# Victims and Prisoners Bill

## Provisions concerning the Parole Board

## Briefing for Peers – Committee of the Whole House

### 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.

### The Bill

The area of particular concern to the Bar Council is **Part** 4 of the Victims and Prisoners Bill which proposes significant changes to the parole system and considers measures for those serving life sentences. These are:

### *Clause 44 – Referral of release decisions: life prisoners*

This provision provides that, where the Parole Board directs the release of a life prisoner from a sentence imposed for certain specified offences, the Secretary of State may refer their case to the High Court (if sensitive material may be relevant to the decision) or to the Upper Tribunal. That court must then apply the release test for itself.

This is a significant improvement from the previous draft in terms of the rule of law which would have permitted the Secretary of State to take certain high-profile release decisions for themselves, with the only route of challenge to such decisions being on judicial review grounds. That proposal had been justified as intended "to maintain public confidence in the parole system and ensure the protection of the public". It was roundly condemned and risked political interference in a judicial process, as well as enabling a party to the proceedings to act as judge in their own cause, and has rightly been withdrawn.

What is now proposed is a compromise that serves neither what appears to have been the Secretary of State's original objective – to ensure that high profile decisions are taken by a democratically accountable individual – nor the interests of justice in securing the highest quality and fairest outcome from the process.

The effect of the new proposed Clause 44 is to (a) modify the existing test for appeal from a release decision from a review to a *venire de novo* and (b) provide the Upper Tribunal with a power of appeal that it didn't previously have, in an area in which it has no real expertise. The provision thus removes what are anticipated to be some of the most serious cases from the specialist tribunal and places them before a generalist tribunal.

If the concern is that there should be a method of reviewing high-profile Parole Board decisions, the answer is that such a method already exists. Parole Board decisions can already be reviewed by the High Court upon referral on judicial review grounds. That is entirely appropriate, because the High Court has considerable experience of determining public law challenge on grounds of error of law, unreasonableness, failure to take into account material considerations (and vice versa) and so is well placed to review the approach of specialist primary decision makers. But neither the High Court nor

the Upper Tribunal have the experience, expertise, or resources of the Parole Board to evaluate risk. With that in mind, the Bar Council cannot see how permitting the High Court or Upper Tribunal to take release decisions for themselves can properly instil greater public confidence than leaving such decisions in the hands of the specialist tribunal as per the present arrangement.

### *Clause 49 – Section 3 of the Human Rights Act 1998: life prisoners*

This provision widely disapplies Section 3 of the Human Rights Act (HRA) 1998 from parole decisions. Section 3 of the HRA requires domestic legislation to be read, so far as is possible, in a way which renders it compatible with Convention rights. The removal of this provision is objectionable in principle in relation to decisions which self-evidently concern liberty (as well as interference with family life). We would also observe that it is not clear how the Minister felt able to make a statement that the provisions of the Bill are compatible with Convention rights under s.19(1)(a) HRA 1998 in light of this provision.

### *Clause 54 – Parole Board membership*

Clause 54 provides the Secretary of State with the power to remove the chair of the Parole Board "*if the Secretary of State considers it necessary to do so for the maintenance of public confidence in the Board*". This may give rise to concerns about the independence of the Parole Board that this may engender.

Such concerns were considered (albeit with reference to different provisions) in *Wakenshaw v Secretary of State for Justice* [2018] EWHC 2089. In that case, Mostyn J's granted the claimant a declaration that the power of the Secretary of State to remove the Parole Board chair in certain circumstances meant that the tenure provisions failed the test of objective independence. Central to his decision was the following, at [27]: *"It is important to recognise that while the role of the Chair of the Parole Board is largely one of leadership, the occupant of the office still has significant judicial functions. Further, it would not be appropriate to consider the role and status of the Chair separately from the role and status of other members of the Board. All the members of the Board, including the Chair, are members of a quasi-judicial body in respect of which there must be complete objective independence."*[1]

With that in mind, it may be relevant to the question of judicial independence that a further proposal in Clause 54 removes the involvement of the chair from deciding cases in its entirety, so that the position would no longer be a judicial role. In such circumstances, it is arguable that the question of independence is not quite as acute as it would be if the chair were a decision-maker. However, concerns remain that – as suggested by Mostyn J – action taken in relation to the chair cannot be considered in isolation from its impact on the other members of the Board.

### *Clause 55 – Whole life prisoners prohibited from forming a marriage*

This provision contains a prohibition on whole-life prisoners from marrying or entering into civil partnership (Clause 56). While there is likely to be limited public sympathy for this cohort, the public disapproval of such relationships is likely to be insufficient to justify this interference with the Article 12 right to marry. The matter was considered in *Frasik v Poland*, App no. 22933/02 (ECtHR, 5 January 2010), in which the court found that a complete bar was not justifiable on the grounds that the relationship may offend public opinion.

**The Bar Council**
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[1] https://www.judiciary.uk/wp-content/uploads/2018/08/approved-judgment-7-august-2018-co-2461-2018-wakenshaw-docx.pdf