Coroners and Justice Bill: Lords amendments

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Section: Home Affairs

The *Coroners and Justice Bill* received its First Reading in the House of Lords on 25 March 2009 (HL Bill 33), followed by second reading on 18 May 2009. Committee Stage took place over nine days between 9 June and 21 July 2009 (amended text available as HL Bill 69). Report Stage took place over four days between 21 and 29 October 2009 (amended text available as HL Bill 77). Third Reading took place on 5 November 2009. The consolidated Lords amendments to the Bill are available as Bill 160 of 2008-09; Explanatory Notes have also been published. The Bill is due to return to the Commons on 9 November 2009 for consideration of the Lords amendments.

Commentary on the Bill as first introduced was provided in Library Research Papers 09/06 *Coroners and Justice Bill: Crime and Data Protection* and 09/07 *Coroners and Justice Bill: coroners and death certification*. Major changes and areas of debate arising during the Bill's Committee Stage in the Commons were set out in Library Research Paper 09/27 *Coroners and Justice Bill: Committee Stage Report*. The House of Lords Library Note on the Bill (LLN 2009/004) summarises some of the key issues debated at report stage in the Commons.

The purpose of this note is to draw attention to the principal changes, additions and deletions that were made in the Lords. It does not cover minor or technical amendments.

The Government suffered a number of defeats on division, as a result of which the following amendments were agreed:

- intercept evidence would be admissible at inquests in certain circumstances;
- deletion of the clause that would have repealed the "free speech" proviso to the offence of inciting hatred on the grounds of sexual orientation;
- deletion of the paragraph that would have prevented "sexual infidelity" from being taken into account when determining whether a person accused of murder could raise the proposed new partial defence of "loss of control"; and

- a new clause establishing an Independent Commissioner for Terrorist Suspects.

Some amendments resulting from Government defeats on division were subsequently replaced with Government amendments at Third Reading, including:

- senior coroners would be required to inform the Chief Coroner if completion of an investigation is likely to take more than 12 months from the time that the coroner was notified of the death, and the Chief Coroner would be required to maintain a register of prolonged investigations;
- the Chief Coroner would have specific responsibilities in relation to military inquests.

In addition a number of Government amendments were agreed, including:

- the removal of controversial provisions relating to “secret inquests”;
- a requirement that a coroner’s investigation must be suspended pending the outcome of an inquiry (in place of an inquest) only where the inquiry is chaired by a High Court judge or a more senior judge; the terms of reference of such an inquiry must include the matters to be ascertained at an inquest;
- the appointment of a coroner for treasure;
- placing the separate posts of the national medical examiner and the medical adviser to the Chief Coroner on a statutory footing;
- enabling short death certificates to be issued;
- the provision of legal aid for certain inquests;
- new clauses on the prosecution of genocide and other war crimes;
- new clauses on the abolition of sedition and criminal libel;
- new clauses establishing criminal offences of subjecting a person to servitude or forced labour;
- amendments restricting the scope of the exploitation proceeds order scheme relating to criminal memoirs;
- amendments to the membership and function of the proposed new Sentencing Council;
- amendments to the proposed data protection assessment notice regime; and
- new clauses establishing a statutory framework for the regulation of damages-based agreements.

Contents

1 Coroners and death certification

1.1 "Secret inquests" and inquiries and intercept evidence

Clause 11 of the Bill as originally introduced in the House of Commons[1] would have enabled the Secretary of State to certify that an inquest must be heard without a jury. This clause proved particularly controversial in House of Commons debates and at oral questions on 17 March 2009, Jack Straw announced that he was tabling amendments "fundamentally to recast the proposals".[2] On 15 May 2009, Jack Straw announced that the Government would be tabling amendments to remove clauses 11 and 12 from the Bill. He also indicated that the Government would instead consider establishing an inquiry under the *Inquiries Act 2005* where it was not possible to proceed with an inquest:

> In some rare but very important cases there may be highly sensitive information directly relevant to the circumstances of the death but which cannot be made public in any way. To meet this problem the Coroners and Justice Bill contains provisions to dispense with a jury inquest in certain tightly defined circumstances. These provisions have greatly been improved during their Commons' scrutiny. Now the decisions as to whether to hold a non-jury inquest would be made within the criteria by a High Court judge, sitting as a coroner. The main provisions on this are in clause 11. By clause 12 the blanket ban on the admission of intercept evidence was modified for the purposes of these special inquests.
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> The Government felt these changes struck a fair and proportionate balance between the interests of bereaved families, the need to protect sensitive material and judicial oversight of the whole process.
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> However, following further discussions in the House and with interested parties it is clear the provisions still do not command the necessary cross party support and in these circumstances the Government will table amendments to remove clauses 11 and 12 (and the equivalent Northern Ireland provisions) from the Bill.
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> Where it is not possible to proceed with an inquest under the current arrangements, the Government will consider establishing an inquiry under the Inquiries Act 2005 to ascertain the circumstances the deceased came by his or her death. Each case will be looked at on its own individual merits. As with the provisions in respect of the certification of coroners' investigations, we would expect to resort to such a procedure only in very exceptional and rare circumstances.[3]

House of Lords Committee stage: Government amendments agreed

Government amendments intended to give effect to this announcement were agreed without division at committee stage in the House of Lords.[4] Lord Bach, Parliamentary Under-Secretary of State at the Ministry of Justice, set out how it was intended to deal with investigations into deaths where it was necessary to consider sensitive material:

> In future, for those rare investigations into deaths when an Article 2-compliant inquest cannot take place because the inquest must be held with a jury and there is sensitive material which is central to the investigation but cannot be publicly disclosed, the Government will consider establishing an inquiry held under the Inquiries Act 2005. So the death will be investigated in that way rather than by way of a coroner's inquest.

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1 Bill 9 of 2008-09
2 HC Deb 17 March 2009 cc762-3
3 HC Deb 15 May 2009 c68WS
4 HL Deb 9 June 2009 cc621-2

> The Committee will be anxious to know what the terms of reference of such an inquiry would be. … As those who have read the provisions of the Inquiries Act will know better than I, this is a matter to be agreed between the Secretary of State establishing the inquiry and the chairman appointed to lead it. However, when an inquiry is held instead of an inquest, the terms of reference are almost certain to include the matters to be ascertained by a coroner set out in Clause 5, which we have just debated.
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> Inquiries are not a lesser form of inquest and a death will be investigated just as thoroughly at an inquiry as at an inquest. Most campaigners would regard the kind of detail it can delve into as being at the very top end of an investigation into a death, an event or a series of events. It is not unusual for inquiries to be sought after an inquest has been held in order that further and wider matters can be considered. This proposal is not a second best for families but a genuine alternative.[5]

Concerns were raised about the use of inquiries instead of inquests. Baroness Miller of Chilthorne Domer, Liberal Democrat Spokesperson for Home Affairs, said that she was "deeply unhappy at the Government's suggestion that anything held under the *Inquiries Act 2005* would substitute for an inquest":

> I see the downsides of an inquiry and I am not at all resolved that the Government have got the right solution to the problem. An inquiry, under the Inquiries Act, does not really fulfil any of the requirements that we are looking for with an open inquest. To begin with, the Secretary of State controls the appointment and the remit of the panel. There is also the big question as to whether it will cover the same ground as the statutory requirements of an inquest. As we discussed earlier in relation to the circumstances, it would be for the Minister to define all that. Therefore, whereas the coroner would control an inquest, it is likely that there would be strong ministerial control, as the Inquiries Act is drafted. There would be no jury asking questions, deciding facts and meeting public concerns. There would be private sittings, which would tend to be much less open and accessible to the public—obviously, because they are private. There is none of the purported scrutiny of the decision to keep evidence secret that the judicial review provisions would have provided for and there may not be sufficient funding made available to the parties to challenge any of this.
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> The only possible advantage is that, following the Counter-Terrorism Act 2008 amendments to RIPA, at least such inquiries can now receive RIPA material. That obviously gets around the issue of this one inquest that cannot be held at the moment and, in fairness to the family, they would very much welcome a resolution to the fact that their inquest cannot be heard. However, I think that, to resolve that one issue, we are in danger of putting on to the statute book a system of holding inquests that runs completely counter to the tone of all the discussion and debate that we have had this evening about having as full disclosure and discovery as possible, not only in the interests of the family, but in the wider interests of society…[6]

The late Lord Kingsland, Opposition Spokesperson for Legal Affairs also expressed concerns:

> I am uneasy about using the Inquiries Act for this purpose because its procedures are initiated by an executive act by the Secretary of State, and the investigation flows from that act. By contrast, coroners are centuries-old, well established public figures who are independent of the Executive; and, as a matter of principle, one would wish that all inquests were conducted through the coronial system.

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5 HL Deb 9 June 2009 c622
6 HL Deb 9 June 2009 cc623-4

> If the Inquiries Act is to play some role in future, however, then in my submission at least four amendments to it are needed, to Sections 3, 5, 13 and 19. The amendment to Section 3, in our submission, requires that where an inquiry is to be used as an inquest, it will always be chaired by either a High Court judge or a more senior judge.
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> Section 5 permits the Minister, believe it or not, to change the terms of reference of an inquiry in the course of the inquiry. I remember that, at the time when the Inquiries Act was before your Lordships' House in the form of a Bill, that power was much fought over. Surely, whatever value it might give to some inquiries in future, it cannot possibly have a role in an inquiry that, in effect, is performing a coronial function. It would be outrageous if the Secretary of State attempted, in the course of an inquiry looking into the death of someone under Clause 5 to seek to change the terms of reference of that inquiry.
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> Section 13, which gives the Secretary of State the power to suspend an inquiry at any point, ought to be amended in the case of inquiries investigating deaths that fall into the category of Clause 5. Any attempt to seek to suspend the inquiry should have the consent of the judge who is chairing it.
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> Section 19 gives wide powers to the Secretary of State to restrict public access to the documentation of the inquiry. We believe that any restrictions placed on such documentation should be placed on it only with the consent of the chairman of the inquiry, the High Court judge or more senior judge.
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> From our point of view, those would be the minimum changes necessary if the issue of an inquiry under the Inquiries Act should be pursued any further.[7]

The crossbencher, Lord Pannick supported amendments proposed by Baroness Miller and Lord Kingsland.[8]

Lord Bach replied that the Government would only use an inquiry in exceptional circumstances:

> The Government have made it clear that we will do everything we can in any particular case not to go down this avenue if there is a way in the coronial system of hearing a sensitive inquest. If we could, we would. This is not our first choice, which is to use the coroners system in every case. If we cannot, we feel we have to find an alternative. The alternative we have found is the Inquiries Act 2005.[9]

Lord Bach also addressed some specific concerns which had been raised:

> On the chairmanship of an inquiry established for these purposes, I assure the Committee that we fully expect to appoint a senior judge, in much the same way that Clause 11 provided for a High Court judge to preside at a certified inquest.
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> As to the other changes the noble Lord has proposed, we remain to be persuaded that they are necessary. Removing the ability to amend the terms of reference of an inquiry into the circumstances of a person's death might be detrimental to the interests of the bereaved family given that information could come to light which suggests that the terms of reference should be revised. That said—I repeat what I said when I spoke to my amendment—we would expect the terms of reference for any inquiry to reflect the matters to be ascertained by a coroner set out in Clause 5 and it is unlikely that, once set, they will need to be changed.

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7 HL Deb 9 June 2009 c624
8 HL Deb 9 June 2009 cc624-5
9 HL Deb 9 June 2009 c625

> As to the powers vested in the responsible Minister to suspend an inquiry and restrict public access—something that has exercised the noble Lord, Lord Pannick—we cannot see why different arrangements should apply in the case of an inquiry examining the circumstances of a person's death compared with any other inquiry which, by its nature, is also likely to be considering issues of considerable public importance. We believe that the decision whether to restrict public access to safeguard national security or international relations should properly rest with Ministers which is what, as I understand it, occurs at the moment.
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> We would expect the greater part of any inquiry to be held in public. While legal aid is not available, the chairman of such an inquiry may award an amount in respect of legal representation for interested parties. Decisions made by the chairman of an inquiry—for example, to exclude the public from certain parts of it—are open to judicial review…
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> Amendments 32 to 36 deal with the relationship between a coroner's investigation and a public inquiry into the same death. It is entirely appropriate that where an inquiry is established into the circumstances of a death, the coroner's investigation should be suspended and resumed only if the coroner considers that there are exceptional reasons to do so.
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> The Bill also provides that an investigation may not be resumed after the completion of an inquiry unless, but must be resumed if, the senior coroner believes there is sufficient reason for resuming it. However, these provisions are intended to cover situations in which the terms of reference of an inquiry will not, or have not, achieved an inquest's statutory purposes. As I have said, an inquiry held in these circumstances is very likely to have within its terms of reference the coroner's statutory purposes; accordingly, a coroner would be expected to suspend and not resume his or her investigation in such cases.
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> Indeed, if the circumstances of the death had been fully investigated by an inquiry, I would have to question the value of resuming the inquest in such a situation, particularly if the coroner did not have access to sensitive material, such as intercept evidence, which had been available to the inquiry.[10]

House of Lords report stage: Government defeat

On report, Baroness Miller of Chilthorne Domer moved amendments designed to provide for the admissibility of intercept evidence at inquests by making amendments to the *Regulation of Investigatory Powers Act 2000*.[11] She said that the amendments had been "carefully drafted to ensure that all evidence, including that gathered under RIPA, can be heard by a judge sitting as a coroner":

> He is independent from Government and seen to be so. He has the power to address the fact that some of the evidence may need to be heard in private and may never see the light of day. But importantly, the whole process remains within the coronial system with all its independence from the state. This point was eloquently explained in Committee by the late Lord Kingsland in his usual forensic and concise manner when he said:
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> "The Opposition would much prefer a solution in the coronial context to the one in the context of the Inquiries Act".—[Official Report, 10/6/09; col. 725.]

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10 HL Deb 9 June 2009 cc626-7

11 Subject to a limited number of exceptions, evidence from intercepted communications or any related communications data is inadmissible in legal proceedings under provisions currently set out in section 17 of *the Regulation of Investigatory Powers Act 2000*. See for example, Archbold, Sweet and Maxwell, 2009, paras 25-367-25-381

He also pointed to a good compromise in an attempt to meet the Government's concerns when he said:

"There may be room for an amendment that advances the possibility that, in certain circumstances, intercept evidence could be used in a traditional coronial context, with appropriate safeguards. However, if it is considered that the security nature of that evidence is such that relevant matters should be withheld from the jury, the Government could go to the second stage and initiate an inquiry—as long as the amendments that we tabled to the inquiry system were accepted by the Government".—[Official Report, 10/6/09; col. 727-28.]…

We believe that our coronial system ensures that the coroner sets the remit for an investigation into a death, and not the state. Our coronial system is there to ensure that citizens as jurors are involved in violent or unnatural deaths at the hands of the state. The fact is, they are there as the eyes and ears of society to make sure that the state has not overstepped the line. Ensuring our security may sometimes involve police shooting to kill, for example. We would all accept that there is a fine line between ensuring our security in such a way and impunity for agents of the state when things have gone wrong. It is not for the Government to have any part in deciding where that line is or, indeed, when it has been overstepped. Our amendments would ensure that the coroners system remains at the heart of the most difficult and controversial deaths.[12]

Baroness Miller had previously moved amendments in committee on this subject which she explained then as follows:

These amendments have been drafted by the organisations Inquest, Liberty and Justice. They, like us, are very pleased that the proposal for secret inquests has been dropped, but we still believe that a change in the law is required so that inquests that involve intercept material are not unnecessarily stalled. The Minister will by now be fully seized of the fact that we do not think that implementing the inquiries system is an adequate substitute.

What was originally Clause 13 amended Section 18 of RIPA to allow intercept material to be admissible in inquiries in certified investigations. That was a tacit acceptance by the Government that intercept material could and should be made admissible in coronial proceedings. In fact, there is a piecemeal removal of the general bar on the use of intercept material; as the Minister will be aware, such material is admissible in, for example, certain civil proceedings, such as those on control orders.

The fundamental flaw in the Government's proposal was that there was no principled reason why the removal of the general bar on intercepts at inquests needed to be restricted to a new breed of certified inquests. With my amendments, it would be possible for a judge conducting an investigation to ban or restrict the jury's or the public's access to material that would be contrary to the interests of national security. Rule 17 of the Coroners Rules 1984 enables a coroner to direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interests of national security to do so. A judge sitting as a coroner can be appointed to head such an inquest, if it is particularly sensitive, and public interest immunity certificates can be issued if necessary. These powers are maintained in the Bill.

The recent inquest into the death of Jean Charles de Menezes is a case in point. It involved very sensitive material including details such as the Metropolitan Police's operational response to the threat posed by suicide bombers—it is hard to think of

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[12] HL Deb 21 October 2009 c723

anything more sensitive—the assistance that the police had from countries such as Israel and the USA in developing it and all sorts of other aspects of undercover and surveillance operations. Despite all that, the inquest went ahead. That was achieved in several ways. A High Court judge was appointed as coroner and was able to consider PII applications by the police in respect of highly confidential policies and documents. Where discussions in open court touched on the contents of any such protected documents, agreements were reached in the absence of the jury and the public about what could be explored. Although some aspects were regarded as too sensitive to be investigated publicly, overall a reasonably fair exploration of the issues was allowed, while national security was protected, as were other policing concerns. Suitable arrangements were made for the protection of witnesses without the need for certification. That inquest went ahead as an inquest, not as an inquiry.

With that recent example in front of the Government, they should be able to see that these amendments are a practical way forward without destroying the tradition of inquests and going for the parallel system of inquiries for such sensitive cases that it looks as though they are attempting to put on the statute book.[13]

Lord Bach resisted the amendments and set out the Government's position:

Our position, as the Government, on the use of intercept evidence in inquests has not changed. Allowing the use of sensitive intercept material as evidence at inquests allows a potentially very wide disclosure of this material, not just to a High Court judge who may be sitting as a coroner but to the jurors, the bereaved families, other interested parties and to the public at large. Even if the public were excluded, this would still be problematic.

We are not persuaded that such widespread disclosure of intercepted material, even if it was confined in the way suggested, is worth the real risk to national security and the fight against serious and organised crime which would ensue. Simply put, it could undermine the vital need to protect such sensitive material, the sources of that material, the capabilities available and the techniques used to obtain that material. On behalf of the Government, I must emphasise that the potential effects of disclosing any of those things cannot be underestimated and are, in our opinion, too high a price to pay.

I have previously acknowledged, and I accept, that it is not necessarily the intention of these amendments for all intercept material to be fully disclosed. However, in those very few cases where this is an issue it will be impossible to redact intercept material in such a way as to disguise the method or means by which it was obtained. Disclosure of intercept capabilities would clearly have a very real and damaging effect on our ability to gather intelligence that is vital to national security and the fight against serious organised crime.

Many distinguished speakers in this debate have referred to the Chilcot review, which, on intercept as evidence, has recognised the dangers of disclosing such material. That is why the Government are taking forward a detailed programme of work to ensure that we can meet the tests set out in that review and allow intercept to be used safely in the criminal courts without putting national security at risk. As I understand it—this came up in the debate—the intention is to provide Parliament with a final report from the Chilcot review in the next few weeks.

The protections offered in these amendments, which include only the possibility of redactions to material relating to the method or means by which the information was

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13 HL Deb 10 June 2009 cc721-2

obtained, are, in our opinion, wholly inadequate to protect the public interest. Moreover, if we were able to identify a way to use intercept evidence safely in criminal trials, there is not an automatic read-across to inquests. I say that because, in a criminal trial the prosecution has the option of discontinuing the prosecution if there is a risk of disclosure of sensitive material or capabilities. That option does not exist in the same way in an inquest which has to be held. We argue that these amendments create the potential for public disclosure of all types of intercept material, including the sensitive techniques, capabilities and sources by which it was obtained, thereby undermining the very real need to protect this material in the public interest.

At present—and this will continue—in the reformed system, coroners and other interested parties are provided, wherever possible, with the gist or a summary of any relevant sensitive material at the outset of the investigation. This material can also be shared with the jury. The amendment does not resolve the problem for those very rare cases where intercept material is absolutely central to the investigation, but which it is impossible to gist or redact in such as way as to disguise the method or means by which it was obtained.

Of course, we recognise the importance of ensuring that bereaved relatives and other properly interested persons should be involved in the conduct of an inquest as far as possible. Ensuring greater participation in the coronial process for the families of bereaved persons is at the heart of these reforms. … But we have to strike a balance between the interests of the families, in one or two exceptional cases, and the wider public interest when there is sensitive material that is central to the inquest. The amendments do not achieve that balance.

By way of contrast, the holding of an inquiry would permit, in exceptional circumstances, the disclosure of intercept material to the chairman of an inquiry established to examine the circumstances of a person's death in accordance with the existing provisions in Section 18 of RIPA. It would also permit disclosure to any inquiry panel members and to the counsel to the inquiry, but it would not permit further disclosure. It would permit the participation of families through counsel to the inquiry to the extent necessary to safeguard their interests. As a result, it would be possible to achieve our twin objectives of an Article 2-compliant investigation while safeguarding sensitive intercept material and preserving what has been described as the ring of secrecy.

Briefings previously provided on this issue by the notable organisations INQUEST, Liberty and JUSTICE have recognised the difficulties that we face, stating that under these amendments,

"it will remain possible for a judge conducting an investigation to ban or restrict the jury's or public's access to material that would be contrary to the interests of national security".

I welcome the recognition that we need to protect intercept material. However, the solution put forward here is flawed, since it does not resolve the central matter of how to proceed when the investigations must, as a matter of law, be held with a jury, but there is sensitive material which may be central to the inquest and which should not be made public—even to the jury—in the interests of national security.

If it is accepted that there will be circumstances where intercept evidence cannot be disclosed to a coroner's jury, it necessarily follows that, in such cases, the jury cannot be the finder of facts as it would be inappropriate and wrong for the jury to give a determination that is not based on all the relevant evidence. I suggest to the House

> that the logical consequence is that the jury would have to be dispensed with in such cases in any event.
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> Having thought about this matter at great length, the only viable way to conduct a full, thorough and Article 2-compliant investigation into deaths where sensitive intercept evidence cannot be made available to the inquest, is not by a blanket lifting of the bar on the admissibility of intercept evidence at inquests, which would put capabilities at risk, but by establishing an inquiry. Therefore, when the time comes, I ask the House to reject the amendments in the name of the noble Baroness.
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> … It remains the view of the Government that it is entirely appropriate that, where an inquiry is established into the circumstances of a death, the coroner's investigation should be suspended and resumed only if the coroner considers that there are exceptional reasons to do so. To do otherwise would be illogical and a waste of resources. To have two separate investigations into the same death going on at the same time under different regimes would lead to confusion and inconsistency, as well as possibly causing added intrusion into the private grief of the family for no obvious benefit.[14]

Baroness Miller pressed for a division and her amendment was agreed by 158 votes to 128 (Bill 160, amendments 1 and 2).[15]

The Government has been quoted as saying that it intends to overturn these amendments when the Bill returns to the Commons.[16]

House of Lords report stage: Government amendments agreed

On report, the Government moved amendments designed to respond to concerns raised in committee about inquiries by Lord Kingsland and Lord Pannick. The Bill, as originally introduced in the House of Commons, included provisions which would enable an investigation to be suspended pending an inquiry under the *Inquiries Act 2005,* and also dealing with the resumption of such investigations (Schedule 1 paragraphs 3 and 8). Lord Bach described the effect of the Government's proposed amendments to these provisions:

> Under the amendments, the duty on a coroner to suspend an investigation pending the outcome of an inquiry would bite only where the inquiry was chaired by a High Court judge or a more senior judge. Moreover, where a coroner has suspended the investigation, the terms of reference of the inquiry must include, as an irreducible minimum, the matters to be ascertained, as set out in Clause 5. I hope that the amendments will reassure the House on that point.[17]

The Government amendments to Paragraph 3 of Schedule 1 were agreed without further debate and without division (Bill 160, amendments 128 and 129).[18]

Proposed amendments to remove inquiry provisions

Amendments 20 and 24 in the *Revised Marshalled List of Amendments to be Moved on Report*, in the names of Baroness Miller and Lord Thomas of Gresford, which would have removed paragraphs 3 and 8 of Schedule 1, were not moved. A joint briefing, *Joint Briefing on the return of 'secret inquests' in the Coroners and Justice Bill Consideration of the House*

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14 HL Deb 21 October 2009 cc729-34
15 HL Bill 77
16 See, for example, "Outrage at government plan for secret inquests", *Independent,* 22 October 2009 (at 5 November 2009)
17 HL Deb 21 October 2009 c730
18 HL Deb 21 October 2009 c756

of Lords Amendments in the House of Commons, prepared by Liberty, INQUEST and JUSTICE, includes the following comment on what happened:

> On 21st October 2009 at Report Stage of the Bill, amendments were tabled in the House of Lords intended as an alternative to the Government's policy. Peers tabling these amendments intended to take out the clauses in Schedule 1 of the Bill that would allow inquests to be replaced with inquiries. Amendments were also laid, that were linked to removal of the power for secret inquiries, to allow normal inquests to admit intercept evidence where appropriate and without undermining national security. This was intended as a move to support the main proposal – the removal of the power to suspend inquests and hold secret inquests. However, unfortunately the vote was only moved over the admissibility of intercept at inquests and not the clauses that allow the Government to replace inquests with inquiries. …
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> As things stand the Bill contains the power for the Lord Chancellor to effectively replace inquests with inquiries and also the power for inquests to admit intercept evidence in limited circumstances. The power to admit intercept evidence was intended as an alternative to 'secret inquiries'.[19]

At third reading, Baroness Miller of Chilthorne Domer was unable to move similar amendments for procedural reasons. Baroness Royall of Blaisdon, Chancellor of the Duchy of Lancaster, said that on the basis of Public Bill Office advice, the usual channels had agreed that the amendments should not be moved.[20] Baroness Miller expressed her surprise as she considered her amendments to be consequential to those agreed on report.[21]

1.2 Treasure: Government amendments agreed

The draft *Coroners Bill*[22] which preceded the Bill included a number of provisions relating to investigations concerning treasure, including the appointment of a Coroner for Treasure. These provisions did not appear in the Bill as originally presented. In Public Bill Committee in the House of Commons, a new clause moved by Henry Bellingham, Shadow Minister for Justice, which would have appointed a coroner for treasure, was defeated by 9 votes to 6.

At Committee stage in the House of Lords, Government amendments were agreed without division which were stated to "largely replicate the provisions for a coroner for treasure that were contained in the draft Coroners Bill, published in 2006".[23] Lord Bach set out how the Government intended that the new provisions would operate:

> The new clauses introduce the distinction between investigations and inquests, so that treasure investigations have a similar structure to the reformed death investigations. It will still be possible for the coroner for treasure to summon a jury for a treasure inquest, although the starting position will be that one is not required, as I understand is almost always the case at present.
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> The new clause to be inserted by Amendment 84 provides for an exception on the duty of the coroner for treasure to investigate an item under the Treasure Act. This would be where the Crown, or the franchisee, if appropriate, did not want the item, even if it were found to be treasure or treasure trove. At present, although an item may be disclaimed at any time, there is no power for a coroner not to proceed with an inquest. Since the

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19 November 2009, p5 (at 5 November 2009)
20 HL Deb 5 November 2009 c380
21 HL Deb 5 November 2009 c380
22 *Coroner Reform: The Government's Draft Bill Improving death investigation in England and Wales,* Cm 6849, June 2006 (at 3 November 2009)
23 HL Deb 23 June 2009 cc1523-1533

> coroner will return the item to the person who found it, it effectively means that an investigation has been wasted. In the reformed system, the Secretary of State would need to certify to the coroner for treasure that the item is disclaimed, and the coroner will then return the item in accordance with the treasure code of practice.
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> The new clause inserted by Amendment 85 allows the code of practice made under the Treasure Act to cover situations where items are disclaimed, and closes the loophole where the coroner for treasure—the local coroner under the current scheme—is potentially liable to civil claims, even if he or she has acted in accordance with the code.
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> (…)
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> One of the reforms in the draft Coroners Bill, published in 2006, was that there would be a duty to deliver an object to the coroner for treasure if a person was in possession of it. This was to prevent cases where a proportion of the find was kept for the finder's own gain; failure to deliver the object would have been an offence under the Treasure Act. Our Amendments 86, 88 and 89 tackle this issue in another way.
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> The coroner for treasure is given the power to order a person to give evidence at an inquest, provide a written statement, produce documents, and produce other items for inspection, examination or testing. This will include not only the item being investigated but any supporting evidence. This will ensure that the investigation is as thorough as possible. Finally, Amendment 212 extends the time limit for prosecutions under the Treasure Act.
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> I am aware that there have been difficulties with the usual six-month time limit, given the time taken to complete treasure investigations. I believe that the reforms will speed up the investigation process, but I am persuaded that there is a need for the time limit to be extended, by way of a certificate from the prosecutor, to a maximum of three years. This will allow any determinations of whether the item is treasure to take place where necessary.
>
> Other government amendments in this group make provision for, inter alia, the appointment of the coroner for treasure and assistant coroners for treasure, for their training and inspection and for appeals against their decisions.[24]

At third reading, following a debate on report[25], the Government moved amendments which would require acquirers of objects that may be treasure to report them to the Coroner for Treasure. There would be criminal sanctions attached to the new duty. The amendments were agreed without division although some reservations were expressed, for example about why it appeared auction houses would not be within their scope.[26]

1.3 Duty to investigate certain deaths

Government defeat on report

On report, Baroness Miller of Chilthorne Domer returned to an issue which had previously been raised in committee.[27] She moved an amendment to Clause 1 which would require a senior coroner to inform the Chief Coroner if completion of an investigation was likely to take more than 12 months from the time that the coroner was notified of the death, and would

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24 HL Deb 23 June 2009 cc1523-4
25 HL Deb 26 October 2009 cc981-91
26 HL Deb 5 November 2009 cc384-9
27 HL Deb 9 June 2009 cc567-74

require the Chief Coroner to maintain a register of prolonged investigations.[28] Several peers spoke in support of the amendment.[29] In reply, Lord Tunnicliffe, a Government Whip, set out ways in which the Bill would assist in preventing delays. He said that he supported the policy objectives behind the amendment but said that there were better ways in which they might be delivered and that regulations, on which there would be consultation, would be a more fitting place for them.[30] The amendment was agreed on a division by 173 votes to 119.

Government amendments agreed at third reading

At third reading, Government amendments, stated by Lord Tunnicliffe to have "substantially the same effect" as those agreed on report, were agreed, without division, in place of Baroness Miller's amendments. The Government amendments would require a senior coroner to notify the Chief Coroner of any investigation that has not been completed within 12 months of when he or she is made aware that the person has died. There would also be a duty to notify the Chief Coroner when such an investigation is finally completed or discontinued. The Chief Coroner would be required to keep and maintain a register of the deaths which are reported to him or her under this provision. In addition, the Chief Coroner's annual report would have to include a summary for the previous year of the number of investigations that have taken more than 12 months, the reasons and any action taken. [31]

1.4 Assembling a jury: Government amendment agreed

In Committee, Lord Thomas of Gresford tabled an amendment which would have restored existing requirements about the minimum and maximum number of persons on a coroner's jury. The Bill originally proposed to reduce the number of persons required for a coroner's jury. At that stage, the Government indicated that it would look at this matter again.[32] On report, Lord Tunnicliffe said that the Government had listened to concerns raised by peers and had taken into account the view of the Joint Committee on Human Rights, and accepted that there should not be a reduction in jury size for a coroner's inquest. Accordingly, a Government amendment was agreed, without division, which would maintain the status quo in respect both of jury sizes and the number of jurors required for majority verdicts (Bill 160, amendments 4 and 5).[33]

1.5 Military inquests

Definition of active service: Government amendment agreed

In Committee, the crossbencher, Lord Craig of Radley, expressed concern about the definition of "active service" in the Bill which referred to the definition in Section 8 of the *Armed Forces Act 2006,* a section which deals with the offence of desertion. He considered that it was inappropriate to use that source definition for those who have been killed on operational service.[34] Lord Craig proposed instead that the definition should be set out in full in the Bill. On report, a Government amendment was agreed, without division, which would give effect to this proposal.[35]

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28 HL Deb 21 October 2009 c709
29 HL Deb 21 October 2009 cc710-2
30 HL Deb 21 October 2009 cc712-3
31 HL Deb 5 November 2009 c381-2
32 HL Deb 10 June 2009 cc699-702
33 HL Deb 21 October 2009 cc745-6
34 HL Deb 10 June 2009 c730
35 HL Deb 21 October 2009 cc760-1

Appointment of specialist Deputy Chief Coroner

Government defeat on report

On report an amendment moved by the Conservative peer, Baroness Fookes, was agreed on a division by 153 votes to 127. The effect of the amendment would be to ensure the appointment of a Deputy Chief Coroner with specific responsibilities for the oversight of military inquests and to ensure that coroners undertaking such inquests have had specialist training (Schedule 8 paragraph 2 of the Bill as amended on report). Lord Tunnicliffe considered the amendment to be unnecessary and set out how the Bill would ensure that military inquests could be conducted with all the necessary expertise.[36]

Government's substitute amendments agreed at third reading

At third reading, Government amendments were agreed, without division, to take the place of and, according to Lord Tunnicliffe, "enhance" the amendments agreed on report:

> Whereas the noble Baroness's amendment would have made a deputy chief coroner responsible for service personnel investigations, the amendments confer those duties instead on the Chief Coroner. This refinement to the noble Baroness's amendment will further strengthen the provision while retaining the spirit and motivation of her proposal. In the reformed coroner system it will be the Chief Coroner who is responsible for setting standards and training coroners to investigate particular types of deaths. It is therefore fitting for the Chief Coroner to have responsibility for training coroners who carry out service personnel investigations, and for monitoring those investigations.[37]

1.6 National medical adviser: Government amendments agreed

On report, a group of Government amendments was agreed, without division, which would place on a statutory footing the separate posts of the national medical examiner and the medical adviser to the Chief Coroner (Bill 160, amendments 12 and 150)[38] This responded to concerns raised on the third day of committee.

1.7 Reports to prevent future deaths: Government amendment agreed

In response to concerns raised in committee, a Government amendment was agreed, without division, on report to require a coroner to make a report if of the opinion that action should be taken to prevent the occurrence or continuation of circumstances creating a risk of other deaths occurring in the future, or to eliminate or reduce the risk of death created by such circumstances (Bill 160, amendment 137).[39] In the Bill as originally presented this was not a requirement but a power given to coroners.

1.8 Allowances fees and expenses: Government amendment agreed

On report, a Government amendment was agreed to clarify that regulations might include provisions indemnifying coroners against costs reasonably incurred in or in connection with legal proceedings. (Bill 160, amendment 145).[40]

1.9 Search and seize powers: Government amendment agreed

On report, Baroness Butler-Sloss raised concerns about the powers included in Schedule 5 for a coroner conducting an investigation to enter and search land or premises and seize any

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36 HL Deb 26 October cc999-1005
37 HL Deb 5 November 2009 c383
38 HL Deb 21 October 2009 cc790-2
39 HL Deb 26 October 2009 cc995-8
40 HL Deb 26 October 2009 cc998-9

items or inspect or take copies of any documents.[41] At third reading, a Government amendment was agreed, without division. Lord Bach set out the intent of the amendment:

> First, these government amendments remove the requirement for authorisation from the Chief Coroner, or from a senior coroner nominated by the Chief Coroner to give authorisation, to be in writing, which will enable authorisation to be sought and given over the telephone. Secondly, they add a requirement for the person giving authorisation to make a record of why they agreed the authorisation. Finally, they add a requirement for the Chief Coroner's annual report to include a summary of the reasons given for authorisations granted in the calendar year to which the report relates. This will help to ensure public transparency for the use of these powers.[42]

Baroness Butler-Sloss replied that taking out the words "in writing" would help but said that "senior coroners remain very concerned".

1.10 Legal aid at inquests: Government amendment agreed

Following a number of calls at earlier stages, the Government introduced an amendment, which was agreed without division, which would make means tested legal aid available for some inquests (Bill 160, amendment 54). The amendments would extend the scope of the community legal service in England and Wales to cover advocacy at inquests into deaths of military service personnel who die on active service. They would also put the Legal Services Commission's ability to fund inquests into deaths in state custody and inquests into deaths that occurred in the course of a police action or arrest on a statutory footing. Lord Bach said that the amendments would cover only advocacy because legal advice and assistance under the legal help scheme is already available. He set out how the new provisions would operate:

> Currently, legal aid for advocacy at inquests into the deaths of military personnel on active service is outside the ordinary scope of civil legal aid, but it is nevertheless available under the exceptional funding procedure and is granted, sadly, on a regular basis. The current procedure requires that applications are considered by the Legal Services Commission and Ministers before they can be granted.
>
> The amendments would bring these inquests within the ordinary scope of civil legal aid for the first time. The practical effect of the amendments will be to simplify and speed up the application process as Ministers will not need to approve individual applications before funding can be granted. Funding for inquests into deaths in custody and inquests into deaths that occurred in the course of a police action or arrest is already in scope, but the amendments put that on a statutory footing.
>
> This change is intended to provide funding for a legal representative for a family or families, but not separate representatives unless there is a conflict of interest. Funding for advocacy and legal help at these inquests will continue to be subject to financial means tests and contributions towards legal aid costs. Presently, the financial eligibility limits and contributions towards costs can be waived and it is our intention to amend the relevant secondary legislation to ensure that the Legal Services Commission continues to have the power to waive the means test and contributions where that is appropriate.[43]

The crossbencher, Lord Ramsbotham moved an amendment to the Government's amendment which would have required coroners to decide and recommend whether legal

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41 HL Deb 26 October 2009 cc991-4
42 HL Deb 5 November 2009 c390

aid should be granted in any particular case. He said that their decision would take into account, for example, the level of representation the state would have at the inquest, and the likelihood of the inquest containing issues that are so complex that the bereaved family would likely to be at a disadvantage.[44] Lord Bach resisted this amendment and said that the views of coroners would already be considered but would not be determinative. He thought that the amendment might lead to different coroners taking different views.[45] Lord Ramsbotham withdrew his amendment saying:

> I have been advised that if I were to propose a vote in this House at this time, it would preclude the opportunity for the other House to discuss this matter when the Bill returned to them. I think that it is a matter of sufficient seriousness for me not to hamper that process.[46]

Lord Thomas of Gresford queried when means testing would not apply:

> I come back to the wording used by the Minister, who said in debate that,
>
> "it would be appropriate to waive",
>
> a means test,
>
> "save in exceptional circumstances".—[Official Report, 21/10/09, col. 748-49.]
>
> That was changed, possibly under pressure from the Legal Services Commission, to the means test being waived "where appropriate". I look forward to hearing what the Minister has to say about that.[47]

Lord Bach replied:

> I hope that the noble Lord, Lord Thomas, will be relieved to hear that I stand by what I said on Report, but we will consult on that when we consult on the regulation.[48]

1.11 Short death certificates: Government amendment agreed

In response to an amendment tabled by Lord Thomas of Gresford on report, the Government moved an amendment to enable short death certificates to be issued (for a fee) (Bill 160, amendment 185). Lord Tunnicliffe said that this would allow the relatives of the bereaved to provide evidence of a death in circumstances in which the cause of death, which might be sensitive, does not need to be disclosed. [49]

2 Crime

2.1 Hatred on the grounds of sexual orientation: Government defeat

Clause 61 of the Bill (as brought from the Commons), which would have repealed the "free speech" proviso associated with the offence of inciting hatred on the ground of sexual orientation, was removed by the Lords during committee. For a full description of the offence, the proviso and the relevant provisions of the Bill, see Library Standard Note SN/HA/4983 *Inciting hatred on grounds of sexual orientation*.

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43 HL Deb 5 November 2009 c392
44 HL Deb 5 November 2009 c394
45 HL Deb 5 November 2009 c397-8
46 HL Deb 5 November 2009 c398
47 HL Deb 5 November 2009 c396
48 HL Deb 5 November 2009 c398
49 HL Deb 5 November 2009c424

On the sixth day of committee, Lord Waddington, who had introduced the original free speech proviso during the passage of the 2008 Act, opened the clause stand part debate by saying:

> The issues today are, first, whether there should be a provision to protect free speech, similar to that in the offence of stirring up religious hatred, and, secondly, a quasi-constitutional point about whether it is right that the Government should be using this Bill to repeal a provision they put on the statute book less than a year ago.
>
> As a result of the Government's actions, we are in an interesting position. When I spoke a year ago, my job was to satisfy the House that we should attach to the new offence a provision safeguarding free speech. Now the boot is on the other foot, and it is for the Government to try to show what conceivable public benefit will flow from the repeal of that provision. It is up to the Government to show why there is this urgency to scrap the free speech safeguard without waiting to see whether in practice it causes prosecutors or anyone else the slightest difficulty.[50]

In response, Lord Bach said:

> The question before us is whether we need the freedom of speech provision. We have always maintained that we do not. I remind the Committee that the other place discussed the section last year and concluded that we did not need it. The other place voted against it twice, on the last occasion by a majority of 202. Eventually, due to pressure to complete the passage of the Criminal Justice and Immigration Bill, the other place agreed to the amendment which had been originally tabled in this House by the noble Lord, Lord Waddington. Since then, the other place has considered the issue again - in March of this year - and agreed by a pretty wide margin of 154 to support the clause. Of course, we do not have to follow what the elected House of Commons, which is supposed to represent the people of this country, does, but three votes in a comparatively short period, all by large majorities and all to the same effect, is something that the House takes notice of in certain areas and perhaps the Committee ought to, to some extent, here.[51]

On division, the Lords rejected clause 61 by 186 votes to 133 and it was removed from the Bill (Bill 160, amendment 59).

On report, the Lords agreed a number of minor amendments consequential on the removal of clause 61. Although Government supported these amendments on the grounds of "proper drafting", Lord Bach commented:

> My Lords, we were disappointed that the Committee voted to retain the freedom of expression section in relation to the offence of inciting hatred on grounds of sexual orientation. However, it is important, when the Bill returns to the other place for consideration of the amendments made by this House, that it is properly drafted in all respects. We therefore support the amendments in this group, which are consequential on the removal of the former Clause 61. I make it clear that this does not change our position on the need for the freedom of expression section, and I would not be surprised if the House comes to debate this substantive issue again before long.[52]

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50 HL Deb 9 July 2009 c790
51 HL Deb 9 July 2009 c815
52 HL Deb 29 October 2009 c1314

2.2 Prosecution of genocide, crimes against humanity and war crimes: Government amendments agreed

On the fifth day of committee, Baroness D'Souza moved a number of amendments aimed at closing a loophole in the prosecution of genocide, crimes against humanity and war crimes. At present, under the *International Criminal Court Act 2001* a person suspected of such crimes can only be prosecuted in the UK courts if he is resident in the UK and if his alleged criminal activity was committed after 2001. The amendments therefore sought to extend both the territorial application of the 2001 Act (to cover suspects who are merely "present" in the UK rather than resident) and its retrospective application (to cover suspects whose alleged actions took place prior to 2001).

The Baroness, a member of the All Party Parliamentary Group for Genocide Prevention (the APPG), said:

> …the amendment seeks to adjust a procedural aspect of current legislation—namely, to extend the retrospective and extraterritorial application of the International Criminal Court Act. In brief, the International Criminal Court Act 2001 enables there to be prosecution in the UK courts of those suspected of perpetrating crimes against humanity, war crimes and genocide, irrespective of where those crimes were committed. However, the criteria insist that the suspect be a UK national or resident in the UK and that the crime was committed after 2001 when the ICC came into force in the UK. The result of this anomaly is that there are at present perhaps up to a 100 people suspected of such serious crimes currently in the UK. Recently four Rwandan suspects deemed to have committed crimes prior to 2001 were released.[53]

On the same date, in response to Baroness D'Souza's amendments and following consultation with the APPG, Jack Straw announced that the Government would itself be tabling amendments on Report to extend the retrospective application of the 2001 Act to 1991 and to clarify the "residence" requirement:

> We propose that, as far is permissible under the legal principles applicable to retrospection, we should seek to cover the categories of crime of genocide, war crimes and crimes against humanity from 1 January 1991. It is that date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the tribunal's statute adopted by the United Nations Security Council.
>
> Making these changes will be quite complex. The offence of genocide, along with offences of war crimes and crimes against humanity, is contained in the International Criminal Court Act 2001. From 2001, we have jurisdiction to try those crimes in the UK if committed by a UK national or resident wherever they took place. The 2001 Act is based on the Rome statute of 1998 establishing the International Criminal Court. While international law existed in respect of all these areas earlier, the offences in the 2001 Act may be wider than those recognised before the Rome statute and any change will need to take account of this.
>
> We propose no change to the categories of people covered by the legislation, which should remain UK nationals and residents (including those who commit crimes, and subsequently become resident). However we are exploring the possibility of providing more certainty as to who may (or may not) be considered to be a UK resident.[54]

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53 HL Deb 7 July 2009 c654

54 HC Deb 7 July 2009 cc41-42WS. See also Ministry of Justice news release, *Genocide – Jack Straw to strengthen law*, 7 July 2009

The Government's amendments were introduced on 26 October 2009 on the second day of report.[55] There was some debate as to whether jurisdiction under the 2001 Act should be extended to people "present" in the UK, as well as those "resident" in the UK, although there was general consensus that the Government's position represented an acceptable compromise. Lord Carlile of Berriew, who had put his name to the original amendments moved by Baroness D'Souza during committee, said:

> Our approach to this difficult issue fell into two headings. One heading was "presence"; we argued that mere presence in the United Kingdom should render people liable to prosecution, as happens in some other countries in the world. We have had enormous co-operation from the Minister, his colleague in the House of Commons and officials in a number of robust - perhaps I may put it that way - meetings, in which there has been a strong exchange of views. That has resulted in what I believe is a satisfactory solution. The Government, however, have approached this from the point of view that only "residence" will do. From those positions, we - those of us favouring presence as the standard - have looked at something that we have been calling "presence minus", or presence qualified, while the Government have looked at something that we have characterised as "residence plus", or residence qualified.
>
> (…)
>
> I say to the Minister that we have compromised, possibly more than we would have wished, and that we do not regard the idea of residence plus - residence with a number of factors defined as residence - as an entirely satisfactory solution. We certainly do not regard it as a perfect solution. However, we understand the legal and jurisdictional difficulties and are grateful for the distance that the Government have come from their original refusal to consider any variation on the word "residence" to the point that we have reached.[56]

The Government's amendments were agreed without division (Bill 160, amendment 56).[57]

2.3 Abolition of sedition and criminal libel: Government amendments agreed

On the sixth day of committee, Lord Lester of Herne Hill tabled a series of amendments to abolish the offences of sedition, seditious libel and criminal libel. He gave the following overview of the offences:

> The common law of seditious libel prohibits all writings and other utterances which tend to bring about hatred or contempt for the king, the Government or the constitution as by law established. Sedition consists of any act done or word spoken or written and published which has a seditious tendency, and done or spoken or written and published with a seditious intent.
>
> (…)
>
> Criminal libel, like seditious libel, is an archaic and outdated offence that unduly restricts free speech. It is all set out in the textbook Gatley on Libel and Slander, and I shall deal with the bare bones of it. The publication of written defamatory words is a common law misdemeanour in England and Wales, punishable on indictment with a fine or imprisonment. The publication of a libel known to be false is a separate statutory offence under Section 4 of the Libel Act 1843, which Amendment 179 would also repeal. Oral defamation is not a crime except for reading aloud a written libel and,

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55 HL Deb 26 October 2009 cc1064-1076
56 HL Deb 26 October 2009 cc1065-1067
57 HL Deb 26 October 2009 cc1089-1094

> by the Theatres Act 1968, for the publication of defamatory words in the course of a play.
>
> What, then, are the differences between the crime of libel and the tort of civil defamation? Broadly speaking, the publications that are the subject of civil and criminal libel are the same. There are some circumstances in which a communication can amount exclusively to criminal libel, and the opposite is also true. When the offence of criminal libel was developed by the Court of Star Chamber early in the 17th century, the rationale was the need to protect social order. Its object was to prevent public disorder through violent retaliation and duelling. More trivial matters were left to be dealt with as civil matters.
>
> These days, however, it need not be shown that criminal libel is likely to disturb the peace or provoke a breach of the peace, so the original rationale no longer applies. I shall not trouble your Lordships with the differences in any detail, but, in the past six decades, the number of trials for criminal libel has fallen sharply. There were four prosecutions from 1948 to 1975. Between 1970 and 1983, there were five committals for trial; between 1984 and 1995, 13 people were found guilty or cautioned; between 1996 and 2001, five were found guilty or cautioned. Five libels were reported to the police from 2002 to 2007. Two were found guilty up to the end of 2006.[58]

He argued that abolishing these offences would help to protect free speech in this country, and that "there would be a benefit in setting an example to oppressive regimes which use similar offences to silence dissent by repealing them".

Lord Lester's amendments received cross-party support. Lord Bach said:

> The Government are content to accept the amendments in principle. If the noble Lord, Lord Lester, is kind enough to withdraw them today, I can undertake to propose similar amendments in time for Report. Those amendments would, among other things, extend abolition of the offences to Northern Ireland and pick up some consequential amendments and repeals to various linked statutory provisions. We also intend to take the opportunity to abolish the obsolete offence of obscene libel. I hope that noble Lords will see this in some small way, especially after our earlier debate, as proof—if proof were needed—that the Government are in favour of freedom of speech.[59]

On the fourth day of report, the Lords agreed a Government amendment abolishing the offences of sedition and seditious libel, defamatory libel and obscene libel (Bill 160, amendment 58).[60] Lord Bach said:

> Our view is that those are arcane offences which have largely fallen into disuse. They stem from a bygone age when freedom of expression was not seen as the right that it is today. As we heard in Committee, taking the initiative to abolish them will be a positive step in helping our country, the United Kingdom, to take a lead in challenging similar laws in other countries where they are used to suppress free speech.

2.4 Murder and "crimes of passion": Government defeat

Paragraph (6)(c) of clause 45 of the Bill (as brought from the Commons) would have provided that acts or words constituting "sexual infidelity" were to be disregarded when determining whether a person accused of murder could raise the proposed new partial defence of "loss of control". On report, the Lords deleted paragraph (6)(c) from the Bill.

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58 HL Deb 9 July 2009 cc843-846
59 HL Deb 9 July 2009 c850
60 HL Deb 28 October 2009 cc1173-1180

Raising the issue for the first time on the fifth day of committee, Lord Thomas of Gresford tabled a probing amendment to remove paragraph (6)(c) and said:

> If the Government want to maintain the defence of provocation, and to maintain it on the basis of the loss of self-control—which is fundamental to the concept—I fail to see why a loss of self-control caused by a deep breach of trust and unfaithfulness should be any less a reason for reducing murder to manslaughter than any other form of provocation that may be advanced. It is fundamental.[61]

On report, Lord Thomas pressed the same amendment to a division, commenting:

> … this is outstandingly obnoxious. What it really reflects is something that has run through the 12 years of this Government—a refusal to trust the good common sense of a British jury. They are the people who decide what the standards are, how deep the hurt is, and what justification there can be for the action of a particular defendant. I would rather leave these issues to the jury, if provocation has to stay, and not confine their consideration of the marital or other relationships between a man and a woman or a man and a man or a woman and a woman. I should rather leave it to their good common sense to determine whether murder, which is proved, should be reduced to manslaughter by reason of the partial defence of provocation.[62]

Lord Bach said that the Government would not concede "the suggestion that, at the beginning of the 21st century, it is acceptable to deal with such situations by resorting to violence".[63]

On division, Lord Thomas's amendment was agreed by 99 votes to 84 and paragraph (6)(c) was deleted from the Bill (Bill 160, amendment 55).

2.5 Criminal memoirs: Government amendments agreed

Part 7 of the Bill proposed new exploitation proceeds orders, which would prevent offenders from profiting from the publication of accounts of their offences. The Lords considered these provisions on the ninth day of committee. During the clause stand part debate,[64] Lord Borrie said that he "doubted the value and usefulness" of the Government's proposals on the grounds that adequate restrictions and remedies already existed under the *Prison Rules 1999, SI 1999/728* and the *Proceeds of Crime Act 2002*. He also argued that in some cases the publication of a criminal's memoirs may have beneficial outcomes for the rehabilitation of the offender.

Part 7 was also criticised on the grounds that it was a disproportionate restriction on freedom of speech, and that its requirement for the courts to take account of "offence to the general public" when deciding whether to impose an exploitation proceeds order would lead to arbitrary decision-making.

Part 7 was revisited on report, when Lord Borrie tabled a series of amendments aimed at removing Part 7 from the Bill altogether.[65] On division, the amendments were negatived by 74 votes to 56.

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61 HL Deb 7 July 2009 c589
62 HL Deb 26 October 2009 c1060
63 HL Deb 26 October 2009 c1062
64 HL Deb 21 July 2009 cc1541-1558
65 HL Deb 29 October 2009 cc1281-1299

However, the Lords did agree a number of Government amendments to limit the scope of the new exploitation proceeds scheme. Lord Tunnicliffe gave the following explanation:

> Those amendments will narrow the scope of the scheme so that it applies only to offenders who exploit material about serious offences, namely those offences that can be tried on indictment—that is indictable-only offences and offences that are triable either way. It is, after all, people profiting from accounts about serious offences, not low-level summary offences, who are most likely to be of concern. To provide additional reassurance to the House and after extensive consultations, we intend to bring forward amendments at Third Reading to further limit the ambit of the scheme to indictable-only offences. Limiting the scheme to those who exploit material about offences that are triable only on indictment will be a major move on our part.
>
> (…)
>
> Noble Lords may also recall that the Joint Committee on Human Rights was concerned about the reference to the "general public" in Clause 151(3)(f). It was suggested that it would be difficult for a court to measure the extent to which the general public is offended by a publication when weighing up whether to impose an exploitation proceeds order. I know that that view is shared by other noble Lords, as it was raised during the debate in Committee on 21 July. On reflection, we think that that is a valid point. Government Amendment 107 therefore deletes the reference to the "general public" from Clause 151.
>
> Importantly, however, the reference to the extent to which the victim or family of the victim are offended by a publication will remain. It would be much easier for the court to measure the degree to which victims or family members are affected than it would be to gauge the strength of public feeling.[66]

Following the commitment given by Lord Tunnicliffe on report, at third reading the Government moved amendments to further limit the scope of the scheme to offences "triable only on indictment".[67] Speaking to the amendments, Lord Tunnicliffe said:

> On Report, the House agreed amendments to limit the scheme to offences that were triable on indictment or triable either way.
>
> The government amendments in this group go a good deal further by limiting the scheme to memoirs about the most serious offences, namely those that are triable only on indictment. This is a significant move. Indictable-only offences make up a very small proportion of criminal cases dealt with by the courts, and no more than 2 per cent of all convictions in 2007. Indictable-only offences include very serious crimes such as murder, rape and manslaughter. Offenders who profit from exploiting material about these offences are likely to be the subject of cases that cause the greatest concern to surviving victims or bereaved families.[68]

However, Lord Lester of Herne Hill argued that even with these amendments the proposed scope of the scheme remained too wide. He therefore moved an amendment (intended to sit alongside the Government amendments) that would have required the offence in question to be "heinous" as well as triable only on indictment:

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66 HL Deb 29 October 2009 cc1295-1296
67 HL Deb 5 November 2009 cc412-420
68 HL Deb 5 November 2009 cc417-418

> Unfortunately, the Government's new amendment does not achieve the Minister's stated aim of confining the scheme to profiting from "accounts of heinous crimes".[69] Offences triable only on indictment in the Crown Court are serious, which is why they cannot be tried in magistrates' courts, but not all indictable offences triable only in Crown Courts can properly be described as "heinous" offences, or as being at the most grave end of the spectrum. (…)
>
> In other words, the scheme, as it would stand with the government amendments moved today, remains overinclusive in that those at risk of having the proceeds of their works forfeited to the state, and the chilling effect on freedom of expression, would remain. (…) That is why, to achieve the Government's stated aim, and no more, it is necessary to limit the scheme's application to those who exploit material about heinous indictable offences.
>
> Some might argue that the test of heinousness is too vague to be applied by the courts. There are several answers to this objection. In the first place, the Government consider that the courts will be capable of interpreting and applying the vague criteria already contained in the Bill. The test of whether an offence is heinous is just as capable of being applied by the court having regard to the particular circumstances of the offence as is that of deciding the social value of a work. What is heinous and at the grave end of the spectrum involves a judgment about matters of fact and degree, which the courts are perfectly capable of making.[70]

In response, Lord Tunnicliffe said:

> Our amendments have the considerable advantage that there can be no doubt which offences will be covered by the scheme. Limiting the scheme to memoirs about indictable-only offences that are heinous lacks that advantage. "Heinous" is undefined in the amendment and is not known in our law. If it were adopted, it would be far from clear what crimes the scheme would cover. It is extremely undesirable - we would say wrong - to introduce this considerable and unnecessary uncertainty to the scheme. Limiting the scheme to indictable-only offences draws the scheme sufficiently narrowly - no further narrowing is needed.[71]

Lord Lester pressed his amendment to a division but it was defeated by 107 votes to 59.[72] The Government amendments were accepted (Bill 160, amendments 99 to 104).

2.6 Independent Commissioner for Terrorist Suspects: Government defeat

On the seventh day of committee, the Lords agreed a new clause establishing an Independent Commissioner for Terrorist Suspects (the Commissioner).[73] The clause was moved by Lord Lloyd of Berwick, who had tabled a similar amendment during the passage of the *Counter-Terrorism Bill* through the Lords in November 2008:

> Eight months ago, in November 2008, I moved an almost identical amendment to the Counter-Terrorism Bill. That amendment was supported by the noble and learned Lord, Lord Mayhew, who I am glad to see in his place, the noble Viscount, Lord Colville of Culross, the noble Lord, Lord Dear, the noble Baroness, Lady Manningham-Buller, and many others, including the two opposition Front Benches. At the end of the debate, the noble Lord, Lord West, said that at first he had been minded to resist the amendment, but that, having listened to the debate, he would accept the amendment in substance,

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69 See HL Deb 29 October 2009 c1293 for Lord Tunnicliffe's speech
70 HL Deb 5 November 2009 c413
71 HL Deb 5 November 2009 c418
72 HL Deb 5 November 2009 c419
73 HL Deb 13 July 2009 cc993-1002

> but needed more time to look at the wording. This Bill seemed to present a good opportunity to bring back the amendment before the Committee.[74]

The function of the Commissioner, to be appointed by the Secretary of State with the approval of the Lord Chief Justice, would be to monitor the detention and treatment of terrorist suspects held under section 41 of and Schedule 8 to the *Terrorism Act 2000*. In particular, the Commissioner would be required to give the judicial authority such independent assistance as it may need in deciding whether or not to extend the period of detention. In order to fulfil this function, the Commissioner would have the discretion to make unannounced visits to Paddington Green Police Station (and any other place of detention where terrorist suspects are held) to ensure that the questioning of suspects was being carried out diligently and expeditiously, and in accordance with the provisions of the 2000 Act and PACE Code H.

The Commissioner would also be entitled to interview terrorist suspects (in the absence of the police if the Commissioner so requested), to attend interviews conducted by the police and to attend court hearings for applications to extend detention periods. He would be required to make an annual report to Parliament as to the carrying out of his functions under the new clause.

Lord Lloyd said the new clause would bring reassurance to members of the Muslim community and add a new safeguard to hearings for extensions of detention periods. Home Office minister Lord Brett resisted the new clause, referring to the "strongly held view" of police and prosecutors that "allowing a commissioner a role in extension hearings would delay those hearings". He also suggested that a Commissioner was unnecessary given the range of existing independent safeguards, and said that the Home Office assessment of costs was £250,000 (rather than the £50,000 suggested by Lord Lloyd) as it believed five Commissioners rather than one would be needed to cover the whole of the United Kingdom.

On division, the new clause was agreed by 145 votes to 103 (Bill 160, amendment 66).

2.7 Servitude and forced labour: Government amendments agreed

On the sixth day of Committee, Baroness Young of Hornsey moved a new clause to introduce an offence of holding a person in servitude. The offence would have been committed where one person severely restricted the freedom of movement and choice of residence of another person, and subjected that other person to forced or compulsory labour. She also spoke to another new clause introducing an offence of subjecting a person to forced or compulsory labour. The new clauses had been drafted by Liberty and Anti-Slavery International.[75] A legal opinion on the new clauses, issued by the former Director of Public Prosecutions Ken MacDonald QC and Helen Mountfield of Matrix Chambers, said:

> Liberty and Anti-Slavery International have suggested an amendment to the Coroners and Justice Bill, which has been tabled by Baroness Young and supported by others, in order to introduce clear, dissuasive and enforceable offences of servitude and forced labour. This would give clear effect to Britain's obligations under Article 4 of the European Convention on Human Rights (ECHR) and the International Labour Organisation (ILO) Conventions on Forced Labour (Conventions 29 and 105).

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74 HL Deb 13 July 2009 c994. For the debate at report stage of the *Counter-Terrorism Bill*, see HL Deb 4 November 2008 cc158-169.

75 For background see Liberty and Anti-Slavery International, *Joint Briefing on the Coroners and Justice Bill for the Report Stage of the House of Lords: Servitude and Forced Labour amendment*, October 2009

(…)

> In our view, the existing criminal law offences pertaining to trafficking, the slave trade, false imprisonment and kidnapping are not apt to cover all offences of servitude. In order for the United Kingdom to comply with its obligations under Article 4 ECHR and the ILO, clear, dissuasive and directly applicable statutory criminal offences of forced labour and servitude are needed which penalise and permit effective prosecution of those who subject others to abuse and oppression. Without them, the United Kingdom is vulnerable to successful challenges in the European Court of Human Rights. We are aware of two such challenges in the pipeline.[76]

During Committee, Baroness Young said:

> We had a very helpful meeting with the Minister last week. He and his team argued that existing laws cover the kind of maltreatment of which there is evidence. The problem is that in order to bring a successful prosecution for some of these offences, it is necessary to put together a package of charges, which the police are not always in a position to do because of the lack of a clear legal steer regarding the exact offences committed. Again, I refer to the legal briefing with which we were provided:
>
> > "In our view, there is no offence known to English law of subjecting another to servitude or forced labour which:
> >
> > a. clearly criminalises imposition of forced labour or servitude, in all the circumstances in which Article 4 requires signatory states to provide a remedy; or
> >
> > b. is sufficiently clear and robust to have dissuasive effect".[77]
>
> This is why we feel it is essential that Parliament now makes it a criminal offence to hold another person in servitude or subject them to forced or compulsory labour, which the proposed amendments seek to do.[78]

For the Government, Lord Bach said "our argument remains that the existing criminal law already allows for appropriate charges to be brought and appropriate penalties to be imposed for this behaviour".[79] He did, however, undertake to review the legal opinion and consider the matter further over the summer recess.

On report, Baroness Young moved the same amendments again but indicated that she would not press them to a division as the Government had agreed to table its own amendments at Third Reading:

> Since Committee, with colleagues from Liberty and Anti-Slavery International, I have had useful and productive discussions with the noble Lords, Lord Bach and Lord Tunnicliffe, and the Bill team. I appreciate officials' strenuous efforts to get to grips with this issue. They have now, we believe, found an effective, workable solution to this distinctive problem and, as a result, a new amendment will be inserted into the Bill

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76 Ken MacDonald QC and Helen Mountfield, Matrix Chambers, *In the matter of Article 4 of the European Convention on Human Rights and whether an offence of servitude or forced labour is required to give effect to it and an amendment to the Coroners and Justice Bill*, 8 July 2009, paras 1 and 3

77 Ibid, para 14

78 HL Deb 9 July 2009 c853

79 HL Deb 9 July 2009 c862

> using Article 4 of the European Convention on Human Rights as a vehicle. It will be tabled at Third Reading. I shall therefore not divide the House today.[80]

Lord Tunnicliffe gave further details of the Government's proposals:

> I promised in Committee that we would explore this issue further. I shall now explain what we have found out over the summer. We held meetings with the Association of Chief Police Officers, the Crown Prosecution Service and the UK Human Trafficking Centre, which is a multi-agency centre that provides a central point for the development of expertise and co-operation in relation to the trafficking of human beings. We also met the Gangmasters Licensing Authority, which was established to regulate labour providers in the agricultural sector. They provided us with some useful examples of cases that bear further consideration. We have also, as we said we would, contacted the Crown Prosecution Service; I understand it has brought this matter to the attention of the Director of Public Prosecutions. It agrees that it may be useful to introduce a further bespoke offence.
>
> (…)
>
> In light of that, we accept that improvements could be made to the current law through an additional offence in this area. That said, and as the amendments before us make clear, this is a complex subject. This would be an important offence that was subject to serious penalties, and it is important that it should be as clear as circumstances permit. With that in mind, we have reservations about the amendment, although this is not the occasion on which to go into detail.
>
> We think that a slightly different approach is preferable—an approach that seeks to achieve the same aim but that relies for its core substance on Article 4, on the prohibition of slavery and forced labour, of the European Convention on Human Rights. This approach is used for the offence of trafficking for such purposes. Our proposed formulation would follow this approach but without the requirement that the person has been trafficked.
>
> We discussed this approach earlier today with the noble Baroness, Lady Young, and are hopeful that it will offer a solution on which we can all agree. We need to finalise the details and are actively working on this. We intend to bring the result before your Lordships to consider at Third Reading.[81]

At third reading the Government fulfilled its commitment to bring forward its own amendments criminalising servitude and forced labour. Lord Tunnicliffe provided the following overview of the proposed new offences:

> The behaviour that the new offence prohibits is holding another person in slavery or servitude or requiring another person to perform forced or compulsory labour where the offender either knew or ought to have known that the person was being held or required to perform labour in such circumstances. Broadly speaking, the offence will require proof of a relationship of coercion between the defendant and the worker, and the circumstances will need to be such that the defendant knew that the arrangement was oppressive and not truly voluntary or had deliberately turned a blind eye to that fact. Precisely what constitutes slavery, servitude and forced or compulsory labour will be determined by the courts using existing case law on Article 4 of the European Convention on Human Rights and Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as it develops. In the vast majority of cases, we do not

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80 HL Deb 28 October 2009 c1181
81 HL Deb 28 October 2009 c1182

> anticipate any difficulty for the courts in deciding whether the behaviour that they are asked to consider amounts to prohibitive behaviour under the new offence. In addition, we anticipate that sentencing guidelines will include a range of factors which will provide an indication of the relative seriousness of the prohibited behaviour. We would expect these to draw on the types of indicators in the International Labour Organisation's conventions.[82]

The amendments were given a warm reception and agreed (Bill 160, amendment 57).

3 Sentencing

3.1 Membership of the Sentencing Council: amendments agreed

On the eighth day of committee the Lords agreed a number of Government amendments to the provisions regarding membership of the Sentencing Council (the Council) (Bill 160, amendments 153 to 155, 157 and 158).[83]

The first replaced the requirement for the Council's deputy chair to be one of its non-judicial members and with a requirement that the deputy be one of its judicial members. Lord Bach said that given the deputy's one specified role would be to chair the council in the absence of the chairing member, who would himself have been drawn from the Council's judicial members, then it was appropriate that the deputy should also be a judicial member.

The second removed the requirement for the Council's eight judicial members to be made up of two Court of Appeal judges, one High Court judge, two circuit judges, one district judge and two lay justices and replaced it with a less restrictive requirement that the eight members must include at least one circuit judge, one district judge and one lay justice. This would give the Lord Chief Justice greater flexibility to decide what the appropriate number for each level of the judiciary should be when appointing the Council's judicial members.

The third created a new post of "President of the Sentencing Council", to be filled by the Lord Chief Justice. The President would not be a member of the Council and would not be involved in its day-to-day operation; however, the role would enable the Lord Chief Justice to be associated with the Council and to attend and speak at its meetings. Lord Bach said that he had discussed the amendment with the Lord Judge, the Lord Chief Justice, and that he had agreed it was appropriate for him to undertake this role.

The Lords also agreed an amendment moved by Lord Dholakia, which added "the rehabilitation of offenders" to the list of areas of experience from which the Council's lay members would be drawn. The amendment received cross-party support and was accepted by the Government (Bill 160, amendment 156).

3.2 Duties of the Sentencing Council: amendments agreed

On the eighth day of Committee, the Lords agreed a Government amendment adding "the impact of sentencing decisions on victims of offences" to the list of matters to be considered by the Council when preparing sentencing guidelines (Bill 160, amendment 67).[84]

On report, the Lords also agreed a series of amendments tabled by Baroness Linklater of Butterstone and Lord Thomas of Gresford, which made the same change to three separate clauses dealing with resources: the clause requiring the Council to publish a resource

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82 HL Deb 5 November 2009 c400
83 HL Deb 15 July 2009 cc1184-1194
84 HL Deb 15 July 2009 cc1198-1200

assessment in respect of its sentencing guidelines; the clause requiring the Council to assess the effect of sentencing practices on resources; and the clause requiring the Council to assess the impact of policy and legislative proposals on resources.[85] Each clause was amended so that the reference to "the demand for prison places" was replaced with "the resources required for prison places", mirroring the wording used in relation to probation provision and the provision of youth justice services. Baroness Linklater explained the effect of the amendments in the following terms:

> The Government have been prepared to go to any lengths to provide for custody and now, despite the crippling economic state of the country, where stringent cuts are being required right across the piece, including NOMS and all criminal justice agencies, a further £1 billion has been made available in the coming year for the prison building programme. This is an extraordinary situation in the light of government policy. Thus, Clause 120 [*Resources: effect of sentencing practice*] is important because the Sentencing Council is required to make an impact assessment on the effect that any changes in the sentencing practice of courts are likely to have on resources for prison places and the resources required for probation and youth service provision.
>
> If it is required to look at comparable resources for all provision, as we hope will now be the case, that will highlight both the enormous disparity in costs between custodial and non-custodial provision, where prison swallows up vastly more than community penalties. It will also draw attention to the comparative outcomes, where community programmes are significantly more effective in preventing reoffending. In other words, government policy, if resourced and implemented, would succeed in reducing reoffending, inspiring public confidence and making society a safer place. By requiring the Sentencing Council to look at what is available on the basis of equal and comparable criteria of resources, which should include costs, appropriate funding and outcome, the council will be able to make a far better assessment of the effects of sentencing practice.[86]

The Government supported the amendments (Bill 160, amendments 89-91), Lord Bach saying that they "captured the essence of what the council is being asked to do: to make an assessment of the impact of sentencing and related issues on prison, probation and youth justice".[87]

3.3 Sentencing guidelines

Format of the guidelines: Government amendments agreed

On the eighth day of committee, the Lords agreed a number of Government amendments intended to give the Council greater flexibility when structuring new sentencing guidelines (Bill 160, amendments 68-87). Lord Tunnicliffe said:

> … the amendments ensure a balance between the desirability of having guidelines that subdivide guidelines and provide starting points, because that format provides guidance to sentencers and transparency to victims and offenders, and the option for the council to opt out of this format if the nature of the offence is such that it is not reasonably practical to produce a guideline in this format.
>
> The Government's view is that this amendment ensures that the council will not be hampered in producing guidelines for the widest range of offences. (…) The other government amendments reflect this change to the beginning of Clause 107. For

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85 HL Deb 28 October 2009 cc1206-1211, 1230 and 1247
86 HL Deb 28 October 2009 c1208
87 HL Deb 28 October 2009 c1211

> example, Amendments 188G, 188K and 188M replace the provision that the council "must format guidelines" with the less onerous "should format guidelines".
>
> Government Amendment 188F allows the council to refer to factors other than the offender's culpability and the harm caused in describing different categories of offending in the guidelines. (…)
>
> Amendment 188Q … allows for different provisions in guidelines if there are different circumstances or cases involving the offence that the guideline covers. This amendment provides more flexibility where, for example, the guideline relates to the sentencing of juveniles, where different sentencing disposals exist.
>
> Amendments 188S and 188V clarify that the intention of the guidelines is to produce starting points within category ranges. (…)
>
> (…)
>
> Finally in this group, Amendment 188Y clarifies the provisions of Clause 110 that deal with proposals for guidelines originating from the Lord Chancellor or the Court of Appeal. Clause 110 allows the Court of Appeal, if it is considering a relevant case, to propose to the council that it frames a new guideline or revises an existing guideline. This amendment makes it clear that this power does not prevent the Court of Appeal from continuing to issue guideline judgments.[88]

Duty to follow the guidelines: Government amendments agreed

On the eighth day of committee, the Lords agreed a Government amendment relating to the duty of the court to follow any relevant sentencing guidelines (Bill 160, amendment 88). The amendment was intended to clarify that:

- the court would be required to sentence within the broad overall range specified for any given offence, rather than any narrower range specified for any sub-categories of that offence; and
- the court's duty to identify the offence sub-category that most resembled the case before them would not apply where none of the sub-categories sufficiently resembled that particular case.

Speaking to the amendments, Lord Bach said:

> …Clause 111 has been redrafted to make it clearer that the duty to follow guidelines does not mean that a sentencer has to sentence within a narrow category; rather, the sentencer is required to sentence only within the entire guidelines range for the offence, unless it is in the interests of justice to depart from the entire guidance. Secondly, the amendment seeks to clarify the duty on sentencers—where there is a guideline that identifies categories of offending behaviour—to identify the category that most resembles the case before them. This amendment means that the duty of the court to decide which category most resembles the facts of a particular case does not apply if there is not a sufficient resemblance. There is already a wide range of discretion for the sentencer, and we hope that these government amendments make that discretion even clearer.
>
> Let me illustrate this with a practical example. If we take an offence such as robbery, we see that there is an existing guideline issued by the Sentencing Guidelines Council. That guideline is formatted in a way which subdivides the offence into three levels of

[88] HL Deb 15 July 2009 c1203-1204

> seriousness. That is the preferred format but, as our earlier group of amendments made clear, it is not mandatory. Assuming that robbery guidelines are subdivided, the duty on the sentencer to follow guidelines is to sentence within the whole offence range—that is, the range for the entire guideline. For the current guideline the offence range goes from a custodial sentence of no years to 12 years' custody. This amendment makes it very clear that the duty does not force the court to stay within the subdivided range known as the "category range". However, the Committee should note that there is sufficient flexibility to have as many or as few categories within a subdivided offence-specific guideline as appear to the council to be appropriate, given the nature of the offence. Again, we should not forget that this duty to follow the guideline—to sentence within that range of 0 to 12 years—does not apply if it is not in the interests of justice to do so.
>
> Furthermore, Clause 111 makes it clear that where there is a subdivided guideline which has starting points and ranges for each category, there is a duty on a sentencer to identify the category that most resembles the case before them. Amendment 189C provides further clarification that this part of the duty does not apply when the sentencer considers that the case they have before them does not sufficiently resemble any of the categories. In other words, a sentencer is not required to try to shoehorn a case into a guideline category.[89]

On report, Lord Lloyd of Berwick moved an amendment to replace the requirement for the court to "follow" any relevant sentencing guidelines with a requirement for the court to "have regard to" any such guidelines. This would have preserved the existing wording used in sections 172 and 174(2) of the *Criminal Justice Act 2003*, Lord Lloyd's purpose being to "keep the law as it is now and has been ever since the Sentencing Guidelines Council was created in 2003 – and indeed since long before that".[90] However, on division the amendment was defeated by 124 votes to 66.[91]

4 Data protection: Government amendments agreed

On the last day of Committee, the Lords agreed a number of Government amendments tabled in response to concerns that the new assessment regime should, in certain circumstances, apply to data controllers in the private as well as the public sector (Bill 160, amendments 105-110). Lord Bach said:

> We recognise that there are genuine concerns about the private sector's handling of personal data … and that there are certain categories of private-sector data controller whose circumstances merit the application of assessment notices.
>
> Government Amendments 198A, 199A and 199C address those scenarios. We remain unpersuaded that the assessment notice regime should apply automatically to all data controllers. Such an approach would be a little excessive and impose disproportionate burdens on business. Instead, our amendments enable the Secretary of State to designate by order certain descriptions of private-sector data controller as liable for assessment notices.[92]

The Secretary of State would only be able to make such an order following a recommendation from the Information Commissioner and consultation with the affected sectors. Before making the recommendation or order, the Information Commissioner or the

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89 HL Deb 15 July 2009 cc1224-1225
90 HL Deb 28 October 2009 cc1217-1218
91 HL Deb 28 October 2009 c1229
92 HL Deb 21 July 2009 c1563

Secretary of State (as the case may be) would have be satisfied that it was necessary for the description of persons in question to be designated, taking into account:

- the nature and quantity of data under the control of such persons; and
- any damage or distress that may be caused by such persons breaching the data protection principles.

The Secretary of State would be required to review any designated descriptions of private-sector data controllers at least every five years.

The amendments also added judges to the list of persons to be excluded from the assessment notice regime:

> For judicial office-holders to be subject to the assessment notice procedure while exercising their professional judicial functions would compromise the constitutional principle of judicial independence, which this and every Government rightly have a statutory duty to uphold. There can be no disagreement that judicial impartiality and freedom from improper influence are at the heart of the fair administration of justice in this country. The Information Commissioner agrees with our making this special exception.[93]

The amendments also introduced new provisions in respect of sanctions for non-compliance with an assessment notice. The amendments would give the Information Commissioner the power to apply for a warrant under Schedule 9 to the *Data Protection Act 1998* where a data controller had failed to comply with a requirement imposed by an assessment notice. The Information Commissioner would then be able to enter and search that data controller's premises in order to assess compliance with the data protection principles.

5 Damages-based agreements: Government amendments agreed

At third reading the Lords agreed a number of Government amendments establishing a new statutory framework for the regulation of damages-based agreements (DBAs), under which legal fees are paid out of damages awarded to the claimant.[94] DBAs are not permitted in connection with court proceedings, but are both permitted and commonly used in proceedings before employment tribunals. The amendments followed a Ministry of Justice consultation, which had proposed that regulations should be introduced requiring solicitors and claims managers to provide full and clear information to consumers on matters such as the costs they would incur under a DBA and alternative options for funding.[95]

The Government had previously tabled similar amendments at both committee and report stages but on each occasion had withdrawn them. Explaining the reasons for this, Lord Bach said on Report:

> The primary intention of the amendments is to ensure consumer protection of claimants. We know from recent research that a significant number of claimants in employment cases who sign up to a damages-based agreement are not given proper information by their representatives. This lack of information covers alternative funding which may be available, such as through a trade union or a legal expenses insurance policy. Claimants are also not fully informed about the costs, such as experts' and

93 HL Deb 21 July 2009 c1564

94 HL Deb 5 November 2009 cc406-412

95 Ministry of Justice, *Regulating Damages Based Agreements: Consultation Paper 10/09*, 1 July 2009 and *Regulating Damages Based Agreements: Response to Consultation CP(R) 10/09*, 27 October 2009

> counsels' fees, which they may nevertheless have to pay—notwithstanding that they have signed a no-win no-fee agreement. It is right to legislate to introduce regulation to protect consumers.
>
> I understand that some noble Lords were concerned at the extent of the amendments as drafted. We are listening to those concerns, and propose to withdraw or not move these amendments at this stage, with a view to bringing back at Third Reading redrafted amendments, which will be narrower in scope and limited to the regulation of damages-based agreements in respect of employment claims which may go to the employment tribunal. I hope in this way that we can meet the concerns that have been raised by noble Lords, while ensuring from the outset the consumer protection of vulnerable claimants in employment cases.[96]

Under the Government's revised amendments, moved at third reading, a DBA in respect of employment tribunal matters would be unenforceable unless:

- it was in writing;
- it did not provide for a payment above a prescribed amount or an amount calculated in a prescribed manner;
- it complied with such other requirements as to its terms and conditions as were prescribed; and
- it had been made only after the legal service provider had provided the consumer with prescribed information.

The prescribed matters would be set out in regulations to be made by the Lord Chancellor following consultation with the judiciary, the General Council of the Bar and the Law Society. Lord Bach gave some further details on the proposed timescale for implementing any such regulations:

> We will draw up regulations in the light of our consultation and take note of any points raised today. We will consult with all the key stakeholders over the details of our regulations. A consultation will begin shortly after the Bill gains Royal Assent. … it is envisaged that the first regulations could include, among other things, a requirement for representatives to provide claimants with clear and transparent information on all likely costs and expenses and on other sources of funding to which they may be entitled and which may allow them to keep all of their damages.[97]

The amendments were agreed (Bill 160, amendment 98), although some concern was expressed as to the late stage at which they had been introduced for debate.

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96 HL Deb 29 October 2009 c1280
97 HL Deb 5 November 2009 c411