Amnesty International UK

BRIEFING

VICTIMS & PRISONERS BILL, PART 4: HOUSE OF LORDS, COMMITTEE STAGE

AMNESTY INTERNATIONAL IS URGING PEERS TO:

- focus on three key areas in Part 4 of the Bill, where amendments have been tabled (highlighted below).
- the bill's attacks on prisoners' human rights, the bill's undermining of the parole board, and the bill's reforms to IPP sentences.

INTRODUCTION

After extensive discussion of the Victims and Prisoners Bill's first three Parts, the House will now turn its attention to Part 4. As we briefed at 2nd Reading, Part 4 has had a rocky legislative history. Many members in both Houses have not focussed on it because of their understandable interest in improving the provision of support to victims of crime; the issue which this bill as a whole is premised on but which now only makes up part 1 of a multi-part bill. Part 4, on reforms to the parole board and the treatment of prisoners more generally, is in many ways an unwanted relic of the policy agenda of the previous Lord Chancellor. This policy agenda has been shown to be flawed in a number of respects, largely as a result of being based on false premises and pursuing an agenda that has little to do with improving the efficiency and effectiveness of the parole and prison systems[1]. Part 4 is no different.

The present Lord Chancellor has introduced some changes to the Bill which have improved matters somewhat. These have lessened the Bill's attack on the basic functions and independence of the Parole Board and used the Bill as a vehicle for introducing much needed reforms with regards to the issue of IPP sentences. However, it remains the case that the majority of Part 4 institutes reforms that are unnecessary, to solve problems that do not exist, and will only result in complicating and confusing the parole process while at the same time stripping prisoners of vital legal protections and damaging the UK's wider framework for the protection of human rights.

During Committee, we ask Peers to focus on three key areas, about which amendments have been tabled; the bill's attacks on prisoners' human rights, the bill's undermining of the parole board, and the bill's reforms to IPP sentences.

ATTACK ON HUMAN RIGHTS

Clauses 49-51 disapply Section 3 of the Human Rights Act (HRA); one of the most important elements of the HRA, which requires public authorities and judges to interpret and apply

[1] https://www.bailii.org/ew/cases/EWHC/Admin/2023/555.html, https://insidetime.org/newsround/high-court-victory-for-lifer-seeking-open-conditions/

legislation in line with human rights, so far as is possible to do so. Clause 52 seeks to weight any judicial decision-making on qualified human rights raised in connection to a release decision, such as the rights that relate to prisoners' family life, their right to liberty or their right to access to courts and a fair hearing, against the prisoner. These clauses relate to release decisions and all the legislation regarding release, license conditions and recall. As such they affect all sentenced prisoners.

When discussing the bill at 2nd Reading, the Minister first sought to gloss over these clauses and then, when pressed to defend their inclusion in the bill, stated the following:

- Section 3 of the HRA gives courts 'power to reinterpret what Parliament has said in a manner that may not have been and probably was not Parliament's original intention';
- that at least one member of the Independent Human Rights Act Review Panel favoured the removal of Section 3 altogether and;
- Section 3 was very complicated, the caselaw had 'gone all over the place' and that it introduced uncertainty in an issue (the release of prisoners) where the government want there to be certainty.

Taking each of these points in turn, the reference to 'reinterpreting' legislation seemed to suggest that there was one legitimate act of interpretation going on and then a second questionable one being done under Section 3. This is not the case; Parliament intended for Section 3 to be used in the way it is and whether or not, a court goes through the process of a 'classic' statutory interpretation exercise and then a separate Section 3 one, or simply conducts the whole exercise applying the principles of Section 3 is really a matter of form for the relevant judge rather than anything of substance. There is also no reason to think that Section 3 interpretations lead to interpretations that are 'probably not' in line with Parliament's original intention. This is an issue which the IHRAR panel chaired by Sir Peter Gross looked at directly and concluded, as Baroness O'Loan, herself a member of the IHRAR panel, stated at 2nd Reading, *"There is very little evidence to support the existence of this hypothetical risk."*[2]

It is true to say that one member of the IHRAR Panel favoured, and favours, the complete removal of Section 3. This is presumably a reference to Sir Stephen Laws, former First Parliamentary Counsel and Senior Research Fellow at the Policy Exchange think tank's Judicial Power Project.[3] However, whatever the merits of the argument in favour of complete repeal of Section 3 (and as will be evident, Amnesty International strongly opposes that idea) it is not a proposal that is on offer in this bill. There is a world of difference between a general reform of the UK's human rights protection framework that impacts on the whole of society, and the discriminatory disapplication of a human rights protection from a politically unpopular and highly marginalised group of people.

Finally, regarding the contention that Section 3 is too complicated and risks introducing 'uncertainty' into release decision making, the reality is that while there was some inevitable development of what Section 3 requires in the years immediately following the Human Rights Act's introduction, that period has long since passed. As the IHRAR panel found, the leading case on the approach

[2] Baroness O'Loan, Victim and Prisoners Bill, House of Lords 2nd Reading, Column 2089

[3] For a detailed example of Sir Stephen's views on how the judiciary's approach to statutory interpretation, including Section 3 of the HRA, 'constitute a direct challenge to the principle' of Parliamentary Sovereignty, see 'Parliamentary Sovereignty, Statutory Interpretation And The UK Supreme Court', in the UK Supreme Court Year Book Volume 10, pp. 160–206, https://df1p766hy5a3u.cloudfront.net/article_public_download_pdf/821.pdf

to take to Section 3 (*Ghaidan V Godin-Mendoza*) was over 17 years old (it is now nearly 20 years old) and 'provide[s] clear and sensible guidance to UK Courts to apply section 3's interpretative duty.'[4] Most importantly, there is no reason to think, given that it has been in effect for the last 20 years during which all the relevant prisoner release legislation has also been in effect and subject to Section 3 interpretation, that Section 3's continued function would suddenly create the kind of dangerous uncertainty the Minister fears.

These clauses are a relic of the previous Lord Chancellor's now abandoned Bill of Rights Bill, which would have removed the protections provided by Section 3 of the HRA from everyone and contained a similar version of what is now Clause 52 regarding prisoners' qualified human rights. When the Bill of Rights Bill was dropped, the government transitioned to implementing many of its measures in other pieces of legislation; including last summer's Illegal Migration Act and the Safety of Rwanda bill that the House of Lords is also currently considering in committee. They serve no identifiable purpose in terms of improving the functioning of the prison or parole systems and are better understood as a spiteful swipe at the few legal protections that exist to protect minimum standards of treatment for prisoners and as a piece of political signalling.

We therefore urge peers to speak to and support the various stand-part notices given by Lord Marks Of Henley-On-Thames, Lord Ponsonby Of Shulbrede, Baroness Chakrabarti, The Lord Bishop Of Manchester, And Baroness Lister Of Burtersett, to remove these clauses from the Bill.

We also ask peers to speak to and support the stand-part notices given by Lords Pannick, Bach and German to remove clauses 55 and 56 from the bill. These clauses unnecessarily and disproportionately interfere with the Article 12 ECHR right to marry of prisoners on whole life orders. As with the clauses discussed in more detail above, they serve no meaningful purpose beyond a piece of political signalling and further undermine the universality of the UK's human rights protections.

PAROLE BOARD INDEPENDENCE

Article 5 ECHR is clear that it requires the Parole Board to operate as an independent court and to have the power to make release decisions. Over many years the Parole Board has been reformed to enhance and insulate its independence; often prompted by losses in court where the Board's setup has been found to violate Article 5 ECHR.[5] Despite welcome improvements on what was originally proposed, the present package of measures in Part 4 continue to constitute a regrettable backwards step in that trajectory.

As noted above, the current Lord Chancellor has made changes to the Bill that replaced a Ministerial veto over Parole Board decisions with a Ministerial right of appeal to the Upper Tribunal (or in limited cases the High Court). However, this new Ministerial appeal process will take the form of a power for the Minister to 'Direct the Parole Board to refer the prisoners case to the relevant court'. It would be highly irregular for a government minister to be given powers to direct an independent court to refer its own decision making for a full merits review by a superior court.

[4] https://assets.publishing.service.gov.uk/media/61b8531c8fa8f5037778c3ae/ihrar-final-report.pdf p207

[5] See eg Weeks v United Kingdom (1988) 10 EHRR 293; Thynne v UK (1991) 13 EHRR 666; and Hussain v UK (1996) 22 EHRR 1

This would be rightly regarded as a clear interference with the independence of the judicial process. Moreover, it must also be remembered that the Minister in question, the Lord Chancellor, is a party in the proceedings before the Parole Board. As such the current formulation of the proposed appeal right creates a situation in which one party to legal proceedings who is dissatisfied with the outcome can compel the independent judicial panel that reached that conclusion to refer itself for review. This runs contrary to basic principles of fairness and risks being found to be an unjustifiable interference with the independence of the Parole Board for Article 5 purposes.

The use of this new power is to be regulated by two filtering clauses, however if anything these clauses serve to make matters worse. They state that the Minister will only use these powers in circumstances where the release of a prisoner would 'be likely to undermine public confidence in the parole system'. Such a vague concept as 'public confidence', which in this context can only be a synonym for an unpopular decision, is no basis for reaching a legal determination about a person's fundamental right to liberty.

Beyond these concerns about Part 4's core proposal, there are two further issues that impinge directly on the Parole Board's independence and risk placing the UK in breach of its obligations under Article 5. These are the powers at clause 54(5)(2C) for the Secretary of State to terminate the chair of the Parole board on grounds of 'public confidence', and the powers at clause 53(b) for the Secretary of State to make Parole Board rules requiring that certain types of persons (understood to mean ex-law enforcement officers) sit on parole board panels. As Lord Thomas stated at 2nd Reading,

"The Parole Board is a judicial body. It seems to me that enabling the Secretary of State to remove the chairman is a fundamental contradiction to judicial independence… Selecting members of a tribunal is a wholly judicial function."[6]

These clauses, once again, do nothing to improve the functioning of the Parole Board; there are already powers for the Chair of the Parole Board to be dismissed in a fair and independent process that is not based in the undefined notion of 'public confidence' and there are already ex law enforcement officers who sit on parole board panels. They do, however, run a serious risk of being found to be incompatible with Convention rights, for the reasons Lord Thomas identified.

We therefore urge Peers attending Committee to speak to and support the amendments 169 and 170 in the names of Lords Thomas, Burnett, Bach and Garnier.

We also urge Peers to take the opportunity to press Ministers on the issues identified above regarding the new powers in clauses 44 and 45 for the Minister who is a party to the proceedings to compel an independent court-like body to submit itself for review, and to do so on grounds of 'public confidence'.

IPP SENTENCES

We welcome the fact that the government has responded to calls for reform to the Imprisonment for Public Protection (IPP) sentencing regime. IPP sentences have long been regarded as a major

[6] Lord Thomas, Victims and Prisoners Bill House of Lords 2nd Reading Debate, Column 2063

mistake in criminal justice policy in the UK. They were ruled to be in breach of Article 5 ECHR by the European Court of Human Rights back in 2012.[7] Yet, while the IPP sentencing regime itself was ended, those people that were previously sentenced under it remained caught by its provisions. The consequences of their continued application have recently been described by the UN Special Rapporteur on Torture as 'cruel, inhuman and degrading.'[8]

The Government's reforms in clause 48 specifically relate to the license period that people released from prison following an IPP sentence will be subject to. In themselves they are a valuable change that will positively impact on a significant proportion of those affected by IPP sentences. However, we support Peers looking to amend this Bill to go further and to substantively address the problem of people that continue to be detained on IPP sentences without ever having been released.

As such we urge Peers to speak to and support amendments to:

- **Improve the new arrangements for licence review and termination (Amendments 149, 150, 151, 152, 153, 156, 157)**
- **Introduce a new power of executive release (Amendments 154, 168)**
- **Improve sentence progression (Amendments 159, 160, 164, 165, 166)**
- **Reverse the Parole Board release test (Amendment 161)**
- **Introduce resentencing in line with the Justice Committee's recommendation (Amendment 167)**
- **Improve the treatment of people sentenced to Detention for Public Protection (Amendment 155, 162, 163)**

FEBRUARY 2024

[7] James, Wells and Lee v UK [2012] ECHR

[8] https://www.ohchr.org/en/press-releases/2023/08/uk-un-torture-expert-calls-urgent-review-over-2000-prison-tariffs-under