

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

Introduction

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 220,000 solicitors, promoting the highest professional standards and the rule of law.
2. This written submission outlines our response to the Joint Committee on Human Rights legislative scrutiny of the Victims and Prisoners Bill.

Will Part 2 of the Bill improve the protection of the rights of victims of major incidents? If not, how could it do more?

Legal aid

3. The Law Society broadly welcomes the creation of an Independent Public Advocate (IPA) in section 2 of the Bill. However, it could go further to protect the victims of major incidents and ensure they can access the courts to enforce their human rights.
4. At present, legal aid is generally not provided for legal representation at inquests or inquiries. There is a limited Legal Help scheme, which can cover some preparatory work for an inquiry. For inquests, Exceptional Case Funding (ECF) may be available, but the test for receiving this is narrowly drawn and very strictly interpreted. Moreover, ECF may in some cases be offered only for preparatory help, and not for representation at a hearing.
5. The exceptional funding test states that legal aid should be granted where there are human rights considerations or a wider public interest. By definition, in cases involving an IPA there is a wider public interest. Removing the test would simply remove an added layer of bureaucracy, helping victims and saving public money.
6. The Bill should be amended to remove the exceptional funding test, and provide that legal aid is automatically available in cases where an IPA is appointed. This would help victims to access the courts, enforce their rights and enhance protections for them.

Powers to appoint lawyers

7. The Government has acknowledged that inquiries following major incidents can be “*daunting, confusing and overwhelming*”, with the IPA intended to provide support through this process. That applies whether the inquiry is in the form of an inquest, a public inquiry or otherwise.
8. Other interested parties will almost invariably have senior legal representation at every hearing. Providing legal aid would ensure that victims have legal representation and access to advice in the run up to and throughout an inquiry to help navigate this difficult process on a level playing field.

9. As the IPA is not permitted to provide legal representation or provide legal advice, their powers should explicitly include being able to appoint a lawyer on behalf of a victim. A lawyer will be able to provide the advice and guidance for a victim, ensuring their best interests are kept at the forefront during an inquiry. This will have the added benefit of providing further independence when an inquiry involves the Government or its agencies.
10. This would be a welcome step to enhance access to justice and support victims to understand and enforce their rights.

What are the human rights implications of the proposed new power for the Secretary of State to decide ‘top-tier’ parole cases and the way in which this will affect the parole process? Are the human rights implications affected by the existence of a right of appeal to the Upper Tribunal?

Powers for Secretary of State to usurp the Parole Board

11. The Bill gives the Secretary of State the power to usurp the Parole Board and retake a parole decision for prisoners involved in serious offences, including murder, terrorism, and serious sexual offences.
12. This power erodes the basic principle of common law that no one can be a judge in their own cause. In the Pinochet case Lord Hope sets out the very lengthy history of common law which makes being a judge in your own cause objectionable and concludes that “*Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases*”.
13. It also creates the clear risk of political interference within cases. The Secretary of State will be under no obligation to explain their reasoning for their decision or set out the factors they took into account when making it.
14. Therefore, this power erodes this key common law principle and risks undermining the integrity of the administration of justice in parole cases, which are all about the liberty of the subject. Should this measure be used, there is no right for legal representation, no access to legal aid or a specific process to follow. A Secretary of State may interview a prisoner, but there is no obligation to do so or for a hearing of any kind.
15. The power of the Parole Board to refer a case to the Secretary of State because it is unable to make a decision also appears to be highly unusual. It seems difficult to imagine a situation where the Parole Board feels it does not have the expertise to make a decision, but the Secretary of State does.
16. It is a fundamental principle of our legal system that decisions about the liberty of citizens are made independently by the judiciary, except where Parliament expressly provides to the contrary, a decision that must involve intense scrutiny. These changes would undermine a founding block of our common law.

Appeal to the Upper Tribunal

17. There is also limited scope for an appeal. A prisoner would be able to appeal to the Upper Tribunal only on judicial review grounds or on the basis that the release test has been met. No other grounds are allowed. As liberty is at stake, this is an extremely limited safeguard, while there is no requirement for legal aid to be available.
18. It also does not remove the risk or perception of political interference that will come from the Secretary of State getting involved in these decisions.

Does the Bill give rise to any other human rights issues you think the Committee should be aware of?

Disapplication of the Human Rights Act to prisoners

19. The Bill will disapply section 3 of the Human Rights Act to prisoners as a group when it comes to legislation about their release. Section 3 of the Human Rights Act requires courts to interpret legislation compatibly with rights under the European Convention of Human Rights as far as it is possible to do so, thereby providing overarching protection for human rights.
20. In practice, section 3 means that where there is ambiguity in legislation, with one possible interpretation being rights-compliant and another non-compliant, the courts should favour the one that respects rights. There is a limit on this in that courts cannot go against the ordinary meaning of the text, or the overall grain of the legislation.
21. The section 3 duty is necessary to provide consistent protection for rights as it enables an immediate remedy to the individual with minimal disruption. Disapplying this duty would mean that, where a decision regarding a prisoner's release made under the legislation concerned is incompatible with Convention rights, courts will instead have to issue a declaration of incompatibility.
22. If these are not acted upon by the executive, it is likely the cases concerned will proceed to the European Court of Human Rights. Given that the domestic court will have already found an incompatibility, this increases the risk that the UK will be found to be in breach of its international obligations in this situation.
23. Disapplying section 3 for prisoners as a group would significantly weaken the system of human rights protections in the UK. It undermines the universality of human rights by targeting a specific group to receive reduced protection. Similar provision has been made in respect of refugees and asylum seekers in the Illegal Migration Bill and the Law Society is greatly concerned that human rights protections are being removed from categories of people.

Application of Convention rights

24. In addition to disapplying section 3 of the Human Rights Act, Clause 45 directs courts to give the "greatest possible weight to the importance of reducing the risk to the public" when a question arises as to whether a person's rights under the European Convention of Human Rights have been breached in relation to a decision made under legislation concerning prisoner release.

25. It is not clear what the “greatest possible weight” will mean in practice and will require interpretation by judges. We are concerned that this will lead to an increase in litigation challenging this new standard.
26. We also do not believe it has been evidenced by the Government that this change is necessary. In practice, judges already carefully consider potential risk to the public when considering issues of prisoner release and the balance to be struck with individual rights.

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