

HOUSE OF LORDS

Select Committee on the Constitution

1st Report of Session 2023–24

Victims and Prisoners Bill

Ordered to be printed 18 January 2024 and published 18 January 2024

Published by the Authority of the House of Lords



Select Committee on the Constitution

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See Appendix 1.

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Victims and Prisoners Bill

Introduction

1. The Victims and Prisoners Bill was introduced in the House of Commons on 29 March 2023 and, having been carried over to the new session, brought to the House of Lords on 6 December 2023. Second reading took place on 18 December 2023 and committee stage is scheduled to begin on 24 January 2024.
2. The Bill has four primary objectives:
 - (1) to improve end-to-end support for victims of crime;
 - (2) to provide for advocates for victims of crime and the bereaved following a major incident;
 - (3) to implement reforms set out in the Government's Root and Branch review of the Parole System;
 - (4) to prohibit prisoners imprisoned under whole life orders from being able to marry or form a civil partnership whilst in prison.¹

Disguised legislation

3. Clause 15 requires the Secretary of State to issue guidance about independent domestic violence advisors and independent sexual abuse advisors.² The guidance must include provision about:
 - the role of such advisors;
 - the services they provide to victims and persons who are not victims (where that service is provided in connection with a service provided to a victim);
 - how such advisors and other persons with functions relating to victims, or any aspect of the criminal justice system, should work together; and
 - appropriate training and qualifications for such advisors.³
4. Under clause 15(5) independent domestic violence advisors and independent sexual violence advisors must have regard to the guidance when exercising their functions.⁴ Clause 15(6) provides that any other person who has functions relating to victims, or any other aspect of the criminal justice system, must also have regard to guidance under this section when exercising such a function, or when the guidance is relevant to the exercise of that function, save for those acting in a judicial capacity.⁵

1 [Explanatory Notes to the Victims and Prisoners Bill](#), paras 2–5

2 [Victims and Prisoners Bill](#), clause 15. “Independent domestic violence advisor” means a person who provides a relevant service to individuals who are victims of criminal conduct which constitutes domestic abuse and “independent sexual violence advisor” means a person who provides a relevant service to individuals who are victims of criminal conduct which constitutes conduct of a sexual nature.

3 [Victims and Prisoners Bill](#), clause 15(4)

4 [Victims and Prisoners Bill](#), clause 15(5)

5 [Victims and Prisoners Bill](#), clause 15(6) and (7)

5. In our view, the guidance provided for by clause 15—which requires those subject to it to take account of its provisions when performing their functions—is an example of ‘disguised legislation’.⁶
6. Its constitutional impact is exacerbated by several factors. First, the guidance applies not just to public bodies but also to independent bodies providing a public service. Second, the Secretary of State is not required to consult appropriate individuals before publishing the guidance. This creates no opportunity for those required to comply with the guidance to object to requirements that it would be impossible to comply with or that might undermine their ability to perform their functions. Third, the guidance may include policy choices as to the role of these advisors and the services they should provide. This could be used, for example, to require independent advisors to give priority to persons who have been found to be victims of criminal proceedings, even though clause 1(5) of the Bill makes it clear that an offence need not have been reported for a person to be a victim.⁷
7. **We are concerned that the use of guidance for these provisions does not offer an adequate degree of parliamentary scrutiny. *The House may wish to seek further information from the Government as to why these provisions are to be established through guidance as opposed to regulations, which would allow for parliamentary oversight.***

Victims of major incidents

8. The Bill requires the Secretary of State to appoint a standing advocate for victims of major incidents.⁸ The Secretary of State may also appoint an individual to act as an advocate for victims of a major incident. This can either be the standing advocate or another suitably qualified individual.⁹ A standing advocate is not to be regarded as a servant or agent of the Crown.¹⁰
9. Clause 31(2)(a) provides that the appointment of an advocate for victims of a major incident may be terminated “by the Secretary of State on such grounds as the Secretary of State considers appropriate”.¹¹ The Secretary of State also has the power to determine the advocate’s salary¹² and secretarial support.¹³
10. For other similar appointments, such as that of the Victims’ Commissioner, there is no provision empowering the Secretary of State to terminate their appointment on grounds the Secretary of State considers appropriate.¹⁴
11. ***The House may wish to consider whether more stringent limits on the ability of the Secretary of State to remove an advocate from office might better protect the independence of the advocate. For example,***

6 The Delegated Powers and Regulatory Reform Committee has defined ‘disguised legislation’ as “instruments which are legislative in effect but often not subject to parliamentary oversight”. Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (12th Report, Session 2021–22, HL Paper 106), para 89

7 [Victims and Prisoners Bill](#), clause 1(5)

8 [Victims and Prisoners Bill](#), clause 29

9 [Victims and Prisoners Bill](#), clause 30

10 [Victims and Prisoners Bill](#), clause 31

11 [Victims and Prisoners Bill](#), clause 31(2)(a)

12 [Victims and Prisoners Bill](#), clause 31(3)

13 [Victims and Prisoners Bill](#), clause 31(4)

14 Domestic Violence, Crime and Victims Act 2004, [section 48](#)

*termination might be limited to where they are unable or unfit to carry out their functions.*¹⁵

Prisoners

Decisions of the Parole Board

12. Clause 44 empowers the Secretary of State to direct the Parole Board to refer to the High Court or Upper Tribunal a decision to release on license a prisoner serving a life sentence. This applies to Parole Board decisions for prisoners who have committed murder, domestic violence leading to the death of a child, rape, and terrorist offences. The Secretary of State may refer these decisions if she or he considers that “the release of the prisoner would be likely to undermine confidence in the parole system” or, if the case were referred, “the relevant court might not be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined”.¹⁶
13. The reference is made to the High Court instead of the Upper Tribunal when the case contains material which, if disclosed, would in the opinion of the Secretary of State harm national security. The Upper Tribunal or High Court must quash the decision of the Parole Board to release a prisoner on licence unless satisfied that “it is no longer necessary for the protection of the public that the prisoner should be confined”.¹⁷
14. Clause 45 provides the Secretary of State with the power to direct the Parole Board to refer decisions to the Upper Tribunal or High Court for those serving fixed-term sentences for domestic violence that results in the death of a child, rape, and terrorist offences.¹⁸
15. The Bill initially granted a wide discretion to the Parole Board to refer parole decisions to the Secretary of State instead of taking the decision itself. In addition, the Secretary of State was originally empowered to request that the Parole Board refer a decision relating to top-tier prisoners¹⁹ to the Secretary of State. In such circumstances the original decision would have been quashed and the Secretary of State granted the power to determine whether the prisoner could be released on license. These provisions, removed from the Bill in the House of Commons, would have risked undermining the separation of powers.
16. **Clauses 44 and 45 grant a new power to the Upper Tribunal and, in some circumstances, the High Court to determine whether it remains necessary for the protection of the public for a prisoner to continue to be confined. We draw it to the attention of the House that the Upper Tribunal and the High Court do not have the same experience as the**

15 This language was used in the Domestic Violence, Crime and Victims Act 2004, Schedule 8 para 2(6) (b). Schedule 8 was subsequently repealed by the Coroners and Justice Act 2009. We use this wording for illustrative purposes only.

16 [Victims and Prisoners Bill](#), clause 44

17 [Victims and Prisoners Bill](#), clause 44

18 [Victims and Prisoners Bill](#), clause 45

19 The Ministry of Justice Root and Branch Review of the Parole System proposed the establishment of a “top-tier” cohort of prisoners who are serving sentences for murder, rape, terrorism and causing or allowing the death of a child and are parole eligible. Ministry of Justice, *Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales*, CP 654 (March 2022), p 4: <https://assets.publishing.service.gov.uk/media/624438e8e90e075f1120586a/root-branch-review-parole-system.pdf> [accessed 10 January 2024]

Parole Board in taking decisions relating to the release of prisoners on license. While both courts have experience applying the law, the power granted in the Bill requires them to be satisfied that it is no longer necessary for a prisoner to be confined. This may require a delicate balance of expert reports, rather than the application of a legal test.

Section 3 of the Human Rights Act 1998

17. Section 3 of the Human Rights Act 1998 (HRA) requires courts to read and give effect to legislation in a manner compatible with the rights included in the European Convention on Human Rights, so far as it is possible to do so.²⁰ The Bill disapplies section 3 of the HRA in several circumstances.
18. The Human Rights Memorandum states that the purpose of this is to “bring forward in this context the repeal of section 3 HRA as set out in the Bill of Rights Bill” in relation to the statutory release scheme.²¹ However, the Lord Chancellor announced in June 2023 that the government had decided “not to proceed” with the Bill of Rights Bill. The Lord Chancellor clarified that the government “have taken and are taking action to address specific issues with the Human Rights Act 1998 and the European Convention, including through ... the Victims and Prisoners Bill”.²²
19. Clause 49 disapplies section 3 of the HRA with regard to reviews of the minimum term to be served by a prisoner sentenced to life imprisonment and their release on licence, public protection decisions for life prisoners, the release of those serving life sentences on compassionate grounds and the recall of a release on licence for prisoners serving life sentences.²³ Clause 50 disapplies section 3 with regard to release, licences, supervision and recall of fixed-term prisoners.²⁴ Clause 51 disapplies section 3 with regard to the power of the Secretary of State, by order, to direct that a prisoner may only be released on licence if certain conditions are met and to any order made by the Secretary of State.²⁵ The disapplication of section 3 of the HRA to these provisions will potentially diminish protection of Convention rights in individual cases.
20. When it is not possible for courts to read and give effect to legislation in a manner compatible with Convention rights, section 4 of the HRA provides that a court may make a declaration of incompatibility.²⁶ However, the retention of section 4 may not provide effective protection of rights in these circumstances because a declaration of incompatibility does not alter the legal situation of the individual whose Convention rights have potentially been breached.
21. However, it will still be possible for courts to interpret these provisions in line with fundamental common law rights, as well as upholding the presumption in common law that the legislature intends to legislate compatibly with international law obligations, including the European Convention on Human Rights, unless there are specific express words in legislation that

20 Human Rights Act 1998, [section 3](#)

21 [European Convention on Human Rights Memorandum for the Victims and Prisoners Bill](#), para 43

22 HC Deb, 27 June 2023, [col 145](#)

23 [Victims and Prisoners Bill](#), clause 49

24 [Victims and Prisoners Bill](#), clause 50

25 [Victims and Prisoners Bill](#), clause 51

26 Human Rights Act 1998, [section 4](#)

clearly rebut this presumption. It will still also be possible for an individual to refer a decision to the European Court of Human Rights once they have exhausted all domestic remedies.

22. **It is difficult to predict how the courts will interpret provisions in the Bill disapplying section 3 of the Human Rights Act 1998. *The House may wish to seek further explanation from the Government as to what effect it intends to achieve with the disapplication of section 3 of the Human Rights Act 1998 to these provisions.***
23. Clause 52 instructs courts as to how to balance Convention rights when determining prisoner release decisions. The Bill states that courts “must give the greatest possible weight to the importance of reducing the risk to the public from persons who have committed offences in respect of which custodial sentences have been imposed” when considering Convention rights other than Articles 2, 3, 4(1) or 7²⁷ of the European Convention on Human Rights.²⁸ The Human Rights Memorandum for the Bill clarifies that “the new clause will ensure that courts have appropriate regard” to the importance of reducing the risk to public safety, whilst recognising that courts will “still have to act compatibly with the Convention rights”.²⁹
24. **Again, it is difficult to predict how clause 52 will be interpreted. The clause seems to be intended to ensure courts strike a different balance between Convention rights and the importance of reducing the risk to the public when determining prisoner release decisions. However, the weight given to public safety does not diminish the courts’ continuing duty to act compatibly with the European Convention on Human Rights. *The House may wish to seek clarification from the Government as to the intended effect of clause 52.***

27 Article 2 (right to life), 3 (prohibition of torture), 4(1) (no one shall be held in slavery or servitude) and 7 (no punishment without law). These are ‘absolute’ Convention rights, protection of which cannot be weighed up against anything else. Clause 52(4) defines “relevant rights” for the purpose of the test under clause 52(3) as all Convention rights other than these.

28 [Victims and Prisoners Bill](#), clause 52(3)

29 [European Convention on Human Rights Memorandum for the Victims and Prisoners Bill](#), paras 46 and 47

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
Lord Anderson of Ipswich
Baroness Andrews
Lord Falconer of Thoroton
Baroness Finn
Lord Foulkes of Cumnock
Lord Hope of Craighead
Lord Keen of Elie
Lord Strathclyde
Baroness Suttie
Lord Thomas of Gresford

Declarations of interest

Baroness Drake (Chair)
No interests declared
Lord Anderson of Ipswich
No interests declared
Baroness Andrews
No interests declared
Lord Falconer of Thoroton
No interests declared
Baroness Finn
No interests declared
Lord Foulkes of Cumnock
No interests declared
Lord Hope of Craighead
No interests declared
Lord Keen of Elie
No interests declared
Lord Strathclyde
No interests declared
Baroness Suttie
No interests declared
Lord Thomas of Gresford
No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared no relevant interests.