House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny:
Coroners and Justice
Bill

Eighth Report of Session 2008-09

Report, together with formal minutes and written evidence

Ordered by The House of Lords to be printed 17 March 2009
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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

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Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), Emily Gregory and John Porter (Committee Assistants), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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Summary

In this report, the Committee raises the following concerns about the Coroners and Justice Bill.

Coroners reform

The Committee considers that clauses 11 to 13, which provide for the Secretary of State to certify certain inquests so that they can go ahead without a jury and without the participation of the bereaved family, should be dropped from the Bill. The Committee does not consider that the Government has made the case for this provision; the proposal is too broad; and the safeguards against infringement of Article 2 of the European Convention are inadequate.

Whilst welcoming the implementation of numerous detailed reforms of the coroners system, which together enhance the protection and promotion of human rights, the Committee raises a number of detailed points about the scope of the provisions, the proposed reduction in the size of juries in inquests, and legal aid.

Data protection

The Committee also supports the omission from the Bill of clause 154, which provides for the creation of broad Information Sharing Orders. It has numerous concerns about how these new Orders would work in practice which it will report on in more detail if the clause is not withdrawn by the Government, as has been widely reported in the press. It also proposes that the new power, in clause 153, for the Information Commissioner to undertake mandatory assessments of compliance with the Data Protection Act should be extended to the private sector. The Committee supports the Information Commissioner’s request for the power to seek sanctions against public authorities who fail to comply with an assessment notice.

Other issues

The report also deals with:

- witness anonymity orders;
- reform of partial defences to murder;
- encouraging or assisting suicide;
- possession of a prohibited image of a child;
- public order offences;
- release of long term prisoners;
- bail in murder cases;
- vulnerable and intimidated witnesses;
• live links; and
• criminal memoirs

The Committee is critical of the breadth of the Bill and the legal complexity and diversity of the topics it covers, given the limited time provided for scrutiny. The Government should have introduced two or three separate bills, each of which would have been substantial pieces of legislation in their own right.
Bill drawn to the special attention of both Houses: Coroners and Justice Bill

1. Introduction

Date introduced to first House: 14 January 2009
Date introduced to second House: 14 January 2009
Current Bill Number: Bill 72

1.1 The Coroners and Justice Bill was introduced in the House of Commons on 14 January 2009 and had its second reading on 26 January 2009. The Public Bill Committee on the Bill reported on 10 March 2009. The Bill is accompanied by a statement by the Secretary of State for Justice, Jack Straw MP, pursuant to Section 19(1)(a) of the Human Rights Act 1998 that the Bill is compatible with Convention rights. A fuller explanation of the Government’s views on compatibility with the ECHR is provided in the Explanatory Notes and we comment on those notes below.¹

Background

1.2 The first part of the Bill proposes reform of the coroners and death certification system in England and Wales. These reforms follow the publication of a draft Coroners Bill, in June 2006, was produced after recommendations for reform were made by the Shipman inquiry and the Luce review in 2003.² The Government explains that these provisions are “part of an overall package of reform aimed at addressing the weaknesses in the present coroner and death certification systems”.³

1.3 Part 2 proposes a number of amendments to the criminal law. These include changes in respect of partial defences to murder and the offence and defence of infanticide; and changes to the law on assisted suicide. It also proposes a new offence of possession of prohibited images of children and changes to the law of incitement to hatred on the grounds of sexual orientation to remove a saving clause inserted by the House of Lords into the Criminal Justice and Immigration Act 2008. Part 3 of the Bill proposes changes to the law of criminal evidence and procedure. Significant proposals include re-enactment of the Criminal Evidence (Witness Anonymity) Act 2008 with some modifications, the extension of the use of live links in criminal cases and changes in respect of bail in murder cases. The Bill also deals with sentencing, further criminal justice issues and provisions in respect of civil and criminal legal aid. Part 7 proposes a new scheme to enable the courts to deprive convicted persons of profits from the sale of criminal memoirs or from paid speaking engagements or interviews. Part 8 makes wide ranging proposals for the reform of data protection law, including in respect of the powers of Government to open new information sharing gateways in secondary legislation.

¹ Bill 9 – EN, paragraphs 793 – 993.
³ Bill 9 – EN, paragraph 17.
Explanatory Notes

1.4 We are pleased to report that the Explanatory Notes accompanying this Bill provide a relatively full account of the Government’s view on the Bill’s compatibility with the European Convention on Human Rights (ECHR). Although we disagree with some aspects of the Government’s analysis, the Explanatory Notes generally identify relevant issues which may engage Convention rights, apply the correct tests, refer to relevant case-law and briefly present the Government’s reasons for concluding that the provisions in the Bill are Convention compatible. We address a few notable exceptions below. We welcome the inclusion of detailed Explanatory Notes on the implications of the Bill for Convention rights and we commend to other Departments the approach taken in relation to this Bill.

Evidence and acknowledgements

1.5 We wrote to the Secretary of State for Justice to raise a number of concerns on 12 February 2009 and 17 February 2009.4 We received a response from Bridget Prentice MP, Parliamentary Under-Secretary of State, on 26 February 2009.5 We welcome the prompt response provided by the Secretary of State to our request for further information, which has assisted parliamentary scrutiny of the Bill.

1.6 We also invited the Information Commissioner to comment on the issues which we raised in respect of the data sharing provisions in Part 8 of the Bill and received a full response from his office on 27 February 2009.6 We publish our correspondence with this Report.

1.7 We invited submissions on the Government’s draft legislative programme, including in respect of the proposed Coroners and Death Certification Bill, which we indicated would be one of the three Bills which we would prioritise in this session. Following our recent practice, we published our correspondence with the Secretary of State and invited further submissions on the human rights implications of the Bill. We publish the submissions received together with this Report. We welcome the engagement of the public and interested organisations in our legislative scrutiny work.

1.8 We would like to record our particular thanks to Raju Bhatt, of Bhatt Murphy Solicitors, our Specialist Adviser for the purposes of Part 1 of the Bill (Coroners Reform).

Significant human rights issues

1.9 There are a number of significant human rights issues that arise in the context of this Bill. These issues are considered, in broad order of significance, below. For the purposes of increasing the accessibility of our Report, we have divided our concerns into six separate chapters:

- Certified or “secret” inquests;
- Data protection;

4 Ev 1 - 11
5 Ev 11 - 29
6 Ev 32 - 36
• Coroners reform;
• Witness anonymity;
• Changes to the criminal law;
• Procedural changes.

**Effective parliamentary scrutiny**

1.10 The Bill contains provisions which were originally expected to be in two separate Bills trailed in the draft legislative programme: the Coroners and Death Certification Bill and the Law Reform, Victims and Witnesses Bill. In addition, it proposes significant changes to data protection law and to the powers of the Information Commissioner.

1.11 The **breadth and size of the Bill and the legal complexity and diversity of the topics it covers** have been the subject of concern during the Bill’s passage through the House of Commons given the limited time provided for scrutiny. We add our voice to those concerns. Large, multi-purpose bills of this sort are almost impossible to scrutinise effectively within the limited timescale provided by the Government. Given the range and significance of the human rights issues raised in this bill, the Government should have introduced two or three separate bills, each of which would have been substantial pieces of legislation in their own right or ensured that there was sufficient time for full pre-legislative and Committee stage scrutiny in the House of Commons. We welcome the fact that two days have been given over for Report stage in the House of Commons, a step not taken in relation to previous Bills of similar size, including the Criminal Justice and Immigration Bill, which we considered in the last session.

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8 See for example, HC Deb, 26 Jan 2009, Col 66.
2. Certified or “secret” inquests

Certified investigations

1.12 The bulk of the evidence which we received on the Bill deals with the issue of certified investigations, or the proposals for “secret inquests”, in Clause 11. The Government has objected to the categorisation of these provisions as “secret inquest rules”, but we consider the description warranted. As Justice explained in their evidence:

The effect of this clause is that in any case where the state is alleged to be responsible for a person’s death – for example the killing of Jean Charles de Menezes by Metropolitan Police or the death of Baha Mousa at the hands of British soldiers in Basra – the Secretary of State will be free to appoint a coroner to sit in closed session without a jury so long as he or she is satisfied that it is in the public interest to do so because of the sensitive nature of the material that is likely to be considered.9

1.13 We deal with this issue separately from the rest of the Government’s proposals on coroners reform as these proposals raise distinct questions about how the Government proposes to reconcile its positive duty under Article 2 ECHR to secure an effective investigation into an individual death; the public interest in preserving national security; and the Government’s associated duty to protect the right to life enjoyed by everyone in the UK.

1.14 Clause 11 would enable the Secretary of State to certify an investigation into a person’s death where he or she considers that the investigation will concern or involve a matter that should not be made public for certain specified reasons. The Bill also makes provision for the admissibility of intercept evidence in certified inquests.10 These provisions correspond to earlier proposals withdrawn from the Counter-Terrorism Bill during the last session. We expressed concerns that these earlier proposals would be incompatible with the obligations of the UK under Article 2 ECHR and proposed that they be reconsidered in the context of this Bill.11 The proposals have been publicised widely, and have been subject to extensive debate in the House of Commons Public Bill Committee. Some press reports suggest that additional safeguards have been introduced since these proposals were withdrawn from the Counter-Terrorism Bill. In our view, for reasons we explain below, the proposals are broadly the same and raise the same concerns.

The requirements of Article 2 ECHR

1.15 It is a significant part of the procedural requirement of the right to life in Article 2 ECHR that where someone dies in circumstances which engage the State’s obligations to protect the right to life an investigation must be conducted which is, among other things, independent of the State and the parties, subject to public scrutiny and which provides for the effective participation of the family of the deceased. Broadly, an Article 2 ECHR compliant investigation is (a) initiated by the state; (b) independent of both the state and

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9 Ev 55
10 Clause 13
the parties; (c) effective and prompt; (d) open to public scrutiny and (e) supports the participation of the next of kin. The last of these requirements is important. Bereaved families must be involved in any Convention compliant death investigation to the extent “necessary to safeguard [their] legitimate interest”. This may include certain positive obligations on the State, including obligations in respect of legal aid and other procedural requirements.\textsuperscript{12}

1.16 These proposals provide for the conduct of at least part of an inquest without a jury and without the participation of the bereaved family, at the instigation of the Secretary of State. A number of witnesses told us that these provisions would breach the requirements for independence, public scrutiny and family involvement.\textsuperscript{13} Human Rights Watch told us:

We remain concerned…that certification represents an unacceptable intrusion by the executive branch into investigations that must ultimately determine state responsibility in a suspicious death….Human Rights Watch is convinced that closed inquests under the terms of the Coroners and Justice Bill are incompatible with the UK’s obligations under international human rights law. Intrusion of the executive branch into investigations of wrongful deaths does not appear to be necessary in order to protect sensitive material or witnesses and would damage the credibility of inquests and their findings\textsuperscript{14}

1.17 Inquest have produced a detailed briefing on the legal implications of this section of the Bill. They stress:

There can be no public scrutiny where core evidence is withheld from the public, and similarly it can never be appropriate for the next of kin to be denied the core facts surrounding the death of a loved one. Again, the element of public scrutiny must be sufficient in order to “secure accountability in practice as in theory” (Jordan and Middleton)\textsuperscript{15}

1.18 The Independent Police Complaints Commission (IPCC) has told us that, in its view, the requirements for a sufficient element of public scrutiny and the involvement of the bereaved family to an “appropriate extent” will not be met when “non-jury inquests are held and relevant information is not disclosed to the next of kin or the public.”\textsuperscript{16}

1.19 The Explanatory Notes explain the Government’s view of Article 2 ECHR compliance. They do not directly address the questions of independence or public scrutiny:

[T]he next-of-kin of the deceased must be involved in the procedure to “the extent necessary to safeguard their legitimate interests”. Article 2 does not therefore give the public and next of kin an absolute right to be present at all times or to see all of the material relevant to the investigation. The Government considers that the courts are very likely to accept that it is consistent with Article 2 for sensitive material not to

\textsuperscript{12} Jordan v United Kingdom (2003) 37 EHRR 2, para 109, R (Khan) v Secretary of State for Health [2004] 1 WLR 971. Further explanation of the scope of the Article 2 ECHR duty can be found in our predecessor Committee’s report on deaths in custody. See Third Report of Session 2004-05, Deaths in Custody, HL 15-I, HC 137-I, Chapter 10.

\textsuperscript{13} See for example, Ev 47, Ev 42-43.

\textsuperscript{14} Ev 47

\textsuperscript{15} Inquest, Second Reading Briefing, February 2009

\textsuperscript{16} Ev 49
be made public or disclosed to the next-of-kin where this is required by a substantial public interest.\textsuperscript{17}

1.20 We asked the Secretary of State for details of any legal authority to support its position that the proposals are likely to be compatible with Article 2 ECHR. The Government reply refers to various cases from both the European Court of Human Rights and the UK domestic courts which the Government considers supports its position. Each of the cases deal with the recognition of the court that certain material may be withheld from family members (for example, sensitive material in police reports or the identity of a particularly sensitive witness). We accept that the right of the bereaved family under Article 2 ECHR only extends to “the extent necessary to safeguard their legitimate interests”. However, in each of the cases on which the Minister relies, the court was referring to its own analysis that Article 2 ECHR did not necessarily require a family to be provided with a particular piece of information or to a specified individual’s identity in a particular case. This is a far cry from providing compelling authority that a blanket procedure that would allow the Secretary of State to instigate a special process whereby the only possible result could be exclusion of the family and the public from a part of the inquiry would be compatible with Article 2 ECHR. \textbf{We consider that there remains a significant risk that the proposed scheme will operate in a way which is incompatible with Article 2 ECHR.}

1.21 The Explanatory Notes accompanying the Bill identify a number of additional reasons or safeguards which the Government considers supports its view that these proposals will be compatible with the right to life. We examine these below.

\textbf{Scope}

1.22 The Secretary of State will be able to certify an investigation for the following reasons:

- in order to protect the interests of (i) national security, (ii) the relationship between the United Kingdom and another country; or (iii) preventing and detecting crime;

- in order to protect the safety of a witness or other person; or

- otherwise in order to prevent real harm to the public interest.

The option to certify in order to protect the interests of the prevention or detection of crime or to protect the safety of a witness or other person has been added since the proposal for secret inquests were removed from the Counter-Terrorism Bill. The public interest test remains very broad, albeit with the addition that the reason must be to prevent ‘real harm’ to the public interest. The ability to certify to protect a relationship with another country could, for example, have enabled a certificate to be issued in respect of an investigation into the death of UK armed forces personnel as a result of friendly fire by allies (see for example, the recent inquest into the death of Lance Corporal Matty Hull, who died after a “friendly fire” incident involving a US pilot).

1.23 Witnesses raised concerns about the scope of the reasons for certification. Liberty told us:

\textsuperscript{17} EN, paragraph 803
It is concerning that the rationale and scope for an already controversial proposal has been widened in this way.  

1.24 The British Legion raised a particular concern about the implication of certified inquests in order to meet the diplomatic objections of third countries:

As long as Clause 11 remains in the Bill, we regret that it may not be possible to dislodge the perception that crucial evidence will be heard behind closed doors. Additionally, the grounds for certification, as defined, seem to suggest the objection of another country and/or diplomatic relations will be placed above the need for a grieving family to find the truth.

1.25 We asked the Government for further information. The Minister explained that the Government was “looking again” at the criteria and that earlier changes had been designed to meet concerns that the earlier “public interest” test had been overly broad. The Minister explain that the third reason, based on “real harm” to the public interest, is necessary as a catch-all provision where the other grounds may not apply:

Clause 11(2)(c) is intended to capture any circumstance not captured under the provisions in Clause 11(2)(a) or (b). For that reason, it is not possible to provide a firm example of the type of case that would fall within this provision. Inquests which are subject to certificate are likely to be very rare and it is accepted that paragraphs (a) and (b) are likely to cover most scenarios where an investigation may need to be certified. However, it is never possible to fully anticipate all the circumstances that might arise.

1.26 We note that the Government had intended to tighten up the grounds for certification, but consider that the changes have not significantly altered the very broad scope of the original proposals. In the light of the fact that the right to life is so clearly engaged in this case, we are alarmed by the Government’s concession that a broad public interest test has been deployed “just in case” a future unforeseen concern might arise.

Safeguards

1.27 In the Explanatory Notes, the Government outlines a number of additional safeguards which it considers will protect the interests of families and other interested parties:

- that Coroners rules will enable the coroner to appoint independent counsel to the inquest (as existing rules provide) and the Government envisages that this counsel would act like a special advocate and would be responsible for testing the evidence presented;

- rules will make clear that persons may be present for those parts of an inquest which do not deal with sensitive material; and

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18 Ev 61
19 Ev 72
20 Ev 14
• the certification decision will be open to judicial review.\textsuperscript{21}

1.28 We note that the Government consider that the public and bereaved families are likely to be able to attend any part of an inquest where sensitive information is not considered. We consider the issues of special advocates and judicial oversight below.

\textit{Special advocates}

1.29 There is no express provision on the face of the Bill for special advocates to be available to represent the interests of bereaved families in a certified inquest. The proposal by the Government falls far short of the requirement that such special advocates be appointed. Currently, the coroner may appoint independent counsel to act as an adviser to the inquest. This counsel acts in the interests of the inquiry, not the interests of any individual party. His or her overriding duty is to the coroner, unlike a special advocate whose duty is to the individual whose interests he or she is appointed to represent.\textsuperscript{22} In the context of an inquest, a number of individual interested parties may be represented. For example, in a case involving a death in custody, the interested parties may include the police authority, a prison authority, the Prison Service, the Justice Secretary and the bereaved family. This in turn may lead to a conflict of interest if an individual counsel were expected to represent all their interests in a balanced way.

1.30 We asked the Government how the proposals in the Explanatory Notes might help bereaved families (and if this was an important safeguard, why shouldn’t it be provided on the face of the Bill). The Minister explained that it would be open to the coroner to appoint multiple counsel to assist the inquest and that “if counsel to the inquest performs the task of testing the evidence diligently then Article 2 will be satisfied and it is not necessary for a special advocate to be provided.” The Minister emphasised the Government’s view that Article 2 ECHR would be satisfied even if the coroner chose not to appoint a counsel to assist the inquiry in this way.\textsuperscript{23} The Government has not explained fully how the ability of the coroner to appoint counsel to the inquest will assist the participation of bereaved family members in certified inquests. There remain a number of difficulties with the Government’s proposal in the Explanatory Notes that counsel for the inquiry act ‘as special advocate’, including how the counsel would resolve any potential conflict of interest between individual interested parties and whether counsel would need to be approved by the Secretary of State if they were not special advocates with appropriate security clearance. In our view, if the family of the bereaved are to be excluded from any part of the inquest, it is vital that they be represented in the closed proceedings by a special advocate whose function is to represent the interests for family.

\textit{Certification and Judicial Review}

1.31 In order to issue a certificate, the Secretary of State may certify an investigation if he or she is “of the opinion” that the investigation will involve a matter that should not be made public for any of the reasons set out above. There is no requirement that the Secretary of State should have reasonable grounds for his or her opinion. The Secretary of State may

\textsuperscript{21} EN, paragraphs 804 - 807

\textsuperscript{22} In proceedings under the Prevention of Terrorism Act 2005, Rule 76.24 of the Civil Procedure Rules, explains that the function of a special advocate is to represent the interests of a relevant party.

\textsuperscript{23} Ev 16
not certify an investigation if, in his or her opinion, other measures would be adequate to prevent the matter being made public. Again the Secretary of State is not expressly required to have reasonable grounds for his or her conclusion. In correspondence, the Minister accepted that the opinion of the Minister must be “honestly held and must rest on a reasonable basis” but told us that “we do not feel that it is necessary to state this on the face of this Bill as this precedent already exists in other legislation and the Minister’s decision would be tested on this basis at any judicial review.”

The Bill makes provision for the Secretary of State to notify individuals of his or her decision to issue a certificate. A certificate will not have effect until 14 days after it is issued or, if judicial review proceedings are initiated, until they are concluded. We have considered precedents similar to those cited by the Government in previous reports. We believe that this formulation will change the degree of scrutiny to which the Minister’s decision will be subject on judicial review.

1.32 In debates on the Bill, the Justice Secretary has argued that the potential to apply for a Public Interest Immunity (PII) certificate in an inquest would not meet the Government’s concerns. He notes that the State can simply discontinue a prosecution in the event that a PII claim is rejected by the criminal court, but that option to discontinue is not available in the context of the inquest process. We asked what the Government would do if judicial review led to a certificate being overturned, and why this would not pose the same problem which the Government considers would be associated with an application for PII. The Minister merely told us that the Government would seek leave to appeal to the Court of Appeal.

1.33 We consider that the same problem which the Secretary of State has identified in relation to a claim for public interest immunity clearly exists in respect of these proposals. On judicial review, the Secretary of State’s decision to certify an inquest may be overturned. The only real distinction, in our view, would be the basis for the review of the Secretary of State’s decision to certify, which we consider may be less rigorous than in cases concerning applications for public interest immunity. Human Rights Watch share this concern:

Human Rights Watch consider the grounds for certification…to be overly broad and likely to render judicial challenges virtually impossible to win.

1.34 We do not consider that the Government has provided a satisfactory justification for its view that there is no need to set out, on the face of the Bill, a requirement that the Minister’s view be honestly and reasonably held. Despite the Government’s assertion that the judicial oversight proposed is adequate, we are concerned that Clause 11 is designed with this purpose in mind: to secure greater protection for information which the Government considers should not be disclosed in the public interest without the rigorous scrutiny which would be applied by the court on an application for PII, where the onus clearly rests on the Secretary of State to persuade the coroner, and if necessary,

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24 Ev 16
26 We would note however, that our domestic courts, in the case of Binyam Mohammed have recently illustrated how information which the Government wishes to keep out of the public domain can be protected by the application of PII. See R(Binyam Mohamed) v Secretary of State for Foreign Affairs [2009] EWHC 152 (Admin).
27 Ev 47
the court, that there are good reasons why certain information should not be disclosed.\(^28\)

1.35 Where a certificate is issued, an investigation must be conducted by a High Court judge nominated by the Lord Chief Justice and the inquest must be held or, if already begun, continued, without a jury. The earlier Counter-Terrorism Bill proposals would have enabled the Secretary of State to appoint a coroner from a list of approved coroners. We strongly criticised this lack of independence in our report on the Counter-Terrorism Bill.\(^29\)

1.36 We welcome the decision to remove the power for the Secretary of State to appoint a coroner to hear a certified inquest. We are concerned however that the proposals have been amended in a way which widens their scope without introducing any additional significant safeguards.

**Are the proposals necessary?**

1.37 The Explanatory Notes explain the Government’s view that these proposals are necessary to ensure that investigations go ahead in cases where disclosure may cause public interest or national security concerns:

> Article 2 requires not only an independent and effective investigation of the circumstances of the death but also requires the State to provide a means of properly protecting the interests of the deceased’s family. Proceedings at a coroner’s inquest are not, at present, considered to be sufficient to meet Article 2 obligations in such cases since the inquest must be held with a jury but the material cannot be disclosed to the jury members or to the public or interested persons.\(^30\)

1.38 The law as it currently stands allows the Coroner to sit *in camera* on the grounds of national security (a very rare occurrence in any event), to rule on a claim of Public Interest Immunity (PII) (a more frequent occurrence), to seek appropriate and enforceable undertakings of confidentiality from interested persons, to order reporting restrictions, and to order special measures for witnesses (including anonymity and provision to give evidence by video link) where necessary. In the past, these measures have been used to deal with a number of highly difficult, contentious and sensitive inquests, for example, De Menezes, the “Nimrod” deaths and “friendly fire” deaths.

1.39 During Public Bill Committee proceedings, the Minister was asked to explain how many cases had been affected by the absence of the proposed ‘certified’ investigation procedure. The Minister explained that there had been two cases which had been affected.\(^31\) We asked for confirmation of the cases which have been affected by the absence of this procedure. The Minister has since confirmed one case has been affected, involving a

\(^{28}\) The law of public interest immunity (PII) already applies to inquests. Applications may be made to the coroner to seek a PII certificate to prevent disclosure of certain categories of information on the grounds of damage to the public interest.

\(^{29}\) Thirtieth Report of 2007-08, paragraph 115.

\(^{30}\) EN, paragraph 802

\(^{31}\) PBC, 3 Feb 2009, Q 136.
police shooting, which has been stalled because material which is relevant for the purposes of the inquest cannot be seen by the coroner or the jury that is required to determine the facts of the death. Another possible case has since been resolved, as the Coroner has concluded that it would be possible to have an Article 2 ECHR compliant inquest without disclosure of the sensitive material concerned.\textsuperscript{32} Inquest said:

This means as far as we are aware there is only one case, that of Azelle Rodney, on which the Government is basing these highly contentious proposals.\textsuperscript{33}

1.40 The IPCC, which investigates all deaths involving contact with the police, wrote to tell us:

The IPCC does not therefore believe that there is any evidence to support the view that there is any requirement for a non-jury inquest for deaths following police contact other than when intercept evidence is an issue.\textsuperscript{34}

1.41 We consider that, in the light of the importance of an open, transparent investigation for the purposes of Article 2 ECHR, the justification for the introduction of proposals which give the State significant power to direct or control the manner in which evidence is produced before the inquiry must be substantial. Proposals which involve the State in this process and enable the exclusion of the public and bereaved family members must be subject to close scrutiny. We take the view that, in order to be compatible with Article 2 ECHR, any proposals must be no more than necessary and accompanied by adequate safeguards, including provision for adequate judicial oversight. We are bolstered in our view by the recent report of the UN Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which categorically urges States:

\begin{itemize}
\item to reduce to a minimum the restrictions of transparency founded on concepts of State secrecy and national security. Information and evidence concerning the civil, criminal or political liability of State representatives, including intelligence agents, for violations of human rights must not be considered worthy of protection as State secrets.\textsuperscript{35}
\end{itemize}

\textsuperscript{32} In the inquest into the death of Terry Nicholas, LM Tagliavini, Assistant Deputy Coroner for West London, viewed the used and unused material in the case in unredacted form, in so far as she had clearance to do so (some material, likely to be intercept evidence, would need to be considered by a High Court judge under RIPA, Section 18(8)). She considered that some of the redaction was overly cautious, but that it was more likely that not that the redacted material and the material she had not seen was not essential to the interests of justice in the inquest. In any event, she considered that the redacted material which she had seen could be the subject of a PII application or otherwise not disclosed. Decision dated 6 January 2009.

\textsuperscript{33} Ev 53. Azelle Rodney was a young man shot and killed by police officers in London in 2005. His death has already been the subject of an investigation by the IPCC. On 2 August 2007, the coroner decided that he could not proceed with the inquest in this case as a result of the heavy redaction of material evidence submitted to the inquest by the police, some accompanied by statements cleared by the IPCC, which gave the ‘gist’ of some of the material available. The coroner accepted that there was a substantial part of this evidence, which was based on police intelligence, which the IPCC could not lawfully disclose, even to the coroner. Although part of the material might lawfully be disclosed to the coroner subject to any application for PII, some material would not be available to inform the inquest as it could not be disclosed to either the coroner or the jury. Despite this difficulty, the coroner remained under a duty to conduct an inquest. See decision of Andrew Walker, HM Deputy Coroner, Hornsey, dated 2 August 2007.

\textsuperscript{34} Ev 49

1.42 We are not satisfied that a case has been made for the broad provisions under Clauses 11-13, and we would recommend that they be deleted from the Bill. We recommend the following amendments to the Bill:36

Page 6, Line 1, Leave out Clause 11
Page 7, Line 1, Leave out Clause 12
Page 7, Line 18, Leave out Clause 13

36 We understand that similar amendments were tabled on 11 March 2009, to delete clauses 11 and 12 from the Bill. For completeness, we recommend the deletion of all three clauses.
3. Data Protection

1.43 The Bill proposes to amend the Data Protection Act 1998 (DPA) in a number of ways: it introduces a number of new powers for the Information Commissioner and creates a new broad power for the creation of information sharing gateways by secondary legislation.

Information Sharing Orders and the right to respect for private life

1.44 Clause 154 of the Bill provides relevant Ministers, including Ministers in the devolved executives, with a broad power to open an information sharing gateway between two or more persons, by statutory instrument. As the Explanatory Notes make clear:

This clause creates a free-standing power for ministers to enact secondary legislation which will have the effect of removing all barriers to data-sharing between two or more persons, where the sharing concerns at least in part the sharing of personal data, where the sharing is necessary to achieve a policy objective, where to do so is proportionate, and where it strikes a fair balance between the public interest and the rights of any individual effected by the data-sharing.37

1.45 The Government accepts that these provisions engage the right to respect for private and family life (Article 8 ECHR). The Government considers that these provisions are justified and proportionate but the Explanatory Notes provide very little justification for the Government’s view that these powers will always be exercised in a Convention compatible way. They explain that an analysis will need to be completed as each Information Sharing Order (ISO) is proposed, as each ISO will serve its own purpose; but, section 6 Human Rights Act 1998 (HRA) will ensure that a Minister will not propose any secondary legislation that is incompatible with the right to respect for personal information. We and our predecessors have consistently rejected this approach in our earlier reports and have called, where necessary, for safeguards to be placed on the face of the enabling legislation to reduce any risk that delegated powers are exercised in a way which is incompatible with the Convention.38 We reiterate our view that, in principle, information sharing powers should be adequately defined in primary legislation, accompanied by appropriate safeguards and subject to the application of the Data Protection Act 1998.

1.46 On 7 and 8 March 2009, press reports indicated that the Secretary of State for Justice intended to ask for Cabinet level agreement to remove this Clause from the Bill.39 It now seems likely that Government amendments will be tabled before Report stage in the House of Commons removing clause 154 from the Bill, with a Government consultation on future proposals on information sharing to be published in due course.40 We would welcome confirmation that the Government has decided to drop these proposals. We recommend that the relevant amendments are tabled as soon as possible and that the

37 EN, paragraph 962
39 See for example, Telegraph, Government abandons data-sharing scheme, 7 March 2009
40 PBC, 10 Mar 2009, Col 586. The Parliamentary Under-Secretary of State confirmed the Government’s intention to remove this clause to the Public Bill Committee. At the time this report was agreed, no Government amendments had yet been tabled for Report stage in the House of Commons.
Secretary of State should make a statement to Parliament on his decision and the Government’s plans for taking this issue forward. No Government amendments have yet been tabled to the Bill for this purpose. For the avoidance of doubt, we recommend that clause 154 be deleted from the Bill:

Page 101, Line 12, Leave out Clause 154

1.47 We received a number of submissions from interested organisations and individuals, expressing concern about the scope of these provisions. We raised a number of issues in correspondence with the Minister and the Information Commissioner about the breadth and purpose of clause 154. We consider each of these in brief below. We recommend that the Government take on board the concerns we received from interested organisations and individuals when formulating any further consultation on information sharing.

1.48 If these proposals are part of the Bill introduced to the House of Lords, we may consider a further report to address our detailed concerns about the Government’s proposals for ISOs.

**Primary vs secondary legislation**

1.49 In our recent report, *Data Protection and Human Rights*, we expressed concerns that primary legislation proposing information sharing or creating new proposals for information sharing gateways often provided very few safeguards on the face of the legislation, allowing very little opportunity for parliamentary scrutiny of whether the relevant safeguards were adequate to protect the individual right to respect for private life.41

1.50 These proposals raise these concerns on a grand scale, but propose alternative safeguards intended to ensure that adequate opportunity for parliamentary scrutiny is provided as and when new information sharing gateways are created. Ideally, safeguards should be provided in primary legislation. If adequate safeguards were in place in the enabling primary legislation, a narrow fast-track ISO procedure could be a positive development in terms of parliamentary oversight of information sharing proposals, particularly given the limited scrutiny of existing information sharing provisions in primary legislation. However, for the reasons set out below, we have significant concerns about the scope of these proposals and the associated safeguards in clause 154.

**The scope of the order**

1.51 The recent Thomas-Walport review, on which these proposals are based, suggested that the Government might require an exceptional power to create new information sharing powers by secondary legislation, but that such a power should be accompanied by safeguards to ensure adequate parliamentary and wider scrutiny for compatibility with the right to respect for personal information.42 The proposed powers in the Bill appear to be far from exceptional and their scope is exceedingly broad. For example:

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• An ISO may relate to many different kinds of information and is not limited to personal data. An ISO could include commercial information, medical information including medical records, information stored on central databases such as the National DNA database and the children’s database. The Thomas-Walport review recommended that information sharing on this scale should not be authorised by ISO.43

• Information may be shared between Government, agencies or other public authorities and private individuals and organisations, including some who will not generally, on the Government’s reasoning, be subject to the provisions of the HRA 1998 and the duty to exercise their powers in a Convention compatible way.

• Similarly, private individuals and organisations may be required to share information with Government, agencies and other official authorities.

• There is no limitation in respect of information gathered before these provisions came into force (so, information which may have been provided for a single purpose some time ago, may now be subject to a wide order permitting it to be shared among multiple parties for multiple purposes). This is of particular concern, as information will not have been provided at that stage, in the expectation that it would later be shared in this way.

• An order made under this section may amend any legislation, except the Regulation of Investigatory Powers Act 2000. This would include power to amend the HRA 1998 and the DPA 1998. We have previously made clear that such a wide order-making power is not acceptable. Ministers should never be given the power to amend, by order, legislation as significant for human rights as the HRA and the DPA.44

1.52 Certain information, including certain types of personal information, is accepted by the European Court of Human Rights as having a greater sensitivity and a greater need for caution in respect of information sharing and the need for respect for private life (as guaranteed by Article 8 ECHR). Similarly, the DPA 1998 recognises “sensitive personal data” which requires greater protection than all other “personal data”. We asked the Minister about a number of these concerns.45 Her responses to our questions add little to the discussion of these proposals during the debate in the House of Commons Public Bill Committee.46

1.53 The Information Commissioner’s responses to our questions were helpful. He does not consider that distinctions based on perceived sensitivities of categories of information are helpful. He notes that existing distinctions have caused some difficulties and stresses that in some circumstances, seemingly innocuous information may be extremely sensitive (for example, in respect of witnesses who require protection). We note the Information Commissioner’s views. However, we are concerned that his caution around the exemption of particular categories of information from the ISO process seems inconsistent with the conclusion of the Thomas-Walport review that information of the type stored on the National DNA Database would not be suitable for sharing under a fast-track procedure.

43 Ibid, 8.47.
45 Ev 6 - 8
46 Ev 20 - 23
1.54 The Information Commissioner shares our concern at the breadth of the effect of
ISOs on primary legislation. We recommend that the Government should take up the
Information Commissioner’s suggestion that a clear savings clause for the continued
application of the DPA 1998 and the HRA 1998 is necessary.

The test: Ministerial policy and proportionality

1.55 The relevant Minister may make an ISO if he or she is “satisfied (a) that the sharing of
information enabled by the order is necessary to secure a relevant policy objective, (b) that
the effect of the provision made by the order is proportionate to that policy objective, and
that the provision made by the order strikes a fair balance between the public interest and
the interests of any person affected by it.” This is an unusually broad test. In information
sharing powers recently considered by the Committee, information sharing has generally
been tied to an individual’s public functions, not the policy objective of an individual
Minister. The Government explains its view that this test is an appropriate safeguard for
the protection of the right to respect for personal information. A Minister must act in
pursuit of a policy objective, but is bound by the HRA 1998 to act in a Convention
compatible way. The ISO must be proportionate to the policy objective and strike a fair
balance between the subject of the information being shared and the public interest. This,
together with parliamentary scrutiny, should, in the Government’s view, satisfy Article 8(2)
ECHR.47

1.56 This reasoning is very difficult to follow. In order to be compatible with Article 8(2),
information can only be shared for the purpose of one of the “legitimate aims” identified
by that article. The proportionality test engaged by Article 8(2) does not equate to the
“striking of a fair balance” between the public interest in meeting the policy interests of a
Minister and the interests of an individual or a group of individuals in keeping information
about themselves private. The correct test is whether the interference with the rights of
those individuals which happens when their information is shared is necessary and
proportionate to the pressing social need which the sharing proposes to address.

Safeguards: the Privacy Impact Assessment

1.57 The Thomas-Walport review recommended that the relevant Minister proposing an
Order under these provisions should be required to perform a Privacy Impact Assessment.
This requirement could enhance the ability of parliamentarians and others, including the
Information Commissioner, to assess the potential impact of an order. The Explanatory
Notes accompanying the Bill do not refer to the requirement to make a Privacy Impact
Assessment. We welcome the Minister’s reassurance that any ISO would automatically
be accompanied by a Privacy Impact Assessment, which would be provided to the
Information Commissioner and generally published more widely.48 We do not consider, however, that this would provide an adequate safeguard to meet our other
concerns about the breadth of the proposals in clause 154.

47 EN, paragraphs 963 - 965
48 Ev 22
Safeguards: Review by the Information Commissioner

1.58 The Bill provides that the Information Commissioner must be given at least 21 days to consider whether to issue an opinion on any draft ISO. He is not required to publish an opinion, but where he does, that opinion must be laid before Parliament, together with the draft Order. The Information Commissioner is not required to report, nor is the relevant Minister required to do anything other than lay his report before Parliament. The Commissioner can only report on whether the effect of a provision is proportionate to the policy objective that the Minister seeks to meet and whether the order strikes a fair balance between the public interest and the interests of any person affected by it. The Commissioner is not permitted to question whether the sharing of information is necessary to meet the specified policy objective, nor is he allowed to report on wider issues in respect of the compatibility of the provisions with Article 8 ECHR or the implications of disregarding the data protection principles in this case. **We are concerned at the limitations on the role of the Information Commissioner in these proposals and note that he shares some of our concerns.**

New powers for the Information Commissioner

1.59 Clause 153 will allow the Information Commissioner to conduct mandatory assessments of compliance with the Data Protection Act (DPA) 1998 by public bodies. Although the Commissioner has the power to inspect these bodies at present, he may only do so with prior notice and consent. This new power will extend to all ministerial and non-ministerial Government departments, local authorities and certain police and NHS bodies. The Commissioner will be required to provide guidance on how he intends to exercise these powers.

1.60 In his commentary on these parts of the Bill, and in his evidence to the House of Commons Public Bill Committee, the Information Commissioner points out that most complaints and risks in respect of data arise in private organisations and argues that these new powers should apply both to the public and private sector. He is also concerned that there is no sanction for non-compliance with an assessment notice provided on the face of the Bill. The Commissioner told us:

> As it stands we regret that the Bill will not give us powers to ensure that all those processing personal information do so in compliance with the principles of data protection. In particular, we must be able to serve an Assessment Notice on any data controller and there must be meaningful sanctions for ignoring a Notice.

He added:

> We received welcome new powers in the Criminal Justice and Immigration Act 2008 to levy fines on data controllers for deliberately or recklessly breaching the data protection principles. However it is important that the Government brings these powers into force as soon as possible. **

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**49 Ev 36**  
**50 Ev 33**  
**51 Ibid**
1.61 The CBI wrote to the members of the Public Bill Committee to express its view that the new powers of assessment provided in the Bill should not be extended to the private sector. We understand that these concerns relate to a lack of adequate safeguards for the privacy of individual data controllers, including in respect of the right of the Information Commissioner to search private commercial premises without, the CBI argues, adequate safeguards for the individuals subject to inspection.52

1.62 We asked the Minister for a further explanation of the Government’s view that these new powers should only apply to data processing in the public sector. The Minister told us that the Information Commissioner already has adequate powers to deal with the private sector, and that the new powers of assessment are principally designed in order to raise awareness in the public sector:

It is important to remember that Assessment Notices are intended to assist in raising the awareness and compliance of public bodies with the data protection principles. The public sector holds a large amount of data about UK citizens, the processing of which is often necessary to safeguard rights and responsibilities. This means, in contrast to the private sector, that individuals usually have no choice over whether data is processed. It is therefore appropriate that those public sector organisations that process information in what the Information Commissioner regards as high risk circumstances should be subject to inspection without necessarily granting prior consent. This is a complementary measure to support the existing investigatory and enforcement powers of the Commissioner.53

1.63 In our recent report Data Protection and Human Rights, we supported the Commissioner’s call for additional powers and resources, noting:

We see the Information Commissioner as an important defender of human rights in relation to data protection and freedom of information. His office should be regarded as an important part of the national human rights machinery.54

1.64 We are concerned that the Government’s response to the Information Commissioner’s request that these new powers extend to the private sector underestimates the role which the private sector increasingly plays in the processing of information and the impact which that processing may have on the right of individuals to respect for their private life. This is particularly the case when private sector providers deliver public services, an issue on which we have often commented. We accept that the Information Commissioner has existing powers in respect of the private sector. These were recently demonstrated with success in respect of the Information Commissioner’s investigation and enforcement action against Ian Kerr, a private detective, in relation to the alleged operation of an unlawful database of personal information and commentary on individual construction workers.55

1.65 We have, in our recent work, consistently emphasised the increasing role that the private sector plays in our public lives. Services are increasingly contracted out by public

52 PBC, 26 Feb 2009, Cols 343 - 345
53 Ev 20
54 Fourteenth Report of Session 2007-08, Data Protection and Human Rights, paragraph 39.
authorities as a matter of course. We and other Committees of both Houses have consistently noted that private sector data handling and surveillance can impact adversely on our individual right to respect for private life and the right to respect for our personal information as the same processing in the public sector. 56

1.66 We share the view of the CBI that adequate safeguards must always accompany powers of search and seizure but we consider that the safeguards already on the face of the Bill are significant (and indeed, provide greater protection than other compulsory powers of entry, search and seizure in this Bill). An assessment notice must specify the time at which a search or other inspection will take place and the time within which an individual data controller must comply; rights to appeal against the terms of any notice are provided; and there is express protection for legally privileged material. These are all safeguards which we have consistently called for with respect to other Bills where the Government considered that safeguards were more appropriately placed in secondary legislation. We recommend that the Government reconsiders the Information Commissioner’s request that the proposed power to issue assessment notices be extended to data controllers in the private sector. Extension of these proposals to the private sector should include safeguards for data controllers’ rights to respect for private life, if necessary. We do not consider that an amendment together with any necessary safeguards should be overly complex and we propose an amendment for the purposes of debate.

Page 98, Line 25, [Clause 153], delete from the second “is” to the end of line 29 and insert “not an excluded body”

1.67 At present, the Bill provides for no sanction for any individual data controller who fails to comply with an Assessment Notice. The Information Commissioner has called for a power of sanction to be applied, if only in respect of public authorities, who fail to comply with Assessment Notices. He recommends that public authorities who ignore or fail to comply with Assessment Notices should be treated as if they were in contempt of court, as they currently are in respect of certain obligations under the Freedom of Information Act 2000. We consider that these additional powers for the Information Commissioner would be a human rights enhancing measure. While we note the Government’s view that it would be unusual for a department or other public body to ignore an Assessment Notice, or to fail to comply with its terms, there is no reassurance on the face of the Bill that this will not be the case. We propose an amendment to meet the Information Commissioner’s concerns, for the purpose of debate.

Failure by a government department or public authority to comply with an assessment notice

To move the following clause–

“(1) If a government department or public authority has failed to comply with an assessment notice the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

(2) Where failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on

behalf of the government department or the public authority, and after hearing any statement that may be offered in defence, deal with the failure to comply as if it were a contempt of court.”
4. Coroners Reform

Coroners reform as a human rights enhancing measure

1.68 As long ago as 2004, our predecessor Committee pressed the Government to move swiftly to reform the coroners system, highlighting delays, problems and lack of resources in the existing system and criticising the impact of these difficulties on the families of those bereaved by deaths in custody and the ability of the UK to comply with the right to life (Article 2 ECHR).\(^{57}\) We have recently received evidence that many of these issues and delays are outstanding and getting worse.\(^ {58}\)

1.69 In late 2006, in correspondence with the then Minister, Harriet Harman MP, on the draft Coroners Bill, we welcomed the number of developments in the draft Bill with the potential to enhance the ability of coroners’ investigations to satisfy the requirements of Article 2 ECHR for a full and effective investigation, including, a) widening the statutory duty to conduct investigations, including a broad duty to conduct investigations into the death of anyone “lawfully detained in custody”, as opposed to the current duty to investigate deaths “in prison” and b) the introduction of new rights of participation and appeal for bereaved families and other “interested parties”. We welcomed the proposed introduction of a Charter for bereaved families, a policy objective which our predecessor Committee praised in its report into deaths in custody.\(^ {59}\)

1.70 We welcome the fact that each of these measures has found its way into the Bill or remains part of the Government’s overall policy on coroners reform. We regret that it has taken so long for parliamentary time to be found for the Government’s proposals. As we explained above, we regret that the issue of reform of the coroners system is having to be dealt with simultaneously with a number of unrelated issues in this ‘Christmas-tree’ Bill. Witnesses who submitted evidence on this issue to us, although highlighting specific concerns about the Bill, generally welcomed the opportunity for reform of the coroners system.\(^ {60}\) We welcome the long-awaited introduction of the Government’s proposals for reform. In so far as the Bill has the potential to support the UK’s obligation to protect the right to life, by enhancing the ability of families to discover the truth about the deaths of their loved ones and by increasing the likelihood that public services and others will learn lessons from often tragic circumstances, we consider Part 1 of this Bill to be a human rights enhancing measure.

1.71 An overarching issue raised by the Bill is whether the new statutory framework for coroner’s investigations will satisfy the procedural requirements of the right to life (as guaranteed by Article 2 ECHR), which place a positive obligation on the UK to conduct an effective investigation into certain deaths.\(^ {61}\) We consider a number of outstanding significant human rights issues below. These principally relate to measures which

\(^{57}\) Third Report of Session 2003-04,Deaths in Custody, Chapter 10

\(^{58}\) Ev 50. However, contrast Ev 72, where the British Legion acknowledge that some improvements have been made in respect of military inquests, but suggest that there is still significant room for improvement.

\(^{59}\) Third Report of Session 2004-05, Deaths in Custody, para 295. Correspondence on the draft Coroners Bill is available on the JCHR website: http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrls06_07.cfm#DCB

\(^{60}\) See for example, Ev 50 and Ev 71.

\(^{61}\) We discuss the requirements of Article 2 more closely in paragraph 1.15, above.
undermine the ability of the United Kingdom to meet its obligations to protect the right to life or where we consider that the Government is missing an opportunity to introduce a human rights enhancing measure to support that obligation. We deal with them roughly in order of significance.

1.72 We have raised a number of additional concerns in correspondence with the Minister and have received evidence from a number of witnesses on issues not addressed in this Report. We may return to these issues during the passage of the Bill through the House of Lords.

1.73 We note that the House of Commons Justice Committee has recently reported on the issue of resources in the coroners system and a number of other issues arising from the Bill. Witnesses have also written to us to emphasise that without adequate resources, the reformed system will continue to fail. We do not comment on the issue of resources in this report, other than to reiterate the conclusions of our predecessor Committee that if there are inordinate delays in the system or administrative or other failings arise due to lack of resources, this creates an increased likelihood that the procedural requirements of Article 2 ECHR will be breached when the right to life is engaged and the UK relies on an inquest to provide a prompt and effective investigation of the death.

**Duty to investigate**

1.74 The Bill imposes a statutory duty on senior coroners to investigate deaths in certain circumstances. These circumstances largely mirror the existing duty, subject to one positive change. The existing duty to investigate deaths “in prison” has been extended to include a duty to investigate cases including deaths “in custody or otherwise in state detention”. The Explanatory Notes explain the Government’s view that this extension enhances the state’s ability to meet its obligations under Article 2 ECHR in relation to a number of cases where the liberty of the subject may have been constrained, for example in cases where persons have died while being detained in a variety of contexts (such as, in prisons, by the police, in court cells, in young offender institutions, in secure training centres, in secure accommodation, under mental health or immigration and asylum legislation). We welcome the new extended duty to investigate deaths in state detention, which is a human rights enhancing measure. However, we are concerned that the only clarification of the scope of this provision is found in the Explanatory Notes accompanying the Bill. We recommend that the Bill is amended to include an interpretative clause which sets out a non-exhaustive list of circumstances when an individual should be considered to be in custody or in state detention.

Page 2, Line 1, [Clause 1], at the end insert–

“(2A) For the purposes of this section, the circumstances when the deceased should be considered to have been in ‘state detention’ include:

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63 Ev 50
64 Third Report of Session 2004-05, Deaths in Custody, Chapter 10
65 Coroners Act 1988, Section 8(1)
(a) detention by a constable or other public authority pursuant to statutory or common law powers;

(b) detention or deprivation of liberty pursuant to the requirements of mental health legislation, including the Mental Health Act 1983 and the Mental Capacity Act 2005, as amended by the Mental Health Act 2007;

(c) the placement of a child in secure accommodation;

(d) detention pursuant to immigration and asylum legislation; and

(e) the detention of any person in custody or otherwise detained while he or she is being transported from one place to another.”.

1.75 We wrote to the Minister inviting the Government to accept that the state’s ability to meet its obligations under Article 2 ECHR would be further enhanced by extending the duty to investigate to cover all deaths in mental health institutions, including deaths of patients who had voluntarily undertaken treatment. We accept the Minister’s explanation of the Government’s view that extension of the duty to investigate in cases where individuals die naturally in circumstances where they have placed themselves voluntarily and the circumstances of their death were clear would “neither be practical nor be in the interests of bereaved families”.

We have one outstanding concern, which relates to individuals without capacity who may be deprived of their liberty in residential care homes or hospitals, so-called “Bournewood patients”. Individuals in these circumstances are particularly vulnerable, whether resident in a state institution or a private facility. The Government should clarify whether the Bill will impose a duty to conduct an investigation in these cases. We recommend that any illustrative list should make clear that a duty should apply.

Purpose of investigation and matters to be ascertained

1.76 The Bill echoes the traditional view that the purpose of a coroner’s investigation will be to ascertain who the deceased was, and how, when and where the deceased came by his or her death. Having so rooted itself, the Bill then goes on to provide that, where “necessary for the purpose of avoiding a breach of Convention rights (within the meaning of the Human Rights Act 1998”, the purpose of an investigation includes ascertaining in what circumstances the deceased came by his or her death as contemplated by the House of Lords in R v HM Coroner ex p Middleton.

1.77 We welcome clause 5 to the extent that it seeks to enshrine in primary legislation the principle, recognised by the House of Lords in Middleton, that the focus of an investigation into a death governed by Article 2 of the Convention should be on the circumstances of the death. We welcome this legislative clarification of the law to give better effect to a court judgment in which the court used the interpretative power in section 3 of the Human Rights Act to change the settled interpretation of the meaning

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66 Ev 1 and Ev 11
67 Pursuant to Section 4A Mental Capacity Act 2005, Schedule 1A
68 Clause 5(1)
of a statutory provision. As the Explanatory Notes state, “the new provision makes the position expressly clear” and “therefore ensures that investigations into deaths under the Bill are compatible with the ECHR as determined by Middleton”. This approach recognises that, in the absence of such explicit provision, there is a risk that the investigation – and, therefore, the quest of families seeking adequate answers – might be frustrated by the traditional focus on “how” the deceased came by his or her death.

1.78 One of the primary functions of any effective coronial system should be to prevent the recurrence or continuation of circumstances creating a risk of death or to eliminate or reduce the risk of death created by such circumstances. Inquest argue that the current provisions in clause 5 are too narrowly drawn to fulfil this function in a meaningful way:

We think that clause 5(1) defines the scope of inquests too narrowly. There are clearly important cases involving questions of public health and safety where the Human Rights Act does not apply and where there is a need for a broader inquiry. The existing clause 5 creates a risk that limits will be placed on the nature of the inquiry that will frustrate both the opportunity for the bereaved to get adequate answers as well as the opportunity to prevent future deaths.

1.79 We are concerned that there are cases not necessarily subject to the application of the HRA or the protection of the Convention, but where, if the evidence warrants, it may be necessary for the investigation to ascertain relevant circumstances of the death, for example, a death of a vulnerable person in a private care home; a death in a private work place; a death involving British state agents in circumstances where the HRA does not apply because of date of death (i.e. before the HRA came into force) or location of death (i.e. abroad and outside of the limited extra-territorial scope of the ECHR); a death of a British national abroad not involving British state agents but in circumstances where there is no prospect of adequate investigation by the host state; or deaths involving other circumstances which, if allowed to continue or recur, may result in the deaths of other members of the public.

1.80 We asked the Minister whether there might be circumstances where a wider Middleton-type investigation into the circumstances of a death might be appropriate, as a

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70 Section 3(1) HRA provides: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

71 EN para. 796. Contrast the Home Office’s refusal to amend the control orders legislation in light of the House of Lords use of s. 3 HRA to reinterpret it in Re MB: see for example, Government’s Response to JCHR Report on Counter Terrorism Bill. Twenty fourth Report of 2007-08, Counter-Terrorism Policy and Human Rights, Government Responses to the Committee’s Twentieth and Twenty-first reports and other correspondence, HL Paper 127, HC 756, Appendix 1.

72 “How” being understood not in the ordinary meaning of the word “how” but as the “means by which” the deceased came by his or her death following a series of controversial cases in the 1980’s and 1990’s, culminating in R v HM Coroner for North Humberside ex p Jamieson [1995] QBD 1.

73 As already recognised in paragraph 6 of Schedule 4 of the Bill itself and elsewhere. See for example the recommendations of the Report of a Fundamental Review 2003 (Cm 5831, Chapter 8, p89); the relevant domestic legal authority, including R (on the application of Amin) v. Secretary of State for the Home Department [2004] 1 AC 653 at para 31; R (on the application of Takoudis) v. HM Coroner for Inner North London [2006] 1 WLR 461, paras 39, 43 to 47; Inner West London Coroner v Channel 4 Television Corp [2008] 1 WLR 945, para 7 and 8; and section 4(7) of the Fatal Accidents and Sudden Death Inquiry (Scotland) Act 1976 which allows the investigating Sheriff in Scotland to determine, amongst other things, (a) where and when the death and any accident resulting in the death took place, (b) the cause or causes of the death and any such accident, (c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided, (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death, and (e) any other facts which are relevant to the circumstances of the death.

human rights enhancing measure, but was not yet provided for on the face of the Bill. In her response, the Minister explained that whilst clause 5(2) only requires the circumstances of a death to be investigated where necessary to avoid a breach of Convention rights, it does not prevent such circumstances being investigated in any other case. As the Minister explained, the scope of a coroner’s investigation is a matter of discretion for the coroner, and clause 5(2) merely sets out the minimum requirements. In the Government’s view, there was nothing on the face of the Bill to prevent a coroner undertaking a wider investigation into the circumstances of the death in any case where he considered that one was appropriate.

1.81 We welcome the Minister’s reassurance that coroners will retain a broad discretion to undertake a wider investigation into the circumstances of a death in cases other than those where one is necessary in order to avoid a breach of Convention rights. Unfortunately, there is nothing on the face of the Bill or in the Explanatory Notes to make clear whether or not it is the Government’s intention that coroners should be able to exercise their discretion in this way. Nor is there any indication of the circumstances in which a coroner may wish to exercise his discretion. We recommend the following amendment to the Bill for the purpose of debate.

Page 4, Line 4, [Clause 5], at the end insert-

(-) The senior coroner may determine that the purpose of any investigation shall include ascertaining the circumstances the deceased came by his or her death where

(a) the senior coroner is satisfied that there are reasonable grounds to determine that the continued or repeat occurrence of those circumstances would be prejudicial to the health and safety of members of the public, or any section of it; or

(b) the senior coroner is satisfied that there are reasonable grounds to consider such circumstances in the public interest.

Outcome of investigation

1.82 The Bill enshrines in primary legislation the existing prohibition on any determination by a coroner or jury which is “framed in such a way as to appear to determine any question of (a) criminal liability on the part of any named person or (b) civil liability.” These words as currently found in secondary legislation have been held on a number of occasions to have a meaning such that they could not defeat the purpose of an inquest to determine “how” the deceased came by his or her death. As the court in Homberg explained:

It is clear … that the coroner’s over-riding duty is to inquire how the deceased came by his death and that duty prevails over any inhibition against appearing to determine questions of criminal or civil liability. Any apparent conflict […] must be

75 Ev 12
resolved in favour of the statutory duty to inquire whatever the consequences of this may be.\textsuperscript{78}

Limits on determinations appearing to determine civil or criminal liability apply only to the inquest verdict and an inquest is open to explore facts bearing on criminal and civil liability in so far as they are relevant to their purpose.\textsuperscript{79}

1.83 It is not clear from the face of the Bill that the purpose of the investigation, as outlined in clause 5 will continue to have the same or similar priority over the limitation in clause 10(2). We were concerned that coroners might exercise undue caution in their approach to clause 10(2), which could undermine their ability to meet the requirements of Article 2 ECHR in cases where the right to life was engaged. Inquest shared our concerns about the inclusion of the provisions of Rule 42 on the face of the Bill. They consider that the prohibition on verdicts appearing to determine an issue should be removed from coronial law altogether. They have proposed an amendment to the Bill meet their concerns.\textsuperscript{80}

1.84 We wrote to the Minister for further information. We welcome the Minister’s reassurance that clause 10 – which is concerned with the way that a determination is framed – is not intended to change the current law, or to prevent a coroner or jury considering facts bearing on civil or criminal liability in order to reach a determination. We also welcome the clarification that the Government consider that verdicts such as “unlawful killing” or “death as a result of neglect” should be open to an inquest following clause 10.\textsuperscript{81}

1.85 We welcome the Minister’s reassurance that the Government does not intend to narrow the scope of the existing law by incorporating in statute the existing limitation on coroners determinations “appearing to determine” civil or criminal liability. However, since clause 5 and clause 10 together will serve to determine the scope of a coroners investigation, we remain concerned that this relationship should be clearly defined. As matters stand, it is not clear how the requirement in clause 10(1) – that any determination should address the purpose of an investigation, by determining how or in what circumstances the deceased came by his death – relates to the prohibition in clause 10(2) against findings that appear to determine civil or criminal liability. Without clarity, there is a risk that the prohibition in clause 10(2) could serve to undermine the very purpose of a coroners investigation as envisaged in clause 5. This could undermine the ability of the inquest to meet the requirements of Article 2 ECHR. We propose the following amendment to the Bill.

Page 5, Line 40, [Clause 10], at the end insert-

(3A) Subsection 2 shall not affect the duty on the coroner to conduct an investigation which meets the requirements of Section 5.

\textsuperscript{78} R v Coroner for East Sussex ex p Homberg (1994) 158 JP 545
\textsuperscript{79} R v HM Coroner for North Humberside ex p Jamieson [1995] QB 1 and (1994) 3 All ER 972
\textsuperscript{80} Inquest, Briefing on the Coroners Bill, February 2009
\textsuperscript{81} Ev 12
Juries

1.86 The Bill sets out the circumstances in which an inquest must be held with a jury, the composition of an inquest jury, and the number of jury members who should agree on any determinations and findings. First, a jury must be summoned where there is reason to suspect that the deceased died “in custody or otherwise in state detention” and that the death is either “violent or unnatural” or that its cause is unknown. This is a positive clarification of the existing requirement which specifies only death in prison or police custody.82 Secondly, it requires that a jury be summoned where there is reason to suspect that the death resulted from “an act or omission” of a police officer in the purported execution of the officer’s duty. This is also a welcome clarification of the existing requirement which specifies death resulting from an injury caused by a police officer.83 Thirdly, in a welcome retreat from the draft Coroners Bill, it maintains the existing requirement for a jury in certain workplace deaths84. Fourthly, it retains a wide residual discretion for the coroner to summon a jury in any other circumstances if there is “sufficient reason” to do so, reflecting the current provision which allows such discretion to be exercised for “any reason”.85

1.87 However, the Bill seeks to remove the existing requirement to summon a jury in cases where the death “occurred in circumstances the continuance or possible recurrence of which may be prejudicial to the health and safety of members of the public or a section of it”,86 and it seeks to reduce the number of members of an inquest jury from 7-11 to 6-9.

1.88 Inquest have raised particular concerns about these restrictions:

We consider that juries are fundamental to the democratic system as they are the only opportunity where the ordinary people, independent of the state, can participate in the judicial system. They have the effect of diffusing power into the community and in cases of contentious deaths are often seen by families as the key safeguard in terms of public accountability.

[…]

We do not accept, as para 90 of the Explanatory Notes states, “that the nature of the inquisitorial task [inquest juries] are required to undertake means that they do not need to be of the same size as juries in the criminal courts.

[…]

We are concerned that any reduction in the number of jurors in inquests will lead to a reduction in the quality of this decision-making…We believe it would be wholly wrong for issues as crucial to the public interest, as for example, the deliberate killing of an civilian by an agent of the state, to be determined by a jury consisting of as few as six members.87

82 Section 8(3)(a)-(b) of the Coroners Act 1988.
83 Section 8(3)(b) of the Coroners Act 1988.
84 Section 8(3)(c) of the Coroners Act 1988.
85 Section 8(34) of the Coroners Act 1988.
86 Section 8(3)(d) of the Coroners Act 1988.
87 Inquest, Ibid, February 2009, paragraphs 32, 41, 43.
1.89 There is nothing in the case law of the European Court of Human Rights that requires the UK to adopt a particular form of inquiry to satisfy Article 2 ECHR. Provided that the relevant investigation complies with the substantive requirements of Article 2 ECHR, states have a wide margin of appreciation to determine the nature of the inquiry. These substantive requirements include that the inquiry must involve a degree of public scrutiny. In England, Wales and Northern Ireland, that degree of public scrutiny has routinely been secured through open inquests and particularly the involvement of juries in the determination of coroners’ verdicts. As we have explained previously, in the context of the right to trial by jury, there is a considerable range of views about the precise status and role of the jury in the common law. In our view, the right to trial by jury in England and Wales has a sufficiently important place in our legal heritage to have attained the status of a right at common law, which requires express justification before restrictions are applied. We consider that similar justification should be provided in relation to the restriction of the involvement of juries in inquests.\(^88\) We asked the Minister to explain why the Government considers that it is appropriate to remove the existing provision for compulsory jury inquests in cases where the health and safety of the public may be at risk. The Minister explained that it is rare for juries to be appointed under the existing provision (because of confusion about what it might mean in practice) and that consequently the Government considers that it is no longer needed. In any event, a coroner will have discretion to summon a jury if appropriate in such circumstances.

1.90 We also asked the Minister to explain the nature of the circumstances in which it is envisaged that the coroner’s discretion to summon a jury may be exercised, and whether this might include cases where there is reason to believe that a risk to the health and safety of the public was engaged and that a report from the coroner (under paragraph 6 of Schedule 4) might be necessary to eliminate or reduce such a risk.

1.91 The Minister told us that a coroner’s discretion to summon a jury is likely to be exercised where it is felt that the public interest in a case was such that the coroner considered that the additional scrutiny and independence of a jury would be beneficial, subject to appropriate guidance issued by the Chief Coroner. This was not likely in the circumstances envisaged in the Committee’s question. The Government response to our questions is confusing. On the one hand the Minister indicates that the coroner may exercise his discretion in health and safety cases where a jury may be required, but on the other she explains that it is unlikely that this discretion will be exercised in those cases.\(^89\) The Government response also overlooks the fact that the reasons behind the compulsion in the existing provision are reflected in the recognition within the Bill itself, at paragraph 6 of Schedule 4, that a real public interest is necessarily inherent in any case where there is reason to believe that circumstances creating a risk of other deaths will occur or will continue to exist in the future, such as to require action to be taken to prevent, eliminate or reduce such a risk.

1.92 The Government’s justification for removing the requirement for a compulsory jury inquest in cases where the health and safety of the public, or a section of the public, is at issue is not clear. We recommend that the Bill is amended to reflect the existing

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\(^{88}\) Second Report of Session 2006-07, paragraphs 5.8 – 5.10 (Fraud (Trials without a Jury) Bill)

\(^{89}\) Ev 12
legal position unless a clear argument against doing so is provided. We propose an amendment for the purposes of debate.

Page 4, Line 31, [Clause 7], at the end insert-

“(d) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public.”

1.93 We also asked the Minister further to consider whether public confidence in the outcome of any relevant inquest, and in the process as a whole, will be diminished by a reduction in jury numbers from between 7 and 11 to between 6 and 9, particularly in cases where Convention rights were engaged, and if not, why not. 90

1.94 The Minister told us no concerns had been raised about this issue in public consultation, but did not provide any further justification. We share the concern of Inquest that no clear justification has been provided for the proposed reduction in numbers for inquest juries. The comparison with criminal trials provided in the Explanatory Notes is difficult to understand.

1.95 We are not persuaded that the Minister has provided adequate justification for the proposed change. We recommend that clauses 8(1) and 9(2) be amended to maintain the existing provision to the effect that the minimum number of members required on a jury is seven and the maximum is eleven. We propose an amendment for the purposes of debate.

Page 4, Line 41, [Clause 8] leave out “six, seven either or nine” and insert “not less than seven nor more than eleven”

Page 5, Line 17, [Clause 9] leave out paragraph (a) and insert-

“(a) the minority consists of not more than two, and”

Powers to gather evidence and to enter, search and seize relevant items

1.96 The Bill makes provision for enhanced investigatory powers for coroners, including enhanced powers of search and seizure as well as powers to summon witnesses and compel the production of all relevant documents or other material. It also makes new provision for enhanced powers of search and seizure.

1.97 Our predecessor Committee recommended that the coroner should be granted similar powers of compulsion in its report on deaths in custody. 91 In short, we agree with their view that enhancing the investigatory powers of the coroner will support his ability to conduct an independent and effective investigation into a death. Satisfactory safeguards must be in place for the protection of the rights of those involved in a investigation to respect for privacy (Article 8 ECHR) and the right to a fair hearing (Article 6 ECHR). We return to this issue, below.

90 Ev 12
1.98 In principle, we welcome the proposals to extend the compulsory powers of the coroner as a human rights enhancing measure.

1.99 In order to support their effective participation in an inquiry, interested parties must be able to secure full and effective disclosure of materials relevant to the inquest. This has been an issue of controversy in recent years. Our predecessor Committee made recommendations in relation to the need to secure more effective disclosure to bereaved families in deaths in custody cases (not least, they recommended that copying costs should be set at a realistic level). We wrote to the Minister to ask whether evidence obtained using compulsory powers would be disclosed to interested parties.\footnote{Ev 17} We welcome the Minister’s confirmation that material gathered under these powers may be disclosed to interested parties, depending upon the nature of the material and its relevance to the investigation, subject to provision in associated secondary legislation. However, the Minister has asserted that these powers will not be used to require one interested party to disclose material to other interested parties, on the basis that it would be inappropriate in an inquisitorial process.\footnote{Ibid}

1.100 The participation of any interested party in the investigation will necessarily be contingent upon access to all relevant material, and such participation on the part of the deceased’s next of kin to the extent necessary to safeguard their legitimate interests is an essential part of an effective investigation in the context of a death governed by Article 2. We welcome the Government’s recognition that evidence obtained using compulsory powers will be subject to the ordinary rules of disclosure in the coroners rules (which will be covered in secondary legislation under this Bill). However, we consider that the Government has missed an opportunity in this Bill to ensure that the disclosure rules will be applied in a way which will support the rights of bereaved families to effective participation. In addition, we regret that draft coroners rules are not available for scrutiny.

1.101 We also asked the Minister for some further information on the relevant safeguards for the rights of individuals involved in the investigation. We welcome the Minister’s reassurance that the compulsory powers extended to the coroner will not require any individual to produce any evidence which would expose him or her to criminal liability.\footnote{Ev 17 - 18}

1.102 In our correspondence on the draft Coroners Bill with the Minister’s predecessor, we made clear our concerns that safeguards similar to those applied to the compulsory powers of the police in Part II of the Police and Criminal Evidence Act 1984 should be specified on the face of the Bill to ensure adequate protection for the right to respect for private and family life (Article 8 ECHR). We wrote again to ask the Minister why these safeguards are not on the face of the Bill. The Minister explained that the equivalent to some of the safeguards provided in PACE will be provided in the coroners regulations under clause 33(3)(g) and (h) of the Bill. The Government considers that this degree of detail is “more suited” to secondary legislation. We have previously expressed our disagreement with Government over whether safeguards in respect of compulsory powers, and in

\begin{footnotes}
\item[92] Ev 17
\item[93] Ibid
\item[94] Ev 17 - 18
\end{footnotes}
particular, powers of search and seizure, should be provided in primary legislation. We agree that some degree of detail may be left to secondary legislation, but consider that the substance of the relevant safeguards should be provided in primary legislation. We are concerned that draft regulations setting out the proposed safeguards which will accompany the compulsory powers of the coroner will not be available for scrutiny during the passage of the Bill.

**Power to report if risk of future death**

1.103 The Bill creates a power for the senior coroner at the end of an inquest to make a report to a person the coroner believes may have the power to take such action with a view to preventing such deaths in the future. Although this power is similar to powers currently held by coroners under rule 43 of the existing coroners rules, the new statutory power will include an express duty on the person receiving the report to provide a response.

1.104 This power has the potential to enhance the ability of the state to comply with its positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction (Article 2 ECHR). However, schedule 4 does not provide a mechanism for ensuring that reports are made, recorded or disseminated. There are no sanctions proposed for failure to respond to a report when one is made. We wrote to the Minister to ask for an explanation of whether these powers could be strengthened, to enhance the ability of the UK to protect the right to life by disseminating positive information and recommendations designed to improve safety and reduce unnecessary risks to life.

1.105 The Minister told us that a formal mechanism, including the possibility of sanctions for failure to respond was unnecessary “following the success of amendment in July 2008 to the current corresponding provision in rule 43 of the Coroners Rules 1984”. The Minister explained that it was the Government’s view that practice so far indicated that ”coroners and the persons to whom they send their reports take their responsibilities very seriously”. He went on to explain that all of the reports submitted since July 2008 have had “at least an interim response”. Unfortunately, Inquest suggest that, in their experience, rule 43 (as amended) has not been as successful as the Minister suggests:

> Despite the best endeavours of these coroners and juries there is abundant evidence that their recommendations and findings have often vanished into the ether, undermining the investigation and inquest process.

1.106 **We do not have adequate information to assess whether last year’s amendments to Rule 43 have been sufficiently successful to obviate the need for a further formal mechanism for collating, monitoring and disseminating coroners’ reports, or any further provision for sanctions. The changes to Rule 43 have been in force for such a short period of time that the experience of their operation may not be as useful as the Minister suggests. In the light of the potential value which coroners’ reports may**

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95 See for example, Twentieth report of 2005-06, paragraphs 2.41 – 2.49 (Compensation Bill); Eighth Report of 2003-04, paragraph 4.28 (Housing Bill).

96 The provisions in Rule 43 were enhanced in 2008, pending the introduction of this Bill. One of the existing changes includes guidance from the Ministry of Justice which indicates that it intends to produce a regular bulletin on the substance of Rule 43 reports.


98 Inquest, Second Reading Briefing, February 2009, paragraphs 74 – 78.
provide in allowing lessons to be learnt from often tragic circumstances and in avoiding unnecessary risk to life, we recommend that the Government reconsider whether more formal arrangements for the treatment of coroners’ reports should be included on the face of the Bill.

1.107 The Minister has explained that secondary legislation under Clause 33(3)(i) will make further provision requiring copies of reports and responses to be sent to interested parties and to the Chief Coroner. Provision will also be made in secondary legislation for wider publication. We regret that no draft regulations dealing with the proposed treatment of coroners’ reports have been produced to assist parliamentary scrutiny.

Legal aid

1.108 In our correspondence with the Minister on the draft Coroners Bill, we highlighted the availability of legal aid for bereaved families as an important consideration for the purposes of facilitating their effective participation and ensuring compliance with Article 2 ECHR. Our predecessor Committee recommended that funding for legal assistance should be available for families in any case involving a death in custody.99 During the second reading debate on the Bill, the Lord Chancellor explained that the Government would consider amendments to the Bill for the purpose of broadening access to legal aid for bereaved families. He made the following qualification, explaining the Government’s views:

The reason why successive Governments have resisted a general provision to make representation or legal aid available in inquests is that they are civil, inquisitorial inquiries. They are not judicial proceedings, and they work very differently even from other civil proceedings.100

1.109 During the Public Bill Committee debates on the Bill, the Minister, Bridget Prentice MP, also indicated that the Government would look again at the provision of legal aid to assist bereaved families participating in inquests.101

1.110 Against this background, we wrote to the Minister to ask for further information. The Minister confirmed the Government’s commitment that appropriate funding should remain available in the future, together with the greater opportunities for accessible family participation as set out in the Charter. The mode of such funding is currently by way of means tested grants made exceptionally for inquests where it is necessary to enable a coroner to conduct an effective investigation, under Article 2 ECHR, or where there is a significant wider public interest in the applicant being represented. The Minister made clear the Government’s intention that such funding must remain means-tested to protect the limited resources of the legal aid budget. The Minister’s response did not acknowledge her earlier commitment to reconsider the current position.

1.111 Inquest and the British Legion are among the witnesses who have written to us to highlight the difficulties facing bereaved families who seek to access legal aid:

99 Third Report of 2004-05, Deaths in Custody, paragraph 309
100 HC Deb, 29 Jan 2009, Col 28
101 PBC, 10 Feb 2009, Cols 204-205.
At present there is no automatic right to non means-tested public funding for families who are thrown into an inquest process through no choice of their own. Although funding for representation is available in “exceptional” cases those representing families have to make lengthy, complicated, intrusive and time consuming applications to the Legal Services Commission for the little funding they received. Many families are excluded from such support simply by virtue of the fact that they have their own home, even if this does not mean in real terms that they have substantial disposable income to spend on legal fees.102 (Inquest)

Many families could simply require advice on the inquest process, its purpose or the role of coroners, while some might need representation during the inquest itself. While Legal Aid may be provided in exceptional circumstances, experience would suggest that the ‘exception’ is too narrowly drawn, that decisions are subject to demoralising delay, and that bereaved families resent being means-tested for what, in all conscience, should be their right to effective representation.103 (British Legion)

1.112 Both organisations highlighted that in cases involving public authorities, those authorities will generally be represented and their legal costs will be met from public funds. Both also argue that in most cases involving allegations of failure on the part of a public authority, the authority will generally instruct their representatives to engage in “extraordinary efforts” in “damage limitation”. 104

1.113 We are concerned by the evidence which we have received on the difficulties faced by families who seek legal assistance and representation to support their effective participation in an inquest where their loved one has died. Article 2 ECHR does not require legal aid to be provided in all cases. However, Article 2 ECHR will require legal aid to be provided where it is necessary to ensure that next-of-kin participation is effective. This may include legal aid for representation throughout an inquest. Evidence appears to suggest that current legal aid rules are being applied in a way which fails to recognise when legal aid may play an integral role in supporting effective participation for many families and that, in many cases, families are faced with unrealistic choices based upon the current application of the means testing rules. We welcome the undertaking of the Secretary of State and the Minister to look again at these rules. We recommend that the Government make a concrete commitment to an independent review of the current system for assessing access to legal aid and other funding for bereaved families to access legal advice and assistance, preparation and representation at an inquest.

1.114 We suggest the following new clause for inclusion in the Bill which would ensure that the Government commissioned such a review and reported its conclusions to Parliament.

Review of access to legal aid in inquests

To move the following clause-

102 Inquest, Second Reading Briefing, February 2009, paragraph 101. See also Ev 51 and 54.
103 Ev 74
104 Ibid
“(1) The Secretary of State shall, within one year after the date on which this Act receives Royal Assent, lay before both Houses of Parliament a report on access to legal aid and other funding for bereaved families in relation to inquests.

(2) The report under subsection (1) shall be prepared by a person appointed by the Secretary of State following consultation with

(a) the Lord Chief Justice; and

(b) such other persons as the Secretary of State shall consider appropriate to consult.”
5. Witness Anonymity

Witness Anonymity

Background

1.115 The Bill re-enacts the Criminal Evidence (Witness Anonymity) Act 2008 on which we reported during its hasty passage through Parliament. During the Act’s passage, on an emergency basis, the Government acknowledged that there had been limited opportunity for parliamentary scrutiny and undertook to re-enact its provisions to allow further and fuller parliamentary debate. The Act provides for the legislation to cease to have effect from 31 December 2009. In our report on the Bill we commented on the regrettable lack of time for detailed parliamentary consideration of the Bill. We therefore welcome the early opportunity to give further consideration to the human rights issues raised by witness anonymity orders.

1.116 We were satisfied that the 2008 Act was compatible with Article 6 ECHR on the basis of its express protection of the right to a fair trial and the discretion left to the trial judge to determine that issue. However, we did have concerns about certain issues and raised questions about them for debate. We were concerned, for example, by the absence from the legislation of any express acknowledgment of the exceptional nature of witness anonymity orders. We were also concerned by the inclusion of “serious damage to property” as one of the possible triggers for a witness anonymity order. We were concerned too by the lack of express provision in the Bill for the appointment of special counsel to represent the interests of both the accused and the witness at hearings for anonymity orders. We return to each of these issues below.

1.117 Since the passage of the Act, detailed guidance on its practical implementation has been forthcoming from a number of sources. The Attorney General has issued Guidelines on the prosecutor’s role in applications for witness anonymity orders, setting out the overarching principles by which a prosecutor should consider, and if appropriate apply for, a witness anonymity order in accordance with the considerations set out in the 2008 Act. The DPP has also issued detailed Guidance on Witness Anonymity for Crown Prosecutors, to be read in conjunction with the Attorney General’s Guidelines, setting out how Crown Prosecutors must deal with applications for anonymity under the 2008 Act. The Lord Chief Justice has also issued a Practice Direction concerning witness anonymity orders.

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105 Clauses 69-79.
107 Section 14.
108 Ibid at para. 1.9.
109 Ibid. at paras 1.17-1.21.
110 Ibid. at paras 1.22-1.25.
111 Ibid. at paras 1.26-1.33.
113 The Director’s Guidance on Witness Anonymity (August 2008).
and the Court of Appeal has provided further guidance in a recent case considering the 2008 Act in detail.\textsuperscript{114}

1.118 Some statistical information about the practical operation of the witness anonymity provisions is also available, because the CPS has been maintaining a register of all cases in which an application for a witness anonymity order has been made.\textsuperscript{115} We welcome the CPS’s initiative in compiling this register of all applications: it provides an important source of information to enable the practical operation of the witness anonymity provisions to be independently scrutinised and is a valuable human rights safeguard.

1.119 The DPP provided the Public Bill Committee with the figures for the period July to December 2008.\textsuperscript{116} During that 6 month period, the police identified 137 cases for application, comprising 346 individual witnesses (there may be more than one witness within each case). The CPS considered those witnesses and made applications for witness anonymity orders in relation to 135 out of the 346 witnesses. 129 applications were granted and six refused. The DPP’s conclusion was that “In that sense, it appears that the measure is working well. In the cases that we have considered, there is a high success rate when they are put before the court.” We comment on the significance of these figures below.

\textbf{Exceptionality}

1.120 In our report on the 2008 Act, we pointed out to Parliament that the equivalent New Zealand legislation expressly requires the court to have regard to “the principle that witness anonymity orders are justified only in exceptional circumstances”.\textsuperscript{117} We observed that there may be some merit in extending the list of relevant considerations to which the court is required to have regard so as to include an express reference to the exceptional nature of such orders. The DPP, in his evidence to us in relation to that Bill, did not agree. He thought that the Bill spoke for itself: the scheme was clearly designed to apply only in exceptional circumstances. Nevertheless we considered that the question ought to be debated in Parliament.

1.121 Since the passage of the Act, both the Attorney General’s Guidelines and the DPP’s Guidance to Crown Prosecutors have made the exceptional nature of witness anonymity orders clear. The Attorney General’s Guidelines, for example, begin by stating that an important aspect of a fair trial is the right of the defendant to be confronted by, and to challenge, those who accuse him or her, and go on to say that applying for a witness anonymity order is:

1.122 a serious step, to be taken by the prosecutor only where there are genuine grounds to believe that the court would not otherwise hear evidence that should be available to in the interests of justice; that other measures falling short of anonymity would not be sufficient; and that the defendant will have a fair trial if the order is made.

\textsuperscript{114} R v Mayers [2008] EWCA Crim 2989.
\textsuperscript{115} The DPP’s Guidance helpfully prescribes the details of each case which must be kept on the register.
\textsuperscript{116} PBC, 5 Feb 2009, Col. 109 (Q265).
\textsuperscript{117} New Zealand Evidence Act 2006, s. 112(5)(b).
1.123 The Director’s Guidance similarly begins by reiterating that the overarching principle of criminal justice is that the defendant must receive a fair trial. It makes clear that the use of an anonymous witness should only be considered where such a course is consistent with a fair trial and only in those cases where it is “absolutely necessary.” Applications for a witness anonymity order should only be made when, after full consideration of all the available alternatives, a clear view is taken that the Act applies.

1.124 We welcome the express acknowledgment of the exceptional nature of witness anonymity orders in both the Attorney General’s Guidelines and the DPP’s Guidance. We also welcome the Minister’s acceptance that “anonymity orders should not become routine instead of exceptional.” We do not consider the number of witness anonymity orders applied for in the first 6 months of the legislation’s operation to suggest that the orders are being treated as other than exceptional. We therefore do not regard it as necessary for the legislation to be amended to insert an express reference to the exceptional nature of witness anonymity orders, such as that contained in the equivalent New Zealand legislation.

1.125 We do have a concern, however, about the striking discrepancy between the number of cases in which the police have considered an application for a witness anonymity order to be appropriate (346 to December 2008) and the number of cases in which the CPS has considered such an application to be appropriate (136 in the same period). This suggests to us that the police may regard witness anonymity orders as much less exceptional than the CPS. While we are pleased to see that the CPS is in practice operating as an effective filter, we are concerned by the relatively large number of cases in which the police appear to have thought an application for an anonymity order to be appropriate. We recommend that appropriate guidelines be drawn up for the police concerning their role in the application for witness anonymity orders, which reflects, in a manner accessible to front line police officers, the clear guidance to prosecutors that witness anonymity orders are justified only in exceptional circumstances.

“Serious damage to property”

1.126 In our report on the 2008 Act, we pointed out that the Bill enabled a witness anonymity order to be made on the basis that a witness had a reasonable fear of “serious damage to property” if the witness were identified. We pointed out that this raised the question of whether the threshold for the making of a witness anonymity order was sufficiently high to avoid breaches of the right to a fair trial in practice, as an anonymity order based solely on the risk of damage to property might well lead to a finding of an unfair trial.

1.127 The Government has told us that so far no applications for witness anonymity orders have been made solely on the basis of a fear of serious damage to property. The DPP told the Public Bill Committee that “15 cases in which the police have asked prosecutors to make an anonymity application based on both the threat to property test and the threat to safety test.” We welcome this approach, which reflects...
what the Minister told the House of Commons during the passage of the 2008 Act: “The protection of property is not the reason for the provision. It is there because a risk of serious damage would in most cases be likely to have an effect on the witness’s safety, and certainly on his perception of his safety.”

1.128 However, some uncertainty about the correctness of this interpretation has now been introduced as a result of the Minister’s response to a probing amendment on this issue in Public Bill Committee. The Minister, opposing the amendment, appeared to suggest that threats to disable someone’s car which they use to get to work would constitute “serious damage to property” for the purposes of the Act. This appears to be at odds with her view during the passage of the 2008 Act that a serious damage to property would in most cases be likely to have an effect on the witness’s safety. It potentially lowers the threshold for witness anonymity orders significantly and in a way which correspondingly increases the risk that they will lead to breaches of the right to a fair trial in practice.

1.129 We recommend that future editions of the Director’s Guidance, which expressly states that it will be kept under review, provides some guidance as to what the Director is likely to regard as constituting “serious damage to property” when considering whether to make an application for a witness anonymity order. In particular, guidance would be welcome as to whether, in the DPP’s view, there will usually need to be some kind of risk to persons for the damage to property to be “serious”, which was the human rights compatible interpretation of the same phrase by the Attorney General of New Zealand.

**Special counsel**

1.130 In our report on the 2008 Act, we recommended that the Bill be amended to give the trial judge a discretion to appoint special counsel. The Secretary of State undertook to give active and urgent consideration to whether a statutory scheme for special counsel was necessary and to consult the judiciary on whether they would find them useful.

1.131 In a letter dated 3 December 2008 to Nick Herbert MP, copied to our Chair, the Secretary of State for Justice explained the reasons for the Government’s view that the re-enacted provisions should not make any express provision for special counsel. In the Government’s view, in the rare cases where special counsel might be required, the present arrangements, which permit judges to invite the Attorney General to request the appointment of special counsel, are adequate.

1.132 The Attorney General’s Guidelines state that such an invitation by a court to the Attorney General to appoint special counsel should be regarded as “exceptional.” The Guidelines do state, however, that “a prosecutor making an application for a witness anonymity order should always be prepared to assist the court to consider whether the circumstances are such that, exceptionally, the appointment of special counsel may be called for. When appropriate a prosecutor should draw to the attention of the court any aspect of an application for a witness anonymity order or any aspect of the case that may, viewed objectively, call for the appointment of special counsel.” The only reference to

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121 Maria Eagle, HC Deb, 8 July 2008, col 1375.
122 PBC, 5 March 2009 Col 553.
123 Ev 36 - 37
special counsel in the DPP’s Guidance, however, is to the fact that judges may invite the AG to appoint special counsel “if they consider it necessary.” It does not suggest that the prosecutor has any role in relation to that question.

1.133 To date, it appears that there have been only two applications to the Attorney General for special counsel to assist the court with a witness anonymity application, and both of those applications have been granted. The Government argues that this shows that the current arrangements are working well: courts can ask the Attorney General for assistance if they consider it is necessary and where those requests have, exceptionally, been made, they have been granted.

1.134 We accept that fairness will not require special counsel to be appointed in every case where an application for an anonymity order is made. It will depend on the circumstances of the case. We are concerned, however, by the very small number of cases in which special counsel has so far been appointed: two out of a total of 136 applications. This suggests that the appointment of special counsel may be being treated as a wholly exceptional course rather than one which fairness may sometimes requires on the facts of a particular case. We note that there is no record of the number of times special counsel were requested or applied for by the defence but that request or application was not acceded to by the court. The information collected by the CPS for the purposes of its register does not capture this. It is possible that the appointments of special counsel has been requested by the defence many more times than the two occasions on which it has been requested by the court.

1.135 In our previous report we also drew attention to the fact that there is considerable uncertainty whether magistrates’ courts have the power to invite the appointment of special counsel, because they are creatures of statute and therefore do not possess inherent jurisdiction. We note that the vast majority of applications for witness anonymity orders have been made in the Crown Court, but that three orders have been made in the magistrates court. So long as there remains the possibility of applications for anonymity being made in the magistrates court, it is undesirable that there remains uncertainty about whether there is power to appoint special counsel in such cases.

1.136 Finally we note that at the time of the passage of the 2008 Act, the Government told Parliament that courts had power under their inherent jurisdiction to appoint special counsel as and when they (the court) considered it appropriate. Since that date, the Attorney General has adopted a different position about the power of the courts to appoint special advocates, arguing that it is the Attorney General, not the courts, that has the power to appoint. Courts can request the Attorney General to appoint special advocates, but whether or not to do so is a matter for the Attorney General. In our view, this further strengthens the case for putting the power of the court to appoint special counsel onto an express statutory footing.

1.137 We therefore remain of the view that the legislation should be amended to place on an express statutory footing the trial judge’s discretion to appoint special counsel and the right of the defence to request the appointment of such special counsel.

124 PBC, 5 March 2009, Col. 547
125 DPP’s Supplementary Memorandum.
Page 41, Line 45, insert new sub-clause:

(7A) The court has the power to appoint special counsel to represent the interests of the defendant in his or her absence, if it appears to the court to be appropriate to do so in the circumstances of the case.

Alternatively, we recommend that such express provision be made in the new rules of court on witness anonymity being drafted by the Criminal Procedure Rule Committee chaired by the Lord Chief Justice.\textsuperscript{126}

1.138 We also recommend that the DPP’s Guidance covers the assistance prosecutors should be prepared to provide to the court to consider whether, in the particular circumstances of the case, fairness requires the appointment of special counsel; and that the DPP’s register of anonymity applications should additionally record whether any request or application was made to the court to appoint special counsel and the outcome of that request or application.

Investigation anonymity orders

1.139 The Bill also provides for investigative witness anonymity orders to be available in cases of murder or manslaughter where death was caused by a gun or a knife. The rationale for making such an extension of the anonymous witness provisions is to encourage witnesses to come forward in the most serious gang-related crimes where witnesses may be reluctant to do so because they fear reprisals.

1.140 An investigative witness anonymity order can be applied for by the police, or other investigative body, as well as by the DPP. There is an obvious practical problem about the effectiveness of such orders: unless the witness is also confident that their anonymity will be protected at trial they are unlikely to come forward. But the investigating authorities are not in a position to know whether such a trial anonymity order is likely to be applied for by the DPP, let alone given by the court. A requirement that an applicant for such an investigation anonymity order first obtain the consent of the DPP would address this practical problem.

1.141 We wrote to the Minister pointing this out and asking if there is any reason why the consent of the DPP should not be required before an application for an investigation anonymity order is made. The Government’s answer is that an investigation anonymity order is essentially an investigative tool to assist the police in their investigation of a particular kind of crime, and it may be used at the early stage of an investigation before the CPS is involved. The Government therefore does not consider it appropriate to require the DPP to consent before the police apply for these orders\textsuperscript{127}

1.142 We accept that investigation anonymity orders and witness anonymity orders serve different purposes at different stages of the case. However, the Government’s answer does not meet our concern about the practical utility of investigation anonymity orders if the CPS is not involved. As the Minister herself acknowledges, in her response:

\textsuperscript{126} See PBC, 5 March 2009, Col. 542.
\textsuperscript{127} Ev 23 - 24
1.143 When approaching the witness about an investigation order, it will be necessary for the police to explain its effect and to make clear that if the witness is required to give evidence at a later date, it would be necessary to make a separate application for a trial order and there is no guarantee this will be granted.

1.144 We are also concerned, as we have pointed out above, that the evidence suggests that the police have in practice not regarded applications for witness anonymity orders as being “exceptional”. Without requiring the CPS’s involvement in investigative anonymity orders, there must be a risk that the number of such applications by the police would be disproportionately large.

1.145 **We therefore recommend that the Bill be amended to require the consent of the DPP before an application for an investigation witness anonymity order is made.**

Page 37, line 40, at the end insert–

(8A) The condition in this subsection is that the DPP has given his consent to the application.
6. Changes to the criminal law

Reform of partial defences to murder

Background

1.146 The Bill reforms the law in relation to the partial defences to murder of diminished responsibility and provocation.\(^{128}\) Where a partial defence to murder is made out, the defendant is liable to be convicted of manslaughter instead of murder. As we have pointed out in previous reports,\(^{129}\) the scope of defences to murder engages Convention rights. The State is under a positive obligation under Article 2 ECHR to take appropriate steps to protect lives, including against deprivation by other individuals. This obligation requires the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person. On the other hand, the State is also under positive obligations to protect people against inhuman or degrading treatment and to protect their physical integrity and privacy, and these obligations underpin some of the defences to the criminal law provisions which protect the right to life.

1.147 It follows that if a partial defence to murder is drawn too widely, it may interfere with the right to life in Article 2 ECHR because it does not provide sufficient protection; if it is drawn too narrowly, it may interfere with other competing rights such as the right to physical integrity of respect for private life in Article 8 ECHR, by providing insufficient protection for the right served by the defence.

1.148 Both the Explanatory Notes to the Bill and the Minister’s reply to our letter explain that the Government accepts that the Bill’s provisions reforming the partial defences to murder potentially engage the right to life in Article 2 ECHR.\(^{130}\) They acknowledge the positive obligation on the State under Article 2 to protect the lives of others from unjustifiable deprivation by other individuals. However, the Government considers that its proposals for reform of the partial defences to murder do not in any way reduce the existing high level of protection for the right to life in the comprehensive legal framework of homicide offences. It points out that partial defences do not operate to determine whether or not criminal liability exists. Rather, they reduce liability from murder to manslaughter, which is itself an extremely serious offence carrying a maximum sentence of life imprisonment.

Diminished responsibility

1.149 The Bill replaces the current definition of the partial defence of diminished responsibility with a modernised definition. According to the new definition, the partial defence will be available where the defendant was suffering from an abnormality of mental functioning arising from a recognised medical condition which substantially impaired their ability to understand the nature of their conduct, form a rational judgment or exercise

\(^{128}\) Clauses 39-43.

\(^{129}\) See for example, reports on the defence of self defence and use of force to prevent crime in the Criminal Justice and Immigration Bill last session: Fifth Report of Session 2007-08, Criminal Justice and Immigration Bill, HL Paper 37, HC 269 at paragraphs 1.66-1.73 and Fifteenth Report of Session 2007-08, Legislative Scrutiny, HL Paper 81, HC 440 at paragraphs 2.21-2.35.

\(^{130}\) EN, paragraphs 845 and 849-50
self control, and the abnormality provided an explanation for their conduct. The Government’s aim is to modernise and clarify the law rather than alter the scope of cases caught by the partial defence.

1.150 There is some concern that the new definition of diminished responsibility means it will no longer be available to those accused of so-called “mercy killing”.

In their review, the Law Commission recognised that the current law was broad enough to allow, in some cases, the criminal law authorities, including courts and prosecutors, to bring those alleged of mercy killing within the diminished responsibility defence. The new provisions are clear that the defence will only arise where the individual is acting as a result of an abnormality based on an existing, recognised medical condition. Dignity in Dying argue that this will create unjust outcomes for individuals who “have acted rationally in response to persistent requests from a seriously ill loved one.” They argue that the new defence of diminished responsibility should be extended to include those who commit “mercy killings”.

1.151 Professor Jeremy Horder, Law Commissioner, in his evidence to the Public Bill Committee, said that one of the most common kinds of mercy killing cases that end up in the courts is one in which a man has become clinically depressed as a result of long term care for a partner who has become increasingly ill. The new definition of the partial defence is apt to cover this sort of case because it is the defendant’s depressive illness that has left him with less than full rational judgment, and that is a recognised medical condition. At least some mercy killings will therefore be covered, but as Professor Horder points out, the problem is that there may be a paucity of medical evidence to demonstrate this, because historically men have been less likely to admit to having, and to needing treatment for, depressive illness. However, he adds “I don’t think there is an obvious solution.”

1.152 The Law Commission’s 2006 report also 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. So far the Government has not taken up this recommendation. We recommend that they should. We note the Government’s statement that the reformulation of the partial defence of diminished responsibility is not intended to change its scope in any way, and that it therefore continues to cover the sorts of “mercy killing” cases identified by the Law Commission.

Loss of control

1.153 The Bill abolishes the existing partial defence of provocation and replaces it with a new partial defence of loss of self-control. The new partial defence based on loss of control will be available in circumstances where the killing resulted from a loss of self-control attributable to a qualifying trigger. The qualifying triggers for the loss of self-
control are that it was attributable to a fear of serious violence,\textsuperscript{136} or to things done or said which (a) constitute circumstances of an extremely grave character, and (b) caused the defendant to have a “justifiable sense of being seriously wronged”.\textsuperscript{137}

1.154 This raised a concern which the Committee has previously raised about compliance with the positive duty to protect against unjustifiable breaches of the right to life, where defences may be based on subjective assessments not grounded in reasonable, objective assessments of the circumstances of their actions. We asked the Government whether this defence would apply, for example, in circumstances where a homophobic male defendant reacted violently to the advances of a man in a nightclub, or a racist defendant reacted particularly violently to an assault by a black or Asian person?

1.155 In both the Explanatory Notes to the Bill and the Government’s response to our questions, the Government is clear that the test of what is a “justifiable sense of being seriously wronged” will be an objective one. First, it would be open to the judge to withdraw the question from the jury if there was not sufficient evidence for the defence to be left to the jury and second, if it went to the jury, it would be an objective question for it to determine. This follows from the use of the word “justifiable.” If the defendant’s sense of being seriously wronged is rooted in prejudice or bigotry, that cannot be regarded as “justifiable”.

1.156 We accept that whether a sense of being seriously wronged is “justifiable” will be an objective question for the judge or jury to determine. However, we note that in relation to the “fear of serious violence” trigger, the test is subjective. As the Explanatory Notes put it, “As in the complete defence of self-defence, this will be a subjective test and the defendant will need to show that he or she lost self control because of a genuine fear of serious violence, \textit{whether or not the fear was in fact reasonable}.”\textsuperscript{138}

1.157 Here, the Government relies on another requirement of the partial defence: that 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 a similar way to the defendant.\textsuperscript{139} “The circumstances of the defendant” exclude any circumstances whose only relevance to the defendant’s is that they bear on the defendant’s general capacity for tolerance of self-restraint.\textsuperscript{140} These provisions, the Government claims, prevent the defendant from seeking to obtain the benefit of the partial defence on the basis of intolerance, and the homophobic or racist defendant described by the Committee in its letter should not therefore be able to rely on their prejudices to avail themselves of the defence.

1.158 We note the Government’s explanation.

\textsuperscript{136} Clause 42(3).
\textsuperscript{137} Clause 42(4).
\textsuperscript{138} EN, paragraph 316
\textsuperscript{139} Clause 41(1)(c).
\textsuperscript{140} Clause 41(3)
Encouraging or assisting suicide

1.159 The Bill replaces the current offences of aiding, abetting, counselling or procuring suicide and of attempting to do so with a single offence of encouraging or assisting suicide. The Government says that the purpose of these provisions is to modernise the language of the current law with the aim of improving understanding of this area of the law. It is not intended to change the scope of the existing law.

1.160 The new provisions make it clear that it will be an offence if a person intentionally does something, or arranges for someone to do something, that is capable of encouraging or assisting suicide or attempted suicide of any person, if he or she intends the act to encourage another person to commit or attempt to commit suicide. This includes people or a group of people not known to the defendant and including whether or not anyone does attempt suicide.

1.161 On its face, the reformulation appears to be wider than the current offence. In any event, uncertainty around the scope of the offence could create uncertainty with a corresponding chilling effect on certain forms of speech. The scope of the offence appears to be broad enough to capture the publication of morbid poetry or song lyrics advocating suicide, whether online or otherwise. Individuals suffering from mental health problems, who may or may not have been suicidal, may be at risk of being criminalised when sharing their experiences or problems with others, whether online or otherwise. In addition, it is unclear whether the advertisement and promotion of lawful services rendered outside the UK would be covered by the proposed new offence: would it be an offence to gather or distribute information about the Swiss Dignitas Clinic in the UK? We wrote to the Minister to raise these concerns.

1.162 The Minister confirmed that it was the Government’s view that these proposals did not change the scope of the existing law and that in any event:

They will not represent any greater incursion on Convention rights than the existing law, which has never successfully been challenged on grounds of non-compliance. Any possible interference with Article 8 or Article 10 is fully justified as necessary in a democratic society.

1.163 The Minister emphasised that the proposals retained the element of intent which existed in the existing law. It would not be an offence to do something capable of encouraging or assisting suicide without the intent that your actions would do so. The Minister explained that in many of the cases we provided as examples, there “may well be no such intent”. The Minister added that no prosecution could be brought without the permission of the Director of Public Prosecutions.

1.164 When asked about the scope of the proposals during his evidence to the Public Bill Committee in the House of Commons, the current DPP, Keir Starmer QC, confirmed that in his view, posting morbid song lyrics or poetry would not carry the relevant intent to support a prosecution. He was not asked to consider any other circumstances where the

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141 Section 2(1) Suicide Act 1961.
142 Section 2(1) Suicide Act 1961 read together with Section 1 Criminal Attempts Act 1981.
143 EN, paragraphs 327 and 825
144 Clauses 46-48
offence might apply or whether its scope could have a chilling effect in the circumstances we addressed in our letter to the Minister. When asked whether, in his view, these proposals changed the current law, he said:

We have approached this on the basis that the measure does not extend the existing law, and I am therefore not anticipating that there will be a greater number of prosecutions resulting from the rewording of the offence.145

1.165 We are concerned that the scope of the new offence of encouraging or assisting suicide is sufficiently uncertain that it might have a chilling effect on speech. We accept that the intent elements of the offence add clarity. However, given that the Bill applies to the encouragement or assistance of suicide, but is not related to the suicide of any individual person or group of persons known to the accused, the intent involved may be relatively broad. For example, we consider that the placing of advertisements or information in respect of assisted suicide services abroad could fall squarely within the ambit of the offence. Similarly, an NGO which provided information about these services could equally be liable to prosecution. We consider that the breadth of the offence remains uncertain and has the potential to have a chilling effect on a range of activities involving reference to suicide or the provision of information or support around end of life decision making. We consider that this chilling effect could engage the right to freedom of expression and the right to respect for private life (Articles 8 and 10 ECHR) and would require justification.

1.166 There have been a number of cases in recent years in respect of the Suicide Act 1961 offences which these proposals replace. These cases have sought to require the DPP to either (a) give an undertaking that he will not bring a prosecution in respect of an assisted suicide, where an individual has helped a loved one to die, at their request or (b) to give clear guidance on the factors which will be taken into account when a prosecutor will decide whether to bring a prosecution in the public interest.146 Whether the DPP is under any duty to provide this guidance is currently being litigated in the courts but it is clear that the DPP has the power to issue such guidance.147 In the light of the potential for uncertainty in the proposals on encouraging and assisting suicide, we recommend that the DPP consult on and publish guidance on the factors which he would take into account in deciding whether it would be in the public interest to bring a prosecution for the new offence of encouraging or assisting suicide.

Possession of a prohibited image of a child

1.167 The Bill creates a new offence of possession of a prohibited image of a child.148 In order to be a prohibited image, an image must be pornographic, fall within subsection

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145 PBC, 5 Feb 2009, Col 106.
147 In Pretty, the European Court of Human Rights recognised that the right to respect for private life may be engaged in cases involving end of life decisions. In the same case, the House of Lords concluded that Article 8 ECHR was not engaged. Under domestic rules of precedent, domestic courts are bound to follow the decision of the House of Lords. The same constraints do not apply to our analysis. See Purdy v DPP [2009] EWCA Civ 92. We have previously commented on the implications of our domestic rules of precedent on the implementation of judgments of the European Court of Human Rights. See Sixteenth Report of 2006-07, Monitoring the Government’s Response to Court Judgments finding Breaches of Human Rights, HC 128/HL Paper 728, paragraphs 9 – 13.
148 Clause 49(1).
(6)\textsuperscript{149} and be grossly offensive, disgusting or otherwise of an obscene character. The definition of “pornographic” is set out in subsection (3). An image must be of such a nature that it must reasonably be assumed to have been produced solely or mainly for the purpose of sexual arousal. Where an individual image forms part of a series of images, the question of whether it is pornographic must be determined by reference both to the image itself and the context in which it appears in the series of images. Excluded from the scope of the offence are images which form part of a series of images contained in a recording of the whole or part of a classified work. According to the Explanatory Notes, “the main intention is to regulate obscene pornographic drawings (typically computer generated) or ‘cartoons’”.\textsuperscript{150}

1.168 Clause 51 sets out a series of defences to the new offence which are the same as those for the offence of possession of indecent images of children under section 160(2) of the Criminal Justice Act 1988:

- that the person had a legitimate reason for being in possession of the image;
- that the person had not seen the image and did not know, or have reasonable cause to suspect, that the images held were prohibited images of children; and
- that the person had not asked for the image and that s/he had not kept it for an unreasonable period of time.

1.169 An image is defined as including still images such as photographs, or moving images such as those in a film. It also includes any data which is stored electronically and is capable of conversion into an image. It does not include an indecent photograph or indecent pseudo-photograph of a child, as these are governed by other legislation.\textsuperscript{151} References to an image of a person include references to an imaginary person.

1.170 The Government accepts that publication of such material could already contravene the Obscene Publications Act 1959, but notes that some material may be published via the internet from sources outside the UK or where prosecution for publication is not feasible. However, the Explanatory Notes suggest that the new offence is required as:

... viewing such images can desensitise the viewer to acts of child abuse, and reinforce the message that such behaviour is acceptable. Banning its possession is justified in order to establish clearly and in accordance with the law that it is not.\textsuperscript{152}

1.171 Whilst the human rights parts of the Explanatory Notes in relation to the new offence are relatively lengthy, in reality they provide very little explanation of the Government’s rationale, and merely recite the applicable test. The main paragraph states:

These clauses could constitute an interference with Convention rights under Articles 8 and 10, but the Government considers that such interference is plainly justified. It is intended to achieve a legitimate aim and is necessary to meet that aim. The provisions are a proportionate response to a pressing social need and any consequent

\textsuperscript{149} Subsection 6 specifies that the image must focus on a child’s genitals or anal region or must portray one of a number of sexual acts involving children.

\textsuperscript{150} EN, paragraph 856.

\textsuperscript{151} The Protection of Children Act 1978, as amendment by Sections 69 – 70, Criminal Justice and Immigration Act 2008.

\textsuperscript{152} EN, paragraph 861.
interference with Convention rights would be in accordance with the law, and necessary in a democratic society for the prevention of crime, for the protection of morals, and for the protection of the rights and freedoms of others.153

1.172 We had concerns about the potential subjectivity of the offence154 and whether the definition of the new offence is sufficiently precise and foreseeable to satisfy the requirement that any interference with Articles 8 (right to respect for private life) and 10 (freedom of expression) ECHR rights be “in accordance with the law”. In addition, the Explanatory Notes do not make clear why the proposed new offence is necessary to meet the aims specified, nor how it is proportionate to those aims so as to be compatible with the right to respect for private life and the right to freedom of expression. We wrote to the Secretary of State to ask him to explain how the proposed new offence satisfies the “in accordance with the law” requirement of Articles 8(2) and 10(2) ECHR, why the offence is necessary and how it is proportionate to the Government’s stated aims.

**Legal certainty**

1.173 In his reply to us, the Minister stated that any interference with Articles 8 and 10 ECHR would be in accordance with the law as “the offences will be set out in clear terms in primary legislation”.155 However, in the Public Bill Committee, some Members expressed concern at the breadth and subjectivity of the definitions and the fact that people could be caught by the new offence for possessing images that they had created themselves without any harm to children or distribution to others.156 The Director of Public Prosecutions, when asked by Members of the Public Bill Committee about the inclusion of the term “disgusting” in the proposed new offence, stated that this was “a familiar formula” which would be subject to Article 10 ECHR consideration.157

1.174 **Criminal offences should be drafted in clear and accessible terms to ensure that individuals know how to regulate their conduct.** We remain concerned at the broad definition of the offence and, as a result, its potential application beyond the people whom the Government is seeking to target.

**Necessity and proportionality**

1.175 On our question of the necessity of the new provisions, the Minister replied that “the Government is satisfied that there is evidence to demonstrate a pressing social need” and referred us back to the Explanatory Notes.158 Summarising the Government’s view of the need for the new offences, she stated that such material was being currently exploited as a form of permissible child pornography; there is a need to protect children from abuse and to protect children and vulnerable adults from coming into contact with the material; such material can desensitise people to child abuse and reinforce people’s inappropriate and potentially dangerous feelings towards children; and that the impact of the internet meant

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153 EN, paragraph 859.
154 I.e. the image must be pornographic, be of one of the prescribed acts and be grossly offensive, disgusting or otherwise of an obscene character.
155 Ev 27 - 28
156 PBC, 3 March 2009, Cols 473-490.
157 PBC, 5 Feb 2009, Col. 104.
158 Ev 27
that existing laws did not cater for the potentially wide sphere of circulation for this material.\textsuperscript{159}

1.176 In the Public Bill Committee, Jenny Willott MP pursued the question of necessity, asking the Parliamentary Under-Secretary of State for Justice for the evidence for the Government’s assertion that the possession of such images causes harm and generates more problems to children, noting that “we have to have clear evidence to show that the change is needed” and “I am a little concerned that we are legislating without any evidence”.\textsuperscript{160} The Under-Secretary Maria Eagle MP did not address this point directly, but noted:

The development of this new offence … has been prompted by the concerns of the police and child protection agencies, dealing with an emerging, serious gap in the law that they have perceived, about the rise and discovery of explicit, non-photographic images depicting the kind of horrific sexual abuse of children that all of us would want to prevent, including, for example, computer-generated images that would not meet the definition of pseudo-photographs, and explicit cartoon and hand-drawn images.\textsuperscript{161}

1.177 Dealing with our question as to the proportionality of the new provisions with the Government’s aims of the prevention of crime, the protection of morals and the protection of the rights and freedoms of others, the Minister again referred us to the Explanatory Notes, stating that the proposed offence has a high threshold, includes specific defences, contains an exclusion for classified films and requires the consent of the Director of Public Prosecutions for a prosecution to be brought.\textsuperscript{162}

1.178 The question is whether or not the proposed restrictions on the rights to freedom of expression and respect for privacy are necessary and proportionate to the aims that the Government seeks to achieve. The Government has stated that the offence is needed to protect children and vulnerable adults and to fill a gap in the law. However, unlike the rapid evidence assessment it produced when introducing provisions in the Criminal Justice and Immigration Act 2008 relating to extreme pornography, it has provided no concrete evidence to demonstrate the need for the new offence. We reiterate our view, which we have expressed on previous occasions, that legislation should be evidence-based. Such evidence should be published in time to assist parliamentary scrutiny. Whilst we fully support appropriately targeted criminal offences which will prevent children from abuse, itself a gross violation of their human rights, we are disappointed that the Government has failed to provide sufficiently weighty reasons for the need of the new offence that they propose in this Bill.

\textsuperscript{159} Ev 28
\textsuperscript{160} PBC, 3 March 2009, Cols 481-2.
\textsuperscript{161} PBC, 3 March 09, Col. 488.
\textsuperscript{162} Ev 28
Public order offences

Incitement to hatred on the grounds of sexual orientation and freedom of expression

1.179 The Bill proposes to remove a savings clause inserted by the House of Lords into the Public Order Act 1986 in respect of the offence of stirring up hatred on the grounds of sexual orientation. This provision currently provides that “discussion or criticism of sexual conduct or practices or urging persons to refrain from or modify such conduct is not, in itself, to be taken to be threatening or intended to stir up hatred”. The Explanatory Notes explain that the Government considers that this savings provision is unnecessary as the incitement offence is expressly limited to threatening conduct intended to stir up hatred. In addition, it is subject to a requirement that the DPP consent to prosecution. In the Explanatory Notes, the Government explains that we considered the original offence, without the savings clause, and concluded that the provisions provided an “appropriate degree of protection for freedom of speech”.

We reiterate our earlier view that the offence of incitement to hatred on the grounds of sexual orientation contains adequate safeguards for the right to freedom of expression without the addition of a savings clause. Clause 58 would not lead to a significant risk of incompatibility with Article 10 ECHR.

“Insulting” words or behaviour

1.180 During our recent inquiry into policing and protest, we received evidence from witnesses who expressed concerns about the operation of section 5 of the Public Order Act 1986 on peaceful protesters. This section provides that if someone uses threatening, abusive or insulting words or behaviour “within the presence of a person likely to be caused harassment, alarm or distress” and intends the words to be threatening, abusive or insulting or is aware that they may be, he or she may be guilty of an offence. Some witnesses to our inquiry complained that this provision has a potential chilling effect on free speech. In our view, section 5 of the Public Order Act gives the police a wide discretion to decide what language or behaviour is “threatening, abusive or insulting”. Whilst arresting a protester for using “threatening or abusive” speech may, depending on the circumstances, be a proportionate response, we doubted whether “insulting” speech should ever be criminalised in this way. We consider that the Government should amend section 5 of the Public Order Act 1986 so that it cannot be used inappropriately to suppress the right to free speech, by deleting the reference to “insulting” language.

This amendment would provide proportionate protection to individuals’ right to free speech, whilst continuing to protect people from threatening or abusive speech. We consider that this Bill provides an opportunity to address our concern and therefore suggest the following amendment.

To move the following clause:

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163 Fifth Report of Session 2007-08, paragraph 1.64. The Parliamentary under Secretary for State, Maria Eagle MP, also referred to the Committee’s view during the debates in Public Bill Committee, see PBC, 2008-09, 3 Mar 2009, Col 498.

Harassment, Alarm or Distress: Insulting Words or Behaviour

“(1) The Public Order Act 1986 (c. 64) is amended as follows.

(2) In sections 5(1)(a) and 5(1)(b), the words “abusive or insulting” are replaced by “or abusive.””

Release of long term prisoners sentenced under the Criminal Justice Act 1991

1.181 On 12 February 2009, the Minister wrote to the Chair of the Public Bill Committee to explain a number of Government amendments. This correspondence was helpfully copied to our Chair.\textsuperscript{165} Among other amendments, the Government proposed to introduce a new provision to transfer from the Secretary of State to the Parole Board responsibility for deciding on the release of prisoners serving a sentence of 15 years or more under the Criminal Justice Act 1991. As the Minister explained, this amendment involved the last remaining category of prisoner where the Parole Board makes a recommendation on release but the final decision still rests with the Secretary of State.\textsuperscript{166}

1.182 This case follows a decision of the House of Lords that the current law is not in breach of the right to liberty (Article 5(4) ECHR), overturning an earlier declaration of incompatibility made by the Court of Appeal.\textsuperscript{167} The Government explains that although the House of Lords overturned the declaration of incompatibility, it was critical of the ongoing involvement of the Secretary of State. \textbf{We welcome the proposal to remove the power of the Secretary of State to overturn or disregard decisions of the parole board on the release of prisoners serving more than 15 years, pursuant to the Criminal Justice Act 1991, as a human rights enhancing measure.}

\textsuperscript{165} Ev 30 - 31
\textsuperscript{166} NC 31
\textsuperscript{167} R (Black) v Secretary of State for Justice [2009] UKHL 1
7. Procedural Changes

Bail in murder cases

1.183 In most cases, a defendant accused of a crime benefits from a presumption in favour of bail, subject to certain considerations, including the risk of failure to surrender to custody, the risk of committing other offences, interfering with witnesses or otherwise obstructing justice. This is in keeping with the requirements of the right to liberty as protected by Article 5 ECHR and the common law. Article 5(3) ECHR provides that an individual accused of a crime is entitled to a trial within a reasonable time or to release pending trial. This has been interpreted as a clear entitlement to release pending trial unless there are relevant and sufficient reasons to justify continued detention.168

1.184 The Bill would appear to reverse this presumption in murder cases and would not permit bail to be granted unless the court was of the opinion that there was no significant risk of the defendant committing, while on bail, any offence that would, or would be likely to cause, physical or mental injury to any person other than the defendant. The Explanatory Notes explain the Government’s view that these provisions are consistent with Article 5 ECHR:

That Article, amongst other things, sets out the circumstances in which a person may be detained pending trial. This provision does not affect most of those circumstances, it simply adds a test in murder cases in relation to a particularly serious category of prospective further offences – those which would, or would be likely to, cause harm. The similar test in section 25 of the Criminal Justice and Public Order Act 1994 (as amended) was found by the House of Lords in O v Crown Court at Harrow [2006] UKHL 42 to be compatible with Article 5 rights.

1.185 This underestimates the strength of the right of release guaranteed under Article 5 ECHR. The European Court of Human Rights has stressed that concrete facts outweighing the rule of respect for individual liberty must be convincingly demonstrated by the authorities:

Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.169

1.186 A similar provision in section 25 of the Criminal Justice and Public Order Act 1994 (as amended) permitted the court in certain cases only to grant bail where it was “satisfied that there were exceptional circumstances to justify it”. In O v Crown Court at Harrow, the court accepted that any presumption against bail would be incompatible with Article 5(3) ECHR. Argument centred around whether the relevant provisions should be read down to achieve compatibility (section 3 HRA) or that compatibility did not arise in that case as the requirements of the provision should not be read as a presumption against bail. On the latter analysis, the court still retained the power to grant bail generally and an

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168 Wemhoff v Germany (1968) 1 EHRR 55, paragraph 11; Yagci and Sargin v Turkey (1995) 20 EHRR 505, paragraph 52.
169 Ilijkov v Bulgaria, App No 33977/96, dated 26 July 2001, paragraph 84.
“exceptional circumstance” included that the court thought that the individual should be at liberty. On either reading, the provision would have little or no practical effect. For the avoidance of doubt, the Court made clear that the provision should be read down to ensure that it was compatible with Article 5(3) ECHR.\(^\text{170}\)

1.187 Both these arguments have been made in submissions by the Law Society and Liberty on this section of the Bill (a) that it cannot lawfully have any practical effect and (b) if the Government intends the provision to create a presumption against bail, that the courts are likely to be required to read these provisions down to make them compatible with the right to liberty.\(^\text{171}\)

1.188 The language in this provision is not as stark as the provision in section 25 of the Criminal Justice and Public Order Act 1994 (as amended) (in that case, exceptional circumstances had to exist, here there must be no significant risk of violence to others; in that case the court had to be satisfied, here it must only have an opinion). We wrote to the Minister to ask for further information about the intended effect of this provision. In his response, the Minister told us:

- These proposals were drafted with the case of O v Crown Court at Harrow in mind; and
- The Government does not intend this provision to reverse the burden of proof in respect of bail. Instead, the Government explains, the test in murder cases will be different from other cases, but the burden of proof will remain with the prosecution. In ordinary bail applications, the Government will need to prove that the defendant poses a risk to the administration of justice, that there is a risk that he will commit further offences or that there is a risk that he or she will abscond, and that bail conditions would be inadequate to meet that risk. In murder cases, the prosecution will need to establish that there is a significant risk of violence to others. As the Minister explains, “establishing that there is such a risk effectively precludes bail”.

1.190 We welcome the Government’s reassurance that clause 98(2) is not intended to create a presumption against bail or to reverse the burden of proof in bail applications in murder cases. In either case, we consider that there would be a clear risk of a breach of the right to liberty (Article 5(3) ECHR). We remain doubtful whether clause 98(2) can have any practical effect on bail decisions.

**Vulnerable and intimidated witnesses**

**Automatic application of special measures to selected witnesses**

1.191 Current criminal procedure provides for special measures to apply in respect of evidence given by certain vulnerable witnesses in criminal proceedings. A witness will be eligible for assistance if the court is satisfied that the quality of his or her evidence would be

\(^{170}\) Ov Harrow Crown Court, [2006] UKHL 42, paragraph 35

reduced on the grounds of fear or distress about testifying. These include measures such as giving evidence by video link or behind a screen. In determining whether to apply special measures, the court must take into account a number of factors and the views of the witness. The Bill proposes to extend eligibility for special measures automatically to proceedings in relation to certain types of offences. The relevant offences would include specified gun and knife crimes listed in schedule 12 (a number of more serious offences related to gun and knife crime have been specified by Government amendments during the passage of the Bill). The Government will be able to add additional offences by secondary legislation following the negative resolution procedure.

1.192 The Explanatory Notes accompanying the Bill provide no explanation of the Government’s view that the automatic application of special measures in any case would be compatible with the right of the defendant to a fair hearing for the purposes of Article 6 ECHR. This proposal, and omission from the Explanatory Notes, raises particular concern in light of the right of the defendant to cross examine witnesses against him (Article 6 ECHR and the common law).

1.193 We asked the Government for further information. The Minister told us:

The availability of special measures are not incompatible with the defendant’s right to fair trial in that the defendant is fully able to examine the witnesses against him or her. There are also a number of safeguards. Courts must determine special measures applications, opposing parties must make representations against applications and before reaching a decision, the court is required to consider whether the proposed measure(s) might tend to inhibit the evidence being effectively tested (Section 19 of the Youth Justice and Criminal Evidence Act 1999). The courts may also discharge a direction if it appears to be in the interests of justice to do so. Additionally, by virtue of Section 32 of the Youth Justice and Criminal Evidence Act 1999 judges must warn the jury as they consider necessary to ensure that the fact that special measures have been made available to a witness should not prejudice any conclusions that they may draw about a defendant.

1.194 The Minister also explained that the court will retain control of the decision over whether to apply special measures in any individual case and which measures would be appropriate.

1.195 During Public Bill Committee, it was suggested that offences related to gun and knife crime could comprise up to 24% of all proceedings. The only witnesses currently automatically eligible for special measures are children and witnesses in sexual assault cases. For example, in cases where individuals affected by disability seek special measures, the court must be persuaded that their disability will diminish the quality of their evidence. In cases where an automatic eligibility is not established, a witness who is frightened or distressed by the process of giving evidence must establish that fear or distress will diminish the quality of evidence given in order to establish eligibility. If eligibility is

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172 Clause 83
173 Ev 26
174 Ev 26
175 Ev 26
176 PBC, 5 March 2009, Col 569
automatically established by reference to the type of offence under consideration, the court will not need to consider whether fear or distress will diminish the quality of an individual’s evidence, but only whether any of the special measures available would be likely to improve the quality of evidence given. We recognise that the court will retain control over whether or not special measures will be in the interests of justice in an individual case. We accept that this discretion will provide a valuable safeguard for the right to a fair hearing as guaranteed by Article 6 ECHR and the common law. However, we remain concerned by the decision of the Government to provide blanket eligibility for special measures to any witnesses in proceedings related to a whole category of offences and the power to extend eligibility to a wider category of offences without further parliamentary debate. The Minister should explain clearly why automatic eligibility is necessary when the existing law already provides for special measures in cases where witnesses’ fear or distress is likely to diminish the quality of his or her evidence.

Extension of availability of intermediaries to vulnerable defendants

1.196 Under existing law certain vulnerable witnesses can be supported to give evidence by an intermediary. This provision – or any other special measures – does not currently apply to evidence given by the accused person. The Bill proposes to extend the assistance of intermediaries to certain defendants, which would include anyone with a mental disorder or a significant impairment of intelligence or social functioning.\(^{177}\) We received significant evidence during our inquiry on the human rights of adults with learning disabilities that a substantial number of adults with learning difficulties were being processed by the criminal justice system without a full understanding of the process or the evidence against them.\(^{178}\) The Prison Reform Trust (PRT) told us that it would be beneficial for some defendants with learning difficulties to be supported at trial by an intermediary or some form of appropriate adult.\(^{179}\) In their evidence to the Public Bill Committee, PRT express cautious support for these proposals, while emphasising the importance of ensuring that only those whom it is appropriate to prosecute stand trial:

> Although this measure is clearly designed to help vulnerable adults, it is difficult to conceive of circumstances where it is ever right to prosecute in a criminal court someone accepted to have a mental disorder (as defined by the Mental Health Act 1983) or a significant impairment of intelligence and social functioning. PRT believes the emphasis for this group should be diversion away from the criminal justice system into appropriate mental health or social care and on assessing individual's fitness to plead.

> Where diversion to a health or social care setting is not appropriate, support in the criminal justice system for vulnerable people is much needed.\(^{180}\)

1.197 Justice is “strongly opposed” to the inclusion of these proposals in the Bill. They rightly told us that Article 6 ECHR requires that an accused must be able effectively to

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\(^{177}\) Clause 88


\(^{179}\) Ibid, Annex 3.

\(^{180}\) PBC, 5 Feb 2009, Written Evidence (CJ08)
participate in their trial. This includes understanding the nature of the trial process, and the significance of any penalty imposed. An individual must, if necessary through the use of an interpreter, lawyer, social worker or friend, be able to “understand the general thrust of what is said in court”. They stress:

If the defendant is unable to do all these things then the mere presence of an intermediary when he gives his evidence cannot cure this defect. We also believe that there are inherent dangers in the use of an intermediary when a defendant gives evidence; the intermediary may not be independent of the defendant or the case (for example, a parent or carer) and may, whether independent or not, misinterpret the defendant’s speech and that of those asking him questions. If an individual is mentally compromised to the extent that they cannot understand and answer questions in simple language from a lawyer to a judge, then we believe that they will not be able to participate effectively in their trial and should not therefore be judged fit to plead.

1.198 Some concern has been expressed about the scope of these provisions, which refer to an intermediary having the power to “explain questions to a defendant” by Liberty, arguing that this could undermine an individual’s right to a fair trial when an intermediary is introduced. On the other hand, the Law Society has expressed some concern that the proposals should make clear that an intermediary’s duties to support a defendant extend to support the accused to understand the proceedings and to facilitate consultation and communication with his or her legal team.

1.199 Like other special measures provisions, these will be within the grant of the court. A direction may only be made where “necessary in order to ensure that the accused receives a fair trial”. The court may discharge or vary a direction when it is no longer necessary to achieve a fair trial or where a further direction or variation is necessary to achieve a fair trial for the accused.

1.200 We share the concerns of the Prison Reform Trust, Justice and other witnesses that individuals who cannot effectively participate in criminal proceedings, whether as a result of any mental health disability, intellectual impairment, or otherwise, should not be subject to prosecution, but should be diverted from the criminal justice system. The right to a fair hearing, guaranteed by the common law and Article 6(1) ECHR requires nothing less. However, we welcome the aim of these proposals to support vulnerable defendants when the court considers that an intermediary would be “necessary” to secure a fair trial. We consider that this provides a valuable safeguard against the use of these provisions in circumstances which would lead to prosecutions of individuals who should rightly be considered unfit to plead. We recommend that the Government consider asking the CPS and the Judicial Studies Board to consider issuing guidance to accompany these proposals, making clear the scope of the right to effective participation in criminal proceedings and highlighting circumstances where the use of an intermediary would be inappropriate. We understand that intermediaries will be funded by Primary Care Trusts (PCTs). We recommend that the Government monitor

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181 Ev 57
182 Ev 57
183 Liberty, Second Reading Briefing, January 2009.
and review how these provisions operate in practice. We consider that this monitoring exercise could be conducted effectively by the CPS or by the CPS with the input of information from PCTs, individual intermediaries, defence lawyers and defendants.

**Live links**

1.201 The Bill amends the Crime and Disorder Act 1989 in relation to the use of live video links for the purposes of conducting preliminary hearings and sentencing in criminal proceedings. Currently, a defendant must generally give his or her consent for these hearings to take place by live link. The Bill proposes to remove the requirement for consent and places the decision to use a live link entirely at the discretion of the judge involved.

1.202 The Government accepts that the right to a fair hearing, as guaranteed by Article 6(1) is engaged by the removal of consent. The Explanatory Notes explain that the Government considers that the requirements of Article 6(1) are satisfied because:

- for the purposes of these provisions, the accused will be treated as present in court when, by virtue of a live link direction he attends a hearing through a live link and there is nothing to stop the accused participating effectively in the conduct of his case;
- the court retains a discretion whether to give live link directions;
- the court can rescind the live link direction at any time during the hearing; and
- the court may not give or continue a live link direction unless satisfied that it is not contrary to the interests of justice.

1.203 Article 6(1) ECHR includes the individual right to be present and to participate freely in the determination of a criminal charge. The European Court of Human Rights has made it clear that the use of a live link is not inherently incompatible with the right to a fair trial, provided the operation of such a link ensures that the accused is able to follow the proceedings, to be heard without technical impediments, and that effective and confidential communication with a legal adviser is provided. An individual retains due process rights under the common law which UK courts have held are no less extensive than those in Article 6. We have written separately to ask the Minister for Security, Counter-terrorism, Crime and Policing why the Government considers that the proposals for the introduction of live links to extradition hearings in the Policing and Crime Bill are considered necessary.

1.204 We have raised similar concerns in respect of the compatibility of pre-charge detention hearings with the requirement of Article 5 ECHR, which protects the right to liberty, in cases involving alleged terrorism offences by live link. Both the Committee for

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185 Clause 90

186 Sakhnovskiy v Russia, App 2127203, Judgment 5 February 2009, paras 43 – 44, 54.

187 Our correspondence on this Bill is available on the JCHR website: http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/policingandcrimebill.cfm

188 Article 5 requires that an individual detained for the purposes of criminal investigation ought to be brought promptly before a judge. See Nineteenth Report of 2006-07, Counter-Terrorism Policy and Human Rights, 28 days, intercept and post-charge questioning, HL Paper 157, HC 790, paragraphs 74 – 80.
the Prevention of Torture and the European Court of Human Rights have determined that an accused who is detained pending charge or trial has the right to be brought physically before a judge who is capable of ordering his release (Article 5(3)).

1.205 Both Justice and the Law Society have raised concerns about the removal of consent in respect of these provisions. Justice calls for the retention of consent:

> These provisions will extend the circumstances in which criminal proceedings can take place via live link. This is an ongoing trend in recent legislation, against which we counsel caution. The physical presence of the accused in court is a very important safeguard not only against physical ill treatment of persons arrested and detained, but also against police and prosecutorial oppression and misconduct in the investigation.

1.206 The Law Society stresses that these proposals may include hearings while an individual is still detained at a police station. These hearings might take place shortly after charge and the Law Society notes that at these hearings little time will have been available for legal advice to be taken or to seek proper disclosure from the prosecution. Information relating to bail or to support a bail application may not be available and, in these circumstances, the individual will face a significant barrier to their ability to participate in the hearing. In addition, it may be difficult for a solicitor to take instructions from a client or to assess their well being if not able to meet face to face. The Law Society expresses particular concern about the use of live links in preliminary hearings when bail applications may be made. In these circumstances, the right to liberty, as guaranteed by Article 5 ECHR would be engaged. It recommends that the requirement for consent should remain until a further pilot to assess the capabilities of existing technology is completed.

1.207 The Explanatory Notes explain the Government’s view that the accused will be considered present when a live link takes place and “there is nothing to stop the accused participating effectively in the conduct of his case”. However, there is nothing on the face of the Bill which makes clear that a live link will not be adequate where a person is restricted in his ability to participate. Although the judge will have the power to stop a hearing, or to refuse a live-link, where the link would not be in the interests of justice, there is no clear direction on the face of the Bill that the interests of justice require that the accused must be able to participate fully in the hearing. We wrote to the Minister to ask for further information, including on why these proposals were considered necessary and compatible with Article 6(1); why the Government considered a person “present” at a hearing when participating by live link; and whether the Government considers that the production of a defendant at court could provide a valuable safeguard against abuse. We also asked whether the Bill should be amended to make it clear that a live-link would not be

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189 Report to the UK Government on the visit to the UK carried out by the European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment, 2 – 6 December 2007, CPT/Inf (2008) 27, paragraphs 8 – 10; See also Ocalan v Turkey (GC), App No 46221/99, 12 May 2005, where the ECtHR determined that the purpose of Article 5(3) ECHR was to “ensure that arrested persons are physically brought before a judicial authority promptly”

190 Ev 57

191 Ev 59

192 EN, paragraph 914
in the interests of justice in any case where the link would restrict the ability of the accused to participate fully in the hearing.

1.208 Responding to our request for justification, the Minister explained:

Live-link hearings are of benefit to the criminal justice system generally and to defendants themselves. Those benefits are maximised if the links are available for use in as many as possible of the cases for which they are suitable.\(^{193}\)

1.209 The Minister’s response does not help us understand the benefits which the Government consider will flow from the increased use of live link hearings, only the Government’s view that live links should be used in as many cases as possible. In the context of pre-charge hearings in cases involving individuals suspected of terrorism, the Government has suggested that security concerns justify the use of live links. When we visited Paddington Green Police Station, counter-terrorism officers told us that live-links were not used for security reasons, but to serve the individual choice of those being held.\(^{194}\) In relation to the proposals currently being considered in the Policing and Crime Bill, the Minister has explained that the financial and administrative burdens associated with travel to short hearings justify the increased use of live links.\(^{195}\) We recommend that the Government provide evidence of the benefits which it considers will flow from the increased use of live links.

1.210 In addition, the Minister’s view was that:

- The person is present for the limited purposes proposed by the Bill, because they are able to “see and hear and to be seen and heard by the court during these hearings.”

- “As a matter of general practice, the need for participation by the defendant in the sorts of hearing that can take place by live link is limited; but to the extent that the need for such participation arises, the court will as a matter of course have regard to it in assessing whether to give a live link direction.”

- An express statement that a live link would not be in the interests of justice where participation would be impaired would be unnecessary as this will automatically be considered by the court as part of the right of the accused to a fair trial.\(^{196}\)

1.211 We remain concerned that the Government has not yet provided a full explanation of its view that these provisions will be compatible with Articles 5 and 6 ECHR. We accept that the control of the court and the restriction of live link orders to cases which serve the interests of justice provide valuable safeguards for the right to liberty and the right to a fair hearing. We are particularly concerned, however, that the removal of the requirement for consent to a live link hearing may lead to circumstances where the right to liberty will be engaged, but may be overlooked in the interests of administrative convenience.

\(^{193}\) Ev 27


\(^{195}\) Our correspondence on this Bill is available on the JCHR website: http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/policingandcrimebill.cfm

\(^{196}\) Ev 26 - 27
1.212 The European Court of Human Rights has stressed that the operation of live links in practice will be key to their impact on the right to a fair trial (Article 6 ECHR). The Minister should be able to explain why the Government considers that there is adequate evidence to show that in the circumstances in which live links may be implemented more widely, they are currently operating in a manner which allows the defendant to participate in the hearing and to consult and instruct his legal adviser in confidence.

1.213 We welcome the Minister’s reassurance that the Government’s view is that the court would automatically consider the defendant’s capacity to participate when considering whether a live link was in the interests of justice.

**Criminal memoirs**

1.214 The Bill proposes to enable the Serious Organised Crime Agency or other specified enforcement officers to apply to the High Court for “exploitation proceeds orders” (EPO) to recover benefits accrued by certain offenders through exploitation of material relevant to their offence. This EPO is designed to allow recovery of profits made by convicted offenders publishing their memoirs, giving paid interviews or participating in paid speaking events. The Explanatory Notes explain the Government’s view that it is “arguable” that these provisions could engage the right to freedom of expression as guaranteed by Article 10 ECHR. They explain that, if Article 10 is engaged, it is the Government’s view that any interference is justified:

> Article 10 is a qualified right and may be subject to restrictions that are prescribed by law and necessary in a democratic society in pursuance of a legitimate aim. These proposals will be prescribed by law with precision in primary legislation. Preventing criminals from profiting from their crimes by receiving benefits for, for example, writing books has the legitimate aim of protecting the rights of others (including the victims of those crimes and their families) and protecting morals. They meet the pressing social need to allay public concern about criminals profiting from their criminal behaviour and are both necessary to achieve that aim and proportionate in doing so. The scheme only relates to those who have committed crimes and would not prevent publication of relevant material but provide for a means for the benefit to be recovered. Only the High Court can make an order and determine the amount payable…In doing so it will be expressly required to consider factors including any public interest in the publication and any social, cultural or educational value, and may also consider other relevant factors.

1.215 The right to free expression is engaged by attempts to recover proceeds or benefits accrued as a result of any form of expression, even where that action does not prevent the individual from expressing him or herself. So for example, in a previous case where the UK Government obtained a civil order to deprive a former double agent of the proceeds of his memoirs, this engaged Article 10 ECHR and required justification.

1.216 The issues which the High Court must consider when deciding whether to make an EPO include “the extent to which any victim of the offence, the family of the victim or the

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197 Part 7; Clauses 135 - 152
198 EN, paragraphs 955-956
general public is offended by the respondent obtaining exploitation proceeds from the relevant offence”. This consideration is in addition to “the extent to which the carrying out of the activity or supplying of the product is in the public interest” and “the seriousness of the relevant offence to which the activity or product relates”. Discretionary powers may be sufficiently precise to meet the “prescribed by law” standard, but only where the way in which the discretion should be exercised is indicated with sufficient clarity to enable someone to regulate their conduct (if necessary, with advice) and to give adequate protection against arbitrary interference. The requirement that the High Court considers whether individual persons or the general public might be offended introduces an entirely subjective element to the determination of whether an order would be appropriate and one which will make it difficult to ascertain in which circumstances an order will or will not be imposed. This ambiguity raises questions over whether the proposed interference with Article 10 ECHR is adequately “prescribed by law”.

1.217 We wrote to the Secretary of State, asking for a further explanation of the Government’s view that these provisions are “prescribed by law” in the light of the requirement that the Court take into account whether individual victims, their families, or the general public may be “offended” in the absence of any order. In response, the Minister told us that:

It is perfectly legitimate (and indeed right) for the court to take into account the impact of publication on victims and the wider public at the same time as considering, for example, the social, cultural and educational value of the publication.

1.218 The Government argues that there are adequate safeguards in the proposed provisions to guard against arbitrary interference, including that the order remains within the discretion of the court (subject to further appeal) and that a great deal of detail is provided on the face of the Bill.

1.219 Given that these proposals are designed to protect the rights of others (being victims and their families) and to protect morals, we accept the Government’s view that the Court will need to consider evidence demonstrating that one of these aims will be served by the order being sought. We agree that it would be “perfectly legitimate” for the court to take into account the impact of publication itself, or the knowledge that an individual had profited financially from a publication or an activity. Unfortunately, the Bill does not require the court to consider the degree to which an order would be necessary to protect the rights of others or to protect morality. Nor does it enable the court to consider the impact which an order may have on the public interest or individual victims or their families. Instead, the Bill requires the court to take into account the extent to which victims, their families and the wider public are offended by the profit made in a particular case. There is no Convention or common law right to be protected from offence. The Bill introduces a degree of legal uncertainty which will be entirely dependent on the subjective reaction of a small group of people or the wider public to an individual’s actions (the latter being more difficult to assess). This legal uncertainty may be resolved by subsequent decisions of the court, but we are concerned as to how the court is expected to gather

201 Ev 28
adequate evidence to consider the relevant “degree of offence” in any particular case. Aside from evidence from victims and their families, in notorious cases would the court be bound to take into account campaigns by national newspapers in order to determine the extent to which the general public was offended?

1.220 We remain concerned that making an Exploitation Proceeds Order (EPO) in part dependent on the degree to which a victim, their family or the general public are offended in a particular case could unnecessarily risk arbitrary application of these proposals. We recommend that the Government should consider an amendment to the Bill to remove any reference to the degree of offence aroused by the relevant profits, while retaining the ability of the court to consider the wider public interest in making an EPO.
Annex: Proposed Committee Amendments

In this Annex, we suggest amendments to the Coroners and Justice Bill \(^{202}\) to give effect to some of our recommendations and to assist parliamentarians in ensuring that some of the matters we have raised are debated in Parliament.

**Certified or secret inquests**

These amendments are intended to remove the Government’s proposals on certified inquests from the Bill. (Paragraph …)

Page 6, Line 2, Leave out Clause 11.

Page 7, Line 1, Leave out Clause 12.


**Information Sharing Orders and the right to respect for private life**

This amendment is intended to remove the Government’s proposals for Information Sharing Orders from the Bill. (Paragraph …)

Page 101, Line 12, Leave out Clause 154.

**New powers for the Information Commissioner**

This amendment is intended to extend the proposed power for the Information Commissioner to issue Assessment Notices to data-controllers in the private sector. (Paragraph …)

Page 98, Line 25, \([\text{Clause 153}]\), delete from the second “is” to the end of line 29 and insert “not an excluded body”.

This amendment is intended to treat failure by a public authority to comply with an Assessment Notice as contempt of court. (Paragraph …)

*Failure by a government department or public authority to comply with an assessment notice*

To move the following clause–

“(1) If a government department or public authority has failed to comply with an assessment notice the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

(2) Where failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the government department or the public authority, and after hearing any statement that may be offered in defence, deal with the failure to comply as if it were a contempt of court.”.

\(^{202}\) Bill 72, 2008-09.
Duty to investigate

This amendment clarifies the circumstances when, for the purposes of the Bill, an individual shall be “in state detention.” This is a non-exhaustive list. (Paragraph …)

Page 2, Line 1, [Clause 1], at the end insert–

“(2A) For the purposes of this section, the circumstances when the deceased should be considered to have been in ‘state detention’ include:

(a) detention by a constable or other public authority pursuant to statutory or common law powers;

(b) detention or deprivation of liberty pursuant to the requirements of mental health legislation, including the Mental Health Act 1983 and the Mental Capacity Act 2005, as amended by the Mental Health Act 2007;

(c) the placement of a child in secure accommodation;

(d) detention pursuant to immigration and asylum legislation; and

(e) the detention of any person in custody or otherwise detained while he or she is being transported from one place to another.”.

Purpose of investigation and matters to be ascertained

This amendment is intended to clarify that the purpose of an investigation will be to ascertain the circumstances of a death in cases where there could be a risk to public health and safety or in any other circumstances that the coroner determines in the public interest. (Paragraph …)

Page 4, Line 4, [Clause 5], at the end insert–

“(2A) The senior coroner may determine that the purpose of any investigation shall include ascertaining the circumstances the deceased came by his or her death where

(a) the senior coroner is satisfied that there are reasonable grounds to determine that the continued or repeat occurrence of those circumstances would be prejudicial to the health and safety of members of the public, or any section of it; or

(b) the senior coroner is satisfied that there are reasonable grounds to consider such circumstances in the public interest.”.

Outcome of the investigation

This amendment clarifies that the limitation in clause 10(2) cannot affect the overriding duty on the coroner to fulfil the purpose of his investigation. (Paragraph …)

Page 5, Line 40, [Clause 10], at the end insert–

“(3A) Subsection 2 shall not affect the duty on the coroner to conduct an investigation which meets the requirements of Section 5.”.
**Juries**

These amendments remove the Government’s proposals to change the composition of inquest juries and restate the current position in the Coroner’s Act 1988 (Paragraph …)

Page 4, Line 31, [Clause 7], at the end insert–

“(d) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public.”.

Page 4, Line 41, [Clause 8], leave out “six, seven, eight or nine” and insert “not less than seven nor more than eleven”.

Page 5, Line 17, [Clause 9], leave out paragraph (a) and insert–

“(a) the minority consists of not more than two, and”.

**Legal aid**

This amendment requires the Secretary of State to initiate a review of Legal Aid and other funding for bereaved families in relation to inquests. (Paragraph …)

**Review of access to legal aid in inquests**

To move the following clause–

“(1) The Secretary of State shall, within one year after the date on which this Act receives Royal Assent, lay before both Houses of Parliament a report on access to legal aid and other funding for bereaved families in relation to inquests.

(2) The report under subsection (1) shall be prepared by a person appointed by the Secretary of State following consultation with

(a) the Lord Chief Justice; and

(b) such other persons as the Secretary of State shall consider appropriate to consult.”.

**Witness anonymity**

These amendments propose additional safeguards in respect of the Government’s proposals for witness anonymity. (Paragraph …)

Page 42, Line 5, [Clause 71], at the end insert–

“(7A) The court has the power to appoint special counsel to represent the interests of the defendant in his or her absence, if it appears to the court to be appropriate to do so in the circumstances of the case.”.

Page 37, line 40, at the end insert–

“(8A) The condition in this subsection is that the Director of Public Prosecutions has given his consent to the application.”.
Public order offences

This amendment removes insulting words or behaviour from the Public Order Act offences of harassment, alarm or distress. (Paragraph …)

*Harassment, alarm or distress: insulting words or behaviour*

To move the following clause–

“(1) The Public Order Act 1986 (c. 64) is amended as follows.

(2) In sections 5(1)(a) and 5(1)(b), the words “abusive or insulting” are replaced by the words “or abusive”.”.
Conclusions and recommendations

1. We welcome the inclusion of detailed Explanatory Notes on the implications of the Bill for Convention rights and we commend to other Departments the approach taken in relation to this Bill. (Paragraph 1.4)

2. We welcome the prompt response provided by the Secretary of State to our request for further information, which has assisted parliamentary scrutiny of the Bill. (Paragraph 1.5)

3. We welcome the engagement of the public and interested organisations in our legislative scrutiny work. (Paragraph 1.7)

4. The breadth and size of the Bill and the legal complexity and diversity of the topics it covers have been the subject of concern during the Bill’s passage through the House of Commons given the limited time provided for scrutiny. We add our voice to those concerns. Large, multi-purpose bills of this sort are almost impossible to scrutinise effectively within the limited timescale provided by the Government. Given the range and significance of the human rights issues raised in this bill, the Government should have introduced two or three separate bills, each of which would have been substantial pieces of legislation in their own right or ensured that there was sufficient time for full pre-legislative and Committee stage scrutiny in the House of Commons. We welcome the fact that two days have been given over for Report stage in the House of Commons, a step not taken in relation to previous Bills of similar size, including the Criminal Justice and Immigration Bill, which we considered in the last session. (Paragraph 1.11)

Certified or “secret” Inquests

5. Some press reports suggest that additional safeguards [to the proposals for certified inquests] have been introduced since these proposals were withdrawn from the Counter-Terrorism Bill. In our view, for reasons we explain below, the proposals are broadly the same and raise the same concerns. (Paragraph 1.14)

6. We consider that there remains a significant risk that the proposed scheme [for certified inquests] will operate in a way which is incompatible with Article 2 ECHR. (Paragraph 1.20)

7. We note that the Government had intended to tighten up the grounds for certification, but consider that the changes have not significantly altered the very broad scope of the original proposals. In the light of the fact that the right to life is so clearly engaged in this case, we are alarmed by the Government’s concession that a broad public interest test has been deployed “just in case” a future unforeseen concern might arise. (Paragraph 1.26)

8. The Government has not explained fully how the ability of the coroner to appoint counsel to the inquest will assist the participation of bereaved family members in...
certified inquests. There remain a number of difficulties with the Government’s proposal in the Explanatory Notes that counsel for the inquiry act ‘as special advocate’, including how the counsel would resolve any potential conflict of interest between individual interested parties and whether counsel would need to be approved by the Secretary of State if they were not special advocates with appropriate security clearance. In our view, if the family of the bereaved are to be excluded from any part of the inquest, it is vital that they be represented in the closed proceedings by a special advocate whose function is to represent the interests for family. (Paragraph 1.30)

9. We do not consider that the Government has provided a satisfactory justification for its view that there is no need to set out, on the face of the Bill, a requirement that the Minister’s view be honestly and reasonably held. Despite the Government’s assertion that the judicial oversight proposed is adequate, we are concerned that Clause 11 is designed with this purpose in mind: to secure greater protection for information which the Government considers should not be disclosed in the public interest without the rigorous scrutiny which would be applied by the court on an application for PII, where the onus clearly rests on the Secretary of State to persuade the coroner, and if necessary, the court, that there are good reasons why certain information should not be disclosed.204 (Paragraph 1.34)

10. We welcome the decision to remove the power for the Secretary of State to appoint a coroner to hear a certified inquest. We are concerned however that the proposals have [otherwise] been amended in a way which widens their scope without introducing any additional significant safeguards. (Paragraph 1.36)

11. We are not satisfied that a case has been made for the broad provisions under Clauses 11-13, and we would recommend that they be deleted from the Bill. We recommend amendments to the Bill.205 (Paragraph 1.42)

Data Protection

Information Sharing Orders and the right to respect for private life

12. We reiterate our view that, in principle, information sharing powers should be adequately defined in primary legislation, accompanied by appropriate safeguards and subject to the application of the Data Protection Act 1998. (Paragraph 1.45)

13. We would welcome confirmation that the Government has decided to drop these proposals. We recommend that the relevant amendments are tabled as soon as possible and that the Secretary of State should make a statement to Parliament on his decision and the Government’s plans for taking this issue forward. No Government amendments have yet been tabled to the Bill for this purpose. We recommend amendments to the Bill. (Paragraph 1.46)

204 The law of public interest immunity (PII) already applies to inquests. Applications may be made to the coroner to seek a PII certificate to prevent disclosure of certain categories of information on the grounds of damage to the public interest.

205 We understand that similar amendments were tabled on 11 March 2009, to delete clauses 11 and 12 from the Bill. For completeness, we recommend the deletion of all three clauses.
14. If these proposals are part of the Bill introduced to the House of Lords, we may consider a further report to address our detailed concerns about the Government’s proposals for ISOs. (Paragraph 1.48)

15. Ideally, safeguards should be provided in primary legislation. If adequate safeguards were in place in the enabling primary legislation, a narrow fast-track ISO procedure could be a positive development in terms of parliamentary oversight of information sharing proposals, particularly given the limited scrutiny of existing information sharing provisions in primary legislation. However, for the reasons set out below, we have significant concerns about the scope of these proposals and the associated safeguards in clause 154. (Paragraph 1.50)

16. We have previously made clear that such a wide order-making power is not acceptable. Ministers should never be given the power to amend, by order, legislation as significant for human rights as the HRA and the DPA.206 (Paragraph 1.51)

17. We recommend that the Government should take up the Information Commissioner’s suggestion that a clear savings clause for the continued application of the DPA 1998 and the HRA 1998 is necessary. (Paragraph 1.54)

18. The correct test [to be applied Article 8 ECHR] is whether the interference with the rights of those individuals which happens when their information is shared is necessary and proportionate to the pressing social need which the sharing proposes to address. (Paragraph 1.56)

19. We welcome the Minister’s reassurance that any ISO would automatically be accompanied by a Privacy Impact Assessment, which would be provided to the Information Commissioner and generally published more widely. We do not consider, however, that this would provide an adequate safeguard to meet our other concerns about the breadth of the proposals in clause 154. (Paragraph 1.57)

20. We are concerned at the limitations on the role of the Information Commissioner in these proposals and note that he shares some of our concerns.207 (Paragraph 1.58)

New powers for the Information Commissioner

21. We recommend that the Government reconsiders the Information Commissioner’s request that the proposed power to issue assessment notices be extended to data controllers in the private sector. Extension of these proposals to the private sector should include safeguards for data controllers’ rights to respect for private life, if necessary. We do not consider that an amendment together with any necessary safeguards should be overly complex and we propose an amendment for the purposes of debate. (Paragraph 1.66)

22. We consider that these additional powers [to sanction public authorities] for the Information Commissioner would be a human rights enhancing measure. While we note the Government’s view that it would be unusual for a department or other public body to ignore an Assessment Notice, or to fail to comply with its terms, there

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207 Ev 36
is no reassurance on the face of the Bill that this will not be the case. We propose an amendment to meet the Information Commissioner’s concerns, for the purpose of debate. (Paragraph 1.67)

Coroners Reform

Coroners reform as a human rights enhancing measure

23. We welcome the long-awaited introduction of the Government's proposals for [coroners] reform. In so far as the Bill has the potential to support the UK's obligation to protect the right to life, by enhancing the ability of families to discover the truth about the deaths of their loved ones and by increasing the likelihood that public services and others will learn lessons from often tragic circumstances, we consider Part 1 of this Bill to be a human rights enhancing measure. (Paragraph 1.70)

Duty to investigate

24. We welcome the new extended duty to investigate deaths in state detention, which is a human rights enhancing measure. However, we are concerned that the only clarification of the scope of this provision is found in the Explanatory Notes accompanying the Bill. We recommend that the Bill is amended to include an interpretative clause which sets out a non-exhaustive list of circumstances when an individual should be considered to be in custody or in state detention. (Paragraph 1.74)

25. We have one outstanding concern, which relates to individuals without capacity who may be deprived of their liberty in residential care homes or hospitals, so-called “Bournewood patients”. Individuals in these circumstances are particularly vulnerable, whether resident in a state institution or a private facility. The Government should clarify whether the Bill will impose a duty to conduct an investigation in these cases. We recommend that any illustrative list should make clear that a duty should apply. (Paragraph 1.75)

Purpose of investigation and matters to be ascertained

26. We welcome clause 5 to the extent that it seeks to enshrine in primary legislation the principle, recognised by the House of Lords in Middleton, that the focus of an investigation into a death governed by Article 2 of the Convention should be on the circumstances of the death. We welcome this legislative clarification of the law to give better effect to a court judgment in which the court used the interpretative power in section 3 of the Human Rights Act to change the settled interpretation of the meaning of a statutory provision.208 As the Explanatory Notes state, “the new provision makes the position expressly clear” and “therefore ensures that investigations into deaths under the Bill are compatible with the ECHR as determined by Middleton”. (Paragraph 1.77)

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208 Section 3(1) HRA provides: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”
27. We welcome the Minister’s reassurance that coroners will retain a broad discretion to undertake a wider investigation into the circumstances of a death in cases other than those where one is necessary in order to avoid a breach of Convention rights. Unfortunately, there is nothing on the face of the Bill or in the Explanatory Notes to make clear whether or not it is the Government’s intention that coroners should be able to exercise their discretion in this way. Nor is there any indication of the circumstances in which a coroner may wish to exercise his discretion. We recommend the following amendment to the Bill for the purpose of debate. (Paragraph 1.81)

Outcome of investigation

28. We welcome the Minister’s reassurance that the Government does not intend to narrow the scope of the existing law by incorporating in statute the existing limitation on coroners determinations “appearing to determine” civil or criminal liability. However, since clause 5 and clause 10 together will serve to determine the scope of a coroners investigation, we remain concerned that this relationship should be clearly defined. As matters stand, it is not clear how the requirement in clause 10(1) – that any determination should address the purpose of an investigation, by determining how or in what circumstances the deceased came by his death – relates to the prohibition in clause 10(2) against findings that appear to determine civil or criminal liability. Without clarity, there is a risk that the prohibition in clause 10(2) could serve to undermine the very purpose of a coroners investigation as envisaged in clause 5. This could undermine the ability of the inquest to meet the requirements of Article 2 ECHR. We propose the following amendment to the Bill. (Paragraph 1.85)

Juries

29. The Government’s justification for removing the requirement for a compulsory jury inquest in cases where the health and safety of the public, or a section of the public, is at issue is not clear. We recommend that the Bill is amended to reflect the existing legal position unless a clear argument against doing so is provided. We propose an amendment for the purposes of debate. (Paragraph 1.92)

30. We are not persuaded that the Minister has provided adequate justification for the proposed change [to the composition of inquest juries]. We recommend that clauses 8(1) and 9(2) be amended to maintain the existing provision to the effect that the minimum number of members required on a jury is seven and the maximum is eleven. We propose an amendment for the purposes of debate. (Paragraph 1.95)

Powers to gather evidence and to enter, search and seize relevant items

31. In principle, we welcome the proposals to extend the compulsory powers of the coroner as a human rights enhancing measure. (Paragraph 1.98)

32. The participation of any interested party in the investigation will necessarily be contingent upon access to all relevant material, and such participation on the part of
the deceased’s next of kin to the extent necessary to safeguard their legitimate interests is an essential part of an effective investigation in the context of a death governed by Article 2. We welcome the Government’s recognition that evidence obtained using compulsory powers will be subject to the ordinary rules of disclosure in the coroners rules (which will be covered in secondary legislation under this Bill). However, we consider that the Government has missed an opportunity in this Bill to ensure that the disclosure rules will be applied in a way which will support the rights of bereaved families to effective participation. In addition, we regret that draft coroners rules are not available for scrutiny. (Paragraph 1.100)

33. We have previously expressed our disagreement with Government over whether safeguards in respect of compulsory powers, and in particular, powers of search and seizure, should be provided in primary legislation.209 We agree that some degree of detail may be left to secondary legislation, but consider that the substance of the relevant safeguards should be provided in primary legislation. We are concerned that draft regulations setting out the proposed safeguards which will accompany the compulsory powers of the coroner will not be available for scrutiny during the passage of the Bill. (Paragraph 1.102)

**Power to report if risk of future death**

34. We do not have adequate information to assess whether last year’s amendments to rule 43 have been sufficiently successful to obviate the need for a further formal mechanism for collating, monitoring and disseminating coroners’ reports, or any further provision for sanctions. The changes to rule 43 have been in force for such a short period of time that the experience of their operation may not be as useful as the Minister suggests. In the light of the potential value which coroners’ reports may provide in allowing lessons to be learnt from often tragic circumstances and in avoiding unnecessary risk to life, we recommend that the Government reconsider whether more formal arrangements for the treatment of coroners’ reports should be included on the face of the Bill. (Paragraph 1.106)

35. We regret that no draft regulations dealing with the proposed treatment of coroners’ reports have been produced to assist parliamentary scrutiny. (Paragraph 1.107)

**Legal aid**

36. We are concerned by the evidence which we have received on the difficulties faced by families who seek legal assistance and representation to support their effective participation in an inquest where their loved one has died. Article 2 ECHR does not require legal aid to be provided in all cases. However, Article 2 ECHR will require legal aid to be provided where it is necessary to ensure that next-of-kin participation is effective. This may include legal aid for representation throughout an inquest. Evidence appears to suggest that current legal aid rules are being applied in a way which fails to recognise when legal aid may play an integral role in supporting effective participation for many families and that, in many cases, families are faced

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209 See for example, Twentieth report of 2005-06, paragraphs 2.41 – 2.49 (Compensation Bill); Eighth Report of 2003-04, paragraph 4.28 (Housing Bill).
with unrealistic choices based upon the current application of the means testing rules. We welcome the undertaking of the Secretary of State and the Minister to look again at these rules. We recommend that the Government make a concrete commitment to an independent review of the current system for assessing access to legal aid and other funding for bereaved families to access legal advice and assistance, preparation and representation at an inquest. (Paragraph 1.113)

37. We suggest a new clause for inclusion in the Bill which would ensure that the Government commissioned such a review and reported its conclusions to Parliament. (Paragraph 1.114)

Witness anonymity

38. We […] welcome the early opportunity to give further consideration to the human rights issues raised by witness anonymity orders. (Paragraph 1.115)

39. We welcome the CPS’s initiative in compiling this register of all applications: it provides an important source of information to enable the practical operation of the witness anonymity provisions to be independently scrutinised and is a valuable human rights safeguard. (Paragraph 1.118)

40. We welcome the express acknowledgment of the exceptional nature of witness anonymity orders in both the Attorney General’s Guidelines and the DPP’s Guidance. We also welcome the Minister’s acceptance that “anonymity orders should not become routine instead of exceptional.” We do not consider the number of witness anonymity orders applied for in the first 6 months of the legislation’s operation to suggest that the orders are being treated as other than exceptional. We therefore do not regard it as necessary for the legislation to be amended to insert an express reference to the exceptional nature of witness anonymity orders, such as that contained in the equivalent New Zealand legislation. (Paragraph 1.124)

41. We recommend that appropriate guidelines be drawn up for the police concerning their role in the application for witness anonymity orders, which reflects, in a manner accessible to front line police officers, the clear guidance to prosecutors that witness anonymity orders are justified only in exceptional circumstances. (Paragraph 1.125)

42. We recommend that future editions of the Director’s Guidance, which expressly states that it will be kept under review, provides some guidance as to what the Director is likely to regard as constituting “serious damage to property” when considering whether to make an application for a witness anonymity order. In particular, guidance would be welcome as to whether, in the DPP’s view, there will usually need to be some kind of risk to persons for the damage to property to be “serious”, which was the human rights compatible interpretation of the same phrase by the Attorney General of New Zealand. (Paragraph 1.129)

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210 PBC, 5 March 2009, Col. 563.
43. We therefore remain of the view that the legislation should be amended to place on an express statutory footing the trial judge’s discretion to appoint special counsel and the right of the defence to request the appointment of such special counsel. Alternatively, we recommend that such express provision be made in the new rules of court on witness anonymity being drafted by the Criminal Procedure Rule Committee chaired by the Lord Chief Justice.\(^{211}\) (Paragraph 1.137)

44. We also recommend that the DPP’s Guidance covers the assistance prosecutors should be prepared to provide to the court to consider whether, in the particular circumstances of the case, fairness requires the appointment of special counsel; and that the DPP’s register of anonymity applications should additionally record whether any request or application was made to the court to appoint special counsel and the outcome of that request or application. (Paragraph 1.138)

45. We therefore recommend that the Bill be amended to require the consent of the DPP before an application for an investigation witness anonymity order is made. (Paragraph 1.145)

**Changes to the criminal law**

**Reform of partial defences to murder**

46. The Law Commission’s 2006 report [on partial defences] also 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. So far the Government has not taken up this recommendation. We recommend that they should. We note the Government’s statement that the reformulation of the partial defence of diminished responsibility is not intended to change its scope in any way, and that it therefore continues to cover the sorts of “mercy killing” cases identified by the Law Commission. (Paragraph 1.152)

**Encouraging or assisting suicide**

47. We are concerned that the scope of the new offence of encouraging or assisting suicide is sufficiently uncertain that it might have a chilling effect on speech. We accept that the intent elements of the offence add clarity. However, given that the Bill applies to the encouragement or assistance of suicide, but is not related to the suicide of any individual person or group of persons known to the accused, the intent involved may be relatively broad. For example, we consider that the placing of advertisements or information in respect of assisted suicide services abroad could fall squarely within the ambit of the offence. Similarly, an NGO which provided information about these services could equally be liable to prosecution. We consider that the breadth of the offence remains uncertain and has the potential to have a chilling effect on a range of activities involving reference to suicide or the provision of information or support around end of life decision making. We consider that this chilling effect could engage the right to freedom of expression and the right to

\(^{211}\) See PBC, 5 March 2009, Col. 542.
respect for private life (Articles 8 and 10 ECHR) and would require justification. (Paragraph 1.165)

**Possession of a prohibited image of a child**

48. Criminal offences should be drafted in clear and accessible terms to ensure that individuals know how to regulate their conduct. We remain concerned at the broad definition of the offence [of possession of a prohibited image of a child] and, as a result, its potential application beyond the people whom the Government is seeking to target. (Paragraph 1.174)

49. We reiterate our view, which we have expressed on previous occasions, that legislation should be evidence-based. Such evidence should be published in time to assist parliamentary scrutiny. Whilst we fully support appropriately targeted criminal offences which will prevent children from abuse, itself a gross violation of their human rights, we are disappointed that the Government has failed to provide sufficiently weighty reasons for the need of the new offence that they propose in this Bill. (Paragraph 1.178)

**Public order offences**

**Incitement to hatred on the grounds of sexual orientation and freedom of expression**

50. We reiterate our earlier view that the offence of incitement to hatred on the grounds of sexual orientation contains adequate safeguards for the right to freedom of expression without the addition of a savings clause. Clause 58 would not lead to a significant risk of incompatibility with Article 10 ECHR. (Paragraph 1.179)

“Insulting” words or behaviour

51. We consider that this Bill provides an opportunity to address our concern [about the current scope of the Public Order Act 1988] and therefore suggest the following amendment. (Paragraph 1.180)

**Release of long term prisoners**

52. We welcome the proposal to remove the power of the Secretary of State to overturn or disregard decisions of the parole board on the release of prisoners serving more than 15 years, pursuant to the Criminal Justice Act 1991, as a human rights enhancing measure. (Paragraph 1.182)

**Procedural changes**

**Bail and murder cases**

53. We welcome the Government’s reassurance that clause 98(2) is not intended to create a presumption against bail or to reverse the burden of proof in bail
applications in murder cases. In either case, we consider that there would be a clear risk of a breach of the right to liberty (Article 5(3) ECHR). We remain doubtful whether clause 98(2) can have any practical effect on bail decisions. (Paragraph 1.190)

Vulnerable and intimidated witnesses

Automatic application of special measures to selected witnesses

54. We recognise that the court will retain control over whether or not special measures will be in the interests of justice in an individual case. We accept that this discretion will provide a valuable safeguard for the right to a fair hearing as guaranteed by Article 6 ECHR and the common law. However, we remain concerned by the decision of the Government to provide blanket eligibility for special measures to any witnesses in proceedings related to a whole category of offences and the power to extend eligibility to a wider category of offences without further parliamentary debate. The Minister should explain clearly why automatic eligibility is necessary when the existing law already provides for special measures in cases where witnesses’ fear or distress is likely to diminish the quality of his or her evidence. (Paragraph 1.195)

Extension of availability of intermediaries to vulnerable defendants

55. We share the concerns of the Prison Reform Trust, Justice and other witnesses that individuals who cannot effectively participate in criminal proceedings, whether as a result of any mental health disability, intellectual impairment, or otherwise, should not be subject to prosecution, but should be diverted from the criminal justice system. The right to a fair hearing, guaranteed by the common law and Article 6(1) ECHR requires nothing less. However, we welcome the aim of these proposals to support vulnerable defendants when the court considers that an intermediary would be “necessary” to secure a fair trial. We consider that this provides a valuable safeguard against the use of these provisions in circumstances which would lead to prosecutions of individuals who should rightly be considered unfit to plead. We recommend that the Government consider asking the CPS and the Judicial Studies Board to consider issuing guidance to accompany these proposals, making clear the scope of the right to effective participation in criminal proceedings and highlighting circumstances where the use of an intermediary would be inappropriate. We understand that intermediaries will be funded by Primary Care Trusts (PCTs). We recommend that the Government monitor and review how these provisions operate in practice. We consider that this monitoring exercise could be conducted effectively by the CPS or by the CPS with the input of information from PCTs, individual intermediaries, defence lawyers and defendants. (Paragraph 1.200)

Live links

56. The Minister’s response does not help us understand the benefits which the Government consider will flow from the increased use of live link hearings, only the Government’s view that live links should be used in as many cases as possible. We
recommend that the Government provide evidence of the benefits which it considers will flow from the increased use of live links. (Paragraph 1.209)

57. The Minister should be able to explain why the Government considers that there is adequate evidence to show that in the circumstances in which live links may be implemented more widely, they are currently operating in a manner which allows the defendant to participate in the hearing and to consult and instruct his legal adviser in confidence. (Paragraph 1.212)

58. We welcome the Minister’s reassurance that the Government’s view is that the court would automatically consider the defendant’s capacity to participate when considering whether a live link was in the interests of justice. (Paragraph 1.213)

Criminal memoirs

59. We remain concerned that making an Exploitation Proceeds Order (EPO) in part dependent on the degree to which a victim, their family or the general public are offended in a particular case could unnecessarily risk arbitrary application of these proposals. We recommend that the Government should consider an amendment to the Bill to remove any reference to the degree of offence aroused by the relevant profits, while retaining the ability of the court to consider the wider public interest in making an EPO. (Paragraph 1.220)
Draft Report (Legislative Scrutiny: Coroners and Justice Bill), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.217 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Eighth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Morris of Handsworth make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 16 December, 3 and 24 February, and 3, 10 and 17 March.
## List of written evidence

1. Letter to Rt Hon Jack Straw MP, Secretary of State for Justice, dated 12 February 2009  
   - Ev 1
2. Letter to Rt Hon Jack Straw MP, dated 17 February 2009  
   - Ev 10
3. Memorandum submitted by the Ministry of Justice in response to the Committee’s letters of 12 and 17 February  
   - Ev 11
4. Letter from Bridget Prentice MP to the Chairmen of the Public Bill Committee on the Coroners and Justice Bill, dated 12 February 2009  
   - Ev 12
5. Letter to the Information Commissioner, dated 23 February 2009  
   - Ev 30
6. Memorandum submitted by the Information Commissioner in response to the Committee’s letter of 23 February 2009  
   - Ev 32
7. Letter to Nick Herbert MP from the Rt Hon Jack Straw MP, dated 3 December 2008  
   - Ev 36
8. British Humanist Association  
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9. British Irish Rights Watch  
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10. British Medical Association  
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11. Campaign Against Criminalising Communities  
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    - Ev 43
13. Dignity in Dying  
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14. HM Deputy Coroner, Selena Lynch  
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Written evidence

Taken before the Joint Committee on Human Rights

Letter to Rt Hon Jack Straw MP, Secretary of State for Justice, dated 12 February 2009

The Joint Committee on Human Rights is currently scrutinising the Coroners and Justice Bill for compatibility with the United Kingdom’s human rights obligations. This is a lengthy Bill covering a number of discrete areas and raising a number of significant human rights issues. It is one of the Committee’s priorities for legislative scrutiny for this session.

I would be grateful if you could provide me with some further information about the Government’s views on compatibility. For ease of reference, I have separated our questions into three sections: a) Coroners reform; b) Data protection and c) Reform of criminal law and procedure.

(a) Coroners Reform

Duty to Investigate (Clause 1)

The Bill sets a statutory duty on senior coroner’s to investigate certain deaths. The Explanatory Notes explain the Government’s view that this extension enhances the state’s ability to meet its obligations under Article 2 ECHR in relation to a number of cases where the liberty of the subject may have been constrained, for example, in cases of persons who have died while being detained in a variety of contexts (such as, in prisons, by the police, in court cells, in young offender institutions, in secure training centres, in secure accommodation, under mental health or immigration and asylum legislation).

1. Would the Government accept that the extension of the duty to investigate all deaths in mental health institutions, including deaths of patients who had voluntarily undertaken treatment, would be an human rights enhancing measure?

Purpose of Investigation and Matters to be Ascertained (Clause 5)

The Bill provides that the purpose of a coroner’s investigation will be to ascertain who the deceased was, and how, when and where the deceased came by his or her death (Clause 5(1)). That provision is qualified to the extent that where “necessary for the purpose of avoiding a breach of Convention rights (within the meaning of the Human Rights Act 1998”, the purpose of an investigation includes ascertaining in what circumstances the deceased came by his or her death as contemplated by the House of Lords in R v HM Coroner ex p Middleton [2004] 2 All ER 465 para 35 (Clause 5(2)).

There are cases where the scope of the procedural requirements of the Convention may not be clear, but where the public interest in protecting the right to life may justify a broader investigation into the circumstances of a death. These cases include circumstances where the Convention rights, guaranteed by the HRA, may or may not apply:

— death of a vulnerable person in a private care home;
— death in a private work place;
— death involving British state agents in circumstances where the HRA does not apply because of date of death (ie pre-HRA) or location of death (ie abroad);
— death abroad not involving British state agents but in circumstances where there is no prospect of adequate investigation by host state;
— deaths involving other circumstances which, if allowed to continue or recur, may result in the deaths of other members of the public.

That one of the primary functions of any effective coronial system should be to prevent the recurrence or continuation of circumstances creating a risk of death or to eliminate or reduce the risk of death created by such circumstances has, of course, been recognised elsewhere:

— Schedule 4 paragraph 6 of the Bill itself;
— the recommendations of the Report of a Fundamental Review 2003 (Cm 5831, Chapter 8, p89);
— relevant domestic legal authority, including R (on the application of Amin) v. Secretary of State for the Home Department [2004] 1 AC 653 at para 31; R (on the application of Takoushiss) v. HM Coroner for Inner North London [2006] 1 WLR 461, paras 39, 43 to 47; Inner West London Coroner v Channel 4 Television Corp [2008] 1 WLR 945, para 7 and 8); and
— section 4(7) of the Fatal Accidents and Sudden Death Inquiry (Scotland) Act 1976 which allows the investigating Sheriff in Scotland to determine, amongst other things, (a) where and when the death and any accident resulting in the death took place, (b) the cause or causes of the death and any such accident, (c) the reasonable precautions, if any, whereby the death and any accident
resulting in the death might have been avoided, (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death, and (e) any other facts which are relevant to the circumstances of the death.

2. Does the Government accept that there may be cases where the HRA may not apply, or where the scope of the Convention may not be clear, but where the wider public interest in the right to life, the right to be free from inhuman and degrading treatment and the common law right to dignity might be served by a wider Middleton-type investigation into the circumstances of an individual death of the kind contemplated under Clause 5(2)?

3. In such cases, does the Government accept that a wider, Middleton-type investigation and inquest would provide an opportunity to learn valuable lessons, to prevent the occurrence or continuation of circumstances creating a risk of other deaths or to eliminate or reduce the risk of such deaths (and so, reduce the risk of future Article 2 ECHR violations)?

4. Accordingly, does the Government accept that the Coroner should have a residual discretion to undertake a Middleton-type investigation and inquest in circumstances where the public interest might be best served by doing so even if those circumstances are outside the strict ambit of Clause 5(2)?

JURIES (CLASSES 7–9)

The Bill changes current provisions in respect of jury inquests in a number of ways:

— The existing requirement to summon a jury in cases where the death has occurred in prison is extended to cover cases where “the deceased died in custody or otherwise in state detention” or where “the death resulted from an act or omission” of a police officer;
— The existing requirement to summon a jury in cases where the death “occurred in circumstances the continuance or possible recurrence of which may be prejudicial to the health and safety of members of the public or a section of it” is removed;
— However, a new wide residual discretion is introduced for Coroners to summon a jury if there is “sufficient reason” to do so;
— It is proposed to reduce the number of members of an inquest jury from 7–11 to 6–9.

5. Please explain why the Government considers that it is appropriate to remove the existing provision for compulsory jury inquests in cases where the health and safety of the public may be at risk, bearing in mind the Convention rights that will generally be engaged in such cases.

6. What additional circumstances would be required for a jury to be summoned (what would be a “sufficient reason” for a jury inquest?) and would these circumstances include cases where a risk to the health and safety of the public was engaged and where a report from the coroner may be necessary to avoid future deaths?

7. Does the Government consider that public confidence in the outcome of the inquest, and in the process as a whole, will be diminished by a reduction in jury numbers from 7–11 to 6–9, particularly in cases where Convention rights are engaged, and if not, why not?

OUTCOME OF INVESTIGATION (CLAUSE 10)

The Bill enshrines in primary legislation the existing prohibition on any determination by a coroner or jury which is “framed in such a way as to appear to determine any question of (a) criminal liability on the part of any named person or (b) civil liability”.

These words as they currently stand in secondary legislation have been held on a number of occasions to have a meaning such that they could not defeat the purpose of an inquest to determine “how” the deceased came by his or her death.

A narrow reading of the prohibition in primary legislation could serve to prevent verdicts currently open to coroners and their juries such as “unlawful killing” or “death as a result of neglect” or, indeed, to obstruct compliance with Article 2 ECHR. The Convention requires that an investigation compliant with Article 2 ECHR must be capable of leading to the identification and punishment of those responsible for a death, including a determination as to the legality of any act or omission resulting in the death. The Explanatory Notes correctly recognise that this requirement concerns procedure rather than results.

The relevant issue in an inquest is responsibility and not liability. The coroner or jury should be free to describe the acts or omissions which are responsible for a death, without any restriction by reference to whether or not such a description might “appear” to determine liability.

1 As defined in the Explanatory Notes to Clause 1, and subject to the conditions that there is reason to suspect that the death was “violent or unnatural” or its cause is unknown.
2 Section 8(3)(d) of the Coroners Act 1988.
5 EN, paragraph 797
8. I would be grateful if you could confirm that these provisions are not intended to change the current position under the Coroners Rules, and where a finding which might point to responsibility for a death is required by the Convention, that finding would not be inconsistent with the proposals in Clause 10.

9. I would also be grateful if you could confirm that the Government intend verdicts such as “unlawful killing” or “death as a result of neglect” to remain open to coroners?

10. Do you accept that the exclusion of findings which “appear to determine” civil or criminal liability could lead to some ambiguity and unnecessary caution on the part of a Coroner or a jury keen not to appear to determine liability?

11. Is there any reason why the exclusion in Clause 10 should not be limited to findings which determine any question of criminal or civil liability on the part of any named person or body, in order to avoid any such unnecessary ambiguity?

Certified Investigations (Clauses 11–13)

During Public Bill Committee proceedings, the Minister was asked to explain how many cases had been affected by the absence of the proposed ‘certified’ investigation procedure. It became clear that the Minister considered that there had been two cases which had been affected.

12. I would be grateful if you could confirm (a) how many cases have been affected by the inability to disclose certain information (despite existing special measures, including the potential to apply for PII in respect of that information); and (b) how those cases have been affected.

The Committee expressed concerns that these earlier proposals would be incompatible with the obligations of the UK under Article 2 ECHR and proposed that they be reconsidered in the context of this Bill.

13. What has happened since these proposals were withdrawn from the Counter-Terrorism Bill during the last session, to persuade the Government that it is necessary to broaden the reasons for certification to include a protection for witnesses and a new “public interest” category?

— In what sorts of circumstances does the Government envisage issuing a certificate for these purposes? Can you give some hypothetical examples?

— Certification for the purposes of protecting a relationship with another country is very broad. In what circumstances would the Government envisage issuing a certificate for this purpose? For example, would the Government issue a certificate (a) to save embarrassment of UK allies in cases of friendly fire and/or (b) to protect a trade or other commercial relationship between a UK company and a third party Government?

The Explanatory Notes explain that Article 2 ECHR does not require, in the Government's view, involvement of the bereaved family in all circumstances:

Article 2 does not ... give the public and next-of-kin an absolute right to be present at all times or to see all the material relevant to the investigation. The Government considers that the courts are very likely to accept that it is consistent with Article 2 for sensitive material not to be made public or disclosed to the next-of-kin where this is required by a substantial public interest.

14. I would be grateful if you could provide a more detailed explanation of the Government's view. In particular, please provide any legal authority for the Government's position that the proposals are likely to be compatible with Article 2 ECHR.

There is no express provision on the face of the Bill for special advocates to be available to represent the interests of interested parties in a certified inquest; instead it is suggested that the responsibility of examining any sensitive material and testing it on behalf of the the deceased’s family or next of kin could be left to counsel for an inquest “acting in effect as special advocate”.

15. I would be grateful if you could provide further reasons for the Government’s view that counsel for an inquest will be able to perform the functions of a special advocate on behalf of the deceased’s family or next of kin, bearing in mind that the primary duty of counsel to the inquest will be, by definition, to the Coroner rather than any of the interested parties. Specifically:

— in any case involving certification, will the coroner be required to appoint an individual with clearance to act as a special advocate?

— how will that individual reconcile his duty to the inquest and the interests of what may be a diverse range of interested parties?

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6 Q 136, PBC Deb, 3 Feb 2009
7 Thirtieth Report of 2007-08, paragraphs 112—121.
8 EN para 804.
16. *If this is an important safeguard for the rights of interested parties, why should the requirement for the coroner to appoint a special advocate or multiple advocates in cases involving certification not be provided for on the face of the Bill?*

The Bill currently provides for the Secretary of State to issue a certificate, subject to judicial review of his opinion that certain information should not be made public.

17. *Does the Government accept that the Minister must have reasonable grounds to support his opinion (a) that the relevant information should not be made public; (b) that the relevant reasons are satisfied and (c) that other measures would not be adequate?*

18. *If so, why shouldn’t the Bill be amended to clearly reflect this requirement?*

19. *What would the Government do if judicial review led to a certificate being overturned? (Wouldn’t this pose the same problem which the Secretary of State considers would be associated with an application for PII?)*

20. *Given the importance of judicial oversight, why shouldn’t the Bill be amended to provide the Secretary of State with the power to certify that certain information should not be made public, but to leave the appropriate measures necessary to achieve this (including the potential for sitting in private and without a jury) to the discretion of the High Court judge hearing the certified inquest?*

**Powers to Gather Evidence and to Enter, Search and Seize Relevant Items (Clause 24, Schedule 4 Paras 1–5)**

The Bill makes provision for enhanced investigatory powers for coroners, including in respect of powers to summon witnesses and compel the production of witnesses. It also makes new provision for enhanced powers of search and seizure.

21. *Does the Minister consider that these powers would enable a coroner to compel an individual to produce evidence which would open him or her to criminal liability? If not, I would be grateful if you could explain the Government’s view. If so, please explain why there should not be a specific exemption on the face of the Bill to deal with this issue.*

22. *Will the Coroner be required to disclose evidence gathered using these compulsory powers to interested parties?*

23. *Does the power to require a person to produce documents include a power to require full and appropriate disclosure and inspection to be provided by each interested party to all other interested parties, reflecting a duty on the Coroner to ensure full and appropriate disclosure and inspection for all interested parties, including bereaved families? If so, why shouldn’t this power and duty be reflected on the face of the Bill?*

We expressed some concern about the breadth of these powers when they were proposed in the draft Coroner’s Bill and suggested that similar safeguards to those in Part II of the Police and Criminal Evidence Act 1984 (PACE 1984) should be provided on the face of the Bill.

The Explanatory Notes indicate that the Government may introduce further safeguards in secondary legislation, including for such coronial functions to be delegated and details of to whom search and seizure powers could be delegated. Additional safeguards could include the provision of a record of items seized and for the return of seized items. They will also provide for a mechanism of complaint, by aggrieved individuals, to the Chief Coroner.

24. *I would be grateful if you could explain why comparable safeguards to those in Part II, PACE 1984 should not be provided on the face of this Bill.*

25. *Has the Government produced any draft Regulations to accompany these powers? If so, I would be grateful if you could provide my Committee with a copy to assist our scrutiny of the Bill.*

**Power to Report if Risk of Future Death (Clause 24, Schedule 4 Para 6)**

This power has the potential to enhance the ability of the state to comply with its positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction (Article 2 ECHR). However, Schedule 4 does not provide a mechanism for ensuring that recommendations are made, recorded or disseminated. There are no sanctions proposed for failure to respond to a report when one is made.
26. There are a number of actions which could enhance the effectiveness of the Coroners Report, and so, enhance the protection for the right to life. I would be grateful if you could explain the reason the Government chose not to use the Bill to:

— Impose a duty on the coroner to make a report if he considers that action is required;
— Impose sanctions for failure to respond on the part of the authorities receiving the report;
— Require disclosure of the report and response thereto to all interested persons, and publication where appropriate;
— Create a mechanism for monitoring and scrutinising such reports and responses thereto in the interests of ensuring that lessons are learnt.

GOVERNANCE: CHIEF CORONER ETC (CLauses 27–31, SCHEDULES 7–8)

The Explanatory Notes explain that the Chief Coroner will introduce training requirements which would “ensure that all those working within the service are aware of and apply best practice, relevant guidelines and standards … and other developments in legislation”. Nothing on the face of the Bill requires the Chief Coroner to establish training requirements, nor does the Bill require any training to include information on relevant guidelines or standards.

27. Why shouldn’t the Bill require the Chief Coroner to institute a system of mandatory national training requirements for coroners, including provision for training in respect of Convention rights and the requirements of the HRA 1998?

The Bill provides that the Chief Coroner will hear appeals against certain decisions of coroners, subject to further appeal to the Court of Appeal on a point of law. The Lord Chancellor will have discretion to add or remove appeal rights.

28. I would be grateful if you could clarify whether it is the Government’s intention that a decision that can be the subject of appeal to the Chief Coroner may no longer be subject of challenge by judicial review? When an appeal to the Chief Coroner is not available, will it be open to an Interested Party to seek judicial review?

29. In view of the importance of the role in the proposed new scheme and the nature of the powers that go with that role, including the power to determine appeals, does the Government agree that it would be appropriate for the Chief Coroner to be a High Court judge (rather than a circuit judge)?

30. I would be grateful why you could explain why the Government consider that it is appropriate to allow the Lord Chancellor to remove proposed appeal rights by secondary legislation.

The Bill provides the Chief Coroner with the power to conduct and carry out any inquest, or to invite the Lord Chief Justice to nominate a High Court or a Circuit judge to do so, in cases where that may be appropriate by virtue of “particularly complex legal characteristics”.

31. I would be grateful if you could provide further information about the breadth of this test. For example, would cases such as the investigation of the shooting of Jean Charles de Menezes or the inquiry into the death of the Princess of Wales, be covered by this power?

32. In high-profile cases engaging Convention rights, but not necessarily raising any new or complex legal characteristics, would the Chief Coroner still have the option to take over the conduct of an inquest or to ask for the appointment of a senior judge to hear it in the place of a senior coroner?

GOVERNANCE: GUIDANCE, REGULATIONS AND RULES (CLauses 32–34)

33. Does the Government intend to seek any substantive changes to existing Coroners Rules, other than those made on the face of the Bill? If so, will draft Regulations and Rules be provided for scrutiny during the passage of this Bill?

34. In the light of the nature of the positive duty of the state in arranging inquiries into deaths where the Convention obligations of the state may be engaged, I would be grateful if you could explain the role that the Lord Chancellor will play in the setting of practice and procedure rules. In addition, I would be grateful if you could set out the Government’s view that this continuing involvement is appropriate.

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9 Clauses 30(2) & (8).
10 Clause 30(5).
11 Clause 31 and paragraph 281 of the Explanatory Notes.
35. I would be grateful if you could explain how coroners and practitioners will be involved in the setting of practice and procedure rules. Would it be appropriate to create a new Rules Committee, similar to the rules committees operating in relation to the Civil Procedure Rules?

LEGAL AID

In our correspondence with the Minister on the draft Coroners Bill, we highlighted the availability of legal aid for bereaved families as an important consideration for the purposes of facilitating their effective participation and ensuring compliance with Article 2 ECHR. Our predecessor Committee recommended that legal aid should be available for families in any case involving a death in custody. During the second reading debate on the Bill, the Lord Chancellor explained that the Government would consider amendments to the Bill for the purpose of broadening access to legal aid for bereaved families. He made the following qualification, explaining the Government’s views:

The reason why successive Governments have resisted a general provision to make representation or legal aid available in inquests is that they are civil, inquisitorial inquiries. They are not judicial proceedings, and they work very differently even from other civil proceedings.

During the Public Bill Committee debates on the Bill, the Minister, Bridget Prentice MP, also indicated that the Government would consider again the provision of legal aid to assist bereaved families participating in inquests.

36. I would be grateful if you could explain further the Government’s view that the current provision for legal aid for families participating in inquests which engage Article 2 ECHR is adequate to meet the requirements of the Convention for effective participation by the family.

37. Is there any reason why this Bill should not be amended to make express provision for access to legal aid for family members of the deceased in any inquiry engaging Convention rights (ie any inquiry under Clause 5(2))?

(b) DATA PROTECTION

NEW POWERS FOR THE INFORMATION COMMISSIONER

In its commentary on these parts of the Bill, the Information Commissioner’s Office (ICO) points out that most complaints and risks in respect of data arise in private organisations and argues that these new powers should apply both to the public and private sector.

38. Does the Government accepts that a breach of Article 8 ECHR could arise as a result of the failure of a private individual or a company to comply with the data protection principles:

— If not, why not?

— If so, does the Government accept that greater scrutiny of the private sector by the ICO would reduce the risk that such a breach could arise?

Information sharing and the right to respect for private life Clause 152 of the Bill provides relevant Ministers, including Ministers in the devolved regions, with a broad power to open an information sharing gateway between two or more persons, by statutory instrument (ISO). The recent Walport review, on which these proposals are based, suggested that the Government might require an exceptional power to create new information sharing powers by secondary legislation, but that such a power should be accompanied by safeguards to ensure adequate parliamentary and wider scrutiny for compatibility with the right to respect for personal information. We have a number of questions about the scope of these proposals and the safeguards for the protection of the right to respect for personal information (Article 8 ECHR).

12 Third Report of 2004-05, Deaths in Custody, paragraph 309
13 HC Deb, 29 Jan 2009, Col 28
14 Recommendation, paragraph 8.40—8.41
39. I would be grateful if you could explain why the Government consider it would be appropriate to subject any and all types of information to wider information sharing by ISO. For example, are there any reasons why the Government considers that the Bill should not be amended to exclude, for example:

— Information which would otherwise be protected as “sensitive personal data” for the purposes of the DPA 1998;

— medical records or medical or clinical information (other than anonymous patient data from which no patient can be identified);

— information held on the National DNA Database and other samples held by the police or others for the purposes of criminal investigation;

— information held on the national children’s database created pursuant to the Children Act 2004;

— records of criminal allegations or accusations;

— information held or gathered pursuant to the Safeguarding Vulnerable Groups Act 2006 (express provisions for information sharing for the purposes of safeguarding children and vulnerable groups are already provided on the face of that Act)?

40. Does the Government consider that the power to modify any enactment, by ISO, includes the power to modify or disapply the provisions of the HRA 1998, including the Section 6 duty to act in a manner compatible with Convention rights?

41. Does the Government consider that this provision would prevent an individual from making a claim, under the HRA 1998, that the treatment of his or her personal information, despite being authorised by the ISO, had led to a breach of his or her right to respect for personal information (Article 8 ECHR)?

42. If so, why shouldn’t the Bill be amended to include a savings clause similar to that inserted in the Civil Contingencies Act 2006, in order to provide a guarantee that individual public authorities processing information pursuant to an ISO will be subject to the requirement to act in a manner compatible with Article 8 ECHR?

43. I would be grateful if you could confirm that once information has been processed in accordance with an ISO, the final data controller of any personal data must hold and process it in a manner which is compatible with the Data Protection Act (DPA) 1998.

44. Is there anything in the Bill which would prevent the Government proposing the permanent amendment or modification of the DPA 1998?

The relevant Minister may make an ISO if he or she is “satisfied (a) that the sharing of information enabled by the order is necessary to secure a relevant policy objective, (b) that the effect of the provision made by the order is proportionate to that policy objective, and that the provision made by the order strikes a fair balance between the public interest and the interests of any person affected by it.” In order to be compatible with Article 8(2), information can only be shared for the purpose of one of the “legitimate aims” identified by that Article. The proportionality test engaged by Article 8(2) does not equate to the “striking of a fair balance” between the public interest in meeting the policy interests of a Minister and the interests of an individual or a group of individuals. The correct test is whether the interference with the rights of those individuals which happens when their information is shared is necessary and proportionate to the pressing social need which the sharing proposes to address.

45. I would be grateful if you could provide a fuller explanation of the Government’s view that the test for an ISO is appropriately defined. In particular:

— Please explain why the Government considers it appropriate to link the making of an ISO with an individual Ministerial policy? Are there significant reasons why the Bill should not be amended to limit information shared under ISO to information which is necessary to meet the public functions of the Minister or any other public authority exercising public functions?

— Why should the Bill not be amended to link the making of an ISO more closely to the legitimate aims identified in Article 8(2) ECHR?

The Walport review recommended that the relevant Minister proposing an Order under these provisions should be required to perform a Privacy Impact Assessment. The Explanatory Notes accompanying the Bill do not refer to the requirement to make a Privacy Impact Assessment.

46. I would be grateful if you could confirm whether the Minister proposing an ISO would be required to make a Privacy Impact Assessment of the proposed Order and whether (a) that assessment would be made available to the Information Commissioner together with the draft Order and (b) it would be published to assist wider public scrutiny?

The Bill provides that the Information Commissioner must be given at least 21 days to consider whether to issue an opinion on any draft ISO. He is not required to publish an opinion, but where he does, that opinion must be laid before Parliament, together with the draft Order. The Information Commissioner is not required to report, nor is the relevant Minister required to do anything other than lay his report before
Parliament. The Commissioner can only report on whether the effect of a provision is proportionate to the policy objective that the Minister seeks to meet and whether the order strikes a fair balance between the public interest and the interests of any person affected by it. The Commissioner is not permitted to question whether the sharing of information is necessary to meet the specified policy objective, nor is he permitted to report on wider issues in respect of the compatibility of the provisions with Article 8 ECHR or the implications of disregarding the data protection principles in this case.

There is no requirement on the face of the Bill for Government to respond a negative report of the Information Commissioner, whether by publishing their rebuttal of the Information Commissioner’s view or by withdrawing their draft ISO.

47. Does the Government accept that, under the proposals in the Bill, the report of the Information Commissioner can have little effect, other than to inform public and parliamentary opinion?

— If not, what will be the practical effect of a negative report of the Information Commissioner?

— If you agree, wouldn’t it be more appropriate to allow the Information Commissioner to report on the proposal for the ISO in any terms that fall within his remit, including commentary on the necessity for the ISO and its implications for the right to respect for personal information?

We have written separately to the Information Commissioner to ask him for his views on these questions.

(c) Reform of Criminal Law and Procedure

The CPS has been maintaining a register of all cases in which an application for a witness anonymity order has been made. During the Public Bill Committee proceedings on the Bill, the Minister and the Director for Public Prosecutions gave statistics on the number of cases involved and the broad types of cases in which applications have been made.

48. In how many cases where witness anonymity orders sought in respect of risk to property alone? Please indicate in how many cases orders were sought by (a) the police and (b) the CPS.

49. In each of those cases, were applications for witness orders actually made? Please indicate in how many applications orders were originally sought by (a) the police or (b) the CPS.

An investigative witness anonymity order can be applied for by the police, or other investigative body, as well as by the DPP. There is an obvious practical problem about the effect of such orders: unless the witness is also confident that their anonymity will be protected at trial they are unlikely to come forward. But the investigating authorities are not in a position to know whether such a trial anonymity order is likely to be given.

50. Is there any reason why the Bill should not be amended to require the consent of the DPP before an application for an investigative witness anonymity order is made?

Reform of Existing Laws on Murder, Infanticide and Suicide (Part 2)

The Bill proposes to reform the law in relation to the partial defences to murder of diminished responsibility and provocation. The Explanatory Notes explain that the Government accepts that these provisions potentially engage both the right to life and the right to a fair hearing in criminal proceedings (Articles 2 and 6 ECHR). The Committee has previously reported that the duty in Article 2 ECHR on the state to take positive steps to protect the right to life includes the need to ensure that appropriate steps are taken to punish individuals who unlawfully breach the right to life. The Government accepts that this duty extends to a duty to protect citizens from unjustifiable deprivation of life by other individuals. The state also has a duty under Article 6 ECHR and the common law to ensure that the criminal law applies with adequate legal certainty to allow an individual to regulate his or her conduct accordingly.

A number of concerns have been raised in debate over the scope of these provisions, including:

— The exclusion of anything related to “sexual infidelity” from the triggers for the partial defence based on loss of control may lead to inequitable situations, where a genuine, reasonable, loss of control has arisen.

— The Bill expressly provides that the loss of control which triggers the new defence need not be “sudden”. Liberty has welcomed this, as it would ensure that victims of domestic violence who react violently after a “slow burn” of consistent ill-treatment would be able to benefit from this defence. The Bar Council is not persuaded and considers that the requirement for loss of control would exclude the defence from this group of individuals, where time has passed between the last instance of abuse and the victim’s death.

— Should, and would, a child be able to benefit from the defence of diminished responsibility?
In their review, the Law Commission recognised that the current law was broad enough to allow, in some cases, the criminal law authorities, including courts and prosecutors, to bring those alleged of mercy killing within the diminished responsibility defence. The new provisions are clear that the defence will only arise where the individual is acting as a result of an abnormality based on an existing, recognised medical condition. Dignity in dying argue that this will create unjust outcomes for individuals who “have acted rationally in response to persistent requests from a seriously ill loved one”.

51. In light of the number of concerns raised about the scope of these provisions, I would be grateful if you could provide a fuller explanation of the Government’s view that these provisions (a) comply with the requirement that the criminal law is framed in a way which allows for adequate legal certainty and (b) complies with the positive obligation on the State to protect the right to life.

The defence based on loss of control will be available in circumstances where the loss of self control is attributable to things done or said which (a) constitute circumstances of an extremely grave character, and (b) caused the defendant to have a “justifiable sense of being seriously wronged”. The Explanatory Notes explain the Government’s view that this test would be an objective one. This raises a concern which the Committee has previously raised about compliance with the positive duty to protect against unjustifiable breaches of the right to life, where defences may be based on subjective assessments not grounded in reasonable, objective assessments of the circumstances of their actions (Article 2 ECHR).15 For example, would this defence apply in circumstances where a homophobic male defendant reacted violently to the advances of a man in a nightclub, or a racist defendant reacted particularly violently to an assault by a black or Asian person?

52. I would be grateful if you could provide a further explanation of the Government’s view that the requirement that the defendant have a “justifiable sense of being seriously wronged” would (a) be applied by the courts as an objective test; (b) comply with the positive duty on the State to protect the right to life (Article 2 ECHR); (c) complies with the duty on the State to protect the right to life without discrimination (Article 14 ECHR).

53. I would be grateful if you could explain whether the Government intends this provision to (a) create a presumption against bail or (b) shift the burden of proof to the defendant to show that bail should be granted (and that he does not pose a significant risk):

— If so, does the Government accept that this provision is likely to be incompatible with the right to liberty (Article 5(3)) and that it will be read down by the courts in order to ensure its compatibility? (in a similar way to Section 25 of the Criminal Justice and Public Order Act 1994 (as amended) (O v Crown Court at Harrow))

— If not, what does the Government intend the practical effect of these proposals to be?

Vulnerable and Intimidated Witnesses (Part 3, Chapter 3)

Automatic Application of Special Measures to Selected Witnesses

The Bill proposes to extend special measures automatically to proceedings in relation to certain types of offences. The Explanatory Notes accompanying the Bill provide no explanation of the Government’s view that the automatic application of special measures in any case would be compatible with the right of the defendant to a fair hearing for the purposes of Article 6 ECHR.

54. I would be grateful if you could provide an explanation of the Government’s view that the automatic application of special measures in relation to certain types of offences will be compatible with the individual right to fair hearing (Article 6(1) ECHR and the common law).

Live Links (Part 3, Chapter 4)

Article 6(1) ECHR includes the individual right to be present and to participate freely in the determination of a criminal charge. An individual retains due process rights under the common law which UK courts have held are no less extensive than those in Article 6.

15 See for example, Fifth Report of Session 2007-08, paragraphs 166-173 (Criminal Justice and Immigration Bill)
55. I would be grateful if you could provide a fuller explanation of the Government’s view that:
— these proposals are necessary;
— these proposals are compatible with Article 6(1), despite the requirement that an individual should be
  present at and participate in the determination of the charges against him; and
— why the Government considers that live links satisfy the requirement that an individual is “present” at a
  hearing.

56. Does the Government agree that the production of defendants at court provides a valuable safeguard against
  abuse of their rights under Article 3 ECHR?

Although the judge will have the power to stop a hearing, or to refuse a live-link, where the link would
not be in the interests of justice, it is not express that the interests of justice require that the accused must
be able to participate fully in the hearing.

57. Is there any reason why the Bill should not be amended to make it clear that a live link will not be in the
  interests of justice in any case where the link would restrict the ability of the accused to participate fully in
  the hearing?

Possession of a prohibited image of a child (Part 2, Chapter 2)

The Explanatory Notes fail to explain why the Government considers that the proposed new offence is
necessary to meet the aims specified, or why it considers that they are proportionate to those aims in order
to be compatible with the right to respect for private life (Article 8 ECHR) and the right to freedom of
expression (Article 10 ECHR).

58. I would be grateful if you could explain how the proposed new offence satisfies the “in accordance with the
  law” requirement of Articles 8(2) and 10(2), why the offence is necessary and how it is proportionate to the
  Government’s stated aims.

Criminal Memoirs (Part 7)

The issues which the High Court must consider when deciding whether to make an exploitation proceeds
order include “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”. This consideration
is in addition to “the extent to which the carrying out of the activity or supplying of the product is in the
public interest” and “the seriousness of the relevant offence to which the activity or product relates”. Discretionary powers may be sufficiently precise to meet the “prescribed by law” standard, but only where
the way in which the discretion will be exercised is indicated with sufficient clarity to give adequate protection
against arbitrary interference.16

59. I would be grateful if you could explain the Government’s view that these provisions are “prescribed by law”
  for the purposes of Article 10(2), in the light of the requirement that the Court take into account whether
  individual victims, their families, or the general public may be “offended” in the absence of any order.

60. Is there any reason why this direction to the court should not be omitted from the Bill?

Letter to Rt Hon Jack Straw MP, Secretary of State for Justice, dated 17 February 2009

Further to my letter dated 12 February 2009, I would be grateful if you could provide some further
information on the provisions in the Coroners and Justice Bill dealing with the offence of encouraging or
assisting suicide. Unfortunately, this section was omitted from my earlier letter.

The Bill replaces the current offences of aiding, abetting, counselling or procuring suicide and of
attempting to do so (amending the Suicide Act 1961 and the Criminal Justice (Northern Ireland) Act 1966)
with a single offence of encouraging or assisting suicide. The Explanatory Notes explain that the
Government considers that the scope of the existing law will not be changed.17

The new provisions make it clear that it will be an offence if a person intentionally does something, or
arranges for someone to do something, that is capable of encouraging or assisting suicide or attempted
suicide of any person, including people or a group of people not known to the defendant and including
whether or not anyone does attempt suicide. An offence will be committed even where the defendant believed
the facts to be different or had subsequent events happened as he or she believed they would.

17 Clauses 46–48
I would be grateful if you could provide a further explanation of the Government’s view that these proposals will not have a disproportionate, chilling effect on the right to freedom of expression and the right to respect for private life (Articles 8 and 10)?

I would also be grateful if you could explain whether the Government considers that prosecutions for encouraging or assisting suicide could be brought in respect of:

— poetry or song lyrics advocating, describing or contemplating suicide, whether online or otherwise;
— individuals, who may be or may have been suicidal, sharing their experiences or problems with others, whether online or otherwise;
— advertising or information in respect of activities or services which are lawful in other countries, which assist individuals who wish to end their own lives.

If not, I would be grateful if you could provide reasons. If so, I would be grateful if you could provide an explanation of the Government’s view that those prosecutions would be compatible with Articles 8 and 10 ECHR.

There have been a number of recent cases in respect of the Suicide Act 1961 offences which these proposals replace. These cases have sought to require the DPP to either (a) give an undertaking that he will not bring a prosecution in respect of an assisted suicide, where an individual has helped a loved one to die, at their request or (b) to give clear guidance on the factors which will be taken into account when a prosecutor will decide whether to bring a prosecution in the public interest.

I would be grateful if you could explain whether or not the Government considers that guidance may be necessary in order to enable individuals to understand when prosecutions for encouraging or assisting suicide may be considered by the DPP.

Memorandum submitted by the Ministry of Justice in response to the Committee’s letters of 12 and 17 February

(A) Coroners Reform

Duty to Investigate (Clause 1)

1. Would the Government accept that the extension of the duty to investigate all deaths in mental health institutions, including deaths of patients who had voluntarily undertaken treatment, would be an human rights enhancing measure?

The Government does not consider that extending the duty in clause 1 to include any death in mental health institutions where the person was there voluntarily would be a human rights enhancing measure.

Deaths in mental health institutions involving patients who had voluntarily undertaken treatment do not necessarily engage Article 2 of the ECHR and in those circumstances an obligatory investigation is not considered necessary. Article 2 is most likely to be engaged in relation to deaths which are unnatural or where the cause of death is unknown and a death in those circumstances would fall to be investigated under clause 1(2)(a) or (b) in any event.

The Government has decided that there should be a statutory requirement for an investigation only when a person is detained in a mental health institution involuntarily. If there was a requirement for an investigation into the natural death of a patient voluntarily in a mental health institution this could arguably extend to a requirement for a coroner’s investigation into deaths in any kind of state care, including in hospitals where there was no suggestion of negligence. This would neither be practical nor be in the interests of bereaved families.

Purpose of Investigation and Matters to be Ascertained (Clause 5)

2. Does the Government accept that there may be cases where the HRA may not apply, or where the scope of the Convention may not be clear, but where the wider public interest in the right to life, the right to be free from inhuman and degrading treatment and the common law right to dignity might be served by a wider Middleton-type investigation into the circumstances of an individual death of the kind contemplated under Clause 5(2)?

3. In such cases, does the Government accept that a wider, Middleton-type investigation and inquest would provide an opportunity to learn valuable lessons, to prevent the occurrence or continuation of circumstances creating a risk of other deaths or to eliminate or reduce the risk of such deaths (and so, reduce the risk of future Article 2 ECHR violations)?
4. Accordingly, does the Government accept that the Coroner should have a residual discretion to undertake a Middleton-type investigation and inquest in circumstances where the public interest might be best served by doing so even if those circumstances are outside the strict ambit of Clause 5(2)?

The Government does accept that deaths may occur in circumstances where Convention rights are not engaged but where, nonetheless, the broader circumstances of a death should be investigated. The Government accepts that in answering the statutory questions in clause 5(1)(a) (who the deceased was and how, when and where the deceased came by his or her death), a coroner has discretion to investigate the broader circumstances of a death where appropriate, even where Convention rights are not engaged.

The purpose of clause 5(2) is to confirm that the purpose set out in clause 5(1)(b) of a coroner’s investigation to determine how, when and where the deceased came by his or her death which is necessary to avoid a breach of Convention rights. Whilst clause 5(2) only requires the circumstances of a death to be investigated where necessary to avoid a breach of Convention rights, it does not prevent the circumstances of a death from being investigated in any other case. The scope of a coroner’s investigation is a matter of discretion for the coroner and clause 5(2) merely sets out the minimum requirements.

The deaths which will fall within the ambit of clause 5(2) will often require a narrative verdict, but a narrative verdict may be given by a coroner (or jury) in a case falling outside clause 5(2) and the clause does not prevent this.

**Juries (Clauses 7–9)**

5. Please explain why the Government considers that it is appropriate to remove the existing provision for compulsory jury inquests in cases where the health and safety of the public may be at risk, bearing in mind the Convention rights that will generally be engaged in such cases.

It is rare for juries to be appointed under what is currently section 8(3)(d) of the Coroners Act 1988 (we believe that, at least in part, this is due to there being some confusion about what the criterion means in practice), consequently we consider that the provision is no longer needed. There are three further points to make—firstly, a coroner will have discretion to call a jury under clause 7(3), secondly, a jury is not necessarily required in cases where Convention rights are engaged, and thirdly coroners will remain independent judicial office holders under the Bill and with their specialised expertise drawn from a wealth of coronial experience will be better qualified than most to assess when the health and safety of the public may be at risk.

6. What additional circumstances would be required for a jury to be summoned (what would be a “sufficient reason” for a jury inquest?) and would these circumstances include cases where a risk to the health and safety of the public was engaged and where a report from the coroner may be necessary to avoid future deaths?

A coroner has discretion to summon a jury in any case falling outside clause 7(2) where he or she thinks there is sufficient reason for doing so (clause 7(3)). For the reasons given above, this is unlikely to include cases where there was a risk to the health and safety of the public or where a report under paragraph 6 of Schedule 4 might be given (which would seldom be known in advance of the inquest). It is far more likely to include cases where it is felt that the public interest in a case was such that the coroner considered that the additional scrutiny and independence of a jury would be beneficial. However, when in post, it is likely that the Chief Coroner will want to consider further how coroners should exercise their discretion in relation to summoning juries, and he or she is likely to issue appropriate guidance.

7. Does the Government consider that public confidence in the outcome of the inquest, and in the process as a whole, will be diminished by a reduction in jury numbers from 7–11 to 6–9, particularly in cases where Convention rights are engaged, and if not, why not?

In the vast majority of jury inquests, the number of jurors will be 9, two more than the current minimum. Having a lower number of 6, only one less than the current minimum, simply means that if jurors drop out during a long inquest, there is greater flexibility for proceedings to continue. The Government does not think public confidence will be affected. During the extensive public consultation on the coroners’ provisions since 2006, concern about this issue has been negligible.
OUTCOME OF INVESTIGATION (CLAUSE 10)

8. I would be grateful if you could confirm that these provisions are not intended to change the current position under the Coroners Rules, and where a finding which might point to responsibility for a death is required by the Convention, that finding would not be inconsistent with the proposals in Clause 10.

We can confirm that it is not intended that clause 10(2) should change the current position under rule 42 of the Coroners Rules 1984. Clause 10(2) is concerned with the way that a determination is framed and it is not intended that it should prevent a coroner or jury considering facts bearing on civil or criminal liability in order to reach a determination. A determination pointing to responsibility for a death will not offend clause 10(2) provided it is framed so as not to appear to determine any question of criminal liability on the part of a named person or any question of civil liability.

9. I would also be grateful if you could confirm that the Government intend verdicts such as ‘unlawful killing’ or ‘death as a result of neglect’ to remain open to coroners?

The content and format of determinations will be considered, and consulted on, when the rules are drafted.

10. Do you accept that the exclusion of findings which ‘appear to determine’ civil or criminal liability could lead to some ambiguity and unnecessary caution on the part of a Coroner or a jury keen not to appear to determine liability?

Clause 10(2) was taken from the equivalent provision in rule 42 of the Coroners Rules 1984, which in turn was taken from rule 33 of the Coroners Rules 1953 and so it has been followed by coroners and juries for decades. There has been caution in the past but it is now clear that verdicts of ‘unlawful killing’ and ‘death as a result of neglect’ do not offend rule 42 and consequently would not offend clause 10(2).

11. Is there any reason why the exclusion in Clause 10 should not be limited to findings which determine any question of criminal or civil liability on the part of any named person or body, in order to avoid any such unnecessary ambiguity?

As indicated in response to question 10, given that rule 42 has operated for many years without apparent difficulty we do not consider an amendment along the lines proposed is required. Moreover, an amendment along these lines would be a fundamental change which would widen the scope of an investigation. It would enable a coroner or jury to conclude that there was negligence or other civil liability (for example, harassment, assault, nuisance) and the only thing that would be prevented is to state who was liable. This is likely to lead to inquests becoming more adversarial rather than inquisitorial with evidence being adduced to establish civil liability which could then be used in civil courts in an action for damages.

CERTIFIED INVESTIGATIONS (CLAUSES 11–13)

12. I would be grateful if you could confirm (a) how many cases have been affected by the inability to disclose certain information (despite existing special measures, including the potential to apply for PII in respect of that information); and (b) how those cases have been affected.

I am aware of one inquest, involving a police shooting, in which the coroner has determined that there is material which is relevant for the purposes of the inquest into the death but which, as a matter of law, neither the coroner nor the jury may see and where the law requires a jury to determine the facts of the death. This inquest is stalled. There was a possible second case, also involving a police shooting, but I understand that the relevant coroner has recently concluded that it would be possible to proceed with the inquest in the normal way, without disclosure of the sensitive material.
13. What has happened since these proposals were withdrawn from the Counter-Terrorism Bill during the last session, to persuade the Government that it is necessary to broaden the reasons for certification to include a protection for witnesses and a new “public interest” category?

— In what sorts of circumstances does the Government envisage issuing a certificate for these purposes? Can you give some hypothetical examples?

— Certification for the purposes of protecting a relationship with another country is very broad. In what circumstances would the Government envisage issuing a certificate for this purpose? For example, would the Government issue a certificate (a) to save embarrassment of UK allies in cases of friendly fire and/or (b) to protect a trade or other commercial relationship between a UK company and a third party?

In the Counter-Terrorism Bill, the criteria for certification were that material could not be made public on the grounds of national security, to protect the interests of a relationship between the UK and another country; or otherwise in the public interest. I accepted that the phrase ‘otherwise in the public interest’ was far too broad and the redrafting of clause 11 was a genuine attempt to respond to the criticisms levelled at the provision in the earlier Bill. The inclusion of the additional criteria of ‘preventing or detecting crime’ and protecting “the safety of a witness or other person” were intended to add specificity and therefore narrow the circumstances in which a certificate might be issued. The Government also sought to raise the bar by replacing a test that was based simply on “the public interest” with one that could only be invoked to “prevent real harm to the public interest”. We are, however, taking a further look at the criteria.

An example of a case involving material that should not be made public in order to protect the safety of a witness or other person is one that is likely to concern covert human intelligence sources. For example, if a covert human intelligence source, such as an undercover police informant, provides the police with information concerning an impending criminal enterprise—say the armed robbery of a bank—and the police shoot and kill one of those involved while taking action to prevent the robbery from taking place, the source’s evidence will be of key relevance to the degree of force used, and to the assessment by a coroner, if the case comes to him or her, of the circumstances which led to the death. If the information provided by the source is such that it would be clear that only he could have informed the police of the details of the planned robbery (that is, so that anonymity and screening would be insufficient to secure his safety), the public disclosure of his evidence could put his life in danger and might also discourage others from providing critical information to the police in similar circumstances if it became known that the police were unable to properly protect their sources.

“Real harm” to the public interest is the test used in the courts when an application is made, by the organisation which owns the material, for public interest immunity (that is that material should not be disclosed because it would be injurious to the public interest to do so). This test has a longstanding and well understood legal meaning in the PII context and it was incorporated in clause 11(2)(c) for this reason.

Clause 11(2)(c) is intended to capture any circumstance not captured under the provisions in clause 11(2)(a) or (b). For that reason it is not possible to provide a firm example of the type of case that would fall within this provision. Inquests which are subject to a certificate are likely to be very rare and it is accepted that paragraphs (a) and (b) are likely to cover most of the scenarios where an investigation may need to be certified. However, it is never possible fully to anticipate all the circumstances that might arise. It is therefore important to preserve the ability to certify in any case where the inquest will involve a matter that should not be made public for a public interest reason—and this is achieved by including paragraph (c). Whilst this may appear to widen the grounds for certification there is an important qualifying requirement of “real harm” to that public interest and without these words, there is a real danger that it would not be possible to certify a future case despite there being real harm to the public interest.

An investigation may be certified if it involves material that should not be made public in the interests of the relationship between the United Kingdom and another country. The Government would not issue a certificate simply in order to save embarrassment or to protect trade or commercial relationships. An example of a case where an investigation may be certified on this ground concerns circumstances where the non-disclosable material has been provided in confidence by a foreign state. For instance, the Mexican authorities provide the UK police with information concerning a major Class A drugs smuggling operation into the UK, including the likely time and location when the drugs will change hands on UK soil. The information provided suggests that all those present when the deal takes place are dangerous and will be heavily armed. The police accordingly send armed officers to keep watch on the location. When the police move to arrest those involved one of the suspects is shot and later dies.

In this scenario, the information provided by the Mexican authorities is clearly directly related to the degree of force used by the officers and should therefore form a central part of the assessment by the coroner of the circumstances which led to the suspect’s death. However, if the material was disclosed publicly despite assurances given to the Mexican authorities regarding the manner in which the material would be treated, the UK’s relations with Mexico could be damaged and they would be extremely unlikely to provide any further information which could be of critical importance in tackling drug-related crime in the UK. In addition, the disclosure of information provided to the UK in confidence by another country might discourage other countries from providing similar information if it became known that the UK could not be trusted to properly protect sensitive material.
14. I would be grateful if you could provide a more detailed explanation of the Government’s view. In particular, please provide any legal authority for the Government’s position that the proposals are likely to be compatible with Article 2 ECHR.

First and foremost, an inquest is an inquiry conducted on behalf of the Crown for the purpose of establishing certain factual matters concerning a death. Where an inquest is the appropriate forum by which the State discharges its obligations under Article 2, there must be an independent and effective investigation, conducted expeditiously, and with a sufficient element of public scrutiny to secure accountability in practice as well as theory. And ‘the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests’ (Jordan v UK\(^20\) and approved in R v Secretary of State for the Home Department ex parte Amin\(^21\)).

The Government accepts that Article 2 does not simply require an independent and effective investigation of the circumstances of the death. It also requires (as well as public accountability) an opportunity for participation in the process by the next-of-kin which includes the disclosure to them of core documents, attending the proceedings and being able to cross-examine the witnesses.

But the Government’s view is that these interests do not require the public disclosure of sensitive material in circumstances where it would be injurious to a substantial public interest to do so. It is consistent with Article 2, as it is consistent with Articles 5 and 6, for sensitive information not to be made public or disclosed to the next-of-kin where this is required by a substantial public interest. In Jordan itself it was said, at paragraph 121:

“As regards the lack of public scrutiny of the police investigations, the court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under art 2”.

In these cases there will be full disclosure of evidence save for any matter which should not be made public. Redacted material and gists will be provided where possible. Only the part of the inquest at which the sensitive material or matter is considered will take place in private. If part of the inquest is held in private the interests of the next-of-kin will be fully protected by the appointment of a person as counsel to the inquest who can be directed by the coroner to take responsibility for representing their interests and testing the evidence which cannot be disclosed. This ensures that even though the next-of-kin cannot ask questions themselves, there is an independent counsel doing so on their behalf. The Government considers that this procedure will be sufficient to secure compliance with Article 2.

The case of Ramsahai and others v Netherlands\(^{20}\) is further authority for this. This concerned a case brought by the relatives of Moravia Ramsahai who was shot dead by a police officer in the Netherlands in 1998. The public prosecutor found that the officer had acted in legitimate self-defence and that no prosecution should be brought and the Amsterdam Court of Appeal agreed. The Grand Chamber of the European Court of Human Rights upheld a finding of the Chamber that there was no violation of Article 2 in relation to the shooting itself but that there was a violation of the investigative obligation because the investigation was inadequate and insufficiently independent. The Court held that:

“The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under art 2 that a deceased victim’s surviving next-of-kin be granted access to the investigation as it goes along... The Court does not consider that art 2 imposes a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation”.

R (on the application of Catherine Smith) v the Assistant Deputy Coroner for Oxfordshire and Secretary of State for Defence\(^21\) challenged the lawfulness of decisions taken by a coroner in an inquest held into the death of a soldier who had been serving in Iraq. The soldier had suffered a cardiac arrest and died due to hyperthermia. Only one of two reports into the soldier’s death produced by the Army Board of Inquiry investigation was provided to the coroner. On finding out about the existence of the other report the coroner decided it was not necessary to consider it as the procedural obligations implicit in Article 2 did not apply to the inquest. The Administrative Court held that Article 2 did apply in the circumstances and therefore there was a presumption in favour of as full a disclosure as possible to both the coroner and interested persons. However, the court also said that:

“Any specific claim that a witness’s identity should not be disclosed because, for example, he or she might be put at risk of harm or because there was a particular request and need for confidentiality, can be made and should be considered by the coroner. Equally, any claim that material should not be disclosed on national security grounds must be considered by the coroner”.

18 [2004] 1 AC 655.
15. I would be grateful if you could provide further reasons for the Government’s view that counsel for an inquest will be able to perform the functions of a special advocate on behalf of the deceased’s family or next of kin, bearing in mind that the primary duty of counsel to the inquest will be, by definition, to the Coroner rather than any of the interested parties. Specifically:

— in any case involving certification, will the coroner be required to appoint an individual with clearance to act as a special advocate?
— how will that individual reconcile his duty to the inquest and the interests of what may be a diverse range of interested parties?

The Government’s view is that the interests of the deceased’s family can properly be protected by counsel whose task it is to represent their interests, ask the questions which the family would ask if the material was disclosed to them and probe the evidence on their behalf. The functions of “counsel to the inquest” will vary depending on the requirements of the coroner and the circumstances of any particular inquest. In some cases, the role of counsel to the inquest will be limited to performing the traditional role of advising the inquest on legal matters and presenting evidence. In other cases, counsel (or several counsel) may be appointed by the coroner solely to represent the interests of the next-of-kin. The material or matter which cannot be made public will be disclosed to counsel to the inquest and the coroner will direct counsel to the inquest to take responsibility for testing the evidence which cannot be disclosed publicly or to the deceased’s family. That counsel can probe the evidence on the family’s behalf and can give considered advice on whether or not there are grounds for challenge to the outcome of the process or to the process itself. The Government considers that if counsel to the inquest performs the task of testing the evidence diligently then Article 2 will be satisfied and it is not necessary for a special advocate to be appointed.

16. If this is an important safeguard for the rights of interested parties, why should the requirement for the coroner to appoint a special advocate or multiple advocates in cases involving certification not be provided for on the face of the Bill?

The Government’s view is that the procedure described above in answer to question 15 will be Article 2 compliant. Counsel to the inquest will be acting in effect as a special advocate but we do not think that Article 2 formally requires a special advocate to be appointed.

There is no provision on the face of the Bill for the appointment of a person as counsel to the inquest as it is clear that a coroner has power to appoint such a person. It is noted in Jervis on Coroners that a coroner has such power and engagement of such counsel has survived criticism by next-of-kin in Re Devine and Breslin’s Application.

17. Does the Government accept that the Minister must have reasonable grounds to support his opinion (a) that the relevant information should not be made public; (b) that the relevant reasons are satisfied and (c) that other measures would not be adequate?

18. If so, why shouldn’t the Bill should be amended to clearly reflect this requirement?

The Government does accept the opinion of the Minister must be honestly held and must rest on a reasonable basis. However, we do not feel that it is necessary to state this on the face of the Bill as this precedent already exists in other legislation and the Minister’s decision would be tested on this basis at any judicial review.

19. What would the Government do if judicial review led to a certificate being overturned? (Wouldn’t this pose the same problem which the Secretary of State considers would be associated with an application for PII?)

The Government considers that a court reviewing the lawfulness of the Secretary of State’s decision to certify an investigation under clause 11(1) would recognise that the nature of such a decision points to the need for a wide margin of appreciation and that a court would be slow to overturn such certification.

In Secretary of State for the Home Department v Rehman Lord Hoffman said at paragraph 62:

“It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove”.

22 Twelth edition, paragraph 12-14.
24 [2003] 1 AC 153
In the Queen on the application of Al Rawi and Others v the Secretary of State for Foreign and Commonwealth Affairs and another\footnote{[2006] EWCA Civ 1279} it was said that the court’s role is to see that the government strictly complies with all formal requirements, and rationally considers the matters it has to confront. It noted that if the subject matter relates to foreign relations or national security the law accords to the executive an especially broad margin of discretion.

If a certification were overturned on judicial review then the Government would seek leave to appeal to the Court of Appeal.

20. Given the importance of judicial oversight, why shouldn’t the Bill be amended to provide the Secretary of State with the power to certify that certain information should not be made public, but to leave the appropriate measures necessary to achieve this (including the potential for sitting in private and without a jury) to the discretion of the High Court judge hearing the certified inquest?

The Government is actively considering ways in which the clause could be amended so as to include some additional judicial oversight. We are grateful for the Committee’s suggestion and will consider whether the clause could be amended in this way.

**Powers to Gather Evidence and to Enter, search and Seize Relevant Items (Clause 24, Schedule 4 Paras 1–5)**

21. Does the Minister consider that these powers would enable a coroner to compel an individual to produce evidence which would open him or her to criminal liability? If not, I would be grateful if you could explain the Government’s view. If so, please explain why there should not be a specific exemption on the face of the Bill to deal with this issue.

The powers in paragraph 1 of Schedule 4, which enable a coroner to require a person to give, produce or provide evidence, are subject to paragraph 2(1) of that Schedule. Paragraph 2(1) provides that a person may not be required to give, produce or provide any evidence or document if he or she could not be required to do so in civil proceedings in a court in England and Wales. By section 14 of the Civil Evidence Act 1968 a person is entitled to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence. Accordingly a person is not required to answer any question or produce or provide any document or thing to a coroner if it would tend to incriminate him or her.

22. Will the Coroner be required to disclose evidence gathered using these compulsory powers to interested parties?

Provisions on disclosure to interested persons will be revised as part of the development of associated secondary legislation. Disclosure will not be dependent on the method of obtaining material, but rather the nature of the material and its relevance to the investigation. In those circumstances, it is likely that material gathered under these powers will be disclosable. Further consideration will be given to this when the secondary legislation is drafted.

23. Does the power to require a person to produce documents include a power to require full and appropriate disclosure and inspection to be provided by each interested party to all other interested parties, reflecting a duty on the Coroner to ensure full and appropriate disclosure and inspection for all interested parties, including bereaved families? If so, why shouldn’t this power and duty be reflected on the face of the Bill?

There is no intention to require one interested person to disclose material to other interested persons. This is inappropriate in an inquisitorial process and the power in paragraph 1(1)(b) or (2)(b) of Schedule 4 will not be used in this way.

24. I would be grateful if you could explain why comparable safeguards to those in Part II, PACE 1984 should not be provided on the face of this Bill.

Equivalent provision to the safeguards in sections 15, 16 and 21 of the Police and Criminal Evidence Act 1984 will be made in Coroners regulations under clause 33(3)(g) and (h). This has been left to delegated legislation as it is considered that the detail of the safeguards is more suited to secondary legislation.
25. Has the Government produced any draft Regulations to accompany these powers? If so, I would be grateful if you could provide my Committee with a copy to assist our scrutiny of the Bill.

The Government has not yet produced a draft of the Regulations that will be made under clause 33 of the Bill.

**Power to Report if Risk of Future Death (Clause 24, Schedule 4 Para 6)**

26. There are a number of actions which could enhance the effectiveness of the Coroners Report, and so, enhance the protection for the right to life. I would be grateful if you could explain the reason the Government chose not to use the Bill to:

- Impose a duty on the coroner to make a report if he considers that action is required;
- Impose sanctions for failure to respond on the part of the authorities receiving the report;
- Require disclosure of the report and response thereto to all interested persons, and publication where appropriate;
- Create a mechanism for monitoring and scrutinising such reports and responses thereto in the interests of ensuring that lessons are learnt.

The Government has chosen not to impose a duty on a coroner to make a report at the end of an investigation and not to impose sanctions for failure to respond as it considers that such provisions are unnecessary following the success of the amendment in July 2008 to rule 43 of the Coroners Rules 1984 (see S.I. 2008/1652). Indications are that coroners and the persons to whom they send reports take their responsibilities very seriously and no reports made since July 2008 have not had at least an interim response. Furthermore, any obligation to make a report would impose unnecessarily on the coroner’s judicial independence.

Accordingly it is not necessary to impose an obligation on coroners to make a report or to create sanctions for failing to respond. Should a coroner refuse to exercise the power to make a report or exercise the power irrationally, that would be subject to judicial review, but we are confident that coroners will continue to make full and appropriate use of the power as they do currently.

It is intended that further provision on reports under paragraph 6 of Schedule 4, including requirement to send copies of reports and responses to the Chief Coroner, interested persons and any other person with an interest, will be made in Coroners regulations under clause 33(3)(i). Provision will also be made enabling reports, or parts thereof, to be published.

Reports and responses are currently copied to the Lord Chancellor and are being collated and scrutinised by the Department and those parts of interest to the wider public will be published in due course. This mechanism works well and it is intended to be continued under the Bill and so it is not necessary for formal provision to be made on the face of the Bill.

**Governance: Chief Coroner etc (Clauses 27–31, Schedules 7–8)**

27. Why shouldn’t the Bill require the Chief Coroner to institute a system of mandatory national training requirements for coroners, including provision for training in respect of Convention rights and the requirements of the HRA 1998?

The Bill enables the Chief Coroner to make regulations about training for coroners and other staff who work with them. These regulations may make provision for the kind, amount and frequency of training to be undertaken. These matters will be considered further when the Chief Coroner takes up post, but the Government has deliberately left open the possibility that some training could be mandatory. The Government agrees that proper knowledge of the HRA should be essential for coroners but it is necessary to provide flexibility so that that training needs can be assessed and so that changes in training needs and materials can be accommodated in response to changes in the law.

28. I would be grateful if you could clarify whether it is the Government’s intention that a decision that can be the subject of appeal to the Chief Coroner may no longer be subject of challenge by judicial review? When an appeal to the Chief Coroner is not available, will it be open to an Interested Party to seek judicial review?

The possibility of judicial review of a decision which may be appealed under clause 30 has been left open but it is intended that an interested person should exhaust any right of appeal under clause 30 before seeking judicial review and it is rare for the Administrative Court to grant permission to an applicant for judicial review if alternative remedies have not been exhausted. When an appeal to the Chief Coroner is not available, it will be possible for an interested person to seek judicial review.
29. In view of the importance of the role in the proposed new scheme and the nature of the powers that go with that role, including the power to determine appeals, does the Government agree that it would be appropriate for the Chief Coroner to be a High Court judge (rather than a circuit judge)?

The Government considers that the position of Chief Coroner should be held by a senior judicial office holder such as a High Court judge or senior Circuit judge. Such a person will have the requisite skills and experience to lead the newly reformed coroner system and will also have sufficient adjudicative experience to enable them to deal with appeals from the decisions of senior coroners.

30. I would be grateful why you could explain why the Government consider that it is appropriate to allow the Lord Chancellor to remove proposed appeal rights by secondary legislation.

The intention of clause 30(5), by which the Lord Chancellor may make an order to amend the list of decisions that can be appealed, is to give the Lord Chancellor the flexibility to add to the list if it is considered that other decisions made by a coroner ought to be made subject to appeal. Any order made under this power will be open to full Parliamentary scrutiny since it is subject to the affirmative resolution procedure.

31. I would be grateful if you could provide further information about the breadth of this test. For example, would cases such as the investigation of the shooting of Jean Charles de Menezes or the inquiry into the death of the Princess of Wales, be covered by this power?

Paragraph 2 of Schedule 8 to the Bill enables the Chief Coroner to request the Lord Chief Justice to nominate a judge to conduct any investigation. While the power in paragraph 2 is at large, it is clear from the generality of the structure of Part 1 of the Bill that the investigation into a death would in the normal course of events be conducted by the local senior coroner and that consequentially the provisions in Schedule 8 would only apply exceptionally. It is anticipated that the provision will be used sparingly and particularly when the inquest is likely to involve complex legal issues. Had it been available, I do consider that the provision would have been used in the de Menezes and the Diana, Princess of Wales, inquests.

32. In high-profile cases engaging Convention rights, but not necessarily raising any new or complex legal characteristics, would the Chief Coroner still have the option to take over the conduct of an inquest or to ask for the appointment of a senior judge to hear it in the place of a senior coroner?

Yes, it would be open to the Chief Coroner to conduct the investigation him or herself or to request the Lord Chief Justice to nominate a judge to conduct it.

GOVERNANCE: GUIDANCE, REGULATIONS AND RULES (CLauses 32–34)

33. Does the Government intend to seek any substantive changes to existing Coroners Rules, other than those made on the face of the Bill? If so, will draft Regulations and Rules be provided for scrutiny during the passage of this Bill?

Draft regulations and rules, which are likely to be substantially rewritten to support the primary legislation, will not be available for scrutiny during the passage of the Bill. Such a task will be a major undertaking requiring extensive consultation and will be dealt with as part of the implementation programme, possibly under the supervision of the new Chief Coroner who it is hoped will appoint as soon as practicable after Royal Assent.

34. In the light of the nature of the positive duty of the state in arranging inquiries into deaths where the Convention obligations of the state may be engaged, I would be grateful if you could explain the role that the Lord Chancellor will play in the setting of practice and procedure rules. In addition, I would be grateful if you could set out the Government’s view that this continuing involvement is appropriate.

Coroners regulations under clause 33 will set out the practice and procedure in relation to investigations (other than the practice and procedure at an inquest) and Coroners rules under clause 34 will set out the practice and procedure in relation to inquests. The former will be made by the Lord Chancellor, with the agreement of the Lord Chief Justice, or his nominee and the latter by the Lord Chief Justice, with the agreement of the Lord Chancellor. An inquest is broadly similar in nature to a court hearing held in other types of proceedings and, since the Lord Chief Justice makes other rules concerning the practice and procedure in courts (for example, in relation to the Court of Protection and Probate), it is appropriate for the Lord Chief Justice to make these rules. However, the Government considers that it is appropriate for the Lord Chancellor to make regulations about the pre-inquest stage of an investigation. The Lord Chancellor retains power to make regulations about practice and procedure in other areas, for example in relation to certain tribunals. We consider that this reflects the proper balance between the roles of the judiciary and the executive in setting rules concerning practice and procedure in courts and tribunals. The Chief Coroner will issue guidance to coroners.
35. I would be grateful if you could explain how coroners and practitioners will be involved in the setting of practice and procedure rules. Would it be appropriate to create a new Rules Committee, similar to the rules committees operating in relation to the Civil Procedure Rules?

The Government is considering setting up an informal rule committee, involving senior and experienced practitioners, who could oversee the rule and regulation making process. There will certainly be full consultation on the new secondary legislation.

**Legal Aid**

36. I would be grateful if you could explain further the Government’s view that the current provision for legal aid for families participating in inquests which engage Article 2 ECHR is adequate to meet the requirements of the Convention for effective participation by the family.

37. Is there any reason why this Bill should not be amended to make express provision for access to legal aid for family members of the deceased in any inquiry engaging Convention rights (i.e. any inquiry under Clause 5(2))?

Representation can be granted exceptionally for inquests where it is necessary to enable a coroner to conduct an effective investigation, under Article 2 ECHR, or where there is a significant wider public interest in the applicant being represented. Cases involving deaths in prison and police custody, for example, are already “in scope” for funding because the Article 2 duty on the state in such cases is clear. However, funding must remain means-tested to protect the limited resources of the legal aid budget. To extend legal aid to all inquests involving a public authority, for example (around 800 per year) would cost in the region of £6.4 million.

The Government does intend that this funding should remain available in the future, together with the greater opportunities for accessible family participation—as set out in the Charter—that will be possible in a reformed coroner system.

**(b) Data Protection**

**New Powers for the Information Commissioner**

38. Does the Government accepts that a breach of Article 8 ECHR could arise as a result of the failure of a private individual or a company to comply with the data protection principles:
— If not, why not?
— If so, does the Government accept that greater scrutiny of the private sector by the ICO would reduce the risk that such a breach could arise?

Private individuals and companies are subject to the Human Rights Act 1998 (HRA) only to the extent that they are exercising “public functions” within the meaning of that Act. In such circumstances only, it is possible that a failure to comply with the data protection principles may also involve a breach of Article 8.

The Government does not agree that the power to issue Assessment Notices in clause 151 of the Bill should apply in relation to bodies that are not Government Departments or public authorities within the meaning of section 1(1) and new section 41A(12) of the Data Protection Act 1998 (DPA). The Information Commissioner already has a broad range of powers to ensure that such bodies comply with the data protection principles and other provisions of the DPA. The terms of section 43 of the DPA (governing Information Notices) are framed broadly and allow the Information Commissioner to request any information in any specified form from any data controller, which would allow him to establish compliance with the data protection principles. This provides the opportunity to uncover bad practice. The scope of Information Notices is being further widened by the Bill (Part 3 of Schedule 18). Additionally, if the Commissioner is satisfied there are reasonable grounds for suspecting any data controller’s non-compliance with the data protection principles, he may apply to the court for a warrant under Schedule 9 to the DPA. This allows him to enter and search the data controller’s premises for evidence of whether the data controller has contravened or is contravening the principles.

It is important to remember that Assessment Notices are intended to assist in raising the awareness and compliance of public bodies with the data protection principles. The public sector holds a large amount of personal data about UK citizens, the processing of which is often necessary to safeguard rights and responsibilities. This means, in contrast to the private sector, that individuals usually have no choice over whether their data is processed. It is therefore appropriate that those public sector organisations that process information in what the Information Commissioner regards as high risk circumstances should be subject to inspection without necessarily granting prior consent. This is a complementary measure to support the existing investigatory and enforcement powers of the Commissioner.
INFORMATION SHARING AND THE RIGHT TO RESPECT FOR PRIVATE LIFE

39. I would be grateful if you could explain why the Government consider it would be appropriate to subject any and all types of information to wider information sharing by ISO. For example, are there any reasons why the Government considers that the Bill should not be amended to exclude, for example:
— information which would otherwise be protected as ‘sensitive personal data’ for the purposes of the DPA 1998;
— medical records or medical or clinical information (other than anonymous patient data from which no patient can be identified);
— information held on the National DNA Database and other samples held by the police or others for the purposes of criminal investigation;
— information held on the national children’s database created pursuant to the Children Act 2004;
— records of criminal allegations or accusations;
— information held or gathered pursuant to the Safeguarding Vulnerable Groups Act 2006 (express provisions for information sharing for the purposes of safeguarding children and vulnerable groups are already provided on the face of that Act)?

The Data Sharing Review carried out by Richard Thomas and Sir Mark Walport identified information sharing orders (ISOs) as a way of lifting the “fog of uncertainty” currently surrounding data sharing. The provisions of the Bill have been drafted broadly so as to allow for a large number of varied situations: we simply cannot predict every single instance where an ISO would be necessary. That said, individual ISOs would be tightly drawn setting out those classes of information which may be shared, who is enabled to share, and for what purposes. Some of the exclusions listed would limit unacceptably the use to which an ISO could be put.

However, the Government is listening carefully to the concerns expressed by the British Medical Association and others and agrees that different standards could be applied to different sets of data. We will reflect further on the comments that have been made so far about certain categories of information.

40. Does the Government consider that the power to modify any enactment, by ISO, includes the power to modify or disapply the provisions of the HRA 1998, including the Section 6 duty to act in a manner compatible with Convention rights?

The power to make an information sharing order does include power to modify or disapply other legislation. Whilst theoretically that covers provisions of the HRA, the Government certainly never intended that an ISO should be capable of including provisions modifying or disapplying the HRA, and it is not readily apparent how the power could be exercised in that way given the limits on the power which are already contained in the Bill.

First, the only purpose for which an ISO can be made is to enable the sharing of information that includes personal data. The substantive scope of such orders is therefore limited including the associated power to amend other legislation.

Secondly, the exercise of the power to make an ISO is dependent on the person making the order first being satisfied that information sharing is necessary to secure a policy objective, that the effect of an order is proportionate to the policy objective to be secured, and that the provisions of the order strike a fair balance between the public interest and the interests of any person affected by the order. Once these tests are satisfied, it is difficult to see how the order could give rise to any breach of Article 8 (or any other Convention right) such that the person making the order would wish to modify or disapply any provision of the HRA.

Moreover section 6 of the HRA does not generally permit Ministers, exercising powers under a later enactment, to make subordinate legislation that is incompatible with the Convention rights, and the Government does not consider that the exceptions identified in section 6(2) apply here.

Having said that, we note the concerns that have been expressed about the scope of this power and the potential for it to be used in a way which was not intended, and are considering the matter further.

41. Does the Government consider that this provision would prevent an individual from making a claim, under the HRA 1998, that the treatment of his or her personal information, despite being authorised by the ISO, had led to a breach of his or her right to respect for personal information (Article 8 ECHR)?

As indicated above, the Government never intended that the power to make an ISO be used to modify or disapply protection under the HRA and considers that it is not readily apparent how the power could be exercised in that way given the limits on the power which are already contained in the Bill but is considering this matter further. Insofar as a data controller is exercising public functions within the meaning of the HRA, it will therefore be possible for a victim to bring a claim against them under the HRA for a breach of Article 8.
42. If so, why shouldn’t the Bill be amended to include a savings clause similar to that inserted in the Civil Contingencies Act 2006, in order to provide a guarantee that individual public authorities processing information pursuant to an ISO will be subject to the requirement to act in a manner compatible with Article 8 ECHR?

As indicated above, it is not readily apparent how an ISO could meet the test in the Bill but at the same time give rise to a breach of Article 8. However, we are looking further at this issue.

43. I would be grateful if you could confirm that once information has been processed in accordance with an ISO, the final data controller of any personal data must hold and process it in a manner which is compatible with the Data Protection Act (DPA) 1998.

We can confirm that any person that becomes a data controller of personal data under an ISO would be required to process that personal data in a manner which is compatible with the DPA.

44. Is there anything in the Bill which would prevent the Government proposing the permanent amendment or modification of the DPA 1998?

As the Information Commissioner pointed out in evidence to the Public Bill Committee, any processing of personal data which takes place further to an ISO would still need to comply with the DPA. It is true that the power in clause 152 could be used to amend the DPA. Indeed, given the subject matter of any order it is possible that an amendment to other provisions of the Act would be needed, for example, to add further exceptions or protections.

The Government has no intention whatsoever of undermining the DPA and the data protection principles within it. The Act gives effect in UK law to EC Directive 95/46EC and substantial changes to it could put the UK in breach of its EC obligations: that fact alone rules out making significant amendments.

However, we recognise that concerns have been expressed about the possibility of amending the DPA and we are considering the matter further.

45. I would be grateful if you could provide a fuller explanation of the Government’s view that the test for an ISO is appropriately defined. In particular:
— Please explain why the Government considers it appropriate to link the making of an ISO with an individual Ministerial policy? Are there significant reasons why the Bill should not be amended to limit information shared under ISO to information which is necessary to meet the public functions of the Minister or any other public authority exercising public functions?
— Why should the Bill not be amended to link the making of an ISO more closely to the legitimate aims identified in Article 8(2) ECHR?

The provisions as drafted strike the right balance between ensuring that an ISO has at its heart the furtherance of a public and government policy objective, while allowing the flexibility to make an order in relation to any body exercising a public function. This flexibility is desirable with the move towards a greater use of private sector organisations to deliver public services. A focus on functions would be too narrow and would lose this flexibility.

As we have indicated above, it is not readily apparent how an order could meet the test in the Bill but be incompatible with the Convention rights.

46. I would be grateful if you could confirm whether the Minister proposing an ISO would be required to make a Privacy Impact Assessment of the proposed Order and whether (a) that assessment would be made available to the Information Commissioner together with the draft Order and (b) it would be published to assist wider public scrutiny?

Further to the findings of the Hannigan review into Data Handling, all Government proposals which potentially involve handling personal data require a Privacy Impact Assessment (PIA) to be produced. This obviously includes ISOs. To ensure maximum scrutiny we envisage that draft PIAs would be made available to the Information Commissioner when he is invited to comment on a draft order. Equally, we envisage that PIAs would be made publicly available. For instance, a PIA would be made available to MPs and Peers when a draft order was laid before Parliament. However, in some cases, particularly sensitive details would need to be removed (for example, legal advice or commercially sensitive information).
47. Does the Government accept that, under the proposals in the Bill, the report of the Information Commissioner can have little effect, other than to inform public and parliamentary opinion? 
— If not, what will be the practical effect of a negative report of the Information Commissioner? 
— If you agree, wouldn’t it be more appropriate to allow the Information Commissioner to report on the proposal for the ISO in any terms that fall within his remit, including commentary on the necessity for the ISO and its implications for the right to respect for personal information?

As we have made clear, the procedure leading to an order being put before Parliament is one which involves a high degree of collaboration. Just as those Government departments or other bodies directly concerned in any information sharing proposal would be in early and continuous discussion, so too would the department proposing an order be in early discussion with the Information Commissioner. The Information Commissioner has indicated that he would like to see as early as possible any proposals and we would encourage Departments to ensure this happens. Richard Thomas has told the Bill Committee: 

“Frankly, it would be a brave Department that came forward and said, ‘We insist on this particular data-sharing measure, even though the commissioner has said that it is unacceptable’.”

We agree with this assessment. An adverse report from the Information Commissioner would naturally mean in practice that a Minister would have to consider very carefully whether to proceed. However, ultimately the Government considers that it is for Parliament to have the final say on any proposal.

(C) Reform of Criminal Law and Procedure

48. In how many cases where witness anonymity orders sought in respect of risk to property alone? Please indicate in how many cases orders were sought by (a) the police and (b) the CPS.

None of the applications for a witness anonymity order made under the Criminal Evidence (Witness Anonymity) Act 2008 related to risk to property alone.

Applications for anonymity orders may only be made by the parties to criminal proceedings, that is either the prosecution or the defence. In the case of the prosecution, the police will ask the CPS for a witness anonymity application to be made, providing the relevant information and if the CPS agree, they will make an application to the court.

As the Committee notes, the DPP provided details to the Public Bill Committee of the number of applications made under the 2008 Act.

49. In each of those cases, were applications for witness orders actually made? Please indicate in how many applications orders were originally sought by (a) the police or (b) the CPS.

Of the 346 witnesses that the police referred to the CPS, during the period 21 July to 31 December 2008, the CPS applied for orders for 135 of them. Of these 135 witnesses, the courts granted orders for 129 of them (and refused for 6 of them)

As noted in the answer to question 48 above, the police do not apply to the court for witness anonymity orders, this is the responsibility of the CPS.

50. Is there any reason why the Bill should not be amended to require the consent of the DPP before an application for an investigative witness anonymity order is made?

Investigation anonymity orders and witness anonymity orders serve different purposes at different stages of the case and must be viewed separately.

An investigation anonymity order is designed as a police tool to assist the investigation of a particular type of crime-gang related gun and knife homicides—with the aim of encouraging witnesses in fear of intimidation to come forward and speak to the police safe in the knowledge that their identity will not be revealed. The granting of an investigation anonymity order does not mean that an application for a trial witness anonymity order will necessarily follow. The witness may be able to provide information that is crucial to the success of the police investigation, but the witness may not be needed to give evidence at any subsequent trial. No-one will know at an early stage of a police investigation whether a charge will be brought or whether a trial will take place.

When approaching the witness about an investigation order, it will be necessary for the police to explain its effect and to make clear that if the witness is required to give evidence at a later date, it would be necessary to make a separate application for a trial order and there is no guarantee this will be granted. However, in circumstances where a witness is the subject of an investigation anonymity order and an application for a trial order is refused by the court, rather than put the witness at risk, the prosecution will have the option of withdrawing the witness from the case or even dropping the prosecution altogether depending on the nature of the witness’s evidence.
As indicated above, the investigation anonymity order is designed as a police investigative tool which may be used at the early stage of an investigation before there is necessarily a suspect and before the CPS are involved—the CPS make decisions on charging in these homicide cases. While both the police and the CPS will be able to apply for investigation anonymity orders, as this is essentially an investigative tool, we do not consider it appropriate to require the DPP to consent before the police apply for these orders.

REFORM OF EXISTING LAWS ON MURDER, INFanticide AND SUICIDE (PART 2)

51. In light of the number of concerns raised about the scope of these provisions, I would be grateful if you could provide a fuller explanation of the Government’s view that these provisions (a) comply with the requirement that the criminal law is framed in a way which allows for adequate legal certainty and (b) complies with the positive obligation on the State to protect the right to life.

The Government agrees that there is a requirement for legal certainty in the substantive criminal law. Citizens should be able to foresee with a reasonable degree of certainty the consequences that a given action may entail. Absolute certainty is not required however and is often unattainable. In the context of criminal law, the requirement of legal certainty is usually said to mean that the law should be sufficiently precise so that an individual knows in advance whether his or her conduct is criminal.

In the Government’s view, the clauses on diminished responsibility and provocation significantly enhance legal certainty.

In respect of diminished responsibility, clause 39 of the Bill will replace the current definition of the partial defence with a new modernised definition. The new definition of the partial defence in clause 39 is set out in clearer and more detailed terms than the existing definition, which itself has never been successfully challenged on grounds of uncertainty. A specific example of increased clarity relates to new section 2(1)(a) and (1A) of the Homicide Act 1957 (as inserted by clause 39(1)). In their report in relation to murder, the Law Commission highlighted that the current definition of diminished responsibility (requiring an abnormality of mind that substantially impaired the defendant’s mental responsibility for the killing) says nothing about what is involved in a substantial impairment of mental responsibility nor in what ways the effect of the abnormality can reduce culpability. Clause 39 addresses this by spelling out with greater clarity what aspects of a defendant’s functioning must be affected in order for the partial defence to succeed.

In relation to provocation the current law, which has never been successfully challenged on grounds of uncertainty, is framed in broad terms. It is derived from a mixture of the common law and statute (section 3 of the Homicide Act 1957). The clauses will abolish that partial defence and replace it with a new partial defence of loss of self control. The requirements of the new partial defence of loss of self-control are set out on the face of the clauses in detailed and plain terms. In accordance with clause 41(1), the partial defence will apply where the killing resulted from a loss of control that had a qualifying trigger (fear of serious violence or things said or done constituting circumstances of an extremely grave character that caused D to have a justifiable sense of being seriously wronged) and a person of the defendant’s sex and age with a normal of tolerance and self-restraint might have reacted in the same or similar way. The concept of a “qualifying trigger” is the subject of detailed and clearly set-out provision in clause 42.

In relation to both diminished responsibility and loss of self-control, the clauses enable a person to foresee, with a reasonable degree of certainty, when the partial defence will apply and hence when conduct that would otherwise lead to a murder conviction will lead to a conviction for manslaughter. The Government considers that these provisions plainly achieve an adequate degree of legal certainty and represent an improvement, in terms of certainty, from the current law.

The significance of the positive obligation to protect the right to life in respect of reforms to the murder laws was highlighted in the Explanatory Notes. The state must put in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches.

The criminal law already makes comprehensive provision for offences relating to the deprivation of life. In addition to homicide offences such as murder, manslaughter, corporate manslaughter and infanticide there are also specific offences such as those relating to causing death by driving. The partial defences to murder form part of this wider legal framework. As noted above, the partial defences do not however determine whether criminal liability exists. Their operation is limited to reducing liability from murder to manslaughter, which is itself an extremely serious offence carrying a maximum sentence of life imprisonment. The Government considers that the existing criminal law provides a high level of protection for the right to life; indeed the courts have never been found to the contrary.

The Government believes that the provisions in the Bill do not in any way reduce the existing level of protection for the right to life. The provisions on diminished responsibility are designed to modernise the law rather than alter the scope of cases caught by the partial defence. The Government’s impact assessment therefore concludes that there will be no significant shift in the number of cases affected by the modernisation of the existing definition. In respect of provocation, the impact assessment concludes that the new partial
defence of loss of control will be narrower than the existing partial defence of provocation in respect of killings committed in anger because of the high threshold set by clause 42(4). In respect of killings committed in fear of serious violence, the impact assessment states that the provisions do not significantly extend the existing law but provide a more logical and clear means of reaching outcomes that are broadly being reached now under the current law. The Government’s overall assessment is that, owing to the narrowing in respect of killings in anger, there may be a modest increase (10-20 cases a year) in the number of people convicted of murder rather than manslaughter.

The Government also notes that none of the specific concerns mentioned at pages 13 and 14 of the Committee’s letter imply that the provisions represent a lessening of the existing level of protection for the right to life.

The criminal law provisions summarised above are backed up by a comprehensive system of law enforcement for the investigation, prosecution and punishment of offences. The Committee will be well aware of the role of the police, prosecutors and courts in this regard and this will be unchanged by the provisions in the Bill.

In the light of the matters referred to above, the Government considers that the proposals in the Bill in respect of diminished responsibility and provocation fully comply with the State’s positive obligation to protect the right to life.

52. I would be grateful if you could provide a further explanation of the Government’s view that the requirement that the defendant have a “justifiable sense of being seriously wronged” would (a) be applied by the courts as an objective test; (b) comply with the positive duty on the State to protect the right to life (Article 2 ECHR); (c) complies with the duty on the State to protect the right to life without discrimination (Article 2 and Article 14 ECHR).

In relation to the phrase “justifiable sense of being seriously wronged”, we are clear that test will clearly be applied by the courts as an objective one. We anticipate that they way that test will work in practice is that the jury will first need to ask themselves whether the things done or said did indeed cause the defendant to have a sense of being seriously wronged. If so, the jury will then need to decide whether the defendant’s sense of being seriously wronged was in fact justifiable. The use of the word ‘justifiable’ is indicative of an objective standard here. Indeed, if the test was intended to be entirely subjective, then there would have been no need to refer to “justifiable” in the clause.

The “justifiable sense of being seriously wronged” test derived from a Law Commission recommendation. The Law Commission was clear in its 2003 report Partial Defences to Murder that the test would be objective. They commented that fact that the defendant himself thought that his sense of being seriously wronged was justifiable would not suffice; it would a question for the jury to determine as to whether it was in fact justifiable. The Law Commission observed that “the jury may conclude that the defendant had no sufficient reason to regard it as gross provocation,” or indeed that the defendant’s attitude in regarding the conduct as provocation demonstrated an outlook (e.g. religious or racial bigotry) offensive to the standards of a civilised society”. The report provides the example of a white person who kills after being spoken to by a black person because he holds deep-rooted beliefs that it is the gravest of insults for a black person to speak to a white man unless spoken to first. In relation to such a case the Law Commission commented that: “No fair-minded jury, properly directed, could conclude that it was gross provocation for a person of one colour to speak to a person of a different colour. In such a case the proper course would be for the judge to withdraw provocation from the jury”.

In addition, it is a further requirement of the partial defence (clause 41(1)(c)) that 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 the defendant. Clause 41(3) is clear that “the circumstances of the defendant” exclude any circumstances whose only relevance to the defendant’s is that they bear on the defendant’s general capacity for tolerance or self-restraint. These provisions are therefore important in the present context as they prevent the defendant from seeking to obtain the benefit of the partial defence on the basis of intolerance. The Law Commission’s Partial Defences to Murder points out that a person of ordinary tolerance and self-restraint is “not a bigot or a person with an unusually short fuse”. So the homophobic or racist defendant described in the Committee’s letter should not be able to rely on their prejudices to avail themselves of the defence.

In summary, the Government considers that the concept of a “justifiable sense of being seriously wronged” will not give rise to any issues of discrimination or any particular issues in relation to Article 2.

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26 ‘Gross provocation’ was the label used by the Law Commission to describe the limb of the partial defence applicable to words or conduct causing a person to have a justifiable sense of being seriously wronged.
53. I would be grateful if you could explain whether the Government intends this provision to (a) create a presumption against bail or (b) shift the burden of proof to the defendant to show that bail should be granted (and that he does not pose a significant risk):

— If so, does the Government accept that this provision is likely to be incompatible with the right to liberty (Article 5(3)) and that it will be read down by the courts in order to ensure its compatibility? (in a similar way to Section 25 of the Criminal Justice and Public Order Act 1994 (as amended) (O v Crown Court at Harrow))

— if not, what does the Government intend the practical effect of these proposals to be?

The purpose of clause 97(2) is to add a new test for bail in murder cases. The general test, that the court need not grant bail where it is satisfied that there are substantial grounds for believing that the defendant would commit offences if released, is reinforced in murder cases by providing that bail is not to be granted unless the court is of the opinion that there is no significant risk of the defendant offending in a way that would cause injury. Establishing that there is such a risk effectively precludes bail.

It is not the Government’s intention, however, to create a presumption against bail in the sense of shifting the burden to the defendant to establish that bail should be granted. We are aware that section 25 of the Criminal Justice and Public Order Act 1994 was read down by the House of Lords in the Harrow Crown Court case, and clause 97(2) was drafted with close regard to that decision so that the clause would be compatible with Article 5 without having first to be read down. In particular, the drafting—which is not the same as section 25—makes it plain that it is not for the defendant to show that there is no significant risk, but for the Crown to show that there is.

VULNERABLE AND INTIMIDATED WITNESSES (PART 3, CHAPTER 3)

AUTOMATIC APPLICATION OF SPECIAL MEASURES TO SELECTED WITNESSES

54. I would be grateful if you could provide an explanation of the Government’s view that the automatic application of special measures in relation to certain types of offences will be compatible with the individual right to fair hearing (Article 6(1) ECHR and the common law).

Special measures were introduced in the Youth Justice and Criminal Evidence Act 1999. These include video recorded evidence in chief, evidence by live TV link, screens round the witness box to shield the defendant from the witness, evidence in private in sexual offence cases and those involving intimidation and assistance with communication through an intermediary or communication aids. The purpose of these measures, which may be used singly or in combination according to the needs of the witness, is to assist vulnerable or intimidated witnesses, including children, give their best evidence. These measures are available to eligible defence and prosecution witnesses.

The availability of special measures is not incompatible with the defendant’s right to a fair trial in that the defendant is fully able to examine the witnesses against him or her. There are also a number of safeguards. Courts must determine special measures applications, opposing parties may make representations against applications and before reaching a decision, the court is required to consider whether the proposed measure(s) might tend to inhibit the evidence being effectively tested (section 19 of the Youth Justice and Criminal Evidence Act 1999). The courts may also discharge a direction if it appears to be in the interests of justice to do so. Additionally, by virtue of section 32 of the Youth Justice and Criminal Evidence Act 1999 judges must warn the jury as they consider necessary to ensure that the fact that special measures have been made available to a witness should not prejudice any conclusions that they might draw about the defendant.

As is already the case with child witnesses and complainants in sexual offence cases, the Bill makes eligibility for special measures in general automatic for witnesses to certain specified gun and knife crimes. But the court will continue to have full discretion to determine which special measures, if any, should be available to any particular witness after being satisfied that the measure(s) would be likely to improve the quality of evidence given by the witness and, if so which measure(s) would be likely to maximise so far as practicable, the quality of that evidence. This is not the automatic application of measures, but of eligibility.

LIVE LINKS (PART 3, CHAPTER 4)

55. I would be grateful if you could provide a fuller explanation of the Government’s view that:

— these proposals are necessary;

— these proposals are compatible with Article 6(1), despite the requirement that an individual should be present at and participate in the determination of the charges against him; and

— why the Government considers that live links satisfy the requirement that an individual is “present” at a hearing.
56. Does the Government agree that the production of defendants at court provides a valuable safeguard against abuse of their rights under Article 3 ECHR?

Live-link hearings are of benefit to the criminal justice system generally and to defendants themselves. Those benefits are maximised if the links are available for use in as many as possible of the cases for which they are suitable. That is the justification for the change.

The use of live links in this context does not extend to contested trials, but only to preliminary hearings and sentencing hearings. Charges against a defendant cannot be determined at a live-link hearing, except where a guilty plea is entered (or an intention to plead guilty indicated) during a preliminary hearing that is being held in that way. For the limited purposes for which live-link hearings are permitted, the Government is satisfied that the defendant’s appearance by live link constitutes being present at the hearing. The person is able to see and hear and to be seen and heard by the court during these hearings. Where it would disadvantage a defendant, the court has discretion not to give a live-link direction or to rescind one that has already been given.

57. Is there any reason why the Bill should not be amended to make it clear that a live link will not be in the interests of justice in any case where the link would restrict the ability of the accused to participate fully in the hearing?

The right to a fair trial implies the right of an accused to be present so that he may participate effectively in the conduct of his case. As stated above, the accused can see and hear what is going on and is able to be heard by the court. As a matter of general practice the need for participation by the defendant in the sorts of hearing that can take place by live link is limited; but to the extent that the need for such participation arises, the court will as a matter of course have regard to it in assessing whether to give a live-link direction, or (where a hearing by live link has commenced) whether there is any need to rescind the direction. An express requirement along the lines suggested is therefore unnecessary.

Possession of a Prohibited Image of a Child (Part 2, Chapter 2)

58. I would be grateful if you could explain how the proposed new offence satisfies the “in accordance with the law” requirement of Articles 8(2) and 10(2), why the offence is necessary and how it is proportionate to the Government’s stated aims.

The Government considers that any interference with Articles 8 and 10 of the Convention is justified as it is in accordance with the law and is necessary in a democratic society for the prevention of crime, the protection of morals and the protection of the rights and freedom of others.

Any interference with Articles 8 and 10 of the Convention will be “in accordance with law” because the offences will be set out in clear terms in primary legislation.

In relation to the requirement that any interference is “necessary in a democratic society”, the Government notes that the concept of necessity implies the existence of a pressing social need and that the interference is proportionate to the legitimate aim pursued.

The Government is satisfied that there is evidence to demonstrate a pressing social need. The matters relevant to the existence of the pressing social need were addressed at paragraphs 860–862 of the explanatory notes. In summary, they are:

(a) Material of the type covered by the offence is being exploited as a form of permissible child pornography. The Government is aware of instances in which the material covered by the offence has been advertised as “legitimate” child pornography. Indeed, police forces have reported that this type of material is often found alongside illegal stocks of images depicting real child abuse.

(b) The offence is needed to protect children. The images can be used as a grooming tool for preparing children for actual abuse. The images themselves can also be used to catalogue actual abuse of real children. The offence is also needed to protect children or vulnerable adults who are more likely to come across this material involuntarily because of the amount of this material on the internet.

(c) Viewing material of the nature covered by the offence can desensitise people to child abuse. The images can also reinforce people’s inappropriate and potentially dangerous feeling towards children. Banning such material is needed to reinforce the important social message that acts of abuse are unacceptable.

(d) Although publication of the material covered by the proposed new offence is already criminal under the Obscene Publications Act 1959, that legislation is not sufficient to address the problem of this type of material because of the impact of the internet. Material of this nature now has a potentially very wide sphere of circulation, which existing laws do not adequately cater for.

The measures proposed in the Bill are a proportionate response to the stated aims. The particular matters pertaining to proportionality were highlighted at paragraphs 863–866 of the Explanatory Notes. In summary:
(a) The proposed offence has a high threshold, covering material at the extreme end of the scale. The image must be pornographic (meaning it is of a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal). It also must be grossly offensive, disgusting or otherwise of an obscene character and must focus solely or principally on a child’s genitals or anal region, or depict one of the explicit sexual acts listed at clause 49(7). This sets a much higher threshold for the offence than that applicable to photographs and pseudo-photographs of children which are required to be indecent;

(b) The clauses include specific defences to the proposed new offence listed at clause 51. A defence will apply where a person had a legitimate reason for possessing the image, had not seen it and did not know or have cause to suspect that it was a prohibited image of a child or was sent the image without prior request and did not keep it for a reasonable time;

(c) There is an explicit exclusion in clause 50 in relation to classified films; and

(d) A prosecution may only brought with the consent of the Director of Public Prosecutions.

For these reasons, the Government consider that any interference with Articles 8 and 10 is justified under Article 8(2) and Article 10(2).

CRIMINAL MEMOIRS (PART 7)

59. I would be grateful if you could explain the Government’s view that these provisions are “prescribed by law” for the purposes of Article 10(2), in the light of the requirement that the Court take into account whether individual victims, their families, or the general public may be ‘offended’ in the absence of any order.

60. Is there any reason why this direction to the court should not be omitted from the Bill?

The scheme created by Part 7 of the Bill ensures that criminals can be stopped from benefiting from publishing material about their crimes. Where offenders benefit from accounts of their crimes, this can increase the pain and distress to victims and their families and cause understandable public concern. The Government considers that the extent to which this has occurred is one of a number of relevant factors for the court to take into account in the overall balance when deciding whether or not to make an order and, if so, the amount of the order. It is not the sole or determining factor. It forms one of a list of factors to be considered and the court may additionally take account of any other matters that it considers to be relevant. But the Government considers that it is perfectly legitimate (and indeed right) for the court to take into account the impact of publication on victims and the wider public at the same time as considering, for example, the social, cultural or educational value of the publication.

The Government considers that any interference with Convention rights arising from the scheme plainly satisfies the requirement of being “prescribed by law”. The decision whether or not to make an order is discretionary. Laws that confer a discretion are not in them selves inconsistent with the “prescribed by law” requirement provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual adequate protection against arbitrary interference. The provisions in Part 7 of the Bill clearly achieve this. The provisions set out the parameters and limits of the discretionary scheme in considerable detail (for example the limit on the recoverable amount in clause 141). The discretion in relation to an application for an exploitation proceeds order is subject to the detailed list of factors in subsection (3) that are required to be taken into account in reaching the decision. Furthermore, the decision on whether or not to make an order and the amount of the order rests with a judge. Any decision may be subject to appeal to the higher courts. There is therefore ample protection against the risk of arbitrary interference with Convention rights.

SUICIDE (CLAUSES 46 TO 48) (LETTER OF 17 FEBRUARY)

I would be grateful if you could provide a further explanation of the Government’s view that these proposals will not have a disproportionate, chilling effect on the right to freedom of expression and the right to respect for private life (Articles 8 and 10)?

I would also be grateful if you could explain whether the Government considers that prosecutions for encouraging or assisting suicide could be brought in respect of:

— poetry or song lyrics advocating, describing or contemplating suicide, whether online or otherwise;
— individuals, who may be or may have been suicidal, sharing their experiences or problems with others, whether online or otherwise; and
— advertising or information in respect of activities or services which are lawful in other countries, which assist individuals who wish to end their own lives.
If not, I would be grateful if you could provide reasons. If so, I would be grateful if you could provide an explanation of the Government’s view that those prosecutions would be compatible with Articles 8 and 10 ECHR.

As the Committee acknowledges, the new provisions replace the offence in section 2 of the Suicide Act 1961 and the offence of attempting to commit a section 2 offence under the Criminal Attempts Act 1981 with a single offence. The provisions will not extend the scope of the current law when section 2 is read together with the Criminal Attempts Act 1981. The clauses cover acts capable of encouraging or assisting suicide so that the new section 2 properly catches conduct that would previously have been caught by the Criminal Attempts Act as well as the substantive offence. They also include provision to reflect the general position under the 1981 Act that a person may attempt the impossible. As the existing two offences are being replaced with one, the Bill includes provision (Schedule 19, paragraph 53) to the effect that the Criminal Attempts Act 1981 will no longer apply to offences committed under section 2 of the Suicide Act. The Director of Public Prosecutions gave oral evidence to the Public Bill Committee to the effect that the provisions will not extend the current law and he did not therefore anticipate any increase in the number of prosecutions for this type of offence (Official Report, 5 February 2009, col 106).

The prohibition on aiding, abetting, counselling and procuring suicide in section 2 of the Suicide Act 1961 has been examined in recent years by the House of Lords and European Court of Human Rights. As highlighted in the explanatory notes, in Pretty v UK (2002) 53 EHRR 1 the court did not make a clear finding as to whether Article 8 was engaged, concluding that it was not prepared to exclude the possibility. But if the right to respect for private life is engaged at all by section 2, the court found the interference to be justified. States are entitled to regulate through the general criminal law activities detrimental to the life and safety of individuals. The court found that section 2 is designed to safeguard life by protecting the weak and vulnerable. The blanket nature of the prohibition in section 2 was not disproportionate to the legitimate aim pursued. The court observed that it was not arbitrary for the law to reflect the importance of the right to life by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.

As the provisions in clauses 46 to 48 do not widen the existing law in respect of assisting and encouraging suicide they will not represent any greater incursion on Convention rights than the existing law, which has never successfully been challenged on grounds of non-compliance. Any possible interference with Article 8 or Article 10 is fully justified as necessary in a democratic society for the protection of the rights of others for the same reasons as those given by the European Court of Human Rights in the Pretty case.

Whether a prosecution for encouraging or assisting suicide can be brought will always depend on the detailed specific facts and circumstances of individual cases. But it is important to recognise that doing an act capable of encouraging or assisting suicide is not, of itself, an offence under the proposals. As with the current law, the act has to be done with the intention of encouraging or assisting a suicide or suicide attempt. So, whilst the examples you give might (depending on the specific case facts) involve acts capable of encouraging or assisting suicide, they would only amount to an offence if the requisite intent was established. In many cases falling within your examples, there may well be no such intent. Even if the relevant intent is present, a prosecution for an offence under section 2(1) may only be brought with the consent of the Director of Public Prosecutions. It will therefore be for the Crown Prosecution Service to decide whether to prosecute in any individual case. Each case is reviewed individually in the light of all the available evidence and in accordance with the Code for Crown Prosecutors before deciding whether or not a prosecution should be brought. This involves consideration of whether there is sufficient evidence to provide a realistic prospect of conviction and whether prosecution is in the public interest.

I would be grateful if you could explain whether or not the Government considers that guidance may be necessary in order to enable individuals to understand when prosecutions for encouraging or assisting suicide may be considered by the DPP.

Whether such guidance is necessary is precisely the point at issue in the case of Purdy v DPP. In October 2008 the High Court dismissed the claim of the appellant, Debbie Purdy, that the DPP had breached her human rights by not publishing a policy with detailed guidance on the circumstances in which a prosecution under section 2 will or will not be brought. That decision has very recently been upheld by the Court of Appeal. Given the possibility of a further appeal to the House of Lords, it would not be appropriate for me to comment on the case save to say that the legal position in relation to the necessity for such guidance will not be affected by the proposals in the Bill.

Ministry of Justice
26 February 2009
Letter from Bridget Prentice MP to the Chairmen of the Public Bill Committee on the
Coroners and Justice Bill dated 12 February 2009

Coroners and Justice Bill: Commons Committee Stage Government Amendments

I am writing to let you have details of the amendments I have tabled today to Parts 2 to 9 to the Bill (copy
attached for ease of reference).

Details of the amendments are as follows.

Partial Defence to Murder: Loss of Control (Amendment to Clause 41)

Clause 41 replaces the existing partial defence of provocation with a new partial defence in circumstances
where the killing resulted from a loss of self control. Under the current law, where there is evidence that a
person has been provoked to lose their self control, the judge must leave the issue of provocation to the jury
even if in circumstances where it would unreasonable for the jury to find the defence made out. The current
law does not serve the interests of justice because the need to put the defence to the jury in these
circumstances increases the likelihood that an unmeritorious claim may succeed. The Law Commission
recommended that the law be changed so that the judge should not be required to leave the partial defence
to the jury unless there was evidence on which a reasonable jury properly directed could conclude that it
might apply.

It was always our intention that clause 41(6) be read as including a reasonableness requirement. During
the drafting of the Bill it was felt that there was no need to refer explicitly to “reasonableness” as the natural
reading of the clause implied as much. However, on further reflection, we have concluded that a reference
to reasonableness would be of greater practical assistance to the courts than the current wording.

Investigation Anonymity Orders (lAO) (Amendments to Clauses 60, 61, 63, 64, 65, 68, 160 and 161
and Schedule 20 and New Clause (Public Interest Immunity))

These are technical and drafting amendments. The most significant address the following points:

— The prohibition on disclosure of information conferred by an investigation anonymity order under
clause 61(1) includes reference to an individual’s assistance or willingness to assist in an
investigation. Inconsistencies between the use of these terms here and elsewhere in clause 61 need
to be removed and the terminology refined.

— Under clause 61 it is an offence to disclose information in contravention of an lAO. The Bill
provides for a penalty following conviction on indictment, but inadvertently makes no provision
for summary trial (I note that Edward Gamier has already tabled a similar amendment to address
this point).

— Clause 61 further provides that an lAO is not contravened in certain specified circumstances,
including where disclosure of information is to a person employed in public administration.
Following further consultation with the police this provision is no longer required. As a result
subsections (8) and (12) of this clause can be omitted.

— Clause 64 provides for appeals against the refusal of an lAO and provides that the hearing on
appeal under this clause is to be by way of a rehearing. It is our intention that such appeals may
be dealt with on the papers given that an oral hearing may not be needed in every case; the
amendment to clause 64 makes this clear.

— Clause 65 deals with the discharge of an lAO. It is important that where an application for
discharge is made the Bill covers the situation where the subject of the order can no longer be
contacted. The amendment to clause 65 will make similar provision in respect of investigation
orders as is already made by clause 75 which relates to the discharge of witness anonymity orders.

— Clause 78 provides that the provisions in respect of Witness Anonymity Orders do not affect the
common law rules on public interest immunity. On reflection a similar saving is required in respect
of lAOs.

Witness Anonymity Orders (WAO) (Amendments to Schedules 19 and 20)

Again these are essentially technical amendments. They deal with two substantive points:

— The Court of Appeal is empowered to vary or discharge a WAO made in a lower court. Given that
applications for leave to appeal are usually determined by a single judge it is necessary to confer
the power to make, vary or discharge a WAO on a single judge rather than the full Court.

— The provisions in respect of WAOs extend to the armed services. They anticipate that the Armed
Forces Act 2006 will be in force in advance of the provisions in the Bill. Transitional provisions
are required to cover the possibility that this might not be the case and will also result in consequential
amendment to the commencement/extent provisions in Part 9.
Eligibility for Special Measures: Offences Involving Weapons (Amendments to Clause 82 and Schedule 12)

Clause 82 extends automatic eligibility for special measures to witnesses in certain specified gun and knife crimes. These crimes are specified in Schedule 12. The list of offences is incomplete. The amendments to Schedule 12 add the offences of murder, manslaughter, wounding with intent to cause grievous bodily harm, malicious wounding, assault with intent to resist arrest and assault occasioning actual bodily harm where, broadly, the gun or knife was alleged to have been used during the commission of the offence.

Unsigned Indictment (Amendment to Clause 99)

Clause 99 removes the requirement for a bill of indictment to be signed by the proper officer of the court. In specifying the cut off point for making objections to an indictment the clause inadvertently refers to a jury having been sworn to consider the fitness of the accused to plead. However, since the Criminal Procedure (Insanity) Act 1964 was amended by the Domestic Violence, Crime and Victims Act 2004 the issue of fitness to plead is now determined by the trial judge. The clause is amended so that the cut off point for objections to an indictment will now be once the jury has been sworn to consider the issue of guilt or whether the accused did the act or made the admission charged.

Sentencing Council (Amendments to Clauses 102, 104, 105, 106, 110 and 115 and Schedule 13)

The Justice Secretary indicated at Second Reading (Hansard, 26 January 2009, col. 41) that we would be bringing forward a number of amendments to the provisions in the Bill in respect of the Sentencing Council. These are principally designed to ensure an appropriately balanced relationship between the Council and the Lord Chancellor. The amendments:

- Remove the duty on the Council (in clause 106) to publish reasons for declining to prepare or revise guidelines following a request to do so by the Lord Chancellor or Court of Appeal;
- Revise the power conferred on the Lord Chancellor (clause 115) to facilitate the performance of the Council of any of its functions’ to make it clear that the Lord Chancellor may only act in response to a request from the Council;
- Remove the delegated power (paragraph 7(1) of Schedule 13) conferring power on the Lord Chancellor to regulate the proceedings of the Council. It will instead fall to the Council to regulate its own proceedings (as the Sentencing Guidelines Council currently does/a similar delegated power in the Criminal Justice Act 2003 has not been exercised);
- Clarify the duty on the Council (clause 110) to monitor the level of compliance by the courts with the sentencing guidelines to avoid any inference that sentences outside the sentencing ranges amount to a failure to comply with the guidelines (as opposed to being a departure by the court from the guidelines).

In addition, the amendments to clauses 102 and 104 place a duty on the Council to consult the Justice Select Committee about draft guidelines. This responds to the following recommendation in the Justice Select Committee’s recent report on the Bill:

“By convention this Committee has been consulted by the Sentencing Guidelines Council in advance of the issue of new definitive guidelines; and has taken evidence in specific instances when appropriate and practical to do so. It is not clear from the face of the bill what role is envisaged for Parliamentary scrutiny of draft guidelines in the future. In our view it is essential for Parliament to continue to be involved in the process whatever new structures are put in place”.

Treatment of Convictions in Other EU Member States (Amendments to Schedule 15)

Clause 124 and Schedule 15 facilitates implementation of an EU Framework Decision designed to ensure that criminal convictions in other member States are taken into account in criminal proceedings in this country. The amendments to Schedule 15 ensure that mutual recognition can be given to the equivalent in other member states of UK (military) service offences.

Criminal Memoirs (Amendments to Clauses 137, 142 and 144)

The provisions in respect of criminal memoirs address the situation where some or all of the respondent’s convictions to which an exploitation proceeds order relates are quashed. In such cases the exploitation proceeds order ceases to have effect or (where not all convictions are quashed) the order may be reviewed. Provisions are also required to deal with circumstances where an offence committed by a third party which is associated with an offence committed by the respondent is quashed.
DRIVING DISQUALIFICATIONS (AMENDMENT TO CLAUSE 155)

The provisions in the Bill in respect to driving disqualifications include a number of delegated powers to enable the calculation of the length of a driving ban to be adjusted to reflect changes in the proportion of a sentence that must be served by an offender before being entitled to release on parole. Two of the delegated powers (in paragraph 29 and 30 of schedule 20) relate to sentencing legislation that has been repealed but is saved for certain offenders. While the power in respect of England and Wales is subject to the affirmative resolution procedure that in respect of Scotland is inadvertently made subject to the negative procedure. The amendment to clause 155(4)(g) brings the delegated power in respect of Scotland into line with that for England and Wales.

TRANSITIONAL PROVISIONS: CORONERS (AMENDMENT TO SCHEDULE 20)

Paragraph 3(f) Schedule 20 includes a transitional provision whereby existing deputy coroners continue in office as assistant coroners in the reformed system. Under the Bill assistant coroners are entitled to receive fees, but as some existing deputy coroners are salaried we need to provide that they continue to be remunerated in this way.

REGULATIONS BY THE CHIEF CORONER (AMENDMENT TO CLAUSE 155)

Clause 28 gives the Chief Coroner power to make regulations, and under clause 155(1) the power is exercisable by statutory instrument. There are various provisions in the Statutory Instruments Act 1946 that need to apply to regulations made by the Chief Coroner, but those provisions are triggered only if the power is conferred on a Minister of the Crown. An amendment to clause 155 is needed to provide that the Chief Coroner shall be treated as a Minister of the Crown for the purposes of the 1946 Act.

RELEASE OF LONG TERM PRISONERS SENTENCED UNDER THE CRIMINAL JUSTICE ACT 1991 (NEW CLAUSE AND AMENDMENTS TO SCHEDULES 20 AND 21)

We have one new provision to add to the Bill which will transfer from the Secretary of State to the Parole Board, responsibility for deciding on the release of prisoners serving a sentence of 15 years or more under the Criminal Justice Act 1991. This is the last remaining category of prisoner where the Parole Board make a recommendation on release but the final decision still rests with the Secretary of State. In all other cases where prisoners are considered for parole, the Parole Board’s recommendation to release is binding. The new clause will, therefore, simply bring 1991 Act prisoners serving 15 years or more in line with the release provisions which apply to those serving less than 15 years.

This change follows a Judicial Review brought by Wayne Black, a 1991 Act prisoner serving 20 years who claimed that his release should be decided by the Parole Board, as a court-like body, rather than by the Secretary of State, in order to comply with Article 5(4) of the ECHR. His JR was initially successful and the Court of Appeal, on 15 April 2008, made a declaration of incompatibility with the ECHR. However, the Ministry of Justice appealed to the House of Lords, arguing that it was not a breach of the ECHR for the Secretary of State to have this power to decide on the release of determinate sentenced prisoners. Judgment was handed down on 21 January 2009, in favour of the Secretary of State. Their Lordships overturned the Court of Appeal judgment and set aside the declaration of incompatibility.

It was important to have this matter resolved before including this provision in the Bill. Whilst we have decided that it makes sense, as a matter of policy, for the release arrangements for this particular category of prisoner to be brought in line with those for other prisoners, as we believe it to be preferable for the Parole Board to be responsible for the release decisions in these cases, it was nevertheless important as a matter of general principle to establish that having a power for the Secretary of State to decide on the release of determinate sentenced prisoners did contravene the ECHR. That is why we appealed to the House of Lords and welcome the judgment. Their Lordships were, however, strongly critical of the fact that the release of this remaining category of prisoner remains a decision for the Secretary of State rather than the Parole Board and this provision responds to that criticism.

There are a number of other minor technical and drafting amendments.

Letter to the Information Commissioner dated 23 February 2009

The Joint Committee on Human Rights is currently considering the compatibility of the Coroners and Justice Bill with the human rights obligations of the United Kingdom. We have written to the Secretary of State for Justice to raise a number of concerns including in respect of the Data Protection proposals in the Bill. We are aware that you have also raised a number of concerns about the adequacy of the safeguards for personal information in the Bill.27

M

Memorandum submitted by the Information Commissioner in response to the Committee's letter of 23 February

Thank you for your letter of 23 February 2009, inviting our comments on a number of questions about the data protection proposals in the Coroners and Justice Bill that you have raised with the Secretary of State for Justice.

The data protection provisions of the Coroners and Justice Bill present a welcome but long-overdue opportunity to put rigorous safeguards in place and to address long-standing deficiencies in the Information Commissioner’s powers, such as those you identified in last year’s report on Data Protection and Human Rights. However, the Bill needs to be improved if it is to make the regulation of personal information more effective, and ultimately to help safeguard individuals’ right to respect for their private life. Wider use of personal data must be balanced by the inspection and information gathering powers for the Information Commissioner’s Office which will actually work in practice. The Bill’s information-sharing provisions are too wide and the safeguards relatively weak. As it stands, we regret that the Bill will not give us powers to ensure that all those processing personal information do so in compliance with the principles of data protection. In particular, we must be able to serve an Assessment Notice on any data controller and there must be meaningful sanctions for ignoring a Notice. We received welcome new powers in the Criminal Justice and Immigration Act 2008 to levy fines on data controllers for deliberately or recklessly breaching the data protection principles. However it is important that the Government brings these powers into force as soon as possible. Effective safeguards and sanctions are vital if we are to “reap the benefits of data sharing, where it is considered desirable, without calling into question the right of ordinary people for respect for their private lives”. (JCRH Report on Data Protection and Human Rights)

Our responses to your questions follow:

38. Does the Government accept that a breach of Article 8 ECHR could arise as a result of the failure of a private individual or a company to comply with the data protection principles:
— If not, why not?
— If so, does the Government accept that greater scrutiny of the private sector by the ICO would reduce the risk that such a breach could arise?

The right to respect for private life in Article 8 ECHR imposes a positive obligation on the State to ensure that its laws provide adequate protection against the unnecessary processing of an individual’s personal data. This is recognised in EU Data Protection Directive 95/46/EC, from which the DPA derives, which specifically states that “the object of the national laws on the processing of personal data is to protect the fundamental rights and freedoms, notably the right to privacy, which is recognised...in Article 8...”.

The processing of personal data including its collection, retention, disclosure and sharing amounts to interference with an individual’s rights to respect for his or her privacy. Article 8 ECHR does not prevent this, but it does require that if this interference is to take place, then certain safeguards for individuals would have to be provided. Whilst the duty to have respect for private and family life is very high-level, neither the Human Rights Act 2000 nor the ECHR itself provide any practical guidance on how to act in a way that ensures that the individual’s right to respect for his or her private life.

The DPA provides this practical guidance through a set of principles of good practice for the handling of personal data. The principles require that any sharing of personal data is necessary and that any information shared is relevant, not excessive and kept securely. These principles apply to all data controllers without distinction as to whether they are in the public or private sector and provide a practical framework for balancing the need for data controllers to make the best use of the personal information they hold whilst respecting the individuals' private lives. In this way the protections afforded to the individual under Article 8 apply (through the DPA and its principles) to the handling of his or her personal information by any data controller whether public or private. The application of the DPA to private and third sector organisations is one of its strengths, given the enormous amount of sensitive and potentially damaging personal information held outside the public sector.

ICO certainly accepts that effective powers to scrutinise the private sector would reduce the risk of breaches arising. An assessment notice—provided for by clause 151 of the Bill—will allow us to inspect an organisation to determine whether it is complying with the data protection principles. However, as it stands, the Bill will only allow the ICO to serve an assessment notice on a government department or a designated public authority. Given that these public authorities have to be designated by order it is not even clear how far into the public sector our power will ultimately reach. The Bill would not allow the ICO to serve an
assessment notice on a private or third sector organisation. We are strongly of the view that if individuals are to be protected properly, ICO must be able to serve assessment notices on all data controllers—including private sector, public sector and third sector organisations.

It is also difficult to understand why the Bill does not provide for any sanction if an assessment notice isn’t complied with and yet does provide for a formal right of appeal against a notice. In order to make ICO’s power of inspection effective, and to ensure the credibility of the inspection process, even if it is limited to public bodies, there must be a sanction where an organisation fails to comply with an assessment notice. One approach would be to introduce a clause similar to s.54 of the Freedom of Information Act 2000. This treats failures by public authorities to comply with our FOI notices as a contempt of court. Alternatively, failure to comply with an Assessment Notice could be taken as grounds to apply for a search warrant.

39. I would be grateful if you could explain why the Government consider it would be appropriate to subject any and all types of information to wider information sharing by ISO. For example, are there any reasons why the Government considers that the Bill should not be amended to exclude, for example:

— information which would otherwise be protected as “sensitive personal data” for the purposes of the DPA 1998;
— medical records or medical or clinical information (other than anonymous patient data from which no patient can be identified);
— information held on the National DNA Database and other samples held by the police or others for the purposes of criminal investigation;
— information held on the national children’s database created pursuant to the Children Act 2004;
— records of criminal allegations or accusations; and
— information held or gathered pursuant to the Safeguarding Vulnerable Groups Act 2006 (express provisions for information sharing for the purposes of safeguarding children and vulnerable groups are already provided on the face of that Act)?

We fully accept that certain types of information are of particular sensitivity. This must be reflected in the way such information is collected, used and shared. However, we are sceptical about categorising certain types of information as sensitive and excluding these from the legislation’s Information Sharing Order provisions. There is a risk in attempting to define sensitivity exclusively according to information type. Context and the circumstances of the people the information is about must also be taken into account. For example, the mere name and address of a person on a witness protection scheme or escaping an abusive partner would be of exceptional sensitivity and would need to be treated with particular care.

The (DPA) divides personal data into sensitive and non-sensitive types. The law provides for additional restrictions on the processing of sensitive information. However, we are not convinced that this distinction has worked well in practice. Part of the problem is the definition of “sensitive personal data’. This includes trades union membership, but excludes financial information, for example. In general, we favour a risk-based approach to compliance that applies to all personal information, rather than an inevitably simplistic categorisation of personal information into sensitive and non-sensitive types. There is a danger that the problems we have encountered in the context of the DPA could re-emerge in the Coroners and Justice Bill. There would be particular confusion if the DPA were to be amended to include a definition of sensitive information in the context of ISO’s that is different from the main DPA definition.

Information Sharing Orders should facilitate reasonable information sharing. In our opinion the sharing of even sensitive information could be reasonable, provided that it is proportionate, in the public interest and subject to rigorous safeguards. For example, information on communicable diseases is already shared in the interests of public health. We need to consider carefully whether it is desirable that the sharing of sensitive information, however that is defined, be entirely excluded from the Bill’s Information Sharing Order provisions.

40. Does the Government consider that the power to modify any enactment, by ISO, includes the power to modify or disapply the provisions of the HRA 1998, including the Section 6 duty to act in a manner compatible with Convention rights?

This is for the government to answer. However, when the Thomas / Walport Data Sharing Review (DSR) recommended a fast-track procedure for removing or modifying a legal barrier to information sharing, it was certainly not the intention that it should be used to disapply the provisions of the Human Rights Act 1998 or the DPA.

41. Does the Government consider that this provision would prevent an individual from making a claim, under the HRA 1998, that the treatment of his or her personal information, despite being authorised by the ISO, had led to a breach of his or her right to respect for personal information (Article 8 ECHR)?
42. If so, why shouldn’t the Bill be amended to include a savings clause similar to that inserted in the Civil Contingencies Act 2006, in order to provide a guarantee that individual public authorities processing information pursuant to an ISO will be subject to the requirement to act in a manner compatible with Article 8 ECHR?

43. I would be grateful if you could confirm that once information has been processed in accordance with an ISO, the final data controller of any personal data must hold and process it in a manner which is compatible with the Data Protection Act (DPA) 1998.

It has always been our understanding that the DPA would still apply to the processing of personal information carried out under an ISO. Nevertheless, we would welcome the introduction of a savings clause stating explicitly that the provisions of the DPA and HRA still apply when information is shared under an ISO. For example, s.68 (4) of the Serious Crime Act 2007 explicitly states that nothing in its disclosure of information provisions authorises any disclosure which contravenes the DPA.

44. Is there anything in the Bill which would prevent the Government proposing the permanent amendment or modification of the DPA 1998?

The wording of clause 152 is very wide. There is nothing in it that would prevent the DPA being amended. It says that an information order may “modify any enactment” or “remove or modify any prohibition or restriction imposed (whether by virtue of an enactment or otherwise) on the sharing of the information by that person or on further or onward disclosure of the information”. The intention of the DSR recommendation was to provide a means for overcoming essentially technical barriers to reasonable information sharing. It was certainly not intended that information-sharing should be facilitated by weakening data protection safeguards. Indeed a major theme of the DSR was that data protection safeguards need to be made more effective as a counter-balance to greater information sharing.

The UK’s data protection legislation implements the European data protection directive (95/46/EC). The UK could well fall foul of its international obligations if it amends or modifies the DPA in such a way that the protection of individuals is undermined.

45. I would be grateful if you could provide a fuller explanation of the Government’s view that the test for an ISO is appropriately defined. In particular:

— Please explain why the Government considers it appropriate to link the making of an ISO with an individual Ministerial policy? Are there significant reasons why the Bill should not be amended to limit information shared under ISO to information which is necessary to meet the public functions of the Minister or any other public authority exercising public functions?

— Why should the Bill not be amended to link the making of an ISO more closely to the legitimate aims identified in Article 8(2) ECHR?

We do think that the scope for making an ISO should be narrowed to bring it into line with the relevant DSR recommendation. This said that “where there is a genuine case for removing or modifying an existing legal barrier to data sharing, a new statutory fast-track procedure should be created. Primary legislation should provide the Secretary of State, in precisely defined circumstances, with a power by Order, subject to the affirmative resolution procedure in both Houses, to remove or modify any legal barrier to data sharing”.

We are not convinced that amending the wording of clause 152 to link the making of an ISO to Ministerial public functions would significantly improve safeguards. We had thought it implicit that securing a relevant policy objective would be part of a Minister’s public functions. We find it difficult to envisage making an ISO for non-public purposes.

An appropriately worded savings clause—see question 43 above—would make it clear that ECHR tests also need to be satisfied when an ISO is made.

46. I would be grateful if you could confirm whether the Minister proposing an ISO would be required to make a Privacy Impact Assessment of the proposed Order and whether (a) that assessment would be made available to the Information Commissioner together with the draft Order and (b) it would be published to assist wider public scrutiny?

The responsible Secretary of State will have an important role in terms of putting safeguards in place as a precursor to granting consent for an ISO. The MoJ’s Memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee says that a Privacy Impact Assessment (PIA) will be required for all proposed information-sharing orders. The Secretary of State’s role and the relevant safeguards should be specified on the face of the Bill.

We would expect the PIA to be made available to us—this would be extremely helpful to us in preparing our report. Ideally this would happen early in the process, providing an opportunity for a draft ISO to be amended, or modified, prior to the “formal” 21 day reporting period beginning. We would also expect the PIA to be published. This is should form a key element of the scrutiny process.
47. Does the Government accept that, under the proposals in the Bill, the report of the Information Commissioner can have little effect, other than to inform public and parliamentary opinion?

— If not, what will be the practical effect of a negative report of the Information Commissioner?

— If you agree, wouldn’t it be more appropriate to allow the Information Commissioner to report on the proposal for the ISO in any terms that fall within his remit, including commentary on the necessity for the ISO and its implications for the right to respect for personal information?

We had understood ICO’s role here as being to provide evidence to Parliament, to help it to inform its decision as to whether to approve an ISO. Of course it is, quite rightly, Parliament’s prerogative to pass an ISO in the light of an unfavourable ICO report. It is difficult to envisage how the ICO’s role could be strengthened here without undermining the affirmative resolution process; it would clearly be impossible, and undesirable, for there to be any compulsion for Parliament to agree with the ICO’s conclusions. It would, of course, be open to the ICO to then take regulatory action against the organisations involved in an information-sharing initiative that breaches the DPA. However, we do think that it would be brave for government to bring a proposal for an ISO forward in the face of an unfavourable ICO report.

The amended section 50(D)(4) of the DPA would only allow the ICO to report on whether the effect of the provision made by the Order is proportionate to the policy objective, and whether it strikes a fair balance between the public interest and the interests of any person affected by it. The ICO may not report on whether the sharing of information enabled by the Order is necessary to achieve the policy objective. This touches on a difficult tension between the informational consequences of a policy objective and the policy objective itself. Inevitably the two are inseparably linked. We do think that must fall to the Minister, rather than to the ICO, to set the policy objective. However, we think it entirely right that ICO should be able to comment on whether the proposed information sharing is a necessary and proportionate means of achieving the policy objective.

There will be inevitable overlap between the three limbs of s.50A(4), and consequent difficulty in determining the extent of the ICO’s reporting role. We believe, therefore, that ICO’s role could be made clearer and more effective if the Information Commissioner were additionally, or alternatively, able to report more generally on compliance with the data protection principles. This would allow ICO to make a more rounded and comprehensive assessment of an information sharing proposal, including, for example, the relevant security arrangements. This would require amendment of clause 50D(4).

Please let me know if you require any further information or assistance.

Richard Thomas
Information Commissioner

Letter to Nick Herbert MP from the Rt Hon Jack Straw MP dated 3 December 2008

One of the purposes of the Coroners and Justice Bill announced in today’s Queen’s Speech is the re-enactment of the provisions of the Criminal Evidence (Witness Anonymity) Act 2008. As you will recall, we agreed to include a sunset clause in that Act in order to provide Parliament with a further and fuller opportunity to debate the use of anonymous evidence in criminal proceedings in the new session. During the passage of the Act, we undertook to consider a number of detailed issues further, in particular the question of whether it would be appropriate to put the role of so called “special counsel” in anonymity cases on a statutory basis.

We have now had the opportunity to consider this issue in some detail. I am writing to explain, the main areas we have looked at, and to inform you of our conclusions.

As noted during the passage of the emergency legislation, the availability of special counsel is already clear from the common law. Where it considers that the assistance of special counsel is required in the determination of an anonymity application. It is open to the court to request the Attorney General to appoint special counsel. This option is set out formally in a Practice Direction which was issued on 28 August by the President of the Queen’s Bench Division after the emergency legislation came into force. The Practice Direction is available at:
http://www.judiciary.gov.uk/docs/judgements_guidance/pd/amendment21CCPDaug08.pdf

During the Parliamentary debates it was clear that there were differing views as to the role special counsel might play in anonymity proceedings. Broadly speaking, the main themes which were identified are:

— representing the interests of the defence;

— a role similar to an Advocate to the Court (amicus curiae) providing assistance to the court on a legal issue;
— an enhanced version of the above involving an investigative role independent of the prosecution and designed to probe the witness’s background and possible motivations etc;
— a role representing the interests of the witness.

In exploring these options we have considered in particular what value special counsel could add to anonymity applications. We note that the criminal law in England and Wales places strong disclosure duties on the prosecution team, and that as a result all relevant information should already be in the hands of the police and prosecutor before making an application. Furthermore, all relevant information will be provided to the court when an application is made.

As noted above, one of the suggestions made during the passage of the emergency legislation was that special counsel might have an independent investigative role. We believe that this would be wrong in principle, because the police are required to have explored all reasonable lines of enquiry, which would include reasonable enquiries into the witness’s credibility.

Furthermore, the prosecutor, who is of course independent of the police with legal and professional duties to the court, is required to disclose anything undermining the prosecution case to the defence. This would include anything undermining the witness’s credibility (but not the identity of the witness itself) unless the court orders otherwise. In addition, the court itself can be expected to perform a role of testing and probing the case which is presented on the application. When coupled with the prosecutor’s duty to put all relevant material before the court, this may often be sufficient to enable a fair and informed decision to be reached without the need to appoint special counsel.

Against this background, we have reached the conclusion that, in the rare case where special counsel might be required, the present arrangements are adequate.

As a result, we consider that there is nothing to be gained from placing special counsel in anonymity cases on a statutory basis. We have accordingly decided that the Bill should not contain provision on this issue.

As well as re-legislating for trial witness anonymity orders the Bill will also include provision for investigative witness anonymity orders to be available in cases of the most serious gang-related crimes. Many potential witnesses in such cases justifiably fear that knowledge of their helping the police will lead to reprisals from the perpetrator or his associates and consequently do not come forward to give evidence to a police investigation.

To counter this climate of fear, witnesses to these very serious gang-related crimes should have early, and greater, reassurance that their identity will be protected throughout a criminal investigation and permanently thereafter. This will give other witnesses more confidence to come forward. These aims cannot be achieved unless there is a climate in which no form of inappropriate disclosure is tolerated.

To achieve them, we propose to create a new “investigative witness anonymity order,” breach of which will be a criminal offence. The purpose of the order will be to prohibit the unauthorised disclosure to any person of any information which might tend to expose the fact that a person has been in contact with the police in relation to a particular criminal investigation.

The target of the measure is street gangs, and gun and knife crime. With this in mind, we propose to make the new order available for investigations into gang-related offences of homicide by gun or knife. However, the Bill will include power to extend, by order, the category of cases that can be covered by these investigative orders. And we envisage that, as with trial anonymity orders, the court should only be able to issue an investigative anonymity order where appropriate conditions, set out in the legislation, are satisfied.

Memorandum submitted by the British Humanist Association

Clauses 39–40 Partial defences to murder: diminished responsibility

I am writing to outline my concerns around the Coroners and Justice Bill, in my capacity as Chief Executive of the British Humanist Association (BHA). The BHA is the national charity representing and supporting the non-religious and campaigning for an end to religious privilege and discrimination based on religion or belief.

We base our responses on the humanist principles that individuals should have the right to live by own personal values and the freedom to make decisions about their own lives, as long as these do not result in harm to others. Humanists consider the often conflicting ideas and unpredictable consequences arising from, for example, new developments in medical science, using reason, evidence, compassion and shared human values, as far as possible.

We do recognise, however, that there are values that are not shared by everyone. Humanists do not share the attitudes to “interfering with nature” or “playing God” or the same definitions of personhood held by some religious believers. We respect the rights of those holding religious beliefs about the sanctity of life and the limits of medical intervention not to participate in some procedures, but we do not believe that the beliefs of the religious, when they are based on supernatural arguments, should be imposed on others.
SUMMARY OF OUR CONCERNS

We are very concerned that the revised definition of the partial defence to murder of diminished responsibility in the Coroners and Justice Bill will have a significant and negative impact on those people that might be termed genuine “mercy killers”: those who have actively helped a seriously ill loved one to die, in response to persistent requests for help to end their life. By changing the definition of diminished responsibility it is likely that “mercy killers” who have acted reasonably in response to persistent requests from a seriously ill loved one will face custodial sentences.

Under the current law, anybody 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 “mercy killing”). At the request of the Home Secretary in 2004, the Law Commission undertook a review of the partial defences to murder. On “mercy killing”, the report stated, “at present, in such cases, a conviction for murder, with consequent mandatory life sentence, can only be avoided by a “benign conspiracy” between psychiatrists, defence, prosecution and the court, to bring them within diminished responsibility . . . . It is however a blight on our law that such an outcome has to be connived at rather than arising openly and directly from the law”.28

The BHA does not endorse “mercy killing” or the current “benign conspiracy”. However, “mercy killings” are taking place, and it is necessary that the law addresses these cases appropriately. We are extremely concerned that the revised definition of diminished responsibility will actually make things worse for genuine “mercy killers” and seriously impact upon their human rights.

The proposed new definition of diminished responsibility set out in the Coroners and Justice Bill requires that to use the defence, the defendant must have a “recognised medical condition” . . . “at the time” at the time of the act. In addition, for the defence to apply, the recognised medical condition would need to be shown to have substantially impaired “the defendant’s ability to understand the nature of their conduct, to form a rational judgement, or to exercise self-control”. The new definition would not help the person who eventually concedes to persistent requests from a terminally ill loved one to help them die, if their help can be shown to be rational, for example, if they understood the consequences of their action, and do not suffer from depression or some other mental abnormality. Clearly such a person will have acted rationally, in a controlled fashion and in the full knowledge and understanding of the implications of her/his conduct, which will make it extremely difficult to apply the defence.

The likely effect therefore, is that many genuine “mercy killers” will be given custodial sentences. This would seem to go against the wider spirit of the proposed changes, which are intended to make the Law of Murder more just. It is particularly surprising, and the practice of the law in “mercy killing” cases was not considered by the Ministry of Justice in its recent consultation on changes to murder law.

While the current law may allow the courts to connive to treat genuine “mercy killers” compassionately, it is clear that the revised definition will put a stop to this. What little protection “mercy killers” currently have against harsh sentencing, and potentially, mandatory life sentencing, will be completely removed. As such, the proposed change to diminished responsibility will have a significant and potentially damaging impact on a particular group of offenders: Government has a responsibility to thoroughly investigate this before making any changes, and I would urge the Joint Committee on Human Rights to investigate this important issue.

January 2009

Memorandum submitted by British Irish Rights Watch

British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and we take no position on the eventual constitutional outcome of the peace process.

We are responding to the Joint Committee on Human Rights (JCHR) call for evidence about the draft legislative programme 2008–09. Of particular significance for BIRW is the draft Coroners and Death Certification Bill. Drawing on 18 years of work in Northern Ireland, our experience is focussed mainly on the use of lethal force by the state where the failure to provide adequate Article 2 ECHR compliant investigations into these deaths is significant. Our comments, therefore, are framed by that experience. However, since contentious cases often test systems to their limits, we hope that our comments will be helpful in other contexts.

The draft Coroners Bill, published for consultation in 2006, attempted to address the reforms recommended by Professor Tom Luce in his Fundamental Review of Inquests (2003) (Luce Review). However, this Bill, unlike the Luce Review, does not apply to Northern Ireland. We have concerns that, should this Bill become law then it will be applied to Northern Ireland without appropriate consultation.

Any application of this Bill to Northern Ireland will fail to take into account the legacy of 30 years of conflict and the existing deep flaws in Northern Ireland’s coronial system. The Luce review clearly noted the need for these recommendations to be implement in Wales and Northern Ireland but with suitable adaptations.29

The European Convention on Human Rights imposes a duty on the state to investigate a death when it has been caused by the use of force, a violation of Article 2 (right to life). An inquest is the appropriate place for the state to comply with the procedural aspects of Article 2. Therefore, any changes to the coronial system must bear the role of the inquest in the procedural aspects of Article 2 compliance in mind.

Changes to the coronial system are significant in the light of the proposals within the Counter-Terrorism Bill 2008, which sought to change the nature of inquests, by the appointment of special coroners or dispensing with a jury. Although we welcomed the fact these clauses were removed from the Counter-Terrorism Bill, we have concerns they may be inserted into the Draft Coroners and Death Certification Bill. BIRW noted that the clauses undermined the legitimate expectation of a number of families in Northern Ireland specifically, but also in England, of receiving an independent, effective, open and accountable investigation into a death. We had particular concerns that specially appointed coroners could be appointed to inquests already open, which would have particular pertinence in Northern Ireland, causing further delays and secrecy. For example, in the death of Pearse Jordan, an inquest into his death was opened in 1995, delayed by the obstruction of the RUC and later PSNI over the disclosure of documents, the subject of a ruling at the European Court of Human Rights in 2001 and a House of Lords judgment in 2007, and may now be further delayed by these new measures. Some of the measures which were to be introduced by the Counter-Terrorism Bill are mirrored in the controversial Inquiries Act 2005, which placed control for inquiries in the hands of the Secretary of State, undermining any attempts for such inquiries to be independent or compliant with the European Convention on Human Rights.

British IRISH RIGHTS WATCH would like to highlight those aspects of the Coroners Bill which we feel give rise to significant human rights concerns. These are:

**Clause 10, Purpose of investigation**

BIRW has concerns about the lack of guidance on where it would be necessary for a coroner to interpret the purpose of an investigation in compliance with Article 2 of ECHR; considering the Human Rights Act was enacted only in the last decade, some corners may be unfamiliar with their obligations.

**Clause 12, Action to prevent other deaths**

BIRW welcomes the fact that an organisation which receives a report from a coroner is obliged to respond. This is particularly pertinent for the security forces and their use of lethal force, where changes to policy and/or practice, could prevent further deaths. This enhances the preventative feature of the inquest system; however, to be truly effective, there is a need to hold timely inquests so that reports can be relevant to organisations.

**Clause 41, Presence of the public at inquests**

The presence of the public at inquests is important; it is hoped that the Coroners Rules will, where possible, maintain this principle.

**Clause 57, Training and guidance**

It is hoped that coroners will be trained in key human rights issues alongside any other training. This is particularly pertinent in cases where significant human rights issues are raised, such as the killing of Jean Charles de Menezes.

**Clause 60–61, Appeals to the Chief Coroner**

BIRW welcome the appeal procedure available within the inquest system to “interested persons”. We agree that it is important that the appeals procedure is not misused by malicious complaints. However, it is important to note that there is nothing in Bill on the subject of legal aid. If families are to participate more fully in the inquest system, then there is a need to provide them with appropriate and accessible legal representation.

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29 See *Fundamental Review of Inquests* (2003), Professor Tom Luce: Chapter 11, Point 60
Inspection

BIRW welcome the introduction of an inspection system for coroners by her Majesty’s Inspectors of Court Administration, which we hope will improve accountability and transparency.

Reporting deaths to the coroner

BIRW welcome the amendment which makes provision for medical practitioners to notify the coroner of relevant deaths. However, we draw attention to the Luce Review, which stated that this power should be extended to professional health care personnel, members of the care inspectorate, fire service personnel, funeral staffs, families and others.30

Outcome and scope of an inquest

The Bill has not implemented the Luce Review recommendation concerning the outcome of inquests. Crucially, the Bill does not provide for an analysis of whether there were systemic failings which may have prevented the death.31 Equally, the Bill does not provide for regulatory bodies or inspectorates to describe in their reports, any of the coroners recommendations.32

Appointment of a lawyer

The Luce Review recommended the appointment of a lawyer, as Counsel to the inquest, in situations where the inquest is exceptionally long or complex; this has not been included in the Bill.33

Multiple deaths

The Bill has not implemented the Luce Review’s recommendation that following a disaster leading to multiple deaths, the inquest should be held by, or at the level of, the head of the coronial jurisdiction.34

Audit

The Luce Review noted the need for all coroner areas to regularly audit their inquest and investigation timings.35 In Northern Ireland, delays to inquests have left families without an acceptable investigation into their loved ones’ death and substantially undermined confidence in the justice system.

BIRW draw the Joint Committee’s attention to the possibility that this Bill could be applied to Northern Ireland. As already noted, while we acknowledge there is a need to reform the coronial system in Northern Ireland, such changes should be the subject of a separate consultation and should take into account the number of contentious deaths in Northern Ireland and the historical failure of the state to adequately address them.

October 2008

Memorandum submitted by the British Medical Association

1. The British Medical Association (BMA) is an independent trade union and voluntary professional association which represents doctors from all branches of medicine throughout the UK. It has a membership of over 141,000 doctors.

B. DATA PROTECTION

Whether the new provisions for the creation of information sharing gateways by secondary legislation compatible with the right to respect for private life, and in particular the right to respect for personal information (Article 8 ECHR and the common law).

2. The BMA is extremely concerned about the impact of Clause 152 of the Coroners and Justice Bill on the confidentiality of personal medical records. The Clause gives ministers of state the power to enable the sharing of any data that fall within their sphere of responsibility without the consent of the data subject. It therefore permits the Minister of State for Health to order the sharing of confidential health information without the consent of the patient to whom the data refers, and irrespective of the views of the individual

30 See Fundamental Review of Inquests (2003), Professor Tom Luce: Chapter 10, Point 52
31 See Fundamental Review of Inquests (2003), Professor Tom Luce: Chapter 9, point 40
32 See Fundamental Review of Inquests (2003), Professor Tom Luce: Chapter 8, point 34
33 See Fundamental Review of Inquests (2003), Professor Tom Luce: Chapter 8, points 30 and 31
34 See Fundamental Review of Inquests (2003), Professor Tom Luce: Chapter 11, Point 68
data controller, such as the doctor, who has requested the information on the presumption that it will remain confidential. It enables the appropriate minister to set aside the common law duty of confidentiality, which has developed over many years and balances the interests of both private individuals and the public, and the confidentiality requirements of the Data Protection Act.

3. The relationship between doctor and patients is based on trust. In the course of consultation and treatment, patients will often disclose highly sensitive information to their doctors, information that can be vital to ensuring the provision of appropriate care and treatment. This information is disclosed on the basis that information will be kept confidential. The Bill as drafted will mean that doctors will no longer be able to reassure patients that their information will only be seen by those with a direct professional interest in their care. It will undermine the presumption of confidentiality, corrode trust in the doctor-patient relationship and will potentially have a disastrous impact on both the health of individuals and of the public. Many key public health goals will be put at risk. Detail on the Government’s intentions is sparse, but as currently drafted there is nothing in the Bill that would prevent the Government, in theory, overturning the confidentiality clauses of the HFE Act or even of the Venereal Disease Regulations. The BMA is extremely concerned that this Bill will also destroy confidence in the NHS Care Record Service and will result in patients either withholding vital information or of opting out of the care record system altogether.

4. The particular sensitivity of medical information, and the fact that it is afforded special protection by Article 8 ECHR was recently established by the House of Lords in the case of Campbell v MGN. The case involved a balancing of Article 8, the right to respect for private and family life, and Article 10, the right to freedom of expression. In the view of the House of Lords, the fact that the information relating to Ms Campbell was health information gave it particular status under Article 8. In the BMA’s view, this status derives from several aspects:

— the nature of the harms that could befall individuals through inappropriate access to and use of their confidential medical information;
— the harm that could accrue to individuals if concerns about confidentiality result in a failure either to disclose relevant health information or to access health services at all; and
— the public health impact of a loss of faith in confidentiality leading to lower uptake of health services.

5. Confidentiality therefore is central to ensuring both the highest standards of personal health, the maintenance of general public health, and to the pursuit of public policy goals in health. Clause 152 threatens to undermine each of these, leading to potentially disastrous unintended consequences. In the BMA’s view the Clause should either be removed in its entirety or restricted to appropriately anonymised information.

Whether the new powers of the Information Commissioner to issue assessment notices should extend to the private sector

6. The new powers of the Information Commissioner to issue assessment notices should extend to the private sector. The Data Protection Act covers both the public and private sectors and misuse of data by either sector would be equally damaging to the public. Whilst government data losses have received greater media attention, there have been cases where private companies have lost data. An example is the loss of thousands of criminal records by PA Consulting in September 2008.

7. The extension of these powers is particularly important in relation to health data. There has been an increase in the number of private providers providing care to NHS patients. It would be nonsensical for the same data to be regulated differently and patients should be offered the same guarantees of confidentiality regardless of who provides their care. Patient data is also handled by private companies for reasons not directly related to patient care for example for research purposes. Whilst this research may be valid and approved there are still anxieties about the private sector handling patient data. Patients tend to be less trustful of private companies, who may have commercial interest in the data, and therefore scrutiny of private sector organisations is arguably of even greater importance.

8. In practical terms it should be recognised that there is a limit to the work that the Information Commissioner’s office can undertake and extending these powers to the private sector will present a huge task. There needs to be transparent criteria and processes in place for selecting and prioritising, which organisations should be subject to assessment notices. Criteria should include the sensitivity of the data, the amount of data held and evidence of bad practice.

February 2009
Memorandum submitted by the Campaign Against Criminalising Communities (CAMPACC)

The Campaign Against Criminalising Communities has for nine years sought to raise awareness of the devastating effects of counter terrorism legislation on individuals, on communities and on our collective civil liberties. We are concerned about the direction of this Government’s legislative programme and the expansion of secret hearings, closed evidence and punishment without accusation or trial. We regard Clause 11 of the Coroners and Justice Bill 2009 as a further example of this trend which threatens to undermine still further civil rights and protections, particularly for victims of state violence.

Clause 11 would permit the Secretary State to appoint a coroner to sit without a jury, without the public and without the family of the deceased, in any case where the state is allegedly responsible for a death, provided he or she is satisfied that it is in the public interest because of the sensitive nature of the evidence. The dangers of this course are obvious, when one thinks of deaths such as that of Jean Charles de Menezes and Baha Mousa, and the temptation to hold secret inquiries to cover up information which is sensitive because it discloses illegality, breaches of human rights or humanitarian law by state agents.

CAMPACC’s constituency comprises communities at the sharp end of anti-terrorist policing—national minorities which have fought for recognition, such as the Kurds, the Tamils and British Muslims. The experiences of these communities are particularly relevant in informing our concerns about the extension of secrecy in inquiries into deaths caused by state agents. It is precisely when the state has caused death that the requirements of independent and effective investigation are the most pressing. Public confidence in the rule of law is important; the rule of law itself is fundamentally important.

When someone is killed by state agents it is either deliberate or accidental. In either case there is a clear and vital public interest in openness. It is vitally important that citizens know what is being perpetrated in their name, and about dangerous operations which cause grave risks, so that there can be proper, informed public debate and lessons can be learned. There are no circumstances imaginable in which an entire inquest needs to be or should be held in secret, as opposed to inquests where some evidence might need to be protected from disclosure to protect important public interests.

Clause 11 and Article 2 of the European Convention on Human Rights

It is impossible to see how the clause can be reconciled with the procedural requirements of Article 2 ECHR. Article 2 is recognised as one of the most important rights in the Convention. According to the European Court of Human Rights, it is a “fundamental” right which, together with Article 3, “enshrines one of the basic values of the democratic societies making up the Council of Europe” (McCann v United Kingdom (1995) 21 EHRR 97, ECtHR, para 147).

The obligation to protect the right to life under article 2, read in conjunction with a state’s general obligation under article 1 to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (Ibid; Jordan, McKerr, Kelly v United Kingdom (2003) 37 EHRR 52 (shootings of IRA members by British armed forces), inquests were abandoned because of non-disclosure by the Crown of material evidence relating to the deaths, under public interest immunity certificates. The ECtHR held that the lack of information and the non-disclosure of witness statements prior to the witnesses’ appearance at the inquest prejudiced the ability of the victims’ families to participate in the inquests, contrary to the procedural requirements of Article 2. There must be sufficient public scrutiny of the investigation to ensure genuine accountability, and the deceased’s next of kin must be involved in the investigation to the extent necessary to protect their legitimate interests.

The judgment in Jordan required the UK government to change the procedure by which disputed deaths are investigated. It was followed in Finucane v United Kingdom (2003) 37 EHRR 656, and by the House of Lords in R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653, a case which bears strongly on the proposed legislation. Amin concerned the killing of a young offender, Zahid Mubarek, by his racist cell-mate at Feltham Young Offenders’ Institution. Inquiries into the circumstances of the killing were carried out by the Prison Service and the Commission for Racial Equality, in addition to the criminal prosecution of the killer. But these measures did not prevent a breach of Article 2, since the inquiries had effectively been held in private, with no participation by or on behalf of the family.

In R (Middleton) v HM Coroner for Western Somerset [2004] 2 AC 182 the House of Lords reiterated that “it is of the utmost importance that a complete and accurate picture emerges of the events leading up to a killing by State agents”.

Secrecy and Article 6 ECHR

It is not just Article 2 but also the requirement for open justice, a fundamental aspect of fair trials under Article 6, which is engaged. In this context, the European Court of Human Rights has upheld non-disclosure for national security reasons or for the protection of the fundamental rights of others, with the provision of adequate safeguards, in Doorson v Netherlands (20524/92) and in Van Mechelen v Netherlands. But there is a big difference between non-disclosure of some information and holding a whole inquest in secret.
Already, there are concerns about the way secrecy spreads like a virus and the exceptional quickly becomes the norm in the context of measures of control of those suspected of support for terrorism. It is a matter for concern that the minister is unable to tell Parliament how many PII certificates had been served on coroners in England and Wales seeking non-disclosure of evidence on national security grounds, on the basis that this information is apparently not held centrally (Hansard HC 9.7.08, col 1608W). The International Commission of Jurists ‘Eminent Jurists’ Panel February 2009 report, “Assessing damage, urging action” (Feb 09) sees the broadening of the permissible grounds for non-disclosure of materials to suspects as posing dangers to due process principles. The Panel expresses concern (p79) that the reasons for non-disclosure have become less clear, and go beyond the valid requirements of secrecy attached to intelligence work.

Non-disclosure in context of control order and national security deportation hearings has resulted in extreme prejudice for appellants and to a widespread perception of injustice. The judicial committee of the House of Lords has grappled with these issues in MB and AF (and in the different context of parole board hearings) in Roberts v Parole Board, and concluded that fair trial principles under Article 6 ECHR, which demand a “substantial measure of procedural justice” require disclosure to the person concerned of enough of the case to enable him to meet it.

The police and security services already benefit from wide judicial discretion to give evidence anonymously or in closed hearings. Allowing this Clause to remain part of the Bill will lead to a decrease in transparency in important public matters and a corresponding increase in alienation of the public.

We are indebted to barrister Frances Webber for her great assistance on the legal background of inquests.

March 2009

Memorandum submitted by the Committee on the Administration of Justice

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of political violence. Its membership is drawn from across the whole community.

The Committee seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch, and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the 1998 Council of Europe Human Rights Prize.

The Committee on the Administration of Justice (CAJ) is an independent non-governmental organisation that was established in 1981. CAJ’s activities include—publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Thank you for permitting CAJ to submit our views on the Coroners and Justice Bill.

CAJ has noted with apprehension the muddled manner in which the provisions of this Bill are presented; the unrelated and numerous provisions which are presented in the schedules of the Bill suggest that significant debate may not be afforded to such important issues.

This submission is dedicated to the provisions relating to inquests which raise concerns in relation to the obligations of the United Kingdom as regards Article 2 of the European Convention on Human Rights (ECHR), particularly as they may apply to Northern Ireland.

Certified Inquests

The European Court of Human Rights has ruled that when an individual dies in custody or at the hands of the state there is an obligation on the state under Article 2 (right to life) to thoroughly investigate the death. Any decision to exclude a jury from the inquest process warrants concern and the public confidence in the justice system may be undermined, a substantial issue in Northern Ireland.

The European Court has acknowledged that “there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests’. That the Coroners and Justice Bill may allow for the family of the deceased to be prevented from participating in inquests which are certified by the Secretary of State or having access to important information relating to
the death opens up the possibility of a breach of Article 2, an issue of particular significance in Northern Ireland where there are a number of inquests outstanding in cases relating to the past where this must not be allowed to happen.

OTHER CONCERNS
In addition to the human rights issues in the Coroners and Justice Bill noted by the Committee, CAJ would like to draw attention to several other concerns specifically relating to Northern Ireland, as it appears that the provisions in relation to non-jury inquests in Northern Ireland are different than those proposed in England and Wales and provide fewer safeguards.

As regards to England and Wales, clause 11 of the Coroners and Justice Bill states that the Secretary of State may issue a certificate for an inquest to be held without a jury and that the Lord Chief Justice will nominate a High Court Judge to conduct the inquest.

However, the provisions for non-jury inquests in Northern Ireland (SCHEDULE 9 Section 38 Amendments to the Coroners Act (Northern Ireland) 1959 section 18A) do not state who shall conduct inquests which have been certified by the Secretary of State. As such this suggests that in Northern Ireland if the Secretary of State issues such a certificate, a coroner (and not HC judge appointed by LCJ) will conduct the non-jury inquest.

Given that the High Court has supervisory jurisdiction over public law decisions, the decisions of a coroner and the Secretary of State are subject to judicial review. While clause 11 (in relation to England and Wales) alludes to this, neither implicit nor explicit reference to judicial review as regards Northern Ireland is made. More significantly, the proposed Bill (clause 11) offers a dedicated appeals system for cases in England and Wales. Why is Northern Ireland not granted this important safeguard, in addition to the normal process of judicial review?

RECOMMENDATIONS
In light of the above, CAJ encourages the Joint Committee to:
1. oppose any provisions which allow for non-jury inquests, particularly those that may permit the exclusion of the next of kin from the investigation process;
2. oppose the extension of these proposals to Northern Ireland; and
3. support the inclusion of an appeal process in any bill which permits an inquest to be certified and subsequently held without a jury.

February 2009

Memorandum submitted by Dignity in Dying
I am writing to outline my concerns around the Coroners and Justice Bill, in my capacity as Chief Executive of Dignity in Dying. Dignity in Dying is the leading organisation campaigning for greater choice at the end of life. Our campaigns focus on giving people choice, control and access to high quality end-of-life care services. We represent 100,000 members and supporters.

In summary, we are very concerned that the revised definition of the partial defence to murder of diminished responsibility in the Coroners and Justice Bill will have a significant and negative impact on those people that might be termed genuine “mercy killers”: those who have actively helped a seriously ill loved one to die, in response to persistent requests for help to end their life. By changing the definition of diminished responsibility it is likely that “mercy killers” who have acted rationally in response to persistent requests from a seriously ill loved one will face custodial sentences.

Under the current law, anybody 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 “mercy killing”). At the request of the Home Secretary in 2004, the Law Commission undertook a review of the partial defences to murder. On “mercy killing”, the report stated, “at present, in such cases, a conviction for murder, with consequent mandatory life sentence, can only be avoided by a ‘benign conspiracy’ between psychiatrists, defence, prosecution and the court, to bring them within diminished responsibility . . . It is however a blight on our law that such an outcome has to be connived at rather than arising openly and directly from the law”.36

Dignity in Dying does not endorse “mercy killing” or the current “benign conspiracy”. However, “mercy killings” are taking place, and it is necessary that the law addresses these cases appropriately. We are extremely concerned that the revised definition of diminished responsibility will actually make things worse for genuine “mercy killers” and seriously impact upon their human rights.

The proposed new definition of diminished responsibility set out in the Coroners and Justice Bill requires that to use the defence, the defendant must have a “recognised medical condition” . . . “at the time” of the act. In addition, for the defence to apply, the recognised medical condition would need to be shown to have substantially impaired “the defendant’s ability to understand the nature of their conduct, to form a rational judgment, or to exercise self-control”. The new definition would not help the person who eventually concedes to persistent requests from a terminally ill loved one to help them die, if their help can be shown to be rational, for example, if they understood the consequences of their action, and do not suffer from depression or some other mental abnormality. Clearly such a person will have acted rationally, in a controlled fashion and in the full knowledge and understanding of the implications of her/his conduct, which will make it extremely difficult to apply the defence.

The likely effect therefore, is that many genuine “mercy killers” will be given custodial sentences. This would seem to go against the wider spirit of the proposed changes, which are intended to make the Law of Murder more just. It is particularly surprising, and deeply concerning, that the impact that changes to diminished responsibility will have on the practice of the law in “mercy killing” cases was not considered by the Ministry of Justice in its recent consultation on changes to murder law.

While the current law may allow the courts to connive to treat genuine “mercy killers” compassionately, it is clear that the revised definition will put a stop to this. What little protection “mercy killers” currently have against harsh sentencing, and potentially, mandatory life sentencing, will be completely removed. As such, the proposed change to diminished responsibility will have a significant and potentially damaging impact on a particular group of offenders: Government has a responsibility to thoroughly investigate this before making any changes, and I would urge the Joint Committee on Human Rights to investigate this important issue.

29 January 2009

Memorandum submitted by HM Deputy Coroner, Selena Lynch

I understand that the Joint Committee on Human Rights is considering the compatibility of the Coroners and Justice Bill with the UK’s human rights obligations, and that submissions should be sent to you.

I have worked in the coronial service since 1990, first as an Assistant Deputy Coroner, then as a full time Coroner for Inner South London between 1997 and 2005 and since then as a Deputy and Assistant Deputy in several districts: the Royal Household, Oxfordshire, Inner South London, South London and North London. My background is in the law, as a solicitor then later a barrister specialising in criminal work.

I am concerned that the Bill as drafted will restrict the ability of the inquest to discharge the State’s obligations under Article 2 of the European Convention on Human Rights (ECHR). This may render some aspects of the Bill incompatible with Convention rights, and lead to arguments for public inquiries in some cases.

Article 2 ECHR imposes duties on the State. First, a substantive obligation not to take life without justification, and to establish a framework of laws, precautions, procedures and means of enforcement which will protect life. Second, a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that the substantive obligation has been, or may have been violated; and it appears that agents of the state are or may be in some way implicated.

Both these obligations trigger the need for the state to conduct an investigation of some sort following a death or near death.

Inquests do not deal with cases of near death, and there is current debate about the way in which the State can fulfil its obligation in this regard. As far as I know, there has been no consideration of the use of the reformed coronial jurisdiction for such cases.

In cases of death, the inquest will usually be the way in which the state discharges its duty to investigate (see R(Middleton) v West Somerset Coroner [2004] UKHL 10 [2004] 2 All ER 465). Whilst the nature of the investigation will vary according to the circumstances, it must always be independent.

The Bill provides for the apparent strengthening of the relationship between Coroner and local authority and a medical examiner system. These provisions may be seen to undermine the independence of the Coroner.

THE INDEPENDENCE OF THE INVESTIGATION

An independent investigation requires independent evidence-gathering. Regrettably, the Bill makes no proper mention of the resources and nature of the Coroner’s investigation. Clause 23 provides that the local authority “must secure the provision of whatever officers and other staff are needed by the coroners for that area to carry out their functions”. This could be perceived as lacking independence, as coroners are often
required to consider the actions or inactions of local authority employees and departments. In those areas where the police are willing and able to continue providing officers, independence remains an issue in cases involving the police.

The perception of a lack of independence is perhaps made worse by the provision that salaries and terms of office for the Coroner are to be a matter of agreement between the Coroner and the local authority (Schedule 3, Part 4).

THE INDEPENDENCE OF THE MEDICAL EXAMINER

The medical examiner is to be appointed and monitored by the very agency that he/she is being asked to assess, and the prohibition against interference contained in c.18(5) will not adequately serve to avoid the risk or appearance of a lack of independence.

February 2009

Memorandum submitted by Human Rights Watch

We are grateful for this opportunity to set out Human Rights Watch’s concerns with provisions in the Coroners and Justice Bill 2009 giving the Home Secretary broad scope to declare an inquest closed to public scrutiny. Human Rights Watch believes that secret inquests are incompatible with the UK’s obligations to protect the right to life under article 2 of the European Convention on Human Rights (ECHR). We urge you to recommend that clauses 11–13 be stricken from the bill.

As you know, the provision for closed inquests was originally brought forward in the Counter-Terrorism Bill 2008. We outlined our concerns with that proposal in a briefing paper submitted to this House in July 2008. Both this Committee and the House of Commons Justice Committee also raised serious concerns about the lack of independence of inquests conducted by specially appointed coroners as well as the limits on the involvement of victims’ families.

While we welcome the government’s decision to strike the relevant clauses from the Counter-Terrorism Bill, we regret that the proposal has been re-introduced, without significant improvement, to the bill now before you. The proposal remains contrary to the UK’s treaty obligations; it is also unnecessary and likely to undermine public confidence in investigations of wrongful deaths where state responsibility must be determined.

Clause 11 (Part I) of the Coroners and Justice Bill gives the Secretary of State the power to “certify” an investigation into a wrongful death to prevent disclosure of sensitive materials or information. She may do so when she is of the opinion that public disclosure must be avoided in order to protect national security, the relationship between the UK and another country, the safety of a witness or another person, in the interest of preventing or detecting crime, or to prevent real harm to the public interest (sub-clause 2). The effect of certification is that such inquests are to be held by a High Court judge appointed by the Lord Chief Justice without a jury (sub-clauses 3 and 6). The decision to certify could be challenged under judicial review, and the bill provides for a 14-day grace period from the time of certification to allow for such challenges (sub-clause 5). Finally, clause 11 stipulates that the Secretary of State may certify an inquest already underway; in these circumstances, the presiding coroner and jury would be dismissed (sub-clause 6).

Clause 12 gives the Secretary of State sole power to discontinue certification and stipulates provisions for summoning a jury to continue the inquest into a death that would have required a jury inquest had certification not been imposed. Clause 13 provides for amendments of the Regulation of Investigatory Powers Act 2000 to allow for the use of intercept evidence in closed inquests.

Human Rights Watch believes the power to order closed inquests is incompatible with the UK’s international treaty obligations. Under ECHR article 2, the UK has a positive obligation to conduct effective investigations of deaths resulting from the use of force. The European Court of Human Rights has established that to be effective, an investigation must be independent, take reasonable steps to collect the evidence necessary to reach a determination, be carried out with promptness and reasonable expedition, and


38 Under the current Coroners Act 1988 and the draft Coroners and Justice Bill, jury inquests are required for all deaths in custody or state detention, and the death was violent or unnatural or the cause is unknown; for all deaths resulting from an act or omission of a police officer or member of a service police force in the purported execution of his or her duties; and where the death was caused by accident, poisoning or disease which must be reported to a government department or inspector. Coroners Act 1988, Section 8(3); Coroners and Justice Bill, Clause 7(2) and (3).
be subject to public scrutiny.\textsuperscript{40} The Court recognizes that the degree of public scrutiny may vary from case to case, and while it has found that limited application of the public interest immunity system in the UK does not necessarily violate Article 2 obligations,\textsuperscript{41} it has also found that its use has prevented review of potentially relevant material and therefore prevented an effective investigation.\textsuperscript{42} Moreover, next-of-kin of victims have a right to participate in the proceedings, a right which must be safeguarded by the process so that they always have access to the investigation “to the extent necessary to safeguard [their] legitimate interests”.\textsuperscript{43}

Giving the Secretary of State a power to order closed inquests undermines the core requirement that such investigations be independent. We note that the current proposal improves upon the one originally included in the Counter-Terrorism Bill 2008, in that a High Court judge, appointed by the Lord Chief Justice, would now conduct the certified inquest, rather than a coroner especially designated by the Secretary of State. We remain concerned, however, that certification represents an unacceptable intrusion by the executive branch into investigations that must ultimately determine state responsibility in a suspicious death. This intrusion is likely to undermine public confidence in the investigation and its outcome.

In this context, it is worth noting that the bill gives the Secretary of State the authority to certify inquests already in progress (sub-clause 6). As this Committee observed in your comments on Counter-Terrorism Bill 2008, this means the provision could be applied to still unresolved cases in Northern Ireland, to the detriment of the UK’s compliance with judgments of the European Court of Human Rights.

We are further concerned that a system of closed inquests would deny the next-of-kin a sufficient degree of access to satisfy their legitimate interests. In its explanatory notes to the bill, the government states that rules will be adopted to allow the coroner to appoint independent counsel to represent the interests of next-of-kin.\textsuperscript{44} This would essentially replicate the seriously flawed system of special advocates already in place in the Special Immigration Appeals Commission (SIAC) and control order proceedings. Special advocates in these proceedings are not able to discuss the evidence or grounds contained in closed material with the controlee or take instructions from him. In the context of closed inquests, it is difficult to see how special advocates could represent properly the interests of the next-of-kin if they are unable to discuss with them information directly relevant to how their loved one died.

In the recent ruling on the abrogated policy of indefinite detention for foreign terrorism suspects, A and Others v. the United Kingdom, the European Court of Human Rights took the unequivocal view that special advocates could only perform their role effectively when detainees were provided sufficient information about the allegations against them, and able to give meaningful instructions to the advocate.\textsuperscript{45} Proceedings in which the decision to uphold or maintain detention were based solely or to a decisive degree on closed material, and that material was not disclosed to the detainee, are to be considered unfair.

Human Rights Watch considers the grounds for certification, as enumerated above, to be overly broad and likely to render judicial challenges virtually impossible to win. The ill-defined concept of “public interest,” in particular when linked to the goal of protecting the UK’s relationship with another country, gives rise to concerns that the interests of justice might be sacrificed to avoid diplomatic tensions.

The government has not made a convincing case that closed inquests are necessary. Indeed, the draft legislation does not require the Secretary of State to consider certification as “necessary”, only that no other measures would be “adequate” to prevent disclosure of sensitive material. Human Rights Watch acknowledges that there may be legitimate reasons for limiting disclosure of certain materials relevant to the inquest. Indeed, UK law already provides for this through Public Interest Immunity (PII) certificates, and the power of the court to hold part of the proceedings in camera, restrict access to the media, and adopt special measures.

The government has argued that PII certificates are not a satisfactory alternative to closed, non-jury inquests because an inquest must go forward whether PII is granted or not (whereas in criminal proceedings, the Crown Prosecution Service can choose to halt prosecution in order to protect sensitive material and sources). It is equally true, however, that an inquest would have to proceed in the event judicial review led to certification being quashed. In this case, the coroner presumably would avail him or herself fruitfully of the existing measures outlined above.


\textsuperscript{41} European Court of Human Rights, Hugh Jordan v the United Kingdom, McCann and Others v the United Kingdom, Judgment of 27 September 1995, Series A, no. 324.

\textsuperscript{42} European Court of Human Rights, McKerr v the United Kingdom, Judgment of 4 May 2001, ECHR 2001-III no. 28883/95 paras 150–151.

\textsuperscript{43} European Court of Human Rights, Hugh Jordan v the United Kingdom, para 109; McKerr v the United Kingdom, para. 148; Finucane v the United Kingdom, para 71.

\textsuperscript{44} Coramers and Justice Bill Explanatory Notes, para 804.

\textsuperscript{45} Ibid, para 220.
Human Rights Watch is convinced that closed inquests under the terms of the Coroners and Justice Bill are incompatible with the UK’s obligations under international human rights law. Intrusion of the executive branch into investigations of wrongful deaths does not appear to be necessary in order to protect sensitive material or witnesses, and would damage the credibility of the inquests and their findings. We therefore urge you to recommend that clauses 11-13 be stricken from the Bill.

February 2009

Memorandum submitted by the Independent Police Complaints Commission

Summary

The primary statutory function of the Independent Police Complaints Commission (IPCC) is to secure and maintain public confidence in the handling of public complaints against the police and police misconduct matters. The IPCC also has a responsibility for investigating incidents involving death or serious injury during or following contact with the police. Despite the fact that inquests are independent of such investigations, the public understandably look at the process as a whole with the result that any failings in the inquest process impact on confidence in both the police complaints system and wider police service as a whole.

The IPCC has concerns regarding Clauses 11-13 of the Coroners and Justice Bill (the Bill) which make provision for non-jury inquests in certain cases. The IPCC recognises the difficulties there are regarding cases involving the use of intercept material but does not believe there is any requirement for non-jury inquests for deaths following police contact in any other circumstances.

In addition, the IPCC has concerns about the lack of provision for consultation as part of the certification process and would welcome a commitment from the Secretary of State to formally consult the IPCC before certifying any inquest into a death the IPCC had investigated.

The Independent Police Complaints Commission (IPCC)

1. The Independent Police Complaints Commission, which operates in England and Wales only, became operational in April 2004, succeeding the Police Complaints Authority. The IPCC was created by the Police Reform Act 2002 as a Non-Departmental Public Body (NDPB) to deal with complaints and allegations of misconduct against police in England and Wales.

2. More recently the IPCC’s remit has been extended to include the investigation of serious allegations against officers of the Serious Organised Crime Agency (SOCA), HM Revenue and Customs and the UK Border Agency.

3. The IPCC is overseen by a Board of Commissioners appointed by the Home Secretary. By law, Commissioners must never have worked for the police service in any capacity. They are the public, independent face of the IPCC.

4. The IPCC’s powers include:
   — Investigative powers: the IPCC may independently investigate cases, oversee police investigations of cases, or leave cases to be locally investigated by the police without oversight;
   — An appeal function whereby complaints who are unhappy with how the police dealt with their complaint may appeal to the IPCC; and
   — The power to direct a force to convene a disciplinary tribunal and, in exceptional cases, may direct that the tribunal be held in public.

5. The IPCC has a statutory responsibility to increase public confidence in the police complaints system. To assist in meeting this responsibility the IPCC has a guardianship function which consists of four main elements:
   — A duty to increase public confidence in the system as a whole;
   — Promoting accessibility of the complaints system;
   — Setting, monitoring, inspecting and reviewing standards for the operation of the whole system; and
   — Promoting a learning culture so that lessons may be learnt from the system.

Article 2 Issues

6. The IPCC’s responsibility for investigation of deaths following police contact arises from the state’s obligations under Article 2 of the European Convention on Human Rights to ensure that where someone has died during or following contact with the police, including fatal use of force cases, an effective and independent investigation takes place.
7. European and domestic case law requires that when Article 2 is engaged that five procedural obligations are met. They are:

- The investigation must be independent. In other words there should be no hierarchical or institutional link between the investigator and the person who is the subject of the investigation;
- The investigation must be effective in that it must be capable of identifying the culpability of anyone involved in causing the death and holding them to account if necessary;
- The investigation must be reasonably prompt;
- There must be a sufficient element of public scrutiny; and
- The next of kin must be involved to an appropriate extent.

It is in relation to the last two headings that the IPCC has particular concerns if non-jury inquests are held and relevant information is not disclosed to the next of kin or the public. In the view of the IPCC such an event would not meet those two procedural obligations.

8. Investigations into the fatal use of force attract significant public interest and their outcome has a major impact on public confidence not just in the complaints system as a whole but also in the way in which the police discharge some of their most critical responsibilities.

9. Under the Bill, there will normally be an obligation on coroners to hold an inquest with a jury in such cases. Despite the fact that investigations into deaths during or following police contact and inquests are independent of each other, the public understandably look at the process as a whole with the result that any failings in or difficulties with the inquest process also impact on confidence in the IPCC and police complaints regime generally.

CORONERS REFORM

Provisions for non-jury inquests

10. Clauses 11 to 13 of the Bill propose that in certain cases an inquest will proceed in the absence of a jury. Those cases include, but are not limited to, those where intercept material informed the police operation that resulted in the fatality. At the present time, the nature and the existence of that intelligence cannot be disclosed to either a coroner or a jury because of section 17 of the Regulation of Investigatory Powers Act 2000.

11. The IPCC currently has one case where an inquest has not proved possible to date. This has added to the emotional distress for those families who are entitled to know how and why their family member died. The IPCC understand that these clauses are partly intended to rectify that issue by providing that the information can be made available to suitably qualified coroners sitting without a jury and to counsel to the inquest.

12. The IPCC recognises the very real difficulty the government has. The relevant material might have been obtained by a covert human intelligence source or “CHIS” and even to reveal the existence of such a person might put their lives in danger. Surveillance might have been in progress throughout the police operation that led to the fatality and in these circumstances it might not be possible for police officers to discuss their actions without revealing sensitive surveillance techniques. On the other hand, there might be cases where the intelligence that led to a police operation was sensitive but no such concerns would relate to the police operation once it was in progress. None of the arguments in this paper should be taken to imply any specific reference to any particular IPCC case.

IPCC’s concerns

13. The IPCC’s concerns relate solely to inquests arising from a death following police contact. It is recognised that these clauses might apply to inquests held in other circumstances of which the IPCC has no direct experience.

14. The IPCC is particularly concerned about the wide scope of these clauses should they be used as a basis to hold an inquest in the absence of a jury in any case where a death has followed, whether directly or indirectly, contact with the police and that contact has either caused or contributed to the death.

15. The IPCC has independently investigated and published a report on every death following the police fatal use of force since 1 April 2004. These cases have included those where the death occurred during a police response to organised crime and Stockwell, which involved the police response to terrorism. Other than the one case where the use of intercept material has been an issue, all of the IPCC’s investigations have been followed by public inquest before a coroner sitting with a jury and the publication of our report. Where necessary, sensitive material has been redacted and appropriate witnesses granted anonymity. The IPCC does not therefore believe there is any evidence to support the view that there is any requirement for a non-jury inquest for deaths following police contact other than where intercept material is an issue.
16. There is no provision in the Bill for the IPCC to be consulted as part of the certification process. This is despite the fact that prior to the inquest, the IPCC will be the only body in possession of all the evidence relating to the death and so will have a relevant view on the centrality of any sensitive material to the inquest’s function. The danger of relying solely on consultation with the relevant force is that there is a risk that the fears of information being disclosed may be overstated. The IPCC would therefore welcome a commitment from the Secretary of State to formally consult the IPCC before certifying any inquest into a death the IPCC had investigated.

March 2009

Memorandum submitted by Inquest

INTRODUCTION

1. INQUEST is a charity which works with the families of those who have died in custody. Through our casework over the last twenty-five years, INQUEST has gained a unique overview of the inquest system and deaths in custody. We extract policy issues arising from contentious deaths and their investigation, and campaign for changes in practice to prevent deaths. Our casework service informs our research, parliamentary and policy work, and we are widely consulted by government ministers and departments, MPs, lawyers, academics, policy makers, the media and the general public.

2. By helping families to obtain legal representation to assist them through this long and daunting process, INQUEST helps families to try to establish the truth about how their relative died, hold to account those responsible for the treatment and care of the deceased, and prevent future deaths. In contributing to that objective, some meaning and purpose can be given to their loss. This was recognised by Lord Bingham of Cornhill in his judgment in the Amin case (brought by the family of Zahid Mubarek, murdered in 2000 by a racist cell mate in Feltham young offender institution in London):

“The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”

3. INQUEST welcomes the inclusion of the Bill in the Government’s draft legislative programme. It awaits sight of the current draft; these comments are based on the currently available draft of the Coroners Reform Bill and the Ministry of Justice summary, dated 27 March 2008, of the changes made in light of consultation on the Bill. As the Committee knows, INQUEST is frustrated by the slow progress of reform, which leaves many families ill-served by the current system. The Committee will be aware of INQUEST’s evidence to its Inquiry into Deaths in Custody 2004, where we raised many of our concerns about the investigation and inquest system. Many of these issues remain unresolved. Indeed, for many families the situation has deteriorated since then. This is particularly so for those who are bereaved in circumstances which engage Article 2 ECHR; there are now unacceptable delays in hearing such cases. We are concerned that the current system is not compliant with the principles set out by the ECHR in Jordan.

4. This submission should be read alongside INQUEST’s policy submissions (September 2006) and legal submissions (October 2006) on the draft Coroners Reform Bill. Many of the comments and concerns expressed in those documents remain relevant to the current draft of the Bill, and a copy of those submissions is attached for ease of reference.

5. On 14 October 2008, the Government announced that it was withdrawing the proposals for “secret” inquests, contained in Part 6 of the Counter-Terrorism Bill, but that such provisions may be included in forthcoming coroners’ reform legislation. INQUEST campaigned against the provisions of Part 6, and welcomes the decision to withdraw them. It would oppose their introduction in a similar form in the Coroners’ Bill for the same reasons. INQUEST assumes that the Government would consult further on such a radical development of the Bill, and will respond if and when any such amendments are made. We now know that in addition to the Azelle Rodney case these provisions were also intended to deal with matters that have arisen in another fatal shooting by Metropolitan Police—the case of Terry Nicholas. It remains a very serious concern that these two families are now in a state of legal limbo, as Article 2 compliant inquests cannot take place and they are being asked to wait until the Coroners reform legislation makes its passage through Parliament.

BROADER CONCERNS

The purposes of an inquest

6. As the only official public hearing where a death in custody is subjected to public scrutiny—in the absence of a criminal prosecution—the inquest is of crucial importance in the search for the truth. The inquest is usually the only opportunity for the family to find out what happened. The human rights caselaw emphasises the importance of the investigation of deaths in custody, given that they take place in situations of dependency on and control by the state. When the state removes a person’s liberty it assumes full responsibility for protecting their human rights, and for properly investigating any deaths which occur.

7. The human rights case law has established consistent minimum standards for the state’s duty to investigate deaths in custody. In Jordan v. UK, the ECtHR set out the five essential requirements of the investigatory obligation: independence; effectiveness; promptness and reasonable expedition; public scrutiny; and accessibility to the family of the deceased.

8. It appears that the Government has not taken the opportunity of revising the Bill to provide any further statutory guidance on the purposes of an inquest. INQUEST considers that this is a missed opportunity. Clause 10 of the Bill simply divides inquests into those where the narrower Jamiesson scope will apply, and Article 2 inquests where, pursuant to Middleton, the jury must determine the cause and circumstances of the death, without any explanation of when Article 2 will apply. We suggest Part 1, Chapter 1 Clause 1.4 should say “in prison, following police contact, in Secure Training Centres, in Immigration Detention Centres, whilst detained under the Mental Health Act or otherwise lawfully detained and/or in other circumstances that engage Article 2 ECHR.”

9. The Explanatory Notes to the Bill indicate that the Government will deal with the applicability of Article 2 in guidance notes. There is no indication of what guidance will be given, or whether there will be consultation on the terms of such guidance. INQUEST’s concerns about the relegation of vital issues to secondary legislation or non-statutory guidance are addressed separately below.

10. The Bill also continues to lack any acknowledgment of the broader purposes of an inquest, including the important public safety function of identifying the lessons to be learned from a death. That function is explicitly part of the State’s Article 2 investigative obligation as it has been developed in the caselaw of the European Court of Human Rights. INQUEST’s suggestions as to the appropriate wording for such statutory acknowledgment are set out in its legal submissions of October 2006.

The funding of the system

11. INQUEST continues to emphasise that, regardless of the legal framework governing the inquest system, the system can only function fairly and effectively if sufficient resources are provided at all stages of the process: both to the coronial system, and to the families of those who have died in custody.

12. Currently, there is a stark inequality of funding as between the families of the deceased and the State institutions concerned in a death in custody. Adequately funded representation for families is vital, both for the sake of the families concerned, and also in order to fulfil the broader public interest of ensuring that the evidence is thoroughly explored in order to identify the full causes and circumstances of the death, and to ensure that lessons can be learned for the future. As the Committee itself has recognised, as well as other parliamentarians such as Tom Luce and Baroness Jean Corston, without public funding families cannot effectively participate in the inquest process. Such participation is an essential component of Article 2 compliance.

13. It is unclear what funding the Government intends to provide to families who wish to pursue an appeal to the Chief Coroner, pursuant to the mechanism contained in clauses 60 and 61 of the Bill. It is vital that adequate funding be provided for that purpose, as well as for representation at the inquest itself: otherwise the appeals mechanism will be primarily of assistance to State bodies, rather than to families.

14. Equally vital is the provision of adequate resources for Coroners, for the Chief Coroner, and for bodies such as the Prisons and Probation Ombudsman and Independent Police Complaints Commission. The inquest system currently functions with long delays, resulting from a combination of delays in investigations by the PPO/IPCC, and delays in coroners being able to case manage complex cases and list them for hearing. The importance of appropriate accommodation for coroners is considered separately below. Particularly in complex cases, coroners often face delays in obtaining adequate accommodation from the local authority. Delays in holding inquests increase the distress of the family and delay the learning of lessons from the death. It will be important that the new appeals mechanism also be adequately funded, in order to ensure that this does not introduce a further element of delay into the system.

15. The current Bill is silent on the issue of resources. INQUEST would welcome a statutory commitment to the provision of (a) appropriate representation for families; and (b) sufficient resources to allow coroners and the Chief Coroner to conduct proceedings in a timely fashion.
The use of secondary legislation

16. On a number of issues, including the applicability of Article 2 and the procedure which will apply in such cases, the Government has indicated its intention to deal with relevant matters through secondary legislation and non-statutory guidance. INQUEST is concerned about dealing with important matters through such mechanisms. As this consultation process demonstrates, primary legislation is subject to the detailed scrutiny of Parliament and of non-governmental organisations, while secondary legislation and non-statutory guidance is not. Further, relegating important issues to secondary legislation or guidance can undermine their importance. On issues such as the procedure to be adopted in an inquest engaging Article 2, the fulfilment of the State’s treaty obligations is at stake, as well as the vital interests of those concerned. INQUEST considers that such issues ought to be dealt with in primary legislation.

Learning lessons from deaths

17. There are a number of developments in this area: these include the establishment of the Forum for the Prevention of Deaths in Custody. However, INQUEST believes that more remains to be done in ensuring that lessons are learned from deaths in custody. It has long argued for the establishment of a Standing Commission on Deaths in Custody, to provide independent scrutiny of the implementation of changes required by coroners’ reports, narrative verdicts and the reports of other relevant bodies (such as the PPO, IPCC and Prison Inspectorate). It welcomes the fact that coroners’ reports are now to be gathered centrally by the Chief Coroner. However, it considers that there remains a need for an independent body to ensure that the numerous agencies which can be involved in a contentious death in custody, and affected by such recommendations, take effective action in response to the findings of coroners, juries, and other investigations.

Deaths in psychiatric detention

18. INQUEST remains concerned that there is still no body which carries out independent investigations into deaths in psychiatric detention. Those detained there are effectively in custody in the same way as those detained in prison or by the police, in the same type of closed environment. They have complex needs, with a high rate of suicide and self-harm. The Joint Committee on Human Rights has recommended the establishment of an independent body to carry out such investigations—“there is a case for a permanent investigatory body with some level of overview in all cases rather than ad hoc investigations in a few cases in order to support Article 2 compliance”—but this recommendation has not been implemented.

COMMENTS ON SPECIFIC PROVISIONS OF THE BILL

19. These comments focus on the changes announced by the Government on 27 March 2008. INQUEST’s comments on the provisions of the Bill which remain unchanged are set out in its previous submissions, attached.

Clauses 5 and 6: deaths abroad

20. INQUEST welcomes the removal of the proposed restrictions on the circumstances in which coroners would need to investigate deaths occurring abroad. Many controversial deaths occur abroad. While inquests into deaths abroad can raise practical problems, there was no principled reason to place those deaths into a special category. The removal of these provisions also removes the risk of families being denied an inquest in the UK because of the holding of an ineffective investigation in the country in which the death took place.

21. The new amendments are also to be welcomed in addressing the practical problems which individual coroners can face in obtaining evidence into deaths abroad, by requiring the Chief Coroner to assist in such cases, if requested. Again, such assistance can only be meaningful if the Chief Coroner’s office has sufficient resources to allow it to carry out the necessary, and sometimes time-consuming, liaison with the authorities of the jurisdiction in which the death took place. It is to be hoped that the Chief Coroner will develop protocols for ensuring international co-operation in such cases.

Clause 12: action to prevent other deaths

22. In advance of the passage of the Bill, the government has amended Rule 43 of the Coroners Rules to provide equivalent powers (by the Coroners (Amendment) Rules 2008, 2008/1652, which came into force on 17th July, along with guidance for coroners issued by the Ministry of Justice).

23. INQUEST welcomes the revised Clause 12 of the Bill. The requirement for recipients of coroners’ reports to respond, and the central collection of such reports, is to be welcomed. Previously, there has been real concern—by both coroners and families—that coroners’ recommendations can be disregarded, or dealt with on a case by case basis without taking an overview of patterns and common issues.
24. It is to be hoped that these changes will also standardise coroners’ practice on Rule 43 reports, which has differed widely across jurisdictions, including on the vital issue of whether such reports may be disclosed to the family.

Clauses 13 and 14: juries

25. On juries, the draft Bill previously removed the requirement that work inquests into workplace deaths are held with a jury, and reduced the number of jurors on an inquest jury to between 5 and 7 people. The revised Bill retains jurors for work place deaths and revises the jury number to between 7 and 9.

26. INQUEST welcomes these amendments. Deaths in custody may be the core case where the public scrutiny of a jury is essential to ensuring accountability. However, many deaths at work also occur in a closed environment lacking in transparency, and may raise equally important questions of institutional responsibility. INQUEST also welcomes the increase in the number of jurors, but remains concerned that the proposed numbers are significantly fewer than in a criminal trial, despite (a) the complex task which inquest juries perform, and (b) the importance of ensuring that controversial deaths are scrutinised by a cross-section of society.

Clause 33: accommodation for coroners

27. INQUEST is concerned that the relevant local authority is required only to provide the accommodation which it thinks appropriate. There is no consistent standard which those facilities must meet. The Government’s notes to this revision make it clear that there is no intention to provide dedicated coroners’ courts in all jurisdictions, and that the practice of coroners hiring facilities on a case by case basis will continue.

28. INQUEST’s experience, the lack of suitable permanent facilities, and the need to hire space in town halls, Crown Courts, conference centres etc, contributes to the delays in holding inquests in complex cases. Such facilities also frequently lack appropriate, private space for families. This leads to families having no private space in which to meet with their legal representatives and to be away from other witnesses (who may be closely concerned in the death). When suitable rooms are available, families are often expected to pay to use them. Presumably the accommodation currently provided is considered appropriate by the local authorities concerned. There is nothing in the Bill to require a higher standard of provision. Without the application of objective standards, it appears unlikely that local authorities will choose to devote greater resources to the issue.

Clauses 60 and 61: appeals

29. INQUEST welcomes the decision to define the list of decisions which can be appealed. It appears that the Bill remains silent on the legal test which the Chief Coroner will apply to such appeals: whether appeals will involve a re-hearing of the point, or a judicial review test. INQUEST considers that a re-hearing would be more appropriate, since the application of a Wednesbury-type test would not provide sufficient scrutiny of coroners’ decisions. It is vital that the Chief Coroner be enabled to determine appeals expeditiously, to ensure that appeals do not contribute to further delay in the hearing of inquests.

October 2008

Supplementary memorandum submitted by Inquest

Inquest has made both its substantive briefing on the Coroners and Justice Bill and its stand alone briefing on “secret” inquests (clauses 11–13) available to the Committee and indeed we are encouraged that the Committee has sympathy with our views on many of the issues that arise in relation to compatibility with ECHR. In relation to the issues outlined by the committee in the call for submissions and the letter to the Justice Secretary we make the follow additional comments.

Certified Inquests

In addition to our comments in our briefings we have forwarded to the committee the directions of the Coroner in the Terry Nicholas case, one of the cases cited by the government as giving rise to clauses 11—13. The coroner clearly sets out her view that the inquest into his death can go ahead and be article 2 compliant within the constraints of the current legislative framework. This means as far as we are aware there is only one case, that of Azelle Rodney, on which the government is basing these highly contentious proposals. We reiterate our view that these clauses should be withdrawn and a simple amendment made to the Regulation of Investigatory Powers Act.
Joint Committee on Human Rights: Evidence

SCOPE OF CORONERS’ INVESTIGATIONS

Inquest does not believe that the proposed scope of coroners’ investigations is adequate to meet the positive obligations of the State to protect lives. Despite recent legal changes inquests still cannot fully explore all the issues of procedure and policy that may have contributed to a death. For example in 2004 the JCHR were aware of the death of 16 year old Joseph Scholes in Stoke Heath young offender institution and supported the call for a public inquiry. Like the coroner who presided over the inquest, they recognised the limitations of the inquest remit which meant important issues of the sentencing and allocation of Joseph, a vulnerable 16 year old boy were not able to be considered. Most recently INQUEST is working on the self inflicted deaths in prison of 15 year old Liam McManus found hanging in Lancaster Farms Young Offender Institution after being sentenced to one month 14 days and a young woman Alison Colk found hanging in Styal prison, sentenced to 28 days. In order to fully scrutinise and understand the issues that contributed to these deaths and establish whether there was a breach of article 2 and how to protect lives in the future it is crucial that there is a detailed examination of sentencing policy and allocation. Within the proposed new system there is no ability to do this.

Deaths will continue to be considered in isolation from one another without an overview of the systemic factors which may have contributed to a pattern of similar deaths. The findings of previous inquests or inquiries into deaths involving similar factors or deaths within the same institution may also not be considered.

PUBLIC FUNDING FOR LEGAL REPRESENTATION FOR BEREAVED FAMILIES

Inquest’s view is that there needs to be a new approach to the funding of families legal representation. The current means tested legal aid system is unfair and potentially prevents families from ensuring they can effectively participate in coroners investigations. There should be automatic non means tested funding available for families in all inquests that engage article 2. The State is always represented and lawyers paid for from unlimited public funds while families face complex, intrusive and additionally distressing means testing.

In the public bill committee “The Parliamentary Under-Secretary of State for Justice (Bridget Prentice) said : We estimate that about 800 inquests a year involve public authorities. They cost an average of about £8,000 for legal aid, which amounts to £6.4 million a year”.

March 2009

Memorandum submitted by Justice

INTRODUCTION

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. The Coroners and Justice Bill is a large “portmanteau” Bill and contains extremely important changes to the law in several of its Parts. Where we have not commented upon a certain provision in the Bill here that should not be taken as an endorsement of its contents.

PART 1: CORONERS ETC

Clause 5; Sch 4, para 6

3. Inquests will often raise matters of cogent public interest; jury inquests in particular, if restricted to the circumstances outlined in clause 7 (regarding which, see below), will by their nature concern these issues. The “muzzling” of the jury and coroner by cl5(3) in these circumstances will often, we believe, be contrary to the public interest and may violate Article 10 ECHR.

4. Further, we are concerned that there is no provision in the Bill for the senior coroner’s report under para 6 of Sch 4, and the written response to that report provided for in para 6, to be made public where appropriate. The publication of rule 43 recommendations by coroners has on previous occasions provided powerful ammunition to those pressing for change in public services; for example, in relation to deaths in custody.
Clause 7

5. We believe that in addition to the circumstances set out in clause 7(2), an inquest should take place with a jury wherever the senior coroner has reason to suspect that the death resulted in whole or in part from the act or omission of a public authority or an entity which falls to be considered as a public authority for the purposes of the Human Rights Act 1998. Further, while the number of jurors may vary we believe that rules should provide that the more significant the public interest in the inquest, the larger the jury should be within the band of six to nine people.

Clause 11

6. Clause 11 is essentially the same as what was previously clause 77 of the Counter-Terrorism Bill, although clause 11 purports to offer some additional safeguards.47 The effect of this clause is that in any case where the state is alleged to be responsible for a person's death—for example, the killing of Jean Charles de Menezes by Metropolitan Police or the death of Baha Mousa at the hands of British soldiers in Basra—the Secretary of State will be free to appoint a coroner to sit in closed session without a jury so long as he or she is satisfied that it is in the public interest to do so because of the sensitive nature of the material that is likely to be considered. This would also be applicable to inquests into deaths of individuals outside of state custody but raising issues of the state's broader conduct, eg an inquest into the death of a soldier killed in Iraq or the inquest into the death of Dr. David Kelly.

7. Nor do we think any of the additional safeguards introduced since the Counter-Terrorism Bill make the proposed use of closed coronial proceedings any fairer or more transparent. For instance, the provision in cl11(5) for staying proceedings pending judicial review of the decision to certify does no more than what would undoubtedly be in the inherent power of the coroner in any event. The involvement of the Lord Chief Justice in selecting the judge (clauses 11(3)(a) and 11(7)) does not ameliorate the unfairness caused by the exclusion of the jury, members of the public and the next-of-kin. Lastly, notwithstanding the proviso in cl11(1)(b) that the Secretary of State may only certify a closed inquest if satisfied that “other measures” for protecting sensitive material would be inadequate, there is no requirement on the Secretary of State that such certification be necessary to protect eg “the safety of a witness” (cl11(2)(b)).

8. Unfortunately the government’s explanation for its view only serves to highlight the deficiencies of its legal analysis. In particular, the government claims that “Article 2 does not . . . give the public and next-of-kin an absolute right to be present at all times or to see all the material relevant to the investigation”:48

   The Government considers that the courts are very likely to accept that it is consistent with Article 2 for sensitive material not to be made public or disclosed to the next-of-kin where this is required by a substantial public interest.

9. However, the government appears to dramatically overestimate the extent to which the European Court of Human Rights (ECtHR) would allow the wholesale exclusion of the public and next-of-kin from coronial proceedings for the sake of some “substantial public interest” in non-disclosure of sensitive material. In the case of Rowe and Davis v United Kingdom, for instance, the ECtHR observed in the context of criminal proceedings that “the entitlement to disclosure of relevant evidence is not an absolute right”.49 Nonetheless, the ECtHR in that case never suggested that it would be appropriate to exclude a jury altogether for the sake of safeguarding the public interest in non-disclosure.

10. Indeed, we note that juries regularly hear serious criminal cases that may behind the scenes involve some very difficult questions of disclosure of sensitive information, eg terrorism cases involving informants or surveillance evidence. If the exclusion of a jury is not deemed to be a proportionate measure in such criminal proceedings, it is very difficult to see how it would be a proportionate measure in the context of an inquest investigating the death of an individual allegedly at the hands of the state. We remain of the view that the Secretary of State’s resort to closed inquests sitting without a jury will almost certainly be incompatible with the obligation under Article 2 ECHR to provide an independent and effective investigation, one that properly safeguards the interests of the victim’s family and the public at large.

PART 2: CRIMINAL OFFENCES

47 The main changes are, first, that the Secretary of State must not only be of the opinion that the investigation concerns “a matter that should not be made public” but also that “no other measures would be adequate to prevent the matter being made public” (clause 11(1)). Secondly, the grounds upon which an investigation may be certified have been clarified slightly, including “preventing or detecting crime” and “in order to protect the safety of a witness or other person” (Clause 11(2)(a)(iii) and (2)(b), but also narrowed to the extent that “real harm” to the public interest is now required (clause 11(2)(c)). Thirdly, the investigation will be carried out by a High Court judge (clause 11(3)(a)).

48 Explanatory notes, para 803.

49 Rowe and Davis v United Kingdom (2000) 30 EHRR 1, para 61.
Ev 56 Joint Committee on Human Rights: Evidence

Clauses 39 to 43

11. We are concerned that in the new formulations proposed in this Chapter there may be deserving cases where no partial defence can be made out. In particular, a consensual mercy killer will be guilty of murder unless, under the new definition of “diminished responsibility”, he can prove that he is suffering from a “recognised medical condition” such as clinical depression. Further, in relation to “diminished responsibility”, we are concerned that the removal of the Law Commission’s “developmental immaturity” limb of the partial defence means that it will be available to an adult who due to a mental condition functions like a 10 year old child, but not to an ordinary 10 year old child charged with murder.

12. In relation to “loss of self-control”, we are concerned that where a person acting in self-defence or defence of another person (including for example an armed police officer) uses a degree of force that a jury judges to be unreasonable, resulting in a person’s death, he will be guilty of murder under these provisions unless he lost his self-control. Further, the retention of the requirement of “loss of self-control” may continue to prejudice women who kill abusive husbands or partners due to ongoing abuse and fear.

13. We are further concerned by the “words and conduct” element of the loss of self-control partial defence: defendants with unpopular views or unusual lifestyles may not be found by a jury to have had a “justifiable sense of being seriously wronged”.

Clause 46

14. The new clauses relating to encouraging or assisting suicide fail to deal with the situation highlighted by recent cases reported in the media: that of a seriously ill person who wishes to end his or her life but is physically unable to do so without assistance and therefore will require the aid of a partner, relative or friend to do so. We are concerned at the issues raised by these cases—in particular, while suicide itself has been decriminalised, those who due to physical incapacitation cannot end their own lives without assistance are denied the opportunity to do so.

Part 3—Criminal Evidence, Investigations and Procedure

Clauses 59–68

15. The concept of the police informant, who can be protected by public interest immunity proceedings, is well known, and therefore we question why this different procedure is necessary—in particular, since it covers only a narrow category of cases.

16. Further, we are concerned at the effect of such a formal order upon subsequent judicial proceedings; if a defendant is charged and the subject of such an order provides information or evidence that may be relevant to a bail application or to the criminal case (as evidence or unused material), what will be the procedure? We will be concerned to ensure during the passage of the Bill that proper safeguards will be in place to protect procedural rights under Articles 5 and 6 ECHR. We also seek assurances that a person made the subject of an investigative anonymity order would not be subject to the unfair use of self-incriminatory statements or material provided by them to police in any future proceedings against them.

Clauses 69–80

17. The right of a defendant to know the identity of a witness against him in criminal proceedings is both a common law principle and a constituent part of the right to a fair trial under Article 6 ECHR, which provides inter alia for the minimum right of a defendant “to examine or have examined witnesses against him” in criminal cases. The Court of Appeal has made clear in the recent case of R v Mayers in relation to the Criminal Evidence (Witness Anonymity) Act 2008 (which this Bill would supplant), that:

Notwithstanding the abolition of the common law rules, it is abundantly clear from the provisions of the Act as a whole that, save in the exceptional circumstances permitted by the Act, the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him is maintained.

18. While it may be necessary for a witness to be anonymised in exceptional circumstances, these should be narrowly defined. In particular, we do not believe that the risk of “any serious damage to property” is sufficient to displace the primary right of the accused to a fair trial and the public interest in the fair and transparent administration of justice. The only legitimate circumstances, in our view, where a witness should be even considered for anonymity are in order to prevent a risk of death or serious physical harm to the witness or another person, or where the witness is an undercover officer (police, security services, etc). The criterion of “real harm to the public interest” in sub-clause 71(3) is in our view too broad, and should be replaced by a criterion referring to undercover officers.

50 [2008] EWCA Crim 1416, para 5.
Clauses 81–88

19. Special measures for witnesses often create a difference between the way that one or more prosecution witnesses, and other witnesses (often including the defendant) give evidence in a case, affecting the principle of equality of arms; they may also, despite any directions given, prejudice a tribunal of fact against the defendant in some cases. They should therefore only be used, apart from any other appropriate criteria (such as age or vulnerability of the witness), where they are necessary and effective to maximise the quality of the witness’s evidence.

20. We are therefore strongly opposed to clause 82 which provides that in relation to listed weapons offences all witnesses will be eligible for special measures under s17 Youth Justice and Criminal Evidence Act 1999 unless they inform the court of their wish not to be so eligible. This is in our view incompatible with Article 6 ECHR. To allow witnesses to be eligible for special measures unnecessarily may indeed compromise the quality of their evidence and will be prejudicial to the defendant. We recommend strongly that this provision be removed from the Bill. We are also disturbed by the provision in clause 82 that the list of offences to which the clause applies should be amendable by the Secretary of State via the negative resolution procedure.

21. In relation to child witnesses, the effect of clause 83 is that where a child does not wish to give evidence via video recording plus video link, the presumption will be that they should be screened. However, in our view it should always be demonstrated that the special measures concerned are necessary and effective to maximise the quality of the witness’s evidence. It is particularly important that where the defendant is also a child or young person, his trial is not prejudiced through the use of special measures for prosecution witnesses which are not available to him when he gives evidence. This is particularly important bearing in mind that the defendant in a case could be, say, 11 years old but the witness given special measures could be 17.

22. We are also strongly opposed to clause 87, which provides for “intermediaries” to be used to assist mentally vulnerable defendants to give evidence in court. The right to participate effectively in criminal proceedings is a constituent part of the right to a fair trial under Article 6 ECHR. As the ECtHR said in S.C. v United Kingdom:

... “effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence. ...

23. If the defendant is unable to do all these things then the mere presence of an intermediary when he gives his evidence cannot “cure” this defect. We also believe that there are inherent dangers in the use of an intermediary when a defendant gives evidence: the intermediary may not be independent of the defendant or the case (for example, a parent or carer) and may, whether independent or not, misinterpret the defendant’s speech and that of those asking him questions. If an individual is mentally compromised to the extent that they cannot understand and answer questions in simple language from a lawyer or judge, then we believe that they will not be able to participate effectively in their trial and should therefore be judged unfit to plead.

Clauses 89–93: Live links

24. These provisions will extend the circumstances in which criminal proceedings can take place via live link. This is an ongoing trend in recent legislation, against which we counsel caution. The physical presence of the accused in court is a very important safeguard not only against physical ill treatment of persons arrested and detained, but also against police and prosecutorial oppression and misconduct in the investigation. We therefore believe that live link hearings should take place only with the defendant’s informed consent.

Clauses 97–98: Bail

25. We do not believe that there should be specific rules for bail in murder cases, since although murder is a charge of the utmost seriousness, the circumstances of a murder charge can vary widely. Further, there are other offences that can be committed at an equal degree of seriousness—for example, certain terrorist offences. The seriousness of the charge, while it may be a relevant factor in relation to bail, cannot alone determine whether bail can be granted.

26. Furthermore, the right to liberty, as guaranteed under Article 5 ECHR, is not abrogated because a person has been charged with murder. There must still be “relevant and sufficient” reasons for bail to be withheld.53 We believe that this clause would either have to be read down under s3 Human Rights Act 1998 (like s25 of the Criminal Justice and Public Order Act 1994) or be judged incompatible with Article 5 ECHR.

27. Article 5 provides the right for a detained person to be brought before a judicial authority within a reasonable time and in our view, an extra delay of 48 hours before the detainee can be released simply because of the fact of the murder charge is not justifiable. If the Crown Court is to make the bail decision at first instance then the jurisdictional rules should be changed so that the person is brought before the Crown Court when they would otherwise have been brought before the magistrates’ court. There is also no good reason why the regime in clause 98 should apply to murder but not to other equally serious cases.

PART 8: DATA PROTECTION

28. Although we welcome the introduction of new powers in clause 151 to allow the Information Commissioner to carry out mandatory assessments of data holders, we are profoundly disturbed by the other proposals in Part 8 of the Bill. In particular, clause 152 contains a sweeping power to enable Ministers to authorise the sharing of data for the sake of any “policy objective” of government. As the explanatory notes themselves admit, it creates:54

... a free-standing power for ministers to enact secondary legislation which will have the effect of removing all barriers to data-sharing between two or more persons, where the sharing concerns at least in part the sharing of personal data, where such sharing is necessary to achieve a policy objective. . . [emphasis added]

29. By contrast, the right to respect for privacy under Article 8 ECHR permits interference with privacy (such as the sharing of personal data by government) only for one of the legitimate aims set out in Article 8(2):

the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30. In addition, such interference must necessary in a democratic society and be proportionate to the legitimate aim under Article 8(2). In the explanatory notes, the government claims:55

Because the order must be necessary to achieve a policy objective of a minister then reading it in light of the ECHR, combined with the fact that Ministers are bound to act in accordance with the provisions of the HRA, all such orders will be in pursuit of a legitimate aim as per Article 8(2).

31. This analysis puts the cart squarely before the horse, for the question of whether or not the terms of any given data-sharing order would be compatible with the requirements of Article 8 ECHR will inevitably depend on the facts of each particular case, the nature of the data being shared, the necessity for it, and—of particular importance—whether the policy objective falls within one of the legitimate grounds identified in Article 8(2).

32. We note that the recommendation of provision for data-sharing orders of the Data Sharing Review was far more limited and cautious than the proposals contained in Part 8. In particular, the Review noted the “exceptional and potentially controversial nature” of such orders,56 and emphasised the need for “necessary conditions and safeguards”.57 In our view, the grossly general provisions of Part 8 in no way constitute an adequate set of safeguards against the potential for disproportionate interference with Article 8 that data-sharing orders are likely to involve.

JUSTICE

February 2009

Memorandum submitted by the Law Society of England and Wales

1. SUMMARY

1.1 The Law Society (“The Society”) is the professional body for solicitors in England and Wales representing over 115,000 solicitors. The Society represents the interests of the profession to decision makers within Parliament, Government and the wider stakeholder community, and has an established public interest role in law reform.

53 Wernhoff v Germany (1979) 1 EHRR 55.
54 Explanatory notes, para 962.
55 Ibid, para 964.
56 Para 8.40.
57 Ibid.
1.2 The Society welcomes the opportunity to comment on the Human Rights aspects of the Bill. Many of the Society’s members are involved in the coronial and criminal justice system, representing and providing legal advice to the bereaved family and those who have been accused of a crime.

1.3 Regarding the coroners provisions, the Society has not done major work on compliance with of its provisions with Article 2, but has some general concerns which it sets out here.

1.4. Regarding the provisions reforming the criminal law, the Society focuses solely on Clauses 89–93 relating to Live Links.

2. Coroners Reform

2.1 While the Law Society has not undertaken a detailed Human Rights analysis of the Bill, it notes the concerns expressed by other organisations.

2.2 Coroners have three major roles: to investigate the causes of the death, to reach a verdict on the cause of death and as has been recognised by recent changes to the existing legislation, to take action to prevent further deaths.

2.3 The Society considers that it is crucial that these duties should not be fettered and that there should be no reduction in the ability of the Coroner to for investigate deaths, particularly those where Article 2 is engaged.

2.4 Inquests should be full, fair, open and transparent. This will be important both to maintain public confidence and to ensure that the aim of protecting the lives of others is fully achieved.

3. Reform of Criminal Law and Procedure etc

3.1 Clause 89 (3) would remove the requirement that a defendant consent to the use of a live link for a preliminary hearing in the Magistrates’ Court where the defendant is at the police station, a so-called “virtual court hearing”. The Society is strongly opposed to removing this requirement. The Society believes that both Article 6, specifically the “right to participate in proceedings’ aspect of the Right to a Fair Trial, and Article 5, specifically the right to be “brought promptly before judge”, are compromised by this provision.

3.2 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 appear in court by live link, or to choose to appear in the usual way.

3.3 Since then, 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 is understood to commence in April 2009. No change to the consent requirement should occur until this pilot takes place, and is fully and independently evaluated.

3.4 The Society believes that there is a significant difference between the use of live link facilities for a first hearing from the police station to court, which will usually take place a short time after arrest, from that of a prison-to-court link. 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 they will have appeared in person in court to apply for bail. In contrast, police station live links are expected to happen within hours of arrest, as a substitute for the customary first appearance in a court room. Important decisions in relation to bail and plea will need to be made immediately, and only a short time after their arrest.

3.5 In these circumstances, the accused may not have adequate 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 act as surety, people who would currently in normal circumstances be held overnight and released on bail the following day, will instead be remanded in custody for many days or even weeks. This could increase the prison population, because of purely procedural factors and not because of any public policy decision that bail should be denied.

3.6 If the solicitor is physically located away from the client at the court, and therefore has to communicate with the defendant by telephone (or video conference, if that facility is available for this purpose), the ability of the solicitor to take detailed initial instructions and to assess the defendant’s mental state and level of comprehension, is likely to be significantly compromised. In addition, concerns may arise as to the confidentiality of communications between solicitor and their client.

3.7 The Law Society believes that the defendant should have the right to appear physically in a court room for their first hearing, in the usual manner, particularly where the case is complex, or where bail and their right to liberty are an issue.
3.8 The Law Society agrees with the comments made, in the context of extensions of pre-charge detention in terrorism cases, by the European Committee for the Prevention of Torture58 ("the CPT") and the Joint Committee59 about the importance of detainees being brought into the direct physical presence of the judge or magistrate. In the Society's view, similar considerations arise in the context of the first hearing in the Magistrates' Court, because important decisions concerning pre-trial detention or bail are made here, as well as the decision on plea.

3.9 Monitoring the treatment of a detainee and accurately assessing their physical and psychological state will be much more difficult for the court over a video link than when done so in the defendant's physically presence in court. The magistrate or District Judge will not have the same opportunity to witness the demeanour and body language of the defendant, and there is a concern that defendants will feel marginalised and dehumanised by appearing via video link.

3.10 The Society is concerned that a defendant's right to participate in the proceedings, a significant feature of the fair trial right, will be compromised. While these concerns may be relevant to a sentencing hearing later in the proceedings where a remanded defendant appears by live link, they are much more pressing in the context of the first hearing following arrest, because there will have been less opportunity to obtain prosecution disclosure and access to legal advice.

3.11 In the case of terrorism offence detention, involving a detainee’s voluntary attendance via video link, the Government submitted to the CPT that the fact the judge had ultimate responsibility to decide whether the physical presence in court of the detainee was necessary, was an adequate safeguard. The CPT disagreed, stating that physical presence should be an obligation, not an option, for the judicial authority. Particularly in the instances of pre-charge detention beyond 48 hours, the CPT noted that physical presence would appear to be a requirement of Article 5(3) of the European Convention on Human Rights, as found by the Grand Chamber judgment of the Court of Human Rights in Ocalan v Turkey.60

3.12 The Law Society shares the CPT's view, and notes that in this context, the detainee's consent was required. If the proposals with the Coroners and Justice Bill are enacted, the requirement for consent will be removed. The Society is concerned that the proposed safeguard in the legislation—that the court must be satisfied that a live link direction would not be contrary to the interests of justice—will be even less adequate where the defendant has been afforded no choice but to appear by video link. The Society would support the suggestion contained in question 57 of the Joint Committee's letter of 12 February to the Secretary of State for Justice, that if consent is removed, the Bill should be amended to make clear that a live link will not be in the interests of justice where it would restrict the ability of the accused to participate fully in the hearing. The court, in making this decision, should have regard to the nature of the case, any vulnerability or special requirements of the accused, access to legal advice and importantly, their wishes as to the mode of hearing. In the Society's view, the provisions in this Bill removing consent, should not be enacted until the proposed pilot in has taken place and has been properly evaluated to test whether virtual first hearings are, in reality, a fair way to proceed.

3.13 As referred to above, we have similar concerns about removing the requirement that a defendant need to consent to appear by way of live link for sentencing and enforcement hearings, particularly when they are to give evidence. The defendant’s consent is an important safeguard to ensure that they are able to participate effectively in the proceedings concerned with the final determination of the charge against them. If this safeguard is to be removed, we suggest that the legislation should make clear that a live link will not be in the interests of justice if it restricts the ability of the accused to participate fully in the hearing.

3.14 Finally, the Society is aware that the European Court of Human Rights has considered the issue of the right to a fair trial and video links in the judgements of Sakhnovskiy v Russia61 and Marcello Viola v Italy.62 The Court has said that this form of participation is not as such incompatible with the notion of a fair and public hearing. Instead it must be ensured the applicant is able to follow the proceedings and be heard without technical impediments, and provision must be made for effective and confidential communications with between a lawyer and their client.

February 2009

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61 ECHR application 21272/03, 5 February 2009.
62 ECHR application 45106/04, 5 October 2006.
Memorandum submitted by Liberty

OVERVIEW

1. The Coroners and Justice Bill raises a number of significant human rights concerns, however, given the maximum word limit for this submission we intend to focus only on the two main concerns that we have with this Bill: changes to the rules as to when jury inquests can be convened (in particular the introduction of secret inquests) and the data sharing powers in clause 152. For further information on the human rights issues raised in the Bill please see Liberty’s Committee Stage Briefing on the Bill.

JURY INQUESTS

2. As drafted clause 7(2) removes one of the existing grounds for when juries are required at inquest, namely: where “the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health and safety of the public or any section of the public”. The Government has given no policy justification for the removal of this ground.

3. Article 2 (right to life) is often said to be the basic precondition for the enjoyment of other rights. The first sentence of Article 2(1) emphasises that a persons right to life “shall be protected by law”. It has been held that this requires the state not only to refrain from the unintentional and unlawful taking of life but also to take steps to safeguard the lives of those within its jurisdiction. In essence this places a positive obligation on states to ensure that the necessary regulatory framework is in place to protect the right to life. Juries should necessarily be convened where there is a chance that the State has neglected its regulatory obligations. It is also crucial that juries are involved in such cases to ensure public confidence. Independent scrutiny is vital in situations where Government inaction may have indirectly caused or contributed to loss of life. For these reasons, and with no policy justification for the removal of the health and safety ground, Liberty urges that the minimum floor for when juries are required is reinstated.

4. Liberty also believes that clause 7 should be amended to allow for a jury inquest where a “death resulted from an act or omission of a person discharging functions under the control of a Public Authority or an entity which falls to be considered as a Public Authority for the purposes of the Human Rights Act 1998”. This would allow for a jury inquest to be convened when a senior coroner has reason to suspect that a death has resulted in whole or in part from the act or omission of a Public Authority. The state’s obligations following a death in custody were expressed by the Court in whole or in part from the act or omission of a Public Authority. The state’s obligations following a death result from state actions. This unhappy provision was first introduced in the Counter-Terrorism Bill 2008 (CT Bill). Following a public outcry and concerted cross-party opposition to the proposal, proposals for secret inquests were dropped after the CT Bill entered the Lords.

SECRET INQUESTS

5. Clause 7 governs the use of a jury inquest. The general rule is that an inquest must be held without a jury. Sub-clauses (2) and (3) set out exceptions to this rule and give the coroner the power to decide to hold an inquest with a jury in any case where he or she thinks it is appropriate. These parts of the clause are modelled on section 8(3) of the 1988 Act. However, the Bill dramatically departs from current rules at clause 7(1) which provides that rules concerning jury inquests are subject to provisions governing “certified investigations” found at clause 11. Clause 11 introduces a provision which would gravely limit transparency, and increase executive control, over the inquest process. Clause 11(1) allows the Secretary of State to issue a certificate that an inquest will be held without a jury giving the Secretary of State significant scope to intercede in inquest proceedings. The removal of juries will effectively allow “secret” inquests to take place following deaths that result from state actions. This unhappy provison was first introduced in the Counter-Terrorism Bill 2008 (CT Bill). Following a public outcry and concerted cross-party opposition to the proposal, proposals for secret inquests were dropped after the CT Bill entered the Lords.

Note

63 See Liberty’s Second Reading Commons Briefing on this Bill which sets out in much greater length our views on the Bill. Available at http://www.liberty-human-rights.org.uk/pdfs/policy-09/coroners-and-justice-second-reading-briefing.pdf
64 Osman v UK (1999) 29 EHRR 245.
6. Initial media reports surrounding the re-introduction of the provisions in the current Bill have indicated that the “secret inquests” have returned with greater safeguards in place. In fact the reverse is true. The grounds for the removal of a jury (which were already extremely broad in the CT Bill) have been extended and now cover situations where the inquest will involve material that should not be made public: (1) in the interests of national security; (2) in the interests of a relationship with another country; (3) in the interests of preventing or detecting crime; (4) in order to protect the safety of a witness or another person; or (5) otherwise in order to prevent real harm to the public interest. 68 It is concerning that the rationale and scope for an already controversial proposal has been widened in this way and we hope that this policy-creep will be challenged as the Bill makes its passage.

7. Determinations as to whether an inquest will be held without a jury are made solely by the Secretary of State. The only potential challenge to a decision to hold an inquest without a jury would be by way of Judicial Review (JR) in the High Court. 69 However, the purpose of a JR would be to challenge the legality of State. The only potential challenge to a decision to hold an inquest without a jury would be by way of will be challenged as the Bill makes its passage.

8. We have serious concerns about the impact that jury removal would have on public confidence in the inquest system. We also question the compatibility of the proposals with the UK’s legal obligations. Exclusion of the jury and the family would seem to conflict with the requirements of family involvement and public scrutiny established in Jordan v UK. 70

9. Almost by definition the inquests to which these provisions would apply are likely to involve controversial or violent deaths. If these provisions were already in place it is likely that they could have been applied to the inquest into the shooting of Jean Charles de Menezes. 71 Any decision will be inherently political. Other inquests might raise similar issues to the de Menezes inquiry but not have the same profile or risk the same political fallout. Political considerations risk inconsistent decision-making when based on such arbitrary grounds as “public interest”. Liberty is especially concerned that inquests into the deaths of serving soldiers are driving the proposals for secret inquests. Clause 11 specifically allows for secret inquests to be held in the interests of a relationship with another country and there has been much speculation that this broad ground would be invoked following the deaths of soldiers killed in friendly fire or other controversial incidents that involve foreign military personnel. 72 Liberty understands that army families are rightly concerned that secret inquest powers would enable the truth about such incidents to be concealed from the public.

10. We can see no reason why these proposals are necessary and we do not believe that any of the Government’s arguments stand up to scrutiny. Measures already exist to ensure that matters in the public interest can be suitably accommodated in inquest proceedings. These include the issuing of Public Interest Immunity certificates; the power to hold part of an inquest in camera; the power to restrict certain details from media reports; and the use of special measures. One of the main planks in the government’s argument seems to be that because jury inquests account for only 2% of the total number of inquests in England and Wales the proposals for secret inquests won’t have a huge impact on fundamental rights. As Inquest has rightly argued, “this is a false and misleading argument. It is the investigation of the most serious and most contentious deaths that will be affected by this legislation—deaths at the hands of state agents. The removal of public scrutiny from these proceedings is therefore highly significant”. 73

11. Liberty understands that the inquest into the death of Azelle Rodney is currently stalled on the grounds that it cannot receive sensitive material—the admissibility of which is regulated under RIPA. Most recently the Government has sought to argue that secret inquests are justified in order to allow them to fulfill Article 2 obligations in inquests such as these. The argument that secret inquests (which may breach Article 2 obligations) are required in order to prevent current breaches of Article 2 is circular and illogical. This is especially the case, given that the continuing ban on the admissibility of intercept evidence is unjustified. In legal terms this bar is an anomaly. The UK is the only country in the world, with the exception of Ireland, to maintain the ban on such evidence. Elsewhere in the world, intercept evidence has been used effectively in criminal and other proceedings. Liberty has long argued that the bar on the use of intercept evidence in

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68 Clause 11(2). The two additional grounds for jury removal are 3 and 4: in the interests of preventing or detecting crime and in order to protect the safety of a witness or another person.

69 While JR of a decision not to allow a jury would have always been possible under the proposals in the CT Bill, clause 11(5) in the current Bill inserts a 14 day staying period before certification can have effect to allow for any JR challenge. This appears to have been included in an attempt to show that concerns over “secret inquests” have been addressed.

70 Summarised at paragraph 4 above.

71 As Inquest have rightly pointed out “in fact the de Menezes inquest managed to deal effectively with highly sensitive evidence and the protection of witnesses, whilst remaining largely open and accessible to all, showing that it was perfectly possible to conduct a full inquest without the need for certification”. Inquest Briefing on Clause 11 of the Coroners & Justice Bill 2009 available at: http://inquest.gn.apc.org/pdf/INQUEST_briefing_on_clauses_11-13_coroners_and_justice_bill_feb_2009.pdf

72 http://www.guardian.co.uk/uk/2008/apr/06/military.iraq

73 Inquest’s Briefing on the Counter-Terrorism Bill 2008 for the House of Lords Committee (page 3).
criminal proceedings should be lifted.\textsuperscript{74} The imperative behind the historic bar on the admissibility of intercept was clearly the protection of Security Services' methods. In Liberty’s view, removing this bar would not only overcome the difficulties highlighted by the Azelle Rodney inquest but would also overcome one of the primary obstacles to bringing criminal proceedings against those suspected of terrorist offences.\textsuperscript{75}

12. The Government is attempting to remedy the situation with clause 13 of the Bill which amends section 18 of the Regulation of Investigatory Powers Act 2000 (RIPA) to allow intercept material to be admissible in inquiries in “certified investigations”. The piecemeal removal of the general bar on the use of intercept is a continuing trend\textsuperscript{76} and represents a tacit acceptance of the use of intercept material. There is no reason why the removal of the ban needs to be limited only to “certified investigations”. It would be far more sensible to simply remove the bar and allow established rules of evidence, both in criminal and other proceedings, to determine the appropriateness of admissibility in individual cases. The Privy Council Review of Intercept Evidence which reported in February 2008 has similarly recommended that the bar be lifted.\textsuperscript{77}

While the Prime Minister initially indicated that these conclusions would be implemented reforms in this area have not yet been forthcoming. Liberty urges the Government to expedite the removal of the general bar on intercept. In the meantime, it would be possible to parliamentarians, to amend RIPA to allow for an Article 2 complaint inquest to take place where sensitive material exists.\textsuperscript{78}

Information sharing powers

13. Clause 152 introduces a new Part into the Data Protection Act 1998 (DPA) to allow for “information sharing” of data if approved by an Order made by a Minister. Liberty strongly opposes these amendments as the powers it gives are extraordinarily broad and make a mockery of the safeguards contained in the DPA.

We trust that recent reports that suggest the government will amend this provisions prove correct, although we believe the entirety of clause 152 should be removed from the Bill. The amendments would enable the Secretary of State, Treasurer or a Minister\textsuperscript{79} in charge of any government department to make an order giving “any person” the right to share information, including personal data, by disclosing it to another person or using the information for a purpose not related to that which the information was initially obtained. Note that the power is not restricted to sharing between government departments as suggested in media reports after this Bill was introduced: it could allow a private company to share personal data so long as an order was made allowing it. Such an order can confer power on any person; remove or modify any legal prohibition on information sharing and amend or repeal any Act of Parliament whenever passed. Before an order is made the order must be approved by Parliament, but Parliament has no power to amend the order.

14. If these amendments are enacted it will give Ministers the power, through secondary legislation, to effectively nullify the protections contained within the DPA, and indeed the very purpose of the DPA. In effect, these amendments would allow a Minister to allow any person (including a company or another government department) to share information about any person (including company information) as well as personal information that they hold on any person (eg name, address, date of birth, ethnicity, credit history, medical records, DNA and genetic information, tenancy records, social work records etc, the list goes on and on), if to do so serves the government’s policy objectives. We do not have to look far for a disturbing example of what could be the subject of an order: the government’s own Explanatory Notes to this Bill suggest an order could be made to allow “NHS Trusts in England to share patient data for the purposes of medical research”.\textsuperscript{80} This could be done “without the consent of any of the people whose records are likely to be shared.

15. These amendments clearly engage the right to privacy under the Human Rights Act 1998 (HRA).\textsuperscript{81} Any attempt to interfere with this right must be for a legitimate purpose,\textsuperscript{82} in accordance with the law and proportionate. It is impossible to know what purpose the orders are intended to achieve, other than a “policy objective”. There is no limit on this other than the very general requirement that all Ministers are prohibited under the HRA from acting in a way that is incompatible with human rights. The government argues that this is enough to demonstrate that “all such orders will be in pursuit of a legitimate aim as per Article 8(2)”.\textsuperscript{83} It is not enough for legislation to give such broad and sweeping powers to make secondary legislation and simply hope that the purpose for which an order is made will be a legitimate one under the HRA.

\textsuperscript{74} Cf Liberty’s evidence to the JCHR on this subject at www.liberty-human-rights.org.uk
\textsuperscript{75} Inadmissibility of intercept evidence is currently a central plank in the Government’s arguments for the continuous renewal of the control order regime.
\textsuperscript{76} The Counter-Terrorism Act 2008 allowed the intercept evidence to be used in terrorist asset-freezing proceedings.
\textsuperscript{77} Privy Council review of Intercept as Evidence available at: http://www.officialdocuments.gov.uk/document/cm73/7324/7324.asp
\textsuperscript{78} For example along the lines of the amendment Baroness Miller tabled to the Counter-Terrorism Bill in November 2008.
\textsuperscript{79} Note that different terms are used in Scotland, Wales and Northern Ireland, but since the effect of the amendments are the same, for the sake of clarity we will refer to the terminology applicable in England.
\textsuperscript{80} Paragraph 700 of the Explanatory Notes.
\textsuperscript{81} Article 8 of the European Convention of Human Rights as incorporated by the HRA.
\textsuperscript{82} The legitimate purposes permissible under Article 8 are in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
\textsuperscript{83} Paragraph 964 of the Explanatory Notes.
16. A "relevant policy objective" must be limited to the types of matters that could be considered to be a legitimate aim under article 8. A blanket discretionary power to allow an order to be made to amend any Act or confer any power to achieve a government policy could never be said to be proportionate and necessary in a democratic society. Further, the requirement to "strike a fair balance" between the public interest and the interests of an individual is a convenient yet misleading analysis that involves weighing up the greater good against a particular individual or group of individuals, who will often be hard pressed to show that their interest outweighs the greater public interest. It is only by aggregating the impact of the order across the many people who may be affected that the real extent of the privacy infringement can become clear.

17. Once the details of the proposed amendments are considered more questions arise. If data is shared pursuant to an information-sharing order will any record be made of this and the purpose for which it was shared? Who will monitor this, given the Information Commissioner is given powers to ensure compliance with the data protection principles, not with any orders made under this Part? The only role the Information Commissioner has is the ability to write a report about the order (within 21 days of being given a copy of the order) which must be laid before Parliament. If an order amends the DPA to revoke the data protection principles in any given case the Information Commissioner will have no authority to investigate any such breach, nor will he have the power to even investigate compliance with the order.

18. Furthermore, proposed section 50B would allow for any Act of Parliament to be amended by way of secondary legislation. This would therefore allow the order to amend the DPA itself and, on the face of it, amend the Human Rights Act 1998. The concern that secondary legislation could amend the HRA was raised when the Civil Contingencies Bill was going through Parliament which led to an amendment to ensure that the HRA could not be amended in this way. If these provisions are not removed from this Bill (as we strongly propose they should be) at the very least a provision should be included to make it clear that the power to "modify any enactment" does not extend to the HRA.

19. If there is a need to share information between government departments to ensure that government services are appropriately distributed, this can be dealt with by obtaining the consent of the people whose data is to be shared. Alternatively, if this is not possible, interference with personal privacy should be regulated by primary legislation and fully considered by Parliament. Secondary legislation is not the appropriate vehicle to achieve any of these aims.

February 2009

Memorandum submitted by Dr C N M Pounder

1. SUMMARY OF CONTENT

This written evidence contains:

— A description of major concerns that arise from the information sharing provisions. I have limited myself to my “top ten”; but no doubt other points will be raised by others.

— An explanation as to why the provisions in the Coroners and Justice Bill will have the effect of degrading the protections afforded by the Data Protection Act and why the proposed Code of Practice is in conflict with ministerial policy objectives and therefore cannot afford protection to individuals.

— A solution that will improve individual protection and Parliamentary accountability whenever Information Sharing Orders are proposed. This solution is built round an explicit linkage between the Sixth Data Protection Principle and Article 8 of the ECHR.

— An Appendix that sets out more detail about the significant divergences between Thomas/Walport recommendations and the information sharing provisions in the Bill.

— An Appendix that describes the remoteness (arguably, the irrelevance) of the Code of Practice to the actual information sharing that could be legitimised in an Order.

Note: Clause 152 of the Coroners and Justice Bill ("the Bill") introduces a number of clauses into section 50 of the Data Protection Act (DPA) (clauses 50A–50F) and, correspondingly, clause 153 would introduce several changes to section 52 DPA. References in this submission to clauses (eg S.50A(1)) are references to the proposed changes to DPA.

84 See section 23(5) of the Civil Contingencies Act 2004.

85 I have been working in data protection for more than 20 years and have given oral or written evidence to several Committees of both Houses of Parliament, including previous written evidence to the JCHR. All the historic evidence I have provided to the House is accessible from www.amberhawk.com.

I. Lack of Scrutiny

There should be no need to remind the Committee of the number of times it has made comments about its inability to scrutinise wide-ranging statutory powers which impact on Article 8 ECHR, nor to refer to the omission of a human rights memorandum which would explain why the exercise of these powers is likely to be consistent with human rights legislation. Once again, these very issues are presented to the Committee again in a heightened way by this Bill.

II. The Extension of Information Sharing Beyond Personal Data

The Bill extends information sharing by means of Statutory Instruments (SIs) well beyond what was explored in the Thomas/Walport report which limited its considerations to “personal data” sharing. The use of “any person” in S 50A(1) means the Bill applies to information sharing by any public or private body or individual. “Information sharing” powers are not limited to personal data (eg can apply the sharing of company confidential information), and the person who receives the shared information might be a foreign government.

III. The “Exceptional” May Become the Routine

Thomas/Walport recommended that the sharing of personal data should be legitimised in “exceptional” or “precisely defined circumstances” and found that there was little evidence that the current laws do in fact prohibit necessary personal data sharing. Their recommended regime (to allow for personal data sharing in “exceptional” circumstances) has been replaced in the Bill by one that legitimises “information sharing” in general whenever it falls within “a relevant policy objective” (S 50F defines a “relevant policy objective” to be “a policy objective of that Minister”). Appendix 1 contains more detail on the divergences between the Bill’s provisions and the actual Thomas/Walport recommendations.

IV. The Generality of an Information Sharing Order

There is no limit as to how “person”, “purpose” and “information class” are specified in an Order. There is no explicit requirement for the purpose of the information sharing to be one of those specified in Article 8(2) ECHR. This contrasts with RIPA (Chapter 1, Part II which lists A.8(2) purposes explicitly).

V. The Prospect of Unlimited Data Sharing from Large Government Databases

The provision in S 50A(6) appears to be designed to facilitate data sharing from any Government database without Parliament being explicitly informed of this sharing when an Order is before Parliament. The prohibition in the clause only relates to Part 1 of RIPA, and specifies that RIPA must be identified in any Information Sharing Order if information sharing is to involve a RIPA-related database (eg the proposed national database of communications data). By implication, sharing from other national databases (eg the national identity register of the ID Card Act) does not need to be explicitly mentioned in an Order. This means that those data can be shared from these other national databases by means of a general order-making provision. As there is no limit on the amount of personal data shared (and by whom), this prospect raises serious questions concerning the adequacy of Parliamentary scrutiny of public policy towards these national databases.

VI. The Exclusion of Critical Comment on the Purpose of the Processing

Under S 50D(4) of the Bill the Commissioner writes a report on an Information Sharing Order, but he is not allowed to comment on whether “the sharing of information enabled by the order is necessary to secure a relevant policy objective” (as S 50D(4) excludes S 50A(4)(a) from the Commissioner’s ability to make recommendations). The problem is that the “relevant policy objective” translates, in data protection terms, to the purpose of the processing of personal data, so the effect is to inhibit the Commissioner from

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86 See the Joint Committee on Human Rights (JCHR), 6th Report, Session 2007–8; Joint Committee on Human Rights (JCHR), 8th Report, Session 2004–05; Joint Committee on Human Rights (JCHR), 12th Report, Session 2004–05; Joint Committee on Human Rights (JCHR), 16th Report, Appendix 20D, Session 2006–07 and Joint Committee on Human Rights (JCHR), 19th Report, Session 2004–05. Recommendations 59 and 60 of the Home Affairs Select Committee’s report into ID Cards (session 2004–5); described powers in the ID Card Bill as “unacceptable”, yet they exist in the ID Card Act 2006 in the same form.

87 Thomas/Walport considered the sharing of “personal data”; the Bill concerns “information sharing” which extends beyond personal data.

88 Paragraph 8.40 Thomas/Walport.

89 The Committee should look at the legal advice published in connection with data sharing associated with the Citizens Information Project (Annex 8 of http://www.gro.gov.uk/cip/Definition/FinalReportAnnexes/index.asp). This suggests that the powers are consistent with Human Rights obligations because they fall within the “margin of appreciation”;

90 See the Joint Committee on Human Rights (JCHR), 6th Report, Session 2007–8; Joint Committee on Human Rights (JCHR), 8th Report, Session 2004–05; Joint Committee on Human Rights (JCHR), 12th Report, Session 2004–05; Joint Committee on Human Rights (JCHR), 16th Report, Appendix 20D, Session 2006–07 and Joint Committee on Human Rights (JCHR), 19th Report, Session 2004–05. Recommendations 59 and 60 of the Home Affairs Select Committee’s report into ID Cards (session 2004–5); described powers in the ID Card Bill as “unacceptable”, yet they exist in the ID Card Act 2006 in the same form.
commenting on the purpose of the processing. As most of the data protection principles, which it is the Commissioner’s duty to enforce are directly or indirectly linked to the processing purpose, it is quite possible that the Commissioner’s recommendations in relation to purpose could be ignored if the sharing proposed is “necessary to secure a relevant policy objective”. This could also prevent him ruling on questions of necessity and proportionality in relation to particular activities, undertaken for that purpose. In addition, it is difficult to see how the Commissioner can report on matters outside his remit (eg when information sharing involves the disclosure of information that is not personal data).

VII. The range of the powers

The powers are widely drawn and their application is very broad (ie orders could require disclosure of information by law; power to demand information; power to override an obligation of confidence; power to modify the impact of the Data Protection Act itself; provide for offences for a failure to share). There is no explicit provision in the main sharing provisions which would facilitate data subject rights and freedoms (eg right to object to data sharing; need to obtain consent to sharing in most cases). Instead, these provisions can “modify” the application of any law (including the Data Protection and Human Rights Acts) which could inevitably weaken the protection afforded to data subjects.

VIII. The lack of transparency

There is no obligation to disclose to the Commissioner or Parliament any background document or legal advice about a proposed Information Sharing Order. There is no obligation to answer any formal request for information from the Commissioner. There is no obligation to engage the public on the subject of a draft Information Sharing Order. The Commissioner’s first sight of a detailed proposal for information sharing could be a draft SI full of legal text and he could have only 21 days to respond. The Justice Committee has drawn this problem to the attention of the House.

IX. The irrelevance of the Code of Practice

There is nothing in these information sharing clauses which expressly states that the sharing of personal data has to be consistent with the Code of Practice. The Code is not the statutory code of practice envisaged by the Commissioner; rather it is just guidance on best practice. The Code is not subject to approval by Parliament; rather, it is subject to approval by the Secretary of State (SoS). There is no provision which sets out what happens if there is a disagreement between SoS and Commissioner about the content of a Code. There is no active role for Parliament in relation to the content of a Code. Appendix 2 contains more detail on the likely irrelevance of the Code to the actual information sharing.

X. Orders can be implemented to achieve purely administrative objectives

For example, suppose Ministers are told by civil servants that the problems associated with one of the Government’s big database projects would be resolved if they used criminal convictions from the Police National Computer. The Bill allows the Minister to argue that the sharing was necessary to secure a policy objective, it was proportionate as there was no other way of securing the policy objective (abandoning a large IT project is not an option), and it was in the public interest to secure the policy objective (given the amount of money committed to the project). This means that sharing which could be excessive and disproportionate in terms of Article 8 becomes necessary and proportionate in terms of realising a policy objective.

3. HOW THE PROPOSED CHANGES DEGRADE THE PROTECTION AFFORDED BY THE DATA PROTECTION ACT

Whenever government uses powers which affect the way in which the data protection principles apply to the processing (as in this Bill and other legislation), it follows that the safeguards for individuals cannot be safely grounded in the application of the Data Protection Act.

The first reason for this is that public sector data controllers can be placed in a different position when they are subject to legislation which require them to process data in specific ways. Whereas private sector data controllers, such as banks, must fit their processing around the obligations of the data protection principles, powers available to Ministers can change how the principles apply to public sector data controllers. These powers enable government, in a sense, to fix the data protection obligations so that they

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90 The word “purpose” is linked to all the Principles (except the Sixth Principle which deals with rights) either via the Principle, or its statutory Interpretation, or in Schedules 2-4 of the Act.
91 The Report, Coroners and Justice Bill, is published as the Committee’s Second Report of 2008-09, HC 185.
92 The Bill uses the phrase “necessary to secure a policy objective”, and this might be different to the requirement that any interference is a “necessary” interference with private and family life as required by A.8(2) of Human Rights. Similarly, because “proportionate to that policy objective” is used in S 50(4)(A) the Bill, this might be different to the requirement that any interference with private and family life is a “proportionate” interference (as required by A.8(2) of Human Rights law).
fit its processing objectives. Specifically, once the processing of personal data is defined as lawful by an Information Sharing Order, then the fairness obligation under the first principle is largely avoided; processing is automatically justified under condition 3 or 5 of schedule 2; processing automatically satisfies the lawfulness requirement of principle 2; application of some of the other principles may also be affected (see footnote). Obviously the ICO cannot enforce these principles as if they were unmodified by the order.

I am not convinced that a Code of Practice and related provisions can afford the necessary protection. I have already commented that there is nothing in Bill which expressly states that the sharing of personal data has to be consistent with the Code of Practice; that the Code is not the statutory code of practice envisaged by the Commissioner; that it is not approved by Parliament and is subject to SoS approval only. Even if these issues were resolved, the Code of Practice cannot possibly “trump” an order if that order defines the lawful purpose(s), the items of the personal data involved, retention times, and any onward disclosure.

However, my main objection to the Code is perhaps more fundamental. If one accepts that Ministers must be free to determine policy (ie to define the processing purpose which realises the policy objectives), then it is not possible to give the Commissioner control over a Code of Practice that describes how the data protection principles apply to that processing purpose. As most principles link to the purpose of the processing, any enforcement of the principles by the Commissioner necessarily involves a conflict with ministerial policy objectives.

This creates a dilemma. The more remote the Code is from the actual processing, the more it is an irrelevance if it is intended to protect data subjects. The closer it is to the processing, then more it is a barrier to Ministers achieving their policy objectives. The Bill’s approach to this dilemma is to define a Code of Practice that is remote from the processing of personal data (see Appendix 2 for detail) with the result that it affords little protection.

Finally, consider the case in which a data subject asks the ICO for an assessment where he thinks his personal data should not have been shared. The Commissioner would be judging a complaint in the context of his own decision to approve the Code and/or his tacit approval of the order. The complainant could well see this as a compromised or flawed procedure.

4. **There is a Solution to Improve Individual Protection and Parliamentary Accountability**

The Information Sharing Order procedure identified in this Bill will (inappropriately in my view) determine matters of significant public policy by use of secondary legislation that is not sufficiently scrutinised by Parliament. As these Orders potentially concern personal data relating to every UK citizen, any mistake in policy objectives risks further undermining the respect the public has for Parliament and for the political process in general.

If Ministers continue to overlook Parliamentary recommendations to the extent identified previously in the context of use of expansive powers which cannot be effectively scrutinised, it is likely they can choose to disregard any ICO report into which raises concerns about an Information Sharing Order. As happened in the case of the ID Card Bill, the Secretary of State (SoS) could dismiss any critical report coming from the Commissioner as merely a report from a body opposing the measure.95

I think that there is fairly simple solution which would improve Parliamentary scrutiny of order-making powers, protect the individual from excessive use of powers, and would not interfere with Ministerial policymaking. This solution starts with the recognition that any personal data sharing is an interference with private and family life. It follows that:

- all data sharing without consent of the data subject must be for a purpose identified in Article 8(2) (ie crime, national security etc), and
- all other data sharing (ie not falling within an Article 8(2) purpose) should be under the control of the individual concerned (there would either be consent to the data sharing or a right to object).

The solution has three components:

1. A linkage between Article 8 ECHR and DPA via the Sixth Data Protection Principle (dealing with rights of data subjects).
2. A new power of the Commissioner to challenge an Information Sharing Order (or any order under other legislation which requires the processing of personal data) on the grounds that the Order is inconsistent with Article 8.
3. An enhanced right to object to the information sharing in circumstances where the sharing is not for a purpose identified in Article 8(2).

93 Section 12 of the Children Act 2004, for example, provides Ministers with powers which can apply to the content of personal data stored on a database as well as accuracy, security, retention, management, disclosure and access. Such powers dictates how the data protection principles apply in practice—for example if the powers were used to define a 10 year retention period, then even if the ICO takes the view that this is excessive and unnecessary he is not going to be able to enforce the Third and Fifth Principles so as to require deletion of personal data after a shorter period.

94 See reference 2.

95 In the context of the ID Card, the then Home Secretary (Charles Clarke) dismissed the Information Commissioner’s concerns as he was “a long-standing opponent of the identity card system” (28 Jun 2005: Column 1157).
Commentary on component 1: Linkage between data protection and human rights

The linkage between the human rights and data protection regime would be created by the sixth data protection principle, if it were to be redrafted in the following form:

“Personal data shall be processed in accordance with the rights of data subjects under this Act and, in particular, personal data shall be processed for a lawful purpose that respects the private and family life or correspondence of each data subject”.

The interpretation of this principle has to be qualified in a way that engages the exemptions found in Article 8(2) (ie provide suitable exemptions for national security, law enforcement etc). In addition, by implementing a privacy right limited to the processing of personal data under the auspices of the Data Protection Act, the processing of personal data for the Special Purpose (ie freedom of expression purposes) will be left undisturbed, so investigative journalism, for example, would be unaffected by the change.

Commentary on component 2: Powers to enforce the linkage

The Commissioner would need powers to enforce the linkage between the two regimes. One way would be for him to be empowered to serve an “Article 8 Incompatibility Notice” which could be applied, for example, in the case of the use of Ministerial powers which have been generously interpreted.

An “Article 8 Incompatibility Notice” would be intended as a last resort power to be used where necessary to test whether a particular SI or element of primary legislation is compatible with human rights law. This notice could be appealed to the Courts by the Secretary of State so that the issue of compatibility of an SI can be challenged within the framework provided by existing human rights law, and can be tested via the Courts. Unlike the Code of Practice, this linkage does not create an interference with a Minister’s policy-making ability—it would be a last-resort safeguard to ensure that any Order which legitimises an interference (ie the sharing of personal data) is consistent with A.8(2).

My own view is that such a notice would work in the same way that the nuclear deterrent works—civil servants and Ministers would not want to take the risk of a notice being served. So the mere fact that the Commissioner could challenge an order on the basis of incompatibility with A.8 would ensure that Civil Servants and Ministers will be consulting the Commissioner (and providing full information) before finalising any proposed order. It would be analogous (but in reverse) with the provision (at s.53 FOIA) for ministerial override of an ICO requirement of government to release information under the Freedom of Information Act. The Commissioner has enough powers to engage with Parliament and the public if that is what is needed.

If the ICO issued such a notice it would signal a serious dispute between government and the Commissioner and one would expect a Parliamentary Committee to investigate. In fact, as a condition precedent to serving a notice, the Commissioner could be required to report to a Parliamentary Committee that a particular use of ministerial powers or procedure should be reviewed. Alternatively the Commissioner could be required to negotiate with the Minister before serving a notice and/or to report to Parliament. In other words, the existence of an “Article 8 Incompatibility Notice” could facilitate the badly-needed informed public and Parliamentary debate on any information sharing policy (and reassure the JCHR that ministers are accountable for the exercise of their powers).

It is recognised that an Article 8 Incompatibility Notice could be seen as politicising the ICO. However, the ICO has recommended that the current single Commissioner should be replaced by a multi-member Commission and this change should ensure that any Notice could only be served with the full support of that multi-member Commission. In addition, the existence of this Notice would make it difficult for the ICO to report to a Secretary of State for Justice—that is why the recommendation of the Justice Committee that the ICO should be funded directly by Parliament (and report to Parliament) should be supported.

Commentary on component 3: An enhanced right to object

The Section 10 DPA right to object to processing of personal data currently requires that the processing is causing or would cause substantial unwarranted damage or substantial unwarranted distress. Additionally, the right is restricted to processing undertaken in limited circumstances, so it is very difficult in practice to exercise, which means that it is rarely used by data subjects.

I propose that the S 10 right be changed so that where the processing objected to is personal data sharing carried out in circumstances which are not justified by reference to the purposes specified in Article 8(2), this right operates as easily as the right to object to the processing of personal data for a direct marketing purpose. In other words there would in these circumstances be no requirement of damage or distress,

96 Section 32 exemption disappplies most of the DPA (including the Sixth Principle) until publication of the personal data concerned.
97 This ability should apply, for example, if powers relating to the use of Section 22(2)(h) of the Regulation of Investigatory Powers Act 2000 (access to communications data “for any purpose.……..specified for the purposes of this subsection by an order made by the Secretary of State”) were used in a way that other Commissioner found to be excessive.
98 See reference 7.
99 The processing has to be legitimised in terms of paragraph 5 and 6 of Schedule 2 of the DPA.
substantial or otherwise, nor would the onus be on the data subject to show that the processing was 
unwarranted, and in addition, the right would have to be exercisable when the Schedule 2 ground for 
processing was condition 3—legal obligation, not just conditions 5 and 6 as at present. Since the processing 
purpose does not need to be concealed from the data subject, it would be appropriate to offer the right to 
object in a fair processing notice informing the data subject of the purpose of the processing. In this way, 
individual choices concerning data sharing can be exercised via the familiar opt-in or opt-out arrangements 
as used in direct marketing.

Such a revised right to object would not interfere with processing of personal data for powerful public 
interest purposes, such as crime prevention, but would arise where data sharing is undertaken merely for 
purposes of administrative convenience. Of course, it follows that if individuals trust the data sharing 
arrangements undertaken by public authorities in these circumstances, then it is unlikely that they would 
ever need to exercise the right to object.

The information sharing orders of this Bill do not allow much if any opportunity to object to data sharing 
and requires the public to trust whatever the public authority says are its data sharing requirements. It 
should, in my view, be replaced by a mechanism which requires the public authority to earn the trust of the 
public it serves if it wants to engage in the sharing of personal data for non-Article 8(2) purposes.

CONCLUDING COMMENT

My hope is that the Committee will recommend that these ideas are explored in order to see whether it 
(or something which would deliver similar safeguards) provides a politically viable and legally consistent 
framework that balances the divergent interests of Ministerial policy objectives, Parliamentary 
accountability and protection of individuals.

APPENDIX 1

MORE DETAIL ON THE SIGNIFICANT DIVERGENCES FROM THOMAS/WALPORT RECOMMENDATIONS

(a) “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”

A. Commentary on Recommendation 7(a):

Thomas/Walport clearly envisage “A statutory code of practice”… that “ would establish a central 
reference point from which further, more consistent guidance could be derived” and “We consider it vital to 
provide that the general code is laid before—and approved by—Parliament”.101

The model for such a Code would be on the lines of Section 67 of the Police and Criminal Evidence Act 
1984 where there is an SI which Parliament has to approve in order to activate the Code. Instead actual 
model for the Code in the Bill is provided by the Section 38 of the Road Traffic Act 1988 in relation to the 
Highway Code; here the Code is approved by the Secretary of State and laid before Parliament.

As the Code is for best practice guidance, approved by the Secretary of State, there might not be any 
Parliamentary debate re the Code, or any related benchmarking/other guidance. The Code only covers 
personal data whereas the sharing provisions relate to any information.

(b) “Recommendation 7(b):

We further recommend that the legislation should provide for the Commissioner to endorse context-
specific guidance that elaborates the general code in a consistent way”.

B. Commentary Recommendation 7(b):

Thomas Walport envisage the Commissioner having a role to modify the Code so that it impacts on the 
Order that allowed the data sharing. This recommendation has not been implemented. The Commissioner’s 
involvement depends now on use of Information Commissioner’s powers and these will have limited effect 
if the Order has modified the impact of the Principles on the processing.

100 Section 1(4) of the ID Card Act allows for such data sharing on “efficiency” grounds. The right to object would apply to this 
purpose but not, for example, to the crime related purpose.
101 Paragraphs 8.33 and 8.34 of Thomas Walport.
(c) “Recommendation 8(a):”

We recommend that where there is a genuine case for removing or modifying an existing legal barrier to
data sharing, a new statutory fast-track procedure should be created. Primary legislation should provide the
Secretary of State, in precisely defined circumstances, with a power by Order, subject to the affirmative
resolution procedure in both Houses, to remove or modify any legal barrier to data sharing by:

— repealing or amending other primary legislation;

— changing any other rule of law (for example, the application of the common law of confidentiality
to defined circumstances); or

— creating a new power to share information where that power is currently absent”.

C. Commentary on Recommendation 8(a):

Thomas/Walport see these powers as occasional and based on the circumstances (that the Commissioner
can test through application of his Code of Practice and statutory endorsement of context-specific
guidance). The report states “Although we found the most significant barrier or hindrance to effective data
sharing to be legal uncertainty and confusion, there are occasions when real legal obstacles—either statutory
or common law prohibitions, or the absence of the necessary legal power—inhibit the sharing of data” (my
emphasis; Para 8:40).

Thomas/Walport add: “When making an Order, the Secretary of State could include necessary conditions
and safeguards, addressing in particular any concerns of the Information Commissioner. And because of
its exceptional and potentially controversial nature, the Order would be subject to the affirmative resolution
procedure”. (My emphasis; Para 8:40).

Government Implementation: the “exceptional” or “precisely defined circumstances” of the Thomas/
Walport Recommendations are satisfied if they fall within any general “policy objective” of a Minister.
Because the Code of Practice is not linked to the information sharing Order, there is no guarantee that the
Information Commissioner’s concerns will be addressed. In addition, it is difficult to see how the
Commissioner can provide guidance on those matters that do not involve personal data

(i) Recommendation 8(b): “We recommend that, before the Secretary of State lays any draft Order
before each House of Parliament, it should be necessary to obtain an opinion from the Information
Commissioner as to the compatibility of the proposed sharing arrangement with data protection
requirements. There should be a requirement that a full and detailed privacy impact assessment
would be published alongside any application, to assist both the Information Commissioner and
Parliament’s consideration”.

(ii) Recommendation 8(b): Thomas Walport say that “we believe this process would not be
appropriate for large-scale data-sharing initiatives that would constitute very significant changes
to public policy, such as those relating to the National Identity Register or the National DNA
database “ (para 8.47)

D. Commentary on Recommendations 8(b):

Re Government Implementation of (i): In his assessment of the arrangements, the Commissioner cannot
report on the purpose of the processing. There is no explicit requirement for a Privacy Impact Assessment.
Publishing details in relation to an Order do not relate to the detail of draft Order but on the principle of
whether an Order is desirable. The Commissioner has 21 days to respond to a draft Order that may contain
pages of legal text.

Government Implementation of (ii): An information-sharing order may not enable any sharing of
information which would be prohibited by Part 1 of the Regulation of Investigatory Powers Act
2000 without the RIPA provision being explicitly identified. This implicitly allows large-scale data-sharing
initiatives involving other databases do not need to be explicitly identified.

APPENDIX 2

THE REMOTENESS OF THE CODE OF PRACTICE TO THE ACTUAL INFORMATION
SHARING

The data protection issues associated with the sharing of personal data will arise following the
implementation of an Order after it has been passed by a Parliamentary procedure that affords little scrutiny.
This means that the following stages, although important in themselves, can be remote from the actual
problem encountered by a data subject after his personal data have been shared. These stages are:

(a) Production of a Code of Practice on the sharing of personal data. This Code is limited to personal
data and not information sharing in general and cannot cover all the privacy issues (eg sharing
personal details from privately held, moderately structured manual files; commercial privacy). It
is therefore incomplete. This document is also likely to contain high level principles or the overall
best practice guidance that need to be applied when the content of the Order is being produced. As such its relevance to the problems encountered by data subjects who don’t want the personal data to be shared could be very limited.

(b) Debate about a policy objective. Ministers choose who and how they want to contact re the policy; the Information Commissioner can choose to respond if need be. Debate can be condensed into a relatively time period. As public policy debate centres on how best the public interest is served (eg the general benefit to the greatest number), its relevance to the actual processing problem encountered by a minority of data subjects could be limited.

(c) Production of a draft Order for the Commissioner to consider. There is no public debate on the detail of a draft Order. The Commissioner has 21 days to work out what is intended and is excluded from considering the purpose of the processing—yet it is the purpose of the processing that gives meaning to the data protection principles. The Commissioner is not provided powers to demand any information he might need (legal advice on human rights obtained by the Government).

(d) Enactment of the draft order by Statutory Instrument (SI). The SI procedures of Parliament is limited and any debate will focus on the policy and generalities associated with the policy objective of the protection of individuals in general. This also is likely to be remote from the actual processing problem encountered by data subjects.

(e) Processing of personal data legitimised by the Order. Government Departments will then interpret the Order and put it into practice.

The recognition of any data protection issue comes AFTER stages (a) to (d). At this stage if data subjects are adversely affected by the processing, it is unlikely that a breach of a data protection principle has occurred. This is because the powers in the Order have modified the impact of most Principles so that the complained-about processing is lawful (eg the Order may define the purpose of the sharing, its legal basis; legal recipients or third parties; what they can do with the personal data; for how long and what is disclosed).

Of course if there is a procedural failure (eg something like HMRC’s lost disks; failure to share accurate records), then the Commissioner can assist the data subject. However, he will be unable to enforce the data protection principles that relate to the purpose of the sharing itself, as the Order makes that processing purpose lawful.

Finally, the complaint will be to a Commissioner who is judging the complaint in the context of his own Code of Practice and/or his tacit approval of the Order. The complainant could well see this as a compromised or flawed procedure.

March 2009

Memorandum submitted by the Royal British Legion

INTRODUCTION

The Royal British Legion welcomes consideration being given by the Joint Committee on Human Rights to the issue of compatibility of the Coroners and Justice Bill with UK human rights obligations. We are also grateful for the decision of the Committee to invite the comments of relevant stakeholders to assist its legislative scrutiny of the Bill.

The Royal British Legion welcomed publication of the Coroners and Justice Bill and believes it provides opportunities for significant improvements to coroner governance, particularly with the introduction of a Chief Coroner. We hope that the Bill will strengthen the Inquest process and that provisions such as the Charter for the Bereaved People will further encourage the involvement of bereaved families.

However, the Bill also contains proposals that cause concern for the Legion on behalf of families of deceased Armed Forces personnel, particularly the provision for military inquests without a jury.

We believe the Bill offers the opportunity to go further, to ensure that comprehensive investigations take place, where required, and that bereaved families have full confidence in the system. In July 2008, the Royal British Legion and the War Widows Association held an event with bereaved Service families to discuss how support for families could be improved. Many of the points outlined in this submission were first raised at this event.

102 See the discussion associated with references 8 and 9.
The Royal British Legion (“the Legion”) was founded in 1921 to provide charitable welfare assistance to those who had served in the Armed Forces, their widows and dependents. This work continues today. The Legion has around 400,000 members and in 2008 we delivered over 100,000 welfare services. In any year around 150 service personnel lose their lives while serving in the Armed Forces. Since the beginning of Operation HERRICK and TELIC over 320 Armed Forces personnel have been killed fulfilling their duty to the nation in these theatres.

In September 2007, the Legion launched a campaign calling on the nation to “Honour the Covenant” with the Armed Forces and veterans. The campaign included a pillar calling for improvements to the support available for bereaved Armed Forces families.

One of the main issues facing bereaved families in early 2007 was the lengthy delays some people were experiencing before an inquest was held. The campaign highlighted the need to quicken the process and the specialist nature of military inquests. Additional resources have been placed at both the Oxfordshire and Wiltshire and Swindon Coroners to help speed the inquest process and avoid backlogs.

In the recently released Command Paper “The Nation’s Commitment; Cross-Government Support to our Armed Forces, their Families and Veterans”, the Government reported:

“Over the last two year, the Government has made significant changes to the support we provide to families which have to go through the painful experience of an inquest. These include making extra resources available to the coroners who are faced with a considerable extra workload, in order to minimise backlogs, and encouraging the transfer of cases to a coroner nearer to where the families live”.

The campaign also aimed to improve the information, support and advice provided to families; there has been some progress here as well. The Ministry of Defence (MOD) and the Ministry of Justice (MOJ) have produced improved information for bereaved families and made changes to the procedures within the MOD.

The Coroners and Justice Bill provides an opportunity for further improvements to be made, particularly opportunities for improvements in relation to the governance structure for Coroners, the introduction of new duties for employers to report actions taken on coroner recommendations to prevent future deaths and further involvement and information for families.

Clause 11 CERTIFIED INVESTIGATIONS

The Legion expressed its reservations over “secret inquests” when proposals were first put forward in the context of the Counter-Terrorism Bill. We recognise that the Government has responded to criticism and the proposals in this Bill have been modified. However, the Bill still gives the Secretary of State power to certify investigations to be held without the public, without the jury and without the involvement of the family of the deceased.

We consider with comments already made by the JCHR regarding shortcomings of the Bill and its concerns that a certified inquest would not meet standards required under Article 2 of the Convention.

We note that the Northern Ireland Human Rights Commission has drawn attention to the weight placed by the European Court of Human Rights upon the role of the bereaved family in defining standards for protection of life. According to one expert:

“The Court views the protection of the legitimate interests of the next-of-kin as a driving aspect to the workings of all accountability mechanisms”.

Military deaths, particularly deaths overseas and deaths associated with military engagements frequently involve issues of national security and relations with military allies in other countries. The challenges of providing an effective investigation do not start in the Coroner’s inquest. It is therefore more important that the proceedings of the Inquest must be demonstrably open and transparent to the bereaved family.

As long as Clause 11 remains in the Bill, we regret it may not be possible to dislodge the perception that crucial evidence will be heard behind closed doors. Additionally, the grounds for certification, as defined, seem to suggest the objection of another country and/or diplomatic relations will be placed above the need for a grieving family to find the truth.

Absence of Institutional Oversight

In light of public over deaths in military barracks, the “Deepcut Review” published in March 2006 recommended the introduction of a Commissioner to receive unresolved complaints from soldiers and their families about issues regarding their welfare, to investigate complaints, to supervise responses to complaints and to report annually to the Minister of State for the Armed Forces.

In 2008 the first Service Complaints Commissioner (SCC) was appointed. The Commissioner has no powers of investigation—only to refer matters raised to the chain-of-command and to review the conduct of the investigation once it has been completed. The Commissioner has also stated that complaints from families regarding deceased service personnel are outside the remit of the office, as the individual is no longer
serving. This provision fails to provide assistance for families who wish to pursue a complaint for independent investigation into military processes following a fatality, remembering that self-inflicted and other non-combat deaths are included.

While membership of the Armed Forces requires some restrictions to the rights of individuals who serve, such restrictions must be proscribed by law and strictly proportionate. There may be no limitation upon the protection of the rights of life.

The investigation of military deaths lacks independent oversight or the pattern of checks and balances established to cover the police and prison services. Is it also true that the MOD is the employer, the investigator, the prosecutor and holder of all documentary evidence.

— the military has no independent ombudsman or complaints commissioner, such as the Independent Police Complaints Commission, with effective powers of investigation;
— overseas military deaths are not subject to investigation by an independent civilian police force;
— evidence given at a military Service Inquiry (formerly the Board of Inquiry) is not admissible as evidence at a coroner’s inquest;
— there is no military equivalent to the HM Inspectorate for Prisons and Police;
— monitoring of training establishments by the Adult Learning Inspectorate instigated following the Deepcut investigation ceased after two years;
— absence of a public interest defence to protect military whistle-blowers from victimisation; and
— limitations on the investigatory powers of the Health and Safety Executive (HSE).

CLAUSE 7 WHETHER A JURY IS REQUIRED

The Legion believes that the investigation of some sudden deaths in military service must be subject to the same protection as that available for a death in a prison or police station.

The absence of independent oversight; issues of isolations and vulnerability, potential abuse of authority, access to weaponry, military codes of silence, confinement in barracks—all speak to the dangers of military life and the requirement for additional protection.

Since the issue of public confidence and serving the interests of bereaved families must be paramount. The Legion would like to see a legislative requirement for an inquest to be held before a jury where a death has occurred in military service during military training or where the individual was under the age of 18. We believe that in these cases it can be argued that military personnel are owed an additional duty of care as they are effectively in the care of the state.

LEGAL REPRESENTATION FOR BEREAVED SERVICE FAMILIES

At the July 2008 event organised by the Royal British Legion and War Widows Association for bereaved families of service personnel, a participant group was asked to discuss legal representation and advice at the event. The group was a mixture of those who had legal representation at inquest and those who had not. The following is a summary of points raised:

— There needs to be a detailed and independent legal guide on inquests for families.
— Families would like information and advice from an independent person—not the MOD.
— The MOD bring a large number of barristers to proceedings, this is intimidating for a lay person and can make it impossible for a lay person to find answers to their questions.
— The lack of legal representation for families creates a “them and us” feeling.
— There was a lack of advice and funding for legal representation.
— Legal representation should be an automatic right for families.
— Families want advice independent of the MOD.
— Documentation was difficult—full of legal jargon and confusion caused by redaction.
— Lack of communication between regiments and MOD, caused more difficulty getting answers.
— Families stated that they were “left to help yourself”.
— Access or the need for legal representation was not mentioned by any contacts with the MOD.
— Legal representation would help deal with enquiries from the media, particularly in cases of single fatalities, where family groups were not formed.
— One family member had applied for legal aid, but been turned down.
— Families couldn’t even apply for legal aid unless special dispensation had already been awarded.

The Deepcut Review conducted by Nicholas Blake QC considered the issue of legal advice an representation for families during the inquest process. His recommendation was:
“As part of the Military Covenant with the soldier, the MOD should ensure that the family of a deceased soldier have access to legal advice and, where appropriate, legal representation prior to, and during, the inquest of FAI (Fatal Accident Inquiry)”. The need for independent legal advice is apparent, and the first step should be for the Government to fund an independent legal advice for families. This could be piloted as an independent service delivered through the voluntary sector or within the SCC office. Advisers should be independent of the Government, but funding should be provided from the Treasury for this purpose.

The issue regarding legal representation is not as clear, and the costs involved could be significant. However, it is worth noting that there is a system in play for legal fees to be paid in exceptional cases, through the legal aid system. It is also worth highlighting that the hourly rates under the legal aid system are capped. No family would question the model of the inquisitorial regime established for the Coroner’s Court. But an investigation that throws up Article 2 issues concerning protection of the right of life, a death in an army training establishment or a death on military service overseas—all too frequently is met with what appears to be extraordinary efforts by the MOD to engage in damage limitation, restrict the public inquiry and defend the status quo.

Many families could simply require advice on the inquest process, its purpose or the role of coroners, while some might need representation during the inquest itself. While Legal Aid may be provided in “exceptional” circumstances, experience would suggest that the “exception” is too narrowly drawn, that decisions are subject to demoralising delay, and that bereaved families resent being means-tested for what, in all conscience, should be their right to effective representation.

INVESTIGATION BY ANOTHER CORONER

Bereaved relatives have welcomed the removal of barriers that have prevented inquests being held somewhere accessible to their extended family and friends. We hope that agreement may soon be reached with the Scottish government over legal measures to permit a Fatal Accident Inquiry in Scotland to investigate a military death overseas. But families are also concerned that the body of expertise built up, in particular by the Oxfordshire and Wiltshire and Swindon coroners should not be dissipated. The coroners in these two jurisdictions have established centres of excellence, unmatched in Europe. Their dedication and courage has won widespread admiration and inspired coronial staff in their commitment to meet the needs of the bereaved.

We have concerns regarding the need for knowledge of the military when carrying out an investigation into a Service death. This is particularly important where a fatality occurs in a theatre of operations.

We believe that a specific training course should be established by the Chief Coroner for military inquests, and only coroners that have completed the training should accept referrals from coroners in repatriation areas. The only alternative to this is for the Coroners and Justice Bill to include the ability for coroners to specialise in particular fields, this would allow coroners to become specialists in military inquiries. The systems should be flexible enough to change as operational commitments alter.

CORONERS RULE 43

The Legion welcomes recent legislation to provide for the post-inquest recommendations of the coroner to be made to the Secretary of State under Coroners Rule 43 and the requirement for a response within 56 days. However, we do not believe such a measure alone is sufficient. Information about the Rule 43 recommendations and responses to them should be collected centrally and made publicly available. Trends should be analysed and indications of persistent or systemic failure be reported in the Chief Coroner’s annual report.

We believe consideration should be given to the establishment of a mechanism that would, in the last resort, empower the Coroner to summons a person who has failed to provide an adequate response to a Rule 43 recommendation within the prescribed period. We also believe that the instrument should allow for the introduction of an Advisory Committee on Military Deaths to monitor the progress of coroner recommendations to the MOD.

February 2009