Joint Committee on Human Rights
Inquiry into the legislative scrutiny of the Victims and Prisoners Bill
Bar Council written evidence

About Us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

This submission deals only with the Committee's questions 6, 8 and 9.

Question 6 – 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?

The direct participation of the Secretary of State in release decisions plainly engages Article 5, in particular Article 5(4):

> *(4) 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.*

If there were no right of appeal against a release decision made by the Secretary of State, Article 5(4) would clearly be breached by the referral measures as they presently appear (in Clause 37). In particular:

(i) The specific requirement that "a court" decide the lawfulness of continued detention would plainly not be met;

(ii) The Secretary of State lacks the institutional competence to properly take release decisions – there is no requirement that they be legally qualified, or receive training in the evaluation of complicated evidence concerning risk upon release;

(iii) There is no requirement that a prisoner be represented in any proceedings (if they can be called such) before the Secretary of State;

(iv) There is no requirement that the Secretary of State receive evidence from the prisoner (merely a power to receive such evidence, via an interview conducted by a third party, if the Secretary of State considers it appropriate);

(v) There is no requirement that disclosure be made to the prisoner, consistent with the fair trial rights guaranteed by Article 6, in order that concerns can be engaged with.

Accordingly, the only way in which the referral measures could be compliant with Article 5 would be if the mechanism by which they may be challenged is itself Article 5 compatible. Focus must therefore turn to Clauses 38 and 39, which provide for appeal to the Upper Tribunal.

The Human Rights Memorandum which accompanies the Bill avers that Article 5 is not breached by the referral measures because the prisoner has the benefit of a "full merits review" of the Secretary of State's decision. That, with respect, is unhelpfully imprecise language, because it risks obscuring the distinction between a review on public law grounds and an appeal on the merits.

If what is meant is that the prisoner has a "full merits appeal", by way of a rehearing, with evidence called and assessed, and disclosure made sufficient to comply with the requirements of the Article 6 right to a fair trial, then it is less likely that the referral measures would offend against Article 5. That would appear to be what is contemplated in the proposed new s.32ZAD(3)(b), to be inserted in the Crime (Sentences) Act 1997 by virtue of Clause 38.[1]

If, on the other hand, the only challenge to a decision of the Secretary of State not to release a prisoner were limited to a review on public law grounds (including irrationality, *Wednesbury* unreasonableness, failure in the duty of enquiry etc.)[2] then it is difficult to see how the requirements of Article 5 could be met.

However, a number of points deserve to be made here:

(i) If an appeal against a decision by the Secretary of State not to release a prisoner includes a right to a full re-hearing, that undermines the objective sought to be met by granting the Secretary of State the power to operate the referral measures in the first place. The stated rationale of the referral measures is connected to public confidence in the system (which the Government suggests is better met by the decision being made at a political level, rather than a quasi-judicial one). However, if the Secretary of State's decision is not ultimately one of veto (or even veto subject to public law challenge), it is hard to see what granting them a power that is subject to being overruled by a tribunal can really achieve in that regard;

(ii) The effective replacement of the Parole Board as the ultimate decision-maker with the Upper Tribunal weakens the protection for the prisoner against breach of Article 5. The Upper Tribunal does not have the institutional competence of the Parole Board in making evaluative decisions about future risk. Nor, for that matter, does the Secretary of State;

(iii) There is as yet no provision setting out the material that the Upper Tribunal would be required to consider when determining an appeal against a decision made by the Secretary of State under the referral measures. In order to be compliant with Article 5(4) and Article 6, the tribunal would need to be provided with evidence from the prisoner (if so advised) and the prisoner would need to receive disclosure sufficient to engage with any concerns raised against their release.

Question 8 – Does the proposed prohibition on prisoners serving whole-life sentences getting married comply with Article 12 ECHR (the right to marry)?

There would need to be a clear case that any interference with a prisoner's rights under Article 12 ECHR was both necessary and proportionate. In particular, following the clear decision of the

[1] In relation to life prisoners; a mirror provision also exists in relation to fixed-term prisoners within cl. 39.
[2] The ability to review on these grounds appears within the proposed new s.32ZAD(3)(a) of the 1997 Act.

ECtHR in *Draper v. UK* [3], there would require to be good evidence to suggest that it is harmful to the public interest to permit the marriage of prisoners (or any particular category of prisoner). The Bar Council cannot see that such a case has not been made out.

Question 9 – Does the Bill give rise to any other human rights issues you think the Committee should be aware of?

The effect of Clauses 42-45 in disapplying section 3 of the Human Rights Act 1998 to the parole decisions of life and fixed-term prisoners and the (dis)applicability of certain Convention rights to prisoner release decisions (including in particular reducing the impact of Articles 5, 6 and 8) give rise to serious concerns about human rights issues. It is also difficult to see how the disapplication of s.3 sits with the statement by the (then) Lord Chancellor under section 19(1) Human Rights Act 1998 that the Bill as a whole is compatible with Convention rights. However, we note that the purpose of these clauses was (according to the accompanying Human Rights Memorandum, para. 43) "to bring forward in this context the repeal of section 3 HRA, as set out in the Bill of Rights Bill … ". The Bill of Rights Bill has of course now been abandoned. Accordingly, it seems likely that the Government will need to look again at whether Clauses 42-45 have any place in this current Bill.

The Bar Council
July 2023

[3] App. No. 8186/78 (1980) 24 DR 72, E Com HR – a case concerning a prisoner serving life imprisonment, albeit not a whole-life term.