

Written evidence from The Prison Reform Trust (PRT) (VAPB0009)

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We welcome the opportunity to provide written evidence to the committee for its legislative scrutiny of the Victims and Prisoners Bill. Our evidence focuses on questions relating to the provisions of Part 3 of the bill on the proposed changes to the parole system. PRT is not a legal charity, and we would not claim to have the expertise to make detailed representations on the legal implications of Part 3. PRT has been working closely with the legal and human rights NGOs Justice, Amnesty and Liberty on scrutiny of the bill. The committee will want to pay close attention to the submissions made by the organisations.

1. Would the proposed changes to the release test applied in parole cases raise any human rights concerns, particularly under Article 5 ECHR?

While we are not qualified to comment in detail on the implications of these provisions for compliance with the European Convention on Human Rights (ECHR), it is not clear on what grounds a revised release test is necessary. Furthermore, we are concerned that it could lead to increased confusion and uncertainty in the way in which the test is applied. In particular, the committee will want assurances that a new test will not have a chilling effect on Parole Board decision-making, which could lead to prisoners spending longer in preventative detention than is necessary for the purposes of public protection.

2. 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?

This provision would constitute a fundamental attack on the independence of the Parole Board and its function as a court-like body. The board’s independence and court-like function are underpinned by common law as well as the UK government’s obligations under the ECHR. The Parole Board has made clear that in its view Article 5 of the ECHR requires decisions on release to lie with a court or court-like body.¹ Commenting on the new power when it was originally proposed in the root and branch review of the parole system, the board explained the basic problem in domestic law of anyone being “judge in their own cause”. In other words, the secretary of state cannot be both a party to the panel’s proceedings and then act as the decision maker as well. As such, this provision raises significant constitutional questions regarding judicial independence and the UK’s compliance with human rights obligations, which are liable to eat up much of the parliamentary debate on the bill, as well as be subject to further legal dispute and controversy if and when the bill becomes law.

The bill is also unclear on a number of practical questions regarding how the new power will be exercised. In particular:

- The criteria the secretary of state will follow in exercising the new power;
- Whether the new power would be exercised directly by the secretary of state or under delegated authority to an official;
- The timeframe within which the secretary of state would be expected to make a decision; and

¹ Letter from the Parole Board to the Ministry of Justice, dated 10 May 2022, <https://prisonreformtrust.org.uk/wp-content/uploads/2022/08/5.-Document-FOI.pdf>

- Expectations around the transparency and fairness of the secretary of state’s decision-making.

Furthermore, for those prisoners made subject to the secretary of state’s new power, there are a worrying lack of procedural safeguards in place to ensure a fair and just process. For instance, there is no reference to legal representation or a right to be interviewed following a referral to the secretary of state. The only procedure explicitly specified within this clause is an option to interview the prisoner if “the secretary of state thinks it necessary”. Subsection (5) confers a widely defined power to make further rules on the procedure in future. At a minimum, the Secretary of State’s process would need to meet the same standards of procedural fairness as the Parole Board, otherwise it would be impossible to see how a minister could make a different decision fairly. In his evidence to the Justice Committee, the chief executive of the board Martin Jones suggested that the Secretary of State’s process would need to be even more robust than that used by the Parole Board if it was to withstand the inevitable legal challenges that would ensue.²

Are the human rights implications affected by the existence of a right of appeal to the Upper Tribunal?

In evidence to the Justice Committee, Simon Creighton expressed concern that the appeal mechanism had been introduced largely to ensure compliance with Article 5 of the ECHR,³ but that because the appeal was not automatic it was still not likely to be ECHR compliant.³ He also raised concerns that the appeal mechanism as it was currently constituted would lead to significant delays in final decisions being made. Furthermore, unlike criminal courts or the Parole Board, the Upper Tribunal has no experience in assessing the risk of harm to the public. Therefore, it is unclear why the government believes that the Upper Tribunal would be best placed to make such assessments.

3. Do the proposals for changes to membership of the Parole Board and individual panels, and proposals for the Secretary of State to have greater powers to dismiss the Chair of the Parole Board, raise any human rights concerns?

Clause 46 gives the Secretary of State the power, through the Parole Board Rules, to prescribe that particular cases be dealt with by a panel including members of a particular background experience (i.e. law enforcement). This provision is an unnecessary interference in the independence of the board which could raise concerns regarding compliance with the ECHR. The provision could also lead to practical problems, including delays, if there were problems with the availability of parole members with specialist backgrounds. This would add to the distress of both prisoners and victims.

Clause 47 creates a new power for the secretary of state to remove the Parole Board’s chair from office before the end of their term if it was considered necessary to maintain public confidence in the board. The clause also prohibits the Chair from being involved in individual parole cases and from trying to influence the outcome of the board’s decision in such cases.

² Neill, R. (7 June 2023) Letter from the Chair of the House of Commons Justice Committee to the Lord Chancellor and Secretary of State for Justice Alex Chalk MP. Available at <https://committees.parliament.uk/publications/40270/documents/196660/default/>

³ Ibid.

We are concerned about the unnecessary interference in the independence of the board this clause represents and its potential implications for compliance with ECHR obligations. The question of whether the chair should be involved in individual cases is matter for the board; it should not be the subject of statutory prescription. We are further concerned about the wide latitude afforded to the secretary of state under the new power to remove the chair on the grounds of public confidence. As the chair of the Parole Board Caroline Corby highlighted in her evidence to the Justice Committee, the power to remove the Chair could see them dismissed if the board made an “unpopular decision”.⁴ Given the sensitive nature of the board’s work, she argued that “the chair of the Parole Board needs more protection than pretty much any other chair of any arm’s length body”. Additionally, Caroline Corby pointed out that at present there is already a termination protocol which means that the Chair of the Parole Board, or any other member, can be removed. It is not clear therefore why a statutory power is needed.

4. Does the proposed prohibition on prisoners serving whole-life sentences getting married comply with Article 12 ECHR (the right to marry)?

Clauses 48–50 of the bill create provision for whole life tariff prisoners to be barred from getting married or having a civil partnership. Despite provision for exceptional circumstances requiring written permission from the Secretary of State, it is hard to see how this provision could not but raise questions regarding compliance with Article 12 of the ECHR. We are deeply concerned about the introduction of specific carve-outs of human rights legislation for people given custodial sentences. This contradicts one of the fundamental principles underlying human rights – their universality and application to each and every person on the simple basis of their being human.

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

Clauses 42–44 disapply section 3 of the Human Rights Act 1998 so 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”.

Clause 45 provides that, where a court is considering a challenge relating to a relevant convention right, in relation to application of any of the release legislation, the court must give the greatest possible weight to the importance of reducing the risk to the public from the person convicted of a criminal offence.

As we highlight above, we are deeply concerned about the introduction of specific carve-outs of human rights legislation for people given custodial sentences. Moreover, it is precisely in custodial institutions like prisons that human rights protections are most vital, because individuals are under the control of the state. It is deeply troubling that despite this, the bill includes a statement of compatibility with the Human Rights Act on the first page, while simultaneously disapplying a critical aspect of that act to a whole group of people, making it highly controversial.

⁴ Ibid.

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. In its written evidence to the Committee, the Bar Council stated: “There is no evidence of any systemic impairment due to the HRA of the Parole Board’s ability to make high-quality, safe, decisions about prisoners—no statistical analysis of recidivism/public safety concerns from prisoners released due to interpretation of legislation in line with Convention principles.”⁵

In his speech on Second Reading, the Chair of the Justice Committee, the hon. Member for Bromley and Chislehurst (Sir Robert Neill) said: “Whatever one’s view of the Human Rights Act, there is no evidence that this is a problem in such cases. In fact, the evidence we heard from practitioners, from both sides, is that it can be helpful to have regard to section 3 in these hearings. These clauses seem to be trying to solve a problem that does not exist, and I wonder whether we really need them. It is perfectly possible to have a robust system that still complies with section 3. This is a needless distraction that sends the wrong signal about a certain desire to pick unnecessary fights, which I know is not the current Secretary of State’s approach.”⁶

In the House of Commons committee stage debate on the bill, the minister Edward Argar MP himself admitted that “these clauses may have caused some concern and a degree of debate. I entirely understand that and will listen carefully to any points raised by right hon. and hon. Members in our debate and will subsequently, with the Lord Chancellor, reflect on them very carefully.”⁷

We urge the committee to oppose these provisions and to recommend their removal from the bill.

14/07/2023

⁵ The Bar Council. 2023. Written evidence to the Victims and Prisoners Bill Committee. Available at <https://bills.parliament.uk/publications/51866/documents/3678>

⁶ Official Report, 15 May 2023; Vol. 732, c. 604. Available at <https://hansard.parliament.uk/commons/2023-05-15/debates/FC7E0C2D-1FF5-49A2-91AE-C9BC9804E524/VictimsAndPrisonersBill>

⁷ Official Report, 11 July 2023. Available at [https://hansard.parliament.uk/commons/2023-07-11/debates/726784e3-d513-40c2-a445-14cc84dba135/VictimsAndPrisonersBill\(ThirteenthSitting\)](https://hansard.parliament.uk/commons/2023-07-11/debates/726784e3-d513-40c2-a445-14cc84dba135/VictimsAndPrisonersBill(ThirteenthSitting))