RESEARCH PAPER 09/27
19 MARCH 2009

Coroners and Justice Bill: Committee Stage Report

This is a report on the House of Commons Committee Stage of the *Coroners and Justice Bill.* It complements Research Papers 09/06 and 09/07 prepared for the Commons Second Reading.

The *Coroners and Justice Bill* deals with a wide range of matters including: coroners; death certification; murder, infanticide and suicide; prohibited images of children; hatred against persons on grounds of sexual orientation; criminal evidence, investigations and procedure; sentencing; legal aid; criminal memoirs and data protection.

The Government has made announcements in relation to two of the most controversial provisions in the Bill. Towards the end of Committee Stage, Bridget Prentice confirmed that the Government would withdraw clause 152 which would have enabled Ministers to make "information-sharing orders". Jack Straw has also announced the tabling of Government amendments intended fundamentally to recast the provision which would exclude juries from some inquests.

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ISSN 1368-8456

Summary of main points

The *Coroners and Justice Bill* deals with a wide range of matters including: coroners; death certification; murder, infanticide and suicide; prohibited images of children; hatred against persons on grounds of sexual orientation; criminal evidence, investigations and procedure; sentencing; legal aid; criminal memoirs and data protection.

There were sixteen sittings of the Public Bill Committee between 3 February 2009 and 10 March 2009; it was originally programmed to have fourteen sittings but two further sittings were added because the Committee had not finished its consideration of the Bill. Concerns were raised on a number of occasions about the wide range of matters included in the Bill and that they were not being dealt with in more specific separate bills.

A number of amendments, most of which were proposed by the Government, were agreed on a range of issues. The amendments were mainly minor or technical or intended to clarify the intention of the provision.

The Government has made announcements in relation to two of the provisions in the Bill which have given rise to most concerns, both inside and outside Parliament.

Towards the end of Committee Stage, Bridget Prentice, junior Justice minister, confirmed that the Government would withdraw the controversial clause 152. The clause (now clause 154), which would enable ministers to make “information-sharing orders”, had previously survived intact despite opposition attempts to amend and then remove it.

Since the Public Bill Committee Stage concluded, Jack Straw, Secretary of State for Justice and Lord Chancellor, has announced the tabling of Government amendments for Report Stage intended fundamentally to recast the controversial provision which would exclude juries from some inquests.

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I Introduction

A. Background

The *Coroners and Justice Bill* deals with a wide range of matters including: coroners; death certification; murder, infanticide and suicide; prohibited images of children; hatred against persons on grounds of sexual orientation; criminal evidence, investigations and procedure; sentencing; legal aid; criminal memoirs and data protection. The Bill was introduced in the House of Commons on 14 January 2009 as Bill 9 of 2008-09 and had its second reading on 26 January 2009. It had sixteen sittings in a Public Bill Committee between 3 February 2009 and 10 March 2009; it was originally programmed to have fourteen sittings but two further sittings were added because the Committee had not finished its consideration of the Bill. The Bill as amended in Public Bill Committee has been reprinted as Bill 72 of 2008-09. A Bill gateway is available on the Parliamentary intranet, which gives additional information and detail of the progress of the Bill. Further background and information about the Bill's provisions is included in two Library Research Papers which were prepared for the Bill's second reading: *Coroners and Justice Bill: Crime and Data Protection*[1] and *Coroners and Justice Bill: coroners and death certification.*[2]

B. Second reading debate

The Bill received its second reading on 26 January 2009.[3] A wide range of the issues included in the Bill were debated. Particular criticism was levelled at the process which would enable the Secretary of State to certify that an inquest must be heard without a jury; and the data sharing provisions. Jack Straw, Secretary of State for Justice and Lord Chancellor said:

> The proposals before the House today are intended to make the coroner and justice systems more effective, responsive and accountable, and to enable them to meet the expectations of victims, witnesses, bereaved families and the wider public.[4]

Dominic Grieve, Shadow Justice Secretary, indicated that the Conservatives supported some of the measures in the Bill and opposed others.[5] He concluded:

> We will work constructively with the Government to improve the Bill, wherever that is possible. We agree that there are good things in it, and we want to facilitate their passage on to the statute book if possible. That is why we will not seek to oppose the Bill's Second Reading tonight. We will strive to improve it in Committee and on Report, and to remove those parts that are unnecessary or counter-productive, or that we deem to be merely offensive. … I put the Government on notice that if the Bill is not substantially amended—particularly in

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1 RP 09/06
2 RP 09/07
3 HC Deb 26 January 2009 cc26-125
4 HC Deb 26 January 2009 c43
5 HC Deb 26 January 2009 cc43-52

> the area of data sharing, but also in other areas—we will oppose it on Third Reading, because its mischief will wholly outweigh the undoubted benefits that it could confer if the Government would listen sensibly to the views being expressed right across the House.[6]

David Howarth, Liberal Democrat Shadow Minister for Justice, moved an amendment to oppose second reading.[7] He said:

> This is a hotch-potch of a Bill. A Second Reading debate is supposed to be about the principle of the Bill, but it is not clear how a Bill such as this, which at a conservative estimate deals with 28 different topics and amends 56 different Acts of Parliament can have any single principle at all, apart from being a sort of Christmas tree Bill, on to which the Government can hang any topic they think useful to debate from the point of view of the all-important media grid, the device by which future announcements are planned out for the year in advance and by which this country has been governed for the past 12 years ...
>
> The other principle of legislative drafting that the Bill seems to follow is that of the red rag and the smuggle. A red rag is a provision in a Bill that is designed to attract the attention of hot-headed Members of this House, and about which the Government do not, in reality, care very much either way, while they smuggle in, largely unnoticed and unchallenged, a lot of significant stuff that otherwise might attract severe criticism. The problem with this Bill is that it is not entirely clear which provisions are the red rags and which are the contraband. Working on the general principle that to avoid scrutiny in Committee, the usual tactic is to put the contraband at the end and the red rag at the start, my guess is that the provisions on data sharing are the contraband and those on secret inquests are the red rag.[8](…)
>
> I therefore ask the House, for the reasons set out in our amendment, not to pass the Bill today. It contains some good proposals, but also dangerous proposals on data sharing, and proposals on secret inquests that are, though a red rag, undesirable. A lot of the rest of the Bill seems ill-thought-through, rushed and muddled.[9]

The amendment was defeated by 278 votes to 47.

C. Evidence

At the first four sittings of the Public Bill Committee, evidence was taken from representatives of the following organisations:

- Coroners Society of England and Wales
- Inquest
- Royal College of Pathologists
- Cardiac Risk in the Young

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6 HC Deb 26 January 2009 c54
7 HC Deb 26 January 2009 c60
8 HC Deb 26 January 2009 cc60-1
9 HC Deb 26 January 2009 c70

- Liberty
- NSPCC
- Barnardo's
- Internet Watch Foundation
- Magistrates Association
- Nacro
- Victim Support
- Prison Reform Trust
- The Law Society
- Criminal Bar Association
- Justice for Women

Ministry of Justice Ministers and officials gave evidence at the first session on 3 February 2009. In addition, evidence was given by Professor Jeremy Horder, Law Commissioner and Professor of Criminal Law, Oxford University, Keir Starmer, Director of Public Prosecutions, Richard Thomas, Information Commissioner and David Smith, Deputy Information Commissioner.

Written evidence submitted to the Committee is available on the *Coroners and Justice Bill* page on Parliament's internet site.

II Committee stage

This part of this paper summarises the main amendments agreed, other significant areas of debate, and issues which a Minister said would be considered further. It does not cover all matters which were considered by the Public Bill Committee or technical amendments. Concerns were raised on a number of occasions about the wide range of matters included in the Bill and that they were not being dealt with in more specific separate bills. The Public Bill Committee decided to consider the data protection provisions in Part 8 of the Bill immediately after the coroner and death certification provisions in Part 1, and this paper follows the same order.

A. Coroners and death certification

1. Amendments agreed

Government amendments were agreed to Clause 31 and Schedule 8, which deal with investigations by the Chief Coroner or by a judge at the Chief Coroner's invitation:

- to extend the pool of persons eligible to conduct investigations, to include, when requested to do so, retired High Court judges, retired Court of Appeal judges and retired coroners and senior coroners
- to require a person nominated or requested to conduct an investigation to formally agree to do so
- to close a potential loophole in respect of a High Court judge who used to be a senior coroner

- to deal with who should hear appeals where the investigation was conducted by a judge or retired judge.[10]

2. Other significant areas of debate

A number of other issues were considered in connection with clause stand part debates and/or proposed amendments. These include:

a. Duty to investigate certain deaths (Clause 1)

Henry Bellingham, Shadow Minister for Justice, expressed concern that, unlike the draft Bill, the Bill did not include provisions dealing specifically with deaths abroad.[11] Bridget Prentice, junior Justice minister, said that once a coroner became aware that the body of a deceased person had arrived in his/her area, no matter where the death occurred, there would be a duty to investigate. She also said that the Chief Coroner would have a central role in establishing relationships with other countries in order to obtain the necessary information for carrying out an investigation.

In reply to concerns raised by George Howarth (Labour), Bridget Prentice said that the Chief Coroner would have power to direct coroner resources to deal with delays and backlogs; and in a case of mass fatalities, a local authority could appoint further deputies to assist.[12]

b. The costs of transferring inquests from one coroner area to another

Bridget Prentice said that, generally, the transferring area would pay the costs of a transferred inquest but that the local area would be expected to pay for a military inquest.[13]

c. National or local service

Jenny Willott, Liberal Democrat Shadow Chancellor of the Duchy of Lancaster, regretted that the Government had not decided to go ahead with a national coronial service which she said would have enabled fair sharing of the burden of work, so backlogs would arise less frequently, and would address the issue of uneven resources.[14]

d. Narrative verdicts

Clause 5(2) provides that, where necessary to avoid a breach of any right under the European Convention on Human Rights, the purpose of an investigation to ascertain how the deceased came by his/her death should be read as including the purpose of ascertaining in what circumstances the deceased came by his/her death: ie a narrative verdict would be required. Henry Bellingham proposed that this provision should be

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10 PBC Deb 24 February 2009 c324
11 PBC Deb 10 February 2009 c150
12 PBC Deb 10 February 2009 c151
13 PBC Deb 10 February 2009 c162
14 PBC Deb 10 February 2009 c163

removed from the Bill following oral evidence to this effect from André Rebello, Honorary Secretary of the Coroners Society of England and Wales.[15] Bridget Prentice said that subsection (2) would provide the necessary flexibility to take into account future judgments changing or extending the circumstances in which convention rights apply and that removing it would make it unclear as to what is required in Article 2 inquests[16] over and above what is normally required.[17]

Jenny Willott proposed that juries and coroners should be able to provide a narrative verdict whenever they felt it was necessary. Bridget Prentice considered that there was already scope for these.[18] Madeleine Moon (Labour) cautioned that narrative verdicts could cause families further distress.[19]

Jenny Willott also wanted to remove the restriction on the coroner or jury expressing an opinion on any matter other than those specified in section 5.[20] Bridget Prentice replied that the purpose of a coroner's investigation was to ascertain facts and not to apportion blame.[21] Furthermore a coroner could properly express views in any report to prevent future deaths.[22] This amendment was defeated on a division by 9 votes to 6.

e. Juries

In response to probing amendments about the circumstances in which a jury would be required for an inquest, Bridget Prentice said that she did not think that every death in custody or state detention necessarily needs an inquest with a jury: "The most obvious example would be if someone died of natural causes in a prison hospital". She resisted attempts to extend the categories of cases where a jury would be required.[23]

f. Medical examiners

Henry Bellingham raised the issue of the independence of medical examiners and proposed that they should be appointed not by Primary Care Trusts (PCTs) and Local Health Boards (LHBs), as in the Bill, but by the Chief Coroner in consultation with PCTs and LHBs.[24] Jenny Willott proposed that the senior coroner should be consulted before the appointment of a medical examiner, to ensure that there was a local link.[25] Bridget Prentice replied that medical examiners would be appointed by the PCTs and LHBs because they would then be closely involved with clinical governance teams and would be able to improve medical provision locally. She said that medical examiners would also

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15 PBC Deb 10 February 2009 c168

16 Article 2 of the European Convention on Human Rights establishes the right to life and imposes on the state both negative obligations not to take life intentionally and positive obligations to protect life. The positive duty to protect life implies a duty to investigate unnatural deaths, including but not confined to deaths in which state agents may be implicated

17 PBC Deb 10 February 2009 cc179-80

18 PBC Deb 10 February 2009 c180

19 PBC Deb 10 February 2009 cc176-7

20 PBC Deb 10 February 2009 c174

21 PBC Deb 10 February 2009 c179

22 PBC Deb 10 February 2009 c181

23 PBC Deb 10 February 2009 c211

24 PBC Deb 24 February 2009 c276

25 PBC Deb 24 February 2009 c277

have to work closely with coroners and that the Department of Health had made clear that PCTs and LHBs would involve the local coroner in appointments of medical examiners. The new national medical adviser would agree the national job description for medical examiners as well as the protocol setting out the minimum level of scrutiny that medical examiners must complete, and would also contribute to the development of training for medical examiners and have a role in the resolution of any disputes that arise between medical examiners and coroners.[26]

Bridget Prentice agreed that it was essential that medical examiners were seen to be independent and indicated that further details might be forthcoming:

> I am not saying that there is not scope for further clarification of the accountability and leadership arrangements for medical examiners at a national level. The Department of Health is actively looking at such matters in the context of the health service, and I hope that by the time we discuss the Bill on Report—certainly while the Bill is undergoing its parliamentary process—I can provide further detail on what the Department of Health envisages in that context.[27]

Henry Bellingham pressed for a division on his amendment which was defeated by 9 votes to 5.

g. Investigations concerning treasure

Henry Bellingham wanted to restore a number of provisions relating to investigations concerning treasure which had appeared in the Government's earlier draft Bill but do not feature in the Bill, including the appointment of a Coroner for Treasure.[28] He suggested that these measures might be made self-financing. Bridget Prentice said that the provisions had been removed because the small number of inquests could be absorbed in the system.[29] Furthermore, treasure investigations would benefit from other parts of the Bill such as the ability to transfer cases. She said that other proposed amendments were unnecessary or would be difficult to monitor. A vote on the new clause which would have appointed a coroner for treasure was defeated by 9 votes to 6.

h. Appointment of coroners

At present, the county coroner appoints his/her deputy and assistant deputy. The Bill would instead give power to the local authority to appoint area and assistant coroners (the revised names for deputy coroners and assistant deputy coroners). Henry Bellingham wanted to revert to the present position and spoke of the need to ensure the independence of the service and the need for the coronial service to work smoothly and well.[30] Bridget Prentice rejected the proposal, saying that it would be contrary to the Government's aim to create an open transparent and consistent system for appointing

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26 PBC Deb 24 February 2009 c278
27 PBC Deb 24 February 2009 c279
28 PBC Deb 24 February 2009 cc291-7 The Coroner for Treasure would deal with treasure investigations across England and Wales in place of the coroner in whose area the find was made
29 PBC Deb 24 February 2009 c298
30 PBC Deb 24 February 2009 c307

coroners.[31] The additional check in the new system would be that the Chief Coroner and the Lord Chancellor would have to consent to the appointment of all coroners.

i. Resources

Bridget Prentice resisted amendments proposed by Jenny Willott which would have introduced standards for coroners into the Bill and were intended to improve uniformity of service. Further amendments would have required the local authority to take into account minimum standards when providing funding.[32] Bridget Prentice considered that, where necessary, suitable provisions were already included in the Bill.

j. Witness anonymity orders

The Committee also considered inquests in the context of Clause 70 (applications for witness anonymity orders). Edward Garnier, Shadow Minister for Justice, sought to extend the regime to coroners' inquests.[33] Maria Eagle, Junior Justice Minister, argued that it was not necessary to make provision for coroners' courts in the same way as for criminal courts and referred to the House of Lords judgment in the Davis case in support.[34]

3. Ministerial undertakings to consider

a. Certified investigations: investigation by judge, inquest without a jury

Members of the Committee spent a considerable time debating the process which would enable the Secretary of State to certify that an inquest must be heard without a jury (Clause 11). As at second reading, this provision proved controversial.[35] Edward Garnier said that the public should know that "the Opposition are deeply opposed to the clause".[36] Henry Bellingham said that it would undermine public confidence in the coronial system.[37] He proposed that, rather than the Secretary of State certifying an investigation, he or she should refer the matter to the Lord Chief Justice who would determine whether the investigation would concern a matter that should not be made public. He said that if the clause were to remain in the Bill, further safeguards would be needed.[38] He stated that various organisations including Inquest, Liberty and Justice were also unhappy with the provision.

David Howarth said that the clause was all about the exclusion of the jury.[39] He queried how it was possible to have juries in espionage and terrorism cases but not at inquests. He proposed that the Secretary of State would have to apply to the court for a certificate; that the Secretary of State must be satisfied that national security and only national

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31 PBC Deb 24 February 2009 c308
32 PBC Deb 24 February 2009 cc312-5
33 PBC Deb 5 March 2009 c533
34 *R v Davis* [2008] UKHL 36
35 PBC Deb 10 February 2009 cc217-224, PBC Deb 24 February 2009 cc227-262
36 PBC Deb 24 February 2009cc229-230
37 PBC Deb 10 February 2009 c218
38 PBC Deb 10 February 2009 c220
39 PBC Deb 10 February 2009 c223

security was at risk, the court would have to be satisfied of that and also that hearing the case in private would be the only way to protect national security. He considered that, under the scheme, there should still be a jury, but the hearing should be in private. He questioned why the anonymous witness provisions elsewhere in the Bill could not also apply to inquests. He thought that the coroner should be replaced by a High Court judge only when appropriate, and not automatically. He further considered that it should be possible to security-vet the jury.

Edward Garnier said Clause 11 would not be compliant with article 2 of ECHR.[40] He acknowledged that there were circumstances in which the full facts could not be brought to light, but highlighted the provisions in existing law which had been used in the inquest into the death of Jean Charles de Menezes:

> There, we had a High Court judge sitting as the coroner, but we also had a jury and witness-anonymity orders. A number of the police officers who were implicated in the death of the deceased were able to appear by letter as opposed to their full name, and they were allowed to appear behind screens and were not visible to press photographers or journalists, as far as I can recall. However, they were visible to counsel appearing at the inquest, and if not to the family of the deceased, then to a supporter of the family of the deceased. There was a form of openness allied to sensible precautions to protect the identity of police officers who conduct secret work.
>
> Sir Michael Wright, the retired judge who conducted the inquest, dealt with applications for personal public interest immunity. He also dealt with a number of other procedural applications, which afforded those who needed their identities or particular information to be kept secret to be satisfied. The jury reached a conclusion—whether we agree with that conclusion or not is neither here nor there—but the procedure was such that there was public accessibility, and the family of the deceased, which was desperately upset and deeply dissatisfied by the inquest's conclusion, were at least there and were able to take part. They would not be able to do that in a clause 11 inquest. I therefore ask the Government to re-examine the de Menezes inquest to see whether there are lessons to be learned before they charge into passing clause 11 and leading themselves into yet further trouble.[41]

He said "the Government are building a vast obstacle to public acceptance on the basis of two cases, which, with common sense—as deployed by Sir Michael Wright in the de Menezes case—could be overcome".[42]

David Kidney (Labour) said that there was a two stage process: first the certification of an issue of national security or public interest. He considered that this should be for the Government, which has responsibility for national security and public safety. The Government's decisions on this issue should be subject to judicial review. David Kidney agreed that the grounds on which the Secretary of State could conclude that a matter should not be in the public domain were too wide, but did not agree that they should be

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40 PBC Deb 24 February 2009 c235
41 PBC Deb 24 February 2009 c236
42 PBC Deb 24 February 2009 c237

limited to national security alone.[43] The second stage was determining the rules for running an inquest to comply with such a certificate. He considered that this should be for the judiciary who should be able to select from a series of options.

Jenny Willott spoke of the position in Northern Ireland:

> There is strong public opinion and concern in Northern Ireland about certified inquests. Following Ministry of Justice questions at which the issue was raised, the Secretary of State wrote to hon. Members saying that it would not apply to legacy cases and, thus, not to cases that are still awaiting inquests on deaths still outstanding from the troubles.
>
> Given the strength of feeling in Northern Ireland among both the public and those at the Human Rights Commission, and the fact that circumstances in Northern Ireland are different from those in the rest of the United Kingdom, the need for the situation and the judicial process to be absolutely transparent and open is more apparent there than almost anywhere else in the UK. If that does not happen, it could lead to all sorts of political issues as well.[44]

Tim Boswell (Conservative) commented on the two inquests which had stalled and which had been put forward by the Government as the reason why this provision was necessary and asked whether legislating to deal with them was the best solution.[45]

Jeremy Wright (Conservative) was concerned that the clause did not require the Secretary of State to carry out any kind of balancing act with the broader interests of open justice or the interests of family and other considerations.[46]

Various specific aspects of the clause were also criticised, including that one of the reasons for certification was "in order to prevent real harm to the public interest"; this was perceived as being a "catch-all" provision and the meaning of the word "real" in this context was queried.

In response, Bridget Prentice said that the debate had shown that there were no easy answers to address how to protect highly sensitive material relevant to a coroner's investigation that could not be made public.[47] She put on record that one of the two inquests already referred to as having stalled pending legislation was now able to proceed. The coroner had decided that the sensitive material was not needed. Bridget Prentice said that this demonstrated the fact that it would be only very exceptional cases in which the proposals set out in clause 11 would ever need to be used.[48]

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43 PBC Deb 24 February 2009 c239
44 PBC Deb 24 February 2009 c242
45 PBC Deb 24 February 2009 cc249-250 For background information, see Library research paper 09/07, *Coroners and Justice Bill: coroners and death certification* p14 and pp26-32 (at 19 February 2009)
46 PBC Deb 24 February 2009 c251
47 PBC Deb 24 February 2009 c253
48 PBC Deb 24 February 2009 c254

The Minister confirmed that she was open to considering other solutions if one could be found[49] and said that she would reflect carefully on the suggestions which had been made.

In response to specific proposed amendments, Bridget Prentice said "Clearly we have failed in our attempts to narrow down the definition [of the circumstances in which a certificate might be issued] in response to the comments made in relation to counter-terrorism provisions".[50] She recognised that there were still considerable concerns about the breadth of the criteria and said that the Government would look again at this area. The Minister said that she could see the merit in Opposition proposals to transfer the responsibility for certifying an investigation to the judiciary, but said "If Opposition Members thought about it, they might find that the judiciary would not be overly keen to make decisions about whether something had a national security implication".[51] She said that she would look at the possibility of vetting juries in more detail, that David Kidney's proposals were worthy of further consideration, and that the Government would come back on Report with more detail, which she hoped to be able to discuss with Opposition Members before then.[52] She concluded:

> I assure the Committee that I have registered the strong desire to narrow the criteria against which a certificate may be issued and to have a greater measure of judicial oversight. I will reflect very carefully and, of course, we will come back to it on Report.[53]

Henry Bellingham pressed for a vote on the clause stand part question. The question was agreed by 8 votes to 7.

Subsequently, at oral questions on 17 March 2009, Jack Straw announced that he was tabling amendments "fundamentally to recast the proposals":

> First, the criteria for the Secretary of State's certification will be significantly tightened. Secondly, the Secretary of State's certificate will trigger consideration by a High Court judge sitting as a coroner. It will then be for the judge, not the Secretary of State, to decide whether it is necessary to hold an inquest without a jury or whether special measures with a jury would be adequate to protect the sensitive information concerned. There would in any event be a right of appeal to the Court of Appeal….
>
> Of course I understand that the whole House—not least those on the Opposition Front Bench and the Liberal Democrat spokespeople—will wish to reflect on the detailed wording of the amendment, but I hope and believe that it will meet the concerns that have been expressed. First, there was concern that the criteria for the initial certification by the Secretary of State were too wide. The criteria have been narrowed, and it will no longer be sufficient for the Secretary of State to

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49 PBC Deb 24 February 2009 cc254-5
50 PBC Deb 24 February 2009 c255
51 PBC Deb 24 February 2009 c256
52 PBC Deb 24 February 2009 c259
53 PBC Deb 24 February 2009 c260

> have the opinion that a non-jury inquest is required; they will need to decide themselves that it is necessary.
>
> Secondly—this is crucial, as this objection was raised on both sides of the House—the decision about whether to hold a non-jury inquest will not be a matter for the Secretary of State. It will be a matter for the High Court coroner, and I am sure that he or she will, in every case, look first at whether special measures of the kind adopted in the criminal courts—including the gisting of secret information to a jury—would be adequate. It is my hope that, in most cases, they will…
>
> There will be circumstances—although I think they will be very few and far between—in which the learned judge might decide that the only way the protected information can be the subject of a proper judgment by the court while remaining protected will be for the judge to sit alone without a jury. I hope, however, that in many cases, the judge will come to the view that it will be adequate for the protected information to be gisted or summarised in a safe way to the jury.[54]

b. Legal aid for representation at an inquest

The concept of having greater access to legal aid for representation at an inquest attracted support from members of all the main parties.

Tim Boswell proposed that legal aid should be available to families in jury cases and in cases where the coroner wished to make a report to a person who might have power to prevent future deaths (in relation to this latter category of cases, Bridget Prentice said that a coroner would not necessarily be able to tell in advance whether they were likely to issue such a report[55]). He also proposed a waiver of the means test in such cases and said:

> It seems to me that the basic principle referred to in our evidence last week is one of equality of arms. If we are not having a single-advocate single-function inquiry, but if we are having an inquest where the state with all its resources is represented by legal counsel, it seems to me inequitable not to offer the same opportunities to the families of the bereaved. That is particularly the case where their loved ones have gone to serve their country, but it is equally the case that the descendants and family of people who I was implying might be unworthy or undesirable, who have come into the way of the state and for whatever reason have been killed, should have the opportunity of getting to the truth of what took place, and hearing a public justification of it made...[56]

David Kidney considered that there should be entitlement to legal aid subject to the applicant fulfilling certain conditions including the means test.[57]

Bridget Prentice replied that even if the family of the deceased did not have legal representation, the coroner would be capable of ensuring a proper balance and a proper

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54 HC Deb 17 March 2009 cc762-3
55 PBC Deb 10 February 2009 c204
56 PBC Deb 10 February 2009 c193
57 PBC Deb 10 February 2009 c199

investigation and that the presence of lawyers would not necessarily result in any party receiving a "better deal from the coroner".[58] However she acknowledged that there was an issue and said that it was important that bereaved people and other interested parties should have more accessible opportunities for involvement in the process.[59] She also gave an indication that she would consider the matter further and said:

> Another idea that I thought somebody might come up with is if a Department or an agency decides to employ barristers, it would also pay for such representation for the bereaved family. That might focus a few minds quite sharply. I am not advocating that at this stage in the Bill, let me hasten to add. These are issues that I think we can consider over the next few weeks.[60]

c. Other issues

Bridget Prentice also said that she would give further consideration to a number of other issues including:

Deaths abroad: Tim Boswell suggested that a death reported to the consular authorities overseas should be notified to the UK authorities, perhaps to the Chief Coroner, so that a decision could be taken as to whether or not an inquest should take place in the UK;[61] also, that the consular authorities should have a duty to inform families of their rights.[62]

Reports to prevent future deaths: various amendments were proposed by members of all the main parties relating to coroners' reports at the end of an inquest to a person the coroner considers might have power to take action to prevent other deaths: for example, Henry Bellingham proposed that coroners "must" (and not "may" as set out in the Bill) make such a report; that a coroner should be able to request that the relevant person submit an update on their actions within three months; and that coroners should forward all updates to the Chief Coroner at the end of each year, who would lay them before Parliament.[63]

Juries: David Howarth asked specifically whether death resulting from the act or omission of the security services would be added to the categories of case where a jury is required. Bridget Prentice replied "That would be a far better argument than that for the general extension to state officials." She said that her objection to his proposed amendment was its lack of precision and that a different amendment might be considered differently.[64] Members of the Committee also questioned why it was proposed to reduce the number of jurors from the present 7 to 11 to between 6 and 9. Bridget Prentice said:

> One of the reasons is to give more flexibility to the coroners, because sometimes there are difficulties in assembling juries for coroners' inquests, so it was to give

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58 PBC Deb 10 February 2009 c202
59 PBC Deb 10 February 2009 c204
60 PBC Deb 10 February 2009 c205
61 PBC Deb 10 February 2009 c156
62 PBC Deb 10 February 2009 c158
63 PBC Deb 10 February 2009 c170
64 PBC Deb 10 February 2009 c212

> them that little bit more space. It was as simple as that. However, I am not going to go to the wall on the size of jury in a coroner's inquest. If Conservative Members want to revert to the present system, I shall happily listen to the arguments.[65]

Post-mortem examinations: Tim Boswell referred to the General Medical Council setting out requirements for quinquennial recertification and demonstration of fitness to practise for general medical practitioners and asked whether the Chief Coroner would adopt a similar requirement in relation to those approved to conduct post-mortem examinations.

Power to remove body: Bridget Prentice said that she would consider with the National Association of Funeral Directors and others how to take forward a matter raised by Jenny Willott about training and guidance for undertakers who remove bodies from certain locations (including railway lines).

National medical adviser: Jenny Willott proposed that the Bill should provide for the appointment of a national medical adviser to the Chief Coroner with power to make regulations establishing minimum standards. Bridget Prentice said that she did not consider that it was necessary to include this matter in the Bill because the national medical adviser's position did not need to be statutory, but that if members of the Committee strongly felt otherwise she would consider the matter further.[66]

Eligibility for appointment as deputy Chief Coroner: Henry Bellingham queried why senior coroners should not be eligible for appointment as Chief Coroner or deputy Chief Coroner.[67] Bridget Prentice said that she considered the post of Chief Coroner required somebody with senior judicial status but that she would consider again the question of eligibility for appointment as deputy Chief Coroner.[68]

Funding: in response to Alun Michael (Labour/Co-op), Bridget Prentice said that she would consider whether there was a need to strengthen and clarify the requirement for there to be an agreement between a local authority and a police authority before coroners' officers are withdrawn.[69]

Public information role: Bridget Prentice said that the Bill was probably not flexible enough to enable the Chief Coroner to carry out public information work including the provision of subscription services. David Kidney had hailed the Australian system in this regard. She continued that the Government was looking at how to improve the Bill and that an amendment might be forthcoming at report stage.[70]

Expenses: Jenny Willott said that it was inappropriate for coroners to be personally responsible for paying the expenses of an inquest and then to claim them back. Bridget

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65 PBC Deb 10 February 2009 c215
66 PBC Deb 24 February 2009 c282
67 PBC Deb 24 February 2009 c308
68 PBC Deb 24 February 2009 c311
69 PBC Deb 24 February 2009 c317
70 PBC Deb 24 February 2009 c320

Prentice refused to accept her amendment but said that she would think seriously about whether to change the Bill.[71]

Annual report: Jenny Willott proposed that the Chief Coroner should have a duty to produce an annual report that would be provided to the Lord Chancellor, "who would be obliged to publish it and lay it before the House of Commons, so that it would be openly available and there would be opportunities for much broader oversight of any issues arising".[72] Bridget Prentice replied that there were sufficient powers elsewhere in the Bill dealing with making annual reports but continued, "Having said that, there is no great principle at stake here, and although I will not undertake now to table a Government amendment at a later stage, I will reflect before Report on what the hon. Lady has said".

B. Data protection

1. Amendments agreed

No changes were made to Part 8 of the Bill which would amend the *Data Protection Act 1998*. Of the provisions in this Part, the most controversial has been clause 152 (now clause 154) on information sharing.

2. Other significant areas of debate

Debate on the data protection provisions began with clause 151 which would allow the Information Commissioner to serve an "assessment notice" on a public sector organisation. Such a notice would allow the Commissioner to audit data handling procedures, without the consent of the data controller, to determine compliance with the *Data Protection Act*. A number of amendments were moved, and subsequently withdrawn. These were primarily concerned with extending the scope of assessment notices to the private sector and introducing sanctions for non-compliance with such a notice. An example of the latter might include a refusal to hand over requested documentation.

David Howarth moved an amendment to remove the restriction whereby assessment notices would apply only to government departments.[73] The ensuing debate referred to the fact that some private organisations carry out public functions and to submitted evidence of "forever shifting" boundary lines between public, private and voluntary sectors.[74] For the Government, Bridget Prentice argued against what she termed an "unwarranted extension" of the assessment notice scheme,[75] which would overburden the private sector in conflict with the Hampton principles (a reference to Sir Philip Hampton's 2005 review, *Reducing administrative burdens: effective inspection and enforcement*).[76]

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71 PBC Deb 24 February 2009 c321
72 PBC Deb 24 February 2009 c327
73 PBC Deb 26 February 2009 c337
74 PBC Deb 26 February 2009 c340
75 PBC Deb 26 February 2009 c346
76 PBC Deb 26 February 2009 c347

On the matter of the enforcement of assessment notices, both the Conservatives and Liberal Democrats introduced amendments to provide legal sanctions for deliberate non-compliance. A new clause would further remove immunity from prosecution enjoyed by government departments.[77] Bridget Prentice acknowledged the Information Commissioner's wish for a penalty or other sanction for non-compliance, but pointed to his existing powers to issue enforcement notices to which government departments may already be subject.

The Bill would also require the Information Commissioner to prepare a code of practice about assessment notices which would require the approval of the Secretary of State before it could be issued. Henry Bellingham moved, and later withdrew, an amendment to require instead the approval of both Houses of Parliament using the affirmative procedure. David Kidney questioned the justification for the Secretary of State approving the code, citing the Information Commissioner's concern to maintain his independence from Government. Bridget Prentice, for the Government, was not persuaded that a code of such relatively narrow scope should be subject to that parliamentary procedure.[78]

Clause 152 of the Bill would enable Ministers to make "information-sharing orders" enabling "any person" to share information which consists of or includes personal data. Among other things, the orders would be able to impose conditions on information-sharing, "provide for a person to exercise a discretion in dealing with any matter" and "modify any enactment".[79] An information-sharing order could also provide for the creation of offences.[80] While the scope and breadth of these proposed powers attracted considerable debate in the Committee, a particular focus was the clause's extension of the definition of information sharing:

> For the purposes of this Part a person shares information if the person […] consults or uses the information for a purpose other than the purpose for which the information was obtained.[81]

Amendment 52, tabled by David Howarth and supported by the Conservatives, would have removed this definition which may be viewed in the context of the second data protection principle that "Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes."[82] At the same time David Kidney noted that a review on data sharing by the Information Commissioner and Sir Mark Walport had recommended the establishment of "a new statutory fast-track procedure" to allow data sharing.[83] The amendment was negatived on division by 8 votes to 7.[84] Clause 152 was then ordered to stand part of the Bill by the same margin, following the Minister's earlier offer to discuss it in further detail.[85]

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77 PBC Deb 26 February 2009 c343-4
78 PBC Deb 26 February 2009 cc352-354
79 "modify" includes amend, add to, revoke or repeal – new section 50F, DPA
80 PBC Deb 26 February 2009 c380
81 New section 50A(3), DPA
82 *Data Protection Act 1998*, Schedule 1
83 PBC Deb 26 February 2009 cc381, 387
84 PBC Deb 26 February 2009 c396
85 PBC Deb 26 February 2009 c390

Clause 153 was ordered to stand part of the Bill. It provides for a data-sharing code of practice to be drawn up by the Information Commissioner. There was some debate over the extent to which the Bill linked the code to the information sharing powers of clause 152.[86] Schedule 18 was agreed to after a brief debate about the Bill's exemption from a civil monetary penalty for data protection breaches brought to light by dint of an assessment.[87]

3. Ministerial undertakings to consider

On clause 151 (assessment notices) Bridget Prentice gave undertakings to consider further the issues of scope and parliamentary scrutiny. As to who should have the final say on the code of practice on assessment notices, she undertook to consider whether responsibility should be handed over to the Information Commissioner rather than the Secretary of State. She said that she would pay close attention to the future conclusions of the Delegated Powers and Regulatory Reform Committee on this matter.[88] The Minister gave an indication that further consideration would be given to extending the scope of assessment notices to some private sector organisations, specifically those operating under a contract with a pubic authority to carry out functions of the latter.[89]

Bridget Prentice undertook to consider very carefully the recommendations of the Delegated Powers and Regulatory Reform Committee on the level of parliamentary scrutiny for the two codes of practice covered in Part 8 of the Bill (assessment notices and data-sharing).[90]

The Committee debated clause 152 on information sharing in its ninth and tenth sittings on 26 February. A day later, the *Guardian* published an article by the responsible Secretary of State, Jack Straw, which included the following:

> The climate in a post-9/11 world is much harder than anyone imagined, even in the immediate aftermath of that outrage. I do not pretend we've got everything right. We haven't. Take the data-sharing measures proposed in the coroners and justice bill. Their aim is good, but parliamentary scrutiny has thrown up justifiable concerns that the powers provided could be misused. It's not our intention but I agree, so we are acting to get a much better balance between data protection and access to services.[91]

Speaking in the Public Bill Committee on 10 March 2009, the Parliamentary Under-Secretary of State for Justice (Bridget Prentice) said:

> Further to that point of order, Mr. Cook. I accept that the Committee in its scrutiny is aware of the difficulties with clause 152. In fact, I have said in Committee that I want to see whether

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86 PBC Deb 26 February 2009 cc392-396
87 PBC Deb 26 February 2009 cc397-400
88 PBC Deb 26 February 2009 c354
89 PBC Deb 26 February 2009 cc347-348
90 PBC Deb 26 February 2009 c353

> "we can come up with a more streamlined version that takes into account the fact that Parliament has a role in scrutinising the decisions of Ministers".——[Official Report, Coroners and Justice Public Bill Committee, 26 February 2009; c. 390.]

I also said:

> "I acknowledge that the clause as drafted has the potential to be far wider than it is intended to be."——[Official Report, Coroners and Justice Bill Public Bill Committee, 26 February 2009; c. 386.]

As a result of our scrutinising matters in Committee, we have decided to remove clause 152. I apologise to the hon. Member for North-West Norfolk that such details should have appeared in the press before they were brought to the attention of the Committee. However, I have followed the proper process and have asked Cabinet colleagues to withdraw the clause from the Bill so that we can have further consultation. I hope that we shall be able to look at how we can draft a more appropriate clause, not necessarily under the Bill, but at some further stage, so that we can put in place a proper data-sharing provision. I hope that I have clarified the position.[92]

C. Murder, infanticide and suicide

1. Diminished responsibility

Edward Garnier introduced an amendment which he said was not intended to be a licence for mercy killing but which would have allowed the partial defence to apply if the killing occurred while the victim (rather than the killer) was suffering from an abnormality of mental functioning. He said, "we need to bear in mind that there may be people who kill others out of a sense of hopelessness caused by the medical or other condition of the victim".[93] Maria Eagle said that this would lead to some "bizarre and undesirable effects" and would not serve the interests of justice.

Edward Garnier introduced further amendments designed to introduce the concept of developmental immaturity into the partial defence in order to extend access to those under the age of 18. David Howarth supported this amendment saying, "An adult who acts like a 10-year-old gets that taken into account, but a 10-year-old who acts like a 10-year-old does not. As I understand it, the intention of the amendments is to correct that point and to give children the benefit of being children, without having to say that they are immature for their age".[94] Maria Eagle rejected the proposal for two reasons: because the Government were not persuaded that there was an underlying problem which needed to be addressed and because including the provision might risk opening up the defence too widely and catching inappropriate cases.[95] She said that the partial defence would be available to any person, whether over or under 18, suffering from an abnormality of mental functioning arising from a recognised medical condition, who could make out the other requirements of the clause.

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91 "Our record isn't perfect. But talk of a police state is daft: There was no golden age of liberty. Since 1997, we have done more to extend freedoms than any government before", *Guardian*, 27 February 2009

92 PBC Deb 10 March 2009 cc585-6

93 PBC Deb 26 February 2009 c401

94 PBC Deb 3 March 2009 c411

95 PBC Deb 3 March 2009 c418

David Howarth criticised the Government's approach and the departure from the Law Commission's proposals to reform the law relating to murder more generally.[96] He introduced a number of probing amendments intended to clarify the meaning of "recognised medical condition", determining mental responsibility, and the causation requirement.

Maria Eagle justified the Government's departure from the Law Commission's proposals:

> The Law Commission's proposals were somewhat radical, and they did not command total agreement between all stakeholders and users of the system, whom we must get on board to ensure that the system works and is credible. We were therefore not able to reach agreement that led us to believe that we should go forward with the full panoply of restructuring the offence as well as splitting it up—as set out by the hon. Member for Cambridge—at this time. However, we believed that it was important to proceed with some of the valuable reforms of the partial defences that are in the Bill. There will be a second stage to our considerations about whether to go forward with some of the other proposals in the Law Commission's report.[97]

Maria Eagle then set out the Government's approach on the various requirements of the clause. She considered that the "recognised medical condition" requirement would be a "substantial improvement on the current law"; and that there must be an element of causation: "We do not believe that the partial defence should succeed where random coincidence has brought together the activity of the person and the recognised medical condition".[98]

2. Loss of control

Clause 41 specifies that, for the partial defence to apply, the loss of control, which need not be sudden, must be attributable to one of the following triggers: fear of serious violence; words or conduct that cause the defendant to have a justifiable sense of being seriously wronged and constitute circumstances of an extremely grave character; or a combination of the two. The partial defence would only be available if a person of the defendant's sex and age with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have reacted as the defendant did. This partial defence would take the place of the current partial defence of provocation.

a. Amendments agreed

The Government accepted an amendment proposed by David Howarth to change the word "justified" in Clause 42(6)(b) to "justifiable", to bring it into line with the wording already used in Clause 42(4)(b).

A Government amendment, which was agreed, was described by Maria Eagle:

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96 PBC Deb 3 March 2009 c409
97 PBC Deb 3 March 2009 c413
98 PBC Deb 3 March 2009 c416

> Government amendment 266 aims to clarify when the trial judge must put the loss of self-control partial defence to murder to the jury. It is intended to put beyond doubt that the trial judge must ask himself, or herself, whether a properly directed jury could reasonably conclude that that defence might apply. In other words, where the judge takes the view that a jury could not reasonably conclude that the defence of loss of self-control might apply, he or she should not put the matter to the jury. It was always the Government's intention, in light of general case law regarding how judges should direct juries, for clause 41(5) to be interpreted as having that effect. However, we have reflected carefully on the wording and feel that it is important to put the matter beyond doubt.[99]

b. Other significant areas of debate

David Howarth criticized the provision, the moral base for which he considered to be less clear than that for diminished responsibility.[100] He said that his starting point was that he could not really understand why "loss of control" should, in itself, be a defence. He also said that the clause was confusing. He proposed a number of amendments including: removing the loss of control element; revising the drafting to ensure that there would not be a problem if a defendant had both a self defence and a loss of control argument; providing that the defendant must have an "objectively" justifiable sense of being seriously wronged (and here he specifically questioned how honour killings would be treated); adding honour killings to sexual infidelity as being circumstances where the partial defence should not be allowed; and redrafting this part of the clause more generally.[101]

Edward Garnier proposed changing the description of the partial defence from that of loss of control to that of gross provocation, which was the term used by the Law Commission. He was also concerned about the proximity of the aggravating or provoking event to the killing.[102]

Maria Eagle indicated that the new loss of self-control partial defence was intended to have a "higher bar than the current provocation defence". She rejected the various proposed amendments for the following reasons:

- the Government regarded the element of loss of self-control to be an important safeguard in ensuring that the defence could not succeed where the defendant kills in cold blood

- there should no longer be a requirement for the loss of control to be sudden because the current defence was "too generous to those who kill in anger, yet is not generous enough to those who have killed in fear"; the Government's approach would make allowance for slow-burn cases such as those involving domestic abuse cases and would bring the statute into line with developing practice in the courts

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[99] PBC Deb 3 March 2009 cc431-2
[100] PBC Deb 3 March 2009 c423
[101] PBC Deb 3 March 2009 cc425-6
[102] PBC Deb 3 March 2009 cc426-7

- the relevant clauses already offered sufficient protection to rule out unmeritorious cases

- adding a concept of "reasonable proximity" would add complexity and might be difficult to interpret; there was a great diversity in reactions of fear; a significant time delay might in any event undermine the claim that the defendant had killed following a loss of self-control

- the use of the term "gross provocation" was unnecessary because the clause covered the same requirement in a different way and because it might make it more difficult for the partial defence to succeed in cases based on fear of serious violence

- it was unnecessary to revise the drafting in relation to the self-defence defence and the clause would already exclude honour killings

- the word "justifiable" made the test objective.[103]

c. Ministerial undertakings to consider

Edward Garnier considered that anything done as an act of revenge, whether "considered" (as specified in the clause) or not, should be outside of the scope of the partial defence.[104] He later said that it should be a question of what was the dominant motive for the killing. Maria Eagle said that she would further consider the comments about dominant motives.[105]

The Minister said that she would also consider the wording about disregarding sexual infidelity: Opposition members wanted to ensure that, where relevant it could be taken into account and gave the example of a stepfather who rapes a stepdaughter.[106]

3. Encouraging or assisting suicide

Members debated at some length the subject of internet sites which give information about how to commit suicide, and the more general issue of assisted suicide/assisted dying. Concerns were raised that this matter was being dealt with in the Bill at all rather than in a separate Bill.[107]

Members debated a number of probing amendments. Edward Garnier said that proposed new section 2A(2) of the *Suicide Act 1961* was "so dense as to be almost incomprehensible".[108] He spoke of recent cases involving the potential liability of the relative of someone who travels to Switzerland in order to commit suicide and said:

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[103] PBC Deb 3 March 2009 cc430-441
[104] PBC Deb 3 March 2009 cc426-7
[105] PBC Deb 3 March 2009 c437
[106] PBC Deb 3 March 2009 c442
[107] PBC Deb 3 March 2009 cc448-473
[108] PBC Deb 3 March 2009 c449

> there is an advantage in what I would call a pragmatic English muddle. The more we tighten up this aspect of the criminal law, the more likely it will lead to prosecutions where many people do not want them or, possibly, to an absence of prosecutions where people want them. Although many may think the law untidy and unsatisfactory—this is not a party political issue or a matter on which my party is whipped—I prefer the approach that the DPP took of his own accord in deciding in the James matter not to prosecute. Again personally and not on behalf of my party, I applaud the Lord Chief Justice, Lord Judge, for adding his observations in the Purdy case.[109]

David Howarth raised two particular concerns: the drafting of the clauses, and the potential criminalising effect on teenagers who might discuss their feelings and suicide on the internet; and also that the Bill "puts into play the whole area of assisted suicide".[110] He said that there were concerns that the Bill would go beyond the Government's stated intention not to change the law but to modernise its language. Liberty had expressed concern that one of the effects of the Bill might be to make more vulnerable to prosecution friends and family members who help others go overseas for assisted suicide. David Howarth also questioned why it was necessary to include the word "assisting" in the offence rather than just "encouraging".

James Gray (Conservative) was particularly concerned about internet sites which give details of how to commit suicide and although he welcomed the Bill in trying to address the problem, he felt it did not go far enough. He objected to amendments proposed by Edward Garnier which would have removed from the offence acts "capable of assisting or encouraging" suicide.[111]

Maria Eagle stated that the Government was not widening the scope of the law through changes in the Bill. Any activity which was currently illegal would remain so. She considered that the current law, in section 2 of the *Suicide Act 1961* and section 1 of the *Criminal Attempts Act 1961*, was capable of catching all behaviour that ought to be unlawful, including the encouragement of suicide through the medium of the internet. Nevertheless, she said:

> However, the fact remains that, among the public, particularly those who have lobbied for stronger action on suicide websites——we all understand why they do——there is doubt about whether the current law is an adequate tool for dealing with such online activity. That is largely because the law is unnecessarily complicated, and the Law Commission shares that view. The law is difficult to understand and explain, and that is why we are changing and updating the language.[112]

Further information about assisted suicide and recent cases is available in a Library standard note, *Assisted suicide.*[113]

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[109] PBC Deb 3 March 2009 cc450-1
[110] PBC Deb 3 March 2009 c451
[111] PBC Deb 3 March 2009 cc455-8
[112] PBC Deb 3 March 2009 cc468-9
[113] SN/HA/4857

D. Images of children and other offences

1. Significant areas of debate

Clause 49 of the Bill seeks to extend the law proscribing the possession of child pornography. It is illegal to publish such images under the *Obscene Publications Act 1959* but the latter does not capture images published on overseas websites. Edward Garnier tabled an amendment to replace the offence of possession by one of publishing by any means whatsoever to another.[114] This would avoid the clause as drafted from capturing an individual who produced an "imaginary image"[115] for his own gratification and did not show (publish) it to another party. Debate took place about whether such non-photographic images legitimised abusive behaviour, thus increasing the risk of harm, or acted as a release, therefore reducing the risk.[116] The Parliamentary Under-Secretary of State for Justice (Maria Eagle) responded that "Possession offences are a way of trying to control these images when the internet is the main means of distribution."[117]

Jenny Willott moved an amendment to clause 52 to restrict the scope of the Bill to computer-generated images. She argued that the clause as it stands would capture "chalk on a board or pen on a piece of paper".[118] Maria Eagle suggested that even cartoon images posed a risk as they could be used as a grooming tool by offenders exploiting children's familiarity with such formats.[119]

Both Edward Garnier and Jenny Willott withdrew their amendments and all the clauses, and Schedule 11, relating to images of children were ordered to stand part of the Bill.

The *Criminal Justice and Immigration Act 2008* creates an offence of inciting hatred against persons on the grounds of sexual orientation. It also includes a "free speech" proviso to provide protection for discussion or criticism of sexual conduct. Clause 58 of the present Bill would remove the latter in what the Minister, Maria Eagle, described as "unfinished business" from the *Criminal Justice and Immigration Act 2008.*[120] She argued that the incitement to hatred offence has a very high threshold, while Henry Bellingham suggested that a low threshold applied in the practical investigation of complaints. A new clause tabled by David Howarth sought to provide for guidance on the operation of the offence, but he did not press this. On a stand part debate clause 58 was agreed by 11 votes to 3.[121]

2. Ministerial undertakings to consider

Maria Eagle gave no indication that she was prepared to move position on the child pornography provisions of the Bill.

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[114] PBC Deb 3 March 2009 c473
[115] PBC Deb 3 March 2009 c478
[116] PBC Deb 3 March 2009 cc480-482
[117] PBC Deb 3 March 2009 cc484-485
[118] PBC Deb 3 March 2009 cc486-487
[119] PBC Deb 3 March 2009 cc488-489
[120] PBC Deb 3 March 2009 c497
[121] PBC Deb 3 March 2009 c500

The Minister reminded the Committee of an earlier undertaking to issue short explanatory guidance about the offence of incitement to hatred on the grounds of sexual orientation.[122]

E. Criminal evidence, investigations and procedure

1. Amendments agreed - Anonymity in investigations

Clause 61 sets out a number of situations in which disclosure of information would not be in contravention of an investigation anonymity order. A number of government amendments were made, most notably to remove immunity for persons employed in public administration (e.g. local authority employees). In the unlikely event such persons were in possession of a witness's details, they would now by subject to the disciplines of the scheme.[123]

Clause 65 provides for the discharge of an investigation anonymity order. Government amendments to protect the anonymity of beneficiaries pending appeal were agreed.

2. Other significant areas of debate

a. Anonymity in investigations

Clause 59 identifies offences that may qualify for an investigation anonymity order: murder or manslaughter where the death was caused by a firearm or a knife. Edward Garner (Con) tabled amendments that sought to widen the ambit of qualifying offences.[124] For the Government, Maria Eagle wanted to introduce the new investigation anonymity order carefully bearing in mind the tradition of ensuring defendants can confront their accusers. She pointed to the clause's order-making power that would allow for future amendments (including extensions) of the qualifying offences.[125] David Howarth (LD) moved an amendment to remove the order-making power, arguing it had been drafted too broadly.[126] Both he and Edward Garnier subsequently withdrew their amendments and clause 59 was ordered to stand part of the Bill.

Clause 63 sets out the conditions for making an investigation anonymity order. It attracted some probing amendments in connection with age range (between 11 and 30) of the offender and the necessity of subsection 8(b). The latter provides a condition that a potential witness would be more likely to provide relevant information were an order made.

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[122] PBC Deb 3 March 2009 c498
[123] PBC Deb 3 March 2009 cc517-518
[124] PBC Deb 3 March 2009 cc500-501
[125] PBC Deb 3 March 2009 cc503-504
[126] PBC Deb 3 March 2009 c506

b. Anonymity of witnesses

Clause 70 deals with applications for witness anonymity orders that are the subject of clause 69. While clause 70 was ordered to stand part of the Bill, it attracted debate on a number of issues. One was whether explicit provision should be made on the face of the Bill for the appointment of an independent special counsel to assist in determining whether a witness anonymity order should be granted. This was considered particularly relevant where witness credibility was an issue. The Minister, Maria Eagle, disagreed with an amendment moved by David Howarth (LD) and a related amendment tabled by Edward Garnier (Con) and Henry Bellingham (Con). These amendments would both have included independent special counsel provisions, but the Minister pointed to an existing practice direction allowing courts to ask the Attorney-General to appoint such a counsel. David Howarth acknowledged that he and the Minister were only divided on a procedural issue and, with reservations, withdrew his amendment.[127]

New clause 37 (not moved), in the name of the Liberal Democrats, aimed to redress an inequality between the prosecution and defence applications for witness anonymity orders. The new clause would prevent the prosecution from disclosing the identity of defence witnesses to other defendants in multiple-defendant cases. Maria Eagle acknowledged this raised an important technical issue of the interplay with disclosure duties under the *Criminal Proceedings and Investigations Act 1996* (CPIA). Having given earlier consideration to this, the Minister argued that, in practice, explicit provisions in the Bill or amendments to the CPIA were unnecessary.[128]

Clause 71 sets out the three conditions that must be met before a witness anonymity order may be made. David Howarth spoke to amendments that sought apply constraints to some of these conditions, notably in relation to threats to property, subjective fear and undercover operations. Edward Garnier argued that a condition relating to the public interest, subsection 3(b), was "vague, wide and open to mischievous interpretation".[129] For the Government, Maria Eagle said that the present provisions (the clause broadly mirrors the *Criminal Evidence (Witness Anonymity) Act 2008*) appeared to work and that it was not sensible to interfere with them.[130]

c. Vulnerable and intimidated witnesses

A number of amendments were considered, but withdrawn or not moved, aimed at clarifying clause 83. While all child witnesses would now be treated the same in terms of the availability of special measures such as giving evidence by a video-recorded statement, under the clause, they would be allowed to ask to opt out.[131]

Clause 87 on the use of intermediaries for certain vulnerable defendants attracted debate of significant length on matters of language: these included why the Bill uses the

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127 PBC Deb 5 March 2009 c549
128 PBC Deb 5 March 2009 cc549-552
129 PBC Deb 5 March 2009 c561
130 PBC Deb 5 March 2009 c563
131 PBC Deb 5 March 2009 cc571-578

term "accused" rather than "defendant"[132] and a grammatical discussion on subsection 7.[133]

d. Miscellaneous

Clause 97 amends Schedule 1 to the *Bail Act 1976* to prevent a court granting bail to a person charged with murder unless the court is of the opinion that there is no significant risk that they would commit an offence likely to cause physical or mental injury to another person. Edward Garnier moved, and subsequently withdrew, an amendment that would have extended the scope of the clause to include attempted murder, manslaughter, rape or attempted rape. He also spoke to new clauses designed to "tighten up bail". In reply, Bridget Prentice said that a focus should remain on the "unique" crime of murder;[134] further, she argued that the new clauses were unnecessary as clause 97 struck a "proper balance between the right to bail and the exceptions that a court can take into consideration".[135]

3. Ministerial undertakings to consider

a. Anonymity in investigations

In connection with clause 59 on qualifying offences for investigation anonymity orders, Maria Eagle suggested that the Bill targeted the "most obvious mischief." She offered, though to discuss both the appropriateness and ambit of the order-making power that would allow for other offences in the future.[136] She was also happy to give some thought to widening the provision to take into account weapons other than firearms and knives.[137] Replying to a point raised by Jeremy Wright (Con) she offered to consider further whether serious assaults resulting later, rather immediately, in death might be brought within the ambit of the clause.[138] As to the breadth of the order-making power in clause 59(4), the Minister stated that the Government would carefully consider any recommendations by the Delegated Powers and Regulatory Reform Committee.[139]

b. Anonymity of witnesses

While the Minister argued that the provisions of clause 71 (conditions for making a witness anonymity order) worked, she offered to reflect on the formulation.[140]

David Howarth moved an amendment to clause 80 (interpretation) that would have made witness anonymity orders unavailable to magistrates courts. He withdrew the

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[132] PBC Deb 10 March 2009 cc586-591
[133] PBC Deb 10 March 2009 cc591-593
[134] PBC Deb 10 March 2009 c612
[135] PBC Deb 10 March 2009 c614
[136] PBC Deb 3 March 2009 c504
[137] PBC Deb 3 March 2009 c505
[138] PBC Deb 3 March 2009 c505
[139] PBC Deb 3 March 2009 c508
[140] PBC Deb 5 March 2009 c562

amendment on the grounds that the Minister (Maria Eagle) would write to him about three orders so far made in the magistrates court.[141]

c. Vulnerable and intimidated witnesses

Special measures for child witnesses are the subject of clause 83. The Minister (Bridget Prentice) undertook to see if the wording of proposed new section 4B(b) could be made clearer.[142] A more substantive undertaking was given in connection with clause 87 which provides for the use of an intermediary where certain vulnerable defendants are giving evidence. Bridget Prentice undertook to clarify that any determination on fitness to plead would precede an intermediary application; this followed a debate on a Liberal Democrat amendment.[143]

d. Live links

With the exception of a grammatical amendment (to clause 92), the clauses on live links were agreed. The Minister stated that she wanted to reflect on points made by David Howarth in connection with clause 91 (searches of persons answering to live link bail) "to make sure that there is no distinction between what happens to the live link bail defendant and someone bailed at court."[144]

e. Miscellaneous

Bridget Prentice undertook to give further consideration to clause 96 in so far as it relates to the designation of the Secretary of State for Business, Enterprise and Regulatory Reform "acting personally" as a prosecutor.[145] An amendment, subsequently withdrawn, had been moved by Edward Garnier; this amendment, "strongly" supported by David Howarth, would have prevented the Secretary of State from being added to the authorities able to give immunity from prosecution.

F. Sentencing

1. Amendments agreed

A number of Government amendments were agreed including:

- the removal of the delegated power conferred on the Lord Chancellor to make provision as to the proceedings of the sentencing council contained in paragraph 7(1) of schedule 13; Maria Eagle said:

> A similar power is contained in section 168 of the Criminal Justice Act 2003 in regard to the Sentencing Guidelines Council. That provision has never been used and, on reflection, and bearing in mind it is not unusual for other advisory bodies

[141] PBC Deb 5 March 2009 cc566-568
[142] PBC Deb 5 March 2009 c577
[143] PBC Deb 10 March 2009 c590
[144] PBC Deb 10 March 2009 c597
[145] PBC Deb 10 March 2009 c605

> to regulate their own proceedings, the Government do not believe that it is necessary to reproduce the power for the Lord Chancellor. The Council will therefore be able to regulate its own proceedings.[146]

- imposing a duty on the sentencing council to consult the Select Committee on Justice when drafting sentencing and allocation guidelines; this would mirror current arrangements

- changing the wording of the clause to clarify the duties of the sentencing council and the Lord Chancellor in relation to the council's duty to monitor the operation and the effect of sentencing guidelines[147]

- clarifying the power of the Lord Chancellor to assist the council to avoid any suggestion that the Lord Chancellor would have power to interfere in the running of the council[148]

2. Other significant areas of debate and Ministerial undertakings to consider

Alun Michael moved a number of amendments which he said were intended to provide clarity and focus in the work of the sentencing council. His amendments dealt with two issues: the purpose of the sentencing council and what it was meant to achieve; and who should be on the council and why.[149] He wanted to ensure that the priority of the council would be to reduce re-offending and that the people appointed to the panel should have experience that would help the guidelines to achieve this. The council should be guided by evidence of what works. He did not think that there should be a majority of judges on the council.

Alun Michael also felt that the Bill followed too closely the review undertaken by Lord Carter of Coles.[150] He repeated the concern of the Justice Select Committee about it.

David Howarth agreed with Alun Michael's proposed amendments.[151] He said:

> If we can reduce the risk of reoffending, we end up protecting the public. If we do that, we put the victim at the heart of the criminal justice system because we are ensuring that we have fewer victims in the future. The resource issue … is part of that. If we spend public resources on sentences that do not work as opposed to spending them on sentences that do, we are, by that very fact, allowing more crime than would have been the case had we used public resources in the best possible way. We have a duty to ensure that public resources are used in the best possible way to reduce reoffending and crime to the extent that we can.[152]

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146 PBC Deb 10 March 2009 c650
147 PBC Deb 10 March 2009 c654
148 PBC Deb 10 March 2009 cc654-5
149 PBC Deb 10 March 2009 cc619-620
150 Lord Carter of Coles, *Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales*, December 2007 (at 17 March 2009)
151 PBC Deb 10 March 2009 c622
152 PBC Deb 10 March 2009 c637

He said that he would go further and set up a national institute for criminal justice excellence, "giving it the job of testing what works, using existing research and its own commissioned research, including studies into the effectiveness of existing sentences". David Howarth also considered that there was a case for saying that judges should be required to take into account the evidence on effectiveness of sentencing. He expressed concerns with a number of the clauses in Part 4 of the Bill and also said that resource allocation questions should be built into the construction of the guidelines: "After that, the application of the guidelines should be a matter of legal interpretation, not of getting judges to carry out economic assessments of the effects of particular sentences".[153]

Edward Garnier said that the Conservatives did not accept that the new sentencing council should have the power to require sentencers to follow its guidelines, as opposed to taking them into account. He quoted concerns raised by the Bar Council in this regard. A vote on his amendment was defeated by 12 votes to 5. Edward Garnier also considered that resources should not impinge on the sentencing in any particular case.[154] His amendment on this subject was defeated by 10 votes to 7.

George Howarth, who sat on the working group chaired by Lord Justice Gage, whose recommendations are largely followed in the Bill, refuted Edward Garnier's concerns that the procedure laid down in the Bill would be too prescriptive and therefore would fetter the courts' discretion. For example, the court could take into account mitigating factors and also whether a particular offence in particular circumstances was so bad that aggravation should also be reflected in the sentence. He also said that the working group considered that that there should not be a direct relationship between sentencing and resources.[155]

In her response, Maria Eagle said that it was not the Government's intention to fetter the proper sentencing discretion exercised by the independent judiciary; or to tie sentencing decisions to the wider issue of the availability of prison places or of any other type of sentence. It was intended that the sentencing council would "enhance consistency, make sentencing more open, ensure that the public understand and have confidence in sentencing, and generally be an improvement on the current arrangements".[156] The Council would continue to be required to have regard to the cost and effectiveness of different sentences,[157] but "that does not imply that we should start setting guidelines that use only the cheaper sentences".[158] There would not be a requirement for the council to have regard to resources when drawing up or revising guidelines: "This is about the council providing additional information that can be used by Government to plan for the demand on prison places, community orders and new justice services".[159] She stated that courts need to know that they have to follow the guideline range for the seriousness of

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153 PBC Deb 10 March 2009 c641
154 PBC Deb 10 March 2009 c630
155 PBC Deb 10 March 2009 c636
156 PBC Deb 10 March 2009 c642
157 As is currently the case under s170(5)(c) *Criminal Justice Act 2003*
158 PBC Deb 10 March 2009 c645
159 PBC Deb 10 March 2009 cc644-5

the offence before them: "That is necessary to meet the principle of promoting consistency and predictability, which was highlighted in the Gage report".[160]

Maria Eagle rejected Alun Michael's proposed amendments because she was concerned about the impact they might have on the work of the council. She said that the Government had decided that there should be a majority of sentencers on the council and considered that this would be the best way in which to retain the confidence of sentencers while enabling the proper reflection of the wider views of the public.[161]

However, Maria Eagle indicated that she would consider further a number of the concerns which had been raised:

- whether there was sufficient flexibility in clause 103 (sentencing ranges)

- the duty to follow guidelines (clause 107):

> We certainly thought that having the ability to depart from guidelines in the interests of justice would guarantee judicial discretion in individual cases. We do not believe that the clause limits discretion, but we are willing to go away and think about this, and if members of the Committee, or others, want to suggest something that they think would be better, we will consider it. [162]

  Maria Eagle said that the Government were willing to continue considering how best to ensure a balance between consistency and judicial discretion

- Alun Michael's amendments aimed at clarifying and focusing the work of the sentencing council: Maria Eagle said that she would have a discussion with Alun Michael and on the basis of that discussion might be willing to consider whether the Government should propose further amendments[163]

- Jenny Willott's proposal that would enable, but not require, magistrates to add an extension period to a disqualification from driving which would start at the end of the previous period of disqualification, for repeat offenders; Maria Eagle said that the Government accepted that there was an issue but was not yet in a position to table amendments of to accept the one already tabled but hoped to introduce a provision once some outstanding issues had been resolved.[164]

A clause stand part vote was passed by 12 votes to 5.

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[160] PBC Deb 10 March 2009 c643
[161] PBC Deb 10 March 2009 c647
[162] PBC Deb 10 March 2009 c643
[163] PBC Deb 10 March 2009 c649
[164] PBC Deb 10 March 2009 cc658-9

G. Miscellaneous criminal justice provisions

1. Commissioner for victims and witnesses

Maria Eagle rejected amendments proposed by Alun Michael which would have given the commissioner a co-ordinating role in directing complaints to the correct body. Alun Michael also queried why the commissioner would not be able to conduct research, even if this power might never be used; and why reports would not have to be laid before Parliament.[165]

Maria Eagle outlined what the Government had done for victims and witnesses including introducing a code of practice and witness care units and the reasons why the provisions in the Bill were thought appropriate. She said that the Government remained fully committed to research, but that the commissioner would have access to Departmental research and would not need to undertake this separately. There was already provision for reporting to Parliament. Furthermore she did not want to create or impose another portal for complaints that may or may not help.

2. Treatment of convictions in other member states etc

A number of Government amendments were agreed which Maria Eagle described as minor and technical.[166]

H. Legal aid

Henry Bellingham moved amendments intended to reduce the proposed pilot scheme period from a maximum of three years to two years.[167] He said that he supported the principle of pilot schemes but said "surely the longer the pilot, the greater the cost". Jenny Willott agreed with the Conservative amendments. Bridget Prentice resisted the amendments on the basis that civil cases generally take longer than criminal cases and reducing the period to two years would reduce the ability to test the new arrangements properly.[168]

I. Criminal memoirs

Part 7 of the Bill would bring in a civil recovery scheme to help prevent offenders from profiting from accounts of their crimes, for example by selling their memoirs or giving media interviews. This would be done through enforcement authorities applying to the courts for an "exploitation proceeds order".

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[165] PBC Deb 10 March 2009 cc660-9
[166] PBC Deb 10 March 2009 cc669-74
[167] PBC Deb 10 March 2009 c674
[168] PBC Deb 10 March 2009 c675

1. Amendments agreed

There were a few minor and technical Government amendments to the provisions. The most substantial of these were to clause 144, which provides for an exploitation proceeds order to cease to have effect where the conviction in question was quashed. The amendments would extend this provision to cover situations where the conviction quashed was an "associated" conviction of another person.[169]

2. Other significant areas of debate

Both Conservative and Liberal Democrats spokesmen expressed support for the broad principles behind the scheme,[170] but David Howarth raised some concerns about the effect, not on the criminal, but on the public who might have a legitimate interest in reading the memoirs. He gave the example of authors who had committed offences in the course of direct action or under the Official Secrets Act. For the Government, Maria Eagle emphasised that the exploitation proceeds orders would not prevent *publication* but profiting, and said that the enforcement authorities would have to take account of whether there was a public interest in applying for them.[171]

[169] PBC Deb 10 March 2009 cc685-7
[170] PBC Deb 10 March 2009 c680
[171] PBC Deb 10 March 2009 c682 and c685

Appendix – Members of the Public Bill Committee

Chairmen: Frank Cook, Mr. Roger Gale

Members:
Bellingham, Mr. Henry (North-West Norfolk) (Con)
Boswell, Mr. Tim (Daventry) (Con)
Brown, Mr. Russell (Dumfries and Galloway) (Lab)
Eagle, Maria (Parliamentary Under-Secretary of State for Justice)
Garnier, Mr. Edward (Harborough) (Con)
Gray, Mr. James (North Wiltshire) (Con)
Hesford, Stephen (Wirral, West) (Lab)
Howarth, David (Cambridge) (LD)
Howarth, Mr. George (Knowsley, North and Sefton, East) (Lab)
Iddon, Dr. Brian (Bolton, South-East) (Lab)
Kidney, Mr. David (Stafford) (Lab)
Lucas, Ian (Wrexham) (Lab)
Michael, Alun (Cardiff, South and Penarth) (Lab/Co-op)
Moon, Mrs. Madeleine (Bridgend) (Lab)
Prentice, Bridget (Parliamentary Under-Secretary of State for Justice)
Robertson, Angus (Moray) (SNP)
Willott, Jenny (Cardiff, Central) (LD)
Wright, Jeremy (Rugby and Kenilworth) (Con)

Committee Clerk: Alan Sandall