



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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 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.

The Independent Public Advocate

The Committee welcomes the Government's decision to legislate to establish the independent public advocate. It would have been preferable to do so through a separate bill to enable the proposals to receive the attention they deserve. We are very grateful to The Right Reverend James Jones KBE, Paul Greaney KC, Jenni Hicks and The Rt Hon. the Lord Wills for giving evidence to us on the proposals in Part 2 of the Bill.

The appointment process

Clause 24 of the Victims and Prisoners Bill would give the Secretary of State a discretionary power to appoint an individual to act as an independent public advocate for "victims" of "a major incident". Bishop James Jones told us that he was concerned with the model of appointment envisaged by the Bill, whereby it would be up to the Secretary of State to decide whether an independent public advocate (or advocates) should be appointed to act in the aftermath of a particular incident. He explained:

That takes time. What the families, the bereaved, the survivors, need is an immediate response to help them to signpost the way forward. Therefore, I think that there should be a standing IPA so that the IPA is enabled to react swiftly to the



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emerging situation, which evolves day by day. To wait for a Secretary of State to be briefed, to be advised and then to decide—that space—is fraught with dangers and, therefore, to have a standing IPA is more preferable.

Bishop James Jones argued that it should be up to the independent public advocate, rather than the Secretary of State, to decide whether to act in relation to a particular incident. Jenni Hicks emphasised the need for the independent public advocate to be seen as truly independent. Paul Greaney KC also stressed the importance of timing, arguing that the independent public advocate would need to be able to assist those affected by a major incident in the immediate aftermath:

There is a problem in the current drafting, in that leaving it up to the Secretary of State to decide whether there is a major incident and, if so, to appoint an IPA is bound to create a degree of delay. That will be a problem.

Paul Greaney KC supported the idea of a standing independent public advocate that would decide whether to act in the aftermath of a major incident. It is also vital that families affected by a disaster are consulted on the involvement of an independent public advocate. In our view, the Government should amend the Bill so that there is a standing independent public advocate who is empowered to decide to act in the aftermath of a major incident. There is a risk that giving the decision to the Secretary of State, as currently envisaged in the Bill, will result in delay and a lack of trust, both of which could undermine the work of the independent public advocate. If the power remains, the Secretary of State must be under an obligation to consider the views of those affected when making a decision on whether to engage the independent public advocate. One of the core lessons from Hillsborough, as was powerfully set out to us by Jenni Hicks, is that those affected by a public disaster will need immediate practical support and advocacy in ensuring that false narratives are challenged.



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Panel

Clause 26 of the Bill would enable the Secretary of State to appoint a panel of advocates following a major incident. The witnesses to the Committee were positive about the role of a panel of independent public advocates. Bishop James Jones suggested that it was important to have a range of professional backgrounds to offer the support required to those affected by a major incident. Lord Wills also welcomed the idea of a panel to deal with the situation where a designated independent public advocate was not available to act in relation to a particular incident. Lord Wills did though raise concerns over how the panel would operate in practice and in particular that it could result in confusion if there were several advocates operating in relation to one incident. It is clear that having only one independent public advocate would not be sufficient and there is a need to provide for a situation where there are several incidents at the same time or an incident on a large scale which meant that one individual alone could not perform all of the functions of the independent public advocate by themselves. However, we are concerned that the Government has not explained how the Bill's proposals for a panel will work in practice. For example, it could be preferable to have a single independent public advocate, drawn from a standing panel, act in relation to each major incident, but for that advocate to have access to a panel of specialist support staff, who could be appointed by the advocate based on the needs of those affected by that particular incident.

Functions and powers

The witnesses to the Committee stressed that an independent public advocate would have a variety of different functions in relation to a major incident. Bishop James Jones told us that he did not envisage the independent public advocate as carrying out investigations, but that he could see them playing a role in protecting documents relating to a major incident. Jenni Hicks also said that it was important that an independent public advocate would be able to provide practical support in helping those affected get access to the documentation they need. Paul Greaney explained that he



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saw the independent public advocate acting as liaison between families and the counsel to the inquest or an inquiry. Bishop James Jones suggested that an independent public advocate could make a statement at an inquest as to what he or she has observed through engaging with the families after an incident.

There is a clear consensus that the independent public advocate should be empowered to provide practical support to those affected by a major incident. However, the evidence presented to the Committee indicates that the Government has not fully thought through what the core functions of the independent public advocate will be. In our view it is vital that the independent public advocate is empowered to act as a powerful counterweight to that of the state in the wake of a major incident. The independent public advocate should not be responsible for conducting formal investigations themselves, that is the role an inquiry or inquest, but they should be empowered to access information that can enable them to advocate on behalf of those affected before, during and after any inquiries or inquests. The independent public advocate should also be empowered with data controller powers so they are able to access and protect documents relevant to a disaster, not to investigate, but to ensure those affected are able to trust the process and the way that information about their loved ones is being handled.

Lessons for the legislative scrutiny

As we said in our report on the draft Victims Bill, we welcomed the opportunity to conduct pre-legislative scrutiny of such an important bill. However, we do wish to register our concern with the Government's approach to the exercise. Parts 2 and 3 of the Victims and Prisoners Bill contain problems which could have been identified and resolved through pre-legislative scrutiny. It is simply bad legislative practice to include controversial and technically complicated provisions concerned with unconnected issues in a Bill that has been subject to pre-legislative scrutiny. We recognise the difficulties



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caused by the limitation of parliamentary time, but the solution in this case was to subject all three parts of the Bill to pre-legislative scrutiny. By introducing two new substantive parts to the Bill that were not included in the original draft bill would appear to be evidence of a fairly dysfunctional policy process. We appreciate that these decisions were taken before you took up your post and welcome the open-minded tone of your speech on Second Reading. We hope that in the future the Government will approach pre-legislative scrutiny with a spirit that reflects the underlying purpose of the exercise, which is to enable Members with a special interest and expertise in justice issues to contribute to examine a Bill before it is formally introduced.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Neill'.

Sir Robert Neill MP
Chair
Justice Committee