THE VICTIMS AND PRISONERS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Summary of the draft Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Victims and Prisoners Bill. It has been prepared by the Ministry of Justice. On introduction of the Bill in the House of Commons, the Lord Chancellor and Secretary of State for Justice (the Rt. Hon. Dominic Raab MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with Convention rights.

2. Part 1 of the Bill (victims of criminal conduct) is designed to build on the foundations provided by existing victims' rights set out in the current Victims' Code[1] to substantially improve victims' experiences of the criminal justice system. The Bill contains the following measures:

    a. Repealing and re-stating with amendments the provisions of the Domestic Violence, Crime and Victims Act 2004 (DVCVA 2004), which relate to the requirement on the Secretary of State to issue a code of practice as to the services to be provided to victims (the Victims' Code). The restated provisions will place the overarching key principles that must be reflected in the Victims' Code into primary legislation and include a power for regulations to make further provisions about the Victims' Code, including about matters that the Code must include;

    b. Placing duties on criminal justice bodies (the police, the CPS, His Majesty's Courts and Tribunals Service ("HMCTS"), His Majesty's Prison and Probation Service ("HMPPS") and Youth Offending Teams ("YOTs")) (collectively referred to herein as "criminal justice bodies") and non-territorial police forces to take reasonable steps to promote awareness of the Victims' Code;

    c. Placing duties on elected local policing bodies ("PCCs") to keep under review how criminal justice bodies in their police area are exercising their functions in accordance with the Victims' Code; related duties on criminal justice bodies to monitor their own compliance, to collect and share information and to review it with PCCs in support and discharge of their duties;

    d. Placing duties on PCCs to share information about Code compliance received from criminal justice bodies with the Secretary of State and to provide the Secretary of State with reports on prescribed matters;

    e. Placing a duty on the British Transport Police Authority ("BTPA") to keep under review how the British Transport Police ("BTP") exercises its functions in England and Wales in accordance with the Victims' Code; related duties for BTP to monitor compliance, to collect and share information and to review it with BTPA in support and discharge of their duties;

[1] Issued under section 32 of the Domestic Violence, Crime and Victims Act 2004 (c. 28)

f. Placing a duty on the Secretary of State (in practice, the Secretary of State for Defence) to keep under review how the Ministry of Defence Police ("MDP") exercises its functions in England and Wales in accordance with the Victims' Code; related duties for MDP to monitor compliance, to collect and share information and to review it with the Secretary of State in support and discharge of their duties;

g. Placing a duty on the Secretary of State to publish Code compliance data received from PCCs, BTPA and MDP; and a duty on PCCs to take reasonable steps to make members of the public aware of how to access code compliance information published by the Secretary of State in relation to their police area;

h. Placing a requirement on the Secretary of State to issue guidance about the discharge of Code compliance duties; and a requirement that the relevant bodies have regard to that guidance;

i. A joint duty on relevant authorities in England (local policing bodies, local authorities and local health bodies) to collaborate when making arrangements for the provision of support services for victims of domestic abuse, criminal conduct of a sexual nature and serious violence; a requirement for the Secretary of State to issue guidance about compliance with this duty; and a requirement that the relevant authorities have regard to that guidance;

j. A duty for the Secretary of State to issue guidance about Independent Domestic Violence Advisors ("IDVAs") and Independent Sexual Violence Advisors ("ISVAs"); and a requirement that IDVAs and ISVAs have regard to that guidance, as well as any person who has functions relating to victims of criminal conduct, or any aspect of the criminal justice system, where they are exercising such a function and the guidance is relevant to the exercise of that function;

k. A duty on the Victims' Commissioner ("VC") to lay an annual report in Parliament; a power for the VC's reports, whether annual or published throughout the year, to contain recommendations aimed at particular criminal justice agencies, and an accompanying requirement for agencies to respond to any such recommendations within 56 days;

l. A requirement for criminal justice inspectorates (HMI Prisons; HMI Constabulary and Fire and Rescue Services (insofar as it relates to police); HM Crown Prosecution Service Inspectorate and HMI Probation) to consult the VC when preparing their work programmes/frameworks and to carry out joint thematic inspections dedicated to assessing victims' experiences of the criminal justice system when directed to do so by the Secretary of State, Lord Chancellor and Attorney General; and a power for the Secretary of State, Lord Chancellor and Attorney General to issue a direction as regards matters to be covered during a victims-focused inspection; and

m. Removal of the existing requirement that complaints to the Parliamentary and Health Services Ombudsman be referred via a MP, where a complaint relates to the complainant's experience as a victim.

3. Part 2 of the Bill (victims of major incidents) permits the Secretary of State to appoint one or more individuals to act as an independent public advocate ("advocate") to assist victims of a major incident that occurs in England or Wales. These measures:

    a. Provide the Secretary of State with a discretion to appoint an advocate when a major incident has caused the death of, or serious harm to, a significant number of individuals. Advocates will be appointed based on their academic, professional or other qualifications, experience or skills, or their relationship with the geographical or other community that is affected by the incident;

    b. Provide for the advocate to be appointed on terms agreed between the Secretary of State and the advocate ('terms of appointment') which will provide for appropriate remuneration and payment of reasonable costs and expenses incurred by the advocate in connection with the exercise of their functions. The Secretary of State and the advocate will both have the ability to terminate the appointment and the terms of appointment may also make provision for how an appointment may be terminated;

    c. Provide that more than one advocate may be appointed in relation to the same major incident, with one of the advocates being appointed as the lead advocate.

    d. Set out that the functions of the advocate are to provide appropriate support in accordance with the terms of their appointment to the injured and bereaved families following a major incident in relation to the aftermath, an investigation into the incident, an inquest under the Coroners and Justice Act 2009, a non-statutory inquiry and an inquiry into the incident under the Inquiries Act 2005;

    e. Amend section 47 of Part 1 of the Coroners and Justice Act 2009 so that an advocate appointed under Part 2 of the Bill will be treated as an interested party to an investigation or inquest into a person's death caused by a major incident;

    f. Create a duty for advocates to report to the Secretary of State at the conclusion of an investigation, inquest or inquiry if requested to do so via a notice, and for the Secretary of State to publish a copy of their report in a way that the Secretary of State thinks fit;

    g. Enable advocates to share information received in the exercise of their functions with any other advocate appointed in respect of the same incident, the Secretary of State, another public authority and the injured and bereaved families in respect of the incident, though this is subject to the injured and bereaved families providing their consent in respect of any personal data; and

    h. Provide a power for the Secretary of State to issue guidance about the matters to which an advocate must have regard when exercising their functions.

4. Part 3 of the Bill (prisoners) makes changes to the system by which prisoners serving custodial sentences are released on licence by the Parole Board ("the Board") to

continue serving their sentence in the community. They were developed following the Department's Root and Branch Review, which was published on 30 March 2022 ("the Review") alongside an oral statement from the Secretary of State. The review was the result of the Department's 2019 Manifesto commitment to conduct a review of the parole system to improve accountability and public safety. The Review's terms of reference were published on 20 October 2020 and included "identifying any additional legislative or Rule changes that would further improve the parole process including whether the current release test continues to be appropriate".

5. The Review contemplates narrow, but fundamental, changes to how parole operates to improve public protection. The nature of the release test is, at root, a factual and inquisitive analysis relating to risk as it stands at the time of parole review. The measures are designed to provide greater provision for public protection and the mitigation of all reasonable risk. The measures will recast the public protection test and the structure of decision-making for the most serious cases to reflect this, removing the balancing test previously imparted by case law.

6. The measures are as follows:

    a. **The statutory test that determines release**

        i. First, putting beyond doubt what is meant by "necessary for the protection of the public" and moving away from the "balancing exercise" set out in case law (see below under Measure 5(a)); to prescribe a condition regarding the risk of further offending that needs to be satisfied before a prisoner can be released.
        ii. Secondly, prescribing a list of criteria that the Board must consider when applying the release test.

    b. **New powers for the Secretary of State regarding release, including an appeal to the Upper Tribunal ("Tribunal")**

        i. In particularly difficult or complex top tier case (murder, rape, causing or allowing death of child, serious terrorism or terrorism-connected cases), the Board can, where it considers it appropriate, refer a case to the Secretary of State, who then makes the release decision (a "discretionary referral").

        ii. Where the Board directs release of a top-tier case, the Secretary of State may call-in the case and quash the direction (a "directed referral") and then apply the release test himself to determine whether the prisoner is suitable for release.

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        iii. Prisoners subject to Secretary of State decision-making will be entitled to appeal that decision to the Tribunal, who may re-take the release decision. Appeal is also available on the grounds of classic review grounds of illegality, irrationality, procedural impropriety and an error of fact fundamental to the decision (with subsequent appeals available on point of law to the Court of Appeal and Supreme Court). Drafting

excludes an ‘anxious’, ‘super-Wednesbury’ or ‘proportionality’ approach by the Tribunal when considering the irrationality limb.

iv. The Tribunal will have the power to order release if any of the direct appeal grounds are made out.

c. **Change of function and accompanying power of dismissal of the Board Chairperson (“the Chair”).** The role of the Chair will be adjusted to make clear that it is a non-judicial role and a unilateral power of dismissal granted to the Secretary of State to improve accountability and maintain public confidence in the Parole Board.

d. **Composition of membership of the Board.** The membership of the Board is to include persons with law enforcement experience, and the Secretary of State’s existing power to make procedural rules will be extended to provide that the Secretary of State may make rules prescribing members with particular expertise deal with particular classes of case.

e. **Interpretive provision from the Bill of Rights.** Makes interpretive provision in relation to the Human Rights Act 1998 and the European Convention on Human Rights in the context of release, licence, supervision and recall of offenders.

7. Part 3 of the Bill (prisoners) will also include measures to:

   a. prohibit from marriage and forming a civil partnership individuals who are both serving a life sentence in a prison or other place of detention, and subject to a whole life order; and

   b. make provision for the Secretary of State to make an exception to the application of any such prohibition in an individual case and where they are satisfied that exceptional circumstances exist which justify the permission being given.

8. Part 4 of the Bill makes the necessary legal provision for regulations under the Bill as well as the short title of the Bill, financial provision, commencement, extent and transitional provisions.

9. The Government considers that clauses or Schedules to the Bill which are not mentioned further in this memorandum do not give rise to any human rights issues. The Convention rights we have considered in respect of provisions in this Bill are:

   a. the right to life (Article 2);
   b. the right to liberty and security (Article 5);
   c. no punishment without law (Article 7);
   d. the right to respect for private and family life (Article 8);
   e. the right to marry (Article 12);
   f. prohibition of discrimination (Article 14); and
   g. protection of property (Article 1 Protocol 1).

Convention article analysis

Part 1 – Victims of criminal conduct

Article 8 ECHR

10. Article 8 provides that everyone has the right to respect for his private and family life, his home and his correspondence.

11. The Bill places duties on criminal justice bodies (see clause 6(6)), the BTP and the MDP to keep under review their compliance with the Victims' Code of practice (the Code) issued under clause 2(1). Specifically, it requires the relevant bodies to collect and share information about their compliance including by sharing the information with others such as Police and Crime Commissioners, the British Transport Police Authority and/or the Secretary of State. The purpose of collecting and sharing this information is to enable compliance with the Code to be monitored at a local and national level in order to encourage consistency in how services are provided to victims and to improve their experience of the criminal justice system. The detail as to what information must be collected and shared will be set out in regulations. The type of information that the bodies will be required to collect and share will include information such as data demonstrating how the bodies are delivering services under the Victims' Code, as well as direct feedback from victims to whom they provide services.

12. It is not anticipated that regulations made under these provisions will specifically require any of the bodies to collect, process or share personal data relating to an identified or identifiable persons, because we do not expect that such information will be required in order for the bodies to monitor their compliance with the Code. However, should personal data be collected, processed or shared by a public authority as a consequence of these provisions and therefore potentially engage Article 8, that authority must, in accordance with section 6 of the Human Rights Act 1998, ensure that the collection, processing or sharing of the data is not incompatible with Convention rights.

13. The provisions in the Bill may provide a lawful basis for data collection, processing or sharing and those activities may be capable of interfering with Article 8. However, the provisions do not compel authorities to carry out these activities in a way that interferes with Article 8. The provisions are therefore compatible with Article 8 because they are capable of being operated in a way that is compatible with Convention rights (see *Christian Institute v Lord Advocate* [2016] UKSC 511).

Part 2 – Victims of major incidents

14. No ECHR concerns arise in connection with the independent public advocate ("advocate"). We have considered the State's procedural obligation under Article 2 to conduct an effective investigation into a death which is satisfied by inquests conducted by a coroner. The role of the advocate is not a necessary requirement to satisfy Article 2 obligations. Its aim is to assist the bereaved and victims to understand the investigation process following the aftermath of an incident, the inquest process and any inquiry process.

Part 3 – Prisoners (Parole)

Measure 6(a) – new statutory release test

Article 5 ECHR

15. Article 5(1)(a) provides for the liberty and security of person, that no one shall be deprived of his liberty except following the lawful detention of a person after conviction by a competent court.

16. Release of offenders from their sentence engages Article 5(1)(a). To comply with Article 5(1)(a), there must be a sufficient 'causal connection' between the conviction and deprivation of liberty. A post-tariff indeterminate sentenced prisoner (or one in the extended licence period of an extended determinate sentence – for the purposes of this memorandum, this ground will be referred to as 'the Stafford cohort'), may only be detained during this period for reasons of risk and dangerousness connected to their original sentence. *Stafford v UK* [2002] 35 EHRR 1121.

17. Compliance with Article 5 also requires that the detention must not be arbitrary. The ECtHR has determined, in the case of indeterminate sentenced post-tariff prisoners and those in their extended determinate sentence extended licence period, that requires a need for proportionality between the ground of detention relied upon and the detention in question, and that release decisions are made consistently with the objectives of the sentencing court: *James v United Kingdom* [2012] ECHR 1706 at [195].

18. Finally, compliance with Article 5 requires that the conditions for lawfulness of detention are sufficiently certain and foreseeable (*Khlaifia and others v Italy* (App No. 16483/12), 1 September 2015 at [92], "Khlaifia").

19. Neither the clarification of the release test, nor the requirement to take into account specified criteria, are considered to infringe those principles: in each case, they bear a 'causal connection' to the original conviction. These changes have been brought forward as the result of the lack of consistency in application of the release test, and refine the balancing test to be sufficiently prescriptive about the matters the Department considers underpin the proper application of the risk assessment the Board must undertake. The Board also retains its latitude to apply those measures proportionately based on the circumstances of each offender.

Measure 6(b) – the new referral and appeal route

Article 5 ECHR

20. As well as the principles relating to Article 5 outlined about for measure 6(a), the referral measures in particular, engage Article 5(4), alongside matters of common law procedural fairness.

21. Article 5(4) provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Release of the Stafford cohort engages Article 5(4). The

appeal ground provided for in the Tribunal which permits the prisoner, following a no-release decision by the Secretary of State, to appeal to have the Tribunal determine whether or not there is more than a minimal risk the prisoner would commit a further offence which would cause serious harm, is a full merits review of the Secretary of State decision sufficient to comply with the requirements of Article 5(4).

22. The "court" must be independent of the Executive. Proceedings must be adversarial and 'equality of arms' must be ensured between the parties: *A and others v UK* (2009) 49 EHRR 29 ("A") at [204]. In *Weeks v United Kingdom*, the ECtHR found that the Board's procedure violated the procedural guarantees of Article 5(4) because it was not required to disclose adverse material which it had in its possession to the applicant, and this did not enable him to properly participate in the decision which affected him (at [66]). The requirements for these procedural guarantees are set out in the decision of *R(Osborn) v Parole Board* [2014] A.C. 1115. These qualities are met by the review process available in the Tribunal under the Tribunal, Courts and Enforcement Act 2007 and the Tribunal Procedure (Upper Tribunal) Rules 2008.

23. It is therefore the Department's view that Article 5 is engaged, but not breached, by the referral measures.

Article 7 ECHR

24. It is the Department's position that Article 7 is not engaged by these measures, as nothing in the referral powers change the nature of the sentence or type of detention imposed on the prisoner. Post-tariff detention following on from the exercise of the referral power remain for the purposes of re-assessing and preventing P's risk and is not a punishment.

Article 14 ECHR

25. There are measures in the Bill to enable the Parole Board to refer cases to the Secretary of State for decision and to allow the Secretary of State to call-in release decisions, quash them and take the decision himself (having applied the release test). These measures will apply to all parole eligible offenders who have committed the most serious top-tier offences. Applying the principles in *Khan v Secretary of State for Justice* [2020] 1 WLR 3932 at [58], measures which provide for different treatment of offenders based on gravity of offence are not an 'other status' on which an Article 14 claim can be based, In any event, the Department considers the measures are justified based on the legitimate aim of preventing further reoffending and the serious implications for public protection should the upward trend in very serious offending and serious further offences continue.

Measure 6(c) – changes to the role of the Chair and power for the Secretary of State to dismiss the Chair unilaterally

26. The structure of the Parole Board involves Board members, who sit on cases and take release decisions, and senior leadership including the Chair, Vice Chair and CEO of the Board, who oversee and run the Board.

27. In addition to the reforms in the Review, the Department wishes to build further accountability into the senior levels of the Parole Board. Following the John Worboys case, and building on the principles of public confidence set out in the Review, the

proposed measure will introduce a power for the Secretary of State to remove the Board Chair where they or the public believe this is necessary for the maintenance of public confidence in the parole system. This hooks into the concept of accountability to Ministers, applying to the Board as a Non-Departmental Public Body and set out in the Public Bodies Handbook at sections 2 and 3.

28. The new functions of the Chair will be as follows:
    a. To lead the board in the general exercise of its functions;
    b. To chair meetings of the Board (insofar as the meeting concerns the general exercise of the Board's functions);
    c. To ensure a strategy for effective exercise of Board functions is in place;
    d. To keep the strategy under review and periodically adjust as appropriate;
    e. To take steps as considered appropriate to promote the independence of the Board;
    f. To take steps to ensure the Board takes account of Secretary of State directions;
    g. To take steps to promote public awareness of the Board and its functions.

29. To ensure compliance with the *Wakenshaw and Brooke* principles (outlined below), the drafting distinguishes between the general exercise of the Board functions as a body corporate, and the specific exercise of its functions in individual decision-making under the release legislation. It then contains an express provision to make it clear that the Chair must not play any part in dealing with individual parole cases, including attending or playing any part in proceedings of the Board in relation to those cases, determining which Board members participate in those proceedings, or otherwise seeking to influence recommendations of Board members in those cases. The effect of these clauses is that the Chair does not and cannot perform any functions which could be perceived to be judicial or act in any way capable of influencing the discharge of judicial functions by the Parole Board members. The judicial functions and judicial-related functions will be a matter for the Board to arrange, but are expected to become the responsibility of the Vice-Chair. The tenure of the Chair is to be extended to 5 years with the possibility of a further 5 year extension, and enshrined, along with that of the Vice Chair, on the face of the legislation.

Article 5 ECHR

30. Article 5(4) and the principles governing the constitutional independence of the judiciary are engaged by this measure. The domestic courts have considered certain aspects of this issue in *R (oao Brooke and another) v Parole Board and another* [2008] EWHC Civ 29 ("Brooke"); and again in *R (oao Wakenshaw) v Secretary of State for Justice* [2018] EWHC 2089 ("Wakenshaw").

31. *Brooke* sets out which aspects of the Parole Board's organisation and structure lacked independence from the Executive at the time of that case, such that a decision taken by the Parole Board failed to meet the requirements of both the common law and Article 5(4).

32. In respect of Parole Board's members' tenure, the Divisional Court held that the relatively short 3-year term of appointment, coupled with the Secretary of State's general power to terminate a member's appointment if satisfied that the member had

failed satisfactorily to perform his or her duties (which was at that time included in the terms of appointment as a matter of routine), was incompatible with the requirement for independence. The Court of Appeal agreed, noting that the general power of dismissal contrasted with other, more specific grounds upon which the Secretary of State could terminate an appointment, and concluded at para 88 that: *"At the least it requires to be restricted by the establishment of a procedure that ensures that a member's appointment is not terminated without good cause and subject to fair process."* Brooke establishes "*the need for the Board to be and to be seen to be free of influence in relation to the performance of its judicial functions. Both by directions and by the use of his control over the appointment of members of the Board the Secretary of State had sought to influence the manner in which the Board carried out its risk assessment"* (at [79]).

33. In *Wakenshaw*, the claimant challenged the Parole Board's decision-making on the basis it lacked independence from the Executive following the resignation of the former Chair in the wake of the Worboys controversy.

34. The Court held the shortness of tenure and ability of Secretary of State to remove a member if *he is satisfied that he or she has failed without reasonable excuse to discharge the functions of his or her office for a continuous period of at least three months, or is unable to discharge the functions of the office, without recourse to any procedure or machinery to determine the merit, or otherwise* led to a lack of procedural safeguards to the extent that Article 5(4) has been breached. The Court held these principles also apply to the Chair as a Board member.

35. Also in that decision, Mostyn J went on to consider the particular position of

36. The case law makes it clear that independence is established only be taking into account the whole of the arrangements relating to the Board. The drafting ensures the tenure issues raised in *Wakenshaw* are resolved by making express primary legislative provision for a longer tenure for the Chair of 5 years with the potential for a further 5-year extension. The Vice-Chair, whose tenure is currently 5 years (with the possibility of a further 5 years) will also have their tenure set out on the face of the legislation to strengthen the Board's independent leadership arrangements. The drafting also amends the role of the Board Chair to be expressly clear that they do not and cannot perform any functions which could be perceived to be judicial or act in any way capable of influencing the discharge of judicial functions by the Parole Board members, thereby ensuring independence as required by Article 5(4) and as a matter of constitutional law. The drafting sets out in statute the role of the Chair to ensure that successful delivery of that role does not include the performance of any functions which could be perceived to be judicial, but is instead focused on general leadership, ensuring a strategy is in place, public awareness, administrative efficiency and effectiveness. This will distinguish the findings in *Wakeshaw* at para 27-30, as there will be an express legislative distinction between the Chair and the Board members. The Chair's tenure of five years followed by the potential for another five years is set out in the provisions. The provisions expressly exclude the currently serving Chair from the changes.

37. It would be unlikely that a reasonable, well-informed observer could conclude that the new role as drafted might lead to Secretary of State influence over the Board's

judicial decision-making, in line with *Wakenshaw* at para 21-22. It is therefore the Department's view this measure engages, but does not breach, Article 5.

Measure 6(d) – parole board composition and membership

38. This measure provides a statutory requirement for the Board's membership to include those with law enforcement experience by allowing Rules to be made prescribing types of members which must deal with certain categories of cases.

Article 5 ECHR

39. Article 5(4) may be engaged if the reforms impugn the appearance of independence of the Parole Board as a 'court'; in particular, the way it exercises its judicial functions.

40. In that regard, this change is unlikely to breach Article 5(4). The composition of Board membership is not concerned with the exercise of any specific or general judicial function of the Board. It is not designed to alter the outcome of cases as was the case in *Brooke*. Instead, the change is intended to ensure the Board, as a specialist tribunal, has the appropriate specialist experience it needs to make risk assessments. As those with law enforcement experience will have first-hand experience of assessing risk to the public, it is plainly sensible that such experience should be represented on the Board. Moreover, such persons are already represented within the Board's composition, albeit not as a consequence of the statutory composition requirements.

41. The second change – to expressly provide the Secretary of State may make procedural rules regarding composition, with a view to rule changes to require members with such law enforcement experience hear 'top tier' cases – also does not infringe Article 5(4) and the Board's independence. As above, the changes are not intended to influence decision-making, but instead ensure the robustness of decision-making. As the Court of Appeal noted in *Brooke*, having such members sitting alongside judges, lay members and other members with other expertise, does not give rise to actual or perceived want of independence. This power is also consistent with the powers of the Lord Chancellor in the unified tribunal system. By paragraph 15 of Schedule 4 of the Tribunals, Courts and Enforcement Act 2007, the Lord Chancellor may by order determine the composition of tribunals. That includes: the number of members to decide a matter; whether that is to be determined by a judicial or lay member; and, if a lay member, what qualifications and experience, if any, they must have. It is therefore the Department's view this measure engages, but does not breach, Article 5(4).

Measure 6(e) – interpretive provision from the Bill of Rights

Disapplication of section 3 of the Human Rights Act 1998 for the release legislation

42. Section 3 of the HRA requires that legislation is to be read and given effect, so far as it is possible to do so, in a way which is compatible with the Convention rights. Clauses 42, 43 and 44 disapply section 3 of the HRA in relation to Chapter 2 of Part 2 of the 1997 Act, Chapter 6 of Part 12 of the 2003 Act, section 128 of LASPO, and all secondary legislation made under these provisions ('the release legislation').

These provisions span the full legislative framework in England and Wales relating to release, licences, supervision, and recall of indeterminate and determinate sentenced offenders.

43. The purpose of these clauses is to bring forward in this context the repeal of section 3 HRA, as set out in the Bill of Rights Bill at paragraph 2 of Schedule 5, which was introduced in June 2022, specifically in relation to the statutory release regime. This means that, if incompatibilities do arise with the new parole measures, or any of the other release measures, courts (and others) will not be under the obligation to interpret the provisions compatibility "so far as it is possible to do so". The purpose of this is to avoid courts adopting a strained section 3 interpretation, which ultimately disregards the policy intentions of the release regime. The Government is content that the provisions to which the disapplication of section 3 apply are compatible with Convention rights. However, if the courts find otherwise, or jurisprudence develops in such a way as to challenge the compatibility of the provisions, the disapplication of section 3 would require Parliament to address these incompatibilities through legislation, rather than the courts through interpretation.

44. Section 3 interpretations are, in principle, adopted in the circumstances of the relevant case/situation (in contrast to amendment of legislation, which changes the relevant provision for all circumstances). It will mean that a court or public authority considering an analogous situation in future will no longer be able to rely on section 3 to interpret the release legislation compatibly. While this may lead to a declaration of incompatibility, we do not consider those incompatibilities would be created by clauses 42, 43 and 44 themselves. Rather, section 3 will simply be removed as a tool for courts and public authorities in future. Further, repeal of section 3 is not retrospective (though as discussed, there are no instances of challenge of this nature to the extant release legislation).

45. Courts will continue to use orthodox principles of statutory construction to interpret legislation. Disapplication of section 3 HRA does not remove the common law presumption that the legislator intends to legislate compatibly with the ECHR, unless expressly indicated otherwise.

Application of certain Convention rights in prisoner release cases

46. Clause 45 of the Bill brings forward the application of clause 6 of the Bill of Rights Bill, but specifically in relation to the prisoner release legislation (as defined). Where a court is considering a challenge relating to a relevant Convention right, in relation to application of any of the release legislation (for example, the new referral process, or a recall by the Secretary of State of a released offender) the court must give the greatest possible weight to the importance of reducing the risk to the public from the offender.

47. The clause will not apply to Articles 2, 3, 4(1) and 7 (i.e. the 'absolute' Convention rights, protection of which cannot be weighed up against anything else). While public protection (or a related concept) is already an explicitly available limitation or qualification in relation to certain rights, such as Article 6 and Article 8, the new clause will ensure that courts have appropriate regard to this consideration in any balancing exercise. Courts will though still have to act compatibly with the Convention rights.

Part 3 – Prisoners (Prisoner Marriage)

48. Clauses 48 and 49 will:

    a. Prohibit from marriage and forming a civil partnership individuals who are both serving a life sentence in a prison or other place of detention, and subject to a whole life order; and

    b. make provision for the Secretary of State to make an exception to the application of any such prohibition in an individual case where they are satisfied that exceptional circumstances exist which justify the permission being given.

Article 12 ECHR

49. The right to marry is protected under Article 12 of the ECHR. In examining a case under Article 12 the Court will determine whether, regard being had to the State's margin of appreciation, the impugned interference was arbitrary or disproportionate: the restriction imposed must be for a legitimate purpose and must not go beyond a reasonable limit to attain that purpose. The Court has accepted that limitations may include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy.

50. In its opinion in Draper v. the United Kingdom Application No. 8186/78 (1980) 24 DR 72, E Com HR, while finding that the policy in that case was in breach of Article 12 the Commission recognised that restrictions on prisoners who have committed certain serious types of offences could comply with Article 12:

    "62. In explaining the reasons for the practice followed in the specific case of life sentenced prisoners, the Government have mentioned various particular types of case, notably involving prisoners convicted for crimes in a family context (such as murder of a spouse) or offences against women or children, where marriage or re-marriage of the prisoner could give rise to public outrage or difficulties concerning release. It is not the Commission's task to express an opinion in abstract as to whether in any of the cases mentioned by the Government the right to marry of the prisoner might legitimately be restricted under Article 12 "according to the national laws governing the exercise of this right". ***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*** *(c.f. para. 48), regardless of the type or length of sentence imposed on the perpetrator.*

51. Given the nature and seriousness of the offences for which prisoners who are subject to whole life orders have been convicted, it is the Government's position that the current position undermines public confidence in the Criminal Justice System.
52. Such prisoners will never be considered for release by the Parole Board and do not expect to be released (subject to a power of the Secretary of State to release on compassionate grounds in exceptional circumstances). The nature of a whole life

order means that the prisoner's ability to benefit in practice from the right to marry has already been lawfully restricted in a very significant way, given that they will never be released and able to freely enjoy married life, and any rehabilitative and stabilising effect of a potential marriage will therefore be curtailed or absent in such cases.

53. The clauses allow for the Secretary of State to make exemptions on a case by case basis in exceptional circumstances. Any discretion available to a Secretary of State will itself be exercised compatibly with ECHR obligations. The intention is that the exemption process will be exercised on an exceptional basis. It might be used, 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.

Article 14

54. A prisoner within scope may argue that Article 14 is engaged because they are treated differently to a prisoner whose sentence means they are not included. The Government have determined that it is proportionate to focus on whole life order prisoners, noting that considerations of public confidence in the Criminal Justice System, and not undermining public confidence in the Criminal Justice System, are at their highest where these prisoners are concerned. These prisoners are by definition the most serious of offenders.

The UN Conventions on the Rights of the Child

55. The UK is signatory to the UN Convention on the Rights of the Child 1990 ("UNCRC") which it ratified in 1991. The Convention has not been implemented directly into legislation, but the UK is bound by it and must under international law perform its obligations in good faith. As such, regard is to be given to the UNCRC when developing any new legislation or policy.

56. Article 3 of the UNCRC requires the best interests of the child to be a primary consideration in all actions concerning children. As public institutions, the Secretary of State for Justice and the Board must have regard to the child's best interests in performance of their duties and functions under the Bill (i.e. determining if a child is safe to be released in accordance with the statutory test). The provisions in Part 3 of the Bill in relation to parole are intended to create a more robust parole system to prevent and reduce serious further offending, thereby enhancing the relevant rights of children who may become victims.

57. The exercise of the referral powers against those under the age of 18 is expected to be especially infrequent (likely less than one annually) and supplemented by policy and operational guidance to ensure UNCRC compatibility of use.

58. The youth justice system is distinct from the criminal justice system applicable to adults, focusing on the statutory aim of preventing offending by children and the welfare of the child. The measures in the Bill will not affect these fundamental

principles. Article 37 of the UNCRC requires that no child shall be deprived of their liberty unlawfully or arbitrarily. The ongoing custodial detention of a child in accordance with the Bill measures shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

59. Article 39 of the UNCRC requires appropriate measures to be taken to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment. It provides that such recovery and reintegration should take place in an environment which fosters the health, self-respect and dignity of the child. The provisions in Part 1 of the Bill which relate to victim support are in line with these objectives and contain specific measures designed to target the distinct needs of child victims. For example, clause 13(3) provides that in preparing a strategy in relation to victim support functions, relevant authorities must have regard to any assessment of the needs of victims, including victims who are children and clause 15(4)(b)(i) provides that guidance in relation to IDVAs and ISVAs must include provision about the services to be provided to victims who are children, where relevant.

60. The Department considers that these measures support the principles of the UNCRC.

Ministry of Justice

29th March 2023