Joint Committee on Human Rights
Committee Office · House of Commons · London · SW1A 0AA
Tel 020 7219 2793 Email JCHR@parliament.uk Website www.parliament.uk

From Rt Hon Harriet Harman MP, Chair

Alex Chalk KC MP
Lord Chancellor
Ministry of Justice

[By Email]

03 October 2023

Dear Secretary of State,

As you will be aware, part of the role of the Joint Committee on Human Rights is to carry out legislative scrutiny in respect of Bills that may raise human rights concerns. The Victims and Prisoners Bill is of interest to the Committee because it purports to enhance the rights of victims. It is also of interest because its clauses concerning prisoners impact on their human rights, most obviously the right to liberty guaranteed by Article 5 of the European Convention on Human Rights, given effect in domestic law by the Human Rights Act 1998.

As part of our scrutiny of the Bill, we have received written evidence from representatives of the legal profession, human rights NGOs and organisations campaigning for rights of victims. We have also taken into account the work of the Public Bill Committee and oral evidence on Parts 2 and 3 of the Bill provided to the Justice Committee, and noted the 7 June 2023 letter to you from Sir Robert Neill, Chair of the Justice Committee. We held an evidence session with witnesses including Bishop James Jones on the proposal for a 'Hillsborough Law', which, amongst other matters, covered the creation of an independent public advocate – something that the Bill seeks to achieve. We have also considered how the Bill could be enhanced to address other ongoing human rights concerns that fall within its scope.

This letter is intended to bring to your attention the key concerns that we have identified in respect of the Bill, and to present proposals for amendments to the Bill.

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Part 2 – Independent Public Advocate

The Committee welcomes the introduction of an independent public advocate to provide support and assistance to the victims of major incidents and their families. However, we received written evidence from witnesses including Inquest[1] and oral evidence from Bishop Jones criticising the Bill's failure to establish a standing advocate, rather than an advocate appointed by the Secretary of State following a particular incident. Bishop Jones noted that:

> "in the immediate aftermath of a public tragedy when people are disorientated, grief-stricken, bereaved, traumatised, that is the very moment when they need an independent public advocate. To wait two weeks or two months for the Secretary of State to work out whether or not the public tragedy merits an IPA overlooks the pressing need in the immediate aftermath of there being an advocate for those who have been affected."[2]

We share these concerns and consider that the Bill should be amended so as to require the establishment of a standing public advocate who is fully independent of Government, and able to take action to provide support to victims in the immediate aftermath of major incidents. An amendment to the Bill designed to achieve this can be seen below in the appendix to this letter.

The Committee intends to return to the wider question of the need for a "Hillsborough Law" in the coming months.

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[1] Written evidence from INQUEST (VAPB0017)
[2] Oral evidence to JCHR, 19 July 2023, Q10

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Part 3 – Parole Board reforms

Article 5(4) ECHR 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.

This right applies to those serving an indeterminate sentence (including life imprisonment) who have reached the end of the tariff period of their sentence and therefore may only be detained for reasons of risk or dangerousness, as well as to prisoners serving the extended licence period of an extended determinate sentence.[3] The right requires the lawfulness of their continued detention to be decided by a court. The Parole Board is the body that decides whether the risk these prisoners pose means they should continue to be confined or should be released. It is sufficiently judicial and independent to meet the requirements of Article 5(4).

The Bill would give the Secretary of State the power to quash decisions of the Parole Board to release prisoners who have committed very serious crimes and to retake them himself. The Parole Board would also be given the power to refer parole cases to the Secretary of State to be decided, but we agree with the Justice Committee that it is hard to see in what circumstances this power would or should ever be exercised.

While we recognise concerns about certain decisions of the Parole Board in recent years, the Secretary of State cannot take a decision in respect of release that complies with Article 5(4). The Secretary of State is not a "court" as he is neither judicial nor independent. Indeed, he is effectively a party to Parole Board cases, meaning that allowing him to take decisions in those cases "erodes the basic principle of common law that no one can be a judge in their own cause", as we heard from the Law Society.[4]

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[3] Stafford v UK, App.no. 46295/99, 28 May 2002

[4] Written evidence from The Law Society of England and Wales (VAPB0002)

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The Bill seeks to remedy this clear inconsistency with Article 5(4) by providing a prisoner who is denied release by the Secretary of State a right of appeal to the Upper Tribunal. This is not, however, enough to meet our concerns in relation to Article 5 because:

1. The initial decision on release is incompatible with Article 5 and it should not be incumbent on the prisoner to conduct an appeal in order to remedy this incompatibility.[5]
2. The Parole Board is the quasi-judicial body best equipped to deal with questions of risk which lie at the heart of any release decision. Taking that decision away from the Parole Board and giving it to the Upper Tribunal is unlikely to result in a better analysis of risk. In particular, it appears unlikely that the Upper Tribunal would be able to rehear the whole case, including oral evidence, before coming to its conclusion on the merits.[6]
3. By granting the Secretary of State a power to re-take decisions already taken by the Parole Board and providing an appeal right against the Secretary of State's decision, the Bill would significantly extend what is already a process that struggles to meet the Article 5(4) requirement of "speediness".[7]

For these reasons, we consider that the Secretary of State's proposed power to direct the referral of decisions of the Parole Board to himself is incompatible with Article 5 ECHR and should be removed from the Bill. An amendment to the Bill designed to achieve this is appended to this letter.

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[5] See written evidence to the JCHR from JUSTICE (VAPB0006) and from Amnesty International UK (VAPB0008) as well as oral evidence given to the Justice Committee by Simon Creighton, a solicitor with Bhatt Murphy (Oral evidence: Victims and Prisoners Bill, HC 1340, Q22)

[6] Points made to us in written evidence from the Bar Council, Amnesty International UK and the Prison Reform Trust

[7] See the oral evidence of Simon Creighton to the Justice Committee

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The Bill would also give the Secretary of State the power to amend the Parole Board Rules to require particular cases to be dealt with by a Parole Board panel including members with particular backgrounds. The explanatory notes that accompany the Bill 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." We agree with the Justice Committee, who heard from witnesses including representatives of the Parole Board, that this amounts to an interference with the independence of the Parole Board.[8] This puts at risk the Parole Board's compliance with Article 5 ECHR.

Similar risks are raised by the Bill's introduction of a statutory power to enable the Secretary of State to dismiss the Chair of the Parole Board. As the Justice Committee have indicated, this power is not compatible with the Parole Board's position as an independent body exercising quasi-judicial functions that amounts to a court for Article 5 purposes.[9]

The Bill should be amended to remove these changes to the structure and function of the Parole Board. Amendments to the Bill that would achieve this can be seen below in the appendix to this letter.

[8] Letter to Lord Chancellor from Sir Robert Neill, dated 7 June 2023
[9] Ibid

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Section 3 HRA

The Bill includes provisions that would disapply section 3 of the Human Rights Act 1998 in respect of "the full legislative framework in England and Wales relating to release, licences, supervision, and recall of indeterminate and determinate sentenced offenders".[10] Section 3 HRA provides that all legislation should, so far as possible, be read and given effect in a way that is compatible with Convention rights.

In previous reports, we have described this section as "crucial to the legal protection of human rights in the UK" and opposed the Government's disapplication of section 3 HRA in respect of the Illegal Migration Act[11] and the proposal to repeal section 3 HRA entirely, which formed part of the Government's now abandoned Bill of Rights Bill.[12] We have been unable to find evidence of the courts misusing section 3 HRA to undermine the will of Parliament. We also consider that disapplying section 3 HRA is likely to result in more legislation being declared incompatible and more successful cases being brought before the European Court of Human Rights in Strasbourg. We agree with the written evidence of the Prison Reform Trust that "as well as being objectionable in principle, it is also unclear what specific issue with existing human rights legislation these provisions are trying to solve."[13]

Disapplying section 3 HRA weakens human rights protections. By disapplying it in respect of a particular cohort the Government also risks undermining the fundamental principle that human rights are universal. The disapplication of section 3 HRA should be removed from the Bill. An amendment designed to achieve this can be seen below in the appendix to this letter.

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[10] ECHR memorandum, para 42
[11] Twelfth Report of Session 2022-23, Legislative Scrutiny: Illegal Migration Bill, HC 1241/HL 208
[12] Ninth Report of Session 2022-23, Legislative Scrutiny: Bill of Rights Bill, HC 611/HL 132
[13] Written evidence from The Prison Reform Trust (VAPB0009)

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IPP Prisoners

Sentences of Imprisonment for Public Protection (IPP) were discontinued in 2012. Despite this, almost 3,000 prisoners continue to serve these sentences, some of whom are more than a decade past their original tariff period.[14] IPP sentences have been described as "irredeemably flawed" by the Justice Committee, who have called for a comprehensive resentencing programme.[15]

IPP sentences also raise obvious human rights concerns. Article 5 ECHR prohibits arbitrary detention and the European Court of Human Rights has held that IPP sentences were arbitrary and in breach of Article 5 where appropriate provision for rehabilitative services was not made.[16] We are concerned that a risk of arbitrariness incompatible with Article 5 also arises where prisoners are still serving IPP sentences many years after a short tariff period has expired and where prisoners are recalled to custody many years after their tariff period has expired. Furthermore, given the right not to be subjected to inhuman or degrading treatment under Article 3 ECHR, we are concerned about the mental health implications of extended detention under an IPP sentence.[17] In respect of Article 2 ECHR, the right to life, we note the disturbing number of self-inflicted deaths amongst IPP prisoners. 2022 saw the highest number of self-inflicted deaths among the IPP prison population since the sentence was introduced.[18] Reflecting these serious concerns, the UN Special Rapporteur on torture has recently described IPP sentences for many as "cruel, inhuman and degrading" and called for the Government to review the sentences of IPP prisoners as a matter of urgency.[19]

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[14] **Offender management statistics quarterly: January to March 2023, published 27 July 2023**
[15] Justice Committee; Third Report of Session 2022-23, IPP Sentences, HC 266
[16] James, Wells and Lee v United Kingdom [2012] ECHR 1706[17] Justice Committee report on IPP Sentences, paras 40-59
[18] Prisons and Probation Ombudsman: Learning lessons bulletin; Fatal incident investigations | Issue 18, September 2023
[19] UN Press Release, 30 August 2023: "UK: UN torture expert calls for urgent review of over 2,000 prison tariffs under discredited IPP sentencing scheme"

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The Victims and Prisoners Bill represents an opportunity to remedy this ongoing stain on the criminal justice system. The Bill should be amended to include provision for the resentencing of all IPP prisoners. We note that a new clause that would achieve this, which we support, has been tabled by Sir Robert Neill, the Chair of the Justice Committee.

Mothers in prison

The Joint Committee on Human Rights has previously reported on the children of mothers in prison and the need for greater respect for their rights, particularly under Article 8 ECHR (the right to respect for family life).[20] When a mother is sentenced to imprisonment or denied bail, the impact on her children may be severe and must be taken into account. The Committee's reports have called for changes to sentencing practice and the approach to bail to take greater account of the welfare of children, as well as for the introduction of obligations on the Government to collect and publish data on the number of people held in prison who have responsibility for the care of a child.

While some progress has been made, the changes we have called for have not been implemented. The need for them remains. The Victim and Prisoners Bill should be expanded to make these important changes in the law. An amendment on data collection can be seen below in the appendix to this letter.

[20] Twenty Second Report of Session 2017-19, The right to family life: children whose mothers are in prison (HC 1610/ HL 411); Sixth Report of Session 2019-21, Human Rights and the Government's response to COVID-19: children whose mothers are in prison (HC 518/ HL 90); First Report of Session 2021–22, Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill (HC 90/ HL 5)

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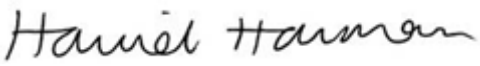
The Committee would be grateful for a response to this letter by 1 November 2023. We look forward to seeing our concerns about the Victims and Prisoners Bill taken into account before the Bill returns for Report Stage in the House of Commons.

Yours sincerely,



Rt Hon Harriet Harman MP

Chair of the Joint Committee on Human Rights

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Appendix – Amendments to the Victims and Prisoners Bill

Independent Public Advocate

Page 23, clause 25, line 14, replace clause 25 to 27 with the following:

"*25 Appointment of independent public advocate*

(1) The Secretary of State shall promptly appoint an individual to act as an independent public advocate for victims of major incidents (referred to in this Part as the "advocate").

(2) A major incident is an incident that—

(a) occurs in England or Wales after this section comes into force, and

(b) appears to the advocate to have caused the death of, or serious harm to, a significant number of individuals.

(3) For these purposes, "harm" includes physical, mental or emotional harm.

(4) An individual may be appointed as the advocate only if the Secretary of State considers that the individual is qualified to act as the advocate by virtue of their academic, professional or other qualifications, experience or skills.

(5) In this Part, "victims", in relation to a major incident, means

(a) individuals who have been harmed by the incident (whether or not that harm is serious harm), and

(b) close family members or close friends of individuals who have died or suffered serious harm as a result of the incident.

26 Terms of appointment and administrative support

(1) Subject to the following provisions of this section, an individual is to be appointed as the advocate on terms agreed between the individual and the Secretary of State.

(2) The Secretary of State shall pay to or in respect of the advocate—

(a) such remuneration as the Secretary of State considers appropriate;

(b) reasonable costs incurred by the advocate in connection with the exercise of their functions, including those incurred in connection with proceedings relating to the exercise (or purported exercise) of those functions;

(c) such other sums by way of allowances or gratuities as the Secretary of State considers appropriate.

(3) The advocate shall appoint sufficient deputies and a secretariat to ensure that the functions and powers set out in this Part can be fulfilled in an efficient and effective manner.

(4) The Secretary of State shall provide sufficient resources to ensure the efficient and effective functioning of the office of the advocate.

(5) The office of the advocate shall sit within the Ministry of Justice for administrative purposes, but shall be independent with respect to its functioning and decision-making processes.

(6) An advocate appointed in respect of a major incident is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown."

Explanation: this amendment requires the appointment of a standing Independent Public Advocate (IPA) and provides for the terms of the IPA's appointment, the appointment of deputies and a secretariat and the IPA's functional independence.

Parole changes

Page 35, line 28, leave out clauses 36 to 42

Explanation: this amendment would remove the power of the Secretary of State to direct the Parole Board to refer the prisoner's case to him, along with consequential matters.

Page 46, line 29, leave out clauses 47 and 48

Explanation: this amendment would remove changes to the Parole Board rules allowing for particular members to be required to deal with particular cases and to statutory provisions regarding membership of the Parole Board and the role of the Chair of the Parole Board]

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Disapplication of section 3 HRA

Page 45, line 1, leave out clauses 43 to 45

Explanation: this amendment would remove provisions that disapply section 3 of the Human Rights Act 1998 in respect of legislation concerning life prisoners, fixed term prisoners and the power to change the test for release on licence of certain prisoners.

Mothers in prison

New clause: data collection on children of prisoners

To move the following clause:

"Imprisonment of primary carers

(1) The Secretary of State shall collect and publish annual data identifying—

(a) how many prisoners are, or would be but for their imprisonment, the primary carers of a child,

(b) how many children have a primary carer, or a person who would be a primary carer but for that person's imprisonment, who is a prisoner, and

(c) the ages of those children.

(2) In this section—

(a) 'child' means a person under the age of 18, and

(b) 'primary carer' means a person who has primary or substantial care responsibilities for a child.

(c) 'prisoner' means a person serving a sentence of imprisonment or imprisoned whilst awaiting sentence or awaiting trial"

Explanation: This imposes a requirement on the Secretary of State to collect and publish data on the number of prisoners who are the primary carers of a child and the number of children who have a primary carer in custody.