Legislative Scrutiny: Coroners and Justice Bill

Eighth Report of Session 2008-09

Drawing special attention to:

Coroners and Justice Bill
House of Lords
House of Commons
Joint Committee on Human Rights

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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).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee’s e-mail address is jchr@parliament.uk
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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: 26 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. We received a response from Bridget Prentice MP, Parliamentary Under-Secretary of State, on 26 February 2009. 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. 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;

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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.
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.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.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 findings14

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)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.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

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13 See for example, Ev 47, Ev 42-43.

14 Ev 47

15 Inquest, Second Reading Briefing, February 2009

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

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:

17 EN, paragraph 803
It is concerning that the rationale and scope for an already controversial proposal has been widened in this way.18

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.19

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.20

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

18 Ev 61
19 Ev 72
20 Ev 14
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The certification decision will be open to judicial review.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.

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.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.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.

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

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21 EN, paragraphs 804 - 807
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.
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,
the court, that there are good reasons why certain information should not be disclosed.\textsuperscript{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.\textsuperscript{29} 

1.36 \textbf{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.} 

\textbf{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.\textsuperscript{30} 

1.38 The law as it currently stands allows the Coroner to sit \textit{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.\textsuperscript{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 

\textsuperscript{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. \n
\textsuperscript{29} Thirtieth Report of 2007-08, paragraph 115. \n
\textsuperscript{30} EN, paragraph 802 \n
\textsuperscript{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:

- 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}

\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

\textsuperscript{35} Professor Martin Shinen, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 4 February 2009, UN HRC, A/HRC/10/3.
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:\footnote{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.}

- Page 6, Line 1, Leave out Clause 11
- Page 7, Line 1, Leave out Clause 12
- Page 7, Line 18, Leave out Clause 13
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.49

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.50

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.51

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). 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/jchr06_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 workplace; 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
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
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] QB1 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. 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. 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. 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.

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.

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

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92 Ev 17
93 Ibid
94 Ev 17 - 18
particular, powers of search and seizure, should be provided in primary legislation.\textsuperscript{95} 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.\textsuperscript{96}

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”.\textsuperscript{97} 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.\textsuperscript{98}

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

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{97} S.I. 2008/1652.

\textsuperscript{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. 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.

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.

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-

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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,
and the Court of Appeal has provided further guidance in a recent case considering the 2008 Act in detail.  

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. 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. 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.

**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”. 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.

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114 *R v Mayers* [2008] EWCA Crim 2989.
115 The DPP’s Guidance helpfully prescribes the details of each case which must be kept on the register.
116 PBC, 5 Feb 2009, Col. 109 (Q265).
117 New Zealand Evidence Act 2006, s. 112(5)(b).
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.

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.

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”

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.

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 the CPS has identified a total of “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.”

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.

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**

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.

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.

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.”

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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.

\[124 \text{PBC, 5 March 2009, Col. 547} \]
\[125 \text{DPP’s Supplementary Memorandum.} \]
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.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.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:

126 See PBC, 5 March 2009, Col. 542.
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. 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, 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. 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.\(^{131}\) 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”.\(^{132}\) They argue that the new defence of diminished responsibility should be extended to include those who commit “mercy killings”.\(^{133}\)

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.\(^{134}\) 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.\(^{135}\) 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-

\(^{132}\) Ev 44 - 45
\(^{133}\) The British Humanist Association make a similar argument. See Ev 37 – 38.
\(^{134}\) PBC, 3 Feb 2009, Written Evidence (CJ 01)
\(^{135}\) Clause 41.
control are that it was attributable to a fear of serious violence, 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”.

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, whether or not the fear was in fact reasonable.”

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. “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. 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.
Encouraging or assisting suicide

1.159 The Bill replaces the current offences of aiding, abetting, counselling or procuring suicide\textsuperscript{141} and of attempting to do so\textsuperscript{142} with a single offence of encouraging or assisting suicide\textsuperscript{143}. 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\textsuperscript{144}.

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

\textsuperscript{141} Section 2(1) Suicide Act 1961.
\textsuperscript{142} Section 2(1) Suicide Act 1961 read together with Section 1 Criminal Attempts Act 1981.
\textsuperscript{143} EN, paragraphs 327 and 825
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{148} In order to be a prohibited image, an image must be pornographic, fall within subsection

\textsuperscript{145} PBC, 5 Feb 2009, Col 106.


\textsuperscript{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, \textit{Monitoring the Government’s Response to Court Judgments finding Breaches of Human Rights}, HC 128/HL Paper 728, paragraphs 9 – 13.

\textsuperscript{148} Clause 49(1).
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’”.

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.

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.

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.

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

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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.

150 EN, paragraph 856.


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.\textsuperscript{153}

1.172 We had concerns about the potential subjectivity of the offence\textsuperscript{154} 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.

\textbf{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”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{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.\textsuperscript{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

\textsuperscript{153} EN, paragraph 859.
\textsuperscript{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.
\textsuperscript{155} Ev 27 - 28
\textsuperscript{156} PBC, 3 March 2009, Cols 473-490.
\textsuperscript{157} PBC, 5 Feb 2009, Col. 104.
\textsuperscript{158} Ev 27
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”. 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.

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.

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.

159 Ev 28
161 PBC, 3 March 09, Col. 488.
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”.\(^{163}\) 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.\(^{164}\) 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:

\(^{163}\) 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.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.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.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. **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.**

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165 Ev 30 - 31
166 NC 31
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

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.  

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.

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).

1.189 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 Ov 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

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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.\textsuperscript{172} 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).\textsuperscript{173} 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.\textsuperscript{174}

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.\textsuperscript{175}

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.\textsuperscript{176} 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

\textsuperscript{172} Clause 83
\textsuperscript{173} Ev 26
\textsuperscript{174} Ev 26
\textsuperscript{175} Ev 26
\textsuperscript{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. 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. 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. 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.

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
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.185

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.186 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.187

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.188 Both the Committee for

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185 Clause 90
186 Sakhnovskiy v Russia, App 21272/03, 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.

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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.197 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.198

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.199

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, [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 Coroners 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.

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203 See for example, HC Deb, 26 Jan 2009, Col 66.
72 Legislative Scrutiny: Coroners and Justice Bill

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)

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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. 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

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.”210 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)

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)
### Formal Minutes

#### Tuesday 17 March 2009

Members present:

Mr Andrew Dismore MP, in the Chair

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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.

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[Adjourned till Tuesday 24 March at 1.30pm.]
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