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Coroners and Justice Bill: Crime and Data Protection

Bill 9 of 2008-09

This paper is one of two which examine the main proposals of the *Coroners and Justice Bill* which was introduced in the House of Commons on 14 January 2009 and is due to have its second reading on 26 January 2009. It deals with the provisions relating to criminal justice and data protection set out in Parts 2-8 of the Bill. A separate Library research paper RP 09/07, deals with the provisions relating to coroners and related matters which are set out in Part 1 of the Bill.

The provisions covered this paper are very wide ranging. They result from reviews of the law on (amongst other areas): homicide (including assisted suicide and infanticide); vulnerable and intimidated witnesses; bail in murder cases; non-photographic child pornography; sentencing; criminal memoirs; and data protection. There are also provisions covering legal aid and hatred on grounds of sexual orientation. A number of the provisions in the Bill have provoked controversy.

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Summary of main points

The *Bill* was introduced in the House of Commons on 14 January 2009 and is due to have its second reading on 26 January 2009. Aspects relating to coroners are dealt with in a separate paper.

Part 2 of the Bill contains amendments to the criminal law. Chapter 1 would amend two of the defences which reduce what would otherwise be murder to the offence of manslaughter. The defence of diminished responsibility would be linked to recognised medical conditions and the defence of provocation would be replaced by a narrower defence of loss of control, which would be available when the loss of control causing the death was triggered by fear of serious violence, or by things said or done which constituted circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged. The offence of infanticide, which can only apply to an infant's birth mother, would be restricted to conduct which would have amounted to homicide if the special conditions of the infanticide offence had not been present. The offence of assisting or encouraging suicide would be restated in simple modern language intended to be easier for internet users to understand.

Clause 58 seeks to amend provisions created by the *Criminal Justice and Immigration Act 2008,* which makes it an offence to incite hatred on the grounds of sexual orientation. It would remove the provision which ensures that discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices is not to be taken of itself to be threatening or intended to stir up hatred.

Part 2, Chapter 2 of the Bill would extend the law proscribing the possession of child pornography to include non-photographic images such as cartoons, drawings and computer-generated images.

Chapter 3 of Part 3 makes changes to the system of special measures which courts can order to help vulnerable and intimidated witnesses give evidence. Current special measures include screens, live television links and video-taped evidence. The changes include giving children more choice about the way they give evidence, give automatic eligibility for help to gun and knife crime witnesses and also introduce new measures for vulnerable defendants to give evidence.

Chapter 4 of Part 3 abolishes the requirement for a defendant's consent when live links from the prison or police station are used in certain court hearings, rather than the defendant appearing in person. In Chapter 5, clause 97 would ensure that defendants charged with murder may not be granted bail unless the court believed there was no significant risk of them causing harm, following a case in 2008.

Part 4 of the Bill would establish a new Sentencing Council for England and Wales, which would replace the existing Sentencing Guidelines Council and Sentencing Advisory Panel. The new Council would take over responsibility for issuing sentencing guidelines and there would be an increased focus on securing consistency and transparency in sentencing. The Council would also have a new role monitoring the

impact of sentencing guidelines and Government policies on the availability of penal resources.
Part 5 contains miscellaneous criminal justice provisions, including the implementation of E-Commerce and Services Directives, and changes to unimplemented provisions on a Commissioner for Victims and Witnesses.

Part 6 of the Bill sets out provisions relating to civil and criminal legal aid. It would make provision for pilot schemes for civil legal aid matters. It would also broaden the scope of an existing exclusion under which civil legal aid is not available for legal matters arising out of the carrying on of a business. In relation to criminal legal aid, Part 6 would introduce enhanced powers to enforce contribution orders and recovery of defence costs orders. For example, a new motor vehicle order would enable the car of an individual owing overdue sums under a contribution order to be clamped and sold.

Part 7 of the Bill would bring in a civil recovery scheme to help prevent offenders from profiting from accounts of their crimes (for example by selling their memoirs or giving media interviews) would have to pay. This follows considerable public concern about a small number of cases.

Part 8 contains amendments to the *Data Protection Act 1998* which would facilitate the sharing of personal data by the public sector. It would also provide the Information Commissioner with more powers to audit and inspect data handling arrangements and pave the way for increased funding of his office. This has been one of the more controversial parts of the Bill because of the potential impact on the privacy of individuals.

CONTENTS

I Introduction

The *Coroners and Justice Bill* was introduced in the House of Commons on 14 January 2009 as Bill 9 of 2008-09. It is due to have its second reading on 26 January 2009. Information about the Bill is available via the Bill Gateway on the Library intranet.

This paper covers Parts 2-9 of the Bill which deal with a wide range of criminal justice matters, together with some provisions on data protection. A separate Library Research Paper RP 09/07 covers the Part 1 of the Bill, which covers coroners and related matters.

The provisions covered in this Bill are wide-ranging, and result from a number of consultations including on: murder, manslaughter and infanticide; non-photographic images of child abuse; vulnerable and intimidated witnesses; bail and murder; and data protection. Background is provided in the various sections of this paper below.

The Bill extends to England and Wales, although a number of clauses relating to reserved or excepted matters also extend to Scotland[1] and/or Northern Ireland.[2]

Under the Sewell Convention, the agreement of the Scottish Parliament may be required in relation to the provisions regarding the implementation of the Services Directive (clause 123), criminal memoirs (Part 7) and amendments to the *Data Protection Act 1998* made by clause 152 (to the extent that those amendments confer functions on Scottish Ministers).

The consent of the Northern Ireland Assembly may also be required in relation to the amendments to the 1998 Act made by clause 152 (to the extent that those amendments confer functions on the Northern Ireland departments).

With respect to Wales, the Bill does not deal with devolved matters or confer functions on the Welsh ministers except in relation to sentencing (clause 114) and data protection (clause 152).

The Explanatory Notes published by the Government with the Bill give a more detailed explanation of the clauses in the Bill [3]

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1 Provisions of the Bill relating to reserved matters that extend to Scotland are Schedule 14, clause 123, Part 8 and amendments to military service law consequential upon other provisions in the Bill.

2 Provisions of the Bill relating to reserved or excepted matters that extend to Northern Ireland are Chapters 1 and 2 of Part 2, clause 57, Chapters 1 and 2 of Part 3, clause 97, clause 119 and Schedule 14, clause 121, clause 123, clause 124 and Schedule 15, clause 126, Part 7, Part 8 and amendments to military service law consequential upon other provisions in the Bill.

3 *Explanatory Notes to the Coroners and Justice Bill*, 15 January 2009

II Reviewing the law of homicide

A. Current law

1. Offences

Homicide means the killing of a human being, usually by another. English law does not have a single offence of homicide, but there is a large number of common law and statutory offences under which a person may be liable for killing, or being involved in the killing of another person. These include:

- **Murder**, which is the unlawful killing of another, with the intention either of killing or doing serious harm to the victim;
- **Manslaughter**, which may be either "voluntary manslaughter" (where there was the intent for murder but a partial defence applies) or "involuntary manslaughter" (which may involve recklessness, gross negligence or an unlawful and dangerous act which results in a death);
- **Corporate manslaughter**, where the way in which an organisation's activities are managed or organised causes a death in gross breach of a relevant duty of care;[4]
- **Infanticide**, which applies only to the killing of a child less than a year old by its natural mother;[5]
- **Aiding, abetting, counselling or procuring the suicide** (or attempted suicide) of another;[6]
- **Causing or allowing the death** of a child or vulnerable adult;[7]
- **Complicity** in homicide;
- **Causing death by dangerous driving** and other Road Safety Act offences where a person's driving has caused another's death.

Life imprisonment is the maximum penalty for most of these offences, although some carry a lesser maximum penalty and, in the case of murder, the life sentence is mandatory.[8]

2. Complete and partial defences to murder

There are three special defences which reduce murder to manslaughter, namely:

- provocation;
- diminished responsibility; and
- killing pursuant to a suicide pact.

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4 *Corporate Manslaughter and Corporate Homicide Act 2007*
5 *Infanticide Act 1938*
6 *Suicide Act 1961*
7 *Domestic Violence, Crime and Victims Act 2004*, section 5
8 *Homicide Act 1957*

Self defence is a complete defence to a charge of murder where the force used was reasonable in the circumstances: section 76 of the *Criminal Justice and Immigration Act 2008* was passed with the intention of clarifying, rather than changing, the existing common law defence. But where excessive force has been used, self-defence does not amount to even a partial defence on a murder charge.

Neither "mercy killing" nor duress provides any defence to a murder charge.

B. Reviews: 2003-2008

The law governing homicide in England and Wales has been described by the Law Commission as a "rickety structure set upon shaky foundations" [9] and, more succinctly, as "a mess",[10] a view which has been echoed by many individuals and organisations concerned with law reform.

In June 2003, the Home Secretary requested the Law Commission to consider and report on the two partial defences to murder, of provocation and diminished responsibility, with particular regard to the impact of the partial defences in the context of domestic violence.[11] That launched the first stage of what an editorial in the *Criminal Law Review* recently described as the Government's "protracted review" of the law of murder.[12]

A series of consultation papers and other publications marks the various stages of the review. These were:

- **2003** - Publication of Law Commission consultation paper, "Partial Defences to Murder",[13] following concerns about how provocation works in domestic homicides;
- **2004** - Publication of Law Commission report, "Partial Defences to Murder";[14]
- **October 2004** – Announcement by the Home Secretary that the Home Office, the Department for Constitutional Affairs and the Attorney General's Office would jointly review the law of murder with the first stage of the review being undertaken by the Law Commission and the second stage by the Government;
- **December 2005** – Publication of the Law Commission consultation paper, "A new Homicide Act for England and Wales?" ;[15]
- **November 2006** – Publication of the Law Commission final report, "Murder, Manslaughter and Infanticide";[16]

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9 *Law Commission Consultation Paper: A New Homicide Act for England and Wales?* Law Commission Consultation Paper No 177

10 *Law Commission Report on Partial Defences to Murder*: Law Com No 290: August 2004

11 ibid, para 1.2

12 "Adjusting the boundaries of murder: partial defences and complicity", [2008] Crim LR 829

13 *Law Commission Consultation Paper on Partial Defences to Murder*: Law Commission Consultation Paper No 173: 2003

14 *Law Commission Report on Partial Defences to Murder*: Law Com No 290: August 2004

15 *Law Commission Consultation Paper: A New Homicide Act for England and Wales?* Law Commission Consultation Paper No 177

16 *Law Commission Report on Murder, Manslaughter and Infanticide*, November 2006, Law Com No 304

- **May 2007** – Lead of the review passes from the Home Office to the Ministry of Justice.
- **December 2007** – Announcement by the Ministry of Justice of the second stage of the review, stating that having considered the Law Commission's recommendations carefully the Government has decided to proceed on a step-by-step basis, looking first at the recommendations relating to:
    - reformed partial defences to murder of provocation and diminished responsibility;
    - reformed law on complicity in relation to homicide;
    - infanticide;
- **May 2008** – reforms to the law on homicide included in the Government's Draft Legislative Programme (subject to the outcome of consultation);
- **July 2008** – Publication of the Government's consultation paper "Murder, manslaughter and infanticide: proposals for reform of the law",[17] together with an impact assessment;[18]
- **January 2009** – Publication of the summary of responses and Government position,[19] and the *Coroners and Justice Bill*.

Also relevant, in the contexts both of complicity in homicide, and assisted suicide, are the Law Commission's consultation paper and report on inchoate liability for assisting and encouraging crime.[20]

1. The Law Commission's proposals

In its report on "Murder, Manslaughter and Infanticide", the Law Commission made a number of radical proposals for recasting the law, splitting the offence of murder into first and second degrees, with the partial defences of provocation, diminished responsibility, and failed suicide pact reducing first degree murder to second degree murder. The Commission also proposed

- Clarifying the offence of diminished responsibility, linking it to recognised medical conditions;
- Modifying the defence of provocation;
- reforming the law on duress and complicity in relation to homicide; and
- improving procedures for dealing with infanticide.

It recommended that the Government should undertake a public consultation on whether and, if so, to what extent the law should recognise either an offence of 'mercy' killing or a partial defence of 'mercy' killing. A brief summary and explanation of the proposals was set out in the Law Commission's press briefing paper.[21]

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17 *Murder, manslaughter and infanticide: proposals for reform of the law*; Ministry of Justice Consultation Paper CP19/08, July 2008

18 *Murder, manslaughter and infanticide: proposals for reform of the law: Impact Assessment* July 2008

19 *Murder, Manslaughter and Infanticide: proposals for reform of the law: Summary of responses and Government position*, January 2009

20 Law Commission Report on *Inchoate liability for assisting and encouraging crime*, Law Com No 300, July 2006

21 *Report on Murder, Manslaughter and Infanticide (Law Com No 304) Press Briefing Paper*

The Law Commission's terms of reference obliged it to assume retention of the life sentence for murder, but under its proposals the mandatory penalty would have been restricted to first degree murder.

In a House of Lords debate following publication of the report,[22] Lord Lloyd of Berwick said that it was by far the most complete and scholarly account of the present state of the law of murder that he had read but, as Lord Monson commented, a number of noble Lords were less than enthusiastic about the categorisation proposed.

Much of the debate was concentrated on the need for consultation on the subject of mercy killings and the perceived injustice of the mandatory life sentence applying to such an enormous range of offences, from the horrific offences which would always carry a sentence of life imprisonment, whether mandatory or not, to offences where mitigation was so strong that judges would normally be thinking of a sentence of two or three years, if that.

2. Government proposals

The Ministry of Justice's consultation paper of July 2008 ("CP") outlined the Law Commission's proposals and said:

> The Law Commission's recommendations in these areas are predicated on their proposed new offence structure, but this paper considers them in the context of the existing structure. The wider recommendations in the Law Commission's report may be considered at a later stage of the review.

The Government's proposals were:

> **Partial defences**
>
> - To abolish the existing partial defence of provocation and replace it with new partial defences of:
>   - killing in response to a fear of serious violence; and
>   - (to apply only in exceptional circumstances) killing in response to words and conduct which caused the defendant to have a justifiable sense of being seriously wronged.
> - To make clear that sexual infidelity on the part of the victim does not constitute grounds for reducing murder to manslaughter.
> - To remove the existing common law requirement for loss of self-control in these circumstances to be "sudden".
> - To provide that the "words and conduct" partial defence should not apply where the words and conduct were incited by the defendant for the purpose of providing an excuse to use violence.
> - To provide that the "fear of serious violence" partial defence should succeed only where the victim is the source of the violence feared by the defendant and the threat is targeted at the defendant or specified others.
> - To provide that neither partial defence should apply where criminal conduct on the part of the defendant is largely responsible for the situation in which he or she finds him or herself.

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[22] HL Deb 1 March 2007 cc1692-1725

- To provide that these partial defences should apply only if a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or in a similar way.
- To ensure that the judge should not be required to leave either of these defences to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that they might apply.
- To introduce a new partial defence of diminished responsibility based on the concept of a "recognised medical condition", spelling out more clearly what aspects of a defendant's functioning must be affected in order for the partial defence to succeed, and making clear that the abnormality should cause, or be a significant contributory factor in causing the defendant to kill.

Complicity

- To reform the law of complicity in homicide with a view to reforming the law of complicity more generally at a later stage, guided by the same principles.
- To create a new statutory offence of intentionally assisting and encouraging murder.

[…]

Infanticide

- To amend the law to make clear that infanticide cannot be charged in cases that would not currently be homicide at all.

3. How the Government's proposals differed from the Law Commission's

As well as not proceeding with the Law Commission's proposed restructuring of homicide offences, the Government's proposals for reforming the partial defences of provocation and diminished responsibility differed from the Law Commission's on a number of points. Principal departures from the Law Commission's proposals on the partial defence of provocation were:

- instead of modifying the law of provocation, the defence was to be abolished and replaced by two separate defences based on two limbs of the defence which the Law Commission had proposed, "fear of serious violence" and "words or conduct";
- the proposal for an additional limb of the partial defence to cover "gross provocation" was rejected;
- it would be expressly provided that sexual infidelity on the part of the victim can never justify reducing a murder charge to manslaughter;
- the requirement for control to have been lost would be retained but the requirement for the loss to have been "sudden" would be removed;
- neither partial defence would apply where criminal conduct on the part of the defendant was largely responsible for the situation in which he or she found him or herself;
- the threshold for the "words and conduct" partial defence would be raised, to apply only "in exceptional circumstances";
- the "words and conduct" partial defence would not apply where the words and conduct were incited by the defendant for the purpose of providing an excuse to use violence;

- for the "fear of serious violence" partial defence to succeed, the source of the violence feared by the defendant would need to be the victim whom the defendant killed and the threat would need to be targeted at the defendant or specified others.

The principal departure from the Law Commission's proposal on diminished responsibility was that the definition should not include, as a cause of impairment, "developmental immaturity in a defendant under the age of 18", alongside abnormality of mental functioning arising from a mental condition.

This paper does not explore the Government's proposals on complicity, since these are not brought forward in the *Coroners and Justice Bill* (see below).

Draft clauses to implement the Government's proposals were annexed to the CP.

4. Reaction to the proposals

An editorial in the *Criminal Law Review* commented:

> [The Law Commission's] imaginative and progressive idea has clearly proved too radical for the government. The CP tersely dismisses it by saying that it may be considered at a later stage of the review, but it will be surprising if it is heard of again. This is because it would make no sense at all to adjust the outer boundaries of murder at this stage, as the CP proposes to do, if the whole map might be redrawn later. It is a sad fate for a good proposal.[23]

Lord Phillips of Matravers, the former Lord Chief Justice, was among others who expressed disappointment at the Government's approach, saying:[24]

> The Government has not adopted the Law Commission's approach of attempting to reform the structure of the law of homicide so that it is rational and fair … I think it is a great pity that the Government is looking, in isolation, at these particular aspects of the law of homicide without looking at the overall structure.

He also said that the law could have been made much clearer and more coherent had the Law Commission been able to propose that determinate sentences should be imposed for murder. That had been precluded by the terms of reference given to the Law Commission.

The legal and human rights organisation, *Justice*, regarded the Government's approach as fundamentally flawed, explaining:

> The government has taken up the Law Commission's proposed partial defences, altered them slightly, and is attempting to apply them, without it seems fully considering the consequences, to the current two-tier homicide structure, where they will operate to reduce murder to manslaughter and will be available in cases

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23 "Adjusting the boundaries of murder: partial defences and complicity", [2008] Crim LR 829

24 Lord Phillips' Essex University/Clifford Chance lecture on *Reforming the Law of Homicide*, delivered on 6 November 2008

> where it is alleged there was an intention to cause serious harm but no awareness of a risk of causing death.
>
> 12. This approach is flawed because the partial defences should be different according to which structure is in place. The government proposes, it seems, to bring in the structural reforms to homicide at some later date. This seems to assume that the same partial defences can apply whatever structure is in place. However, under the Law Commission's proposals – where they were only available in the most serious cases – it was understandable that they should be narrowly drafted, since the defendant's intention in those cases is more difficult to justify even in a partial sense. This narrow drafting is much less justifiable in the serious harm cases, particularly if the serious harm rule is left to operate as it does now and is not more closely confined in the way that the Law Commission proposed.
> 13. If the government do propose to bring in a three-tier structure then we believe that they should delay all but essential reforms to the partial defences until they do so. If they do not intend to bring in a three-tier structure, then they should ask the Law Commission to redraft partial defences with the two tier structure in mind.[25]

The summary of responses and Government position ("the Summary Paper") was published on 14 January 2009, on the same day as the *Coroners and Justice Bill*. It lists those who participated in the pre-publication stage of the consultation process as well as the 73 individuals and organisations who formally responded to the consultation. However, the Department has not published the responses, and the summary does not, for the most part, specify which of the respondents had particular concerns about each of proposed reforms. Responses which are currently available online include:

- *Liberty*[26]
- *Institute of Legal Executives*[27]
- *Justice*[28]
- *Northern Ireland Human Rights Commission*[29]
- *Matthew Dyson*[30]

Recording respondents being "unhappy" that the Government had chosen to undertake a "piecemeal" review of murder rather than a comprehensive one taking in all of the recommendations of the Law Commission, the Summary Paper said that it had been:

> argued that the Law Commission report was a comprehensive package of reform supported by thorough and careful research and that its parts were inter-

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25 *Justice response to government consultation Murder, Manslaughter and Infanticide: proposals for reform of the law*
26 *Liberty's response to the Ministry of Justice consultation: "Murder, manslaughter and infanticide: proposals for reform of the law"*
27 *Institute of Legal Executives response to government's consultation on Murder, Manslaughter and Infanticide*
28 *Justice response to government consultation Murder, Manslaughter and Infanticide: proposals for reform of the law*
29 *Northern Ireland Human Rights Commission: Response to Murder, Manslaughter and Infanticide: proposals on the reform of the law*
30 *Matthew Dyson: Reply to Ministry of Justice consultation paper "Murder, manslaughter and infanticide: proposals for reform"*

> dependent. It was not appropriate to lift some parts of the Law Commission proposals and graft them onto the existing law. To support this view it was contended that to attempt reform of partial defences without tackling underlying problems regarding the scope of, and mental element for, murder risked unfairly leaving some defendants to a full murder conviction where this was not merited.

but

> … The Law Commission's recommendations for this important and sensitive area of law are ambitious and wide-ranging; it is critical that we get this right and so we have proceeded on a staged basis. We will be looking at the Commission's other recommendations, in particular those for a new structure for homicide and complicity to murder, in due course, in the light of the effect of any changes arising from this stage of the work.[31]

The Summary Paper stated that the Government had decided not to proceed with the proposed, separate reform of complicity to murder, explaining:

> We originally included complicity to murder in the first stage of the review. This followed the Law Commission's report on homicide which similarly singled out complicity in murder in advance of reporting on complicity as a whole. However we have now received their full report on complicity, and we accept the weight of opinion expressed in response to the consultation that any legislation in this area should address the Law Commission's proposals for a comprehensive reform of the law on secondary liability.[32]

The Summary Paper outlines the Government's reasons for rejecting most of the respondents' comments on the elements proposed for the partial defences.

III Homicide provisions in Part 2 of the Bill

A. Murder

1. Partial defence of diminished responsibility

Clause 39 would replace the existing diminished responsibility defence under section2 of the Homicide Act 1957 with:

> (1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are—
>
> (a) to understand the nature of D's conduct;

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[31] Para 120
[32] Para 106

> (b) to form a rational judgment;
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

The new format has been welcomed by the civil liberties and human rights organisation, *Liberty*, and the *Bar Council* (who had formerly been in favour of the Law Commission's express inclusion of developmental immaturity). Although the view of Justice was that the overall approach was flawed, it did comment that Law Commission's inclusion of developmental immaturity had been a positive development and that, although under the Government's proposed version an adult who due to mental disability functioned like a 10 year old could try to make out the diminished responsibility defence on those grounds it was illogical that that a 10 year old who functioned like a 10 year old could not.

Lord Phillips also regretted the omission of any reference to developmental immaturity, saying:

> The Government has not accepted this argument for two reasons. The first is that they do not believe that the absence of such a provision is causing serious problems in practice. The second is, I quote:
>
> > "We think there is a risk that such a provision would open up the defence too widely and catch inappropriate cases. Even if it were to succeed only rarely (as the Law Commission suggest), we think it likely that far more defendants would at least try to run it, so diverting attention in too many trials from the key issue".
>
> I believe that there is something of a paradox in this reasoning. At present natural developmental immaturity in a child who has reached the age of 10 does not constitute a defence. That may be why developmental immaturity is not causing problems in practice. But it is surely offensive to justice that a child whose brain has not yet developed to the extent necessary to provide the self-control that is found in an adult should be unable to pray this fact in aid, at least as a partial defence. Children develop at different speeds. If (and it may be a big if) some are sufficiently mature at the age of 10 to have full criminal responsibility, those who are not should, I feel, be entitled to pray this in aid.
>
> What, I wonder, is the 'key issue' from which a plea of diminished responsibility by reason of developmental immaturity would detract?[33]

2. Partial defence of loss of control (replacing provocation)

Reform of the provocation defence has proved more difficult and contentious, and the structure of the clauses differs from that of the drafts published in the CP. **Clause 41** would introduce the new partial defence of "loss of control", available if three criteria are met, including that the loss of control had a "qualifying trigger", while **clause 42** would define what could be a "qualifying trigger". Although the Government had said that there would be two new partial defences, the clauses present one defence which can succeed if the relevant loss of control had a qualifying trigger of:

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[33] Lord Phillips' Essex University/Clifford Chance lecture on *Reforming the Law of Homicide*, delivered on 6 November 2008

- fear of serious violence (**clause 42(3)**); or
- things done or said which constituted circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged" (**clause 42 (4)**);or
- a combination of the two (**clause 42(5)**).

a. Title of clause

The title of clause 41 is: **Partial defence to murder: loss of control**, dropping the additional words "resulting from fear of violence etc" which were in the draft, This may be in response to the *Bar Council*'s plea that:

> The defence, in whatever form it is ultimately defined, should be titled with a short, practical and appropriate term by which it will be universally known.[34]

b. Loss of control need not be sudden

A new subsection has been added, to confirm that the loss of control need not be "sudden", in response to respondents' concerns that failure to do so could result in the common law requirement of suddenness being read into the new statutory defence: this could thwart what the *Bar Council* described as the "laudable objective" of opening the defence to "slow burn" cases in which, for instance, a battered wife kills her husband after prolonged abuse.[35] *Liberty* agreed that a general requirement for loss of self control should be retained, and welcomed the dropping of the suddenness requirement which had been difficult to reconcile with the slow burn responses associated with domestic abuse cases.[36]

c. Circumstances of an extremely grave character

While the draft clauses would have limited the "words and conduct" defence to apply only when the words or conduct amounted to an "exceptional happening", **clause 42(4)** would now provide that they must constitute "circumstances of an extremely grave character". A number of the respondents to the CP had not thought the meaning of "exceptional happening" to be clear, and were concerned lest cumulative abuse cases be ruled out. Lord Phillips commented that the test was likely to give rise to exceptional difficulty. He preferred the Law Commission's test (gross provocation), although either test was likely to complicate the summing up and raise difficulties with the jury. The Government considers that the new formulation should ensure that the defence is only available in a very narrow set of circumstances in which a killing in response to things said or done "should rightly be classified as manslaughter rather than murder".[37]

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34 *A joint response on behalf of the Law Reform Committee and the Criminal Bar Association of the General Council of the Bar*

35 The Bar Council considered that the loss of self control should not be a requirement at all

36 *Liberty's response to the Ministry of Justice consultation: "Murder, manslaughter and infanticide: proposals for reform of the law"*

37 *Murder, Manslaughter and Infanticide: proposals for reform of the law: Summary of responses and Government position*, January 2009, para 40

d. Justifiable sense of being seriously wronged

Although "a number of organisations" had considered that this test was insufficiently objective, the Government said that, having adopted the Law Commission's test, it believed that it would be interpreted as an objective test in which the jury would be able to take into consideration the situation the defendant was in[38]. *Liberty*, for example, had said that the concept of being seriously wronged was entirely subjective and would add little certainty or clarity to the current law: the proposed new defence ought to be treated with extreme caution.

e. Disregarding sexual infidelity

Some respondents did not agree with the Government that sexual infidelity should never provide the basis for a partial defence to murder. Lord Phillips confessed to being

> uneasy about a law which so diminishes the significance of sexual infidelity as expressly to exclude it from even the possibility of amounting to provocation.

He said that ministerial statements had not persuaded him that it was necessary for the law to go so far:

> The Ministry of Justice press release recorded Maria Eagle as saying:
>
> > "For men and women who kill their partners these changes will mean that the letter of the law finally catches up with judges and juries who, in recent years, have been less prone than people think to let men off lightly and punish women harshly. However, in order to be fair they've had to stretch the law to its limits. With these changes, the law will be clearer."
>
> So far as not letting men off lightly is concerned, I have some difficulty with this proposition. The current law requires provocation to be conduct that would cause a reasonable man to act as the defendant acted.
>
> If juries are declining to hold that infidelity meets this test I cannot understand why it should be suggested that they are stretching the laws to its limits.

The Government sought to improve the wording in response to respondents' concerns. Instead of -

> An act of sexual infidelity is not, of itself, an exceptional happening

the Bill provides (**clause 42(6)(c)**) that, in determining whether a loss of self control had a qualifying trigger,

> The fact that a thing done or said constituted sexual infidelity is to be disregarded.

The Guardian reported that

> lawyers said the changes would make little difference in practice. "As a general trend, defendants have not been able to rely on sexual infidelity under the current

[38] ibid, para 45

> law," criminal barrister John Cooper said. "Any defence run on that basis would have been unlikely to convince a jury."[39]

B. Infanticide

Section 1(1) of the *Infanticide Act 1938* provides:

> Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of her giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

Infanticide is therefore both an offence in its own right, and a defence to a charge of murder.

Possible modifications to the law of infanticide, which have been considered while the law of homicide has been under review, but which have not been pursued, include:

- Total abolition;
- To accommodate infanticide within the defence of diminished responsibility;
- To change or remove the arbitrary restriction of the offence/defence to children under 12 months;
- To require a causal link between the disturbance of the mother's mind and the act or omission of killing;
- To extend the offence/defence to persons other than the birth mother;
- To remove the reference to, "the effect of lactation";
- To specify the offence as being committed when, at the time of the act or omission, the balance of the woman's mind was disturbed by reason of the effect of giving birth or circumstances consequent upon that birth;
- To modify the burden of proof on the defendant in infanticide so that it should only go to adducing sufficient evidence to raise the issue.

In its report "Murder, Manslaughter and Infanticide", the Law Commission did not propose any substantive changes to the law of infanticide, but was concerned at the possibility of a mother being convicted of murder, when she would have met the criteria for the defence of infanticide, yet had not raised it. After considering other mechanisms to deal with the situation (including giving the trial judge discretion to leave infanticide to the jury, even if the prosecution, or defence or both, objected), the Law Commission recommended that:

> In those limited circumstances where infanticide is not raised as an issue at trial and the defendant (biological mother of a child of one year or less) is convicted

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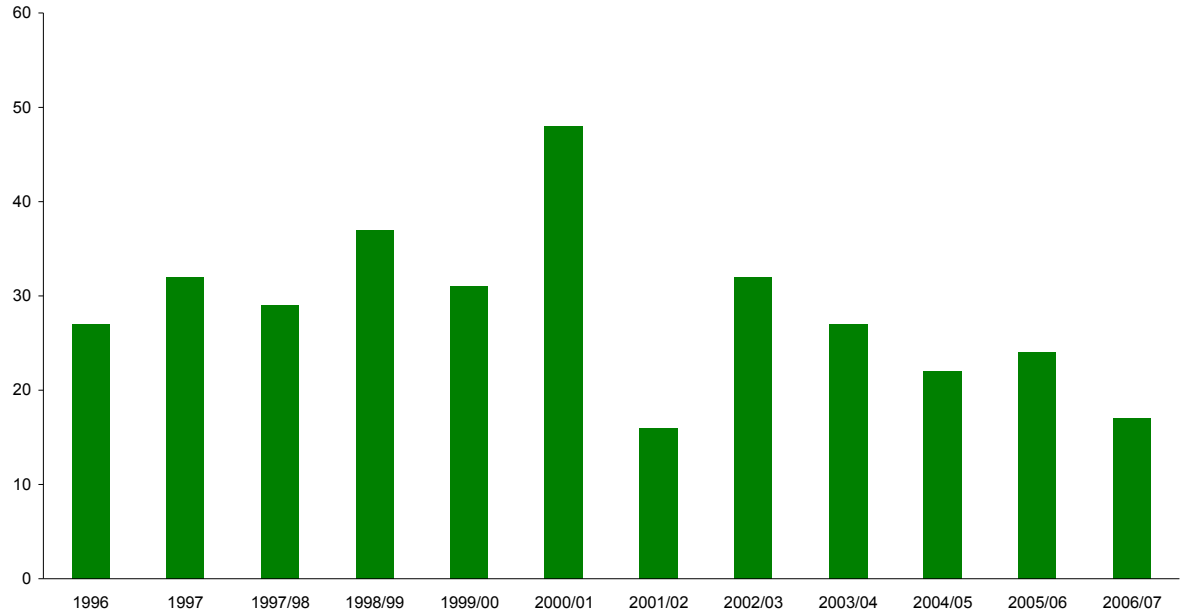
[39] "Murder law changes will make little difference, say lawyers", *Guardian*,19 January 2009,

> by the jury of murder, the trial judge should, within the conclusion of 28 days from conviction, have the power to order a thorough medical examination of the defendant. This would be with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present. If so, then the trial judge should be able to postpone sentence and the fixing of the minimum term.

The Government agreed with the Law Commission that the offence worked satisfactorily in practice in the very small number of cases (fewer then one a year) in which it applied.

The following chart shows the number of homicides where the victim was aged under 1 year, as recorded by the police at 21 November 2007. These figures are subject to revision as cases are dealt with by the police and the courts, or as further information becomes available. Data for 2007/08 will be published on 29 January 2009.

Number of homicides recorded by the police where victim was aged under 1 year, England and Wales



The table on the following page shows the number of women indicted for infanticide, the number convicted of infanticide and the sentences handed down.

Suspects indicted and convicted for infanticide and sentenced passed, England and Wales

			Sentence passed				
	Indicted for offence	Total convicted of offence	Immediate imprisonment - 4 years and under	Hospital/ Restriction Order	Hospital Order	Probation/ Supervision	Other sentence
1996	2	4	-	-	-	4	-
1997	-	3	2	-	-	1	-
1997/98	1	4	2	-	-	2	-
1998/99	4	7	-	-	2	5	-
1999/00	-	1	-	-	-	1	-
2000/01	1	5	1	-	-	4	-
2001/02	1	1	-	-	-	1	-
2002/03	1	-	-	-	-	-	-
2003/04	-	-	-	-	-	-	-
2004/05	1	1	-	-	-	1	-
2005/06	2	1	-	-	-	-	1
2006/07	-	-	-	-	-	-	-

Source: Tables 1.09 & 1.10, Home Office Statistical Bulletin 03/08

In the CP, the Government said that as far as the Law Commission's procedural recommendation was concerned, it had not found evidence that this was a problem in practice, so it did not propose to take forward the recommendation. The Government's view was not shared by the Bar Council. The Government's response was that, even if there were such cases (and no-one had produced evidence of such a problem), there would be substantial problems in practice, and such a procedure would sit uneasily with the neutral role of the judge, running the risk of eliding his role with that of the defence.

Clause 44 would, however, make two small modifications so that the section would read:

> Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of her giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then **if** the circumstances were such that but for this Act the offence would have amounted to murder **or manslaughter**, she shall be guilty of felony, to wit infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

The purpose of the modification is to reverse what the Government believes to have been an unintended effect of a recent Court of Appeal judgment in a posthumous appeal where a mother had pleaded guilty to infanticide.[40]

Lisa Gore's baby died within a very short time after his birth, and she had left his body on nearby sand dunes. Before the birth she had denied being pregnant, there was no reliable independent evidence as to how the baby had died, and her motivation for pleading guilty may have been distorted by her condition. After her own death, the Criminal Cases Review Commission referred her case to the Court of Appeal. Its submission was that a woman could only be convicted of infanticide if all the ingredients

[40] R v Gore [2007] EWCA Crim 2789, see *Murder, manslaughter and infanticide: proposals for reform of the law*; Ministry of Justice Consultation Paper CP19/08, July 2008 p32

of murder were proved, in particular that there must be mens rea, i.e. an intention to kill or cause really serious bodily harm. The court disagreed. It said that the mens rea for infanticide was contained explicitly in the first few words of section 1(1), namely that the prosecution had to prove that the defendant acted or omitted to act wilfully: there was no reference to any intention to kill or cause serious bodily harm. There was every reason to believe that the baby would have lived if he had received some medical attention, but Miss Gore had wilfully left him to die.

The court said that Parliament had intended to create a new offence of infanticide which covered situations much wider than offences that would otherwise be murder, and it was sharply critical of the Commission for having made the referral and raising the hopes of Lisa Gore's parents, wondering:

> whether anybody has explained properly to Mr and Mrs Gore that, had we accepted the interpretation of the law put forward on Miss Gore's behalf, the result could have been disastrous for other distressed young women in the position of their daughter.

In the CP, the Government commented that the court's interpretation differed from the understanding of some stakeholders. It is significant that in its report "Murder, Manslaughter and Infanticide", the Law Commission had stated:

> The present offence/defence of infanticide applies to cases that, if not for the 1938 Act, would constitute murder.[41]

The CP concluded that the effect of the judgment was to make it possible for infanticide to be charged in cases that would not currently be homicide at all. While this might not be problematic in practice, the Government did not think it appropriate that a birth mother could be convicted of a homicide offence in circumstances where any other person would face a lesser charge, such as child cruelty. It therefore proposed to amend the law to make clear that infanticide could not be charged in cases that would not currently be homicide at all.

C. Assisting suicide

The terms of reference for the review of the law of murder made it plain that the review would only consider the areas of euthanasia and suicide inasmuch as they formed part of the law of murder, and that it would not cover the more fundamental issues involved which would need separate debate. In its report "Murder, Manslaughter and Infanticide", the Law Commission made the further recommendation that the Government should undertake a public consultation on whether and, if so, to what extent the law should recognise either an offence of 'mercy' killing or a partial defence of 'mercy' killing.

Thus, the murder review was not concerned with the separate offence of assisting or encouraging suicide, which had been retained when the act of suicide or attempted suicide was decriminalised by the *Suicide Act 1961*. Section 2 provides:

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[41] Para 9.96

> A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

Proceedings under this section can only be brought by or with the consent of the Director of Public Prosecutions (DPP).

Two recent developments have given rise to concerns about that retained offence, and the Law Commission gave it separate consideration in its 2006 report on Inchoate Liability for Encouraging and Assisting Crime.[42] It said:

> Over recent years there has been a growth in the phenomenon of "suicide websites". In their least objectionable form such websites provide the visitor with little more than advice as to potential methods for committing suicide. However, such websites can also offer services akin to a dating agency for potential suicides. Such websites have been at the root of numerous suicide pacts, uniting people contemplating suicide and providing them with the advice as to how they should end their lives. This has become an increasing cause for concern.

The Commission's conclusion was that the offence did offer an adequate solution to the problem posed by those who involve themselves in the suicide of another, but that there was a strong case for updating the language of section 2 of the *Suicide Act*. There was also

> a strong case for applying the Encouraging and Assisting Bill's broader provisions on extra-territorial jurisdiction [as proposed in the main report] to the offence of aiding suicide contrary to section 2 of the Suicide Act. These provisions would be especially useful in combating suicide websites. This is because the Internet facilitates cross-border communication and its use is, therefore, by its very nature, more likely to raise jurisdictional issues.

a. Internet sites

In September 2007, the Prime Minister asked Dr Tanya Byron to conduct an independent review looking at the risks to children from exposure to potentially harmful or inappropriate material on the internet and in video games. She found that research looking at pro-suicide sites had had mixed results, with some studies reporting high degrees of emotional and social support by these sites, particularly on sites where the methods of suicide were not discussed. There had been considerable debate about how best to deal with such sites, and questions had been raised about how the criminal law should be applied where people were using the internet to encourage others to commit suicide. She referred to the Law Commission's conclusion that assisting or attempting to assist someone to commit suicide was a crime, even when it happened online, but she thought there seemed to be a lack of clarity about what this meant in relation to how individuals used online services. Some groups had argued that the law was not

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[42] Law Commission Report on *Inchoate liability for assisting and encouraging crime*, Law Com No 300, July 2006

effectively enforced in relation to websites and their users. In her report, published in March 2008,[43] she recommended that:

> - the Council [on Child Internet Safety] work to clarify the law around internet material and explore appropriate enforcement responses, include consideration of this type of content, and that this feeds into wider discussions about the law in this area;
> - sites which exist to promote suicide in a way that contravenes UK law should be taken down once the relevant internet service providers have been notified of their existence and the fact that they are illegal has been confirmed.

In March 2008, the Secretary of State for Justice, Jack Straw, said that the Under Secretary of State at the Ministry was looking urgently into suicide websites, about which there was growing concern. On 17 September 2008, Maria Eagle announced that, following a review, which had been part of a wider government effort to tackle the sensitive and complex issue of suicide and the internet, the Government had decided to reframe the Suicide Act 1961 in new, modern language which would make it easier for individual internet users and internet-based businesses such as Internet Service Providers to understand.[44]

b. Adults physically unable to end their own lives

A parallel cause for concern has been the potential liability to prosecution of individuals whose loved ones were, or would become, physically unable to end their own lives without assistance at a time when it was their wish to do so, often when they were in the closing stages of a terminal illness, and facing the prospect of a distressing natural death. A number of illustrations are set out in the Library Standard Note on Assisted Suicide.[45] Several of these involved planned suicide at the Dignitas Clinic in Switzerland (where the law appears to be that assisting suicide will not be prosecuted unless the assister is acting out of self-interest).

There were two highly publicised cases, those of Diane Pretty and Debbie Purdy, where terminally ill women contemplating suicide have been concerned about the consequences for their husbands, and sought clarification from the court. Dianne Pretty suffered from motor neurone disease and faced the prospect of a distressing and humiliating death. She was unable, without help, to take her own life, and unsuccessfully sought an undertaking from the DPP that, if her husband aided her, he would not be prosecuted. She claimed that article 2 of the European Convention on Human Rights protected a right to self-determination, entitling her to commit suicide with assistance, that failure to alleviate her suffering by refusal of the undertaking amounted to inhuman and degrading treatment proscribed by article 3, that without justification her rights to privacy and freedom of conscience under articles 8 and 9 were infringed and that in breach of article 14 she had suffered discrimination, since an able-bodied person might exercise the right to suicide whereas her incapacities prevented her doing so without

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43 Safer Children in a Digital World: *The Report of the Byron Review*
44 *Statement on the Suicide Act*, 17 September 2008, Ministry of Justice
45 SN/HA/4857

assistance. The House of Lords unanimously dismissed her appeal, finding, inter alia, that article 2 could not be interpreted as conferring a right to self-determination in relation to life and death and assistance in choosing death and that since the executive had no power to dispense with or suspend laws or their execution without parliamentary consent, the DPP had no power to undertake that a crime yet to be committed should be immune from prosecution.

Five months later, the European Court of Human Rights ruled unanimously that the refusal of the government to allow Mrs Pretty's husband to help her to die did not violate the European Convention on Human Rights. Her response to the ruling was that the law had taken all her rights away. Less than two weeks after that, in May 2002, she died in a hospice. Her husband said:

> Diane had to go through the one thing she had foreseen and was afraid of - and there was nothing I could do to help.[46]

Debbie Purdy suffers from multiple sclerosis, for which there is no known cure, and she is confined to a wheelchair. She has said that when her condition becomes unbearable, she hopes to end her life at Dignitas. Her husband is willing to help her and, if necessary face a prison sentence, but she says that she is not prepared to put him in that position, and she therefore sought clarification in the High Court about when prosecutions would be likely. She sought judicial review of the DPP's decision not to reveal details of how cases of assisted suicide are prosecuted in England & Wales. She asked:[47]

> Does that mean that, if my husband picks up the medical information that I need to go to Switzerland, he'll be breaking the law and face jail?" she asked.
> "Does it mean that if he pushes my wheelchair onto a train, if he buys my tickets knowing that I'm going to go to Switzerland to end my life... what constitutes assisting a suicide?

In October 2008 the court held that the DPP had not acted unlawfully in failing to publish detailed guidance as to the circumstances in which individuals would or would not be prosecuted for assisting another person to commit suicide. There were special reasons why the DPP had promulgated specific Codes of Practice in relation to crimes of domestic violence, bad driving and football-related offences, and those reasons did not apply to assisted suicide. Delivering the judgment of the court, Lord Justice Scott Baker emphasized that the case was not about whether it should continue to be a criminal offence in this country to help another person, whatever the circumstances, to take their own life: that was a matter for Parliament and not the courts. Nor was it about whether someone could obtain in advance immunity from prosecution for helping another person to travel to another country where assisted suicide is lawful, for the purpose of an assisted suicide: that question had already been decided in the negative by the House of Lords in the case of Diane Pretty. Even if Article 8(1) of the European Convention on Human Rights had been engaged, any interference with the right, by the operation of s2 of the *Suicide Act*, would be by a public authority and in accordance with the law.

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[46] BBC news, *Diane Pretty dies*, 12 May 2002
[47] Sky News, 2 October 2008

c. Debate on assisted dying

Shortly after the Court of Appeal judgment there was a Westminster Hall debate on Assisted Dying. Dr Evan Harris gave examples of the difficulties people faced in not knowing what would happen to them if they assisted someone with death, and referred to the assistance given by the Dignitas clinic:

> The problem with the current state of the law for people in that situation is that they fear legal consequences for their loved ones on return to the UK. That is cruel. A lack of legal certainty about prosecuting those who accompany loved ones to Dignitas leads some terminally ill people to travel to Switzerland all by themselves, and as a consequence to go earlier than they would have liked. It forces people to make that decision while they are still able to make it themselves and do not need assistance. They are forced to die in a foreign country, away from familiar surroundings and in some cases without their loved ones.
>
> The second example is mercy killing. Under current law, anyone who ends the life of another can be convicted of murder and receive a life sentence, even if the act is a compassionate response to a dying person's request for help to die—a so-called mercy killing. Despite the risk of a murder conviction, a number of people who resort to mercy killing regard it as the final act of love towards a loved one who is dying and requests help to die. Home Office records show that in the past 15 years, a total of 57 suspects in homicide cases could be described as being involved in mercy killings. Again, that probably represents a small fraction of the true number.[48]

Chris Mccafferty also raised the subject of mercy killing, commenting that the Government had not followed the Law Commission recommendation that there should be a review:

> In a written answer to me on 24 April, my hon. Friend the Minister said that the Government had no plans to do that, despite the fact that changes proposed by the Ministry of Justice to the law of murder could result in genuine mercy killings resulting in life sentences for murder. Such harsh treatment is unfair and goes against public feeling. I understand why the Government are making the proposed changes, but the effect could be that the benign sentencing that we have come to expect or to know in relation to genuine mercy killings is replaced by long custodial sentences. The whole area is murky, and I ask the Minister to adhere to the Law Commission's recommendation for a consultation on mercy killing, which would be in everyone's best interest.[49]

Crispin Blunt suggested that Parliament was obviating its responsibility to bring the law on assisting suicide up to date. He said:

> In the latest case, the judges have made it clear that it is time for Parliament to take up its responsibilities. I was concerned by the alacrity with which the Minister leapt to her feet to confirm for my hon. Friend the Member for New Forest, East (Dr. Lewis) that there have been no cases of imprisonment for assisted suicides.

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48 HC Deb 11 November 2008 c224WH

49 Ibid c236WH

> There have been prosecutions; people have been left on bail for murder for months and have then had to go through the judicial process. We are failing people such as the family of Debbie Purdy. They are in a position of doubt because we, as Members of Parliament, are not prepared to take up our responsibilities and make the law clear.
>
> However, the issue is not just about those who are involved in assisting people to commit suicide who would not otherwise be able to do so in circumstances in which a terminally ill person is competent and wants to bring their life to an end; it is about providing the comfort of the knowledge that a terminally ill person will potentially have control at the end of their life over circumstances that they cannot predict. That is the greatest and most striking benefit from the change in the law in the state of Oregon, where 17 per cent. of people who are dying take the opportunity to discuss the possibility of ending their life in circumstances over which they have some control with their family. That simple proposition is overwhelmingly supported by the public and would bring comfort to an increasing proportion of our population who are now dying from diseases in a more drawn-out, longer, undignified way than previous generations. We, as Members of Parliament, have a responsibility to hold a debate and bring this matter to a conclusion.[50]

d. The Assisted Dying for the Terminally Ill Bill

In 2003, 2004 and 2005, Lord Joffe introduced his Bill "to enable a competent adult who is suffering unbearably as a result of a terminal illness to receive medical assistance to die at his own considered and persistent request; and to make provision for a person suffering from such a condition to receive pain relief medication. It was remitted to a select committee under the chairmanship of Lord Mackay of Clashfern. The committee's report was published in March 2005, recommending that:

> (a) an early opportunity should be taken for our report to be debated by the House in the next session of Parliament (Paragraph 235).
>
> (b) in the event that another bill of this nature should be introduced into Parliament, it should, following a formal Second Reading, be sent to a Committee of the whole House for examination (Paragraph 235).
>
> (c) any such bill should take account of the following considerations which have emerged in the course of our inquiry:
>
> (i) a clear distinction should be drawn in any future bill between assisted suicide and voluntary euthanasia in order to provide the House with an opportunity to consider carefully these two courses of action, and the different considerations which apply to them, and to reach a view on whether, if such a bill is to proceed, it should be limited to the one or the other or both (Paragraphs 243-246);
>
> (ii) any future bill should set out clearly the actions which a doctor may and may not take either in providing assistance with suicide or in administering voluntary euthanasia (Paragraphs 247-248);

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[50] Ibid c233WH

> (iii) if a future bill should include terminal illness as a qualifying condition, this should be defined in such a way as to reflect the realities of clinical practice as regards accurate prognosis (Paragraphs 250-251);
>
> (iv) a definition of mental competence in any future bill should take into account the need to identify applicants suffering from psychological or psychiatric disorder as well as a need for mental capacity (Paragraphs 252-254);
>
> (v) consideration should be given in any future bill to including "unrelievable" or "intractable" suffering or distress rather than "unbearable" suffering as a criterion (Paragraphs 255-256);
>
> (vi) if a future bill is to claim with credibility that it is offering assistance with suicide or voluntary euthanasia as complementary rather than alternative to palliative care, it should consider how patients seeking to end their lives might experience such care before taking a final decision (Paragraphs 257-258);
>
> (vii) in setting a waiting period between an application for assisted suicide or voluntary euthanasia and the carrying out of such actions, any future bill should seek to balance the need to avoid increased suffering for determined applicants against the desirability of providing time for reflection for the less resolute. Such a waiting period is of less importance in the case of assisted suicide but needs to be considered carefully in the case of voluntary euthanasia (Paragraphs 259-260);
>
> (viii) any new bill should not place on a physician with conscientious objection the duty to refer an applicant for assisted suicide or voluntary euthanasia to another physician without such objection; it should provide adequate protection for all health care professionals who may be involved in any way in such an application; and it should ensure that the position of persons working in multi-disciplinary teams is adequately protected (Paragraphs 261-263);
>
> (ix) any new bill should not include provisions to govern the administration of pain relief by doctors (Paragraphs 264-266).[51]

The report was debated was on 10 October 2005,[52] and the final Second Reading debate was on 12 May 2006.[53] None of the Bills progressed. The Joint Committee on Human Rights' conclusions were:

> that ECHR Article 2 does not prohibit legislation such as the Patient (Assisted Dying) Bill. The compatibility of such legislation would depend on the extent to which allowing such a measure to be operated would be consistent with the State's positive obligations under Article 2 to take active steps to protect life. We consider that the State has a discretion to allow such a measure in order to respect some patients' rights under ECHR Article 8, if satisfied that the rights of other, vulnerable, patients would be adequately protected.

and

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[51] Select Committee on the Assisted Dying for the Terminally Ill Bill - First Report March 2005
[52] HL Deb 10 October 2005 cc12-32,45-150
[53] HL Deb 12 May 2006 c 1184-1296

> that the safeguards set out in the Patient (Assisted Dying) Bill would be adequate to protect the interests and rights of vulnerable patients. They would ensure that nobody could lawfully be subjected to assisted dying without his or her fully informed consent. We consider that this would respect the right to personal autonomy and self-determination of mentally competent patients under ECHR Article 8.1, and would not be incompatible with the positive obligations of the State to protect life under ECHR Article 2.[54]

Lord Joffe has commented that the last thing the opponents of assisted dying seem to want is a debate, as shown by their conduct at the last hearing of his Bill –

> when they broke a longstanding tradition in the Lords of never opposing a Private Member's Bill at second reading. They succeeding in summarily bringing the debate to an end before a detailed examination of its provisions could even take place.[55]

He plans to resurrect the Bill.[56]

e. Reframing the Suicide Act

Clause 46 of the *Coroners and Justice Bill* would substitute a new section 2(1) into the 1961 Act and add a new section 2A setting out some "acts capable of encouraging or assisting": these are not expressed to be either exhaustive or merely illustrative.

The core of the modern statement of the offence would be

> "(1) A person ("D") commits an offence if—
> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
> (b) D's act was intended to encourage or assist suicide or an attempt at suicide

with further provisions to make it clear that the offence does not depend on any suicide having been attempted or on the encouragement having been directed at any specific person or class of persons. New section 2A(3) would provide:

> Where the facts are such that an act is not capable of encouraging or assisting suicide or attempted suicide, for the purposes of this Act it is to be treated as so capable if the act would have been so capable had the facts been as D believed them to be at the time of the act or had subsequent events happened in the manner D believed they would happen (or both).

Dignity in Dying (formerly the Voluntary Euthanasia Society) says that it supports the Government's efforts to better protect young and vulnerable people who may be encouraged to commit suicide by others, regardless of whether this is done via the internet or not, but that it is extremely concerned that the amendments fail to address a wider problem,

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[54] Joint Committee on Human Rights, Seventh Report,2002-03, march 2003
[55] "Debbie Purdy deserves a less terrible choice", 30 October 2008, *The Times*
[56] "Peer to resurrect Bill in effort to clarify law", 30 October 2006, *The Times*

> which is that at present (and as proposed) the law fails to distinguish between those who assist and/or encourage suicide, and those who assist the death of a mentally competent terminally ill adult who feels their suffering has become unbearable.
>
> Parliament should reform our suicide laws so that it is clear whether the same category of offence applies in all cases. In a recent interview with the Times, the DPP said if the law was revised to clarify categories of offence "that obviously means everyone is in a better position, but that is not in my gift, that is for Parliament".[57]

Liberty's view is that the proposed modernising restatement of the law would create problems. It says that it is extremely hazardous to rewrite such provisions merely to improve understanding and that the drafting:

> seems to go further than merely modernising language. There is a real concern that this change could further open up the possibility of prosecution of friends and family members of those who help loved ones to go overseas for assisted suicide. Enacting these provisions in this Bill will arguably make it more difficult for the DPP to decide in a given case, that it is not in the public interest to prosecute family members who help a terminally ill relative to commit suicide, given Parliament will have recently sent a clear signal that this is an offence under UK law.
>
> 38. The extension of this law to cover situations where an offence is committed even when the defendant does not know the specific person or class of persons who is being encouraged or assisted to commit suicide, appears to cover where material is posted on the internet. In many cases this material may be posted by depressed teenagers who honestly believe there to be little point in life. Any post that expresses this disenchantment with the world, stating for example that it would be better to kill oneself, would be criminalised under this section. It does not seem a helpful or appropriate response to criminalise those who are expressing an opinion distorted by their own depression. This could be more appropriately dealt with by removing such postings from the internet and providing counselling and understanding rather than invoking the criminal law (particularly as a breach of this provision can lead to up to 14 years imprisonment).[58]

Liberty also questions the need for section 2A(2) –

> a broad provision that states that even where an act is not capable of encouraging or assisting suicide, it will be an offence if the defendant believed the facts to be different or had subsequent events happened as he or she believed they would. This provision is confusing and seems wholly unnecessary given section 1(2) of the Criminal Attempts Act 1981 provides that a person may be

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57 "Coroners and Justice Bill, Overview of relevant clauses", Dignity in Dying

58 Liberty, *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009

guilty of an offence of attempt "even though the facts are such that the commission of the offence is impossible".

IV Other criminal offences in Part 2 of the Bill

A. Images of children

Part 2, Chapter 2 extends the law proscribing the possession of child pornography. Section 1 of the *Protection of Children Act 1978* already prohibits the possession of indecent photographs or pseudo-photographs[59] of children. Subsequent amendments have included, among other things, tracings derived from photographs or pseudo-photographs.[60] The present Bill would create a new offence of the possession of non-photographic visual images of child sexual abuse. Consideration had been given to effecting this change by amendments to the 1978 Act but, following consultation,[61] the Government has decided to create a new free-standing offence for a person to be in possession of a prohibited image of a child. In addition, the government response document outlined the rationale for legislating further on child pornography:

> The response to the consultation illustrated the sensitivity surrounding many of the issues raised. The creation of a new offence of the possession of cartoons, drawings, computer generated images and other material which depicts, or appears to depict, child sexual abuse is a significant step. It is recognised that these images, unlike those produced in the making of indecent photographs of children, do not involve harm to real children in their creation, and the Government has further deliberated on the proposals, in the light of the comments put forward. However, possession of the material in question (which would be caught by the Obscene Publications Act 1959 in respect of their publication) is cause for increasing concern. Recent technological advances have provided a challenge to the relevant legislative and physical protections that existed to obstruct the availability of these types of extreme images. It is important, in this changing environment, that the law is responsive and remains fully equipped to protect the public, and, in particular, the most vulnerable members of society. We continue to believe that tightening up the law to cover possession of such material is justified.[62]

The response document also acknowledged some of the arguments advanced against controls on non-photographic images:

> Frequently, those opposed to the proposals articulated unease about potential 'thought crime' and the regulation of artistic expression. A number of individuals also put forward the view that the images acted as a beneficial and victimless outlet for the inappropriate feelings of potential offenders. Those opposed to the proposals also raised issues of proportionality, the relationship of the material

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59 "pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph (section 7(7), *Protection of Children Act 1978*)

60 Section 69, *Criminal Justice and Immigration Act 2008*

61 *Consultation on possession of non-photographic visual depictions of child sexual abuse*, Home Office, Scottish Executive and Northern Ireland Office, April 2007

62 Consultation on the Possession of Non-photographic Visual Depictions of Child Sexual Abuse: Summary of responses and next steps, Ministry of Justice and Northern Ireland Office, May 2008

> with other genres that may be deemed equally undesirable and also maintained that there was a lack of evidence of harm from the existence of this material.[63]

The difficulties involved in establishing a causal link between pornography (of any kind) and harm were acknowledged back in 1972 by the Longford Committee:

> Pornography clearly must have some effect. We ourselves have no doubt about its general tendency.
>
> Only in very rare cases can a causal connection between pornography and anti-social behaviour be conclusively proved, if only because it is undesirable to use human beings in controlled experiments which would be necessary for conclusive proof. But we repudiate the deduction that such a connection therefore may not exist.[64]

Tim Tate's book, *Child pornography: an investigation* (Methuen 1990) includes an appendix by Ray Wyre, a former probation officer who spent many years working with sex offenders and paedophiles. What Wyre wrote could be taken as lending support to the proposals in the present Bill:

> Child pornography (and for that matter adult pornography) is something that can be used not only for sexual stimulus, but also to confirm some of the above statements [identifying non-sexual needs met through offending] made by abusers. In working with child sex abusers one is constantly dealing with their distorted thinking. An abuser is a person seeking to make his behaviour seem as normal as possible: he will use anything – including child pornography or child erotica – to achieve this.

Clause 49 of the *Coroners and Justice Bill 2008-09* would create an offence, in England, Wales and Northern Ireland, for a person to be in possession of a prohibited image of a child. The clause goes on to define a prohibited image in terms of its pornographic and obscene nature with detailed references to the focus of the image or the acts it portrays. This may be intended to avoid genuine works of art from being captured by the provisions of the Bill. An additional safeguard in this regard is that, under the clause, proceedings could not be instituted without the consent of the relevant Director of Public Prosecutions. Last year's seizure by Northumbria Police of a photograph on display in the Baltic Centre, Gateshead, provides a recent example of how this might work in practice.[65]

The maximum penalty for an offence under clause 49 would be three years' imprisonment, compared to ten years for an offence under the 1978 Act.[66] Powers of entry, search, seizure and forfeiture would mimic those for indecent photographs of children.[67]

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63 Ibid.
64 *Pornography: The Longford Report*, Coronet Books 1972
65 "Sir Elton John's young girl art: No charges", *Daily Telegraph*, 29 October 2007
66 Clause 53
67 Clause 54

Clause 50 excludes films which have been classified by the British Board of Film Classification. However, the exclusion does not apply to extracts of such films where there is a reasonable assumption that these were compiled solely or principally for the purpose of sexual arousal. This application of context follows the wording, relating to extreme adult pornography, in section 64 of the *Criminal Justice and Immigration Act 2008*.

Among the available defences in **clause 51** is one covering the unsolicited receipt of a prohibited image of a child which was not kept for an unreasonable time. This could cover instances where an individual promptly deleted any such images inadvertently received during an internet search. Again, this follows the wording of existing provisions in relation to extreme adult pornography.[68]

Under **clause 52**, photographs or pseudo-photographs that are indecent are excluded from the definition of "image" as these are already covered by the provisions of the *Protection of Children Act 1978* and analogous legislation applying to Northern Ireland.[69] A child is defined as being a person under 18, subject to subsection (6):

> Where an image shows a person the image is to be treated as an image of a child if—
> (a) the impression conveyed by the image is that the person shown is a child, or
> (b) the predominant impression conveyed is that the person shown is a child despite the fact that some of the physical characteristics shown are not those of a child.

Clause 55 and **Schedule 11** make provisions in relation to providers of "information society services" such as internet service providers. The significance of these measures could extend beyond the control of child pornography in that they could potentially provide a test bed for the future development of wider internet regulation. Despite this, the explanatory notes on this clause and schedule are sufficiently brief to reproduce in full here:

> 362. Clause 55 and Schedule 11 ensure that the provisions outlined above which make it an offence to possess prohibited images of children are consistent with the UK's obligations under the E-Commerce Directive.
>
> 363. Under Schedule 11 providers of information society services who are established in England, Wales or Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. Paragraphs 3 to 5 of the Schedule provide exemptions for internet service providers from the offence of possession of prohibited images of children in limited circumstances, such as where they are acting as mere conduits for such material or are storing it as caches or hosts.

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68 Section 65, *Criminal Justice and Immigration Act 2008*

69 *Protection of Children (Northern Ireland) Order* SI 1978/1047 (N.I.17)

B. Hatred against persons on grounds of sexual orientation

1. Background

The *Public Order Act 1986* makes it an offence to incite hatred against persons on the grounds of race, religion or sexual orientation. The last of these offences was added to the 1986 Act by the *Criminal Justice and Immigration Act 2008*. During Second Reading of the then *Criminal Justice and Immigration Bill* (the CJI Bill), Jack Straw announced that the Government proposed to table an amendment in Committee to add a new offence of inciting hatred against persons on the grounds of sexual orientation to the 1986 Act.[70]

The Chief Executive of Stonewall[71] told the Committee that there had been a recent increase in what seemed to be very obvious examples of incitement to hatred for gay people, which would not be caught by the existing law. He said that reggae music was a key area and quoted lyrics such as "Hang lesbians with a long piece of rope" and "All gay men should die".[72] The Chairman of the Police Federation told the Committee that proper guidance would have to be provided to ensure that jokes and sermons were not covered.[73]

In Committee the Government tabled a new clause and schedule to the CJI Bill, under which a new offence of inciting hatred against persons on the grounds of sexual orientation would be added to Part 3A of the 1986 Act.[74] The Minister said that the new clause and schedule were aimed at words and behaviour which were threatening, not merely insulting or abusive, and that there must be an intention, not merely a likelihood, of inciting hatred. The emphasis on intent was intended to allay concerns (which had been widely expressed) that people may inadvertently commit the new offence by preaching religious doctrine or telling jokes.[75]

Philip Hollobone said that the worry of many people who held faith was that the proposed new offence would have "a huge chilling effect on their ability to pronounce their faith".[76] He was the only Member to vote against the new clause on a division; the Government's amendments were carried by the Committee by 11 votes to one.[77]

The CJI Bill then progressed to the Lords. Following extended debate in Committee, Lord Waddington pressed what was described as a "free speech clause" to a division on Report. The clause added the following proviso to the proposed new offence of inciting hatred on the grounds of sexual orientation:

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70 HC Deb 8 October 2007 c67
71 An organisation that works for "equality and justice for lesbians, gay mean and bisexuals".
72 PBC Deb 16 October 2007 c70
73 PBC Deb 16 October 2007 c59
74 PBC Deb 29 November 2007 cc658-692
75 PBC Deb 29 November 2007 c663
76 PBC Deb 29 November 2007 c678
77 PBC Deb 29 November 2007 c750

> For the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

Lord Waddington said that the Minister had not addressed the undesirability of there being a free speech clause in the religious hatred offence[78] but no free speech clause in the sexual orientation hatred offence:

> The noble Lord said that the free speech clause in the religious hatred offence had been added against the wishes of the Government, who had not thought that it was necessary. But the Government have accepted the position and have not chosen, for instance, to remove the provision during the passage of this Bill. I cannot believe that the noble Lord really thinks that it is desirable that there should be a free speech clause in the religious hatred offence but no free speech provision here.[79]

The Government and Liberal Democrats considered Lord Waddington's amendment unnecessary and Lord Thomas of Gresford commented:

> Freedom of speech is not derived by clauses inserted into every statute for the avoidance of doubt.[80]

On division Lord Waddington's amendment was carried by 81 votes to 57.[81]

The provisions creating the new offence and "free speech" proviso were enacted as section 74 and Schedule 16 of the *Criminal Justice and Immigration Act 2008*. Paragraph 14 of Schedule 16, which inserted the "free speech" proviso into the 1986 Act in the form of a new section 29JA, came into force on 8 May 2008.[82] Section 74 and the parts of Schedule 16 that set out the substantive incitement offences have not yet been brought into force.

2. The Bill

Clause 58 of the Bill would remove section 29JA, the "free speech" proviso, from Part 3A of the 1986 Act. The Explanatory Notes to the Bill state "The removal of the section will not affect the threshold required for the offence to be made out".[83]

The Explanatory Notes go on to consider the compatibility of Clause 58 with rights under the European Convention on Human Rights (Convention rights):

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78 Section 29J of the 1986 Act sets out the following proviso for the religious hatred offence: "Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."

79 HL Deb 21 April 2008 cc1366-1367

80 HL Deb 21 April 2008 c1373

81 HL Deb 21 April 2008

82 s153(1)(j) *Criminal Justice and Immigration Act 2008*

83 EN, para 372

> 869. The Government considers that the offences of stirring up hatred on grounds of sexual orientation are compatible with Convention rights regardless of section 29JA.
>
> 870. The offences engage in particular the right to freedom of thought, conscience and religion under Article 9(1) and the right to freedom of expression under Article 10(1). The Government considers that interference with these rights is justified under Articles 9(2) and 10(2) respectively. The offences are prescribed by law, and so capable of being justified if they have a legitimate aim and are a proportionate response to a pressing social need to advance that aim. The legitimate aims are the protection of the rights of others to be free from abuse, and the protection of public order.[84]

The Government considers that a "compelling case can be made that there is a pressing social need",[85] citing evidence of hatred against homosexual people being stirred up by, for example, extreme political groups and song lyrics. In relation to proportionality, the Explanatory Notes state:

> …the offences are modelled on the existing offences of incitement to racial and religious hatred. The latter have only relatively recently been brought into force, but the former are relatively long-standing provisions whose ECHR compatibility has not been successfully challenged. (…) The offences of stirring up racial hatred have been prosecuted only rarely with a total of 84 prosecutions (resulting in 60 convictions) between 1988 and 31 August 2007, and it can reasonably be anticipated that the figures will be even lower for the new, narrower offences.[86]

Liberty has argued for a wholesale review of the efficacy and impact of the speech offences already in existence:

> This clause is potentially taking away the ability of a legitimate defence of genuine discussion of sexual orientation (i.e. by Christian groups based on their faith). A similar exception based on religious belief (in section 29J) is not being repealed. No reason is given as to why this amendment is necessary. Liberty calls for a reasoned and thorough review of all of these speech offences, exceptions and defences, rather than this piecemeal approach.[87]

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84 Ibid, paras 869-870
85 Ibid, para 871
86 Ibid, para 874
87 Liberty, *Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009, para 42

V Criminal evidence, investigations and procedure

A. Witness anonymity

1. The Criminal Evidence (Witness Anonymity) Act 2008

The *Criminal Evidence (Witness Anonymity) Bill* was introduced as an emergency measure on 3 July 2008 in response to a House of Lords judgment delivered on 18 June 2008. It went through all its Commons stages on 8 July, and its Lords stages on 10 and 15 July, achieving Royal Assent on 21 July. The Act ("the 2008 Act") introduced statutory powers for courts to make witness anonymity orders on the application of either the prosecution or a defendant.

The background to the Bill, and its provisions, are outlined in Library Research Paper 08/60,[88] and are not reproduced in this paper. Despite the speed of the Bill's passage, its provisions were considered by two select committees, the Joint Committee on Human Rights, whose report was published on 14 July 2008,[89] and the House of Lords Constitution Committee, whose report was published on 9 July.[90]

Some amendments were made during the Bill's passage, including:

- amendments inserted into the clause regulating the application procedure to provide a more detailed system, spelling out that the court must be informed of the identity of the witness and making explicit provision for both parties to be heard before the judge determines an application (section 3);
- a specific obligation for the court considering an application to have regard to whether the witness's evidence is the sole or decisive evidence implicating the defendant (section 5(2)(c));
- that nothing in the Act was to be taken as restricting any power to make rules of court (section 3(8)); and
- a sunset clause, providing that the power will cease to have effect on 31 December 2009 unless extended by order (section14).

The sunset clause followed the Justice Secretary's undertaking that the Act's provisions would be subsumed in legislation in the 2008-2009 session.

Numerous other amendments had been tabled, including that defendants' legal representatives should be among those from whom witnesses may not be screened, to add to the list of matters which the court must have regard, and to insert a requirement that independent counsel would be instructed in all cases (as in the New Zealand model)

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88 House of Commons Library Research Paper, Criminal Evidence (Witness Anonymity) Bill, Bill 134 of 2007-08

89 Joint Committee on Human Rights, Twenty-sixth Report of 2007-08, Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill

90 House of Lords Select Committee on the Constitution, Ninth report 2007-08, Criminal Evidence (Witness Anonymity) Bill

to assist the court and protect the defendant's interests. The Justice Secretary said that there was insufficient time, before the Bill's proceedings must be brought to a conclusion, to pin down exactly how a statutory scheme of appointing independent counsel could work. He undertook that, before the 2008-09 Bill was published:

> I will indeed give active and urgent consideration to whether a scheme is feasible and necessary, together with my right hon. and learned Friend the Attorney-General and my hon. and learned Friend the Solicitor-General, others within the court system, the Crown Prosecution Service, defence lawyers and right hon. and hon. Members of the House.[91]

He also agreed to indicate to the judiciary that, in that interim period they should consider, in light of the cases that come before them, whether the existence of independent counsel would be of use to them.

In *R v Mayers*, a five judge Court of Appeal analysed a number of features of the 2008 Act, particularly the conditions which had to be met before anonymity orders could be made.[92] On the subject of special counsel, the court said:

> The principles which govern the use of special counsel to protect the overall fairness of the trial when the question whether information should be withheld from the defence is being addressed should be adapted when its possible use arises in the context of witness anonymity. Nothing in the legislation suggests, and we can see no justification for any blanket rules, one way or the other. Sometimes special counsel may contribute significantly to the fairness of the process, sometimes not.
>
> There is however one significant difference between the use of special counsel for public interest immunity purposes, and such use for the purposes of witness anonymity. The former is concerned with the circumstances in which non-disclosure to the defence may be appropriate, the latter with whether sufficient and complete investigation and consequent disclosure have taken place. If the judge entertains reservations about the good faith of the efforts made by the prosecution investigation into any relevant consideration bearing on the question of witness anonymity, an application for witness anonymity will be met with a point blank refusal. The services of special counsel may however enable the judge to ensure that any investigative steps specific to the case, and not perhaps otherwise apparent, have been taken. Our approach to this issue enables us to highlight that the obligations of the prosecution in the context of a witness anonymity application go much further than the ordinary duties of disclosure. As we shall see when we examine the statutory considerations a detailed investigation into the background of each potential anonymous witness will almost inevitably be required.

While the prospect of the provisions undergoing proper parliamentary scrutiny eased the passage of the emergency legislation, the principle of anonymity for witnesses has not been universally accepted. Writing in the journal, *Counsel*, barrister Francis Hoar wrote:

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91 HC Deb 8 July 2008 c1351

92 *R v (1)Mayers (2) Glasgow (3) Costelloe (4) Bahmanzadeh: R v (1) P (2) V (3) R* {2008] EWCA Crim 1418

> A democratic society under the rule of law has a responsibility to ensure that those guilty of the worst crimes are unable to avoid just conviction through their intimidation of witnesses. But steps that violate the right to a fair trial will not lead to just convictions. Where defendants are unaware of the very identity of those making grave accusations, they are stripped of their right to know an essential part of the case against them. Such trials offend against a free society's need for public justice. It is disturbing that a cross-party consensus appears to have sleepwalked into yet another ill thought out, authoritarian response to a considered judgment in the best traditions of the common law: one handed down to protect from injustice those who care about it least.[93]

B. Part 3 of the Coroners and Justice Bill

1. Witness anonymity orders

The provisions of the 2008 Act are largely reproduced in Chapter 2 of Part 3 of the Bill. The chapter contains some additional provisions dealing with discharge and variation of orders at various stages, but the core provisions are largely unchanged.

Section 2 of the 2008 Act, defining witness anonymity orders, specifies in subsection (4) that nothing in the section authorises the court to require the witness to be screened to such an extent that the witness cannot be seen by the judge or other members of the court (if any), the jury (if there is one), or

> (iii) any interpreter or other person appointed by the court to assist the witness.

The reference to interpreters and other persons is omitted from clause 69(4). Section 4 of the 2008 Act, which deals with the three conditions which must be met before an order may be made, is reproduced in **clause 71**, with the difference that the third condition (condition C) has been rewritten. Condition C under the Act is:

> that it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that—
> (a) it is important that the witness should testify, and
> (b) the witness would not testify if the order were not made.

Under **clause 71(4)** it would be:

> that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and—
> (a) the witness would not testify if the proposed order were not made, or
> (b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

2. Anonymity in investigations

The ten clause first chapter of Part 3 contains wholly new provisions, although they could be regarded as an extension of the witness anonymity scheme.

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93 "No justice in anonymity", *Counsel*, August 2008

a. Background

The background and purpose of the new provisions are set out in the Ministry of Justice Impact Assessment, which describes the current situation relating to gun and knife crime, particularly where gangs are involved, and goes on:

> 2.1 "Implicit" intimidation is a particular problem in gang crime cases where gang violence creates a community-wide atmosphere of fear and a real but unexpressed threat of harm to those witnesses who dare come forward
> 2.2 There is also evidence of an exploitative relationship between young and old gang members. Fear and intimidation may be used to compel compliance of young gang members, scare them into not providing evidence against elder members and make it difficult for them to disengage from the gang.
>
> Reluctant witnesses
> 2.3 Thus potential witnesses and victims of gun and gang crime are often unwilling to give information or evidence to the authorities due to intimidation and fear of violent reprisals against themselves and family members. As a result the police find it difficult and often impossible to identify suspects or gather sufficient evidence to support a charge and prosecution. Police investigations into the shooting of Jesse James in Moss Side in Manchester and Rhys Jones in Croxteth in Liverpool, for example, were hindered by the reluctance of willing to provide information to the authorities.
> 2.4 The Government believes that in gang crime cases additional measures are required to encourage witnesses both to come forward and assist the police and to give evidence at trial, including providing protection from the earlier stages of the criminal investigation and well as during and after the trial.
> […]
> 3.1 The Office for Criminal Justice Reform has been working with ACPO, CPS and the Attorney General's office on the following package of legislative measures aimed at ensuring that the criminal justice system "stands up for those who stand up for the victims of gun and gang crime".
> Anonymity
> 3.2 We are proposing that anonymity should be granted to witnesses in gun and gang crime cases at the earliest possible stage during the investigation through to trial itself in two ways:
>
> > (i) a new investigative witness anonymity order obtained by the police from a District Judge or magistrate to assist in gathering evidence during an investigation. This would be limited to gang-related gun and knife homicides. It would be issued for the purposes of a specific investigation and would last for life. It would also be available to the defence post charge. We estimate about 800 applications a year across the country. There would be a right of appeal to a Crown Court judge against refusal to grant an application but we envisage that this would be used rarely. Breach of the order would be a criminal offence;
> > (ii) re-enacting emergency legislation – the Criminal Evidence (Witness Anonymity) Act 2008 – which provides for anonymous evidence at trial.
>
> 3.3 In the event that an investigative anonymity order is granted but the trial judge declines the subsequent application to give anonymous evidence in court, the prosecution would decide whether to proceed with the case without the witness or

> to drop the prosecution altogether as is currently the case with informant evidence.[94]

Following the conviction, in December 2008, of the killer of 11-year-old Rhys Jones, the *Daily Telegraph* reported:

> Rhys and his family lived in Croxteth Park, a middle class area between Croxteth and Norris Green, where two of Liverpool's most notorious gangs are based. The Croxteth Crew and the Strand Gang had been carrying out tit-for-tat murders and beatings since the killing of Danny McDonald, reputedly the leader of the Croxteth Crew, on New Year's Day 2004.
> […]
> The gangs were so feared by the community that on the day of Smith's funeral local shops were forced to close out of "respect", while teenagers lined the streets wearing the improvised uniform of Lowe Alpine ski caps and black T-shirts with the logo: "Smigger - Nogsy Soldier".
>
> Detectives in Force Matrix, the unit set up three years ago to combat the Liverpool gangs, estimate the combined membership of the Croxteth Crew and the Strand Gang to be 100. The core members tend to be in their late teens, with new recruits blooded at 12 and 13.
>
> Ironically, at the time of Rhys's murder, police had begun to turn the tide against the gangs. The deployment of scores of extra officers helped to identify gang members and gather evidence that might be used to convict them. By the time Mercer opened fire in the car park of the Fir Tree pub, more than half their number had either been jailed or were awaiting trial.
>
> […]
>
> The gun that Mercer used to kill Rhys had been bought by James Yates, 20, a gang member since his early teens, who was battered with a wheel brace by members of the Strand Gang in 2005. Despite his hard man image, Yates is said to have been tearful in prison when he told a warder he feared reprisals against his family.
>
> Videos made by the gangs, which appeared on YouTube, typified what the judge, Mr Justice Irwin, described as the culture of "glorifying" gang violence. The clips, set to rap music, showed youths brandishing sawn-off shotguns and pistols and handling vicious dogs. One of the most widely viewed clips, tagged the Croxteth Crew, featured a glove-covered hand pretending to shoot the cameraman.

One point made by several Peers in the debates on what became the 2008 Act was the difficulty judges might face in applications where the police had induced potential witnesses to come forward by promising anonymity.[95] Lord Thomas of Gresford said:

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[94] Impact Assessment of legislative measures to strengthen support for witnesses in gun and gang crime cases

[95] Lord Marlesford, HL Deb 10 July 2008 c882, Lord Thomas of Gresford, HL Deb 10 July 2008 c888, 15 July 2008 c1114

> As I said at Second Reading, this problem has arisen because in small stages we had reached a point where, in effect, anonymity was being offered to witnesses by the police. I know that the noble and learned Baroness, Lady Scotland, has disputed that in her letter but—at times I try to speak from experience—it appears to me that the police do offer anonymity. Your Lordships will recall that I pointed out a headline that appeared in the Guardian a week last Saturday saying that the police guaranteed anonymity to a witness in relation to a specific case currently under investigation.

b. Investigation anonymity orders

Chapter 1 would empower justices of the peace to make orders, in relation to specified persons, prohibiting the disclosure of any information, which either identifies them as having assisted or been willing to assist in a specified investigation, or which might enable such identification. The five conditions which would have to be satisfied, under **clause 63** are:

- That a "qualifying offence" has been committed – for the time being, at least, the only qualifying offences would be murder or manslaughter where the death was caused by a firearm or a knife (**clause 59**);
- That the person likely to have committed the offence was aged at least 11 but under 30;
- That that person was a member of a group having the characteristics of a young criminal gang as set out in the clause;
- That the potential informant has reasonable grounds to fear intimidation or harm if identified as having assisted; and
- That he or she is able to provide information which would assist the investigation and is more likely than not to provide it if the order is made.

It would be an offence with a maximum penalty of five years' imprisonment to disclose information in contravention of an investigation anonymity order, but **clause 61** sets out a number of situations in which disclosure of information will not be in contravention of such an order. These include circumstances in which a person disclosing information has no reason to suspect that the order has been made, and disclosures between persons involved in the investigation.

The Impact Assessment explains that the option of restricting such orders to gun and knife crime *homicide* cases was selected because, although it may not provide an entirely satisfactory solution, options which covered *serious injury* cases as well were not viable because of the cost implications.[96] However, it says that an order making power should be included in the legislation so that the provisions could be extended to cover other crimes at a later stage. The order making power is in **clause 59(4).**

Liberty was pleased to see that a suggestion made in its briefing on the 2008 Act had inspired this proposal. It had suggested that one option meriting consideration would be:

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[96] Impact Assessment of legislative measures to strengthen support for witnesses in gun and gang crime cases

> to give the police a power to give binding promises to witnesses, who are truly fearful of reprisals, that they will not be compelled to give evidence unless it is possible for them to do so anonymously. This would encourage people to come forward and provide the police with potentially highly valuable information. Even if, ultimately, this cannot be used as evidence in court, it could have provided a valuable source of intelligence for the police, helping them to identify other lines of inquiry or questioning.[97]

Liberty has, however, some doubts about the reasoning and rationale for some of the conditions that need to be fulfilled before the orders can be granted, giving the particular example of the limitation that the person thought to have committed the offence has to be between 11 and 30:

> The explanatory notes state that "the provisions are targeted at informants who are afraid of reprisals from street gangs. The age range set out is the understood age range for membership of such gangs, and the activities are the understood activities of such gangs". While we can understand the policy objective in targeting fear associated with a perceived gang culture, it is difficult to see how the results can lead to anything other than arbitrariness. It also presumes that the investigating authorities must already have some intelligence implicating a suspect before an order can be granted. This seems to run contrary to the purpose of these orders – namely to encourage witnesses to come forward where there are little or no leads. We also question the unlimited applicability of the orders and the creation of a criminal offence for breach. We believe that the orders should bind those working in public administration who are involved in the investigation and prosecution of the qualifying offence. Breach of an order could then be dealt with more proportionately through a employment obligation.

C. Vulnerable and Intimidated Witnesses

Clauses 81-88 of the Bill deal with special measures to help vulnerable and intimidated witnesses give evidence.

1. Background

Article 6 of the European Convention on Human Rights, which is concerned with the right to a fair trial, provides that:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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[97] Liberty's second Reading Briefing on the Coroners and Justice Bill

> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The courts in England and Wales operate on the principle that court business should generally be conducted openly. A witness' name is therefore usually given before he or she begins to give evidence and this may be freely reported in the media. There are exceptions to this principle. For example Youth Courts are not open to the public and under section 49 of the *Children and Young Persons Act 1933*, there is a mandatory prohibition on press reporting of matters likely to lead to the identification of young people involved in the proceedings. Also section 39 of the *Children and Young Persons Act 1933* allows other courts to prohibit the reporting or publication of details which could identify children involved in court proceedings.

Home Office research on vulnerable and intimidated witnesses, published in 2006, set some of the issues in context:

> The Anglo-American common law system poses particular problems for victims and witnesses. Common law systems are adversarial and rely far more than do inquisitional systems (such as are common in Europe) on the provision of oral evidence in prosecutions. Not only do witnesses generally have to give evidence orally, which can be an ordeal for many people, but – inevitably in an adversarial system – this can be challenged by the side against whom evidence is being given. Challenge, in the form of cross-examination, can be robust, making the giving of evidence even more of an ordeal in many cases. In civil law systems, by contrast, much evidence is given to examining magistrates in private and much questioning in court is done by judges, all of which is less traumatic for sensitive witnesses than are adversarial processes.[98]

This report went on to describe that historically, the problems have extended to the treatment of vulnerable witnesses by police or the Crown Prosecution Service, anxious to establish how they would cope in court.

Concerns were raised during the 1970s and 1980s about the negative effects which the system could have on vulnerable people, such as victims of sexual offences, children,

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[98] Mandy Burton, Roger Evans and Andrew Sanders, *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies*, Home Office Online Report 01/06

and those with learning disabilities and mental disorders. There were calls for courts to be made less hostile and intimidating environments for victims and vulnerable witnesses. As part of the response to such concerns, the *Sexual Offences (Amendment) Act 1976* provided for the anonymity of complainants in rape and related offences[99], and this protection was extended to a wider range of sexual offences by the *Sexual Offences (Amendment) Act 1992*. This takes the form of a mandatory reporting restriction on identifying the complainant but the defendant and the court are fully aware of the complainant's identity.

Concern about child witnesses resulted in section 32 of the *Criminal Justice Act 1988*, which permitted those under the age of 14 years in sexual offence cases and in the case of offences of violence or cruelty to give evidence by way of live link, so that they could give evidence from outside the courtroom. Then, following recommendations of the Pigot report in 1989[100], provisions in the *Criminal Justice Act 1991* permitted video-recorded interviews to be allowed as the evidence-in-chief[101] for certain child witnesses. In some circumstances the courts allowed the use of protective devices such as screens round the witness box to shield the child witness from the defendant.[102] However, the use of such protective measures was limited, and not consistently applied, and the provisions in the 1991 Act fell far short of the Pigot report's conclusion that children ought never to be required to appear in public as witnesses unless they wished to do so, and its recommendation that child witnesses be examined and cross-examined at a preliminary out-of-court hearing before the trial itself.[103]

The Labour Party manifesto for the 1997 General Election promised greater protection for victims in rape and serious sexual offence trials, and for those subject to intimidation, including witnesses.[104] In 1998, an interdepartmental working group made a number of proposals in a report, *Speaking up for Justice*,[105] which led to the current legislation on special measures for vulnerable and intimidated witnesses, which is contained in the *Youth Justice and Criminal Evidence Act 1999* (as amended).

2. The current law

Part II of the *Youth Justice and Criminal Evidence Act 1999* (as amended) creates a framework in which vulnerable and intimidated witnesses became eligible for various special measures in court. The measures were rolled out over time, with most starting in July 2002, but some being introduced later. Some have yet to be implemented, as is described below.

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99 For further background, see Library Standard Note SN/HA/4746, *Anonymity in rape cases*, 11 June 2008

100 Home Office, *Report of the Advisory Group on Video Evidence*, December 1989

101 Evidence-in-chief is the evidence given by the witness for the party who called him (or her).

102 See for example R *v* X and others (1990) 91 Cr App R36; R *v* Schaub and Cooper (Joey), *Times*, 2 December 1993

103 Home Office, *Report of the Advisory Group on Video Evidence*, December 1989, para 2.26

104 Labour General Election Manifesto, *New Labour because Britain deserves better,* available on Keele University's Political Science Resources website, visited 19 January 2009

105 Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System,* June 2008

a. Who are "vulnerable and intimidated witnesses"?

Under the Act, some witnesses are eligible for special measures "on grounds of age or incapacity".[106] They are

- Children under 17
- Those with a mental disorder
- Those who are significantly impaired in relation to intelligence and social functioning
- Physically disabled witnesses

The last three groups are eligible if the court considers that the quality of their evidence would be likely to be diminished because of those conditions.

In addition to these vulnerable witnesses, intimidated witnesses (those suffering fear or distress in relation to testifying in the case) are also eligible for most of the special measures.[107]

It is for courts to determine whether the witness falls into any of these categories. Children are automatically eligible and also complainants in sexual offence cases unless they tell the court that they do not want this help. It is also a matter for the court to determine which special measures will maximise the quality of the witness' evidence after taking into account the views of the witness.

b. What are the special measures?

Sections 23 to 30 of the 1999 Act contain eight possible measures to assist these vulnerable and intimidated witnesses (but not defendants) to give evidence. They are:

- Screens to shield the witness from the defendant (section 23)
- A live television link, to allow the witness to give evidence from outside the courtroom (section 24)
- Clearing the public gallery in sexual offence cases and those involving intimidation(section 25)
- Removal of wigs and gowns (section 26)
- A video-recorded interview which can be admitted as the witness's evidence-in-chief (section 27)
- Video-recorded pre-trial cross-examination (section 28)
- Examining witnesses through approved intermediaries (section 29)
- Allowing the witness to use communication aids (section 30)

The last two of these are available only to vulnerable witnesses as defined by section 16, whilst the rest are available both to vulnerable and to intimidated witnesses.

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[106] s 16
[107] s 17(1)

Further information about these special measures and the supporting suite of guidance documents may be found on the Criminal Justice Service web site. Information is also available on the Crown Prosecution Service website[108] and the CPS has also produced detailed guidance.[109]

c. *The "primary rule"*

Section 21 of the 1999 Act provides for a "primary rule" which the courts must follow – a strong but rebuttable presumption that a child witness under 17 will normally benefit from the admission of a video-recording as their evidence-in-chief.[110] Any evidence not video-recorded would normally be given by live link. The presumption created by the primary rule is even stronger for particularly vulnerable child witnesses (designated as being "in need of special protection") because they are giving evidence in a sexual offence case or a case involving violence, kidnapping or neglect.[111] For this category of child witness, the giving of evidence by video recorded evidence-in-chief and live link is deemed to maximise the quality of the child's evidence. For other child witnesses it is presumed that they will give evidence this way unless it does not maximise the quality of their evidence.

However, in the case of video recorded evidence-in-chief there is a limitation on this presumption, in that the court has power to exclude the video, either wholly or in part, if the court believed that it would be against the interests of justice to do so.[112]

In respect of the primary rule, the 1999 Act is more rigid than the 1989 Pigot report had recommended.[113] Pigot had advocated a more flexible approach which recognised that some children (particularly older ones) might actually wish to appear in court in person.[114] Other commentators have argued that child witnesses should be given more choice than section 21 allows.[115]

d. *Implementation of the measures*

Seven of the measures have been implemented, sometimes initially in pilot areas, over time since July 2002.[116] The eighth, which has not yet been brought into force, is the video recording of pre-trial *cross examination* (as opposed to recorded *evidence-in-chief*) which proved the most complex to implement. In response to concerns about this measure, the Government commissioned research from a leading academic in the field, Professor Diane Birch. Professor Birch's report (which was unpublished, but was deposited in the House of Commons Library) concluded that major changes had taken

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108 CPS, *Special Measures*, updated 27 March 2008

109 CPS, *Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses using special measures*, 2007 revision

110 See footnote 101 for explanation

111 Section 21(1)(b)

112 Sections 21(4)(b) and 27(2)

113 Home Office, *Report of the Advisory Group on Video Evidence*, December 1989

114 As cited in Birch D and Powell R, *Meeting the challenges of Pigot: Pre-trial cross examination under section 28 of the Youth Justice and Criminal Evidence,* Dep DP 04-1478, February 2004, p

115 See below

116 Information on implementation can be found in Ministry of Justice Circular 25/06/2007, *Complainants in sexual offences tried in the Crown Court: implementation of Section 27 of the Youth Justice and Criminal Evidence Act 1999*, appendix 2

place since the Pigot report, and that section 28 did not satisfy the needs of witnesses or the interests of justice.[117] Rather than implement section 28, the report recommended that a review should be conducted to look into the current needs of witnesses.

3. The Government's review of special measures

In a Written Ministerial Statement in July 2004, Paul Goggins, then a junior Home Office minister, announced that the Government would not be implementing section 28 and that it would be reviewing both the primary rule and video-recorded pre-trial cross-examination, partly in the light of Professor Birch's report:

> The report concludes that one of the two main reasons for undertaking visually recorded pre-trial cross-examination—that of capturing all the witness's evidence early in the pre-trial process—is no longer valid. That is because of new rules on disclosure that effectively mean that by the time both counsel are in a position to undertake visually recorded pre-trial cross-examination, they will be ready to go ahead with the trial itself.
>
> The second reason—keeping the witness out of court altogether—is still valid. However, the report concludes that rather than introduce the cumbersome mechanism of visually recorded pre-trial cross-examination many months after having visually recorded evidence-in-chief, it would be far more sensible to return to the original recommendation in the report of the advisory group on video evidence (1989) chaired by his Honour Judge Thomas Pigot QC. This was that the child should appear at an informal hearing, at which both the child's evidence-in-chief (supplemented, where there was one, by an earlier video recorded interview) and the cross-examination would be recorded on video for subsequent transmission to the court.
>
> The report recommends that section 28 of the 1999 Act that provides for visually recorded pre-trial cross-examination should be revisited. It recommends also that the operation of section 21 of the same Act should be reviewed. Section 21 provides that under-17 year olds who are witnesses in cases of sex or violence are given no choice in having certain special measures—such as visually recorded evidence-in-chief or live TV links—applied to them, whether they wish for them or not. So a 16½ year old, who has witnessed any sort of violent crime, even where he was not himself involved, would be forced to give evidence in this way.
>
> The Government are disappointed not to be implementing one of the eight special measures for vulnerable or intimidated witnesses that we provided for in good faith five years ago. But we believe it is better to take the advice of one of the leading experts in the field and many senior practitioners, and revisit this complex issue. Our aim is to achieve genuine improvements to the way in which vulnerable and intimidated witnesses give their evidence, and this will not be achieved by ploughing on doggedly with implementation of provisions which informed advice suggests will not be practicable or yield the benefits originally envisaged.

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[117] Birch D and Powell R, *Meeting the challenges of Pigot: Pre-trial cross examination under section 28 of the Youth Justice and Criminal Evidence Act 1999, Dep DP 04-1478, February 2004*

> We have therefore decided that in the autumn we shall embark upon a wider review of how child evidence is taken and presented in the criminal courts, particularly in cases involving sex or violence, with the aim of delivering the greater flexibility recommended in Professor Birch's report. This will assist in our aim of enabling measures to be more tailored to the individual witness's needs. (…)[118]

4. Research on vulnerable and intimidated witnesses

In 2004, the NSPCC and Victim Support published a report based on interviews with 50 child witnesses.[119] This concluded (amongst other findings) that there were problems surrounding the lack of choice for child witnesses, particularly to do with the primary rule and the fact that they were not allowed to be accompanied by someone they knew when they were giving evidence by TV link:

> Article 12 of the UN Convention on the Rights of the Child (1990) states that children have the right to participate in decision-making processes that are relevant to their lives and to influence decisions taken in their regard. It is a challenge for courts to take account of children's views about how to give evidence(…) It is therefore ironic that the Youth Justice and Criminal Evidence Act 1999, the first legislation requiring courts to take account of witness views about how to give evidence, has resulted in restricting the options available.[120]

The report went on to welcome the Government's apparent readiness to revisit what it described as "the essentially compulsory use of TV links for young witnesses in cases of sex or violence under section 21":

> While most young witnesses in our study were content with the TV link decision, others feared being seen by the defendant or the public gallery over the TV link and some were misled into thinking this could not happen.[121]

Home Office research was published in 2004[122] and 2006.[123] Findings from the 2004 study included the following:

- 90% of witnesses using the live TV link found it helpful, and a similar proportion found using video-recorded evidence-in-chief helpful[124]
- 33% of witnesses using special measures said they would not have been willing and able to give evidence without this

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[118] HC Deb 21 July 2004 c40WS

[119] Joyce Plotnikoff and Richard Woolfson, *In their own words; The experiences of 50 young witnesses in criminal proceedings,* NSPCC in partnership with Victim Support, 2004. Summary available from the NSPCC website (site visited19 January 2009)

[120] Executive summary, p11

[121] Ibid.

[122] Becky Hamlyn et. al., *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses*, Home Office Research Study 283, June 2004

[123] Burton et al *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies*, Home Office Online Report 01/06

[124] Hamlyn et al., p xiii

- While witness satisfaction had improved in a number of areas there was still some way to go before the needs of vulnerable and intimidated witnesses were fully met[125]

Findings on the use and effectiveness of special measures in the 2006 study included the following:

- Often the Crown Prosecution Service (CPS) applied for special measures at a late stage, including on the day of the trial, which ignored the value to Vulnerable and Intimidated Witnesses (VIWs) of knowing what will happen in court well in advance of the hearing.

- The CPS did not make applications for some prosecution witnesses because defendants were also VIWs and they sought parity of treatment. If special measures were available to defendants this problem would not arise.

- Video recorded evidence and the live television link (CCTV) were highly regarded by practitioners and VIWs who used them. Some practitioners had reservations about televised evidence because they thought it was less convincing than 'live' evidence. The study stated that "there is no research evidence to indicate that acquittals are more likely using these methods, however".

- Screens were less highly regarded by most agencies. However, for VIWs themselves there were advantages – screens shield VIWs from the defendant's view whereas CCTV does not.

- Overall, the agencies believed that VIWs were, and felt, better assisted now than prior to the 1999 Act. However, there was "a significant unmet need".[126]

5. Consultation on changes to the law

The Government's Office of Criminal Justice Reform (which is a cross-departmental team supporting criminal justice agencies) conducted two consultations on vulnerable witnesses. The first consultation paper, on justice for rape victims, was published in spring 2006.[127] This was particularly concerned with problems to do with consent in cases of intoxication and with the question of expert evidence.[128] However, chapter 6 of this considered "special measures" for rape victims.

One proposal considered was the automatic admissibility of video-recorded evidence-in-chief. Complainants in sex offence cases are already automatically eligible for special measures in general as "intimidated witnesses" under section 17 of the 1999 Act, subject to an opt out.

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[125] Ibid, p xv

[126] Burton et al, *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies*, Home Office Online Report 01/06, pvii

[127] Office of Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: A Consultation Paper*, Spring 2006

[128] Background on the paper can be found in Library Standard Note SN/HA/4294, *Rape*¸ 4 April 2008

The Green Paper proposed introducing a rebuttable presumption for the admissibility of one particular measure, video-recorded evidence-in-chief in respect of complainants in serious sexual offence cases. This would be similar to the rebuttable presumption for child witnesses under the primary rule, described above:

> While we have made progress in the treatment of victims of sex offences in court, we consider that there is more that can be done. Prosecutors need to be able to use the best evidence available in prosecuting rape cases. Enabling the jury to see and hear a rape victim being interviewed at the time of the complaint by means of a video-recorded statement used as evidence in chief will usually provide more compelling and coherent evidence than evidence given in court several months later. This is a matter which the prosecutor is best placed to determine in any particular case - in the same way that he or she decides what other evidence to use as part of the prosecution case. Therefore, as is already the case for child witnesses in sex offence cases, we seek views on proposals to amend the Youth Justice and Criminal Evidence Act 1999 to provide that video-recorded statements for adult victims of serious sexual offences should be automatically admissible as evidence in chief, if the prosecutor wishes to use it, subject to the interests of justice (s27 (2) 1999 Act). However, whilst we believe that most of these complainants would benefit from these measures, the Government regards it as important that all witnesses retain the right to opt out of them if they wish to give evidence live in court. Therefore we seek views on the following proposals for serious sexual offence cases:
>
> ● the video-recorded statement of the complainant should be automatically admissible as evidence-in-chief;
>
> ● this will be subject to the victim agreeing that they wish to give their evidence in this manner and the court being satisfied that it would not otherwise be contrary to the interests of justice.[129]

The questions put were as follows:

> Question 8
> Do you agree that the legislation on special measures should be amended to make video recorded statements by adult complainants in serious sex offences cases automatically admissible as evidence in chief, subject to the interests of justice test?
>
> Question 9
> Do you agree that victims of sex offences generally should continue to have the choice NOT to receive assistance from special measures?

Responses to this consultation were published in November 2007.[130] A substantial majority of respondents to these questions agreed that video-recorded statements should be automatically admissible for adult complainants in serious sex offence cases

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[129] p32
[130] Office of Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation*, November 2007

and that the prosecutor should be able to decide whether the video is used as evidence-in-chief:

> Respondents identified a number of justifications for the use of this measure for both complainants and the wider criminal justice system:
> • It is likely to enable complainants to provide a more detailed account and one in their own words
> • It will improve the quality of the complainant's evidence
> • The evidence is likely to be more compelling and coherent
> • Complainants are likely to be less traumatised by giving evidence on video rather than live in a courtroom
> • It may help encourage victims to come forward and also reduce the high attrition rates
> • The integrity of the interview will be preserved as the jury will be able to see exactly what was said.
>
> 8.3 Whilst there was general agreement that the prosecutor should be able to use the video recorded statement, several notes of caution were urged. A distinction was drawn between the video recorded statement being automatically admissible and being automatically used by the prosecutor. There should be a case-by-case assessment of the witness' needs and consultation with the complainant as to whether they wish for the video to be used.[131]

Of those who responded to the question about continuing to allow an opt-out from special measures for victims, most supported this. The Government response to this part of the consultation was as follows:

> The Government is committed to ensuring that all vulnerable and intimidated witnesses receive the benefit of special measures to be able to achieve their best evidence. The Government indicated in the consultation paper that it hoped to implement the existing video-recorded evidence provisions for complainants in rape and serious sex offence cases this year and this provision came into force on 1 September 2007.
>
> When Parliamentary time permits, the Government proposes to amend the legislation to provide for automatic admissibility of video recorded statements by complainants in rape and serious sex offence cases. The Government agrees that complainants should retain their present ability to opt out of special measures and that they should be fully consulted by prosecutors before any decision is made to use a video recording in court. It also agrees that such decisions should be taken by prosecutors on a case by case basis with the aim of ensuring that the best evidence is presented to the court in each case. It recognises that before implementation of any such change it will be necessary to ensure that any necessary training needs are met.[132]

[131] p 29
[132] p 32

a. Child witnesses

The second green paper, *Improving the criminal trial process for young witnesses*, was published in June 2007.[133]` Chapter 3 of this dealt with the question of the unimplemented "special measure" in section 28 of the 1999 Act, video-recorded cross-examination. It recognised the difficulties with implementation raised by the Birch report[134] and others, but asked whether section 28 should be retained for the most vulnerable witnesses, as this might be the only way in which they might give evidence:

> This would include very young children, those with a terminal or degenerative illness and those suffering from some form of mental incapacity who are nevertheless still able to give evidence.

The green paper also consulted on changing the primary rule to allow children more choice. It recommended that there should be a rebuttable presumption that any child witness should give their evidence by live link, and that the distinction between children in need of "special protection" (because they were giving evidence in violent or sexual cases) and others should be removed. Under the proposals, a child would be able to choose to give their evidence in the court room (provided the court did not decide that this would result in a diminution of the quality of the child's evidence). If they did choose to give evidence in court, the presumption would be that they would be screened. Here again, a child would be able to choose not to be screened, although the court would have clear criteria about how to decide whether to allow this.[135]

Chapter 10 of the green paper picked up another criticism made by the NSPCC report,[136] which was that child witnesses should be allowed more choice over the supporter they have with them in the live-link room. Under the original guidance, only a court usher was allowed to act as supporter because of fears that other people might influence the way the child gave evidence, particularly if they knew them. The guidance on this point was relaxed in 2002.[137] However, the green paper proposed putting the presence of a supporter on a statutory footing.

b. Vulnerable defendants and live links

The green paper on young witnesses also consulted on special measures for child defendants.[138] This issue arose as a result of a judgement in June 2004 by the European Court of Human Rights.[139] The case was of an 11 year old British boy with a cognitive age of between six and eight, who, it was found, had not had a fair trial

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133 Office of Criminal Justice Reform, *Improving the criminal trial process for young witnesses: A Consultation Paper*, June 2007

134 See footnote 117 above

135 Office of Criminal Justice Reform, *Improving the criminal trial process for young witnesses: A Consultation Paper*, June 2007, pp 19-20

136 Cited above: Joyce Plotnikoff and Richard Woolfson, *In their own words; The experiences of 50 young witnesses in criminal proceedings,* NSPCC in partnership with Victim Support, 2004. Summary available from the NSPCC website

137 *Consolidated Criminal Practice Direction, Part III.29*

138 See discussion on **clause 87** below

139 SC v UK (2005) 40 EHRR 10; Case available on the European Court of Human Rights website, *Application no. 60958/00*

because he had not been able to participate effectively. As a result, the Government added a new provision to the 1999 Act by way of an amendment at the Lords Committee Stage of the *Police and Justice Bill 2005-06*.[140] The new section 33A permits defendants whose ability to participate is compromised by their intellectual ability or social functioning, to use a live link where this would help them to be able to participate effectively. This applies both to defendants under 18, and to those over 18, although the latter group are also allowed a live link if they suffer from certain mental disorders.

Improving the criminal trial process for young witnesses recommended that these provisions should be extended, so that child defendants should qualify for assistance "via a menu of special procedures ensuring that they understand the function and process of the trial and the potential outcome for them.[141]

A judicial Practice Direction on the treatment of vulnerable defendants in court was issued by the President of the Queen's Bench Division in May 2008, as an amendment to the Consolidated Criminal Practice Direction.

c. Government response

At the time of writing, the Government's response to *Improving the criminal trial process for young witnesses* has yet to be published. A written answer to a Lords PQ in July 2008 indicated that publication had been delayed "due to the need to analyse the volume of responses to the large number of questions asked in the consultation paper".[142]

6. The Bill

a. Age limits

Clause 81 increases the upper age limit for child witnesses to be eligible for special measures, so that in future they will be available to children and young people aged under 18 rather than 17. This was recommended in *Improving the criminal trial process for young witnesses* in order to bring the provisions in the line with the new protection for defendants (described in paragraph ?? 5c of this Research Paper).[143]

b. Automatic eligibility for witnesses in cases of gun and knife crime

Clause 82 extends the eligibility of intimidated witnesses (as defined in section 17 of the 1999 Act) to assistance. It would give automatic assistance to witnesses in proceedings related to "relevant offences", which are specified gun and knife crimes listed in Schedule 12 of the Bill. This list is amendable by order.

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[140] HL Deb 11 July 2006 cc675-89; now section 47 of the *Police and Justice Act 2006*
[141] p25
[142] HL Deb 22 July 2008 c272WA
[143] Office of Criminal Justice Reform, *Improving the criminal trial process for young witnesses: A Consultation Paper*, June 2007, pp 19-20

c. The primary rule

Clause 83 would make the so-called "primary rule"[144] more flexible, as the green paper had proposed. As recommended, it abolishes the distinction between children in need of special protection (in sex, violence and abuse cases) and other child witnesses. Under this provision all child witnesses are treated the same. It retains the presumption that child witnesses will normally give their evidence by video recorded evidence-in- chief[145] and live link. But it would allow the child to opt out of giving evidence by one or both of these methods, provided the court was satisfied that this would not diminish the quality of the child's evidence. If this would mean giving evidence in court, then this would normally have to be from behind a screen unless the court considers that this would not maximise the quality of the child's evidence. However, the child could also opt out of this secondary requirement, subject to the court's agreement. In deciding on these matters, the court would have to take the child's age, maturity and understanding of the consequences of the decision into account, as well as other factors such as relationship to the accused, background and the nature of the offence.

d. Video-recorded evidence from sex offence complainants

Clause 84 would introduce a rebuttable presumption in favour of admitting video-recorded evidence-in-chief in the case of sex offence victims, as the green paper had proposed. Currently, for adult vulnerable or intimidated witnesses, video recorded statements are only admissible as evidence-in-chief if the court determines that the measure would be likely to maximise the quality of the witness' evidence. Under the new procedure (which would apply only to complainants in serious sex offence cases) where an application is made for video recorded evidence in chief, the presumption would be that the video recorded statement should be admitted unless it would not maximise the quality of the witness' evidence.

e. Supporters for people giving evidence by live link

Clause 85 would allow the court to direct that a specified person can accompany the witness when giving evidence by live link, and that it must take the witness's wishes into account when choosing this person.

f. Supplementary testimony to video recorded evidence in chief

Currently under section 27(5)(b) of the 1999 Act, where witnesses give video recorded evidence in chief, there are restrictions on asking the witness additional questions. This has the effect of prohibiting questions about matters which the court considers have been adequately dealt with in the recorded evidence. Questions about other matters covered in the testimony (but not adequately dealt with) are allowed, but only with the court's permission. **Clause 86** relaxes the restrictions. The effect of this change would be to provide that the witness may be asked supplementary questions:

- on matters not covered in the video, as at present, and

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[144] Discussed in paragraph V(C)(2)(c) above
[145] See footnote 101 above

- matters that are covered in the video (whether covered adequately or not) but with the permission of the court.

g. Vulnerable defendants

As noted above, [146] the Government introduced new provisions to the 1999 Act through an amendment to the *Police and Justice Act* 2006, following a judgement in the European Court of Human Rights to give the court limited powers to make directions in respect of live links for defendants giving oral testimony in court.[147] The Bill adds to these powers by providing for the use of an intermediary where certain vulnerable defendants are giving evidence. Under **clause 87**, a direction to allow a court approved intermediary to relay questions and answers could be made. Where the defendants were under 18, this could be done where their ability to participate effectively in the trial was compromised by their level of intelligence or social functioning. The condition for adult defendants would be that they had a mental disorder, or a significant impairment of intelligence and social functioning, which prevented them from participating in the trial. The direction would have to be necessary to ensure a fair trial.

7. Comments on the provisions on vulnerable and intimidated witnesses

Victim Support, in their brief on the Bill entitled *Coroners and Justice Bill: a missed opportunity for victims of crime,* say that the changes do not go far enough:

> The Bill makes minor changes to the availability of special measures in court (eg screens or video links) for vulnerable and intimidated witnesses - for example it makes those under 18 automatically eligible rather than those under 17 as currently.
>
> Special measures do not diminish the quality of a witness's evidence - quite the opposite: they help to reduce the fear and intimidation of the court room. Too often vulnerable and intimidated witnesses are not identified by the police and, even where they are, judges have a discretion to grant the measures or the equipment is simply not available in court. Last year our Witness Service identified 18,000 vulnerable and intimidate witnesses on the day of the trial who had not been identified until then. The system is not working and simply tweaking the law will not solve the problem.
>
> **What is needed is automatic availability of special measures for any witness who requests it. Choice is now an essential feature of most public services - but not the criminal justice system, where the witness has no say in how they are treated by the court. If that is a step too far for the criminal justice system, then a proper system is needed to identify vulnerable and intimidated witnesses before the trial and make sure the special measures are available in court.** [148]

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[146] In paragraph (V)(2)(5)(b) of this research paper
[147] *Police and Justice Act 2006* s45
[148] Victim Support, *Coroners and Justice Bill: a missed opportunity for victims of crime*, January 2009

By contrast, the human rights NGO, Liberty, has raised concerns about clause 82 (automatic assistance for witnesses in gun and knife-related crime) going too far, and potentially influencing juries unnecessarily to assume that the defendant is dangerous:

> Under clause 82 the court would not need to be satisfied that the quality of the witness' evidence will be diminished and a witness can inform the court that he or she does not wish to be eligible for assistance. The explanatory notes contain no explanation or justification for the extension of automatic eligibility to specified offences. We assume that this measure is inspired by the need to be "seen" to be doing something in response to the increasingly high profile of gun and knife-related crime. Liberty believes that whether to direct special measures should be a matter of discretion for the court. It is important that wherever possible witnesses should give live evidence to ensure a fair and open trial process. As section 17 already provides protection for those whose evidence would be reduced on the grounds of fear and distress (and takes into account a wide range of potentially relevant factors) we cannot see any reason why the category of automatic eligibility has to be extended in this way. The extension to certain classes of offences does not stand up to scrutiny and is based on clumsy assumptions. It is imperative that, as far as possible, special measures are left to the discretion of the court to determine on a case-by-case basis. Special measures can have a negative impact on the jury. There is an inevitable danger that once the jury sees a witness screened off, with their voice distorted, they will assume that the defendant is a dangerous criminal capable of serious violence. For this reason, special measures should be used only in exceptional cases where the trauma to a witness outweighs any potential prejudice to the defendant and where this could not be addressed by other means. Section 17 strikes a delicate balance and we can see no reason for extending special measures by class.[149]

However, Liberty has welcomed the introduction of intermediaries to assist vulnerable defendants, although it has questioned the fact that under the provisions, intermediaries would be able to explain questions:

> 62. Under the YJCEA, there are only limited powers with regard to the evidence of accused persons when compared with special measures powers applicable to other witnesses. Clause 87 increases the powers available providing for the use of an intermediary where certain vulnerable accused persons are giving evidence in court. Clause 87 inserts new sections 33BA and 33BB to the Act. These new sections allow an intermediary (approved by the court) for certain vulnerable accused if the direction is necessary to ensure that the accused receives a fair trial. The intermediary is to relay any questions that are put to the accused and to relay the answers to the questioner. The intermediary can explain to the accused what the questions mean and to the questioner what the answers mean. Intermediaries are required to declare that they will perform the role faithfully and the Perjury Act 1911 is extended to persons in the role of intermediary. While Liberty welcomes the introduction of intermediaries for vulnerable defendants, we question the extent of intermediary functions allowed under clause 87. An intermediary should not have the power to explain questions. Their function should be to faithfully and accurately interpret the questions put. If a question is

[149] Liberty, *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009, pp30-1

> unclear, the intermediary should ask the person putting the question to put it in such a way that it can be understood.[150]

The Law Society has welcomed the increase in age of eligibility for young witnesses to special measures, and the greater flexibility for these witnesses to opt out. It "strongly supports" the statutory right to an intermediary for vulnerable defendants, although with a query:

> The Law Society strongly supports accused persons being given the statutory right to an intermediary. We note and query the need for a more restrictive test of eligibility that is contemplated for defendants - in that their ability to participate effectively is compromised by their level of intelligence or social functioning, in the case of an under 18 year old, or because the accused has a mental disorder or significant impairment of intelligence or social functioning - than for prosecution witnesses, where the test relates to the quality of their evidence. However, it is the experience of solicitors that a great many accused persons are subject to the type of vulnerabilities which would mean that an intermediary would be appropriate, and they are therefore likely to meet the test. · While the clause contemplates the use of an intermediary during the giving of evidence by the accused, provision should be made for their presence throughout the trial to assist this the accused to understand the proceedings, as well as during legal consultation to facilitate communication between the accused and his or her legal team. Such assistance could be essential to ensuring a vulnerable defendant's right to effectively participate in their criminal trial is respected.[151]

D. Live links – "virtual courts"

Clauses 89-93 of the Bill make various provisions to do with live links. Section 57 of the *Crime and Disorder Act 1988* contained provisions to allow prisoners to "appear" in court by live television link from the prison for hearings before the start of the trial, rather than appearing in person. These provisions were extended by means of amendments to the *Police and Justice Bill 2005-06*. This followed proposals in a paper by the then Department of Constitutional Affairs and the Home Office entitled *Delivering Simple, Speedy, Summary Justice* that the legislation should be amended to allow for a pilot in London using live links between police stations and the court "for guilty pleas to be dealt with at charge in low-level offences":

> Subject to the necessary legislative changes, we will implement live links in London between the police station and the court for guilty pleas to be dealt with at the point of charge in low-level offences without ever leaving the police station. We are working with the London Criminal Justice Board on developing proposals for the introduction of live links between police charging centres and courts, a service that will also be provided outside normal hours. The effective use of video link technology would also ensure a prompt response in those cases, for example where people have failed to appear.[152]

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[150] Liberty, *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009, p 32

[151] The Law Society, *Coroners and Justice Bill Commons Second Reading - 26 January 2009*, January 2009

[151] Liberty, *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*

[152] Home Office/DCA, *Delivering Simple, Speedy, Summary Justice*, July 2006, p17

Section 45 of the *Police and Justice Act 2006* added five new sections to the 1998 Act to extend the scheme. They allow live links also to be used in sentencing hearings and also in preliminary hearings where the defendant is at a police station (whether in police detention or in answer to bail). In the case of links from prison at preliminary hearings, the court can only allow this once the parties in the proceedings have been given the opportunity to make representations. Where the live link from a prison is being used in a sentence hearing, the convicted person has to give consent.[153] In cases where the live link is from a police station to the court, this, too, can only be allowed where the defendant has given consent.[154]

Introducing the amendments at the Lords Committee stage of the *Police and Justice Bill*, the then Home Office Minister, Baroness Scotland, explained that there were three safeguards involved in this measure, two of which involved the defendant's consent:

> Amendment No. 191B would extend an existing provision that allows courts to order that a defendant in prison custody should attend hearings before the start of trail over a live link so that it would also apply, provided the prisoner consented, to sentencing hearings. That would permit the more effective use of the existing live-link facilities and avoid the unnecessary transport of prisoners between prisons and courts. For example under the current arrangements , where a defendant pleased guilty at a preliminary hearing, the hearing has to be adjourned and the prisoner brought to court before the court can proceed to sentence, even if the prisoner would like it to be dealt with otherwise. The amendment would allow the court to proceed straight to sentence, if appropriate.
>
> The measure includes three safeguards to ensure fairness to the defendant. The first is that sentencing can take place over a live link only where the defendant consents. Secondly, where a defendant has to give evidence over a link, he or she must specifically consent to giving evidence in that way. Finally, the court will allow a live link to be used only where it is not contrary to the interests of justice to do so.[155]

The Policing Green Paper, which was published in July 2008, signalled the Government's intention to remove the requirement for consent:

> We are also piloting the use of 'virtual courts', which generate saved time in not having to deliver defendants to a court house over long-distance or through heavy traffic and allows for officers giving evidence to remain in the station. For example, a virtual court may allow for a Friday evening hearing rather than keeping the accused in custody over the weekend for a Monday appearance at the magistrates' court.
>
> To ensure the benefits of this approach 2.28 can be used as often as possible, the Government will seek a suitable legislative opportunity to remove a

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[153] Section 57E(5)(a)
[154] Sections 57C(7), 57D(2)(b)
[155] HI Deb 11 July 2006 c677

> defendant's consent as to whether or not to attend a virtual court, where the participants are in a different location but are joined by live video link.[156]

This removal of the consent requirement is achieved by **clause 89**:

Liberty has expressed concern about this provision, which it sees as having particular dangers if a defendant had been abused:

> 63. Chapter 4 amends the Crime & Disorder Act 1998 (CDA) in relation to the use of live video links. Of the greatest concern is clause 89, which systematically replaces the existing requirements in the CDA that the accused must give his or her consent to the use of a live link at preliminary hearings and sentencing hearings. Instead, the court may direct the accused's attendance by way of a live link "where it is satisfied that it is not contrary in the interests of justice" to do so. There is no direction on how this is to be assessed, or whether representations can be made. Similarly, the amendment removes the requirement for consent on the part of the accused to the giving of evidence at preliminary or sentencing hearings. The requirement that the accused consent to live link directions is an important safeguard against potential abuse. The physical appearance of an accused in court at pre-trial and sentencing hearings is a prerequisite for the effective exercise of rights under Article 3 (prohibition on torture and degrading treatment), 5 (right to liberty) and 6 (right to a fair trial) of the HRA. By appearing in court, the court may see first-hand whether the accused has been subjected to any abuse.
>
> 64. Clause 89(4) of the Bill provides that the accused may continue from a preliminary hearing by live link directly to a live link sentencing hearing (for example, where he or she pleads guilty) at the direction of the court so that an accused may never have the opportunity to present him or herself in court. This of course increases the risk, however minimal this might be perceived, that an abused prisoner may be induced to plead guilty. [157]

The Law Society is "strongly opposed" to removing the consent requirement:

> • When Section 57C was inserted into the Crime and Disorder Act 1998 as amended by the Police and Criminal Justice Act 2006, Parliament saw fit to require that the defendant at a police station should have the right to consent to appearing in court by live link, or to choose to appear in the usual way.
>
> • Since then the Act, there has been a limited experiment known as the 'Camberwell prototype', which was designed to assess whether the technology was capable of facilitating the appearance of the accused from a police station. Having established that it is so capable, a larger pilot of the system is currently being planned, which we understand will commence in April 2009. No change to the consent requirement should occur until this pilot takes place, and is fully and independently evaluated.

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[156] Home Office, *From the neighbourhood to the national: Policing our communities together*, July 2008 (see paragraphs 2.27-2.28)

[157] Liberty, *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009, pp32-3

> • Unlike the situation with other live link hearings (where the accused is held at police station and it is likely to be their first hearing), in the case of a prison-to-court live link, some time will have elapsed since the prisoner's arrest and it is likely that they will have received detailed legal advice in person in relation to the case, and have appeared in person in court to apply for bail. In contrast, the police station live links are expected to happen within hours of arrest, as a substitute for the usual first appearance in court. Important decisions in relation to bail and plea will need to be made immediately, and only a short time after their arrest.
>
> • In these circumstances, people may not have time to access proper disclosure of the prosecution case, or to take legal advice. Their ability to participate effectively in the hearing might thereby be compromised. If the solicitor and client are unable to gather the necessary information to support a bail application, or locate people who may be prepared to be surety, people who would currently be held overnight and released on bail the following day will instead be remanded in custody for many days or even weeks, thus increasing the prison population, because of purely procedural factors, and not because of any public policy decision that bail should be denied.[158]

E. Bail in murder cases

1. Background

Clauses 97 to 98 make changes to the *Bail Act 1976*. This is in response to concerns raised in a much reported case in January 2008, when Garry Weddell, a police inspector, took his own life whilst he was on bail awaiting trial for the alleged murder of his wife. The case was raised in Parliament by Andrew Selous at Prime Minister's Questions, and Gordon Brown replied:

> This is indeed a set of tragic circumstances that are almost difficult even to contemplate—that someone was let out on bail and then apparently is alleged to have murdered his mother-in-law and then to have taken his own life. The question is why bail was given. It is not in the power of the Government to give bail, although of course it is up to us to look at any laws affecting that. It was a decision by the judge, who set down an amount of money and probably took into account the fact that the man was a policeman. Those are the things that we have to look at, and if any changes in the law are necessary, we will make them.[159]

Later that month it was raised again by Bill Wiggin who asked:

> On 16 January the Prime Minister said that the Bail Act 1976 was to be reviewed and that "if any changes in the law are necessary, we will make them."—[Official Report, 16 January 2008; Vol. 470, c. 925.] However, in his speech to the Parole Board earlier this month, the Secretary of State said that there "must be independent judicial decisions based on the law as it is". Can the Secretary of

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[158] The Law Society, *Coroners and Justice Bill Commons Second Reading - 26 January 2009*, January 2009
[159] HC Deb 16 January 2008 c925

> State confirm that a review is taking place, and say whether there are any plans to change the law?

The Justice Secretary, Jack Straw replied:

> There is no inconsistency at all between what I said and what my right hon. Friend the Prime Minister said. The point that I was making to the Parole Board, which I shall repeat now, is that judicial decision makers, whether they be magistrates or judges, have an extraordinarily difficult job to do in predicting the future behaviour of offenders, on the best evidence available and in the context of a general presumption, from which I hope the Opposition do not resile, that people are innocent until they are found guilty. The Opposition may sometimes forget that, but it is rather fundamental to the operation of our law. What I am doing is looking in a measured way at whether we should take further steps to strengthen the law in that respect, particularly in the light of the Weddell case, and I am happy to take representations from all parts of the House on that.[160]

On 17 June 2008, the Ministry of Justice launched a consultation on whether the rules governing the enforcement of bail conditions and the grant of bail to suspects *charged with murder* should be revised in the light of recent cases of murder and manslaughter committed by persons on bail.[161] This looked in some detail at the Weddell case[162] , and also at another case, that of Anthony Leon Peart, who had fatally stabbed Richard Whelan on a bus in 2005 and later pleaded guilty to manslaughter on the grounds of diminished responsibility. Peart was not on bail at the time of the stabbing, but had been involved in three other sets of criminal proceedings some little time before and had either failed to answer to bail, or breached bail conditions in all of them.

The consultation document gave the following statistical information:

> 11. In 2006 1,922,300 persons were proceeded against in England and Wales: 493,800 persons were bailed and 76,700 were remanded in custody (including defendants who spent part of the proceedings on bail and part in custody).
>
> 12. A 'snapshot' count on 31 January 2008 showed that 60 (13 per cent) of the 455 defendants charged with murder at that time were on bail, as were 35 (85 per cent) of the 41 charged with manslaughter.
>
> 13. By way of comparison, the corresponding figures for all cases in the Crown Court at 31 December 2007 was 22,500 (68 per cent) defendants bailed out of a total of 33,000.
>
> 14. The bail rate for those charged with murder is, unsurprisingly given the great seriousness of the charge, much lower than that for Crown Court cases generally (13 per cent compared with 68 per cent), whereas the rate for defendants charged with manslaughter (85 per cent) is higher.

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[160] HC Deb 29 January 2008 c164
[161] Ministry of Justice, *Bail and Murder*, Consultation Paper CP11/08, 17 June 2008
[162] A summary of bail hearings is given at Annex A

> 15. Clearly, defendants charged with murder are much less likely to be granted bail than those charged with manslaughter: the nature of the manslaughter offence, where elements of negligence or recklessness rather than serious intent to injure may play a large part, presents a very different case for the court to consider.[163]

The document gave three main options, which were: no change; amending the statutory test for bail in murder cases; and requiring the court to have regard to risks:

> **i) No change**
>
> It is not surprising that there is real public concern when a murder is committed by a person on bail. Information disclosed by a number of police forces to a national newspaper in response to a Freedom of Information Act request suggests that 79 out of 462 alleged murders had been committed by a defendant who was on bail.
>
> The central problem however is whether it could have been predicted that the defendant would go on to commit so serious an offence. No court would remand on bail where the evidence of such a risk was high. In many cases where murder is committed while on bail, the defendant will have been bailed for commonplace (and often much less serious) offences, and whilst it might arguably be foreseeable (for example after he had committed an assault immediately after being bailed by the Crown Court) that he might reoffend in some way, there will not necessarily have been anything to suggest that the person would go on to commit murder. In particular, if a person has pleaded guilty and is highly likely to receive a non-custodial sentence, the court may have considered it disproportionate to remand them in custody pending trial.
>
> Weddell's case is worrying because he was on bail for another murder. But it is very unusual for a murder to be committed in these circumstances and the fact that it is so unusual is significant. Looking at the facts of the case, there appears to have been no reason for the court to fear such an outcome: the grounds on which he was initially remanded in custody were not that he was thought to present a risk of committing further offences but that he was considered to be at risk of harming himself, and only after very careful consideration of that risk on the basis of expert evidence did the judge decide, at the third remand hearing, to grant bail. The remand decision itself, in spite of its terrible aftermath, was unexceptionable and it is arguable that amending the legislation would not have affected the outcome.

(…)

> **ii) Amend the statutory test for bail in murder cases**
>
> 31. Short of prohibiting bail in murder cases, it might be possible to amend the Bail Act along similar lines to section 25 of the 1994 Act – that is, to provide that bail was to be granted to defendants in murder cases only "if the court is satisfied that there are exceptional circumstances which justify it". Such a provision would emphasise the need for care in such cases owing to the gravity of the charge and the effect that is likely to have on the defendant, while leaving the court the discretion to grant bail where appropriate.

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[163] p9

> 32. It is however arguable that such a provision would seldom lead to different decisions being made, and that it would be liable to be read down (as has section 25 itself) to the point where its utility would be questionable.

(…)

> **iii) Requiring courts to have regard to risks**
>
> 33. A more modest alternative would be to amend, not the test itself, but the factors that are specified in the Bail Act as considerations to which (if relevant) the courts are to have regard in making their decision. The objective would be to highlight the need to take full account of the risks, including risks to public safety, that are highly likely to be involved in granting bail in murder cases. The exceptional nature of the crime and the mandatory life sentence that it carries mean that often (though not of course in every case) there could be considered a greater risk than usual that defendants will abscond, or harm themselves, or obstruct the course of justice. While there may not be a high risk of further offending, the court must have regard not only to the probability of a defendant's committing an offence if bailed but also to the potential seriousness of any offence that he might commit.
>
> 34. The Bail Act provides (in paragraph 9 of Part 1 of Schedule 1) that *"...the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say – a) The nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it)…"* So it is already clear that the seriousness of the offence should be a factor in the court's decision where it is relevant – needless to say, the more serious the offence, the more weight might be attached to that factor. But sub-paragraph (a) might be expanded to identify the seriousness of the offence as a particular consideration where the defendant is accused of murder.[164]

The consultation closed on 12 September 2008. At the time of writing, no response document has been published.

Guidance on the current law on bail can be found on the Crown Prosecution Service website. The Crown Prosecution Service guidance also refers to a Law Commission consultation from November 1999, entitled *Bail and the Human Rights Act 1998.*[165]

2. The Bill

Clause 97 amends Schedule 1 to the *Bail Act 1976* to prevent a court granting bail to a person charged with murder unless the court is of the opinion that there is no significant risk that they would commit an offence likely to cause physical or mental injury to another person. Clause 98 removes the power of magistrates to consider bail on murder case, so that a person who is charged with murder may not be granted bail, except by a judge of the Crown Court.

The Law Society considers this to be "unnecessary legislation":

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[164] pp12-14

[165] Law Commission, *Bail and the Human Rights Act 1998*, Consultation Paper No 157, 15 November 1999

Clause 97, Bail: risk of committing an offence causing injury

- This provision would amend Schedule 1 of the Bail Act 1976, to prevent a court granting bail to a person charged with murder unless the court is of the opinion that there is no significant risk that they would commit an offence likely to cause physical or mental injury to another person. This is a wholly unnecessary change to the law on bail, which will simply increase its complexity for no good purpose. It has been prompted by a very tragic, but very unusual, set of circumstances that arose in the Gary Weddell case.

- At present, when deciding any bail application, a court will take into account the risk of re-offending, particularly that which could pose a risk of injury. This is especially the case where the charge is serious, and murder is of course among the most serious of offences. Parliament should not create unnecessary legislation on the basis of one exceptional case. Members of Parliament might wish to press for statistics on the number of cases where an accused, charged with murder, has committed an offence of violence, or has not complied with their bail conditions. The Society is confident such figures would be low, and that courts are fulfilling their role in protecting the public in this regard very effectively.[166]

Liberty also questions the statistics in the consultation document, and goes on to argue that the provision may not be compatible with the European Convention on Human Rights:

66. Clause 97 amends Schedule 1 to the *Bail Act 1976* (BA) and provides that a defendant who is charged with murder may not be granted bail unless the court is of the opinion that there is no significant risk that, if released on bail, he or she would commit an offence that would be likely to cause physical or mental injury to another person. In making the decision the court can have regard to any relevant considerations in paragraph 9 of Part 1 of Schedule 1 to the BA.

67. It is rare for persons charged with murder to be granted bail at all. In 2008 the Ministry of Justice consultation on bail and murder stated that a 'snapshot' count taken on 31st January 2008 indicated that on that date 60 defendants, being 13% of the total of defendants charged with murder were on bail at that time. We suggest, necessarily tentatively as we do not have access to the statistical data used, that that figure in itself could be uncharacteristically inflated. We understand that at that time there was a pending murder trial involving 21 young defendants who were all admitted to bail because of their age, in fairly unusual factual circumstances. Liberty understands that in practice the admission of murder defendants to bail is rarely encountered, and generally occasioned by exceptional personal circumstances.

68. The 'exceptionality' of the murder charge is already catered for as under the present statutory framework, the tribunal already has recourse to paragraph 9 of Part 1 of Schedule 1 to the BA. The exceptions to the right to bail under Schedule 1 (risk of failure to surrender to custody/risk of committing further offences/ risk of interference with witnesses or otherwise obstructing justice) are, in practice,

[166] The Law Society, *Coroners and Justice Bill Commons Second Reading - 26 January 2009*, January 2009

> imbued with the exceptionality of a murder charge. The tribunal considering bail determinations is entitled under paragraph 9 of Schedule 1 to take into account the nature and seriousness of the charge and the likely outcome if convicted. In Liberty's experience bail decisions in murder are already treated with a high seriousness. We also believe that, as currently drafted, clause 97(1) will be inconsistent with article 5(3) of the ECHR (anyone arrested entitled to release pending trial) on the basis that it introduces a presumption against bail incompatible with the liberty of the subject.
>
> 69. A parallel can be drawn with section 25 of the *Criminal Justice and Public Order Act 1994* which was originally enacted to provide that there should be no bail for persons charged with offences of homicide and rape after previous conviction for such offences. The original provision was challenged as being inconsistent with Article 5(3) of the ECHR and the present position is that section 25(1) provides that such persons: *shall be granted bail in those proceedings only if the court, or as the case may be the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it.* However, following *R (O) v Crown Court of Harrow (2007) 1 AC 249 HL* this provision is treated by the courts as having no substantive effect on bail determinations and being of utility only in reminding courts of the risks normally posed by defendants to whom it applied. We imagine that clause 97 would be treated in much the same way and read down so we do not see the utility of this proposed amendment.[167]

F. Unsigned Indictments

Clause 99 would remove the requirement that a bill of indictment must be signed by a proper officer of the court before a valid trial on indictment can proceed. In a decision which surprised some practitioners, the House of Lords had held that, without such signature, any resulting conviction would be invalid.[168] It had accordingly quashed several convictions, after the sentences had been served, on appeals arising from a Criminal Cases Review Commission reference. In his speech Lord Bingham had commented that Parliament had had many opportunities over the past two decades to reverse the effect of the caselaw, had not chosen to, but might now be prompted to do so.

The decision – rejecting the more flexible approach to the rules which the Court of Appeal had favoured - has attracted critical comment. Writing in the Criminal Law Review, [169] P.J.T. Fields commented:

> The decision has no connection with the realities of what actually happens in the Crown Court. Their Lordships seem to think that the statutory procedure contains safeguards for an accused because "the proper officer of the court" will carefully scrutinise the bill of indictment to ensure that it is legitimately before the Crown Court, that the counts are supported by the accompanying evidence, that they are in correct form and are properly joined. The reality is that the signing is delegated

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[167] Liberty, *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009

[168] *R v Clarke, R v McDaid* [2008] UKHL 8

[169] "Clarke and McDaid: A Technical triumph",[2008] CLR 612-624

> to diligent but unadmitted and unqualified administrative staff. They are so busy with other work that they are simply not in a position to offer such safeguards.

He also asked whether, if a defendant was acquitted following a trial underlying which there had been no signed indictment, the Crown would be able to "have another go" as the defendant had not been in jeopardy in the earlier proceedings.

VI Sentencing

A. Sentencing Council

1. Current practice

The Sentencing Guidelines Council (the SGC) was established in February 2004 by the *Criminal Justice Act 2003* to act as an independent body responsible for formulating and issuing sentencing guidelines.[170] The SGC is chaired by the Lord Chief Justice (head of the judiciary of England and Wales) and comprises seven other judicial members and four non-judicial members with experience of policing, criminal prosecution and defence and victim welfare.[171] The Sentencing Advisory Panel (the SAP),[172] an independent body of judges, academics and criminal justice practitioners, provides the SGC with objective advice and suggests topics for guidelines. An overview of the way in which these two bodies, together with the Secretary of State, formulate guidelines is provided on the Sentencing Guidelines website:

> **How we produce guidelines**
> The development of sentencing guidelines follows a process which is outlined below:
>
> **Step 1**
> The Sentencing Guidelines Council decides to consider a particular topic for a guideline. The Council may have decided on the topic themselves or it may have been suggested by the Sentencing Advisory Panel or the Secretary of State.
>
> **Step 2**
> The Council then commissions the Sentencing Advisory Panel to provide advice on the topic.
>
> **Step 3**
> The Sentencing Advisory Panel consults statutory consultees and the wider public as part of their research process. The consultation paper is published, and made available on this website. The normal approach is to seek written submissions, allowing 12 weeks for responses.

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[170] Prior to February 2004 the Court of Appeal (Criminal Division) and the Magistrates' Association were responsible for preparing sentencing guidelines.

[171] The seven judicial members are appointed by the Lord Chief Justice after consultation with the Lord Chancellor and the four non-judicial members are appointed by the Lord Chancellor after consultation with the Secretary of State and the Lord Chief Justice: s167 *Criminal Justice Act 2003* (as amended).

[172] Established by ss 80 and 81 of the *Crime and Disorder Act 1998*.

Step 4
The Panel considers the responses.

Step 5
The Panel submits its advice to the Council.

Step 6
The Council forms a preliminary view and issues a draft guideline to the Secretary of State, Parliament and any other party the Council sees fit. The draft guideline and the Panel's advice to the Council are published simultaneously.

Step 7
Council allows up to two months to receive comments on the draft guideline and then issues a definitive final guideline which is binding on all courts in England and Wales.

Step 8
The Sentencing Guidelines Council then keeps the guidelines under review so that they can be amended and developed as required.[173]

Parliamentary select committees monitor the guidelines produced by the SGC, although there is no formal requirement under the 2003 Act for sentencing guidelines to be laid before Parliament.[174]

Sentencing guidelines may cover specific groups of offences, for example causing death by driving, or generic sentencing principles, for example seriousness or reduced sentences following guilty pleas. When framing or revising guidelines, the SGC must have regard to a number of factors, including:

- the need to promote consistency in sentencing;
- the cost of different sentences and their relative effectiveness in preventing re-offending; and
- the need to promote public confidence in the criminal justice system.[175]

As part of the aim to promote consistency in sentencing, the court must "have regard to" any relevant sentencing guidelines when sentencing offenders.[176] The court does, however, have the discretion to depart from the guidelines, provided it can give reasons for the departure.[177]

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[173] Sentencing Guidelines webpage [on 19 January 2009], *How we produce guidelines*. This summarises the procedure set out in ss 170 and 171 of the 2003 Act.

[174] The Home Affairs Committee took on the role of scrutinising sentencing guidelines in 2004 at the suggestion of the then Leader of the House. Since May 2007 the scrutiny role has been carried out by the Justice Committee. Further background on the role of select committees in scrutinising sentencing guidelines is set out in Home Affairs Committee, *Draft Sentencing Guidelines 1 and 2*, 26 October 2004, HC 1207 2003-04, paras 8-10 and Appendix A.

[175] s170 *Criminal Justice Act 2003*

[176] Ibid, s172

[177] Ibid, s174

2. The Carter Review

In the light of an increasing prison population and a projected deficit of prison places,[178] in June 2007 the Government commissioned Lord Carter to conduct a review of the prison system in England and Wales, considering in particular options for improving the balance between the supply of prison places and demand for them. The results of the review were published in December 2007.[179]

In addition to recommending an expansion of the prison building programme, Lord Carter considered that the current sentencing guidelines system hindered effective planning on the use of penal resources. He suggested replacing it with a structured sentencing framework monitored by a sentencing commission:

> **The current sentencing framework**
>
> 26 The current sentencing framework is based on legislation, the decisions of the Court of Appeal, including guideline judgements, and sentencing guidelines issued by the Sentencing Guidelines Council. Parliament is responsible for laying down maximum and in some cases minimum sentences for offences, usually on the basis of measures introduced by the government. Court of Appeal judgments provide guidance to the courts. In addition, since 2004, the Sentencing Guidelines Council has had the responsibility for framing sentencing guidelines in respect of offences or offenders, or in respect of particular matters affecting sentencing.
>
> 27 As with most other common law systems, the sentencing framework is based upon multiple and fragmented legislation developed and added to, over many decades. In addition to the basic legislative framework, sentencing practice may also be affected by numerous and unquantifiable influencing factors including political rhetoric, government activity and media pressure (...)
>
> 28 The complexity and uncertain effect of external factors makes the sentencing framework opaque. Predicting the factors that determine and influence sentencing is therefore difficult and inhibits government decision making and planning on the use of finite penal resources.
>
> 29 A structured sentencing framework has been shown in several jurisdictions to bring greater transparency, predictability and consistency to sentencing and the criminal justice system. There is a clear precedent, from a number of jurisdictions, as to how this can be successfully achieved through a structured sentencing framework, developed and monitored by a permanent Sentencing Commission.[180]

Lord Carter drew particular attention to the American states of Minnesota and North Carolina, both of which had implemented grid-style structured sentencing frameworks

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[178] Detailed analysis of the prison population in England and Wales is set out in Library Standard Note SN/SG/4334 *Prison population statistics*.

[179] Lord Carter of Coles, *Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales*, December 2007

[180] Ibid, pp31-32

and been able to predict the demand for prison places to within 66 and 11 places respectively.[181] Lord Carter's view was that a framework and Commission "could allow for the drivers behind the prison population to be addressed and managed in a transparent, consistent and predictable manner".[182] He went on to consider how a structured framework and Commission might function in practice:

> **The components of a structured sentencing framework**
>
> 30 The main feature of a structured sentencing framework is a single comprehensive set of indicative guideline ranges. This would cover sentence lengths, types of community sentences and the level of financial penalty, for groups of all offences, ranked by seriousness and offender characteristics (e.g. criminal history and culpability).
>
> (…)
>
> 33 **A structured sentencing framework proposal does not mean that individual sentencers have to have regard to resources at the time they sentence in individual cases.** The task of ensuring that aggregate sentencing outcomes remain within the envelope of available prison places and other penal services is undertaken in the design of the structured sentencing framework.
>
> 34 Sentencers would, of course, continue to pass sentences on the evidence and aggravating and mitigating factors in each case. Sentencers must retain the independence to depart from an indicative range where they consider it appropriate (subject to the statutory maximum and any statutory minimum requirements).
>
> 35 The ranges would need to be developed in such a way that departure is kept to a minimum as the breadth of the range would be designed to account for the vast majority of usual aggravating and mitigating factors seen in current sentencing practice.
>
> 36 In exercising the discretion to depart from a presumptive sentence, the judge would explain in sufficient detail, the particular identifiable circumstances. In addition to his sentencing remarks, the judge would record the reasons for the departure so that his decision, could if necessary, be reviewed on appeal.
>
> **Developing and overseeing a structured sentencing framework**
>
> 37 Most jurisdictions that have introduced successful structured sentencing frameworks have done so through the work and guidance of an independent statutory body (usually known as a Sentencing Commission). Successful Sentencing Commissions are invariably led by a member of the senior judiciary with further judicial input as well as from prosecution, defence, and victims' representatives and significant statistical, analytical and legal support.

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[181] Ibid, p32. For diagrams of the grids and further information on how they operate see Sentencing Commission Working Group, *A Structured Sentencing Framework and Sentencing Commission*, March 2008, Annex C (discussed further in the next section of this paper).

[182] Ibid, p3

> 38 The task of a Sentencing Commission is to develop a comprehensive set of indicative ranges according to the objectives set down by the legislature and in consultation with all key parties and the public. Once a table of indicative ranges is in place the Commission monitors their use and carries out a number of other reporting and advisory functions.

Lord Carter went on to suggest that the set of indicative ranges produced by the Commission should be subject to Parliamentary approval. He also suggested that the Commission should have an ongoing role in advising the Government on the likely effect of non-sentencing factors (such as remand, recall and the work of the Parole Board) on the prison population. The Commission could also be required to assess the potential impact of all national policy proposals, including proposed legislation, on the availability of prison places.

Lord Carter recommended that a working group be set up to consider whether the development and adoption of a structured sentencing framework and commission represented a feasible long-term solution to prison population pressures.

3. The Sentencing Commission Working Group

In response to Lord Carter's recommendation, in December 2007 the Lord Chief Justice and the Lord Chancellor set up a working group under the chairmanship of Lord Justice Gage. The working group was tasked with examining the advantages, disadvantages and feasibility of a structured sentencing framework and sentencing commission. Following an initial investigation period, including visits to Minnesota and North Carolina to examine the use of grid-style sentencing frameworks in practice, the working group issued a consultation paper in March 2008.[183] The consultation paper identified a number of ways in which the current sentencing guidelines system makes it difficult to predict prison numbers:

> 2.20 The Working Group recognises that the SGC has achieved a great deal since its creation in fulfilling its statutory obligations. The SGC itself recognises, however, that the inadequacies of the current data collection system limit the scope of its activities. There are a number of issues relating to the guidelines process that merit exploration. These issues may have to be considered as the guidelines begin to cover most criminal offences and issues of internal consistency come to the fore. Such consideration will certainly be needed before any definitive view is taken on a full structured sentencing framework.
>
> 2.21 In developing levels of offence seriousness for each offence, the starting points and ranges the SGC considers CACD [Court of Appeal (Criminal Division)] guideline judgments, responses to the consultation and previous sentencing practice. In determining the starting points and ranges the members of the SGC/SAP can apply their own judgments as to what these levels and ranges should be but these will not necessarily map current sentencing practice.

[183] Sentencing Commission Working Group, *A Structured Sentencing Framework and Sentencing Commission*, March 2008

> 2.22 At present the SGC is not in a position to know when it selects the starting points and ranges that will correspond to levels of seriousness how many sentences passed will fall within each of the descriptions given. For example, the SGC could not know prior to the publication of the Robbery guideline how many offences would fall into the each of the specified levels of seriousness.
>
> 2.23 SGC guidelines state that "where the offender has previous convictions which aggravate the seriousness of the current offence that may take the provision sentence beyond the range given for a first time offender particularly where there are significant other aggravating factors present". Sentencers, using their common sense and experience, can approach the exercise in different ways and it is difficult to judge the effect of previous convictions. It is, therefore, not possible within the present system to calculate the effect of previous criminal convictions on guideline starting points and ranges.
>
> 2.24 It has not been part of the SGC's statutory duty to frame guidelines having regard to prison population and correctional resources. In addition, although the SGC … consults Parliament and Ministers before promulgating guidelines, it is not under a duty to advise the Executive or Parliament on the possible effect on the prison population of its guidelines or of proposed future legislation. Historically it has been the responsibility of the Executive under the scrutiny of Parliament to ensure sufficient prison places exist to house those sent to custody by the courts.
>
> 2.25 It follows from the above that the SGC can neither know the effect of its guidelines in terms of prison population before they are promulgated; nor does it have the means to predict what will be their effect. The final set of guidelines could have an impact on correctional resources for which no forward planning has been possible. It also follows that when framing its guidelines past sentencing practice is only a part, perhaps a very important part, of the mix of factors taken into account to provide the definitive guidelines.
>
> 2.26 Once the guidelines are issued courts must have regard to any guidelines which are relevant to the case and where the sentence is of a different kind or outside the range of the guideline state the court's reasons for so deciding. However, there is no system for monitoring when and why courts depart from the guidelines, apart from when the case is appealed. It is not the SGC's role to enforce the guidelines – that is a role for the CACD. Nor is it currently the role of the SGC, apart from publishing data, to identify and examine and discuss differences in sentencing practice across the country.[184]

The consultation paper sought views on a number of proposals aimed at improving the alignment of supply and demand for prison places; however, from the outset the working group indicated that the introduction of a US-style sentencing grid, as advocated by Lord Carter, was unlikely to be a suitable approach to sentencing in England and Wales:

> It is noteworthy that the background which led to the creation of such frameworks and the circumstances in which they operate are very different from those that exist in England and Wales. The Working Group is conscious that the specific design of the USA sentencing grids, particularly the way that account is taken of previous criminal history, is overly formulaic and mechanistic to an extent that is

[184] Ibid, paras 2.20-2.26

> inimical to our tradition of judicial discretion. However, the greater predictability and consistency that may be achieved by a structured sentencing framework makes it worthy of consideration. The Working Group is therefore seeking views in this consultation on a different approach to structured sentencing to that of these US states that would be compatible with judicial independence. It hopes that the consultation paper will stimulate debate and help the Working Group in developing this approach.[185]

The key issues on which the working group sought views included:

- whether it would be desirable to create a defined scale of offence seriousness in England and Wales;
- whether sentencers should be given more detailed guidance on the treatment of an offender's previous criminal convictions;
- whether sentencing guidelines should continue to be advisory, with the courts only being required to "have regard to" them, or if a stronger presumptive approach should be taken with sentencers having to satisfy a stricter "departure test" before departing from any relevant guidelines;
- whether the SGC and SAP should be replaced by an independent sentencing commission and, if so, whether the commission's role should include assessing the impact of proposed new legislation on correctional resources; and
- what role, if any, Parliament should play in approving sentencing guidelines.

The consultation closed in June 2008; in July 2008 the working group published a summary of consultation responses, together with a full report setting out its findings, conclusions and recommendations.[186]

4. Recommendations

The recommendations of the working group are summarised in Chapter 9 of its July 2008 report. Key recommendations included: a US-style structured sentencing framework should be rejected; further guidance should be issued on the weight to be given to previous convictions; the current requirement for courts to "have regard to" the guidelines should be strengthened; the SCG and SAP should be replaced by a unified Sentencing Council; the new Council should have an enhanced role in data collection and resource monitoring; and there should continue to be no requirement for Parliament to approve sentencing guidelines.

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[185] Ibid, para 1.7. The findings of the working group's visits to Minnesota and North Carolina, including diagrams of the sentencing grids used in these states, are set out in Annex C to the consultation paper.

[186] Sentencing Commission Working Group, *A summary of responses to the Sentencing Commission Working Group's consultation paper* and *Sentencing guidelines in England and Wales: an evolutionary approach*, July 2008.

a. Offence severity scale

The working group reiterated its view, originally set out in the consultation paper, that a US-style sentencing grid was unsuitable for use in England and Wales:

> 9.3 The Working Group finds that structured sentencing frameworks on the US grid model increase consistency and predictability of sentences but at the cost of an inflexibility that makes them unsuitable and unacceptable in England and Wales. The Working Group **recommends** that the process of introducing guidelines through the SGC be retained and the introduction of a US style grid be rejected.[187]

This recommendation reflected the views of the consultation respondents, none of whom supported the introduction of sentencing grids.[188] The working group did, however, recommend that the SGC should produce definitive guidelines for all major high-volume offences as soon as possible, so as to enable the SGC to assess all its guidelines relative to each other:

> **The development of an offence severity scale**
>
> 7.3 We are satisfied that to endeavour to place all current offences into a comprehensive severity scale in our jurisdiction would be at best extremely difficult and at worst end up in a scale which would be so prescriptive as to reduce the judge's discretion to an unacceptable extent. Unlike those states in the USA which we have observed and researched we do not have a codified criminal law. Many of our offences cover a wide breadth of seriousness. One of the best examples of this is the offence of involuntary manslaughter. This can cover at one end of the scale a single punch killing and towards the other end a killing following a violent, unprovoked and sustained attack by more than one offender.
>
> (…)
>
> 7.5 We have been informed by the SGC that within a year it will have completed definitive guidelines for all the high volume, high custody offences. In the course of producing them each guideline will be cross-referenced with existing guidelines to ensure that severity levels bear an appropriate relationship with existing guidelines.
>
> 7.6 We note that when preparing its guidelines the New Zealand Sentencing Council did not provide a hierarchy of seriousness. They have taken the view that relativities can best be established by bands of seriousness for each broad offence type. We regard this approach as sensible.

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[187] Sentencing Commission Working Group, *Sentencing guidelines in England and Wales: an evolutionary approach*, July 2008, para 9.3

[188] See, for example, Sentencing Commission Working Group, *A summary of responses to the Sentencing Commission Working Group's consultation paper*, July 2008, p3. For press coverage see: "Judges scorn American-style sentencing to control prison overcrowding", *Times*, 30 June 2008; "Judges fight plans for US-style sentencing", *Guardian*, 23 June 2008; and "So which Sir Igor is taking charge?", *Daily Telegraph*, 10 July 2008.

> 7.7 In our view the SGC should produce definitive guidelines for all major offences as soon as possible. Once they have been completed this work the SGC will be able to assess all its guidelines relative to each other. It may be able to produce a document which in simple terms sets out the broad bands of sentence levels for all offences for which there are definitive guidelines. We recognise the difficulties of attempting to produce such a document but nevertheless urge the SGC to endeavour to do so. In any event, it seems to us that consultation on such a document when completed would give the guidelines added authority.[189]

b. Previous convictions and aggravating and mitigating factors

The working group also recommended that sentencers be given more detailed guidance on the treatment of previous convictions and aggravating and mitigating factors, although it advised that such guidance should be in the form of narrative guidelines rather than any form of quantitative grid:

> 7.8 In the Consultation Paper we made it quite clear that we regarded the mechanistic approach to previous criminal convictions in the grids in Minnesota and North Carolina as inimical to our criminal justice system. We did, however, ask consultees if they thought further guidance was required on the treatment of previous convictions in the sentencing process. (…)
>
> 7.9 A significant body of respondents have suggested that further guidance would be helpful. (…) Many experienced judges expressed the view that there was no need for further guidance on this issue as it is well understood by them that the relevance of previous convictions depends upon the facts of the offence for which the offender is to be sentenced, the facts underlying the previous convictions, the date when they were committed relative to the offence for which the offender is being sentenced and the possibility of previous convictions displaying a pattern of offending. Some respondents said that they would value further guidance. We recognise the value of this argument. We understand that the SAP is actively considering providing some further guidance with a view to enhancing consistency. In the circumstances, we recommend that the SGC considers this issue and gives such further narrative guidance as it thinks appropriate.
>
> 7.10 We add the Working Group is clear that such further guidance should not attempt to quantify the weight given to previous convictions in the sentencing process. To do this would, in our opinion, elevate previous convictions to a status in the sentencing process which is disproportionate to the other factors which may aggravate the offence. It would also introduce the element in the structured sentencing frameworks in the USA which we find objectionable and would, we believe, be likely to increase sentence lengths.

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[189] Sentencing Commission Working Group, *Sentencing guidelines in England and Wales: an evolutionary approach*, July 2008, paras 7.3-7.7. The consultation response from the senior criminal judiciary questioned whether it would be feasible to produce such a document, describing it as a "Herculean task to creat comprehensive sentencing guidelines": see Judiciary of England and Wales, *Response to the Sentencing Commission Working Group consultation paper*, 30 June 2008, paras 11.4-11.7

> 7.11 Finally on this issue, whilst further guidance may assist transparency and consistency in the sentencing process, a number of members of the Working Group are sceptical as to whether it will assist predictability.[190]

c. Strengthening the "departure test"

The working group considered the issue of whether sentencing guidelines should continue to be advisory, with the courts only required to "have regard to" them, or if a stronger presumptive approach should be taken. It considered three levels of "departure test":

- The first level, used in Minnesota, requires the court to follow sentencing guidelines unless it can find (and record) "substantial and compelling reasons" for departing from the guidelines. This level is the most presumptive approach.

- The second level, used in New Zealand, requires the court to follow sentencing guidelines relevant to the offender's case unless the court is satisfied that it would contrary to the interests of justice to do so.

- The third level, currently used in England and Wales,[191] requires the court to have regard to any guidelines relevant to the offender's case. However, the court retains the discretion to depart from the guidelines, provided it can give reasons for the departure.

The working group rejected the first level on the grounds that it is too restrictive of judicial discretion. The majority of the working group recommended that the second level, under which sentencers would be required to apply sentencing guidelines unless it was not in the interests of justice to do so, should be adopted. A minority of the working group recommended that the current approach (i.e. the third level) be maintained. The minority also recommended allowing the current sentencing guidelines to "bed down" and analysing whether the departure rate under the current third level is unacceptably high before introducing a more prescriptive test.

The split in the working group's views was reflected in the consultation responses; a majority of judicial respondents, together with the Criminal Bar Association and the Justices' Clerks Society, did not consider it necessary to strengthen the current departure test, whereas the Crown Prosecution Service and NACRO, together with the majority of academics, were in favour of strengthening it. Justice argued that the current rate of departure from the guidelines should be assessed before any change is implemented:

> … an alteration to the statutory language might encourage over-adherence to guidelines and therefore we would like to see research into the current rate of

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[190] Sentencing Commission Working Group, *Sentencing guidelines in England and Wales: an evolutionary approach*, July 2008, paras 7.8-7.11

[191] As set out in s172 and 174(2) of the *Criminal Justice Act 2003*.

> observance of guidelines and the reasons for departing from it in various courts before recommending change.[192]

d. A unified Sentencing Council

The working group recommended that the SGC and the SAP be combined into a single body:

> 6.12 The Working Group is clear that if our recommendations are adopted, the SGC and SAP will in future need to have a different shape. We are all agreed on the following proposals. First, we are agreed that it is undesirable for the SAP and SGC to remain as two distinct bodies. We recognise the value of the input to the guidelines of both bodies as they are at present constituted. From our discussions with the SAP, the SGC and information and opinions given to us by Professor Andrew Ashworth (the current Chair of the SAP but acting in his personal capacity) we conclude that it is cumbersome and unnecessary for the two bodies to remain separate. In particular, it seems to us unnecessary for each body to carry out separate consultations in the process of producing guidelines. Whilst recognising that at present the two consultation processes involve different groups of consultees, we think it would be an advantage and would speed up the process of producing guidelines if one body carried out all functions.
>
> 6.13 For these reasons we favour the combining of the SGC of the SAP into one statutory body.

In light of its recommendations that this unified statutory body should have new duties to assess resource implications and collect sentencing data (discussed further in the following sections), the working group indicated that the new unified body should be provided with additional staff and resources to meet its increased workload. The working group was also of the view that this increased workload would make it impossible for the Lord Chief Justice to chair the new body; instead the chair should be appointed by agreement between the Lord Chief Justice and Lord Chancellor.

A number of consultation respondents, particularly members of the judiciary, questioned the need for reform of the current SGC and SAP structures:

> Many judicial responses highlighted increasing amounts and frequency of criminal justice legislation impacting on sentencing. It was often said that the sentencing framework was already overly complex and that what was needed was a moratorium on further change. In connection with this view, many judicial responses drew attention to the relatively recent establishment of the Sentencing Guidelines Council (SGC) and argued that the SGC should be allowed to continue with its work and that no decisions should be taken on further reforms until the current system had bedded down.[193]

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[192] Justice, *Response to A Structured Sentencing Framework and Sentencing Commission*, June 2008, para 27

[193] Sentencing Commission Working Group, *A summary of responses to the Sentencing Commission Working Group's consultation paper*, July 2008, p3. For an example of such a response see Judiciary of England and Wales, *Response to the Sentencing Commission Working Group consultation paper*, 30 June 2008, para 11.8

e. Data collection

The working group recommended that a system of sentencing data collection be devised and put into effect as a matter of urgency. The working group also recommended that the SGC should conduct a national survey of current sentencing practice and should have ownership of the new data collection system. The working group suggested that this data would enable the SGC to publish reliable estimates of the likely impact of its guidelines:

> 5.10 The ability to make accurate predictions of the prison population depends upon a combination of the strictness of the departure standard and the thoroughness of data collection. Thus, a prescriptive framework such as those adopted in Minnesota and North Carolina is likely to provide a more accurate prediction that the guidelines system in England and Wales. In order to improve predictability in England and Wales it is essential that studies are made to identify the data upon which accurate predictions will rely. It is only by knowing why offenders are in prison for specific offences with specific aggravating and mitigating factors that analysts will be able to advise how the prison population would change by the introduction of new sentencing provisions intended to affect a limited number of them.

As part of its research, the working group commissioned a one month data collection exercise in ten Crown Court centres.[194] The exercise asked judges to complete questionnaires indicating how they had applied various factors (for example aggravating and mitigating factors and any previous convictions) when sentencing offenders. The working group suggested this exercise could act as a pilot for how such information might be collected more widely:

> **Applying Lessons Learnt from the Survey**
>
> 5.14 The Working Group believes that it is essential to develop a picture of current sentencing practice in order to establish a clear set of data for assessing the impact of guidelines, and to act as a reference point for framing or revising guidelines. To establish this, the Working Group recommends that the SGC conducts a sentencing survey on a national basis to understand the factors that influence sentencing practice. The information that would be required is similar to that collected in the Crown Court Sentencing Survey, with appropriate adaptations for the Magistrates' Court. (…)
>
> **Enhancing the SGC**
>
> (…)
>
> 6.2 We are unanimous in our view that the SGC should be provided with the ability to collect the data referred to in Chapter 5. This will require a team dedicated to the task, the appropriate owner of which is the SGC. This would help it to assess the effect of its guidelines on correctional resources, that is to reach an informed conclusion on the impact in terms of prison places and non-custodial orders which a guideline might be expected to produce. Once it has

[194] Sentencing Commission Working Group, *Crown Court Sentencing Survey*, July 2008

> completed the exercise of providing guidelines for all the major offences the SGC will be able to provide a prediction of the effect in terms of capacity required in respect of sentencing. As time passes the SGC's analysts will doubtless become more adept at making such predictions.[195]

The summary of consultation responses indicates that respondents were generally supportive of the proposals regarding data collection,[196] although some expressed concern about the IT and time costs of implementing them.

f. Duty to assess resource implications

The working group made three recommendations in relation to the assessment of resource implications. The first was that the unified Sentencing Council should be required to

> assess the effect of its guidelines on correctional resources, that is to reach an informed conclusion on the impact in terms of prison places and non-custodial orders which a guideline might be expected to produce.[197]

Such assessments would be conducted using data collected under the new data collection system recommended by the working group. Estimates of the impact of guidelines on correctional resources should be included in the Sentencing Council's annual report.

The second recommendation was that when introducing legislation or significant policy initiatives that are likely to have an effect on the demand for correctional resources, the Secretary of State should invite the Sentencing Council to assess the impact of the proposals on correctional resources and to publish the results of that assessment. The working group commented that:

> In our view, if adopted in England and Wales, this would have the beneficial effect of enabling Parliament and the wider public to know the impact of proposed sentencing legislation and other major policy initiatives. Amongst respondents there is a considerable body of support for this proposal which we believe would assuage concern about the proliferation of legislation by promoting informed debate on legislative proposals.[198]

The third recommendation was that the Sentencing Council should be responsible for identifying any non-sentencing factors[199] that influence correctional resources and the prison population. Having identified such factors, the Sentencing Council should have an ongoing duty to draw the Government's attention to any significant developments.

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[195] Sentencing Commission Working Group, *Sentencing guidelines in England and Wales: an evolutionary approach*, July 2008, paras 5.14 and 6.2.

[196] With the exception of the Council of HM Circuit Judges: paragraph 31 of its consultation response set out its view that there is already sufficient information available for the purposes of predicting the prison population.

[197] Sentencing Commission Working Group, *Sentencing guidelines in England and Wales: an evolutionary approach*, July 2008, para 6.2

[198] Ibid, para 6.6

[199] For example re-offending patterns or changes in police policy.

The working group stressed that this duty should not equate to a requirement for the Sentencing Council to consider such factors when developing its guidelines:

> 6.10 We wish to emphasize that these are factors which should not influence the framing or revising of guidelines nor should the SGC have any responsibility for policy in relation to these factors. What we have considered is whether the SGC, in undertaking its functions should identify and have regard to the statistics relating to these other factors and be able to alert the Government to the likely effect of these factors on trends in the prison population.
>
> 6.11 The Working Group is of the opinion that there would be an advantage in a single body - the SGC - being able to assess the likely impact of all these factors in order to provide authoritative advice on the need for future prison places and other correctional resources. Although the information on the other factors included in the composite prediction would have to be supplied to the SGC by the Government, it is thought that in the interests of transparency and compatibility it would be advantageous for the SGC, as an independent body, to advise on the impact of these factors.[200]

g. The role of Parliament

The working group considered whether there should be a requirement for sentencing guidelines to be approved by Parliament, as is the case in New Zealand. A minority of the working group recommended this approach on the grounds that enhanced parliamentary scrutiny and participation in the guidelines process would give the guidelines greater democratic legitimacy.

However, a majority of the working group considered that no such recommendation should be made; a requirement for Parliamentary approval would represent "a significant and unwarranted change in the relationship between Government and Parliament on the one hand and the judiciary on the other".[201]

5. The Bill's provisions

The Bill would implement most of the recommendations of the working group's report.

Clauses 100 to 118 and Schedule 13 of the Bill would replace the SGC and the SAP with a unified Sentencing Council for England and Wales (the Council). The Council would consist of 14 members: eight judicial members appointed by the Lord Chief Justice (with the agreement of the Lord Chancellor) and six non-judicial members appointed by the Lord Chancellor (with the agreement of the Lord Chief Justice). One of the judicial members would act as chair.

The Council would be responsible for drawing up sentencing guidelines. The Council would be able to prepare guidelines on its own initiative or following proposals from the Lord Chancellor or the Court of Appeal. The Council would be entitled to decline to

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[200] Sentencing Commission Working Group, *Sentencing guidelines in England and Wales: an evolutionary approach*, July 2008, paras 6.10-6.11

[201] Ibid, para 8.23

produce guidelines in response to such proposals but would have to publish its reasons for doing so.

The current incremental approach to developing guidelines would be maintained; the Bill does not propose to replace it with a US-style structured sentencing framework. However, Clause 103 of the Bill would set out more detailed requirements than are currently in force regarding the content of sentencing guidelines that relate to offences:

- The guidelines must divide the offence to which they relate into categories of seriousness based on the offender's culpability and/or the harm caused or intended to be caused.

- The guidelines must specify a range of sentences for each category of seriousness, together with a starting point in that range. The starting point would be the sentence the Council considers appropriate in a case where the offender pleads not guilty and before aggravating or mitigating factors have been taken into account.

- The guidelines must list relevant aggravating and mitigating factors and provide guidance on the weight to be given to an offender's previous convictions.

- The guidelines may make different provisions for offenders under 18 years of age. The Lord Chancellor may also, by Order, prescribe other circumstances in which different provisions may be made in relation to different cases.

A streamlined consultation process would be introduced, as would a new fast track procedure for issuing guidelines in cases of urgency. The working group's majority recommendation that there should not be any requirement for Parliament to approve new guidelines has been accepted and the Bill does not include any such proposals.

The working group's majority recommendation that the departure test be strengthened has also been accepted. Clause 107 of the Bill would replace the existing duty of the courts to "have regard to" sentencing guidelines with a requirement to "follow" the guidelines unless it would be contrary to the interests of justice to do so.

When publishing draft guidelines or issuing new definitive guidelines, under Clause 109 the Council would have a new duty to publish an accompanying resource assessment. The resource assessment would set out the Council's views of the likely effect of the guidelines on the demand for prison places, the resources required for probation provision, and the resources required for the provision of youth justice services. The Council would have to keep published resource assessments under review and, if any were found to be materially inaccurate, publish revised versions.

Under Clause 110 the Council would also have a new duty to monitor the operation of its sentencing guidelines and draw conclusions from the information obtained by such monitoring, in particular relating to:

- the level of compliance with the guidelines;

- the factors that influence sentences imposed by courts;

- the effect of the guidelines on the promotion of consistency in sentencing;
- the effect of the guidelines on the promotion of public confidence in the criminal justice system.

A summary of this information would have to be included in the Council's annual report. Under Clause 102(11) the Council would also have to have regard to this information when formulating its sentencing guidelines.

Clause 111 would require the Council to publish information on sentencing practice of the magistrates' courts and the Crown Court by location. This new duty, coupled with the duty under 110, would require implementation of the new data collection system recommended by the working group.

Clauses 112 and 113 would give the Council new responsibilities for monitoring the availability of correctional resources. Its annual report would have to include a "sentencing factors report" and a "non-sentencing factors report". The sentencing factors report would be the Council's assessment of the effect that any changes in the sentencing practice of the courts are having (or are likely to have) on the demand for prison places, the resources required for probation provision, and the resources required for the provision of youth justice services. The non-sentencing factors report would be the Council's assessment of any significant quantitative effect that non-sentencing factors[202] are having (or are likely to have) on the resources needed or available for giving effect to sentences imposed by the courts.

Under Clause 114 the Council would also have a new role in assessing the impact of Government legislative or policy proposals (including proposals from the Welsh Ministers) on correctional resources. If the Lord Chancellor considers that any such proposals may have a significant effect on the demand for prison places, the resources required for probation provision, or the resources required for the provision of youth justice services, he may refer the proposals to the Council. The Council would then be required to assess the likely effect of the proposals on these matters and report its findings to the Lord Chancellor or Welsh Ministers as appropriate.

B. Driving disqualification

Clause 119 and Schedule 14 of the Bill would introduce extension periods for driving disqualifications for offenders who receive both a custodial sentence and a driving ban for a road traffic offence. Under present arrangements for such offenders, the Impact Assessment for the Bill indicates that "the ban is often served at least in part whilst the offender is in custody" and is therefore of limited effect.[203]

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[202] Clause 113(4) of the Bill defines "non-sentencing factors" as factors that do not relate to the sentencing practice of the courts, including the recall of persons to prison, breaches of community orders, patterns of re-offending, decisions of the Parole Board, discretionary early release of persons detained in prison and the remanding of persons in custody.

[203] Ministry of Justice, *Impact Assessment of the Coroners and Justice Bill*, January 2009, pp6-7

Under the Bill's proposals, the court would continue to determine the appropriate sentence and driving disqualification for the offence in question using existing legislation and sentencing guidelines. However, the court would then have to apply an extension period to the disqualification to take account of time spent in custody. The relevant extension period would be determined mathematically based on the length and type of custodial sentence imposed, for example:

- for a life sentence or indeterminate sentence for public protection, the extension period would be the period of the minimum tariff set by the court, as this is the earliest point at which the offender may be released;

- for an extended sentence, the extension period would be half the custodial term, being the period actually served in prison;

- for standard determinate sentences, the extension period would be half the custodial term, at which point the offender is subject to automatic release or, for sentences of 12 months or more, released on licence in the community until the end of the sentence.

The aim is for the disqualification extension period to be served while the offender is in custody, and the disqualification period determined by the courts to be served following the offender's release. Certain exceptions would apply to the requirement for an extension period, for example if the custodial sentence was suspended.

C. Dangerous offenders

Under the *Criminal Justice Act 2003* (for England and Wales) and the *Criminal Justice (Northern Ireland) Order 2008* (for Northern Ireland) the courts can impose sentences of imprisonment for public protection or extended sentences for certain specified violent or sexual offences. These sentences can be imposed where the court considers that the offender is likely to cause serious harm to the public through the commission of a further violent or sexual offence.

Clauses 120 and 121 of the Bill would add certain terrorist offences to the lists of violent offences specified in the 2003 Act and 2008 Order. The terrorist offences that would be added all currently carry a maximum penalty of ten years or more. The Impact Assessment for the Bill explains that the offences to be added "are concerned with violence (rather than, for example, obtaining and using information)".[204] Examples of the offences to be added include weapons training, directing a terrorist organisation, possession of an article for terrorist purposes and inciting terrorism overseas.

[204] Ibid, p6

VII Miscellaneous criminal justice provisions

A. Implementation of E-Commerce and Services Directives

Clause 123 of Part 5 of the Bill will allow the Government to implement fully Article 30(2) of the Services Directive and Article 3(1) of the E-Commerce Directive.

Very briefly, a revised Commission proposal for the Services Directive was published on 4 April 2006 and the Directive was approved with amendments by both Parliament and the Council on 12 December 2006.[205] Member States have until 28 December 2009 to bring into force the necessary laws, regulations and administrative procedures.

Taken as a whole, the Services Directive aims to liberalise the services market within the EU, an area which the European Commission had previously identified as containing a number of barriers to the development of a full internal market, especially for Small and Medium-sized Enterprises (SMEs). The Directive forms part of the EU's Lisbon strategy which aims to improve the economic performance of Member States. The Directive therefore seeks to establish the free movement of services and freedom of establishment between and within Member States, subject to a number of rules and exceptions. The Commission lists four aims of the Directive, to:

- Improve the basis for economic growth and employment in the EU;
- Achieve a genuine Internal Market in services by removing legal and administrative barriers to the development of service activities;
- Strengthen the rights of consumers as users of services; and,
- Establish legally-binding obligations for effective administrative co-operation between Member States.

A detailed outline of the history and background of the Directive, its implementation and how it will work in practice is provided in Library note SN/EP/4316.[206]

The E-Commerce Directive (2000/31/EC) was adopted in 2000 and sets up an internal market framework for electronic commerce, with the aim of providing legal certainty for businesses and consumers.[207] It establishes EU rules on matters such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. As a consequence of the Directive's internal market clause, information

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[205] Directive 2006/123/EC of the European Parliament and of Council of 12 December 2006 on services in the internal market.

[206] Library Standard Note SN/EP/4316, *The EU Services Directive*, 20 April 2007.

[207] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services in particular electronic commerce in the Internal Market (Directive on e-commerce)

society services[208] are subject to the law of the Member State in which the service provider is established. Moreover, the Member State in which the information society service is received cannot restrict incoming services.

Both Article 30(2) of the Services Directive and Article 3(1) of the E-Commerce Directive require the UK to extend the powers of its regulatory agencies (competent authorities) so that they are able, if so required, to take action in relation to offences committed by UK-based providers in other EU Member States.

Both Articles will be implemented by secondary legislation through the powers in section 2(2) of the European Communities Act 1972 (ECA 1972). However, clause 123 of the Bill makes it clear that the limitations in paragraph 1(1)(d) of Schedule 2 to the ECA 1972 on the penalties which can be imposed for a criminal offence by secondary legislation under section 2(2), will not apply for the purposes of implementing the Services Directive or the E-Commerce Directive.

B. Victims Commissioner

The Victims Commissioner was legislated for in the *Domestic Violence Crime and Victims Act 2004*.[209] Background on this measure can be found in Library Research Paper 04/43.[210] However, a Commissioner was never appointed and the legislation has not yet been commenced. The Bill would make modifications to the Commissioner's role without changing what the Explanatory Notes describe as his or her "core functions" which are: promoting the interests of victims and witnesses; encouraging good practice on the their treatment; and reviewing the operation of the statutory *Code of Practice for Victims of Crime* which was established under the 2004 Act.

Victim Support, who originally supported the idea of a Victims Commissioner, is concerned, and feels that improvements could now best be made by monitoring the Code and regularly increasing its service standards:

> Victim Support is concerned that almost five years after Royal Assent for the provisions creating the Victims Commissioner the Government has not implemented them or appointed a Commissioner - and is now resurrecting the idea in a watered down form.
>
> At the time Victim Support agreed with the idea of a Commissioner, as a body with the weight to drive change through the criminal justice system. Since then, the Victims Code of Practice has brought about many of the basic improvements in the system that would have fallen to the Commissioner, so the rationale for the role is now much weaker. Further improvements could be better delivered

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[208] Information society services are "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient for services" (Directive 1998/48/EC). This covers a wide range of online activities, for example online newspapers and libraries, electronic commerce, online travel or real estate agencies, professional services provided by electronic means and online entertainment services.

[209] Sections 48 to 53 and Schedules 8 and 9

[210] Library Research Paper 04/43.*The Domestic Violence, Crime and Victims Bill: [HL]Criminal procedure and victims*, 9 June 2004

> through proper monitoring of the Code and regular increases in its service standards.[211]

VIII Legal aid

A. Community Legal Service

1. Pilot schemes for civil legal aid

The Community Legal Service (CLS), created under the *Access to Justice Act 1999*, provides eligible individuals with publicly funded legal assistance for civil matters. The Legal Services Commission (LSC), also created under the 1999 Act, is responsible for administering the CLS fund, setting priorities about the types of legal assistance that may be funded, and monitoring, reviewing and enhancing the services provided through the CLS.

As part of its role, the LSC occasionally pilots new methods of delivering services through the CLS.[212] Section 18A of the 1999 Act (as inserted by the *Criminal Justice and Immigration Act 2008*) sets out an express power to pilot schemes for criminal legal aid. However, there is currently no equivalent express power for the LSC to pilot schemes for civil legal aid.

Clause 128 of the Bill seeks to clarify the position by inserting a new express power for the LSC to conduct pilot schemes for civil legal aid. Pilot schemes could be conducted in relation to specified areas, courts, services or persons. The length of any pilot scheme would generally be limited to three years.

2. Excluded services

Schedule 2 to the 1999 Act sets out a list of excluded legal matters in respect of which no legal aid funding is available. Examples include conveyancing, boundary disputes, the making of wills, defamation, matters of company or partnership law and other matters arising out of the carrying on of a business. The Explanatory Notes to the Bill indicate that:

> Business cases were excluded from the scope of civil funding as they are low priority cases and alternative forms of funding are available. In addition, only individuals may make applications or be funded as part of the CLS.[213]

Clause 129 would replace "other matters arising out of the carrying on of a business" with a broader exclusion:

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[211] Victim Support, *Coroners and Justice Bill: a missed opportunity for victims of crime*, January 2009

[212] For example, in 2007 the LSC piloted the delivery of specialist family legal advice over the telephone to assess the demand for such a service and the quality of outcomes achieved for the telephone clients. The pilot was successful and the LSC introduced "family advice" as a permanent category of advice available via the Community Legal Advice helpline. Further details are available from the "Tenders" section of the LSC's website.

[213] EN, para 628

> "1A Services consisting of the provision of help to an individual in relation to matters arising out of or in connection with –
>
> (a) a proposal by that individual to establish a business;
>
> (b) the carrying on of a business by that individual (whether or not the business is being carried on at the time the services are provided);
>
> (c) the termination or transfer of a business that was being carried on by that individual."

In addition to matters arising out of the carrying on of a business, an individual would therefore also be unable to claim legal aid for matters arising from the establishment or termination of a business. Examples given in the Explanatory Notes are disputes arising from the carrying on of a business that has ceased trading and disputes arising out of the preliminary steps of establishing a business (including where the business has not come into existence at the time of the claim).[214]

B. Criminal Defence Service

The Criminal Defence Service (CDS) provides people under police investigation or facing criminal charges with legal advice and representation. It is run by the LSC in partnership with criminal defence lawyers and representatives.

Since October 2006[215] defendants in the magistrates' courts applying for criminal legal aid have had to pass a means test in order to be eligible. There has not been a means test in place for legal aid in the Crown Courts since the previous scheme was abolished in 2001. However, in November 2008 the Ministry of Justice announced a consultation on proposals to re-introduce means testing for legal aid in proceedings before the Crown Court:

> **The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach):** In October 2006, the Government introduced a means-testing scheme for legal aid for defendants being tried at the magistrates' courts. As this scheme has now been successfully embedded, delivering £65 million of savings to date by ensuring that those who can afford to pay for their defence costs do so, the Government intend to fulfil their commitment to extend means testing to defendants appearing at the Crown Court.[216]

A consultation paper was published on 6 November 2008 and the consultation period closes on 29 January 2009.[217] An overview of the consultation's proposals was published by the Ministry of Justice and the LSC in December 2008:

- It is proposed that every defendant who appears for trial at the Crown Court will be granted a representation order provided they have submitted an

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[214] Ibid, para 629
[215] Following implementation of the *Criminal Defence Service Act 2006*
[216] HL Deb 6 Nov 2008 cc24-5WS
[217] Ministry of Justice and Legal Services Commission, *Crown Court means testing (Consultation Paper CP27/08)*, 6 November 2008

application for legal aid. As part of the application process, defendants will be asked to provide information about their income and capital assets.

- On assessment of a defendant's disposable income, the eligibility test will determine whether a defendant falls into one of four categories:
  - Entitled to free legal aid;
  - Exempt from the payment of an income-based contribution but liable for their legal aid costs following a conviction because of the high value of their capital assets (in excess of £3,000 or £30,000 of equity in their primary residence);
  - Required to pay an income-based contribution only (disposable income is in excess of £3,398);
  - Required to pay an income-based contribution and liable for the remainder of their legal aid costs following conviction because of the high value of their capital assets (disposable income is in excess of £3,398 and capital assets are in excess of £3,000 or £30,000 of equity in their primary residence).
- The Government believes that the calculation of a defendant's annual disposable income is generous. It takes account of actual expenditure on mortgage or rent, council tax and childcare whilst it also incorporates a cost of living allowance which is weighted to reflect the defendant's family circumstances. The cost of living allowance covers estimated expenditure on items such as food, utility bills, clothing, footwear and transport. Having made deductions for all such expenditure, only in those cases where the defendant's disposable income exceeds £3,398 will they be liable to pay an income contribution.
- A hardship unit will act as an additional safeguard for those defendants who are judged able to contribute towards their defence costs but believe that they genuinely cannot afford to meet the terms of their payment plan.
- If the defendant is convicted, the outstanding balance of their defence costs may be recovered from capital assets held by that individual. If the defendant is acquitted, any income contributions paid under the scheme will be refunded with interest.
- The Government is committed to supporting an effective and efficient justice system by minimising any risk of disruption to the courts and other parts of the criminal justice system. We have therefore decided not to withdraw a defendant's representation order if s/he fails to comply with the terms of a contribution order. Instead, the Government will be prepared to use a range of measures to ensure the effective enforcement of the contribution order against the defendant.[218]

[218] Ministry of Justice and Legal Services Commission, *Means testing and the Crown Court: Questions and Answers*, December 2008

Clauses 130 and 131 of the Bill would introduce powers related to certain elements of the proposed Crown Court means testing scheme.

1. Information requests

Under Schedule 3 of the 1999 Act, the LSC currently has the power to seek information about individual legal aid applicants from Her Majesty's Revenue and Customs (HMRC) and the Secretary of State. The information that can be sought includes an individual's name, address, national insurance number, benefit status and employment history. The LSC can currently only exercise this power for the purposes of determining whether an applicant for legal aid is financially eligible for a representation order.[219]

Under the proposed Crown Court means testing scheme, individuals whose disposable income and/or capital assets exceed a certain level would be issued with a contribution order. A contribution order could require individuals with sufficiently high disposable incomes to make monthly contributions to their legal representation. A contribution order could also require a convicted individual with capital assets above a certain level to pay, in part or in full, the outstanding balance of their defence costs.

Clause 130(1) would therefore extend the current information-seeking power in Schedule 3 so that the LSC could also exercise it for the purposes of determining whether an individual is liable to be issued with a contribution order. The remainder of Clause 130 would make a number of amendments to the type of information that could be sought, for example by enabling the LSC to request details of an individual's former name, address and benefit status as well as their current details.

The Ministry of Justice Impact Assessment on Clauses 130 and 131 indicates that the amendments in Clause 130 would "avoid concerns about relying on an applicant's written consent to verify the information and help combat fraud".[220]

2. Enforcement of orders

Contribution orders were described in the previous section of this paper. Recovery of defence costs orders (RDCOs) give courts the power to order a convicted defendant whose income and/or assets exceed a certain level to pay all or some of the legal aid costs incurred in defending him. Under sections 17 and 17A of the 1999 Act, regulations may make further provisions about these orders, including provisions as to the enforcement of such orders and the recovery of unpaid sums.

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[219] A representation order is effectively an order confirming that an applicant has been granted legal aid for professional representation in a criminal case. They are available for proceedings in both the magistrate's court and the Crown Court. To qualify for a representation order in the magistrate's court, the applicant must satisfy the requirements of the magistrate's court means testing scheme. An applicant does not currently have to satisfy any financial requirements to get a representation order in the Crown Court. The Government has indicated that under the new Crown Court means testing scheme representation orders will continue to be automatically granted provided the applicant in question has submitted a completed application for legal aid. Individuals who do not submit legal aid applications, for example if they have elected to pay for their own legal representation, will not be entitled to representation orders.

[220] Ministry of Justice, *Impact Assessment of powers that are needed to support the introduction of the means test*, 19 November 2008, p6

Under Clause 131(2) and (3) of the Bill, such regulations would also be able to provide for the cost of enforcing contribution orders and RDCOs to be added to the amounts already due from the individuals in breach of the orders.

Clause 131(3) would also introduce a new "motor vehicle order" for the purposes of enforcing contribution orders. A motor vehicle order could take the form of either a "clamping order" or a "vehicle sale order". A clamping order would enable the court to order that an individual's car be fitted with an immobilisation device. A vehicle sale order would enable the court to order that a vehicle already subject to a clamping order be sold or otherwise disposed of. Motor vehicle orders would only be available in respect of individuals owing overdue sums under a contribution order. Schedule 16 to the Bill would insert a new Schedule 3A into the 1999 Act setting out detailed provisions governing the making of motor vehicle orders. In particular, clause 5(2) of the new Schedule 3A would limit clamping orders to motor vehicles owned by the individual liable to pay the overdue sum, although for these purposes "owned" includes "has an interest in". No indication is given as to how these orders would apply to vehicles in which people other than the liable individual have an interest. Clause 5(3) would provide an exemption for cars used by disabled persons.

The Ministry of Justice Impact Assessment on Clauses 130 and 131 indicates that the new powers are only intended for use in the final stages of enforcement:

> Our provisions in the Coroners and Justice Bill will firstly enhance the current enforcement regime by providing for motor vehicle orders, ie clamping orders and orders for the sales of vehicles so acting as an effective deterrent against non-compliance for those who wilfully refuse or culpably neglect to comply with a contribution order. Secondly, they provide for the cost of enforcement action to be added to the amount due under a contribution order or a recovery of defence costs order. These powers will only be used in the enforced compliance stage, i.e. those cases where the defendant ignores the contribution order and/or the terms of the supported compliance stage. Definitions of the three distinct stages of collection and enforcement are provided below.
>
> - Voluntary compliance – where an individual requires little or no assistance in complying with their payment plan. To encourage a defendant's compliance, the Government is exploring a range of incentives, including offering a discount to those defendants who choose to make an early payment.
>
> - Supported compliance – where the defendant requires assistance to comply with the Order. This might involve, for example, the use of text messages, phone calls and correspondence setting out the range of ways in which a defendant can pay their contribution order and setting out what the consequences of non-payment would be.
>
> - Enforced compliance – where the defendant ignores the contribution order and/or the terms of supported compliance stage. It is in these cases that the Government wishes to use the motor vehicle orders alongside distress warrants, freezing injunctions and attachment of earnings orders. Having a range of options available will allow those who refuse to pay to be effectively targeted. Defendants who fall into this stage of the collection and recovery process, will be

> charged for the cost of this enforcement action, regardless of whether they are later acquitted.[221]

However, Liberty has expressed concerns about the potential human rights impact of the new enforcement powers:

> These amendments would allow the Legal Services Commission to not only recover the cost of the legal representation but also the cost of trying to enforce an order to pay (which would necessarily include legal costs). This could quite conceivably mean that a person who has been given legal aid funding in a criminal matter but later required to pay for some of his or her legal representation is charged with costs that could exceed the amount of the initial representation. A Recovery of Defence Costs Order can be made against someone who is convicted of an offence in the Crown Court and higher courts and who earns over £22,235, has capital of over £3000 or has more than £100,000 equity in their home. These are not necessarily high income earners or those with substantial assets. Allowing a requirement to be imposed to add on the costs of enforcing an order (which may well exceed the amount of the order itself) does not seem to be fair or proportionate. As part of requiring the person to pay, these amendments also introduce the ability for the court to make an order to sell a person's car in order to pay the debt. We have particular concerns about the ability for such an order to be made in respect of motor vehicles in which the person whom the order has been made against only has an interest in the motor vehicle. This could clearly impact not only on the property rights of the person concerned but also any co-owner of the motor vehicle. No provision has been made to set out the rights of any co-owner to object to such an order being made or to recover their interest in the vehicle, and as such, this seems to clearly breach the right to property in the HRA [*Human Rights Act*].[222]

IX Criminal Memoirs

A. The problem

There have been several examples in recent years where criminals have reportedly profited from published accounts of their crimes. Whilst the number of these incidents is fairly low, some of them have attracted considerable public outrage. It was widely anticipated that new controls would be introduced in 1998 after it was reported that Mary Bell, who killed two toddlers when she was eleven, was receiving payment for helping with a book about her life, *Cries Unheard* by Gitta Sereny.[223] There were many reports that Mary Bell had received £50,000 for her contribution, although this was disputed at the time.[224] The book was serialised in the *Times*. The Moors murderer Ian Brady published a book in 2001 resulting in widespread controversy.[225] There was public

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[221] Ibid, pp5-6

[222] Liberty, *Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009, para 73

[223] See for example "Blair says payment to Bell is repugnant", *Times*, 30 April 2004

[224] See for example "Mary Bell in court to plead for anonymity" *Independent on Sunday*, 15 September 2002 and "Mary Bell was only paid £15,000", *Observer*, 3 May 1998

[225] See for example, "Defiant Brady feels no remorse", *Times*, 30 November 2001

concern in 2003 that Tony Martin, who shot and killed a young burglar, had sold his story to the *Mirror* for £125,000, although the Press Complaints Commission did not uphold a complaint against the newspaper, arguing that the payment was necessary, and that the story was in the public interest.[226] In 2005, the BBC paid £4,500 to the surviving burglar in the Tony Martin case, Brendan Fearon and argued that the programme was in the public interest.[227] The programme maker stated that Fearon would not have been interviewed without payment.[228]

In a 2003 case involving the manuscript autobiography of Dennis Nilsen, who murdered six men, the court rejected arguments that confiscation of the manuscript was incompatible with his right to freedom of expression under Article 10 of the *European Convention on Human Rights*. Maurice Kay J said that the Home Secretary was entitled to have regard to the likely effect of publication on members of the public, including survivors and the families of victims. He was entitled to take the view that it was not futile to prevent publication notwithstanding that other versions, in the outside world, might get published (and one author had published biographical material based on what Nilsen had said).[229] Nilsen's appeal was dismissed in November 2004. Giving the judgment of the court, the Master of the Rolls agreed that the prison rule was lawful. He said that the court –

> … did not believe that any penal system could readily contemplate a regime in which a rapist or murderer would be permitted to publish an article glorifying in the pleasure that his crime had caused him.
>
> (...)[Strasbourg jurisprudence] did not establish that it was disproportionate for imprisonment to carry with it some restrictions on freedom of expression. [230]

B. The current law

There is no law which prohibits convicted criminals from publishing their autobiographies or other writings in which their crimes may be described. Nor is there any law which prohibits them from selling their stories, or otherwise profiting from such publications. However, a prisoner may be prevented under prison rules from publishing such material whilst they are in prison.

1. Prison law

The *Prison Rules 1999*[231] provide for the Secretary of State to impose any restriction or condition on communications permitted between a prisoner and other persons if he considers that the restriction or condition is proportionate and compatible with rights under the *European Convention on Human Rights* as well as being necessary on certain

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226 Press Complaints Commission press release, *PCC Investigation - Daily Mirror*, 2 October 2003
227 "BBC defends paying burglar", *Guardian*, 29 July 2005
228 "Magnus Temple: Why I was right to pay Tony Martin's burglar", *Independent*, 6 March 2006
229 R (on the application of Nilsen) v Governor of HMP Full Sutton and another [2003] EWHC 3160 (Admin),19 December 2003
230 Nilsen *v* Governor of HMP Full Sutton and another EWCA Civ 1540; "Prison ban on murderer's memoirs justified", *Times,* 23 November 2004,
231 SI 1999 No 728, as amended

specified grounds, including national security, crime prevention, protecting health or morals or the reputation of others. [232]

Until fairly recently, guidance on prisoners' memoirs was contained in Standing Orders.[233] It is now contained in Prison Service Orders. Prison Service Order 4411 forbids prisoner correspondence to contain various types of material, including:

> Material which is intended for publication or use by radio or television (or which, if sent, would be likely to be published or broadcast) if it:
>
> (a) is for publication in return for payment, unless the prisoner is unconvicted. However, prisoners are permitted to receive payment for pieces of artwork or work of literary merit but only if they do not contravene any of the restrictions contained within paragraphs 10(b) – (e) and only if channelled through appropriate charitable organisations. This should also not be done on a regular basis so as to constitute any form of business activity (i.e. being commissioned to write a series of books or a regular feature in a national publication). It would be for the Governor to decide if such material contravened any of these restrictions. Further guidance on this is at paragraph 2.27 of PSO 4465 - Prisoners' Personal Financial Affairs ;
>
> (b) is likely to appear in a publication associated with a person or organisation to whom the prisoner may not write as a result of the restriction on correspondence in paragraph 4.9 above;
>
> (c) is about the prisoner's own crime or past offences or those of others, except where it consists of serious representations about conviction or sentence or forms part of serious comment about crime, the criminal justice system or the penal system;
>
> (d) refers to individual prisoners or members of staff in such a way that they might be identified;
>
> (e) contravenes any of the restrictions on content applying to letters.[234]

Further guidance on payment for artwork or written material is given in Prison Service Order 4465, which again stresses the prohibition on material about prisoners' own crimes "except where it consists of serious representations about their conviction or serious comment about crime, the criminal justice process or the penal system."[235]

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[232] Rule 34(3), SI 1999/728

[233] *Prison Service Standing Orders* 4 and 5B

[234] PSO 4411, *Prisoner Communications Correspondence* (Available from the list of Prison Service Orders on the Prison Service website) para 7.10

[235] PSO 4465, *Prisoners' Personal Financial Affairs* (Available from the list of Prison Service Orders on the Prison Service website) para 7.10

2. Criminal confiscation

The *Proceeds of Crime Act 2002* set up the Asset Recovery Agency and allowed it to take both criminal and civil proceedings to recover the proceeds of crime. This function has now been transferred to other bodies, including the Serious Organised Crime Agency.[236] Part 2 of the *Proceeds of Crime Act* contains provisions about the confiscation orders which the court can make when a person has been convicted and has benefited from his general or particular criminal conduct. Before the 2002 Act was passed, there was a corresponding power.[237]

A 2006 green paper on criminal memoirs, which is discussed in more detail below, gave the following account of the application of criminal confiscation powers to the publications by criminals:

> 6. The relevance of criminal confiscation law to publications about crime has been tested on only one occasion. This was in the case of *Randle and Pottle* who, in 1966, helped the spy George Blake to escape from prison and subsequently wrote a book entitled *The Blake Escape: How We Freed George Blake and Why* for which they received a payment of £30,000 from their publisher. (They were later tried with offences relating to the escape but acquitted.) The High Court held that the book was fairly to be regarded as "connected with" the commission of the offences of aiding Blake's escape and conspiring to harbour and assist him, and that the payment of £30,000 was obtained at least partly in connection with the commission of the offences and so potentially able to be confiscated.
>
> 7. The confiscation provisions in Part 2 of the Proceeds of Crime Act 2002 are similar to those that were in place in the *Randle and Pottle* case. Money can be confiscated from an individual if it was obtained as a result of or in connection with the offence for which he was convicted or if there has been a benefit following the commission of a criminal lifestyle offence. In light of the *Randle and Pottle* case it is therefore arguable that there is already the power to obtain the profits of publications about crime under Part 2 of the Proceeds of Crime Act 2002. This is on the basis that obtaining such a profit constitutes a benefit "as a result of or in connection with" the crime. However, dealing with publications about crime is not what the 2002 Act is designed to do and its application in such circumstances is far from certain. The legislation is generic and only bears incidentally upon accounts of crime.[238]

Similarly, the green paper argued that the money laundering offences contained in the *Proceeds of Crime Act 2002* were unsuitable for this purpose, and that "any attempt to use them would be highly arguable before the courts".[239]

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[236] From 1 April 2008, following the abolition of ARA by the *Serious Crime Act 2007*

[237] Background on the previous regime is given in Library Research Paper 01/79, *The Proceeds of Crime Bill*, 29 October 2001

[238] Home Office/Northern Ireland Office/Scottish Executive, *Making sure that crime doesn't pay: proposals for a new measure to prevent convicted criminals profiting from published accounts of their crimes,* November 2006, pp3-4

[239] Ibid., p4

3. Civil recovery

Part 5 of the *Proceeds of Crime Act 2002* contains provisions allowing civil recovery of property obtained through unlawful conduct. There is currently a 12 year limitation period within which such civil asset recovery actions can be launched, although this is due to be extended to 20 years under provisions in the *Policing and Crime Bill* currently before Parliament.[240] The 2006 green paper explains that these provisions do not apply to criminal memoirs:

> Whereas the confiscation provisions in the Proceeds of Crime Act 2002 are part of the criminal sentencing process, the civil recovery provisions in Part 5 of the 2002 Act concern the recovery of property obtained through unlawful conduct. The possibility that the civil recovery scheme now included in the Proceeds of Crime Act should cover the proceeds of publications by criminals about their crimes was considered as the scheme was developed. But it was decided that that scheme should be limited to property that was obtained through unlawful conduct. As writing about a crime is *not* unlawful conduct, the civil recovery provisions as they stand are not applicable.[241]

The green paper considers other civil law remedies, concluding that none held out much prospect of a remedy in cases concerning criminal memoirs.

The Regulatory Impact Assessment on this part of the Bill states that:

> Currently there is no effective mechanism through which criminals' profits from publications about their crimes can be confiscated.[242]

C. Media codes of practice

The Ofcom Broadcasting Code states that payments should only be made to criminals when it is in the public interest:

> 3.3 No payment, promise of payment, or payment in kind, may be made to convicted or confessed criminals whether directly or indirectly for a programme contribution by the criminal (or any other person) relating to his/her crime/s. The only exception is where it is in the public interest.[243]

The Press Complaints Commission code of practice is similar on this point:

> **Payments to criminals**
>
> i) Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be

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240 See Library Research Paper 09/04, *Policing and Crime Bill* 15 January 2009

241 Home Office/Northern Ireland Office/Scottish Executive, *Making sure that crime doesn't pay: proposals for a new measure to prevent convicted criminals profiting from published accounts of their crimes,* November 2006, p4

242 MOJ, *Impact Assessment of new scheme to prevent convicted criminals profiting from accounts of their crimes*, 15 December 2008

243 Ofcom, *Ofcom Broadcasting Code*, 2008, para 3.3

> made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.
>
> ii) Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.[244]

The BBC's editorial guidelines make similar points, although its policy is spelt out in more detail on its website.[245]

D. Reviews and consultation

The furore over Mary Bell's paid collaboration over her biography led to a statement in the House from the then Home Secretary, Jack Straw, in which he stated that he had asked officials to "consider whether the law relating to criminal memoirs might sensibly be strengthened".[246] An Interdepartmental Working Group conducted this review. In October 1999, Lord Bassam of Brighton, then a junior Home Office minister, said that the review had completed its work, the report was due to be submitted to the Home Secretary shortly, and publication of the outcome was likely to follow in the very near future.[247] *The Guardian* reported that the review had been completed and was "believed to have concluded that the ban on profiting from criminal memoirs be extended".[248] No conclusions were published.

However, the work of this review was incorporated into a much later review which resulted in the green paper, *Making Sure that Crime Doesn't Pay*, published in November 2006.[249] Indeed, Annex C to this document presents the findings of the 1998/9 Working Group in relation to the law in other countries.

The 2006 green paper followed a commitment in Labour's 2005 General Election Manifesto that it would "develop new proposals to ensure that criminals (were) not able to profit from publishing books about their crimes."[250]
The foreword to the 2006 green paper, by Home Office, Scottish Executive and Northern Ireland Office ministers, sets out the difficulties of the issues, and that any legislative changes might well, in practice, "capture a very few cases":

> This is not a simple issue: there are conflicting interests. We want to prevent further hurt and distress to victims and their families who have already been deeply traumatised by their unwanted exposure to dreadful experiences. But at

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244 Press Complaints Commission, *Code of Practice*, 1 August 2007
245 BBC Editorial Guidelines, *Crime and Anti-social Behaviour: Payments*, available at www.bbc.co.uk, site visited 21 January 2009
246 HC Deb 22 July 1998 c547
247 HL Deb 11 October 1999 c7
248 "Bulger killers face media gag", 20 December 1999, *The Guardian*
249 Home Office/Northern Ireland Office/Scottish Executive, *Making sure that crime doesn't pay: proposals for a new measure to prevent convicted criminals profiting from published accounts of their crimes,* November 2006
250 Labour Party Manifesto, *Britain forward not back*, 2005, p48

> the same time we do not want any prohibition on profit to discourage or prevent publications which may help us to understand why criminal acts are committed, contribute to the rehabilitation of ex-offenders or constitute genuine academic research. Publications about alleged miscarriages of justice could pose particular difficulties. All of these issues need to be considered within the context of a free society where, except for certain carefully limited circumstances, citizens and the media are free to express opinions and publish views.
> (…)
> It may be that no legislative measure can provide a complete answer to this problem and that any new measure will in practice capture very few cases. The purpose of this consultation is to find the best solution and one which balances the conflicting requirements in a way that is right and appropriate. [251]

The consultation document explained why, in the Government's view (and that of the Scottish Executive and Northern Ireland Office), a UK-wide solution was important:

> We consider it to be extremely important that, in matters which involve the publication of criminal memoirs, a common approach is taken across the United Kingdom and are determined that any response that we do make to this particular problem is robust and does not create cross border issues that might be exploited by those seeking to profit from publishing material about their crimes.[252]

E. The proposals

The green paper presented four options:

- **Making receipt by and/or payment to convicted criminals of money for publications about their crimes a criminal offence**

Here, the Government made it clear that the possible new offence would be targeted at the criminal's profits rather than preventing publications. An offence of receiving payments would leave publishers open to prosecution for secondary participation offences, such as aiding, abetting, conspiracy, soliciting or inciting another to commit the crime, which could attract the same penalty. Three possible solutions were proposed: targeting the criminal only, by disapplying the secondary offences; targeting the criminal and the publisher, the latter as a secondary participant; or targeting both as principal offenders. The offences would only apply to the criminal's profits, and not to those of others such as the publisher.

- **Introducing a new civil scheme for the recovery of profits based on the civil recovery provisions in Part 5 of the Proceeds of Crime Act.**

This would involve the main recovery agencies in England and Wales (now the Serious Organised Crime Agency) and Scotland (the Civil Recovery Unit) taking proceedings against people they thought had profited from publications about their crimes. Direct and indirect benefits would be covered, to prevent payments being made to criminals'

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[251] pp1-2
[252] Ibid.

families for example. The paper sought views on whether there should be a threshold, such as the existing £10,000 threshold for a civil recovery order, to avoid the costs of court action outweighing the benefits, as well as a number of other questions such as definitions of net profits, limitation periods and retrospectivity.

- **Extending the self-regulatory approach governing the press to other groups such as book publishers and film-makers.**

The Government suggested that bodies such as the UK Film Council and trade associations for publishers might be willing to assist in establishing self-regulatory regimes.

- **Doing nothing.**

The green paper argued that despite the small number of cases, this was not an attractive option because of the pain and distress caused to victims, and the risk of sending out the message that it was acceptable for criminals to benefit in that way:

> Despite the small number of cases, we believe that the moral case against allowing criminals to profit is sufficiently strong to make this option unattractive.

F. Responses to the consultation

The 2006 green paper attracted only 24 responses, and these are analysed and quoted from in some detail in a response document published by the Ministry of Justice[253] in January 2009:

> 1. We received a total of 24 responses to the consultation, 4 from individuals and 19 from organisations. Broadly speaking, the types of respondents were as follows:

Victims groups/relatives	3
Broadcasters	3
Press and publishing organisations	7
Members of the judiciary	1
Legal bodies	3
Police groups	2
Members of the public	2
Other organisations	3

> 2. Most respondents agreed in principle that it is wrong for criminals to profit, directly or indirectly, from their crimes, that such payments can be distasteful and that they can have a serious impact on victims and their families. But opinion was divided on whether legislation was necessary, proportionate or practical.

[253] The MoJ took over policy responsibility for this area after its creation in May 2007

> 3. Of the four options set out above, victims groups and the Superintendents Association of Northern Ireland favoured the introduction of criminal offences. Media respondents generally agreed that a civil recovery scheme would be preferable to criminal offences but were unanimously and strongly opposed to any new legislative measure and most favoured doing nothing. Six respondents, including the Assets Recovery Agency, HM Council of Circuit Judges, the President of the Queen's Bench Division and the Police Federation of England and Wales, supported new civil legislation. Six respondents, including the Criminal Bar Association and the Northern Ireland Human Rights Commission (NIHRC), thought that extending the self-regulatory approach governing the press to other groups such as book publishers and film-makers would be preferable to legislation though not all of them, including the NIHRC, thought that such extension was necessary. Ten respondents (all of whom represented the media and publishing industries) favoured doing nothing.[254]

On the first question on the general principle as to whether a new measure was necessary, the document presented the following views:[255]

> 1. 10 respondents answered yes to this question and 11 answered no. The reasons given by those who answered yes included that it is morally wrong for criminals to profit from their crimes, harmful to victims and their families and that current legislation and codes of practice did not adequately address the problem or cater for all forms of publication.
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> 2. The Victims' Voice organisation did not consider publications by criminals to be of great value, pointing out that they are "not known for their truthfulness or integrity", and thought that it was unhealthy for children to see "killers on a counter" in high street bookshops. In their view, the financial loss to publishers and criminals as a result of a new law would be minimal compared to "the terrible damage to the health and any future happiness and financial stability of the grieving families should the practice of profiting from crime continue". They felt that the present system of self-regulation by the media was not working to protect those already victimised by the criminal, and that the media had "aided and abetted criminals in peddling their stories" without any thought or consideration to the suffering this can cause to grieving families.
>
> 3. Media respondents unanimously considered that new legislation in this area would be disproportionate, unnecessary, impractical and have serious consequences for freedom of expression. In their view, there was no evidence to suggest that the problem of criminals profiting from publications about their crimes is widespread and the small number of cases did not justify any action. They argued strongly that payments to criminals were already controlled effectively by the self-regulation of the press and the statutory regulation of broadcasters. Broadcasting respondents emphasised the significant powers and sanctions available to OFCOM for breaches of their Code of Practice including substantial financial penalties and even removal of a broadcast licence.

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[254] Ministry of Justice, *Making sure that crime doesn't pay: A new measure to prevent convicted criminals profiting from published accounts of their crimes: Response to consultation,* CP(R) 11/06, January 2009, p5

[255] pp6-7

4. In particular, media respondents took issue with the assertion in the consultation paper that for them any additional burden resulting from the proposals would not be significant. The Editors Code of Practice Committee said that it would be extremely difficult, if not impossible, for the current voluntary regime to operate effectively in this area if there was also a supervening legal sanction. They pointed out that, as a voluntary measure, the Editors Code places obligations on journalists that would not be acceptable in a legal context and so allows for much more comprehensive constraints than it would be possible to achieve in legislation.

5. The Press Complaints Commission endorsed that view. They said that editors would be reluctant to cooperate with the Commission if they thought that in doing so they might incriminate themselves in relation to a further enquiry; and this would seriously undermine their ability to police this area effectively. ITN made similar points in relation to OFCOM's role.

6. Book-publishing respondents thought that legislation potentially endangered freedom of speech and was unlikely, especially in the case of books, to make sufficient positive impact. The Macmillan Publishing Group also expressed concerns about cost, efficiency and public interest. They felt that that any new measure would be expensive and time-consuming to implement, difficult to define and that the market should be the ultimate arbitrator of what is acceptable.

7. The Criminal Bar Association considered that both the criminal and civil options were "unworkable and liable to produce results against the public interest as often as they might attract popular public support". They also questioned whether instances of profit-making by offenders were sufficiently great to warrant legislative action.

8. The Association of District Judges did not express any view on whether or not a new measure is necessary but thought that the proposed civil recovery scheme had two major flaws: first that the confiscation of profit provided no financial benefit to victims of crime; and secondly that the scheme was probably unworkable in practice. In their view, if there was to be some form of recovery of financial profits, these should go into a fund from which damages could be paid to successful victim litigants. There was also a risk that, if the mechanism for recovery is too complex, the agency charged with effecting recovery may be reluctant to attempt recovery except in the most obvious cases. And the costs associated with recovery, which would fall on the taxpayer, could be out of proportion to the amounts recovered.

9. The Northern Ireland Human Rights Commission thought that criminal sanctions were inappropriate for the sole purpose of targeting profit; and that a civil scheme would give rise to protracted litigation which in many if not most cases could cost the public purse more that the value of any profits recovered and would not necessarily be in the best interests of victims.

The response document confirmed the Government's intention, and that of the Scottish Executive and Northern Ireland Office, to proceed with the option of a civil recovery scheme:

Support for option 1 (new criminal offences) was limited and came mainly from victims groups, including individuals whose lives have been directly and deeply affected by this issue. The Government understands their strength of feeling and

desire for the strongest possible deterrent. However, it believes that imposing criminal sanctions on publishers either as secondary participants in an offence and/or principal offenders (options 1b and 1c) would be disproportionate to the scale of the problem and shift the main focus from where it ought to be, i.e. on criminals who are profiting. Option 1a (targeting the criminal only) would be less disproportionate but the Government is not convinced that criminalising the receipt of payment for conduct that is not of itself unlawful is the best approach if an option not involving the criminal law is workable.

4. Option 4 (doing nothing) attracted strong support from media and publishing respondents who accounted for the majority of the responses received. The Government acknowledges the legitimate concerns of those in the media and publishing sectors about proportionality and freedom of expression. But it is not persuaded that a legislative measure would necessarily compromise the existing self-regulation of the press or statutory regulation of broadcasters. And it remains of the view that the moral case against allowing criminals to profit from publications about their crimes is sufficiently strong to make option 4 unattractive. In a society in which celebrity, however it is achieved, is increasingly sought after, and valued for its own sake, it seems likely that opportunities for criminals to exploit their crimes for financial gain will increase. In the Government's view, allowing this situation to continue unchecked could encourage glorification of crime or the implication that crime and profiting from it is acceptable; and it will do nothing to mitigate the additional pain and distress that such exploitation can cause to victims and their families.

5. Whilst generally seen as preferable to legislation, option 3 (extending the self-regulatory approach governing the press to other groups such as book publishers and film-makers) did not, of itself, receive much support; and the limited support that was expressed did not come from either of the groups concerned. Of the consultation responses received, only two came from book publishing companies (neither of which favoured this option) and none were from representatives of the film-making sector. As any self-regulation initiative in these areas would have to be voluntary, this does not provide a sound basis for pursuing option 3.

6. Accordingly, the Government remains of the view that option 2 (a new civil recovery scheme) is the way forward. It offers the greatest flexibility and is more proportionate to the mischief being addressed. The Government is conscious of the views of some legal practitioners that the more complex such a scheme, the less workable, and consequently, effective it may be in practice. In developing the proposal further, therefore, we have endeavoured to create a scheme which is as simple and straightforward to operate as possible.[256]

G. The Bill

Part 7 of the Bill would introduce a civil recovery scheme through which courts could order offenders to pay amounts in respect of assets or other benefits derived from the exploitation of accounts of their crimes. The money would have to be paid to an enforcement authority. Sums received would be paid into the Consolidated Fund (or Scottish Consolidated Fund, as appropriate).

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[256] p30

Under the scheme, courts will make "exploitation proceeds orders" from "qualifying offenders" if they are satisfied that the offender has obtained the proceeds from a "relevant offence". A person will be taken to have done this is they have derived benefit from the exploitation of any material relating to the offence, or from "any steps taken or to be taken with a view to such exploitation". So, for example, if a person obtains a payment for a book, but it is not published, they will still be taken to have derived a benefit.[257]

A "qualifying offender" could have been convicted either in the UK or outside it under the law in force in that country.[258] They could also be people found not guilty by reason of insanity, or have been found to be suffering a disability and to have "done the act charged". Service offenders are also covered.

The conviction could have taken place either before or after the commencement of this part of the Bill[259], but benefits derived before the provisions are commenced will not be recoverable under the scheme.[260]

A "relevant offence" could be one committed by the qualifying offender, or by a third party where their offence is associated with the one which is being exploited – for example if the offence was committed in the same joint criminal venture, or if one of the offenders conspired to commit the offence or incited its commission.[261]

Under clause 138, a person will be deemed to have "derived a benefit" if they obtain it themselves, or if they secure it for another person, to avoid the situation where payments were made to the offender's family, for example.

Clause 140 sets out the matters which the court must consider when deciding whether to make exploitation proceeds order. These are:

> (a) the nature and purpose of the exploitation from which (or intended exploitation in connection with which) the respondent derived the benefit
>
> (b) the degree to which the relevant material was (or was intended to be) integral to the activity or product and whether it was (or was intended to be) of central importance to the activity or product;
>
> (c) the extent to which the carrying out of the activity or supplying of the product is in the public interest;
>
> (d) the social, cultural or educational value of the activity or product;
>
> (e) the seriousness of the relevant offence to which the activity or product relates;

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[257] Clause 133; EN para 650
[258] Clause 134
[259] Ibid.
[260] Clause 138(5)
[261] Clause 137

> (f) the extent to which any victim of the offence, the family of the victim or the general public is offended by the respondent obtaining exploitation proceeds from the relevant offence

The court may take other matters into account if it thinks them relevant.

Under clause 141, the recoverable amount cannot exceed the total value of the benefits derived by the offender (including those secured for a third party), or the funds available to that party as, in the words of the Explanatory Notes, "it is not the intention of the scheme to cause bankruptcy".[262]

The Bill would amend the *Limitation Act 1980* so that an application for an exploitation proceeds order could not be made more than six years after the enforcement authority has actual knowledge that the person had obtained exploitation proceeds from a relevant offence.

H. Regulatory Impact Assessment

The Regulatory Impact Assessment on this part of the Bill made it clear that these provisions will result in very few cases, and that proceeds are unlikely to exceed enforcement costs:

> At most it is projected that two cases a year will arise, with an estimated annual cost to SOCA of around £280,000. The scheme will also have minor cost implications for the civil courts and also for the Community Legal Service if public funding were granted to defend any recovery action. On the basis of two cases per year, the financial impact is estimated to be under £90,000 per annum.
>
> Benefits
>
> Any proceeds recovered by the scheme are unlikely to exceed enforcement costs unless the criminal's memoirs are widely read and generate significant amounts of profit. Any money recovered will be paid into the Consolidated Fund.
> Although we anticipate only a small number of cases, in terms of public perception that crime does not pay the scheme is an important one which justifies its existence even if it rarely needs to be used.[263]

The RIA also conveniently summarised the Government's view of the scheme's impact on human rights

> The scheme may engage Article 10, Article 1 of Protocol 1 and Article 7 rights under the European Convention of Human Rights (ECHR). Article 10 protects the right to freedom of expression. Article 1 of Protocol 1 protects a person's right to the peaceful enjoyment of possessions. Article 7 provides that a person should have freedom from retrospective punishment.

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[262] EN para 141

[263] Ministry of Justice, *Impact Assessment of new scheme to prevent convicted criminals profiting from accounts of their crimes*, 15 December 2009

> We have considered these rights carefully and our view is that the proposals are compatible with Article 10, Article 1 of Protocol 1 and Article 7.
>
> Article 10 is a qualified right under the ECHR and interference with the right may be justified in pursuance of certain aims. These include the aims of protecting the rights of others and the protection of morals. The restriction is necessary in a democratic society, that is, it is compatible with the characteristics of a democratic society, specifically because of the public concern where criminals profit from their crimes, which amounts to a "pressing social need" justifying legislative action. We consider that the scheme is proportionate to the aim being pursued, particularly as it only relates to those who have committed crimes and would not prevent publication altogether, but would apply to recover the benefit from the publication. In addition, a court considering an application for an order has a discretion as to whether or not to make the order and, if so, the sum to be paid. In exercising that discretion, the court must take into account a list of factors which including the public interest in the publication and its social, cultural or educational value. Furthermore, an application for an order may not be made without the consent of the Attorney General.

I. Comment

As stated above, the MOJ's January 2009 response document, *Making sure that crime doesn't pay*, summarises 24 responses to their consultation document from a range of sources.[264]

An article in the *Guardian* in December 2008 described a considerable amount of hostility to the measure from a range of spokespeople from the publishing industry, including the Publisher's Association:

> Publishing trade body the Publishers Association described the plans as "disproportionate", "impractical" and "unnecessary" in its response, saying they would "set a highly dangerous precedent for state control of publishing, putting at risk the UK's enviable and hard-won freedom of speech", and would be "impossible to implement in practice".[265]

X Data protection

Part 8 of the *Coroners and Justice Bill 2008-09* aims to amend the *Data Protection Act 1998* (DPA) in a number of ways. It introduces new provisions in relation to the sharing of personal data while strengthening the powers of the Information Commissioner to audit and inspect data handling procedures. There would also be scope to increase the funding of the Information Commissioner's Office, via the payment of notification fees, to provide the additional resources that more effective application of such powers would require.

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[264] Ministry of Justice, *Making sure that crime doesn't pay: A new measure to prevent convicted criminals profiting from published accounts of their crimes: Response to consultation,* CP(R) 11/06, January 2009

[265] "Publishers angry at plans' to hit criminals' memoirs", *Guardian*, 5 December 2008

A. Inspection powers

Clause 151 would introduce assessment notices, allowing the Information Commissioner or his staff to conduct an audit of data handling in the public sector.[266] Assessments can already be made with the consent of the relevant data controller,[267] but such consent would no longer be necessary under the current Bill. Data controllers in a limited number of bodies, principally those dealing with security matters, are excluded. The purpose behind the serving of an assessment notice would be to allow the Information Commissioner to determine compliance with the data protection principles. These lie at the core of the DPA and, subject to a number of exemptions, data controllers are required[268] to comply with them. The eight data protection principles are set out in Schedule 1 of the DPA:

> 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
> (a) at least one of the conditions in Schedule 2 is met, and
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
>
> 2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
>
> 3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
>
> 4. Personal data shall be accurate and, where necessary, kept up to date.
>
> 5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
>
> 6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
>
> 7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
>
> 8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Clause 151 would also require the Information Commissioner to prepare and issue a code of practice about assessment notices. Such a code would have to set out the factors determining the serving of an assessment notice on a data controller as well as dealing with the nature of the assessment process. The latter could include the provision

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[266] A government department or a public authority designated by an order made by the Secretary of State
[267] Section 51(7), *Data Protection Act 1998*
[268] Section 4(4), *Data Protection Act 1998*

of documents and information, inspections, examinations and interviews. These would inform any assessment report, the preparation, issuing and publication of which by the Information Commissioner would also have to be dealt with in the code. The Information Commissioner's code of practice about assessment notices could not be issued without the approval (in a form not specified) of the Secretary of State.

The Government's decision to grant the Information Commissioner his long hoped for additional inspection powers was flagged in a recent Ministry of Justice report summarising responses to an earlier consultation.[269] The provenance of this report, published in November 2008, is given in its introduction:

> The consultation paper 'The Information Commissioner's inspection powers and funding arrangements under the Data Protection Act 1998' was published on 16 July 2008. It invited comments on a recommendation of the Data Sharing Review published on 11 July, which was that the ICO requires stronger powers and sanctions to carry out its duties as an effective regulator and in order to facilitate this, greater funding.

On the new audit powers for the Information Commissioner, the report includes a rationale for restricting these to the public sector:

> Although the DPA does not generally distinguish between the public and private sector in this case such a distinction is vital. We are conscious of imposing further burdens on business, but more significantly we must consider the nature of the information held and processed by the public sector. It is essential to protect the rights of every data subject and to ensure their confidence in public authorities that their personal data is safeguarded. We can and must do all that we can to ensure personal data is handled securely.
>
> We therefore propose to allow the ICO to carry out GPAs [Good Practice Assessments] on public authorities without necessarily requiring prior consent. This builds on the Prime Minister's undertaking last year to open up Government departments to inspection by the ICO and recognises the different circumstances of private sector data controllers from those in the public sector. We propose to legislate to extend the Prime Minister's undertaking to public authorities in the UK. We plan to work with the devolved administrations to ensure that the proposals are applied to all relevant public authorities consistently across the UK.[270]

In a commentary on the Bill, the Information Commissioner's Office (ICO) has acknowledged the particular risks that can arise in public sector contexts but points to the tens of thousands of complaints received each year, "most of which are about private sector organisations." The ICO commentary goes on:

> We are strongly of the view that if individuals are to be protected properly, we must be able to serve assessment notices on all organisations.

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[269] *The Information Commissioner's inspection powers and funding arrangements under the Data Protection Act 1998: Summary of responses*, Ministry of Justice, 24 November 2008

[270] Ibid.

> It is particularly worrying that the Bill does not provide for any sanction if an assessment notice isn't complied with, but does provide for a formal right of appeal against a notice.[271]

B. Information sharing

At least in so far as data protection is concerned, **clause 152** contains the most controversial measures of the Bill. While some reports have suggested that the clause would remove the barriers to the bulk sharing of personal data across government departments, it would be more accurate to say the barriers would be lowered (albeit significantly) – and with some in-built safeguards.

The Government has, for some years,[272] been developing a strategy on data-sharing across government departments – motivated as a means of providing more efficient and accessible public sector services. Data sharing represents a significant arm of the "Transformational Government" strategy published by the Cabinet Office in November 2005 (Cm 6683) which comments: "Modern government – both in policy making and in service delivery – relies on accurate and timely information about citizens, businesses, animals and assets. Information sharing, management of identity and of geographical information, and information assurance are therefore crucial." It further observes: "data sharing is integral to transforming services and reducing administrative burdens on citizens and businesses. But privacy rights and public trust must be retained. There will be a new Ministerial focus on finding and communicating a balance between maintaining the privacy of the individual and delivering more efficient, higher quality services with minimal bureaucracy."[273] A Transformational Government *Implementation Plan* was subsequently published in March 2006.[274] In July 2008 the Cabinet Office published its second annual progress report on Transformational Government.[275] One obvious impediment to increased data sharing is the second data protection principle, repeated below:

> Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.[276]

Although the *Data Protection Act 1998* (DPA) provides for a number of exemptions and exceptions to this, few of which are blanket in nature,[277] greater comfort to would-be information sharers can be provided by legislation. Recent examples of data sharing powers can be found in, among others, the following:

- *Digital Switchover (Disclosure of Information) Act 2007*

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271 *Coroners and Justice Bill: A commentary from the Information Commissioner's Office – Second Reading 26 January 2009*, Information Commissioner's Office, 22 January 2009
272 *Privacy and Data Sharing*, Performance and Innovation Unit, April 2002
273 *Transformational Government*, Cabinet Office, Cm 6683, November 2005
274 *Transformational Government – Implementation plan*, Cabinet Office, March 2006
275 *Transformational Government Annual Report 2007*, Cabinet Office, 16 July 2008
276 *Data Protection Act 1998*, Schedule 1, Part I
277 Not even national security: see *Tolley's Data Protection Handbook*, 4th Edition, 2006, chapter 20.

- *Serious Crime Act 2007*
- *Education and Skills Bill 2007-08*
- *Pensions Bill 2007-08*
- *Counter-Terrorism Bill 2007-08*

Clause 152 of the *Coroners and Justice Bill* would obviate the need for primary legislation to enable personal data sharing, providing instead a secondary legislation route. It inserts a new Part (5A) on information sharing in the DPA. In particular, a new section (50A) would enable Ministers to make "information-sharing orders" enabling "any person" to share information which consists of or includes personal data. Quite what constitutes personal data is the subject of ongoing debate,[278] but it is defined in section 1 of the DPA as follows:

> "personal data" means data which relate to a living individual who can be identified—
> (a) from those data, or
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
> and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

New section 50A includes a definition of sharing that explicitly overrides the second data protection principle:

> For the purposes of this Part a person shares information if the person […] consults or uses the information for a purpose other than the purpose for which the information was obtained.[279]

However, among the conditions attaching to the contents of an information-sharing order is one that requires specification of the purposes for which the information is to be shared.[280] Constraints are also placed on when a particular Minister can make an information-sharing order[281] and this "designated authority"[282] – in general the appropriate Minister in Whitehall or one of the devolved administrations – must further be satisfied that the following conditions are met:

> (a) that the sharing of information enabled by the order is necessary to secure a relevant policy objective,

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[278] Some assistance comes from *Opinion 4/2007 on the concept of personal data*, adopted on 20 June 2007 by the Article 29 Data Protection Working Party (an independent European advisory body on data protection and privacy).
[279] New section 50A(3), DPA
[280] New section 50A(5)
[281] New section 50C, DPA
[282] A definition of "designated authority", taking into account devolution arrangements, appears in New section 50A, DPA

> (b) that the effect of the provision made by the order is proportionate to that policy objective, and
>
> (c) that the provision made by the order strikes a fair balance between the public interest and the interests of any person affected by it.[283]

The orders would be able to, among other things, impose conditions on information-sharing, "provide for a person to exercise a discretion in dealing with any matter" and "modify any enactment".[284] An information-sharing order could also provide for the creation of offences; obvious possibilities would include serious breaches of the conditions imposed by any such order on information-sharing.

New section 50D requires the designated authority to consult affected persons in advance of making an information-sharing order. A draft of such an order would also have to be submitted to the Information Commissioner. The latter would have 21 days to submit, should he so choose, a report to the designated authority. Any such report would state whether or not the Information Commissioner was satisfied that the draft order was proportionate and had achieved a fair balance between the public interest and the interests of affected persons. The draft order, with any report by the Information Commissioner, would then be laid before Parliament or, as appropriate, the Scottish Parliament, National Assembly for Wales or the Northern Ireland Assembly. In all cases, it would be subjected to the relevant affirmative resolution procedure.

In the light of an adverse report by the Information Commissioner, a Minister might choose not to lay the draft order (or the report) before Parliament:

> If the Commissioner submits a report under subsection (4) and the designated authority proceeds to lay the draft order before Parliament, the designated authority must at the same time lay a copy of the report before Parliament.[285]

New section 50E provides an additional hurdle in relation to the making of information-sharing orders in that it provides for oversight by the Secretary of State having primary responsibility for government policy on data protection – the Secretary of State for Justice. His consent is necessary when an appropriate (Whitehall) Minister wishes to make an order; in the case of the devolved administrations he must be consulted. An appropriate Minister wishing to make an order which would impact on either information sharing or legislation in Scotland, Wales or Northern Ireland would have to obtain the consent of the appropriate devolved government.

Liberty "strongly opposes" these proposed amendments to the DPA, commenting adversely on "such broad and sweeping powers to make secondary legislation."[286] Its second reading briefing on the Bill cites in support the Joint Committee on Human Rights.[287] On the other hand, the Information Commissioner's Office believes the *Data*

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[283] New section 50A(4), DPA
[284] "modify" includes amend, add to, revoke or repeal – new section 50F, DPA
[285] New section 50D(6), DPA
[286] *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009
[287] Joint Committee on Human Rights, *Data Protection and Human Rights*, HL 72/HC 132, 2007-08 para 20

Protection Act 1998 as it stands, and the introduction in the present Bill of Commissioner's reports on draft information-sharing orders, provide appropriate safeguards for personal privacy.[288]

Clause 153 would insert five new sections (52A-52E) into the *Data Protection Act 1998*. These deal with the preparation, approval, publication and effect of a data-sharing code and any subsequent modifications to it. This clause represents the Government's response to the following recommendation in the *Data Sharing Review Report* of Richard Thomas (Information Commissioner) and Mark Walport (Director of the Wellcome Trust) published on 11 July 2008:

> Recommendation 7(a): We recommend that new primary legislation should place a statutory duty on the Information Commissioner to publish (after consultation) and periodically update a data-sharing code of practice. This should set the benchmark for guidance standards.[289]

Such a code would contain practical guidance on the sharing of personal data, both to meet the requirements of the DPA and to promote good practice having regard to the interests of data subjects and others. Provision is made for the Information Commissioner to consult both data controller and data subject interests.

New section 52B requires that the data-sharing code be submitted to the Secretary of State for approval – though this could only be withheld on grounds relating to the United Kingdom's international obligations. The Secretary of State would have to publish his reasons for withholding approval. Alternatively, if approval were granted, the Secretary of State would have to lay the code before Parliament. Its subsequent issue by the Information Commissioner would be dependant on neither House of Parliament passing a resolution, within 40 days, refusing approval – akin to the "negative resolution procedure" for statutory instruments.[290]

If the Information Commissioner's code is refused approval, either by the Secretary of State or Parliament, he would have to prepare another one. New section 52C requires the Information Commissioner to keep the data-sharing code under review and allows him to prepare an alteration or a replacement. An altered or replacement code would be subject to the same ministerial and Parliamentary approval procedures as set out in new section 52B taking into account that an accepted code would already be in place were approvals to the proposed alterations or replacement withheld.[291]

Under new section 52E, the data-sharing code would be admissible in evidence in any legal proceedings but would not of itself render a person liable to such proceedings. The explanatory notes to the *Coroners and Justice Bill 2008-09* provide examples of what this could mean in practice:

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288 *Coroners and Justice Bill: A commentary from the Information Commissioner's Office – Second Reading 26 January 2009*, Information Commissioner's Office, 22 January 2009

289 Richard Thomas and Mark Walport, *Data Sharing Review Report*, 11 July 2008

290 House of Commons Information Office Factsheet L7, *Statutory Instruments*, May 2008

291 New section 52C(4)

> New section 52E(1) to (5) provides that although the code is not legally binding, a person's breach or compliance with the Code is to be taken into account by the courts, the Information Tribunal and the Commissioner whenever it is relevant to a question arising in legal proceedings or in connection with the exercise of the Commissioner's functions. So, for example, the Information Commissioner is entitled to consider levels of compliance with the Data-sharing Code when evaluating whether to instigate enforcement action in relation to an instance of data-sharing. Equally a court would be entitled to have regard to levels of compliance with the code where it was attempting to resolve an issue relating to whether or not a particular person had fulfilled their legal obligations by complying with good practice and not acting negligently.[292]

As noted above, the Government believes that data sharing has an important role in improving public services while, at the same time, acknowledging the privacy rights of individuals. A leading article in the *Independent* provided one of the more hostile responses to the information-sharing proposals in the Bill:

> The Coroners and Justice Bill , published yesterday, proposes to give ministers the right to allow public bodies to exchange sensitive data about each of us between themselves. The effect would be to free organisations such as the Inland Revenue and the National Health Service from the present data protection laws which state that such information can only be used for the purpose for which we originally handed it over. Ministers would even be able, in theory, to transfer public records to private companies. If this Bill is passed by Parliament, it will represent yet another encroachment by the state into areas in which it has no business.
>
> […]
>
> There is a good reason why government agencies have hitherto not been allowed to pass around our personal data at will. And that is because it belongs to us, not the state. We provide this information to receive certain specified benefits and services, on the understanding that it will be kept strictly confidential. If ministers are unable to recognise why it is inappropriate for them to undermine our privacy in this way, they simply reveal themselves to be unfit to govern.[293]

C. Further data protection measures

Clause 154 introduces **Schedule 18** which details further amendments to the *Data Protection Act 1998*. Some of these are related to and enhance the wider audit and inspection powers the Information Commissioner's Office is to be given by the Bill. The effective application of these is likely to require an increase in resources: according to a talk given by the Deputy Information Commissioner on 17 September 2008, the Information Commissioner's Office had four people in its audit team.[294] **Part 1 of Schedule 18** contains the potential for increased funding.

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[292] *Explanatory Notes to the Coroners and Justice Bill*, 15 January 2009, para 728
[293] "Riding roughshod over our privacy", *Independent*, 15 January 2009
[294] Bird and Bird, *Data Protection Update*, 17 September 2008

Under section 17(1) of the *Data Protection Act* personal data must not be processed (e.g. obtained, held or disclosed) unless the data controller has registered with the Information Commissioner's Office. A data controller who contravenes this section is guilty of an offence. The process is called notification; an annual fee of £35 is payable; and it applies to a wide range of both public and private bodies. It is intended[295] that this flat rate fee be replaced with a tiered fee system, the level being determined by information provided by data controllers under notification regulations. This information about data controllers would not be subject to the public disclosure provisions that apply to other "registrable particulars"; this may be because such information might be commercially sensitive.

Part 3 of the schedule would enhance existing information-gathering powers the Information Commissioner has by virtue of section 43 (information notices) and section 44 (special information notices)[296] of the DPA. Most particularly, sections 43 and 44 would be amended to allow the Information Commissioner to specify the time and place at which specified information would have to be furnished.

Part 4 would place further restrictions on the use to which information gathered by the Information Commissioner's Office could be put. The intention is, taking into account the expanded information-gathering powers, to preserve the level of protection from self-incrimination that data controllers currently have under the DPA. For example, in relation to information notices, section 43(8) of the DPA already provides:

> A person shall not be required by virtue of this section to furnish the Commissioner with any information if the furnishing of that information would, by revealing evidence of the commission of any offence other than an offence under this Act, expose him to proceedings for that offence.

The additional protection appears even to extend, in prescribed circumstances, to offences under the DPA.[297]

Following a series of high-profile losses of personal data, both in the public and private sectors, a late amendment to the *Criminal Justice and Immigration Bill 2006-07* introduced section 55A into the DPA.[298] On commencement this will allow the Information Commissioner to issue a civil monetary penalty for serious breaches of the data protection principles. **Part 5** of Schedule 18 of the current Bill would exempt data controllers if such a breach came to light either as a result of one of the new assessment notices or where a data controller has consented to an assessment under existing provisions[299] of the DPA. The rationale for this, at least in connection with the latter of these exemptions, was given in a Ministry of Justice consultation response in November 2008:

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295 *Explanatory Notes to the Coroners and Justice Bill*, 15 January 2009, para 732
296 Special information notices relate to the processing of data for journalistic, artistic and literary purposes
297 For information notices, see new sections 43(8B-C)
298 "Information Commissioner gets power to fine for privacy breaches", OUT-LAW News, 12 May 2008
299 Section 51(7), DPA

> Government proposes to legislate to exempt a data controller who has consented to a GPA [Good Practice Assessment] from the new civil penalty should a breach of the DPA be found in the course of that assessment. The ICO will, however, retain the power to use existing powers to issue Enforcement and Information Notices and powers to undertake prosecutions.
>
> This measure is designed to promote good practice, allowing data controllers to invite scrutiny, safe in the knowledge that no penalty would be imposed for problems identified.[300]

Schedule 9 of the DPA provides for a circuit judge to grant a warrant to the Information Commissioner; such a warrant provides the Commissioner or any of his officers to enter and search premises where breaches of the data protection principles or an offence under the DPA is reasonably suspected. **Part 6** of the Schedule would extend the powers such a warrant may authorise. The additions to the range of existing provisions primarily comprise the imposition of a requirement on any person on the premises to provide relevant explanations and information – essentially allowing interviews to be conducted. An offence would be committed in respect of responses that were either intentionally or recklessly false. There are also qualified restrictions on self-incrimination.

[300] *The Information Commissioner's inspection powers and funding arrangements under the Data Protection Act 1998 - Summary of responses*, Ministry of Justice, 24 November 2008