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By Lauren Nickolls,
Lisa Rowland,
Graeme Cowie,
Joanna Dawson

The Victims and Prisoners Bill

Summary

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Summary

The Victims and Prisoners Bill was introduced to the House of Commons on 29 March 2023. The Bill's second reading is scheduled for 15 May 2023.

The Government has three main aims for the Bill:

- to strengthen the rights of victims of crime and improve their treatment;
- to provide support for victims of major incidents; and
- to ensure the Parole Boards keeps public protection as its primary focus when making decisions to release people. The Parole Board is a public body responsible for the parole system.

This briefing provides background to the Bill, an overview of its main provisions, and analysis of its proposals.

Victims of crime

Part 1 of the Bill includes several proposals aimed at holding criminal justice agencies more strongly to account for the service they provide to victims and to improve the support victims receive.

This includes placing the key principles of the Victims' Code in primary legislation. The code sets out the minimum level of service victims can expect from criminal justice agencies. The Bill would also place duties on criminal justice bodies to raise awareness of the code and to collect and review information on their compliance with it. Police and Crime Commissioners (PCCs) would also be given a corresponding duty to monitor compliance of criminal justice agencies within their police force area.

Reaction to the Bill's approach to victims of crime

Stakeholders representing victims have generally welcomed the ambitions of the draft Bill and the "opportunity to improve victims' experiences".

However, the Justice Committee raised concerns about whether the measures will in fact strengthen the position of victims' rights in legislation (PDF) and felt they would "do little to improve agencies' compliance with the Victims' Code".

Former Victims' Commissioner Dame Vera Baird KC questioned whether the proposals go far enough to drive a cultural change in criminal justice agencies affecting the way they perceive and treat victims.

Stakeholders also raised concern about resource. Refuge, a charity supporting women and children experiencing domestic abuse,said for the Bill "to truly transform outcomes for survivors it needs to ensure sustainable multi-year funding for specialist community-based services." The Association of Police and Crime Commissioners also expressed concern about the resource available for PCCs to deliver additional duties placed on them.

The charity Victim Support said it is "seriously worried" that the Government's decision to add provisions on prisoners to the Bill since its draft version will distract from victims' issues (see below).

Victims of major incidents

Part 2 of the Bill would introduce an 'Independent Public Advocate' scheme, whereby advocates would be appointed by the Justice Secretary to support bereaved families and victims of major incidents. Advocates would be appointed if there is an incident rather than holding a permanent position.

An advocate could provide support in the immediate aftermath of an incident as well as assist victims while any police or coroners' investigations, inquests or public inquiries take place. They would have some data sharing powers to keep victims informed about information they may receive through these investigations. Advocates may also be required to report to the Justice Secretary on victims' experiences after of major incidents.

Reaction to the Independent Public Advocate scheme proposal

The Government's decision to legislate for a public advocate has been broadly welcomed. However, the proposed model has been criticised for not be sufficiently independent from the Government.

Theresa May raised issues with the fact that victims and families would not be able themselves to initiate having a public advocate. She noted that in the case of the Hillsborough disaster "the state and state authorities shut their doors to people that led to the 34 years' wait for any answers for the families". Steve Reed, Shadow Secretary of State for Justice, also argued for one advocate who is "a fully independent, permanent figure that is accountable to the families, not a panel of advisers appointed … by the Government if they see fit".

Other MPs have also raised concerns that the advocates would lack sufficient legal powers to compel public authorities to disclose evidence. Ian Byrne (Labour) described the proposed role as "a weak signposting service".

Prisoners and parole

Part 3 of the Bill would make several reforms to the parole system and Parole Board proceedings. This includes proposals to provide the Justice Secretary with powers to veto a decision by the board to release certain individuals that would fall into a 'top-tier' of serious cases. The Justice Secretary would then make the decision about release themselves.

The Bill would also give the Justice Secretary powers to mandate that the Parole Board include members with law enforcement experience and that they would be involved in handling 'top-tier' cases. The Justice Secretary would also have a statutory power to remove the board's Chair if deemed necessary for ensuring public confidence in the board.

Reaction to parole reforms

Several legal commentators and criminal justice charities raised concern about the proposals when they were first suggested in 'Root and Branch' Review of the Parole System conducted by the Government in March 2022. These concerns were primarily about the risk to the Parole Board's independence by giving an elected official powers to override the board's decision and the potential effect of this on fair and impartial decision-making.

the necessity of the proposed changes have also been questioned. The Prison Reform Trust argued the proposals are "wholly unsupported by any evidence" as the parole system is "already overwhelmingly focused on public protection", with the board taking a "very cautious approach" to release decisions.

Similar issues have been raised about giving the Justice Secretary powers to remove the Parole Board Chair and direct which type of board member presides over certain types of cases. The Parole Board said it could create legal risk in the future if this is presented as an attempt by the Ministry of Justice to influence decision making (PDF). It also said there is no evidence of a significant difference in decision-making between members from different backgrounds, including those with law enforcement experience.

1 The Bill: An overview

The Victims and Prisoners Bill was introduced to the House of Commons on 29 March 2023. The Bill's second reading is scheduled for 15 May 2023. The following supporting Government documents have been published regarding the Bill:

- Explanatory Notes (PDF)
- Factsheets for the Bill's victims measures (PDF) and Victims' Code (PDF)
- Equality Statement (PDF)
- Impact assessments
- Victims and Prisoners Bill: European Convention on Human Rights Memorandum (PDF)

1.1 What would the Victims and Prisoners Bill do?

The Bill is split into key three areas:

- **Part 1** which is designed to ensure the rights of victims of crime and improve their treatment in the criminal justice process and access to services.
- **Part 2** which is designed to ensure support for victims (and families of victims) of major incidents while any police or coroners' investigations, inquests or public inquiries are ongoing.
- **Part 3** which is intended to ensure that public protection is maintained as the primary focus of release decisions made by the Parole Board and to provide the Justice Secretary with greater powers over decisions to release certain parole-eligible prisoners.

The rights of, and services, for victims of crime

Clause 1 of the Bill would establish a statutory definition of 'victim'.

Clauses 2-4 would place four key principles that underpin the Victims' Code into primary legislation whilst reserving the detail of the code for secondary legislation.

Clauses 7-10 would place new duties on criminal justice bodies to raise awareness of the Victims' Code and to collect and review information on their compliance with the code. Duties would also be placed on PCCs to review the compliance of criminal justice bodies in their local area with the code.

In addition to a new duty to oversee operation of the Victims' Code at a local level, **clauses 12-14** would place a new duty on PCCs alongside local authorities and integrated care boards to collaborate over their respective roles in commissioning support services for victims of domestic abuse, sexual offences, and serious violence.

The Bill includes further provision for:

- strengthening the role of the Victims' Commissioner by introducing requirements for agencies to respond to the Commissioner's recommendations, for criminal justice inspectorates to engage with the Commissioner, and for the Commissioner to lay their annual report before Parliament;

- issuing statutory guidance for Independent Sexual Violence Advisers (ISVAs) and Independent Domestic Violence Advisers (IDVAs) that they and other criminal justice professionals must have regard to; and

- enabling victims to escalate complaints regarding their treatment directly to the Parliamentary and Health Service Ombudsman (PHSO) without the need to go to their MP first.

Establishing independent public advocates for victims of major incidents

Part 2 would introduce an 'independent public advocate' scheme.

Clause 24 of the Bill would provide the Justice Secretary with a discretionary power to appoint a 'qualified and suitable' advocate for victims of 'a major incident' (ie an incident that caused the death or serious harm of a significant number of individuals).

Clause 25 sets out the terms of appointment for the public advocates. Advocates would be appointed on an ad hoc basis in response to incidents and victims' needs on terms agreed with the Justice Secretary. The Justice Secretary would also be able to dismiss the advocate on grounds they "consider appropriate". **Clause 26** would also allow for more than one advocate to be appointed (eg where there is a large number of victims or different groups of victims with different needs). In this situation, there would be an "advocates panel" and a "lead advocate" that would be able to issue directions to the other advocates.

Clauses 27-30 set out the functions, duties and powers of the advocate(s):

- **Clause 27** would empower advocates to provide support to victims they consider appropriate in relation to the aftermath of an incident and/or any investigations, coroner's inquest or public inquiries taking place.

- **Clause 29** would allow the Justice Secretary to commission a report from an advocate and specify what it must cover, including how victims were treated in any investigation, inquest, or public inquiry.

- **Clause 30** would provide a framework for advocates to share information where appropriate with the Justice Secretary, a court or tribunal, coroner or inquiry, other public authorities, and with victims. The Justice Secretary would also be permitted, but not required, to share information with an advocate.

Clause 31 would provide the Justice Secretary with powers to issue statutory guidance to advocates that they must "have regard" to.

Prisoners and parole

Part 3 of the Bill would make several significant reforms to the parole system and Parole Board proceedings:

- **Clauses 32-34** would clarify the statutory release test that the board uses when deciding whether to release a prisoner. The Bill would remove any possibility of a balancing exercise between the rights of prisoner and public protection so as to ensure public protection is the only consideration. The Bill would also provide a list of criteria the board must consider when deciding on cases.

- **Clauses 35-37** would establish a 'top-tier' of parole cases including prisoners that have been sentenced for murder, causing the death of a child, serious terrorist-related offences, and rape. The Bill would enable the Parole board to refer cases that fall within this category to the Justice Secretary to decide on their release when the board is not confident that the test for release has been met. If the board decides to release someone from the top-tier, the Bill would also enable the Justice Secretary to mandate that the case be referred to them and allow the Justice Secretary to set aside the board's decision.

- **Clauses 46-47** would allow the Justice Secretary to change the Parole Board Rules so that the Board would be required to have members with law enforcement experience and also require that they are involved in handling 'top-tier' cases. The provisions would also provide the Justice Secretary with powers to remove the Chair of the Parole Board if they deem it necessary for maintaining public confidence in the board.

Part 3 would also prohibit prisoners sentenced to whole life orders from getting married or from forming a civil partnership. These provisions are set out in **clauses 48-50**.

1.2 Where and when will the Bill take effect?

The Bill would apply only in England and Wales, except for the following which will also apply to Scotland and Northern Ireland:

- **Clause 21 -** and the consequential amendment in clause 23(3) - which removes the 'MP filter' for complaints to the Parliamentary and Health Service Ombudsman (PHSO) by victims and those that experienced "injustice due to the maladministration of a Government department or other authority" that is within the remit of the PHSO.[1]; and

- **Clause 50** which enables the Secretary of State to by regulation make consequential provisions related to clauses 48 and 49 that would prevent prisoners sentenced to whole life tariffs for getting married as it would provide a power to amend a Measure or Act of Senedd Cymru, an Act of the Scottish Parliament or Northern Ireland legislation. Such regulations may encompass amendments, repeal or revocation in relation to primary legislation.

The Bill does not provide specific commencement dates for any of its provisions. Instead the Secretary of State would be given powers to bring the provisions into force on a day appointed by them by regulations. Clause 54, which would grant these regulation-making powers, would itself come into force on the day the Bill receives Royal Assent (along with the rest of the general provisions in Part 4).

[1] Explanatory Notes (PDF), p33

2 Part 1: Victims of criminal conduct

2.1 Background: Victims in the criminal justice system

A criminal prosecution in England and Wales involves the state against the defendant, and the victim has no legal standing in their own right. There have been longstanding concerns that as a result victims can often be left feeling excluded and lost in the criminal justice process. Former Victims' Commissioner, Dame Vera Baird KC, said that victims are treated as "an afterthought" in the system.[2] She argued that poor experiences of the criminal justice system are causing victims to lose confidence in the process and are preventing victims from reporting crimes or following through with cases.[3] Only 43% of 451 responses to the Victims' Commissioner's latest 2021 annual survey said they would report a crime again based on their experience and of those that went to court, only half (out of 46) said they would attend again.[4]

The role of the Victims' Commissioner

The Victims' Commissioner promotes the interests of victims and witnesses of crime by raising awareness of issues effecting victims, conducting research and sharing good practice, and seeking to influence policy making. The Commissioner also monitors how criminal justice agencies comply with the Victims' Code (see below) and has a statutory responsibility to keep the code under review. The role is a public appointment and independent of Government. At the time of writing the role is vacant and has been since the last Victims Commissioner, Dame Vera Baird KC, resigned in September 2022.[5]

2 Victims' Commissioner, New survey reveals low victim confidence, as Victims' Commissioner warns victims remain an "afterthought", 9 September 2021

3 The Victims' Commissioner, New survey reveals low victim confidence, as Victims' Commissioner warns victims remain an "afterthought", 9 September 2021. **Note:** The 2021 survey received 587 responses, of which 569 said they had reported or been a victim of crime in the last three years (almost half of these cases were reported or dealt with during the Covid-19 pandemic). Not all respondents answered every question and not every respondent had their case proceed through the criminal justice system so sample sizes vary for each response.

4 The Victims' Commissioner, Victims' Experience: Annual Survey (PDF), 9 September 2021, p2

5 The Victims' Commissioner, What we do, [last accessed: 2 May 2023]. Note: The Commissioner's role was first established in 2004 by the Domestic Violence, Crime and Victims Act 2004. However the post was not filled until 2010 by Baroness Louise Casey.

The Victims' Code

The Code of Practice for Victims of Crime in England and Wales, better known as the Victims' Code, came into effect in 2006. The code sets out 12 key rights for victims that focus on ensuring access to advice, information, and support. The code is intended to ensure a minimum standard of service for victims. However, criminal justice agencies have continued to face criticism for not meeting the needs of victims and not delivering the rights in the code.

The code has been accused of not being sufficiently enforceable. Failure to comply with the code does not make a person working for criminal justice services, or the organisation itself, liable to any criminal or civil proceedings, nor does it necessarily result in any disciplinary proceedings. Baroness Newlove (Victims' Commissioner from 2012 to 2019) said the code was merely "persuasive guidance".[6] Her successor, Dame Vera Baird KC (Victims' Commissioner from June 2019 to September 2022) echoed these concerns, saying agencies are able to treat the entitlements in the code as "favours" rather than rights.[7] She has argued that the historical exclusion of victims has left a "legacy culture" in the criminal justice system where agencies still do not adequately see victims as their responsibility.[8]

Table 1: 'Summary of Victims' Rights' under the 2021 Victims' Code	
1	To be able to understand and to be understood
2	To have the details of the crime recorded without unjustified delay
3	To be provided with information when reporting the crime
4	To be referred to services that support victims and have services and support tailored to your needs
5	To be provided with information about compensation
6	To be provided with information about the investigation and prosecution
7	To make a Victim Personal Statement
8	To be given information about the trial, trial process and your role as a witness
9	To be given information about the outcome of the case and any appeals

6 Victims' Commissioner, Annual report of the Victims' Commissioner 2017 to 2018, 1 July 2018

7 Victims' Commissioner, The Victims' Bill - an opportunity to revolutionise how victims are treated, 22 June 2022

8 The Victims' Commissioner for England and Wales, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p9

10	To be paid expenses and have property returned
11	To be given information about the offender following a conviction
12	To make a complaint about your Rights not being met

Source: Ministry of Justice, Code of Practice for Victims of Crime in England and Wales (PDF), Summary of Victims' Rights, November 2020, p5-6

Calls for a Victims Law and the draft Victims Bill

For several years, victims' rights advocates have been calling for the core rights of victims to be put into law, for more accountability and for these rights to be made more enforceable.[9] Baroness Newlove argued that without a "guarantee[d] package of core legal rights" to protect victims, "no number of initiatives, can change the ethos of a system … [that] has been solely about the Crown and offenders."[10]

The 2017 and 2019 Conservative Party manifestos committed to enshrining the code's entitlements in law.[11] In 2018 the Government also published a Victims Strategy which committed to consulting on victim-focused legislation.[12] This pre-legislative consultation, improving victims' experiences of the justice system, ran from December 2021 to February 2022. The consultation sought to find ways to "make concrete improvements" to victims' experience of, and confidence in, the criminal justice system, and the support that they receive.[13]

Alongside its response to the consultation, the Government published a draft Victims Bill which largely covered the same provisions as part 1 of this Bill on victims of criminal conduct. **Note:** it did not include parts 2 and 3 of the Bill that has now been introduced to the Commons which cover victims of major incidents and prisoners (respectively).

Further reading: Draft Victims Bill

The Library has produced a briefing on the draft Victims Bill which provides a more detailed background to the draft Bill and analysis of its content.

9 See for example: Victim Support, Victim Support Manifesto: Making a Victims Law a Reality (PDF), April 2015, p2; Victim Support, Make it Right for Victims (PDF), March 2021; and The Victims' Commissioner, Annual report of the Victims' Commissioner 2017 to 2018, 1 July 2018, p20

10 The Victims' Commissioner, Annual report of the Victims' Commissioner 2017 to 2018, 1 July 2018, p19

11 Conservative Party, Conservative Party Manifesto 2017: Forward together: Our plan for a stronger Britain and a Prosperous Future (PDF), p44; and Conservative Party, Conservative Party Manifesto 2019: Get Brexit Done, Unleash Britain's Potential, p12

12 HM Government, Victims Strategy, 10 September 2018

13 Ministry of Justice, Delivering justice for victims: A consultation on improving victims' experiences of the justice system, 9 December 2021

Reactions to the (draft) Victims Bill

Overall, there was a positive reaction to the ambitions and intentions of the provisions in the draft Bill.[14] Representatives of victims felt it presented an important opportunity to improve the experience of victims and survivors.[15]

However, the then Victims' Commissioner, Dame Vera Baird KC, raised concerns about whether the draft Bill went far enough to reform the treatment of victims and drive a cultural change amongst criminal justice agencies in the way they perceive victims.[16] This view is still held by many campaigners for victims, who say the updated Bill that has now been introduced will still "not transform victims' experiences without significant changes."[17]

The Justice Committee undertook pre-legislative scrutiny of the draft Bill and concluded that the draft Bill "falls short of what is required". [18] The Committee said the draft Bill would not strengthen the rights of victims any more then currently provided for in legislation and therefore would not deliver on the Government's stated purpose for the legislation: to "enshrine" victims' rights in law.[19] Whilst the Committee welcomed the intention to increase transparency of the support that agencies provide for victims, it criticised the draft Bill for still putting "the onus on the victim to claim rights they are often unaware of, rather than requiring the relevant agencies to deliver them".[20] The Government accepted five of the Committee's 47 recommendations:[21]

- to amend the definition of 'victim' (for the purposes of part 1 of the Bill) to include bereaved families, children who have witnessed domestic abuse, and individuals born of rape;
- to add a new obligation for criminal justice agencies to promote awareness of the Victims' Code with victims;
- to require standardisation of data collection regarding the Victims' Code to allow for comparison across areas. The Government noted that this will be underpinned by regulations;

14 See for example: LGA, LGA responds to the publication of the Draft Victims Bill, 25 May 2022; Victim Support, Victim Support responds to the draft Victims Bill, 26 May 2022; and London Councils, Draft Victims Bill, November 2022

15 Victim Support, Victim Support responds to the draft Victims Bill, 26 May 2022; and Refuge, Refuge responds to Government's response of the Justice Select Committee's report on the draft Victims Bill, 20 January 2023

16 Victims' Commissioner, Victims' Bill holds promise but falls short in key areas, says Victims' Commissioner, 26 May 2022, p87

17 Victims and Prisoners Bill 'won't deliver what victims need', say campaigners, Police Professional, 29 March 2023

18 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p3

19 As above

20 As above

21 Ministry of Justice, Pre-legislative scrutiny of the draft Victims Bill: Government Response to the Committee's Report (PDF), 19 January 2023, p1

- to require that statutory guidance on sexual and domestic violence advocates includes information on their expected role, function, and training; and
- to keep oversight of the Victims' Code in the Victims' Commissioner's remit (which the draft Bill had originally proposed removing).[22]

The Committee also urged the Government to consider what additional funding would be needed to deliver the draft Bill's ambitions and to meet any extra demands that would be placed on services.[23] Resource continues to be raised as a key challenge facing the Bill. The Association for Police and Crime Commissioners were concerned about the resource available for PCCs to deliver additional duties the Bill would place on them. Refuge also argued that for the Bill "to truly transform outcomes for survivors it needs to ensure sustainable multi-year funding for specialist community-based services".[24]

2.2 Setting a statutory definition of victim (clause 1)

Who does the Bill define as a victim?

Clause 1 would define a 'victim' for the purposes of the part 1 of the Bill as someone who has suffered harm (including physical, mental or emotional harm or economic loss) as a direct result of:

- being subjected to a crime;
- having seen, heard, or otherwise directly experienced the effects of a crime;
- being born as the result of rape;
- a close family relative dying as the direct result of a crime; or
- being a child and witnessing domestic abuse.

Note: there would not need to be a charge or conviction for an action to be considered criminal conduct and for the victim to be recognised as a victim.

22 The Government also said it would amend the draft Bill to require agencies to respond to any report by the Commissioner (not just their annual report as originally proposed) and for inspectorates to consult the Victims' Commissioner annually on their inspection programmes.

23 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p24

24 Refuge, Refuge responds to Government's response of the Justice Select Committee's report on the draft Victims Bill, 20 January 2023

Reactions and responses: who should be recognised as a victim?

The definition in clause 1 has been updated to address concerns raised by the Justice Committee's scrutiny of the draft Bill, that bereaved families, children who have witnessed domestic abuse, and individuals born of rape were not included in the previous iteration.[25]

Victims of anti-social behaviour (ASB)

The definition of victim in clause 1 requires that an individual be victim of 'criminal conduct'. What is considered ASB does not always cross the threshold into criminal. Some argue that those whose face persistent ASB have been "historically overlooked" as victims and have called for them to be recognised in the Bill so that they can access the same rights and entitlements for support.[26]

Witnesses of crime

The Draft Victims Bill previously included in its definition of victim a person "who has suffered harm as a result of … witnessing criminal conduct." The Children's Commissioner, Dame Rachel De Souza, welcomed this inclusion of witnesses to crime, noting that witnessing crime can be "enormously traumatic" and that "it is vital that the Bill recognises this".[27]

In contrast, the Justice Committee raised some concern about the breadth of the definition and the inclusion of witnesses as victims. It argued this could "make the application of [Victims'] Code rights more difficult in practice" because witnesses will be affected by what they have seen to varying degrees.[28]

The explicit reference to "witnessing" a crime has been removed from the Bill. However, clause 1 includes people who have suffered harm as a direct result of having "seen" or "heard" a crime within the definition of victim, which leaves the Bill open to applying to witnesses.

Note: Non-victim witnesses are not covered by the current Victims' Code. They are afforded standards of care under a separate Witness Charter.[29]

25 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022; Ministry of Justice, Pre-legislative scrutiny of the draft Victims Bill: Government Response to the Committee's Report (PDF), 19 January 2023

26 The Independent Victims' Commissioner for London, Claire Waxman: Victims' Bill Consultation Response, 3 February 2022, section 2.1

27 The Children's Commissioner, The Children's Commissioner will give evidence on the draft Victims Bill to the Justice Select Committee, 10 June 2022

28 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p51

29 Ministry of Justice, The Witness Charter: standards of care for witnesses in the criminal justice system, 10 December 2013, [last accessed: 11 July 2022]

2.3 Legislating for the Victims' Code (clauses 2-4)

The Government's approach for putting the Victims' Code on a statutory footing is to:

1. Place key **principles** of the Victims' Code into **primary legislation** to "send a clear signal to all listed agencies that they must comply with delivering it."[30]

2. Grant the Justice Secretary a range of delegated powers to set out **the detail** of the code and what victims are entitled to in **secondary legislation.** This is to allow greater flexibility to respond to future changes in the criminal justice landscape and enable the code to be more easily amended.

The Victims' Code in primary legislation

The duty for the Government to issue a Victims' Code is already provided for in primary legislation in sections 32 to 34 of the Domestic Violence, Crime and Victims Act 2004 (the '2004 Act'). The Bill would repeal these provisions and clause 2 would restate the duty of the Justice Secretary to issue a Victims Code that would apply to any services that have functions relating to victims or any aspect of the criminal justice system.

The difference under clause 2 would be the addition in primary legislation of certain key principles that must be reflected in the Victims Code and by extension in the services delivered by agencies subject to the code. These key principles would be:

1. victims should be **provided with information** to help them understand the criminal justice process;

2. victims should be able to **access services which support them**;

3. victims should have the opportunity to **make their views heard** in the criminal justice process; and

4. victims should be able to **challenge decisions** which have a direct impact on them.

Another difference is that subsection 4 would give the Justice Secretary power to make regulations on further matters related to the Victims' Code (including about matters the code must include). In turn these would then need to be reflected in the services delivered by those subject to the code. The intention behind this approach is for regulations "to set out a framework for the new Code by reference to the twelve key entitlements from the [current] Code"[31]

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30 Ministry of Justice, Delivering justice for victims (PDF), December 2021, p13

31 Explanatory Notes (PDF), p6

and also allow for "further matters to be provided for in the regulations, if and when the Secretary of State deems it necessary."[32]

Reactions and responses: the principles-based approach

Broad principles or specific rights?

Some stakeholders were critical of the proposal for the legislation to set out broad principles rather than the specific code rights. The Justice Committee said in its pre-legislative scrutiny that this approach:

> does not appear to enshrine the Victims Code in law any more than is already provided for. The four overarching principles in the draft Bill are so broad and permissive that it is not clear that they serve any significant legal purpose.[33]

The Justice Committee further argued that "the approach taken retains the onus on the victim to claim rights they are often unaware of rather than requiring the relevant agencies to deliver them".[34]

Respondents to the Government's pre-legislative consultation similarly questioned how the approach would lead to the Victims' Code being more enforceable than it currently is and argued that attempts to "simplify" the code would dilute victims' entitlements.[35] The Prison Reform Trust said:

> It is unclear how placing a limited set of broad principles on a statutory basis will translate into an enforceable set of rights and minimum standards which victims are entitled to receive from statutory and contracted services. Legislation without teeth is unlikely to lead to a significant improvement in the quality of the service received by victims.[36]

Responding to the new Bill, Why me?, a national charity delivering and promoting restorative justice, agreed that "Distilling victims' entitlements from 12 rights to four key principles risks diluting rather than strengthening them."[37] The then Victims' Commissioner, Dame Vera Baird KC, echoed concerns about the effectiveness of the approach. She argued there is a culture in agencies that treats victims as peripheral rather than participants in the justice system and that the principles provided are "partial and

32 Explanatory Notes (PDF), p6
33 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p12
34 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p14
35 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p15
36 Prisons Reform Trust, Prison Reform Trust response to the Ministry of Justice consultation: Delivering Justice for Victims (PDF), February 2022, p1
37 Why me?, Will the Victims and Prisoners Bill improve victims' rights to Restorative Justice?, 31 March 2023

expressed in a very high-level way which will not drive the culture change necessary" to address this.[38]

The Government says it has chosen this approach because it will "enhance Parliamentary oversight of the Code" whilst still retaining "flexibility to review and amend the framework of the Code, to ensure that it stays relevant for victims."[39]

The principles: Have the right principles for victims been included in the Bill?

Out of 289 respondents, 161 (56%) agreed with the key principles set out in the Government's pre-legislative consultation. These principles were broadly similar to the ones that are now in the Bill. Of those that disagreed, it was largely because the respondents felt there were some key principles missing from the Bill. [40] In the Justice Committee's scrutiny of the draft Bill, it also found "broad consensus" amongst the stakeholders that contributed to its inquiry "that the principles are too weak"[41] and should be expanded.

For example, the Criminal Justice Alliance - a membership organisation for criminal justice charities, academics and stakeholders - highlighted key entitlements not reflected in the four chosen principles. This included rights for victims to be informed about compensation, to have access to a complaints process, to have their case progressed without unjustified delay, and to be kept informed of case progress.[42]

The then Victims' Commissioner, Dame Vera Baird KC, suggested additions that in her view were "imperative to go into the legislation if victims' expectations are to be met".[43] These included an allocated independent victim advisor for all vulnerable victims and victims of serious sexual or violent crime; free legal representation regarding any agency decision that engages a victim's right to privacy; and protection of pre-trial therapy and counselling notes for sexual assault victims.

Several stakeholders have argued that the Bill should do more to expressly protect migrant victims.[44] The Victims' Commissioner for London, Claire Waxman OBE, whilst broadly supportive of putting the outlined key principles of the code into legislation, suggested that safe and secure reporting of a crime should be a key principle in the Bill to ensure that a victim is entitled to

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38 The Victims' Commissioner for England and Wales, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p9

39 Explanatory Notes (PDF), p6

40 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p15

41 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p13

42 Criminal Justice Alliance, Written evidence to the Justice Committee, June 2022

43 The Victims' Commissioner, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p9

44 The Justice Committee described this as a "reoccurring theme" in the evidence it received from stakeholders during its pre-legislative scrutiny of the draft Bill. See: Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p9

their rights under the code regardless of their immigration status.[45] The Justice Committee similarly recommended that the Bill be used to introduce provision that would prevent police from sharing the data of victims and witnesses with immigration enforcement so "that entitlements in the Code will not be restricted on the basis of immigration status".[46] The Government has been criticised by representatives of victims, such as Refuge, for rejecting this recommendation.[47]

Migrant victims: data sharing between the police and immigration enforcement

In 2020, the College of Policing, Independent Office for Police Conduct, and the inspectorate investigated information sharing practices between the police and immigration enforcement following a super-complaint made by Liberty and Southall Black Sisters.[48] The investigation found the police did not have a consistent approach for sharing information and victims were fearful that if they reported crimes to the police, their details would be passed to the Home Office and make their situation worse.

The police watchdogs concluded that the current system was causing "significant harm to the public interest", was not serving victims, and was leading to crimes not being investigated.[49] They called for "immediate action" from the Government to safeguard migrant victims and enable them to confidently report to the police.[50]

The Home Office conducted its own review of the legal framework on data-sharing and has proposed an 'Immigration Enforcement Migrant Victims Protocol' to assure migrant victims that they will have relief from immigration enforcement action during any criminal proceedings.[51] Many stakeholders feel this does not go far enough and has called for a complete firewall to block data sharing between police and immigration enforcement that could harm victims.[52]

45 The Independent Victims' Commissioner for London, Claire Waxman: Victims' Bill Consultation Response, 3 February 2022, section 2.2

46 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p10

47 Refuge, Refuge responds to Government's response of the Justice Select Committee's report on the draft Victims Bill, 20 January 2023

48 **Note**: A super-complaint can be made against the police by designated bodies about a particular issue that is - or appears to be - significantly harming the interests of the public. The aim is to identify and address systemic issues rather than individual complaints about conduct.

49 HMICFRS, the College of Policing, and the Independent Office for Police Conduct, Safe to share? Report on Liberty and Southall Black Sisters' super-complaint on policing and immigration status (publishing.service.gov.uk)

50 HMICFRS, Immediate action needed by government and police to ensure vulnerable migrant victims of crime can confidently report to police, 17 July 2020

51 Home Office, Home Office and Police data sharing arrangements on migrant victims and witnesses of crime with insecure immigration status (PDF), December 2021

52 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p10

The charities Why me? and the Restorative Justice Council have also called for the Bill to provide victims with the right to be referred to a restorative justice service for information to ensure agencies do this more consistently.[53] This Justice Committee supported this, recommending that the Bill provide victims with "a legislative right to access Restorative Justice services".[54] The charity Justice, highlighted this is particularly important for children and young adults where restorative justice can be an "especially effective" alternative to putting them "through a gruelling process, that can lead to re-traumatisation" and "lasting impacts".[55]

The process for developing the Victims' Code

Clause 3 would require the Justice Secretary to prepare a draft of the code and consult with the Attorney General on this. The draft code would then have to be published for consultation. The finalised draft would have to be laid before Parliament.

Clause 4 would allow for the Justice Secretary to revise the code. Any major changes to the code would need to go through the process in clause 3 again before they could be brought into force. Subsection (4) would allow minor revisions such as corrections, clarifications or to reflect changes in other areas of practice or law without having to go through the full process.

The then Victims' Commissioner, Dame Vera Baird KC, called for the Victims' Commissioner be given an explicit statutory power to recommend changes to the Victims Code where the Commissioner has found it to be inadequate. She also recommended there be a statutory requirement for the Justice Secretary to consult the Victims' Commissioner on any changes to the code.[56] The Government has not accepted these recommendations.

2.4 Victims' Code compliance (clauses 5-11)

Consequences for not following the Victims' Code

Clause 5 provides that if a person working for a service subject to the code were to fail in their duties to deliver the code, this would **not** in and of itself make them liable to criminal or civil proceedings.

53 Why me?, Will the Victims and Prisoners Bill improve victims' rights to Restorative Justice?, 31 March 2023; and Restorative Justice Council Justice Committee Report backs RJC's concerns about the Victims Bill, October 2022

54 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p24-25

55 Justice, Delivering Justice for Victims, February 2022

56 The Victims' Commissioner for England and Wales, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p41

Duties to raise code awareness and review code compliance

Duties on criminal justice agencies

Clause 6 would place a duty on police forces, the Crown Prosecution Service, court services, prisons, probation services, and Youth Offending Teams (referred to collectively as 'criminal justice bodies') to:

- promote awareness of the Victims' Code to victims they are in contact with through their service and the wider public; and
- keep under review whether their services are being delivered in accordance with the Victims' Code, ie to monitor their compliance with the Code.

Current awareness of the Victims Code

Survey data has indicated that most victims of crime are unaware of the code's existence, which may be a barrier to ensuring compliance and effective delivery of the code. Data from the Crime Survey for England and Wales suggests that in the year ending March 2020 only 23.4% of respondents who had been a victim of crime were aware of the code.[57] The 2021 annual survey by the Victims' Commissioner found just 29% of respondents had heard of the Victims' Code.[58]

These new duties would be organised at a local level by police force area. This would mean in every police force area the relevant criminal justice agencies/services would be subject to delivering the duties, rather than the organisation as a whole at a national level.

To fulfil the duties, the relevant agencies would be required to collect information regarding their delivery of the Victims' Code. They would then have to share that information at a local with the other criminal justice bodies in the same police force area and arrange to jointly review it. They would also be expected to share this information with the relevant local PCCs.

The Justice Secretary would be given powers to make regulations that could require particular information to be collected. The regulations would also be able to set timeframes or periods for when this information must be collected, shared, and reviewed.

Note: Some criminal justice agencies/services, for example probation, are not necessarily coterminous with the boundaries of police force areas.

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57 Office of National Statistics, Table 1, Awareness of the Code of Practice for Victims of Crime, Crime Survey for England and Wales, year ending March 2020

58 Victims' Commissioner, Victims' Experience: Annual Survey (PDF), September 2021, p1

Therefore, they may be required to share information with criminal justice bodies and PCCs for more than one area and to participate in separate reviews for each area.

Duties on Police and Crime Commissioners

Clause 7 places a duty on PCCs (or equivalents) to monitor how the criminal justice bodies in their police force area are providing their services in accordance with the Victims Code. [59] In other words, PCCs would be made responsible for monitoring not just their police force's compliance with the Victims Code, but also that of other agencies and services that fall within their area.

To deliver this duty, PCCs would need to also participate in the reviews of code compliance data that criminal justice bodies would be required to undertake under clause 6. PCCs would also have to provide the Justice Secretary with information that is shared with them by criminal justice bodies on code compliance, including information from these reviews "such as key insights generated from the joint review and the sharing of best practices". [60]

The Justice Secretary would also be given powers to make regulations that set out what information or reports would be required from PCCs and timeframes for this information.

Note: PCCs currently only have statutory responsibility for scrutiny and oversight of their police force's performance, not that of wider criminal justice agencies. There is no obligation currently for other criminal justice agencies to provide data to PCCs. Similarly, there is no power for PCCs to require data from them or to otherwise monitor or analyse the performance of partner agencies working in its area.

The Victims' Commissioner and Code compliance

Section 49(c) of the Domestic Violence, Crime and Victims Act 2004 provides the Victims' Commissioner with a statutory duty to keep the operation of the Victims Code under review. Whilst the Bill would give PCCs the duty to keep code compliance under review at a local level, section 49(c) of the 2004 Act would be retained as it is. This means the Victims' Commissioner would keep overarching responsibility for monitoring compliance with the code. A regular overview of the Commissioner's findings on the operation of the Victims' Code is set out in their annual report.

[59] **Note:** The duty would be placed on Mayor's Offices in areas where they have taken on the responsibilities of a PCC, eg in London.

[60] Explanatory Notes (PDF), p26

Transparency of code compliance

A new feature of the Bill that was not in the draft version, is the requirement under **clause 10** for the Justice Secretary to publish information they consider will enable the public to assess compliance of criminal justice bodies with the Victims' Code. This would be based on the information provided to the Justice Secretary by PCCs (as above). The Bill does not specify any timeframes, frequency, or form for this information to be published in.

There is currently no consistent collection of data relating to the Victims' Code and agency compliance or information on it that is routinely made available to the public.

Support to deliver new duties

Clause 11 would require the Justice Secretary to issue guidance for criminal justice bodies and PCCs on delivering their duties to promote awareness of the code and review compliance with the code. The Explanatory Notes say this guidance is to advise on issues such as ways for promoting awareness of the Victims' Code, how to obtain feedback from children and people with protected characteristics, and likely processes for sharing and reviewing information on code compliance. The Government also plans to include information on the interaction between the role of PCCs and the Victims' Commissioner's duty to keep the code under review.[61]

Reactions and responses: responsibilities for compliance with the Victims Code

Most respondents to the Government's consultation (153 out of 167; 97%) felt that there should be consequences for failures in service delivery towards victims. Responses were mixed about where the accountability should ultimately fall, whether on agencies (33%), individuals (18%) or both (33%).[62]

Whilst in post, the former Victims' Commissioner, Dame Vera Baird, was highly critical of the criminal justice system's delivery of, and compliance with the Victims' Code, describing the "current status of Code 'rights' as merely favours to be delivered if convenient" for the agency.[63] She raised concern that current local monitoring arrangements of the Victims' Code are "beset with difficulties" [64] because of limitations in what data could be extracted from different agencies' systems, the inconsistency in data across agencies and areas, and the varying levels of communication from agencies.[65] The proposed power in the Bill to issue regulations on the information criminal

61 Explanatory Notes (PDF), p28

62 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p36

63 The Victims' Commissioner, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p21

64 Victims' Commissioner, Victims Law Policy Paper: Victims' Commissioner's Proposals for a Victims Law (PDF), 2021 p33

65 As above

justice bodies collect regarding the code is intended to encourage standardisation in the data and allow for comparison across police areas.

In response to the Government's proposals, the then Victims' Commissioner Dame Vera Baird supported a model where "day to day monitoring of Code compliance" sits with PCCs and agreed this should be a statutory duty for PCCs.[66] However, she felt this monitoring responsibility should be at a local level, with a legal requirement on PCCs to then forward this information to the Victims' Commissioner for "national assessment".[67] She also said that PCCs need stronger legal powers to request data from criminal justice bodies on code compliance and that those agencies need to legally be required to respond.

Sophie Linden, the Lead on Victims at the Association of Police and Crime Commissioners (the representative body for PCCs), raised concern that PCCs would not be properly resourced to effectively deliver the proposed new duties or have the necessary powers and analytical support to review and ensure compliance with the code.[68]

In its scrutiny of the proposal, the Justice Committee echoed concerns about providing PCCs with a greater monitoring function where they lack enforcement powers to see it through, stating that the Bill:

> provides no additional powers to PCCs should agencies refuse to provide the data requested or if the data shows evidence of an agency's non-compliance with the Code.[69]

However, the Justice Committee highlighted challenges with giving PCCs this power to direct the work of agencies independent of them as this would be beyond their remit. The Justice Committee recommended instead that the Government set out escalation routes for PCCs where there they have concerns about another agency's delivery of the code or the quality of outcome for victims so that they can raise this with bodies who do have powers to act. The Committee said this should include "the right to make representations to and share data with the inspectorates and the Victims' Commissioner".[70]

2.5 Commissioning support services for victims (causes 12-14)

Note: the following **clauses 12-14** apply to England only and not to Wales**.**

66 The Victims' Commissioner, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p32

67 As above

68 APCC, APCC Lead calls for greater clarity on Victims Bill, 22 June 2022

69 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p29

70 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p29

A new duty to collaborate on commissioning

Victim support services are funded and commissioned by a variety of sources both at a national and local level including Government departments, PCCs, local authorities, health commissioners, and trusts and foundations.

Clause 12 would place a duty on PCCs (or their equivalents), local authorities and integrated care boards[71] to collaborate in their roles commissioning and providing victim support services. The duty to collaborate would be organised by police force area and therefore could involve multiple local authorities and integrated care boards that may wholly or partly fall within a police force area. The converse is also true and a single local authority or integrated care board could have to work with multiple PCCs to deliver their duty.

What counts as a 'victim support service'?

Under subsections (4)-(5), the duty to collaborate would apply to the commissioning and provision of services that support victims of domestic abuse, sexual offences, and serious violence. **Note:** It does not include services that provide accommodation-based support to domestic abuse victims. The Government explained this is because accommodation-based services are already covered by separate legislation under part 4 of the Domestic Abuse Act 2021 which places a duty on local authorities to assess the need for, and prepare strategies to, provide support for domestic abuse victims in safe accommodation.[72]

Delivering the new duty

As part of this duty, **clause 13** would require the PCC, local authorities and integrated care boards of a police force area to develop and implement a joint strategy for delivering their functions with regards to commissioning, and ensuring the provision of, relevant victim support services in the area. The strategy would also need to set out how they are fulfilling, or intend to fulfil, their new duty to collaborate.

In preparing the strategy, the authorities would need to consult with people that represent the interests of victims and those providing victim support services. They would also need to consider any needs assessments that have already been carried out for victims (eg as part of previous commissioning processes). They would be expected to have a particular focus on the needs of children and victims with protected characteristics as they "may experience barriers to using generic support services".[73] The authorities must also consider existing victim support services "to avoid duplication".[74]

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71 Integrated health boards were recently established under the Health and Care Act 2022. They are statutory bodies that bring together relevant parties that are involved in the planning and provision of NHS services in a local area. They were set up to collaboratively deliver health plans and outcomes for their population.

72 Minister of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p51

73 Explanatory Notes (PDF), p30

74 Explanatory Notes (PDF), p30

The strategy must be published and kept under review. Subsection (4)(c) requires that the strategy be revised from 'time to time' but does not specify timeframes or frequency for this.

Clause 14 would require the Justice Secretary to issue guidance for PCCs, local authorities and integrated care boards on delivering their duty to collaborate and developing the corresponding strategy. This guidance would "advise on issues such as local partnership structures that may work for collaboration and how joint activity may be convened in practice."[75]

Reactions and responses: is the proposed duty too much or not enough?

There is currently no framework or structure in place to bring together the various bodies who commission or provide support services for victims. The Government said funders don't always work together "without specific incentives or top-down national frameworks or requirements"[76] to do so. This "siloed commissioning"[77] can then mean that victims are not always able to "access the right support in their local area and … can find the range of services they access [are] disjointed and difficult to move between.[78]

In the Government's response to its pre-legislative consultation, it noted that stakeholders raised particular concerns about:

- the diversity of services and there not being enough tailored support to meet specific needs;
- the resourcing and quality of services causing problems such as long waiting lists and poor staff training; and
- poor awareness of the support available both among victims and professionals, meaning victims do not always get signposted or referred to appropriate services or know to self-refer.

The Government aims to address these issues with the duty to collaborate by encouraging funders to better consider what services there already are, what the right services would be, and how best to target resources and work more effectively together to meet need.[79] The Children's Commissioner welcomed the proposed duty, stating that the duty would be:

75 Explanatory Notes (PDF), p30-31

76 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p46

77 As above

78 As above, p44

79 Alongside this Bill, the Government has committed to further work in its Victims Funding Strategy to improve the commissioning of victims services. See page 14 of the Library's briefing on Draft Victims Bill for more information.

> very important to ensure that there is clear and accountable join-up to support children's (often complex) journeys through the police, justice, and health systems, and beyond.[80]

Creating bureaucracy

There were some concerns raised that the duty to collaborate would create "added complexity and a more bureaucratic approach to commissioning", with some respondents feeling that coordination issues could arise if roles and responsibilities are not clear.[81] The Local Government Association also said there is a need for more consistent commissioning frameworks across Government.[82]

The Justice Committee echoed these concerns, noting the risk that the legislation "simply adds new duties to an already crowded landscape".[83] It also noted the additional practical difficulties of collaborating and developing a single strategy for a police force area when PCCs, local authorities and health boards "are rarely coterminous" in the areas they cover.[84] In its consultation response, the Government said to support relevant authorities, further detail on the practical issues of delivering the duty will be provided in statutory guidance.[85]

The funding to deliver services

Many responses called for increased investment in services, with some raising concern that there would be "insufficient funding to deliver the duty".[86] Responding to the draft Bill, London Councils said "the duty would not introduce any more funding for the commissioning of services" when "pressures on services remain high, with higher demand than services available".[87] They also said the draft Bill:

> would leave the gap between safe accommodation based services for survivors of domestic abuse, which receive statutory funding, and community based services for such victims, which do not.[88]

The Domestic Abuse Commissioner, Nicole Jacobs, agreed with this and told the Justice Committee that "Services in England and Wales are unable to meet demand" and that "there is a big gap in the realism about the resourcing in this Bill".[89]

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80 The Children's Commissioner for England, The Children's Commissioner will give evidence on the draft Victims Bill to the Justice Select Committee | Children's Commissioner for England, 10 June 2022

81 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p45

82 LGA, LGA response to the Government's consultation: Delivering justice for victims, 3 February 2022

83 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p33

84 As above

85 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p50

86 As above, p45

87 London Councils, Draft Victims' Bill Briefing, 7 June 2022

88 As above

89 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p34

The Government has acknowledged that demand for victims' services currently "outstrips supply" but has not addressed specific funding pots within the Bill.[90] More recently, responding to the new Bill, the End Violence Against Women (EVAW) coalition said without addressing this there is a risk of "raising victims' awareness of their rights only to leave them unable to access them due to the relevant services already working at full capacity".[91]

Requirements to (co)commission

Both the then Victims' Commissioner and the Domestic Abuse Commissioner argued that the duty should go further by either requiring commissioning of community-based services or requiring co-commissioning.[92] The Government said it engaged with commissioning bodies that fund victims' services who argued against a duty to co-commission. These bodies reportedly highlighted issues with the feasibility of this due to inconsistent commissioning timelines, different approaches, and a lack of capacity to co-commission.[93]

There was a range of additional suggestions to improve the funding landscape for victim services and encourage collaboration, including national guidance and minimum requirements for funders, a national oversight mechanism, multi-year and ring-fenced funding to improve joint working, and more engagement mechanisms for smaller 'by and for' services.

Other victims' services

EVAW also said the Bill does not sufficiently address "inequalities in access to specialist support and justice for marginalised" women, including Black and minority ethnic women, migrant women, women with disabilities, and LGBT+ victims and survivors.[94] Refuge echoed this, stating that "the lack of any recognition of the need to prioritise specialist support for victims in this Bill" will put services that support these groups at greater risk.[95] In her response to the Government's pre-legislative consultation the Domestic Abuse Commissioner called for provision that would ring-fence funding for these specialist services alongside clearer commissioning guidelines.[96] The Justice Committee recommended that the duty to collaborate should include providers of children's services to ensure the needs of child victims are met.[97]

The LGA noted the focus on victim support services for domestic abuse, serious violence and sexual violence. It said that it is "vital to ensure that the

90 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p44
91 Victims and Prisoners Bill 'won't deliver what victims need', say campaigners, Police Professional, 29 March 2023
92 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p45
93 As above, p46.
94 Victims and Prisoners Bill 'won't deliver what victims need', say campaigners, Police Professional, 29 March 2023
95 Victims and Prisoners Bill 'won't deliver what victims need', say campaigners, Police Professional, 29 March 2023
96 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p47
97 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p32

Bill does not lose sight of the need to ensure victims of all crimes are supported effectively".[98]

2.6 Independent domestic and sexual violence advisors (clause 15)

Statutory guidance on the role of IDVAs and ISVAs

Clause 15 would place the role of IDVAs and ISVAs in legislation, giving them statutory footing for the first time. It would do this by placing a requirement on the Justice Secretary to issue guidance on the roles and requirements of IDVAs and ISVAs.

Subsection 15(2) would define:

- IDVAs as "a person who provides a relevant service to individuals who are victims of criminal conduct which constitutes domestic abuse"; and
- ISVAs as a "person who provides a relevant service to individuals who are victims of criminal conduct which constitutes conduct of a sexual nature".

"Relevant service" refers to support provided to someone specifically in relation to them having been the victim of domestic abuse or a sexual offence.

The current role of IDVAs and ISVAs

There is currently no one single definition or standardised job description for IDVAs or ISVAs. Their role, the exact functions they perform, and their remits can vary. In general, ISVAs and IDVAs act as a single point of contact for victims, providing them with advocacy, impartial advice, and continuity of care. If the victim is going through the criminal justice system, their ISVA or IDVA should support them through this and be able to engage with agencies on their behalf for updates on their case.

The roles can be based in a variety of organisations (often third sector providers) and work in partnership with a range of agencies, organisations, and victim and survivor groups. They are independent of statutory agencies and the criminal justice system so that they can be an independent voice for the victim.

[98] LGA, LGA responds to the publication of the Draft Victims Bill, 25 May 2022

The statutory guidance is intended to set out "recommended minimum expectations and best practice"[99] for IDVAs and ISVAs and working with them. Subsection (4) would require the guidance to cover:

- the role of IDVAs and ISVAs and the services they provide to victims, including a focus on children and victims with protected characteristics;
- how IDVAs and ISVAs should work together with other practitioners and professionals in the criminal justice system or those that otherwise work with victims; and
- what training and qualifications IDVAs and ISVAs must have.

IDVAs and ISVAs would be required to have regard to the guidance in their work, as would any other person working in the criminal justice system with victims of domestic abuse or sexual offences.

Reactions and responses: supporting consistency or restricting services

The Government's consultation highlighted challenges ISVAs and IDVAs face working with other agencies and practitioners and a lack of understanding about their role and remit. This was felt to partly be due to a lack of standardisation and professionalism in the roles, leading to a lack of consistency in the services they provide.[100]

By placing ISVAs and IDVAs in legislation, the Government aims to raise the profile of these roles amongst criminal justice practitioners and demonstrate their value. Defining what ISVAs and IDVAs are and providing statutory guidance on the roles is intended to provide greater clarity and standardisation in the roles. For example, on what qualifications and expertise to expect from the role and what should fall within their remit and responsibilities. The Government hopes this will address some of the barriers facing ISVAs and IDVAs in their work and encourage greater engagement and support for their roles from criminal justice professionals. It also hopes this will drive more consistency in the quality of provision.

46 out of 58 respondents to the Government's consultation on this issue "agreed that defining IDVA roles would have a positive impact, with similar agreement on the benefits of defining ISVA roles."[101] Responses in favour of this approach felt the benefits could also include improved "referral pathways" and "evaluations". Some also felt that defining standards would serve as an opportunity to "re-assess the remit of IDVA and ISVA roles to

99 Explanatory Notes (PDF), p31
100 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p59
101 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p59

ensure they are fit-for-purpose, which includes delivering more inclusive, needs-based support."[102]

However, some were more cautious, raising concern that the proposals could impact the flexibility to be innovative, respond to demand, deliver their varied roles and also remain "independent and autonomous."[103] The then Victims' Commissioner said it was important that no single definition excludes the roles that 'by and for' specialist services provide.[104] Responding to the Bill, Women's Aid echoed these concerns stating:

> This Bill fails to recognise that the role of the Independent Domestic Violence Advisor (IDVA), while hugely important, is just one type of victim support. Survivors desperately need access to a range of options – including holistic support and intersectional advocacy from organisations led 'by and for' black and minoritised women, deaf and disabled women, and LGBT+ victims, which are already chronically underfunded.[105]

To address these concerns, the Explanatory Notes state that the definitions provided in the Bill have been kept "deliberately broad in view of the wide range of support provided by these advisors."[106] To not limit the scope of services which might be provided, it also does "not prescribe eligibility for advisor services."[107]

The then Victims' Commissioner also raised some concerns about the cost and resource implications of any training accreditation processes for roles to meet the statutory guidance.[108] The Justice Committee reiterated concerns that advocacy services are already facing "unmanageable referral levels and caseload" and require additional funding to meet the extra "strain" that would be put on them by the provisions in the Bill.[109]

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102 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022

103 Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022

104 The Victims' Commissioner for England and Wales, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p77. **Note:** By and for services refer to services that are set up and generally delivered by those from the same cohort they are for. These roles may work to provide specialised advocacy support to a specific group, such as services for deaf and disabled people or particular ethnic groups.

105 Victims and Prisoners Bill 'won't deliver what victims need', say campaigners, Police Professional, 29 March 2023

106 Explanatory Notes (PDF), p31

107 As above

108 The Victims' Commissioner for England and Wales, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p82

109 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p41

2.7 Role of the Victims' Commissioner (clause 16)

Strengthening the Victims' Commissioner's role

The role of the Victims' Commissioner was established in 2004 by the Domestic Violence, Crime and Victims Act 2004 to promote the interests of victims and witnesses of crime.[110] The role is independent of Government and works to raise awareness of issues faced by victims, conduct research, promote good practice, and hold agencies to account on their treatment of victims.[111]

Clause 16 would amend the 2004 Act to enable the Victims' Commissioner to:

- make recommendations at any point in time, rather than just in their annual report as is currently the case;
- direct recommendations in their reports to any authority within the Victim Commissioner's remit; and
- lay their annual report before Parliament.

The Bill would also create a duty for criminal justice agencies, Government departments, and criminal justice inspectorates to respond to recommendations made to them by the Victims' Commissioner. They would have to publish a written response within 56 days setting out what actions have, or will be, taken in response to the recommendation, or why action will not be taken.

Reactions and responses: what powers should the Victims' Commissioner have?

The most recent Victims' Commissioner, Dame Vera Baird KC, and her predecessors have called for these changes to support the Commissioner in fulfilling their duties. These enhancements to the role are expected to improve the Commissioner's ability to raise the profile of victims' issues, ensure more engagement from criminal justice agencies, and encourage greater take-up of the Commissioner's recommendations to drive change.[112]

However, the Bill stops short of implementing Dame Vera Baird's full recommendations for strengthening the role. This included calls to enhance the Victims' Commissioner's research and engagement functions and support to consult directly with victims and other bodies.[113] The original legislation

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110 Even though the role established in 2004 by, the post was not filled until 2010 by Baroness Louise Casey.

111 The Victims' Commissioner, What we do, [last accessed: 2 May 2023]

112 The Victims' Commissioner, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022, p39

113 As above, p40-41

that established the Victims' Commissioner provided for the role to undertake or arrange research, but this was repealed in 2009. It has been argued this restricted the Commissioner's role in conducting specialist research and identifying best practice.[114]

There is also currently no statutory obligation to compel agencies to co-operate with the Commissioner, which it has been argued enables them to treat doing so as a "favour" or a "matter of convenience".[115] Dame Vera as a result called for a legal obligation on agencies to comply and co-operate with the Victims' Commissioner's work, including a requirement to provide data on request. She also said there should be an explicit statutory power for the Victims' Commissioner to recommend changes to the law, be consulted on changes to the Victims' Code and be empowered to recommend changes to the code where it is found to be inadequate.[116]

Role of criminal justice inspectorates (clauses 17-20)

Clauses 17-20 would amend the various pieces of legislation that set out the remit of each criminal justice inspectorate to add a requirement for each of them to consult with the Victims' Commissioner regarding their work programmes and frameworks, ie what they each plan to inspect and how.

The Bill would also enable relevant ministers (namely the Secretary of State for Justice, the Home Secretary, and the Attorney General) to require the criminal justice inspectorates in their joint thematic inspection programmes include regular inspections of matters relating to the treatment and experience of victims. The ministers would also be able to, at specific times, require that specific matters regarding the treatment and experiences of victims are looked into.

Requiring joint inspections on victims' issues is intended to encourage a "more rounded examination of issues that cut across the whole criminal justice system" rather than each inspectorate working in siloes.[117]

2.8 Recourse for victims to raise complaints (clause 21)

Simplifying the complaints process

Under the Victims' Code, a victim is entitled to make a complaint if they feel their rights under the code are not being met. In the first instance they need

[114] The Victims' Commissioner, Constitutional powers of the Victims' Commissioner for England and Wales, 3 December 2020

[115] As above

[116] The Victims' Commissioner, Response to "Delivering justice for victims: A consultation on improving victims' experiences of the Criminal Justice System" (PDF), February 2022,

[117] Ministry of Justice, Delivering justice for victims: consultation response (PDF), May 2022, p36

to direct their complaint to the agency or service it is about. If the victim remains dissatisfied, the complaint can be escalated to the Parliamentary and Health Service Ombudsman (PHSO) to investigate.[118] However a victim cannot complain directly to the PHSO themselves. They must contact their MP who can then refer the complaint to the PHSO on their behalf. This is referred to as the 'MP filter'.[119]

The PHSO can handle complaints against public bodies including the Crown Prosecution Service, HM Courts and Tribunals Service (HMCTS) and HM Prison Service but excludes judges, magistrates and the police.[120]

Clause 21 would amend the Parliamentary Commissioner Act 1967 which sets out the remit of the PHSO in order to remove this 'MP filter' for complaints related to the Victims' Code. The MP filter would also be removed for complainants who feel they have experienced "sustained injustice due to the maladministration of a Government department or other authority" within the remit of the PHSO.[121]

This would enable the complainant to take their complaint directly to the PHSO without having to go through their MP. A complainant could also authorise a 'suitable representative' to make the complaint on their behalf (which could still be an MP). Complaints would still generally need be raised with the PHSO within 12 months of the complainant becoming aware of the issue in question, as is currently the process.

Reactions to changing the complaints process

The majority consensus to the Government's pre-legislative consultation was that the complaints process for victims needs to be simplified and more transparent. Several stakeholders – including the PHSO itself – had called for the removal of the MP filter, saying that it "acts as a hurdle to accessing justice".[122] The PHSO believes the filter is linked to the low number of cases they receive from victims of crime because it creates confusion and delays, and can lead to victims being denied access to the service if an MP does not refer the complaint.[123] The Justice Committee also welcomed removal of the MP filter[124] but urged the Government to allow victims to raise complaints in formats other than in writing and to take steps to increase the visibility of the PHSO's role amongst victims of crime.[125]

118 PHSO, The Victims' Code, [last accessed: 2 May 2023]
119 As above
120 Ministry of Justice, Victims placed at heart of justice system under radical shakeup, 29 March 2023
121 Explanatory Notes (PDF), p33. All other types of complaint that go to the PHSO for investigation would remain unchanged and would still have to be made via an MP.
122 PHSO, Written evidence from the Parliamentary and Health Service Ombudsman (PDF), 21 June 2022, p1
123 PHSO, PHSO response to MoJ Victims' Bill consultation (PDF), February 2022, p2
124 Justice Committee, Pre-legislative scrutiny of the draft Victims Bill (PDF), 30 September 2022, p47
125 As above

3 Part 2: Victims of major incidents

Part 2 of the Bill would introduce a power for the Justice Secretary to appoint public advocates to provide support for victims of major incidents (and the families of those bereaved by major incidents) in the aftermath of the event and any investigations.

3.1 Background: Public advocates for victims of major incidents

Attempts to introduce legislation for a public advocate

In 2014 - and again in 2015 - Lord Wills (Labour) introduced two consecutive Private Members Bill that attempted to legislate for an independent public advocate.

The Public Advocate Bill [HL] introduced on 3 June 2015 received second reading on 29 January 2016 and proposed that the Lord Chancellor appoint a person to act as a public advocate to provide advice to representatives of those deceased after major incidents and keep them updated on the progress of any investigation into the incident.

The Advocate would also have been able to set up a Panel and register it as a "Data Controller" under the Data Protection Act 1998. This would have allowed it to review documentation related to the incident if requested to by the survivors or representatives of the deceased.[126]

Under the proposals in this Bill, the advocate would have been able to take it upon themselves to exercise their functions without having to be asked by the Lord Chancellor as long as certain conditions were met. For example, if there was large-scale loss of life and a request for them to do so by a certain proportion of the survivors or those representing the deceased.

At second reading, Lord Wills said the Bill was informed by his experiences devising the Hillsborough Independent Panel.[127] He argued there was a need for an independent and appropriately resourced advocate for the bereaved as a way to collect the views of the bereaved and improve transparency.[128]

126 For a summary of the provisions, see House of Lords Library in Focus LIF 2016-0008, Public Advocate Bill [HL] HL Bill 22 of 2015-16 (PDF)

127 HL Deb, Public Advocate Bill: second reading, 29 January 2016, c1519

128 As above, c1521

Lord Faulks, then Minister of State at the Ministry of Justice, acknowledged that there were "significant issues in the way in which the Hillsborough families were treated",[129] but said the Government had already taken steps to support the needs of families. Lord Faulks pointed to reforms to the coronial process under the Coroners and Justice Act 2009 which allowed coroners to designate bereaved people as an 'interested person' and improved their rights to request documentation.[130] He also highlighted the statutory requirement for fairness under the Inquiries Act 2005 that chairs of public inquiries are subject to.[131]

Lord Faulks concluded that "much of what is in the Bill setting out what a public advocate would do is already happening in the existing processes" and there was "no need for the public advocate role that the Bill envisages".[132] The Bill did not progress beyond Second Reading.[133]

Maria Eagle (Labour) had also sought to introduce a Public Advocate Bill into the House of Commons several times since 2016. Her most recent attempt, a presentation Bill - Public Advocate (No. 2) Bill – introduced on 20 June 2022, reached second reading which took place on 15 July 2022. Maria Eagle said the Bill - which contained the same key proposals as Lord Wills' earlier bill - would ensure families are central to any response to public disasters and give them agency by ensuring the advocate is available if they wish it. She also said it the model proposed in the Bill would improve transparency, noting:

> As a data controller, the advocate would be able to establish a panel to review all documentation and produce a report at a much earlier stage than the 23 years it took for Hillsborough. So it would be cheaper and the process would be shorter. That enforced transparency would quickly put a stop to any venal attempts to deflect blame ...[134]

Responding for the Government, Tom Pursglove, then Minister of State at the Ministry of Justice, said the Government supported the aims of the Bill, but not the proposals contained in it:

> I place on record that the Government support the overriding objective of the Bill and are sympathetic to its aims. We believe that it is a welcome addition to the debate, but I am afraid that we do not consider the specific proposals in the Bill to be the best way to provide the support of an independent advocate.[135]

129 HL Deb, Public Advocate Bill: second reading, 29 January 2016, c1530

130 As above

131 As above, c1531. See also: section 17(3) of the Inquiries Act 2005

132 HL Deb, Public Advocate Bill: second reading, 29 January 2016, c1531

133 Note: In June 2022, Lord Wood (Labour) introduced another Private Members Bill - Public Advocate Bill [HL Bill 25] – to legislate for an independent public advocate. This Bill contained broadly the same provisions as Lord Will's bill but has not received second reading.

134 HC Deb Public Advocate (No. 2) Bill: second reading, 15 July 2022 c665

135 As above, c669

Review of the experience of families affected by the Hillsborough disaster

In April 2016, Theresa May, then Home Secretary, commissioned Rt Revd Bishop James Jones to produce a report detailing the experiences of families bereaved by the Hillsborough disaster.[136] Before its final findings were laid before Parliament in November 2017, the Conservative Party's 2017 manifesto committed to establish an independent public advocate:

> To ensure that the pain and suffering of the Hillsborough families over the last twenty years is not repeated, we will introduce an independent public advocate, who will act for bereaved families after a public disaster and support them at public inquests.[137]

The Government reiterated this intention in the Queen's Speech on 21 June 2017.[138] However, no Government legislation was introduced during the 2017-19 Parliament.

In his report, Bishop James welcomed the commitments made by the Government to create an independent public advocate, which he said would "fill a real gap in the provision of support to bereaved families".[139] However, he urged caution in defining the type of event that might engage a public advocate:

> … to ensure that the pain and suffering of the Hillsborough families is not repeated I would caution against the adoption of too narrow a definition of 'public disaster'. As this report shows, many of the experiences of the Hillsborough families are very sadly also reflected in the experience of families bereaved through other forms of public tragedy where the state has fallen short.[140]

Bishop James envisaged an independent public advocate having several roles in the aftermath of a public disaster, including:

- referring bereaved families to support in their area:[141]
- engaging with the media, press regulators and bereaved families to ensure the bereaved are treated with dignity and respect;[142] and

136 HC Deb, Hillsborough, 27 April 2016, c1436

137 Conservative and Unionist Party, Forward, Together. Our Plan for a Stronger Britain and a Prosperous Future (PDF), 2017, p44

138 HL Deb 21 June 2017 c6

139 The Right Reverend James Jones KBE, A report to ensure the suffering of the Hillsborough families is not repeated (PDF), 1 November 2017, p3

140 As above

141 The Right Reverend James Jones KBE, A report to ensure the suffering of the Hillsborough families is not repeated (PDF), 1 November 2017, p33

142 As above, p36

- ensuring that bereaved families are kept fully informed.[143]

Government consultation and proposals for legislation

In 2018, as part of the Government's Victims Strategy, it launched a consultation on proposals for an independent public advocate.[144] The consultation addressed a number of matters, including the need for a public advocate, the type of support it could provide, the circumstances under which it could be required and how it could operate.

The consultation closed on 3 December 2018, but a summary of the responses received was not published until 1 March 2023. The summary also contained the Government's conclusions on how the public advocate would operate. The Government said that for "qualifying events', the advocate would:

- be activated by the Justice Secretary (with consideration given to the severity, scale and impact of the event);
- have a panel structure (the size of which would be determined by the scale of the event);
- support the injured in addition to the bereaved, including those who suffer mental injuries because of being present at the event;
- be involved in a range of investigation types;
- provide reports to Ministers, to be laid before Parliament where appropriate; and
- have the power to make non-binding recommendations to Government[145]

The advocate would be expected to be impartial and not have been involved in past events. The role would also operate independently of the Government. The Ministry of Justice said it would establish a pool of individuals with appropriate skills from which a panel would be composed, based on the scale, location and impact of an event.[146]

Alongside publishing conclusions of its consultation, Dominic Raab, then Secretary of State for Justice and Lord Chancellor, made an oral statement to the House of Commons, confirming the current Government planned to legislate "as soon as possible" to introduce an Independent Public Advocate. He said this:

143 The Right Reverend James Jones KBE, A report to ensure the suffering of the Hillsborough families is not repeated (PDF), 1 November 2017, p70

144 Ministry of Justice, Establishing an Independent Public Advocate, 10 September 2018

145 Ministry of Justice, Establishing an Independent Public Advocate. Summary of consultation responses (PDF), 1 March 2023, pp2-5

146 As above, p5

> ... will go some way to making good on the Government's longstanding promise to ensure that the pain and suffering of the Hillsborough victims, and other victims, is never repeated".[147]

Reactions to part 2 of the Bill

Dominic Raab's statement that the Government would introduce legislation for an independent public advocate was broadly welcomed by MPs. However, the proposals were criticised in several areas.

Steve Reed, Shadow Secretary of State for Justice, said the Government had missed an opportunity to create a fully independent public advocate that could give "victims the voice that they need and the power to make it heard":

> [The] proposals do not go far enough and will be too weak, as they stand, to prevent future cover-ups. The public advocate needs to be a fully independent, permanent figure that is accountable to the families, not a panel of advisers appointed as a signposting service by the Government if they see fit.[148]

He went on to argue the importance of having sufficient powers to access data:

> It is critical that the public advocate has the full power of data controller, not just the power to make representations, as we heard from the Secretary of State. That means having the power to access all data, communications, documents and other information to torpedo cover-ups before they even happen. We know from the Hillsborough Independent Panel that the existence of such powers would be a massive deterrent to future cover-ups.[149]

These concerns were echoed by former Prime Minister, Theresa May, who particularly noted that victims would not be able to initiate the public advocate themselves:

> One [issue] is the question of whether the families, victims and survivors will be able themselves to initiate the independent public advocate, so that they are not relying on the Government to do that for them. Certainly, in the case of Hillsborough, it was the fact that the state and state authorities shut their doors to people that led to the 34 years' wait for any answers for the families.[150]

Dominic Raab stated the Government would allow victims, families and the bereaved to have the power to call for an independent public advocate, but it would be for the Government to decide what form it would take.[151]

While welcoming the decision to legislate, Maria Eagle (Labour) expressed her disappointment at the proposals the Government set out:

147 HC Deb, Independent Public Advocate, 1 March 2023 cc790-92
148 As above, c793
149 As above
150 As above, c794
151 As above, cc794-795

> His proposed public advocate would not be independent, would not be a data controller, and would not be able to act only at the behest of families. It would be directed by the Secretary of State. It would not have the power to appoint independent panels such as the Hillsborough independent panel—but at a much earlier stage following a disaster than the 23 years it took us to get that report out—and it would not have the power to use transparency to get at the truth at an early stage and torpedo the cover-ups that public authorities set about undertaking in the aftermath of disasters. This must be something that the families themselves can initiate and use to get at the truth at an early stage.
>
> The public advocate having the power to compel—to produce documentation and shine the light of transparency on what public authorities have done in the immediate aftermath of a disaster—would stop cover-ups. It would mean people not still having to fight to get at the truth 34 years later.[152]

The Chair of the Justice Committee, Sir Robert Neill (Conservative), urged the Government to consider the implications of access to legal representation following major incidents:

> The former Prime Minister's point about the risk of cover-ups by those in authority is an important one. That is why, while I very much welcome what the Secretary of State has said—it is an important step—I hope that when engaging on how best to refine and advance these proposals, he looks again at the Justice Committee's recommendation that there should be an extension of legal aid availability. Although the situation has already improved, we should be extending non-means-tested legal aid to all cases where there are mass fatalities, or where public bodies are potentially at fault. It is not fair—there is no equality of arms—when those public bodies are represented by teams of lawyers, but the bereaved families have to rely on sometimes getting legal aid and sometimes not, or on pro bono representation. Equality of arms would surely mean representation as a matter of right in those cases.[153]

Alison McGovern (Labour) sought clarity on whether the Government planned to impose a statutory duty of candour on public authorities to cooperate with official investigations and inquiries (a so-called 'Hillsborough Law'):[154]

> I … want to ask the Secretary of State about extending the duty of candour to public servants so that they have to proactively tell the truth, because without this information we will … always be liable to these cover-ups. I saw it through all of the process with Hillsborough, with Lakanal House, with Grenfell and with the covid inquiry—again and again. I want the Secretary of State to understand this issue properly; it is about the truth. Will he explain what he is going to do on the duty of candour?[155]

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152 HC Deb, Independent Public Advocate, 1 March 2023, c795

153 As above, c796

154 The omission from the Bill of provisions to impose a statutory duty of candour has been criticised by numerous Hillsborough families. See Hillsborough campaigners criticise proposal for new victims' advocate role, The Guardian [online], 1 March 2023

155 HC Deb, Independent Public Advocate, 1 March 2023, c798

The Justice Secretary said he understood the significance of a duty of candour, but that taking action on an independent public advocate, while only a partial step, was necessary to restore confidence:

> I have never said that the IPA is the whole picture; I said that it is a partial but important step that we are taking. It is better to get on with it, because after so long, one thing that I get from the communities, victims and survivors is the need to get on with tangible action—that is the way we will restore confidence. Thy [sic] duty of candour was included in the report by Bishop James Jones, and therefore it is right that is part of the Home Office response. As has been set out previously, the Home Office will publish that response in the spring, and of course it will cover that issue.[156]

3.2 Appointing a public advocate (clauses 24-26)

The power to appoint an advocate

Clause 24 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".

Victims

Clause 24(7) would define "victims" for the purposes of Part 2 of the Bill. Victims would be individuals directly "harmed" by an incident (whether or not that harm is considered "serious"),[157] and close family members or close friends of those who have died or been caused serious harm by the relevant incident.

Those individuals directly harmed would be construed to have suffered physical, mental and emotional harm or injury as a result of being present at a major incident. Close friends would be treated as a victim for the purpose of receiving support from an independent public advocate only in the absence of a suitable family member.[158]

Major incident

Subsection (2) of clause 24 would define "major incident" for the purposes of engaging the statutory regime. A major incident would be one that occurs in England or Wales and appears to the Secretary of State to have caused the death of, or serious harm to, a significant number of individuals.

A major incident would likely encompass events "on a similar scale or magnitude" to the Hillsborough disaster, the Manchester Arena bombing and the Grenfell Tower fire.[159]

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156 HC Deb, Independent Public Advocate, 1 March 2023, cc 798-799
157 Explanatory Notes (PDF), p35, para 565
158 As above, p35, para 566
159 Explanatory Notes (PDF), p34, para 561

Harm and serious harm

Subsection (3) of clause 24 would define the term "harm" as arising from a major incident to include physical, mental or emotional harm. Harm would have arisen in consequence of being physically present at the incident in question.[160]

"Serious harm" as caused to victims, close family members or close friends of victims would not be defined. There would be no (presumably statutory) test for harm.[161]

Qualified and appropriate

Subsection (4) of clause 24 would give the Secretary of State the power to appoint an individual as an advocate in relation to a major incident where that individual would be "qualified" to act and "appropriate" to appoint in connection with the particular incident. Subsection (5) of clause 24 would list criteria by virtue of which an individual would be qualified to act, including:

- academic, professional or other qualifications, experience or skills
- their relationship with a geographical or other community.

Subsection (6) of clause 24 would set out factors to be considered by the Secretary of State in assessing whether an individual would be appropriate to appoint. Such factors would include:

- where geographically the incident occurred
- the communities affected by the incident
- the relevance of an individual's qualifications, experience or skills to the incident and to geographical and community considerations.

In assessing both qualification and appropriateness, the Secretary of State would have discretion to consider any other relevant matters, thus making the list of criteria non-exhaustive.

Terms and termination of an advocate

Clause 25 would provide for the appointment of advocates.

Terms of appointment

Under subsection (1), terms of appointment would be agreed between the Secretary of State and the relevant individual. Such agreement would take place before that individual would be considered for appointment, subject to

[160] As above, p34, para 562
[161] As above

variation by the Secretary of State with the agreement of potential appointees.[162]

Termination of appointment

By subsection (2), the Justice Secretary of State would be able to terminate the appointment of an advocate on grounds they "consider appropriate", while an advocate would be able to give notice of resignation. Alternatively, an appointment would be ended in accordance with its terms.

Pay, remuneration and secretarial support

Subsection (3) would give the Secretary of State the discretion to pay an advocate appropriate remuneration, pay reasonable costs incurred in the exercise of their functions, or other appropriate allowances or gratuities. Payment of costs would include indemnifying an advocate in relation to reasonable costs of legal proceedings connected to the exercise of their functions.[163]

Subsection (4) would allow, though not require, the Secretary of State to make secretarial support available to the advocate. Provision would be via a secretariat, based in the Ministry of Justice, available upon appointment.[164]

No immunity or privileges

By subsection (5), an advocate would not be regarded as a servant or agent of the Crown and so would not enjoy the status, immunity or privilege conferred by the Crown.

Appointing multiple advocates

The Government envisages that for larger scale incidents, it would likely be necessary or desirable to appoint more than one advocate, as the number of victims requiring support would be larger. In such cases, those advocates appointed would form a panel.[165]

Clause 26 would apply where the Secretary of State appointed more than one advocate in respect of the same major incident.

Provisions would permit the Secretary of State to appoint a "lead advocate". Subordinate advocates would be required to have regard to directions given by the lead when exercising their functions in relation to the incident to avoid duplication of activity.[166]

162 Explanatory Notes (PDF), p35, para 568
163 As above, p35, para 570
164 As above, p35, para 571
165 As above, p35, para 573
166 As above, p36, para 576

3.3 The functions of a public advocate (clauses 27-29)

Providing support to victims

Clause 27 provides for the functions of an Independent Public Advocate.

Context of support

By subsection (1), an advocate would have the discretion to provide support to victims of a major incident, "as the advocate considers appropriate". Such support would relate to:

- the aftermath of the incident
- related investigations by a public authority (including non-statutory inquiries)
- an inquest under the Coroners and Justice Act 2009 where the death may have been caused, or contributed to, by the incident, or
- a related inquiry under the Inquiries Act 2005.[167]

Nature of support

Subsection (2) would provide (non-exhaustively) for the types of support advocates would have the discretion to give.[168] These would include:

- helping victims to understand the actions of public authorities in relation to the incident and how their views can be considered
- informing victims about sources of support or advice in connection with the incident
- communicating with public authorities on victims' behalf in relation to the incident
- assisting victims to access documents or other information.

Victims' representatives

Subsection (3) would provide for situations in which one or more victims, or persons who are not victims as defined under Clause 24(7), wish to have their interests represented by another. This subsection would allow an advocate to provide support to persons acting as representatives, either in an official or unofficial capacity. The Government suggests such a person could be

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167 Explanatory Notes (PDF), p36, para 579-580

168 Clause 27(7) of the Bill would provide that "Nothing in this Part confers a right on any person to require an advocate to provide support, or support of a particular type, to that person or any other person."

appointed as an advocate but anticipates that such instances would be rare.[169]

Persons who would act as representatives are not defined for the purposes of this subsection, although the Explanatory Notes to the Bill envisage such a person might be a community leader.[170]

Restrictions relating to representatives

Under subsection (5), persons under 18 years of age would not be able to represent victims.

A person who, by acting as a representative, would be carrying on a legal activity would also be prohibited from acting as a representative.[171] In simple terms, lawyers would not be permitted to represent victims seeking support from an independent public advocate.

By subsection (4), an advocate would only be able to provide support to victims under the age of 18 via a representative, most likely their legal guardian.[172]

Restrictions relating to advocates

In exercising their functions to support victims, a public advocate would not under subsection (6) be allowed to:

- carry on a legal activity
- provide financial support to any person, or
- provide health care to any person.

Inquests and "interested persons"

Section 47(2) of the Coroners and Justice Act 2009 defines categories of "interested persons" in relation to a deceased person or an investigation or inquest into a person's death under Part 1 of the 2009 Act.

Interested persons have certain rights during a coroner's investigation or inquest. For example, where a senior coroner discontinues an investigation into a death, (s)he must give an interested person - who has submitted a written request – an explanation as to why the investigation was discontinued.[173] An interested person may also ask for disclosure of a document held by a coroner, who must then – subject to certain restrictions -

169 Explanatory Notes (PDF), p36, para 581
170 As above. Note: 'Person' may include a body of persons corporate or unincorporate, see schedule 1 of the Interpretation Act 1978
171 'Legal activity' as defined by section 12(3) of the Legal Services Act 2007
172 Explanatory Notes (PDF), p36, para 582
173 Section 4(4) of the Coroners and Justice Act 2009

provide that document, a copy, or make the document available for inspection.[174]

Clause 28 of the Bill would amend section 47(2) of the 2009 Act, to permit an independent public advocate to be an "interested person" in relation to investigations or inquests into a person's death, which may have been caused or contributed to by a major incident.

Reporting duties to the Justice Secretary

In a letter to the (then) Prime Minister and Home Secretary that prefaced his report into the experiences of the Hillsborough families, the Rt Revd Bishop James Jones stated that how the authorities deal with families bereaved by a major disaster "is in itself a burning injustice which must be addressed."[175]

Clause 29(1) would make mandatory provision for an advocate to report to the Secretary of State their opinions as to the treatment of victims during an investigation, inquest or inquiry. This would be the case if (under subsection (2)) the Secretary of State would send a notice specifying that such information, and any other information requested, be disclosed in a report.

Subsection (4) would provide for an advocate to address issues relevant to the exercise of their functions whether requested by the notice or not. This would allow them to "exercise their independence where they feel it is relevant and appropriate to include specific matters …"[176]

Subsection (5) would require the Secretary of State to publish a report made under this section in whatever manner considered appropriate. The Secretary of State would, under subsection (6), be permitted to omit material contrary to the public interest or that would breach data protection legislation.

3.4 Information sharing and data protection (clause 30)

Powers to share information

Clause 30 would create a statutory scheme governing how advocates would share information relating to the exercise of their functions.

Subsection (1) would permit, but not require, an advocate to share information (including personal data) - to the extent they consider it appropriate - with the following:

174 Rule 13 of The Coroners (Inquests) Rules 2013

175 The Right Reverend James Jones KBE, A report to ensure the pain and suffering of the Hillsborough families is not repeated (PDF), 1 November 2017, p2

176 Explanatory Notes (PDF), p37, para 591

- other advocates appointed in relation to the same incident
- the Secretary of State
- another public authority
- victims of the incident.

Equally, the Secretary of State would, under subsection (2), be permitted, but not required, to share information with a public advocate, in connection with the exercise of the advocate's functions.

Information received by an advocate in relation to the exercise of their functions would be used only for the purpose of exercising those functions (subsection (3)).

Personal data

Subsection (5) would permit an advocate to share personal data under subsection (1) only where the relevant data subject would consent to the advocate doing so.

Neither disclosure nor processing of information would be required or authorised where disclosure or processing would contravene data protection legislation – albeit information-sharing powers relating to public advocates would need to be considered in any assessment of a breach (subsection (6)).

3.5 Guidance for public advocates (clause 31)

Clause 31 would enable the Secretary of State to issue guidance regarding matters to which public advocates must have regard when exercising their functions (to the extent the guidance is relevant). Such guidance would not be directed at particular advocates or relate to a specific major incident.

The Delegated Powers Memorandum accompanying the Bill sets out how the guidance would inform the exercise of various functions of public advocates:

> The purpose of the guidance will be to provide more detail to explain how the advocate may decide to carry out their role, including guidance on how a 'close family member' and 'close friend' is to be understood for the purposes of the advocate determining who is an appropriate representative from or for a bereaved family, how the advocate may go about publicising their role and making themselves known to victims of the incident and the methods by which the advocate will provide support. The guidance is not mandatory, but will assist in setting out best practice, taking into account learnings from previous incidents.[177]

[177] Victims and Prisoners Bill Delegated Powers Memorandum (PDF), 29 March 2023, para 100

4 Part 3: Prisoners

4.1 Background: Prisoners and parole

Part 3 of the Bill includes provisions relating to prisoners and the parole system.[178] The Government says the new provisions in the Bill would deliver on proposals set out in its 2022 'Root and Branch' Review of the Parole System, including clarifying the test for release used by the Parole Board, introducing a role for ministers in deciding on release in certain cases, and requiring that the Board take on members with law enforcement experience and involve them in certain cases.[179] The Bill would also introduce a ban on marriage and civil partnerships for prisoners sentenced to a whole life order (ie those who have no prospect of release).

About the Parole Board

The Parole Board is an executive non-departmental non-departmental public body that is responsible for the parole system. It carries out risk assessments of prisoners serving indeterminate sentences indeterminate sentences (and some determinate sentenced prisoners)[180] to decide whether they can be safely released into the community, or re-released if they have been recalled from the community.

The Parole Board is governed by the Parole Board Rules, which is secondary legislation setting out the procedures that must be followed when determining parole cases.

Recent reforms of the parole system

The Bill's proposed changes to the parole system continue reforms that have been taking place over recent years. These changes followed the case of John Worboys, who was convicted of 19 serious sexual offences involving twelve victims. In December 2017, the Parole Board attracted controversy for

178 **Note:** The provisions in part 3 of the Victims and Prisoners Bill (as introduced to Parliament) were not in the original draft Victims Bill.

179 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), 30 March 2022

180 An indeterminate prison sentence does not have a fixed length of time. This means the prisoner has no fixed release date. They have to spend a minimum amount of time in prison determined by the courts (called a 'tariff') before they can be considered for release. A determinate prison sentence is for a fixed length of time. It includes a period of time in prison and a period of time in the community 'on licence'.

determining that Worboys could be released into the community.[181] This led the then Justice Secretary, David Gauke, to order a review of the law, policy and procedure relating to Parole Board decisions.[182] The Ministry of Justice published the review in April 2018.[183]

2018-2019 reforms: Transparency and reconsideration of parole decisions

The 2018 review led to the introduction of a 'reconsideration mechanism' which allows the Justice Secretary to apply for the Parole Board to reconsider certain decisions if they have reasons to show the decision was either procedurally unfair or irrational. Victims can ask the Justice Secretary to apply to the Parole Board to reconsider a case on their behalf.[184]

The Parole Board Rules were also amended to allow summaries of Parole Board decisions to be provided to victims and other interested parties. Previously the rules prohibited any release of information about parole proceedings.

2022 reforms

In 2022 more reforms were introduced which included:

- Enabling public hearings: the rules were amended to remove the requirement that parole hearings be heard in private.[185]

- Re-opening decisions: The Justice Secretary made rules that gave the Parole Board powers to re-open cases where it has made a release decision to reconsider that decision. The new decision would override the previous one.[186]

- Tightening the rules for moving to open conditions: The Justice Secretary could only block a Parole Board recommendation to move a prisoner from closed prison conditions to open conditions in certain circumstances. Now the Justice Secretary can only accept a recommendation to move someone if the case passes a three-stage test: that the move is essential to inform future decisions about release, essential to prepare for possible release, and it will not undermine public confidence.[187]

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181 See for example: "'Black-cab rapist' John Worboys to be freed from jail", BBC News, 4 January 2018

182 HC Deb 9 January 2018 c193

183 Ministry of Justice, Review of the law, policy and procedure relating to Parole Board decisions (PDF), April 2018

184 Parole Board, Apply for a parole decision to be reconsidered, 31 January 2020. Note: Prisoners can also apply using this mechanism to have a Parole Board decision reconsidered.

185 Ministry of Justice, First public parole hearing following government reforms, 12 December 2022

186 The Parole Board (Amendment) Rules 2022

187 Ministry of Justice, Offenders to face toughest test yet for open prison moves, 5 June 2022

Root and Branch review of parole: Further proposed reform

In March 2022 the Government published a Root and Branch Review of the Parole System of the parole system which set out plans for further reforms, some of which require legislation, including:

- changes to the statutory test for release used by the Parole Board;
- a role for ministers in deciding on release in certain serious case. This included plans to allow the board to refer certain cases to the Justice Secretary if it is not confident about releasing them and a new power for the Justice Secretary to veto the board's decision to release certain prisoners; [188] and
- a new requirement for the board to have members with a law enforcement background and a new power to allow the Justice Secretary to direct the composition of panels in order to require members with particular experience to handle certain cases.[189]

The Government has said this "overhaul of the parole system"[190] is necessary following high-profile cases such as that of John Worboys which have "shaken public confidence in the system".[191]

Part 3 of the Bill would deliver on these proposals.

Reactions to part 3 of the Bill

Responding to the Bill, the Prison Reform Trust said the proposals are "wholly unsupported by any evidence" and accused them of being "driven by politics".[192] The charity further argued that the changes are not necessary because the board already takes a "cautious approach":

> 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 consequence is that any further offending by lifers released on parole is very rare — less than 2% of such releases result in a new conviction of any kind.[193]

Representatives of victims have raised concern that the expanded Bill since its draft version is "creeping away from its intended aim of improving victims'

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188 The Review sets out plans to establish a "top-tier" of parole cases where these powers would be available based on what offence(s) prisoners have been sentenced for. The Bill sets out what offences would come under this top-tier. This is discussed in more detail in section 4.3 of this briefing.

189 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), 30 March 2022

190 Ministry of Justice, Victims placed at heart of justice system under radical shakeup, 29 March 2023

191 Ministry of Justice, Victims placed at heart of justice system under radical shakeup, 29 March 2023

192 Prison Reform Trust, PRT comment: Victims and Prisoners Bill, 29 March 2023

193 As above

experiences".[194] The charity, Victim Support, said the Bill "contains a number of positive measures relating to victims" but it is "seriously worried that expanding the Bill's scope to include prisoners will be a distraction".[195] The Domestic Abuse Commissioner reiterated concern that the additions around prisoners and parole will detract from victims' issues.[196]

Further reading: The parole system

The Library's briefing on the Parole System of England and Wales discusses the system, the responsibilities of the Parole Board, and the recent history of reforms in more detail.

4.2 Release test for parole-eligible prisoners (clauses 32-34)

Clarifying the legal test for release

Currently, the Parole Board must apply the 'statutory release test' to determine whether a person should be released into the community. The board cannot determine someone should be released unless it is "satisfied that it is no longer necessary for the protection of the public that the person should be confined."[197]

Clauses 32 and 33 of the Bill seek to "clarify the meaning and application" of this test.[198] They do so by introducing a "list of criteria the Board must take into account" when applying it.[199] The Bill would also amend various pieces of legislation so that the changes would apply to all parole-eligible prisoners whose release is covered by different laws.

By amending Chapter 2 of Part 2 of the Crime (Sentences) Act 1997, clause 32 would set out an updated, overarching test for the Parole Board to apply when deciding whether to release a life-sentenced prisoner (both for the first time they are released and for any re-release decisions if the individual has

194 The End Violence Against Women Coalition, Victims and Prisoners Bill won't deliver what victims need, 29 March 2023

195 Victim Support, Victim Support responds to the Victims and Prisoners Bill, 29 March 2023

196 Victims and Prisoners Bill 'won't deliver what victims need', say campaigners, Police Professional, 29 March 2023

197 The test for release is currently set out in several pieces of legislation that each govern the release of prisoners serving different types of sentences. See for example for life sentenced prisoners section 28(6) of the Crime (Sentences) Act 1997. This test is applied to the vast majority of prisoners who come under the remit of the Parole Board. The Explanatory Notes (PDF) highlight this test was first introduced in 1991 in the now repealed Criminal Justice Act 1991.

198 Explanatory Notes (PDF), pp38-39

199 As above, p14

been recalled).[200] Under the test in clause 32, in order for the Parole Board to be satisfied that it is "no longer necessary for the protection of the public" to keep the prisoner confined, the board would need to be sure that "there is no more than a minimal risk" that the prisoner, if released, would commit an offence that would cause "serious harm".

Subsection (2)(5) sets out the criteria the board would have to consider when making a release decision. These are to help the board determine whether the individual has met the threshold for passing the release test and include:

- the nature and seriousness of all offences that the individual has been convicted for (not just the one(s) that attracted the life sentence);
- the individual's conduct while serving their sentence (whether in prison or in the community on licence);
- the risk that the individual would commit a further offence if released;
- the risk that the individual would not comply with licence conditions if released;
- any evidence that the risk the individual poses to the public has reduced whilst serving their sentence, such as the impact of any treatment, education or training undertaken;
- any submissions made by (or on behalf of) the prisoner; and
- any submissions made by (or on behalf of) of the Justice Secretary.

Subsection (2)(6) would also require the board to pay particular regard to the protection of the prisoner's victims when making release decisions.

Note: Currently, the above considerations are not expressly set out in the legislation that regulates the release of parole-eligible prisoners. The Parole Board does however have a Decision-Making Framework which sets out the approach for parole decisions. It has been developed by an internal strategic group, known as 'RADAR'. RADAR is led by members of the Parole Board and is responsible for reviewing the board's approach to decision-making about risk.[201]

Clause 32(5) would amend section 31A of the Crime (Sentences) Act 1997 so that the above test for release and criteria for the board to consider would

[200] **Note:** The test would also apply to decisions made by the Secretary of State where the case has been referred to them by the Parole Board and they are exercising the new power to refuse release that would also be introduced by the Bill. See section 4.3 of this briefing for more information on the proposals to introduce new provisions for referring certain release decisions to the Justice Secretary and introducing a power for Justice Secretary to veto certain release decisions made by the Board and take their own decision instead.

[201] The Parole Board, The Parole Board Decision-Making Framework (PDF), October 2022

also apply to Parole Board decisions to terminate the licence of prisoners serving sentences of imprisonment for public protection (IPP sentences).[202]

Clause 33 would amend Chapter 6 of Part 12 of the Criminal Justice Act 2003 to apply the same changes as clause 32 (the same updated statutory release test and corresponding criteria to consider) to fixed-term sentenced prisoners whose release is decided by the Parole Board.[203]

Why is the release test being updated?

In its Root and Branch review of the parole system, the Government argued that the Parole Board had "shifted away" from Parliament's original intention behind the statutory release test when it first introduced it in 1991.[204]

The Government said that a lack of clear guidance or criteria in the legislation to support how the release test should be used has left the courts to set guidance.[205] It said this has led to "varied interpretations" of the test and the board's role.[206]

The Government noted two court judgments from the 1990s, which determined that the role of the Parole Board is to "carry out a balancing exercise between the legitimate conflicting interests of both prisoner and public"[207] and that in approaching its risk assessment, the board must consider:

> ...the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public against a man who is not unlikely to cause such injury.[208]

The Government disagrees with this apparent "balancing exercise" approach and states that risk to the public and victims should take precedence over prisoners' rights.[209] It is therefore seeking with the Bill to ensure the test

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202 The licence of someone serving an IPP sentence is in force indefinitely until its termination. IPP prisoners are eligible to have the termination of their licence considered by the Parole Board ten years after their first release. For further reading on IPP sentences, refer to the Library briefing: Sentences of Imprisonment for Public Protection.

203 Note: Individuals serving 'Extended Determinate Sentences' or 'Sentences for Offenders of Particular Concern' (which are available for certain specified violent, sexual or terrorist offences) are considered for release by the Parole Board between the two-thirds and end point of the custodial term. Those who receive a standard determinate sentence for a terrorist offence must also go through the Parole Board before being released and any prisoner referred to the board after having been assessed as presenting a high risk of committing further serious offences.

204 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), 30 March 2022, p23

205 As above, p24

206 Explanatory Notes (PDF), p14, para 413

207 *R v Parole Board, ex p Bradley* [1991] 1 WLR 134

208 *R v Parole Board, ex p. Watson* [1996] 1 WLR 906

209 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), 30 March 2022, p24

"leave[s] no room for confusion" that "public safety should be the only priority when making release decisions".[210]

The added list of criteria for applying the release test (where previously there was no further direction provided in the legislation) is to "remove ambiguity" about the factors that the board must consider when assessing whether someone meets the threshold for release.[211] The listed criteria does not include factors related to the affect of continued imprisonment on the prisoner. The Government's position is that these changes are not a new approach but are instead a return to Parliament's intention for the test by "amplify[ing] in greater detail its original purpose".[212]

In January 2022, the human rights charity, Justice, published a report, A Parole System fit for Purpose', with its own review of parole and recommendations for reform. This found "inconsistency between how the [release] test is set out, how it is interpreted by panel members, and how it is understood by the judiciary" and agreed there is a need for clarification around the test.[213]

However, a letter from the Parole Board to the Ministry of Justice in response to the proposals first set out in the Root and Branch review suggests that the board does not consider this legislative update of the release test to be necessary, and it does not agree with the Government's interpretation of the case law and the conclusion that release decisions have become a balancing exercise.[214]

The Parole Board has a differing legal reading of the court judgments to the Government, stating "the test has not seen a drift away from its original meaning."[215] In particular it highlighted a 2016 Court of Appeal judgment in *King v The Parole Board*, which stated the words in the release test, "necessary for the protection of the public", does not involve "a balancing exercise in which the risk to the public is to be weighed against the benefits of release to the prisoner or the public."[216] This led the board to conclude that in its view, "the legal position is clear that the protection of the public is always paramount" and the test "requires no refinement".[217]

The board went on to raise concern that placing specific criteria for parole decisions to consider into statute could be counterproductive. It argues that such a list could never be an exhaustive list of factors that influence risk and would not represent how those factors can interplay to exacerbate risk.

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210 Ministry of Justice, Victims placed at heart of justice system under radical shakeup, 29 March 2023

211 Explanatory Notes (PDF), p14, para 413

212 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), 30 March 2022, p24

213 Justice, A Parole System fit for purpose (PDF), 20 January 2022, p27

214 Parole Bord, Letter from the Parole Board to the Ministry of Justice (PDF), 10 May 2022, p3. This letter was released in response to an FOI request by the Prison Reform Trust.

215 As above

216 *R (on the application of Ben King) v The Parole Board* [2016] EWCA Civ 51

217 Parole Bord, Letter from the Parole Board to the Ministry of Justice (PDF), 10 May 2022, p3-4

Therefore, "by implying the exclusion of unstated criteria, [it] may actually impede the abilities of panels to take into account all aspects of risk."[218]

Views on determining release

There is some debate about where the threshold for the release test should be, who is responsible for demonstrating for demonstrating the test has been met, and to what extent the interests of prisoners should factor.

The burden of proof

In 2020, the then Justice Secretary, Robert Buckland, in 2020 wrote that in the Government's view parole-eligible prisoners must "clearly demonstrate that they no longer pose a threat to the public and where this is not the case … remain in prison for the full duration of the sentence".[219]

In contrast to this, and to the approach set out in the Bill, the charity Justice recommended that:

> …it should be incumbent on the SoSJ [Secretary of State for Justice] to justify the continued detention of an individual beyond the minimum term and to show that any risk an individual poses after the minimum term cannot be managed in the community.[220]

Justice argues this would "properly allocate" the responsibility for demonstrating that someone's risk can or cannot be managed.[221] It also says this would reflect the fact that prisoners are post-tariff, ie are past the minimum amount of time that the court stipulated they must spend in prison. As such they are "no longer serving the punitive element of their sentence and therefore should not have to justify why they ought to be released."[222]

In 2018, the charity Howard League for Penal Reform published a paper by Professor Nicola Padfield (a professor of criminal and penal justice and Director of Cambridge University's Centre for Criminal Justice) which supported this argument, calling for a presumption of release for post-tariff prisoners[223] (that can be reversed where necessary). Professor Padfield suggested a form of release test based on the length of time the prisoner has served and the principle that:

218 As above

219 Ministry of Justice, The Parole Board for England and Wales: Tailored Review (PDF), October 2020, p3

220 Justice, A Parole System fit for purpose (PDF), 20 January 2022, p27

221 Justice, JUSTICE publishes landmark report on reforming the Parole Board and system, 20 January 2022

222 Justice, A Parole System fit for purpose (PDF), 20 January 2022, p28

223 Note: Currently there is a presumption of release "in a very small sub-set of cases" but that "that presumption does not remove the requirement to consider public safety". See: Parole Bord, Letter from the Parole Board to the Ministry of Justice (PDF), 10 May 2022, p3

> The longer a prisoner has served post-tariff, the more convinced the Parole Board should have to be of the imminent danger presented by the prisoner, which is preventing their (post-tariff) release.[224]

Justice's report highlights that the courts have taken the view that the burden for proving whether someone is a danger to the public should not fall to either the state or the prisoner as the parole system is not a normal judicial process in the sense that it sets one side against the other. Instead, determining suitability for release and the risk assessment process is seen as a shared responsibility and inquisitorial process. It is described as being "more akin to many administrative decisions than … whether a matter requiring proof has been established".[225]

The interests of prisoners, victims and the public

In the Howard League paper, Professor Padfield suggested some form of balancing approach in release decisions, arguing that the parole process should prioritise "prisoners' rights as well as the protection of society".[226]

The Prison Reform Trust has accused the Government of trying to present the interests of prisoners "in direct opposition to the interests of victims" in the Bill. It argues that in reality less than 2% of life-sentenced prisoners released on parole receive a further conviction.[227]

The Parole Board has said it "very much support[s] a precautionary approach to public protection" and considers this "paramount" to release decisions. It notes this is already "built into our training and guidance, and reflected in our outcomes".[228]

In response to a 2022 ministerial statement made by the Justice Secretary's on the parole system and the Government's Root and Branch Review, Shadow Justice Secretary Steve Reed called for further changes to the board's proceedings. These included victims having the right to make a new personal statement saying how they would feel if the prisoner was released and for the public risk assessment to include the risk of re-traumatising the victim.[229]

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224 Dr Nicola Padfield, Parole: Reflections and possibilities: a discussion paper (PDF), Howard League for Penal Reform, May 2018, p17

225 Justice, A Parole System fit for purpose (PDF), 20 January 2022, pp27-28

226 Dr Nicola Padfield, Parole: Reflections and possibilities: a discussion paper (PDF), Howard League for Penal Reform, May 2018, p17

227 Prison Reform Trust, PRT comment: Victims and Prisoners Bill, 29 March 2023

228 Parole Bord, Letter from the Parole Board to the Ministry of Justice (PDF), 10 May 2022, p3

229 Steve Read at HC Deb, Parole System: Public Protection, 30 March 2022, c833

4.3 Ministerial role in release decisions (clauses 35-42)

Referring release decisions to the Justice Secretary

Clause 35 would add three new sections (sections 32ZAA, 32ZAB and 32ZAC) to chapter 2 of the Crime (Sentences) Act 1997. These would allow the Parole Board, when making a decision on whether certain life-sentenced prisoners pass the release test, to refer a case to the Justice Secretary instead of making the release decision themselves. The Parole Board would be able to refer a case for "any reason it considers appropriate" but with a particular focus on the board doing so when it is "unable adequately to assess the risk to the public" if the prisoner were to be released. The Government describes this mechanism as being intended for use by the Parole Board "when it cannot confidently decide the release test has been met."[230]

Clause 36 would amend Chapter 6 of Part 12 of the Criminal Justice Act 2003 to provide for the same changes as clause 35, for certain determinate-sentenced prisoners whose release falls within the Parole Board's remit, giving the board the ability to also refer these release decisions to the Justice Secretary.

Once a case has been referred to the Justice Secretary, they would either need to release the prisoner on licence as soon as is reasonably practicable or decide that the individual should remain imprisoned. The Justice Secretary would only be able to release a prisoner if they were satisfied that it was no longer necessary for the protection of the public that they be imprisoned. They would do this by applying the same statutory release test that the Parole Board must follow (as discussed in section 4.2).

If the Justice Secretary were to decide that the individual must remain in prison, they would have to notify the prisoner and the Parole Board of their decision, the reasons for it, and the prisoner's right to appeal.

When could the board refer a case? Establishing a 'top-tier' of offences

Only certain cases can be referred to the Justice Secretary The Government has described these as the 'top-tier' of offences, meaning the ones identified as being the most serious.

Under **clause 35,** the ability to refer a case would apply to prisoners who are serving a life sentence in relation to any of the offences specified or described in new section 32ZAB of the Crime (Sentences) Act 1997. This includes offences such as murder, causing or allowing the death of a child, serious terrorist-related offences, and rape.

[230] Ministry of Justice, Victims placed at heart of justice system under radical shakeup, 29 March 2023

Note: Some of the offences incorporated into this list of 'top tier' offences do not carry a life sentence, but according to the Bill's explanatory notes have been included to ensure those serving IPP sentences "who have committed these offences who are being considered for release are treated consistently with those serving life sentences".[231]

Clause 36 mirrors the same 'top tier' offences as above that would be listed in a newly added section 256AZBB of the Criminal Justice Act 2003. However, it does not include murder because murder attracts a mandatory life sentence and by default the case would automatically fall under the provision in clause 35.

Power to review and quash release decisions

If the Parole Board were to decide to release an individual who fell within the 'top-tier' of offences without referring the case to the Justice Secretary, the Justice Secretary would have the power, under **clauses 35 and 36,** to require the board to refer the case to them.

If the Justice Secretary were to issue such a direction to the board, it would automatically quash the board's decision to allow the release of the prisoner. Review of the case and the decision on release would then fall to the Justice Secretary. The Justice Secretary would not be required to give effect to the board's initial decision.

How the Justice Secretary would handle cases

Clause 37 sets out the procedure that the Justice Secretary would need to follow for cases referred to them by the board. This includes a requirement to take into consideration any documents given to them by the Parole Board; any other oral or written information they obtain; and, if necessary, appointing someone to interview the prisoner on their behalf and considering the report from that interview.

The Justice Secretary could then, based on the evidence available, "make such findings of fact as the [they] consider appropriate". They would be free to make their own determination on release and would not be held to the Parole Board's findings on the same case.

Subsection (5) would also provide the Justice Secretary with powers to make rules around the procedure that the must be followed when dealing with referred cases, for example requiring they be dealt with within a prescribed timeframe.

Note: Clause 46(3) of the Bill would enable the Justice Secretary to make rules about steps the Parole Board would have to take to determine whether to refer a case to the Justice Secretary for a release decision.

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231 Explanatory Notes (PDF), p41

Appealing the Justice Secretary's decision on referred cases

Clause 38 would provide a mechanism for life-sentenced prisoners to appeal a decision by the Justice Secretary to refuse their release if the case went to them for a decision.[232] The appeal would go through the Upper Tribunal.

There would be two grounds for an appeal:

Flawed decision-making

A prisoner could appeal on the basis that the Justice Secretary's decision was flawed because it was either illegal, irrational, did not follow proper procedure or made a fundamental error of fact. [233]

An appeal on these grounds would first require the permission of the Upper Tribunal to proceed. This means the Upper Tribunal would make an initial judgment as to whether there could be sufficient grounds for the challenge to go ahead and if not, it could prevent it from proceeding.

If the challenge proceeded, there would be two possible outcomes for appeals on these grounds. Either the Upper Tribunal could dismiss the appeal, confirming the Justice Secretary's decision, or require that the decision be reconsidered. Even if it upheld the appeal, the Upper Tribunal would not be able to direct the release of the prisoner bringing the challenge.

Public protection

Alternatively, an appeal could be made on the grounds that there is no more than a minimal risk that the prisoner will commit another offence that would cause serious harm if they were released on licence (ie the release test has been met).

The Upper Tribunal would not be required to give permission before proceeding with an appeal on these grounds. The Upper Tribunal would have to consider the same criteria as originally required in determining whether the threshold for release had been met (set out in clause 32(2)(5)). In this case, the Upper Tribunal would either be able to dismiss the appeal, upholding the Justice Secretary's decision, or set aside its decision and direct that the prisoner must be released into the community on licence as soon as reasonably practicable.

Clause 39 would introduce an equivalent appeal mechanism for decisions relating to fixed-term sentenced prisoners.

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232 By further amending the Crime (Sentences) Act 1997.

233 The test of whether the decision was 'irrational' would be whether it was one that the Upper Tribunal considers it was a decision that "no reasonable Secretary of State could have made".

Licence conditions for prisoners released following a referral

Life-sentenced prisoners

Section 31 of the Crime (Sentences) Act 1997 provides for the duration and conditions of licences for life-sentenced prisoners. **Clause 40** would amend this legislation to allow the Justice Secretary to set licence conditions for life-sentenced prisoners if they have been released following a referral to them. The Justice Secretary would also be able to change those conditions as part of managing a person in the community.

Clause 40 would also allow for any conditions stipulated by the Upper Tribunal to be included in an individual's licence if they are released following a successful appeal on public protection grounds. The Justice Secretary would be able to "subsequently vary and cancel those conditions as part of the normal process of managing an offender's licence as their circumstances change".[234]

Fixed-term sentenced prisoners

Section 250 of the Criminal Justice Act 2003 provides the Justice Secretary with powers to set, and vary, licence conditions for fixed-term sentenced prisoners. Under this provision, for those whose release is determined by the Parole Board, the Justice Secretary cannot include, vary or cancel a licence condition unless the board directs it.

Clause 41 would amend this legislation to account for those released following a successful appeal to the Upper Tribunal. This would mean – as with the Parole Board, that the Justice Secretary would only be able to, on release, set licence conditions directed by the Upper Tribunal.

After release, the Justice Secretary would be able to subsequently vary or cancel licence conditions to manage the individual in the community.

Reactions and responses: Independence of parole decisions and the role of the minster

The Government first outlined its plans to establish a 'top tier' of offences and provide the Justice Secretary with powers to review release decisions in these cases in its 2022 Root and Branch review of the parole system.

Several legal commentators and criminal justice charities raised concern at the time about the proposal. Concerns have primarily centred on the affect that giving an elected official powers to override the Parole Board's decision could have on the impartiality and fairness of decisions. Others have also highlighted concerns about the necessity and practicality of the proposal.

234 Explanatory Notes (PDF), pp43-44

Tyrone Steele, a criminal justice lawyer for the charity Justice, raised concern about political interference in legal processes:

> Separation of powers is a fundamental part of our constitution … As such, not only is it wrong for ministers to impose their own decisions over and above that of judicial bodies such as the Parole Board, but it is also clearly unlawful given our responsibilities under the European Convention on Human Rights.[235]

Lord Brown of Eaton-under-Heywood (crossbench), a former Justice of the Supreme Court, has also raised similar questions about the proposals for a "ministerial check on parole decisions". He said that it had been established under the European Convention on Human Rights that it is the judiciary's role to decide when indeterminate sentence prisoners are released on licence. He questioned whether the proposals would mean the Parole Board, as "an independent quasi-judicial body", would no longer have this role.[236]

The Parole Board echoed this, noting that "any ministerial decision to override a Parole Board decision will attract legal risk" as there is a "clear principle" established in the current legal framework "that the final decision on the release of prisoners should be a matter for a court or a courtlike body".[237]

Andrea Coomber, Chief Executive of the Howard League for Penal Reform warned that the proposals would "lead to political grandstanding" and "distort the whole purpose of parole, which is about assessing current risk and not re-judging the original offence".[238] Peter Dawson, Director of the Prison Reform Trust, argued that it would be:

> … unfair to let an individual's future – however grave their crime – be sacrificed to the electoral calculation of a member of the executive. The separation of powers is a bastion of fairness.[239]

Echoing these concerns, legal commentator Joshua Rozenberg said that while the Parole Board is "far from perfect", it is a "much more reliable and appropriate way of deciding whether a prisoner is safe for release than a panel chaired by a politician".[240]

He questioned what the point of the additional process would be, saying that in his view it seems unlikely that the Justice Secretary would conclude it was safe to release an individual if the board itself was uncertain and felt the need to refer the decision to the minister. He argued that the proposals appear designed to put pressure on Parole Board panels.[241]

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235 Dominic Raab must introduce new laws to give himself the power to stop prison releases, The Independent, 31 March 2022

236 Lord Brown at HC Deb, Queen's Speech, 12 May 2022, c178

237 Parole Bord, Letter from the Parole Board to the Ministry of Justice (PDF), 10 May 2022, p5

238 Dominic Raab must introduce new laws to give himself the power to stop prison releases, The Independent, 31 March 2022

239 Peter Dawson, Fairness Foundation, Review of the parole system, 31 March 2022

240 Joshua Rozenberg, A Lawyer Writes, Parole: who should decide? 6 May 2022

241 Joshua Rozenberg, A Lawyer Writes, Can Raab block parole?, 1 April 2022

Lord Dholakia (Liberal Democrat) similarly questioned the necessity and evidence base for the proposal, and how the minister's decision-making would be more robust than the board's:

> It is difficult to see any serious argument for such a change. The proportion of prisoners released on parole who commit a further offence is less than 0.5%. No system based on human judgment could produce a significantly better result and there is certainly no reason to believe that the Secretary of State's judgment would be more accurate than the accumulated experience and expertise of the Parole Board.[242]

He called it an "astonishing proposal" for the Justice Secretary to "be empowered in certain cases to overrule release decisions by the Parole Board" and accused the measure of "line[ing] us up with dictatorships around the world in which politicians interfere with judicial decision".[243]

In response to the plans being incorporated into the Bill, the Prison Reform Trust said it could have the reverse impact on public confidence. In its view the board is already "overwhelmingly focused on public protection" and takes "a very cautious approach". Therefore, there is a risk that the measures will create "false expectations" of releases being vetoed, when this should be unlikely if the test for release is to truly "remain about public protection rather than public outrage".[244]

The Government, however, argues that there is a need for a "more precautionary approach to releasing offenders".[245] It says that the Root and Branch review identified a need for greater safeguards whenever the Parole Board determines that any prisoner that would fall within the 'top-tier' cohort is suitable for release. It says: "enabling the Secretary of State to call in the Parole Board's decision, review it and, if necessary, refuse the prisoner's release" will ensure these release decisions are "subject to greater scrutiny".[246] In its view:

> As the Parole Board plays a crucial role in protecting the public, it is not unreasonable for the public to expect ministers to provide robust oversight of the Board and the decisions it takes. The provisions in this Bill … to review top tier cases and veto release decisions demonstrates that the Government takes its responsibilities seriously.[247]

The Parole Board also noted practical challenges with the proposed measures, questioning how the cases that would be reviewed by Justice Secretary would be selected, who would select them, and the transparency of this process.[248] It highlighted potential issues if such reviews are sparked by public or media criticism of cases. It was concerned this could allow potential

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242 Lord Dholakia at HC Deb, Queen's Speech, 12 May 2022, c152

243 As above

244 Prison Reform Trust, PRT comment: Victims and Prisoners Bill, 23 March 2023

245 Explanatory Notes (PDF), p14

246 As above

247 As above, p17

248 As above

public and media reactions to have greater influence on the parole system and decision-making.

The also noted that "some of the most difficult and complex cases in the system are not the controversial cases which attract public attention". It said that cases with "live risk factors" such as those who have been recalled or are serving IPP sentences for offences of violence and robbery are more likely to commit further serious offences. The board also warned the proposed powers for the Justice Secretary could create further delays to cases and enable the prisoner to seek compensation for this.[249]

Calls for the Parole Board to become a tribunal

Concerns about whether the Justice Secretary has too much executive control over the Parole Board have led to calls for the board to be reconstituted as a tribunal to ensure it is independent.[250]

The Parole Board describes itself as "a court like body whose members make judicial decisions".[251] However, the Prison Reform Trust argues "in reality, the quasi-judicial status of the Parole Board [is] deeply problematic".[252]

The charity Justice's review of the parole system found that although the board has characteristics of a court, in practice:

> ... the executive, and increasingly members of the legislature, comment on Parole Board decisions in a way that they would not in relation to other courts making difficult or complex decisions.[253]

Justice argues the board is inhibited by this and by the Justice Secretary being able to "dictate" its processes. It recommended the board be made a tribunal with procedural rules and case management powers in line with other tribunals. The Prison Reform Trust agreed, stating "a tribunal structure would help restore a clear dividing line between the distinct roles of the executive and the judiciary."[254] The Justice Committee has supported this as an option.[255]

The Government's Root and Branch review of parole considered reconstituting the board as a tribunal but concluded it would be "better for the parole system to maintain the board as an ALB [arms length body]"[256] within the

249 As above, p6

250 See for example: Justice Committee, Letter from the Chair of the Justice Committee to the Secretary of State for Justice on Parole Board (PDF), 27 March 2018

251 The Parole Board, Legal Positon Statement 2021 (PDF), 18 May 2022, p1

252 Prison Reform Trust, Evidence submitted to review of parole review (PDF), 19 March 2018 p6

253 Justice, A parole system fit for Purpose (PDF), 20 January 2022, p17

254 Prison Reform Trust, Evidence submitted to review of parole review (PDF), 19 March 2018 p7

255 Justice Committee, Letter from the Chair of the Justice Committee to the Secretary of State for Justice on Parole Board (PDF), 27 March 2018

256 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), 30 March 2022, p33

Ministry of Justice because it "emphasises the importance of oversight of the Parole Board and its decision-making".[257]

In the Government's view, being sponsored by the Ministry of Justice allows the Parole Board to get its funding from the Ministry of Justice, work closely together with department, and be accountable to Parliament while still being able to make independent decisions. It says this model also helps to "maintain public confidence that the Board is fulfilling its role" and prevents the upheaval that would be caused by reconstituting it as a tribunal while other reforms are still embedding in.[258]

Danny Shaw, a home affairs journalist and commentator, suggested a better approach would be a 'referral' model similar to that used by the Attorney General to refer unduly lenient sentences to the Court of Appeal.[259] The Unduly Lenient Sentence Scheme allows members of the public to contact the Attorney General to request a review of sentences given by the Crown Court. If the Attorney General considers that the sentence might be unduly lenient, they can refer the sentence to the Court of Appeal for review.[260]

4.4 Application of convention rights (clauses 43-45)

Clauses 42-45 concern the application of the European Convention on Human Rights in relation to the release of prisoners.

The explanatory notes state that these provisions would 'bring forward' reforms in the Bill of Rights Bill to guide the interpretation of the new parole clauses and other 'release legislation'.[261]

Disapplication of section 3 of the Human Rights Act 1998

Clauses 42-44 would require the courts to take a particular approach to the interpretation of legislation relating to release, licences, supervision and recall of indeterminate and determinate sentenced offenders.

257 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), 30 March 2022, p33

258 As above

259 Danny Shaw, The Politics of Parole, 30 March 2022

260 For more information on the scheme, see the Library briefing on Review of unduly lenient sentences.

261 Explanatory Notes (PDF), para 422-423. The Bill of Rights Bill was introduced in the House of Commons on 22 June 2022. Second reading was provisionally scheduled for 12 September but did not take place. It would repeal the Human Rights Act 1998 and replace it, replicating some aspects of it, and amending and removing others. However, its current status is unclear.

Section 3 of the Human Rights Act 1998

Sections 3 and 4 of the Human Rights Act 1998 (the 'HRA') provide the mechanisms for the courts, the Government and Parliament to resolve inconsistencies between domestic law and the European Convention on Human Rights.

Section 3 HRA requires all legislation to be read and given effect in a manner that is compatible with the rights guaranteed by the European Convention on Human Rights "so far as it is possible to do so". Previously the courts could consider the European Convention on Human Rights to help them resolve ambiguities in legislation, but section 3 goes further, allowing the courts to interpret legislation in a manner that is not obvious from the language used by Parliament, as long as it does not run counter to the underlying thrust of the statute or SI.

Where a Convention compliant read down of primary legislation is not possible, the court can make a declaration of incompatibility under section 4 HRA. This does not affect the validity or continuing operation of the legislation under scrutiny. It puts the onus on Government and Parliament to remedy the incompatibility.

The Bill of Rights Bill would repeal section 3 without replacement.

Clauses 42-44 would amend the Crime (Sentences) Act 1997 (the '1997 Act'); the Criminal Justice Act 2003 (the '2003 Act'); and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the '2012 Act'). It would introduce new clauses stating that section 3 HRA does not apply in relation to the following statutory provisions (and any subordinate legislation):

- Chapter 2 of the 1997 Act, which governs the release of prisoners subject to life sentences, as amended by Part 3 of the Bill (discussed in the previous section);
- Chapter 6 of Part 12 of the 2003 Act, which governs the release, licensing, supervision and recall of fixed-term prisoners, as amended by Part 3 of the Bill (discussed in the previous section);
- Section 128 of the 2012 Act, which provides a power to alter release test provisions in Chapter 6 of Part 12 of the 2003 Act by order, as amended by Part 3 of the Bill (discussed in the previous section).

The explanatory notes state that these provisions "span the full legislative framework … relating to release, licences, supervision, and recall of indeterminate and determinate sentenced offenders".[262]

[262] Explanatory Notes (PDF), para 422

The purpose of the new provisions is to avoid the courts adopting a "strained section 3 interpretation, which ultimately disregards the policy intentions of the release regime" if new or existing release measures are subsequently found to be incompatible with the European Convention on Human Rights.[263]

The proposal in the Bill of Rights Bill to repeal section 3 without replacement reflects the Government's concern that it compels the courts to expand the interpretive duty beyond what is appropriate for an unelected body. The Government believes that a less expansive duty to interpret legislation would provide "greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues".[264]

As a result of these provisions, the courts would revert to the pre-HRA approach to statutory interpretation in the context of the release legislation. This would mean following the ordinary and natural meaning of the language unless there is any ambiguity or uncertainty, in which case it should be resolved in a Convention compliant way. This approach is based on the assumption that Parliament intends to act compatibly with the UK's international legal obligations. The European Convention on Human Rights would therefore be treated in the same way in terms of its influence on statutory interpretation as other unincorporated international treaties in this context.

Other public authorities would also no longer be under an obligation to give effect to the provisions in question in a way that was compatible with Convention rights so far as it is possible to do so.

4.5 The makeup of the Parole Board (clauses 46-47)

Rules on who should handle cases

The Parole Board is governed by secondary legislation, known as the Parole Board Rules, which sets out the procedures that must be followed when determining parole cases. Section 239 of the Criminal Justice Act 2003 gives the Justice Secretary the power to make these rules through the negative procedure, which means Parliament is not required to approve them before they become law.

Clause 46 would amend section 239(5A) of the 2003 Act, which enables rules to be made regarding the number of board members required to deal with a case and for cases to be dealt with at prescribed times. The amendment

263 Explanatory Notes (PDF), para 423. As noted above, section 3 does not currently allow the courts to adopt an interpretation that runs counter to the thrust of the legislation in question.

264 Ministry of Justice Human Rights Act Reform: A Modern Bill of Rights - Consultation response, June 2022, para 67

would add in the power for the Justice Secretary to make rules requiring parole cases to be dealt with by board members of a 'prescribed description', meaning members with specified skills or experience. The Bill's explanatory notes state that:

> This power will be used, in the first instance, to require any panel considering a top tier case to include at least one member with law enforcement experience.[265]

This marks a change in policy direction for these rules. A 2019 Ministry of Justice review highlighted that:

> Restrictions on which panel members can hear particular types of case have gradually been lifted over time … to allow greater flexibility and timeliness in listing the right cases for the right panel members[266]

The review found that instead, the Parole Board had put its own "measures in place to make sure that panels comprise members with the right experience and expertise for the case", with the most experienced or judicial members appointed "to deal with the more complex, high profile or legally challenging cases."[267]

However, the Government's 2022 Root and Branch review argued that "frontline [law enforcement] experience can bring a different perspective on offending and offenders in the Criminal Justice System". It said that requiring their involvement in 'top-tier' cases will allow this "unique frontline insight from dealing with offenders in the community" to assist the risk assessment and decision-making of the parole panel.[268]

Chair of the Parole Board and panel composition

Schedule 19 of the Criminal Justice Act 2003 sets out the statutory requirements for the status and capacity of the Parole Board, its membership, and its staff.

Current Parole Board membership

Leadership

The Chair of the Parole Board is a public appointment made by the Justice Secretary under paragraph 2(1) of Schedule 19 of the 2003 Act. The Chair is responsible for representing the board with stakeholders and the public, for communications between the Parole Board and the Justice Secretary, and for

265 Explanatory Notes (PDF), p16

266 Ministry of Justice, Review of the Parole Board Rules and Reconsideration Mechanism (PDF), February 2019, p29

267 As above

268 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), March 2022 p34

providing scrutiny and accountability of the board and its Chief Executive Officer to ensure the board is meeting its legal responsibilities. However, these responsibilities are not currently set out in legislation.

The Parole Board Chief Executive Officer has the leading role in decision-making and financial management.

Board membership and panel composition

Parole Board members are the individuals who form the parole panels and are responsible for making risk assessments and release decisions. They are public appointees delivering the judicial aspects of the organisation's functions, distinct from the board's staff, who are directly employed to deliver the board's management and administrative functions. As of October 2020, there were 269 Parole Board members.[269]

Legally, under section 2(2) of schedule 19 of the 2003 Act, the board must include in its membership:

- former or current members of the judiciary;
- psychiatrists or specialist psychologists;
- individuals with the "knowledge and experience of the supervision or after-care of discharged prisoners"; and
- individuals that have studied "the causes of delinquency or the treatment of offenders".

The composition of each individual panel, however, will vary. A 2019 review of the Parole Board rules conducted by the Ministry of Justice notes that allocating members to specific panels is a statutory responsibility of the board Chair but "in practice, this is discharged by members of the secretariat" who "ensure that each panel is comprised of appropriate members for the case before it".[270] The Justice Secretary retains power to approve member appointments.

Typically, when cases progress to an oral hearing, decisions are made by a panel consisting of between one and three members. All panels are led by an accredited panel chair who has undertaken specialist training.

Clause 47 would amend schedule 19 of the 2003 Act to make the following key changes to the rules on Parole Board chairmanship and membership.[271]

269 Ministry of Justice, The Parole Board for England and Wales: Tailored Review (PDF), October 2020, p33

270 Ministry of Justice, Review of the Parole Board Rules and Reconsideration Mechanism (PDF), February 2019, p29

271 Note: The provisions in the Bill relating to the role of the Parole Board Chair would not apply to the current Chair.

Vice Chair of the Parole Board

Clause 47(3) would formally introduce the role of Vice Chair of the Parole Board into legislation (by adding it to Schedule 19 of the 2003 Act).

There is already a Vice Chair of the Parole Board in post. In February 2020, His Honour Peter Rook KC was appointed to the role to share in the leadership and governance of the Parole Board.[272] However, the role is not yet a legal requirement.

Law enforcement experience

Clause 47(4) would amend paragraph 2(2) of schedule 19 of the 2003 Act to add in a requirement the board's membership includes individuals with law enforcement experience (defined as experience of the "prevention, detection or investigation of offences").

In 2020/21, only 5% of Parole Board members had experience of working in law enforcement (such as police officers).[273] This means there is currently "only a small proportion of panels on which such members are involved in taking release decisions"[274] and would not be enough to deliver on the Government's plans to require law enforcement representation on all 'top-tier' cases. Changing the rules to require the board to appoint members with law enforcement experience is intended to enable the Ministry of Justice to "run targeted campaigns … to appoint sufficient numbers of members with this experience to meet the requirements of the [proposed] statutory framework."[275]

Appointment, tenure, and termination of the Parole Board's Chair

The exact terms of appointment for the Parole Board's Chair are not currently set out in legislation. **Clause 47(5)** would insert terms of appointment for the Parole Board's Chair and Vice Chair into schedule 19 of the 2003 Act. These would stipulate that the Parole Board's Chair and Vice Chair could only be appointed for an initial five-year term by the Justice Secretary. After that, they would only be able to be re-appointed one time for another five-year term before they would have to step down from the role.

The Bill would also introduce a statutory power for the Justice Secretary to remove the Parole Board's Chair and Vice Chair from office (and other board members) before their term is up if the minister considered it necessary to maintain public confidence in the board.

272 Ministry of Justice, Appointment of new Vice Chair of the Parole Board, 3 February 2020

273 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), March 2022 p34

274 Ministry of Justice, Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales (PDF), March 2022 p34

275 As above

The details of any procedure that would have to be followed to remove the Chair and Vice Chair is not included in the Bill.

Current process for removing the Parole Board's Chair

Until 2018 there were no clear grounds or procedure in place for removing the board's Chair. Following the Worboys case, in 2018 the Justice Secretary agreed a termination protocol with the board for removing the Chair and other members. Under this protocol, the Chair can be removed if they:

- have been absent, without reasonable excuse, from their office and not fulfilled its functions for a continuous period of at least three months;
- have been convicted of an offence;
- are bankrupt; or
- have otherwise become incapable of carrying out their duties as Chair.

A panel consisting of a representative of the Justice Secretary, a representative of the Parole Board and an independent member are responsible for assessing whether any of the above grounds have been met. If they conclude there are grounds for removal, the panel can make a recommendation to the Justice Secretary for the Chair's termination.[276]

This protocol was never put into legislation and is therefore not a statutory procedure.

Clarifying the functions of the Parole Board's Chair

Clause 47(7) would add an additional section to schedule 19 of the 2003 Act that would expressly set out in the legislation the functions of the Parole Board's Chair. The Chair would be able to delegate these functions to other members or employees of the board. These functions would include:

- leading the board in the general exercise of its functions and chairing meetings in relation to this (as long as it does not relate to specific parole cases);
- ensuring the board has a strategy for effectively delivering its functions and keeping that strategy under review;
- taking appropriate steps to promote the board's independence;

[276] Explanatory Notes (PDF), p16

- taking into account directions given by the Justice Secretary on matters that the board must consider when it is discharging its duties;[277] and
- promoting public awareness of the board and its functions as appropriate.

Clause 47 would also expressly state in legislation that the Chair is prohibited from being involved in individual parole cases (including attending any proceedings) and from trying to influence the outcome of the board's decisions in such cases. The Government explains this is to clarify that the Chair "has a non-judicial role" and create "a ring-fence to prevent the Chair's involvement in its judicial functions" so that they remain "completely separate from the board's assessment of individual parole cases."[278]

Reactions and responses: Power to remove the Chair and the Parole Board's independence

In 2018, the Parole Board's (later overturned) decision to release John Worboys generated significant media and political attention and drew public concern. The case led to the resignation of Chair of the Parole Board, Nick Hardwick. In his letter of resignation, he claimed that the then Justice Secretary David Gauke had told him his position as Chair was "untenable" because of the case.[279]

This sparked further debate about the independence of the board, the level of political pressure it and its Chair faces, and the extent to which ministers should have a power to approve and remove members. The High Court later ruled that as an organisation with judicial functions, the Justice Secretary's involvement in Nick Hardwick's resignation had amounted to interference in the Parole Board's independence.[280]

The charity Justice accused the Government of politicising the board's decision in the Worboys case and said that Nick Hardwick's resignation was "a strong sign of the Parole Board's lack of real independence."[281] It argued:

> Every day, judicial bodies are tasked with taking difficult decisions. Sometimes, these may be controversial. It is essential for good decision-making, public confidence, and for the rule of law that the Parole Board be fully endowed with the necessary powers and status to undertake its role genuinely independent of Government pressure.[282]

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277 Section 239(6) of the Criminal Justice Act 2003 gives the Justice Secretary power to issue the Board with directions on matters that it must take into account when discharging its functions. In giving any such directions the Justice Secretary of State must have regard to (a)the need to protect the public from serious harm from offenders, and (b) preventing the commission of further offences securing the offender's rehabilitation.

278 Explanatory Notes (PDF), p17

279 Worboys release decision overturned as parole head quits, BBC News, 28 March 2018

280 *R (Wakenshaw) v Secretary of State for Justice* [2018] EWHC 2089 (Admin), para 31.

281 Justice, A parole system fit for purpose (PDF), 20 January 2022, p18

282 As above, p18-19

The Prison Reform Trust echoed this, stating that the "independence of the Parole Board is critical to its vital role in overseeing the safe release of prisoners" but is under threat.[283] In its response to Nick Hardwick's resignation, the charity reiterated calls to establish the Parole Board as an independent legal tribunal to "insulate the system from any semblance of political interference (real or perceived)." It argued that "high-profile parole decisions will continue to attract public interest" and therefore almost inevitably "politicians will be drawn into public debate".[284]

The High Court's judgment following the resignation of Nick Hardwick further concluded that given the Parole Board's quasi-judicial status, the ability of the Justice Secretary "to remove members without recourse or appeal" does "reduce the body's independence".[285] The Government said the creation of a protocol for removing members and the Chair has addressed this.[286]

The Government further argues that the provisions in the Bill reflect the high level of public attention and concern that the board's decision-making can generate and the need for the board to "command the confidence of the public at all times."[287]

Setting out the Chair's functions in statute and providing a statutory power to remove them from post is therefore felt to be necessary for strengthening "oversight of the parole process" and ensuring the Chair is "properly accountable to the Secretary of State" on matters of public confidence.[288]

Requiring members with law enforcement experience

The Government's intention to require the board to appoint members with law enforcement experience and to require them to deal with certain cases may reignite long-standing debates about the extent to which the Government should be able to direct the board's membership and the influence it is being seen to exert on the board's proceedings.

The then Lord Chief Justice Lord Phillips raised such concerns back in 2008 in a case in the Court of Appeal which challenged the independence of the board. Giving the judgment, he concluded that the Justice Secretary had "sought to influence" how the board carried out its risk assessment by controlling the appointment of board members. [289]

He went on to say that the "close working relationship" between the sponsoring department (the Ministry of Justice) and the board "had tended to

283 Prison Reform Trust, PRT comment: resignation of Parole Board Chair Nick Hardwick, 6 April 2018

284 Prison Reform Trust, Review of the Parole System PRT submission (PDF), 19 March 2018

285 Ministry of Justice, The Parole Board for England and Wales: Tailored Review (PDF), October 2020, p36

286 Ministry of Justice, The Parole Board for England and Wales: Tailored Review (PDF), October 2020, p36. See the box titled 'current process for removing the Board's Chair' on p73 of this briefing.

287 Explanatory Notes (PDF), p16

288 As above, p17

289 *R v Brooke [2008] EWCA Civ 29.* Note: at the time of this case, the Parole Board was part of the then National Offender Management Service.

blur the distinction between the executive role of the former and the judicial role of the latter."[290]

In response to the Root and Branch review when the initial proposals were outlined, the Parole Board said it welcomes more recruitment of members from a law enforcement background to enable it to meet its increased caseload.[291] However, the board urged "caution on mandating that certain membership types should sit on certain cases", raising similar concern that it could create legal risk in the future, if the requirement to appoint police officers is presented as an attempt by the Ministry of Justice to influence decision making.[292]

Campaign to recruit members with law enforcement experience

The Government has indicated that it intends to run a targeted campaign to increase the number of members with law enforcement experience to meet the requirement that they be involved in 'top-tier cases'.

This may have implications for training and medium to long-term resourcing for the Parole Board. In its tailored review of the Parole Board, the Ministry of Justice highlighted that previous recruitment campaigns which sought to recruit large numbers in one go "resulted in large numbers of experienced Members leaving the organisation at the same time". This put "a strain on the Parole Board" as it meant many new members required training at the same time, diverting resources from operational delivery and represented "a significant and sizeable loss of corporate knowledge and expertise."[293]

The board raised similar concerns about the "immense practical difficulties" of "a blanket requirement" for certain members to sit on cases.[294] The board said it "takes very great care in how it panels cases", with the most experienced and specialist members sitting on the most complex cases. It argued that to go against this and panel such cases "with newly appointed members who are still building their experience" would present "huge legal and reputational risk, and potential risk to the public".[295] The alternative, it argued, would be to rely on the limited number of existing members with law enforcement experience while new members are upskilled. However, it warns this would lead to long delays in cases and potentially mean prisoners would be able to claim compensation for excessive delays. The board notes that according to its evidence there is no significant difference in decision making between member types, including police officers.[296]

290 As above
291 Parole Bord, Letter from the Parole Board to the Ministry of Justice (PDF), 10 May 2022, p4
292 As above
293 Ministry of Justice, The Parole Board for England and Wales: Tailored Review (PDF), October 2020, p47
294 Parole Bord, Letter from the Parole Board to the Ministry of Justice (PDF), 10 May 2022, p4
295 As above
296 As above

4.6 Marriage and civil partnerships in prison (clauses 48-50)

Marriages in England and Wales are primarily regulated by the Marriage Act 1949, and the Marriage Act 1983. Section 1 of 1983 Act enables the marriage of "detained persons" in England and Wales "at the place where that person usually resides". In the case of prisoners this is the prison where they are being held. Notice of marriage must be accompanied by a statement from the governor of the relevant prison, stating they do not object to it being used as a place of marriage.[297] In 2022, approximately 60 prisoners applied to marry in prison out of a total prison population of around 80,000.[298]

Equivalent provisions for detained persons who wish to enter a civil partnership are contained in section 19 of the Civil Partnership Act 2004.

Preventing prisoners on whole life orders from marrying and forming civil partnerships

Whole life orders are where an offender will spend the rest of their life in prison (apart from in exceptional cases of compassionate release) due to the seriousness of their offence(s).[299] These are rare. As of December 2022, 66 prisoners were serving whole life orders in prisons in England and Wales.[300]

Clause 48 would amend section 2 of the Marriage Act 1949 by inserting a new section 2A on marriages of whole life prisoners. By section 2A(1), people serving a life sentence in a prison or other place of detention (such as a secure hospital or Young Offender Institution) and who are subject to a whole life order would not be permitted to marry.[301]

Section 2A(1) would not apply if the prisoner in question had written permission from the Justice Secretary to marry. However, the Justice Secretary would not be able to give such permission unless satisfied that there were exceptional circumstances to justify it. 'Exceptional circumstances' is not defined. The Government suggests the Justice Secretary could exercise this power:

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297 The Government issues guidance for governors on giving permission for marriages or civil partnerships inside a prison. See Handling prisoner applications to marry or form a civil partnership: PSI 14/2016.

298 Explanatory Notes (PDF), p17

299 Section 321 of the Sentencing Act 2020 provides for whole life orders. For most life sentences, where a whole life order is not imposed, the judge sets a minimum term to be served in prison before the prisoner is eligible to apply to the Parole Board for release into the community on licence for life.

300 Ministry of Justice, Victims and Prisoners Bill: Restrictions on the Marriage or Civil Partnerships of Whole Life Prisoners – Impact Assessment (PDF), 29 March 2023, p4

301 This provision would also be applicable to prisoners serving a mandatory life sentence that was received before December 2003 and who were notified in writing that there is no intention for them to be released on licence. See: Explanatory Notes (PDF), p46, para 669.

> ... for example where preventing the marriage would have material (as well as symbolic) consequences e.g. granting an exemption for a deathbed marriage where the long term partner of a whole life order prisoner would otherwise lose the family home on the whole life order prisoner's death.[302]

There is no proposed appeal process for challenging exemption decisions. The Government does note however that "a party could challenge a decision through judicial review, if they felt the procedure was improper or they wanted to challenge the substance of the decision".[303]

Clause 49(2) would amend section 3 of the Civil Partnership Act 2004 which sets out the circumstances in which two people are not eligible to register as civil partners. The clause would insert a new paragraph stating that two people cannot register if either are serving a life sentence and are subject to a whole life order. The remaining provisions of clause 49 reproduce those set out in clause 48 on exemptions from this ban.

Power to make consequential provision

Clause 50 would give the Justice Secretary the power to make provisions consequential on clauses 48 or 49 by regulations. Such regulations may encompass amendments, repeal or revocation in relation to primary legislation.

Potential human rights implications

Article 12 of the European Convention on Human Rights provides that men and women of marriageable age have the right to marry and found a family. However national laws may limit these rights. For example, on a procedural basis in relation to publicity of a marriage or with regards to matters such as capacity and consent.[304]

In *Hamer v United Kingdom*, the European Commission on Human Rights stated that while national law may set out rules in relation to marriage on the basis of public interest, it may not "otherwise deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with the exercise of that right."[305]

In *Draper v United Kingdom*, the Commission considered a policy under which prisoners serving life sentences were not permitted temporary release to marry but also lacked the facilities to marry in prison. The Commission found that the applicant's Article 12 rights had been violated, but also stated - as highlighted by the Government - that, "It is conceivable that in cases involving certain types of offence, a restriction on the right to marry could be justified on the basis of considerations of public interest". The Government

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302 Ministry of Justice, Victims and Prisoners Bill European Convention on Human Rights Memorandum (PDF), 29 March 2023, para 53

303 Ministry of Justice, Victims and Prisoners Bill: Restrictions on the marriage of Civil Partnerships of Whole Life Prisoners (PDF), 29 March 2023, para 33

304 *F v Switzerland*, App no 11329/85 (ECtHR, 18 December 1987) [at 32]

305 *Hamer v United Kingdom* (1979) 4 EHRR 139 (Commission Decision) [at 139]

gave examples of where this might be the case including prisoners convicted for crimes in a family context (such as murder of a spouse) or offences against women and children. [306]

In *Frasik v Poland*, the European Court of Human Rights observed that although restrictions placed on persons deprived of their liberty may be justified by security concerns,[307] there should be no question of detained persons forfeiting their Article 12 rights on the grounds of their detained status. Nor should there be automatic interference with their right to marry based on what the authorities might consider offensive to public opinion.[308]

Given prisoners on whole life orders have, in general, no prospect of release, the Government has argued their "ability to benefit in practice from the right to marry has already been lawfully restricted in a very significant way", including any rehabilitative or stabilising effect a marriage might have.[309] Having received feedback from victims and campaign groups about the "distress and trauma" caused to victims and their families when whole life prisoners apply to get married in prison,[310] the Government said allowing such marriages to continue could be perceived as "inappropriate" by the public. It said this could undermine public confidence that the criminal justice system "is able to deal with such prisoners in a manner reflecting the seriousness of their offending".[311]

The Government has acknowledged it is "possible" the restrictions on marriage will be challenged on human rights grounds, but the volume of such challenges is expected to be "low given the small number of prisoners where this issue could arise".[312]

Note: Article 14 of European Convention on Human Rights provides that everyone should be able to enjoy the rights and freedoms set out in the Convention without discrimination. The Government said in theory a prisoner could argue the proposed restrictions on marriage engages Article 14. However, in the Government's view singling out whole life prisoners in this case is proportionate on the grounds of public confidence. [313]

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306 *Draper v United Kingdom* (1980) 24 DR 72 [62]. See also: Ministry of Justice, Victims and Prisoners Bill European Convention on Human Rights Memorandum (PDF), 29 March 2023, para 50

307 The Court referred to Rule 3 of the European Prison Rules, which states: "Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed"

308 *Frasik v Poland*, App no 22933/02 (ECtHR, 5 January 2010) [at 93]

309 Ministry of Justice, Victims and Prisoners Bill European Convention on Human Rights Memorandum (PDF), 23 March 2023, para 52

310 Ministry of Justice, Victims and Prisoners Bill: Restrictions on the Marriage or Civil Partnerships of Whole Life Prisoners – Impact Assessment (PDF), 29 March 2023, para 13

311 Ministry of Justice, Victims and Prisoners Bill European Convention on Human Rights Memorandum (PDF), 29 March 2023, para 51

312 Ministry of Justice, Victims and Prisoners Bill: Restrictions on the Marriage or Civil Partnerships of Whole Life Prisoners – Impact Assessment (PDF), 29 March 2023, para 33

313 As above, para 54

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