



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

**January 2009**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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## **Contact**

Isabella Sankey

Policy Officer

Direct Line 020 7378 5254

Email: [bellas@liberty-human-rights.org.uk](mailto:bellas@liberty-human-rights.org.uk)

Anita Coles

Policy Officer

Direct Line: 020 7378 3659

Email: [anitac@liberty-human-rights.org.uk](mailto:anitac@liberty-human-rights.org.uk)

## Overview

1. The Government's zeal for reform of the criminal justice system has been a prominent feature of its administration. Liberty has agreed with many of these reforms, but has expressed concern about a number of measures that have been ill-thought out and impact adversely and unnecessarily on traditional rights and freedoms. We welcome many of the provisions contained in the Coroners and Justice Bill, especially the broad reforms of the coronial system, which have been long overdue. However, the government has introduced a number of provisions that raise significant concerns. Given the length of this Bill and the short period in which we have had to produce our briefing, we have concentrated on areas of greatest specific concern. In particular:

- The reintroduction of proposals for the Secretary of State to certify 'secret inquests' after deaths at the hands of the State - a measure dropped from the Counter-Terrorism Bill in 2008;
- The introduction of a sweepingly broad power for any Minister to make an order that would allow any person to distribute any information that they hold on someone to any other person regardless of the purpose the information was originally gathered for or a lack of consent to so share this data, simply to achieve the government's policy purposes.

### Part 1 – Coroners etc

2. Part 1 of the Bill is designed to address the failures in the current coronial system, largely unchanged since the 19<sup>th</sup> century, and will replace the *Coroners Act 1988* (the 1988 Act). The stated aims of the coroners system are, to "*serve family and friends by clarifying the causes and circumstances of death, contribute to the health and safety of the public and provide information on mortality and preventable risks to life*".<sup>1</sup> There is, however, wide consensus that the coroners system is failing to do this. Many coroners are frustrated with the current system and, in the words of Victor Round, the Secretary of the Coroners Society, "*really quite frightened about the future*".<sup>2</sup> Liberty has consistently been pressing for reform of the coroners system. A draft Coroners Bill was consulted on in 2006 but was unfortunately dropped from the parliamentary programme. While we have grave concerns about new clause 11 and

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<sup>1</sup> Para 13, p8 Constitutional Affairs Committee Report, 2006.

<sup>2</sup> Q107 in Mr Round's evidence to the Constitutional Affairs Committee.

misgivings about several missed opportunities, we welcome many of the reforms in Part 1.

3. Clause 1 sets out a duty to investigate certain deaths. The circumstances in which the duty will apply largely mirror the requirements currently in place under section 8(1) of the 1988 Act but the current duty to investigate where a death occurs 'in prison' has been extended to cover circumstances where the deceased "*died while in custody or otherwise in state detention*". The explanatory notes state that this will include deaths in "*prison, in police custody, or in an immigration detention centre, or held under mental health legislation*". The requirement that a death be 'sudden' has also been removed. Liberty welcomes this extension which better reflects the State's Article 2 obligations to protect life.<sup>3</sup> As the Joint Committee on Human Rights (JCHR) has rightfully observed: "*when the state takes away a person's liberty, it assumes full responsibility for their human rights. The most fundamental of these is the right to life*".<sup>4</sup> When the state fails to protect the life of those in custody (whatever type of custody) it is vital that the full circumstances of the person's death are established and improvements to the system are implemented to prevent a reoccurrence. This goes to the heart of the coroner court's role. Indeed the European Court of Human Rights (ECtHR) has stated that an Article 2-compliant investigation must be carried out into a death in state custody. This applies whether the death occurs in police detention, in prison or when a person has been detained under mental health laws. The state's obligations following a death in custody were expressed by the Court in *Jordan v UK*<sup>5</sup>: to give the deceased's family the truth; ensure that lessons are learnt to improve public health; and to ensure that, if appropriate, criminal proceedings are brought. In *Jordan* the ECtHR stated that failure to meet the requirements listed below will in itself constitute a breach of Article 2. This position was confirmed by the House of Lords in *Amin*.<sup>6</sup> The requirements are that the investigation must be made on the initiative of the state (i.e. not civil proceedings); independent; effective; prompt; open to public scrutiny; and support the participation of the next of kin.

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<sup>3</sup> Article 2 of the *European Convention of Human Rights* as incorporated into the *Human Rights Act 1998* (HRA).

<sup>4</sup> Page 5, JCHR, *Deaths in Custody*, Third Report of the 2004-2005 Session. The JCHR also drew attention to the relevance of the bar on inhuman or degrading treatment (article 3) and the prohibition of discrimination (article 14).

<sup>5</sup> (2001) 33 EHRR 38.

<sup>6</sup> *Ex Parte Amin* [2003] UKHL 51; [2004] HRLR 3.

4. Clause 5 covers the purpose of the coronial investigation and matters to be ascertained. Sub-clause (1) lists as the purposes: “*who the deceased was; how, when and where the deceased came by his or her death; the particulars (if any) required by the 1953 Act to be registered concerning the death*”. Sub-clause (2) inserts: “*where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998, the purpose mentioned in sub clause (1) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death*”. This new sub-clause is welcome. It represents a positive recognition of the State’s duties under Article 2 to investigate the wider circumstances of a death where State action (or inaction) may be involved. Over recent years, narrative verdicts have been introduced following deaths in custody in order to meet HRA obligations. Narrative findings enable juries to go beyond a narrow mandate to consider “by what means and in what *circumstances*” a person died as required by Article 2 (established in the *Middleton* and *Sacker* judgments).<sup>7</sup> This includes, “*whether and to what extent systematic failings were a factor in death*”<sup>8</sup> and in cases of suicide (as in the *Middleton* and *Sacker* cases), “*whether a person takes their own life, in part because the dangers of their doing so were not recognised by the prison authorities*” and “*whether appropriate precautions could have been taken to prevent the death*”.<sup>9</sup>

5. Clause 10 is linked to clause 5 in that it governs the outcome of investigations. The requirement under clause 10(1)(a) that the senior coroner (or jury where there is one) make a ‘determination’ as to the factors listed in clause 5(1) is broadly similar to the current rule in the 1988 Act. Liberty welcomes the addition that the determination must include the circumstances of the death in Article 2 investigations. We do, however, believe that clause 10 could go further. Clause 10(1)(b) requires the coroner or the jury to make a ‘finding’ at the end of an inquest as to the particulars to be registered under the 1953 Act.<sup>10</sup> This continues the current system allowing for short verdicts (such as ‘unlawful killing’ or ‘misadventure’) in non-article 2 cases which can become an additional source of distress to the bereaved. Short verdicts

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<sup>7</sup> *R v Coroner for the West Somerset and other ex parte Middleton* [2004] UKHL 10 and *Regina v Coroner for West Yorkshire ex parte Sacker* [2004] UKHL 11 In *Middleton* the House of Lords said that the requirement of a coroners inquest in determining how a person came by their death required “how” to be interpreted as “by what means and by what circumstances”.

<sup>8</sup> Paragraph 298, p 85 JCHR report Deaths in Custody, Third Report of the 2004-2005 Session.

<sup>9</sup> Paragraph 42, Inquest Submission to CAC.

<sup>10</sup> *Births and Deaths Registration Act 1953*.

give an inadequate explanation of the circumstances of death and can be applied inconsistently. Liberty believes the extension of narrative verdicts to all inquests would provide better answers to questions the bereaved have about the circumstances of the death as well as prevent further fatalities.

### *Secret Inquests*

6. Clause 7 governs the use of a jury inquest. The general rule is that an inquest must be held without a jury. Sub-clauses (2) and (3) set out exceptions to this rule: an inquest must be held with a jury if the senior coroner has reason to suspect:

*“(a) that the deceased died while in custody or otherwise in state detention and that either—*

- (i) the death was a violent or unnatural one, or*
- (ii) the cause of death is unknown,*

*(b) that the death resulted from an act or omission of—*

- (i) a police officer, or*
- (ii) a member of a service police force*

*in the purported execution of the officer’s or member’s duty as such, or*

*(c) that the death was caused by a notifiable accident, poisoning or disease.”*

Sub-clause (3) gives the coroner the power to decide to hold an inquest with a jury in any case where he or she thinks it is appropriate.

7. These parts of the clause are modelled on section 8(3) of the 1988 Act. However, the Bill dramatically departs from current rules at clause 7(1) which provides that rules concerning jury inquests are subject to provisions governing ‘certified investigations’ found at clause 11. Clause 11 introduces a provision which would gravely limit transparency, and increase executive control, over the inquest process. Clause 11(1) allows the Secretary of State to issue a certificate that an inquest will be held without a jury giving the Secretary of State significant scope to intercede in inquest proceedings. The removal of juries will effectively allow ‘secret’ inquests to take place following deaths that result from state actions. This unhappy provision was first introduced in the Counter-Terrorism Bill 2008 (CT Bill). Following a public outcry and concerted cross-party opposition to the proposal, proposals for secret inquests were dropped after the CT Bill entered the Lords.

8. Media reports surrounding the re-introduction of the provisions in the current Bill have indicated that the 'secret inquests' have returned with greater safeguards in place. In fact the reverse is true. The grounds for the removal of a jury (which were already extremely broad in the CT Bill) have been extended and now cover situations where the inquest will involve material that should not be made public: 1) in the interests of national security; 2) in the interests of a relationship with another country; 3) in the interests of preventing or detecting crime; 4) in order to protect the safety of a witness or another person; or 5) otherwise in order to prevent real harm to the public interest.<sup>11</sup> It is concerning that the rationale and scope for an already controversial proposal has been widened in this way and we hope that this policy-creep will be challenged as the Bill makes its passage.

9. Determinations as to whether an inquest will be held without a jury are made solely by the Secretary of State. The only potential challenge to a decision to hold an inquest without a jury would be by way of Judicial Review (JR) in the High Court.<sup>12</sup> However, the purpose of a JR would be to challenge the legality of the decision not to allow a jury. Given that the grounds for the Secretary of State to make a determination cover a broad non-specific 'public interest', the decision could prove difficult to challenge in practice. The Bill does not specifically state that other interested parties, such as family or legal representatives, are excluded. However, the basis for deciding that a jury should be excluded is that "*the inquest will involve consideration of material that should not be made public*". By implication anyone who is not security cleared is likely to be excluded from proceedings in the same way that they would be from, for example, closed sessions in control order proceedings.

10. We have serious concerns about the impact that jury removal would have on public confidence in the inquest system. We also question the compatibility of the proposals with the UK's legal obligations. Exclusion of the jury and the family would seem to conflict with the requirements of family involvement and public scrutiny established in *Jordan v UK*.<sup>13</sup>

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<sup>11</sup> Clause 11(2). The two additional grounds for jury removal are 3 and 4: in the interests of preventing or detecting crime and in order to protect the safety of a witness or another person.

<sup>12</sup> While JR of a decision not to allow a jury would have always been possible under the proposals in the CT Bill, clause 11(5) in the current Bill inserts a 14 day staying period before certification can have effect to allow for any JR challenge. This appears to have been included in an attempt to show that concerns over 'secret inquests' have been addressed.

<sup>13</sup> Summarised at paragraph 3 above.

11. A more general concern is the impact on public confidence in the inquest process. Almost by definition the inquests to which these provisions would apply are likely to involve controversial or violent deaths. If these provisions were already in place it is likely that they could have been applied to the inquest into the shooting of Jean Charles de Menezes. This inquest, clearly raised issues concerning national security. It also involved the consideration of material, for which the Government might have easily argued that disclosure was not be in the 'public interest'. Any decision to hold the de Menezes inquiry in secret would have been extremely politically contentious. There would inevitably have been allegations of a whitewash and a cover up. Indeed, the political pressure might be such that the decision to hold the inquiry without a jury might have been considered too contentious. While this is supposition, we make this point to demonstrate the dangers of allowing this type of determination to be made by the Secretary of State. Any decision will be inherently political. Other inquests might raise similar issues to the de Menezes inquiry but not have the same profile or risk the same political fallout. Political considerations risk inconsistent decision-making when based on such arbitrary grounds as 'public interest'.

12. We can see no reason why these proposals are necessary and we do not believe that any of the Government's arguments stand up to scrutiny. Measures already exist to ensure that matters in the public interest can be suitably accommodated in inquest proceedings. These include the issuing of Public Interest Immunity certificates; the power to hold part of an inquest in camera; the power to restrict certain details from media reports; and the use of special measures. One of the main planks in the government's argument seems to be that because jury inquests account for only 2% of the total number of inquests in England and Wales the proposals for secret inquests won't have a huge impact on fundamental rights. As Inquest has rightly argued, "*this is a false and misleading argument. It is the investigation of the most serious and most contentious deaths that will be affected by this legislation – deaths at the hands of state agents. The removal of public scrutiny from these proceedings is therefore highly significant*".<sup>14</sup> Of further worry is the government's recent reasoning which, if followed to its logical conclusion, could justify scrapping juries in any or all criminal cases.

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<sup>14</sup> Inquest's Briefing on the Counter-Terrorism Bill 2008 for the House of Lords Committee (page 3).

13. The Government's arguments are even further undermined by clause 13 which amends Section 18 of the *Regulation of Investigatory Powers Act 2000* (RIPA) to allow intercept material to be admissible in inquiries in 'certified investigations'. The piecemeal removal of the general bar on the use of intercept is a continuing trend<sup>15</sup> and represents a tacit acceptance of the use of intercept material. There is no reason why the removal of the ban needs to be limited only to 'certified investigations'. It would be far more sensible to simply remove the bar and allow established rules of evidence, both in criminal and other proceedings, to determine the appropriateness of admissibility in individual cases. In fact a complete removal of the ban could represent the final nail in the coffin for the secret inquests plan.

14. The only retreat on this issue is an amendment to the proposal for 'specially appointed coroners' as originally proposed in the CT Bill. Clause 65 of the CT Bill originally sought to allow for the appointment of coroners by the Secretary of State in specific cases. Indeed under initial proposals this could have even happened during an ongoing inquest - allowing the first coroner to be replaced with the politically appointed alternative. Such direct governmental interference with the inquest system would have severely undermined public confidence. The purpose of an inquest is to provide an independent determination of law and evidence. Allowing direct executive interference would prejudice this independence.<sup>16</sup> Liberty is relieved that such direct interference is no longer being envisaged.<sup>17</sup> Instead it is proposed that where a certification has effect, the investigation must be conducted by a judge of the High Court nominated by the Lord Chief Justice (clause 11(3)(a)). While this is preferable to what was initially proposed it does not alter our fundamental opposition to the secret inquests proposals.

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<sup>15</sup> The *Counter-Terrorism Act 2008* recently introduced a number of other exceptions to the general RIPA ban on the use of intercept.

<sup>16</sup> Similar criticisms of these proposals have been made by: the JCHR in their Ninth Report of Session 2007 – 08: *Counter-Terrorism Policy & Human Rights* (Eighth Report): Counter-Terrorism Bill available at:

<http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf> and the House of Commons Justice Committee in their third Report of Session 2007-08 on the Counter Terrorism Bill available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/405/405.pdf>

<sup>17</sup> This proposal was scaled back during the passage of the CT Bill before the coroners provisions were removed altogether.

### *Suspension and resumption of investigations*

15. Clause 14 and Schedule 1 make provision for the suspension and resumption of investigations. Paragraphs 1 –3 govern suspension where certain criminal charges may be brought, are brought or pending an inquiry under the *Inquiries Act 2005*. Paragraph 4 provides a power at large for a senior coroner to suspend an investigation if it appears to the coroner that it would be appropriate to do so. The explanatory notes states that this “*may be appropriate if another investigation is being conducted into the death, for example, by the Independent Police Complaints Commission (IPCC), the Health and Safety Executive or an Accident Investigation Board or if an investigation is being conducted in another jurisdiction*”. Paragraph 9 similarly provides that where an investigation is suspended under paragraph 4 it may be resumed “*at any time the coroner thinks there is sufficient reason for resuming the investigation*”. Paragraph 7(2) and 7(3) prevent the resumption of an investigation until the criminal proceedings which triggered the suspension have come to an end at the court of trial or until the prosecuting authority has confirmed that they have no objection.

16. Liberty understands the policy objective of preventing simultaneous criminal investigations and inquiries, by different bodies, into the circumstances around deaths. We do, however, take this opportunity to raise concerns over the unnecessary delays to justice that can take place under the current system. A well-known and tragic example is the case of Jean Charles de Menezes who was fatally shot at Stockwell tube station on 22<sup>nd</sup> July 2005. While an inquest into the shooting was opened on 25<sup>th</sup> July 2005, the inquest was suspended after the IPCC opened its investigation into the shooting two days later. The IPCC took over two years to release their report - well after a decision by the CPS that no criminal prosecutions would take place. As a result the inquest into the death was only resumed in September 2008. While blame for the delay in justice can be laid firmly at the door of the IPCC in this case, questions are raised about the role of the coronial system in such situations where other mechanisms of investigation and accountability fail. Delays such as these prolong the pain and suffering for the bereaved and undermine one of the primary functions of a timely inquest. We ask parliamentarians to consider the relationship between the coronial service and other relevant bodies when looking at the current Bill and to consider whether time limits need to be imposed to ensure that justice is not delayed and therefore denied.

17. Paragraph 7 of Schedule 1 governs the arrangements for resuming investigations suspended because certain criminal proceedings have been brought. Under sub-clause (1) a suspended investigation may not be resumed unless the senior coroner thinks that there is sufficient reason for resuming it. The explanatory notes state by way of example that “*it could be that the senior coroner resumes the investigation because the criminal investigation did not find all the facts that the senior coroner is required to find or because it did not meet ECHR Article 2 obligations, for example because the defendant pleaded guilty*”. We are pleased that the explanatory notes recognise that the State may have enduring Article 2 obligations. It is indeed questionable that any criminal prosecution could effectively satisfy Article 2 requirements. The purpose of a criminal investigation is not to determine the circumstances but to establish whether proof of guilt of the offence charged has been established beyond reasonable doubt. While the explanatory notes recognise that the State may have ongoing Article 2 duties in the event of a suspension, as currently drafted these obligations are not reflected on the face of the legislation. Liberty believes that there should be a rebuttable presumption that, in cases where Article 2 obligations arise, the inquest will be resumed.

#### *Operation of the coronial system*

18. Clause 22 and Schedule 3 sets out the procedure for the appointment of coroners, qualifications required and terms of office. Clause 27 and Schedule 7 create the offices of Chief Coroner and Deputy Chief Coroners. They will be responsible for hearing appeals against decisions of coroners, for establishing and overseeing national performance standards and for providing leadership to the service in general. They may also conduct investigations. Clause 28 states that the Chief Coroner may make regulations about the training of all levels of coroners, coroners’ officers and other staff who support coroners. Clause 32 enables the Lord Chancellor to issue guidance about how the system is expected to operate for interested persons. The first of such guidance, in the form of the draft Charter for the Bereaved, was published at the same time as the Bill. We strongly welcome the introduction of the Charter which sets out the rights of the bereaved in the coronial process, the objectives and values of the coronial system and the expected standards of service. The Charter should help the Government fulfil their Article 2 obligations and should help ensure consistency of practice in the treatment of the bereaved. However, while this is an important first step, we highlight at paragraphs

27 - 29 several other ways in which the Bill could improve the system for the bereaved.

19. At present there is no centralised coronial service. The appointment of staff and funding for the coronial system comes from local authorities. The fragmented nature of the coronial service has led to inconsistency in practice and standards. The Luce Report<sup>18</sup> recommended that the Government nationalise the coroners system, making it centrally funded, with a national leadership and training structure. Ideally the coronial system should, as much as possible, be brought into line with the civil court system. It should be organised and funded on a national level with accountability to a national leadership. While this Bill misses the opportunity to create a more centralised service it represents a significant improvement in terms of standardisation. Liberty welcomes the establishment of a Chief Coroners Office, the commitment to a more professional coroners system and to improved provisions for training. This should improve standards across the system, as should national leadership. It is however still unclear whether training will be compulsory.

#### *Coroner Powers*

20. Clause 24 and Schedule 4 provide for the powers of senior coroners. Paragraph 1 of Schedule 4 gives the senior coroner statutory powers to summon witnesses and to compel the production of evidence for the purposes of an investigation. Inherent to the right to a fair trial (Article 6 of the HRA<sup>19</sup>) is the privilege against self-incrimination. The ECHR does not necessarily protect the individual from being required to answer questions when this is in the public interest. However answers given during an inquest cannot be used as evidence in a subsequent trial. There are good arguments that the public interest in obtaining the truth may be sufficient justification for forcing answers to questions asked in inquest proceedings even where this will force the witness to admit they have committed offences. Compliance with Article 2 is dependent on the inquest receiving as much information as possible. This could be especially important in cases of deaths in custody, where there are lessons to be learnt to improve public safety and prosecutions are rare. It is vital however that the families of the deceased and the general public are aware of the inadmissibility in criminal proceedings of any admissions made.

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<sup>18</sup> *The Fundamental Review of Death Certification and the Coroners Services*, chaired by Mr Tom Luce, 2003.

<sup>19</sup> Article 6 of the ECHR as incorporated by the HRA.

## *Search and Seizure*

21. Paragraph 3 of Schedule 4 gives senior coroners new statutory powers to enter and search land and seize items which are relevant to their investigations. Senior coroners can, with approval of the Chief Coroner, enter and search property. We do not take any particular issue with the creation of these powers. However it is important that anyone exercising them is subject to proper accountability. In particular they should be governed by Code of Practice B issued under the *Police and Criminal Evidence Act 1984*.<sup>20</sup>

## *Recommendations*

22. Paragraph 6 of Schedule 4 gives the senior coroner the power, at the end of an inquest, to make a report to a person who the coroner believes may have power to take such action with the view to preventing deaths in the future. The person or organisation to whom the report was made must give the senior coroner a written response to it. The explanatory notes state that “*further provision may be made in rules enabling reports to be published*”. A key role of the coronial service is to improve public safety by ensuring that mistakes, omissions and bad practice leading to deaths are not repeated. Unfortunately Schedule 4 does not go far enough in ensuring appropriate steps will be taken. In particular there is no mechanism to ensure that recommendations are made, recorded or implemented. A senior coroner who believes that action should be taken to prevent the reoccurrence of fatalities *may* report the matter to the relevant authorities. There is no responsibility to report findings and there are no guidelines on cases where recommendations should be made. Furthermore, coroners have no power to ensure that their recommendations are implemented and there are no duties on the part of other agencies to respond or institute changes.

23. Coroners have, in the past, made making identical findings and recommendations which were not implemented.<sup>21</sup> The previous draft Coroners Bill gave a nod towards this problem with provision made for the Chief Coroner to report to Parliament so that

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<sup>20</sup> PACE Code B – Code of practice for searches of premises by police officers and the seizure of property found by police officers on persons or premises.

<sup>21</sup> These are referenced in Liberty’s 2003 Report: *Deaths in Custody: Redress and Remedy*. More recently a number of coroner verdicts have been highly critical of the Ministry of Defence over the deaths of British personnel in Iraq and Afghanistan: ([www.guardian.co.uk/uk/2008/oct/23/military-iraq-mod-esf-hercules](http://www.guardian.co.uk/uk/2008/oct/23/military-iraq-mod-esf-hercules))

contentious issues could be scrutinised. However, while this alone wouldn't have been sufficient to address the problem of recommendations, the current Bill seems to have recoiled from this relatively mild measure. The Government claims that this Bill is aimed at meeting the needs of the bereaved yet one of the primary concerns of the bereaved is that lessons should be learnt from their loved-ones death. This is unlikely to happen under this Bill. It is vital to the improvement of public safety that mechanisms to implement change are written onto the face of the Bill.

24. Liberty believes that if proper recording mechanisms are established inquests can have long term benefits. In our 2003 report: *Deaths in Custody: Redress and Remedy*, we explored coronial systems in Ontario, Canada and New South Wales in Australia. In NSW recommendations are an integral part of the inquest process and they are logged in a detailed document at the end of the inquest. This document is available to the public and is tabled in parliament. Doing this can exert political pressure on Government to take action. In Ontario, the inquest jury gives the verdict and makes recommendations. The recommendations are published centrally and are sent to all parties involved. Implementation is monitored on an annual basis by a department of the Chief Coroners Office. Liberty, Inquest, the Fundamental Review of Coroner's Services and the Constitutional Affairs Committee's Report agree that recommendations can and should be a driver for positive change. We believe that recommendations should be made at the end of every inquest, and that these be centrally recorded and monitored.

### *Appeals*

25. Clause 30 provides a right of appeal of interested persons to the Chief Coroner against decisions that fall within sub-clause (2).<sup>22</sup> The Chief Coroner can consider any evidence which he or she thinks is relevant to the decision, determination or finding. The Chief Coroner can substitute or quash a decision and amend or quash a determination or finding. The decision of the Chief Coroner or Deputy Chief Coroner may be appealed to the Court of Appeal on a point of law. Under the current coronial system there is no appeal as such against a coroners decision, short of judicial

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<sup>22</sup> Including among other things: a decision whether or not to conduct an investigation; a decision whether to discontinue an investigation; a decision whether to resume a suspended investigation; a decision not to request a post-mortem examination; a decision whether there should be a jury at an inquest; and a decision embodied in a determination or a finding.

review.<sup>23</sup> We therefore welcome plans to allow interested persons to appeal decisions. This is a fundamental and important reform which brings greater accountability to coroner's decisions. We do however have concern about the power reserved in clause 30(5) which enables the Lord Chancellor to change the list of decisions that can be appealed by order.

### *Interested Persons*

26. Clause 36 lists those that come within the definition of an 'interested person'. Interested persons have, amongst other things, the right to appeal against certain decisions made in the course of investigations and inquests (by way of clause 30). Clause 36 expands the list of interested persons to include the IPCC. This expanded definition would give the IPCC the right to appeal against a senior coroner's decision or failure to make a decision. This extension provides the IPCC wide scope to intervene in the coronial process. The Government's policy behind this extension should be articulated. At this stage we believe that at the very least, the decisions which the IPCC would be able to appeal should be limited in scope.

### *Missed opportunities in Part 1*

27. The disclosure of evidence to all interested parties before the inquest is of fundamental importance, especially in cases concerning deaths in custody. However there is currently no legal obligation to do so. In 1999 the Home Office published a voluntary code of disclosure; instructing that in deaths in custody cases, evidence should be disclosed "*not less than 28 days before the date of the inquest proceeding*"<sup>24</sup>. However, this voluntary code has frequently proved to be ineffective. There is no disclosure obligation in this Bill so it seems the current voluntary system will remain in place. In *Deaths in Custody: Remedies and Redress* we called for "*a stronger statutory (disclosure) obligation which would standardise practices and create more confidence in the system*". We hope that this obligation will be included in the Bill during its passage.

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<sup>23</sup> Applications can be made to the High Court under section 13 of the 1988 Act if a coroner refuses to hold an inquest or where a fresh inquest is required but there is no general appeal route.

<sup>24</sup> Paragraph 17 of Home Office Circular 20/1999.

28. Where disclosure is granted, it is the policy of the court services to levy a disclosure fee which may be well outside the means of many families. For disclosure to support effective participation for families (as required by Article 2) it should be affordable. In cases involving deaths in custody the court service should cover the cost of copying evidence.

29. The Bill fails to propose any changes to the legal funding available to the bereaved. This will continue to be granted on a financially assessed basis and in tightly defined exceptional circumstances. While families can apply for funding based on significant public interest many families of those who die in custody, even those with limited financial means, have to fund their own involvement in controversial inquests. This is despite the fact that effectively unlimited funding is available for lawyers to represent the police, prison service and other public bodies. For families to participate effectively in the inquest process they need legal representation. Liberty agrees with the JCHR that “*in cases of deaths in police custody, funding for legal assistance should be provided to the next of kin*”.<sup>25</sup> We have additional concerns about the way in which proposals in this Bill may adversely affect the present levels of access to legal aid funding in inquests (see below at paragraphs 71-72).

## **Part 2 – Criminal Offences**

### *Murder, Infanticide and Suicide*

30. In August 2004 the Law Commission published its report entitled “Partial Defences to Murder” and later, in response to ongoing criticisms that the law governing murder was in need of a wholesale review, the Law Commission carried out a fundamental review of the various elements of murder and manslaughter, culminating in the publication of the Murder Report in November 2006.<sup>26</sup> The Murder Report was intended to form the first stage in the review of the law governing murder. The Government stated that it would proceed with the next stage of the review on a step-by-step basis, looking first at the recommendations in relation to areas of the law that are of most pressing concern. The outcome of this is these amendments in respect of the partial defences of provocation and diminished responsibility, homicide and infanticide. We note that complicity, which had been included in the

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<sup>25</sup> 309 JCHR Deaths in Custody, Third Report of the 2004-2005 Session.

<sup>26</sup> See the Law Commission’s report, *Murder, Manslaughter and Infanticide*, available at: <http://www.lawcom.gov.uk/docs/lc304.pdf>.

government's consultation,<sup>27</sup> is not included in this Bill. We welcome the government's acknowledgement that this complex area should be reviewed in the context of the wider law on complicity.<sup>28</sup> In our response to the government's consultation<sup>29</sup> we emphasised the importance of undertaking a wholesale review of all elements of the law of homicide, rather than pressing forward with piecemeal revisions in certain areas of the law, which are unlikely to lead to greater clarity and certainty. We are disappointed that the government has instead decided to proceed on this step-by-step basis to reform an important area in the criminal law.

31. We are also disappointed that the government has not taken this opportunity to abolish the mandatory life sentence for murder, or alternatively, adopt the Law Commission's recommendations to develop different categories of murder and manslaughter, with only the most serious attracting mandatory life sentence. Currently, a conviction for murder attracts a mandatory sentence of life imprisonment or, if the offender is aged under 18, detention at Her Majesty's pleasure. Given the range of acts falling within the category of murder with vastly differing degrees of culpability, Liberty considers that the retention of the mandatory life sentence for murder cannot be justified. No other offence under the criminal law provides the courts with one sentencing option for such a broad range of acts. The replacement of the mandatory life sentence for murder with a discretionary life sentence would solve many of the problems that have led to these proposed amendments, as the courts would have greater flexibility to take into account any factors that are relevant to the offender's culpability (for example, any premeditation, provocation and/or the mental state of the offender) at the sentencing stage. Rather, the government has decided to go down the perilous path of abolishing the common law and prescribing the precise circumstances when murder can be reduced to manslaughter. There is always a danger when legislation prescriptively sets out the circumstances when a complicated defence can apply that limits the ability of the judge and jury to decide on a case-by-case basis what are the relevant applicable circumstances.

32. Clauses 39 and 40 set out a new test for diminished responsibility. We broadly support the amendment to the law of diminished responsibility to tie this to a "*recognised medical condition*" as this provides for greater medical certainty. We

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<sup>27</sup> Government consultation paper, *Murder, Manslaughter and Infanticide: proposals for reform of the law*.

<sup>28</sup> See paragraph 26 of the Explanatory Notes to this Bill.

<sup>29</sup> Liberty's response, October 2008, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy08/murder-manslaughter-consultation.pdf>

are, however, disappointed that the government has not adopted the Law Commission's recommendation to include developmental immaturity as a possible basis for reducing murder to manslaughter. We believe that in certain circumstances a child under 18 should be able to have a partial defence to reduce murder to manslaughter on the basis of developmental immaturity. The age of criminal responsibility begins at 10 years of age and there is much research that shows that a child of 10 does not have the same reasoning process as that of an adult. Under these proposals an adult with a learning difficulty who has the mental age of a child will be able to plead diminished responsibility, but a child without any medical condition will not.

33. Clauses 41 to 43 sets out the proposed amendments to the partial defence to murder because of a loss of self-control (generally known as provocation). These are complicated amendments that allow a person to be convicted of manslaughter rather than murder in certain defined circumstances. These include where the defendant loses self-control and a person in the defendant's circumstances might have done the same and where the loss of self control was attributable to either (or both) the defendant's fear of serious violence from the victim (unless the defendant incited the violence) or because of things done or said which were of an extremely grave character and caused the defendant to "*have a justifiable sense of being seriously wronged*" (unless the defendant incited it to provide an excuse to use violence). This partial defence will not apply if the defendant acted in a "*considered desire for revenge*" and the fact that a thing done or said relates to sexual infidelity is to be disregarded. In addition the loss of self-control need not be sudden. This is intended to cover situations such as where an abused woman kills her violent partner, after an episode of violence has ended. We welcome this proposal, as the 'suddenness' requirement has tended to work against victims of domestic violence in cases that otherwise would clearly be seen to involve provocation.

34. We consider the proposal to allow the defence where the defendant's loss of self-control is attributable to his or her fear of violence from the victim to be a reasonable response to some of the current problems arising under this partial defence. For example, in relation to the situation regarding victims of domestic violence, the current need to rely on provocation places the focus on the victim's reaction to the acts of the abuser, rather than focusing on the victim's fear of serious violence. In relation to where a person overreacts to what they perceive to be an imminent threat, under the current law if a person acts in a disproportionate manner to this perceived

threat, the only option is to plead self-defence. However, as this full defence can be difficult to prove in such situations, such an overreaction usually leads to a conviction for murder, and therefore a mandatory life sentence. This may explain, for example, why juries are currently reluctant to convict people who kill burglars, even though the killing is considered to be a disproportionate response to the threat posed. We therefore welcome this proposed amendment.

35. However, the proposal to reduce murder to manslaughter where, in circumstances of an extremely grave character, things done or said caused the defendant “*to have a justifiable sense of being seriously wronged*” should be treated with extreme caution. The concept of being “*seriously wronged*” is entirely subjective, and therefore the defence would add little certainty or clarity to the current law. It is particularly concerning that this applies where the victim *said* something that caused the offence. Given the amendment provides that the loss of control need not be sudden, this could give rise to a situation where the killing has a vigilante element to it or a sense of revenge. We appreciate that proposed clause 41(4) provides that this will not apply if the defendant acted in a considered desire for revenge, but we are concerned by the qualifier “considered” and what this means when coupled with the broadly drafted notion of a sense of being “wronged”.

### *Suicide*

36. Currently, section 1(1) of the *Suicide Act 1961* makes it an offence for a person to aid, abet, counsel or procure the suicide or attempted suicide of another person. Clause 46 proposes amendments to this Act to expand this definition. It will make it an offence if a person intentionally does something, or arranges for someone to do something, that is capable of encouraging or assisting suicide or attempted suicide of any person, including people or a group of people not known to the defendant and including whether or not anyone does attempt suicide. There is also a broad provision that states that even where an act is not capable of encouraging or assisting suicide, it will be an offence if the defendant believed the facts to be different or had subsequent events happened as he or she believed they would. This provision is confusing and seems wholly unnecessary given section 1(2) of the *Criminal Attempts Act 1981* provides that a person may be guilty of an offence of attempt “*even though the facts are such that the commission of the offence is impossible*”.

37. The explanation given for the need for these amendments is that the clause “modernises the language of the current law with the aim of improving understanding of this area of the law” and does not “change the scope of the current law”.<sup>30</sup> Given the complex nature of this area of the law and the body of case-law surrounding it, it is extremely hazardous to rewrite such provisions merely to improve understanding. This is a matter that can be done through education if necessary. The way clause 46 (and clause 47 in relation to Northern Ireland) is currently drafted seems to go further than merely modernising language. There is a real concern that this change could further open up the possibility of prosecution of friends and family members of those who help loved ones to go overseas for assisted suicide. Enacting these provisions in this Bill will arguably make it more difficult for the DPP to decide in a given case, that it is not in the public interest to prosecute family members who help a terminally ill relative to commit suicide, given Parliament will have recently sent a clear signal that this is an offence under UK law.

38. The extension of this law to cover situations where an offence is committed even when the defendant does not know the specific person or class of persons who is being encouraged or assisted to commit suicide, appears to cover where material is posted on the internet. In many cases this material may be posted by depressed teenagers who honestly believe there to be little point in life. Any post that expresses this disenchantment with the world, stating for example that it would be better to kill oneself, would be criminalised under this section. It does not seem a helpful or appropriate response to criminalise those who are expressing an opinion distorted by their own depression. This could be more appropriately dealt with by removing such postings from the internet and providing counselling and understanding rather than invoking the criminal law (particularly as a breach of this provision can lead to up to 14 years imprisonment).

### *Images of Children*

39. Clauses 49 to 54 introduce a new offence of possessing prohibited images of children (being children under the age of 18). The definition of “image” in clause 52, by linking it to the definition in the *Protection of Children Act 1978*,<sup>31</sup> means that only

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<sup>30</sup> Paragraph 327 of the Explanatory Notes.

<sup>31</sup> The *Protection of Children Act 1978* (s 7) defines an indecent photograph or pseudo-photograph which includes films, regular photos, photographic negatives, data stored electronically, a tracing or other image derived from a photo and data stored electronically which is capable of conversion into this.

cartoons, drawings and computer-generated images are covered by these provisions. A prohibited image is one which is pornographic (because it is produced for sexual arousal), focuses solely on a child's genitals or anal region or portrays a sexual act with or in the presence of a child and which is grossly offensive, disgusting or otherwise of an obscene character. A child means a picture of someone under the age of 18 if the impression conveyed is one of a child or the predominant impression is of a child despite some physical characteristics that are not of a child.<sup>32</sup> Clause 52(7) and (8) also provide that references to an image of a person or child include images of an imaginary person or child.

40. Currently the law criminalises the possession of indecent images of real children (including images of children made by computer graphics which appears to be a photo).<sup>33</sup> It also criminalises the taking or making of, distribution and publishing of real and pseudo-photos.<sup>34</sup> In addition the *Obscene Publication Act 1959* (OPA) criminalises the publication of an obscene article, being a publication which will “*tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it*”. ‘Publication’ includes distributing, selling, giving or lending or showing or playing something, whether for gain or not. This would cover cartoons and drawings etc, but it does mean that mere possession of such an image is not currently an offence.

41. We agree that legitimate and proportionate legal restrictions on pornography, including criminal offences of possession, can be justified in a democratic society. The criminal law can play an important role in protecting the vulnerable from harm and possession of certain forms of pornography should be a criminal offence. In particular, any pornography in which the participants have not consented is a legitimate subject of the criminal law. It follows that the possession of child pornography is rightly criminalised as children are unable to give consent to sexual activity. However, we fear that the proposed offence could criminalise those who do no harm to others and detract attention from those who cause genuine hurt. It would, for example, be tragic if the creation of an offence aimed at private cartoons and drawings reduced the police resources available to tackle real child pornography or other circumstances where victims are clearly forced to submit to sexual abuse.

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<sup>32</sup> How a drawing of a 17 year is meant to be distinguished from a drawing of an 18 year old is unclear.

<sup>33</sup> See section 160 of the *Criminal Justice Act 1988*.

<sup>34</sup> See section 1 of the *Protection of Children Act 1978*.

Extreme caution should be exercised with all new criminal laws. Liberty believes that the state should be required to provide justifications for all new legal restrictions and to demonstrate that a proposed measure does not go further than is necessary.

#### *Hatred against persons on grounds of sexual orientation*

42. Clause 58 seeks to amend Part 3A of the *Public Order Act 1986*, which (relevantly) makes it an offence to incite hatred against people on the grounds of sexual orientation. This clause seeks to repeal section 29JA which provides that “*discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices*” is not to be taken of itself to be threatening or intended to stir up hatred. When the provisions criminalising incitement to hatred on the grounds of sexual orientation were first introduced, Liberty expressed concerns. Incitement to hatred criminalises an incitement to do something that is not itself criminal. We were concerned that once the new offence was in place it would be logically difficult to resist further extensions to cover other forms of hate incitement. We believe that instead of adopting a piecemeal approach, with new offences introduced as a consequence of who is lobbying hardest for them, there should be a review of the efficacy and impact of the speech offences in existence. This would allow an opportunity to consider how effective the existing criminal law is and whether extensions can be justified. Further, any piecemeal changes to these laws attract the same criticism and caution. This clause is potentially taking away the ability of a legitimate defence of genuine discussion of sexual orientation (i.e. by Christian groups based on their faith). A similar exception based on religious belief (in section 29J) is not being repealed. No reason is given as to why this amendment is necessary. Liberty calls for a reasoned and thorough review of all of these speech offences, exceptions and defences, rather than this piecemeal approach.

### **Part 3 – Criminal Evidence, Investigations and Procedure**

#### *Chapter 1 – Anonymity in Investigations*

43. Like the Law Lords that delivered the much-maligned judgment in *R v Davis*,<sup>35</sup> Liberty does not doubt the hugely destructive impact of gun and gang-related crime

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<sup>35</sup> [2008] UKHL 36.

on victims, their families and communities. Neither does Liberty doubt the very real and serious problem of witness intimidation and its impact on the administration of justice - not a new problem but certainly a grave one. Human rights law requires states to investigate and prosecute serious crime.<sup>36</sup> It requires states to take active steps to protect people whose lives are put at risk from the actions of other private individuals (including intimidated witnesses).<sup>37</sup> We therefore welcome indications that the police and prosecution are rigorously pursuing convictions for cases of witness intimidation.<sup>38</sup> We also broadly welcome Chapter 1, Part 3 of this Bill which creates “investigation anonymity orders”. In our briefing on the Criminal Evidence (Witness Anonymity) Bill<sup>39</sup> last year, we urged the Government to consider more ways of encouraging people to come forward and offer intelligence to the police and to assess the current systems for protecting people that are brave enough to do so. In particular, we said:

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

We are pleased to see that this suggestion has inspired a proposal taken up in this Bill.

44. Chapter 1 allows for orders to be made for qualifying offences<sup>40</sup> by a justice of the peace, in relation to a person specified in the order, prohibiting the disclosure of any information that (a) identifies the specified person as a person who assisted or was willing to assist a qualifying investigation specified in the order, or (b) that might enable the specified person to be identified as such a person. Five conditions must

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<sup>36</sup> *McCann v UK* (1996) 21 E.H.R.R. 97.

<sup>37</sup> See *Osman v UK* (1998) 29 E.H.R.R. 245.

<sup>38</sup> Convictions for witness intimidation have doubled in number between 1996 and 2005.

<sup>39</sup> <http://www.liberty-human-rights.org.uk/pdfs/policy08/liberty-briefing-witness-anonymity.pdf>

<sup>40</sup> Including murder and manslaughter where the death was caused by being shot with a firearm and/or being injured with a knife.

be satisfied before an order can be granted:<sup>41</sup> (1) a qualifying offence has been committed; (2) the person likely to have committed the offence was at least 11 but under 30 years old at the time the offence was committed; (3) that the person likely to have committed the offence is a member of a group, being a group identifiable from the criminal activities its members appear to be engaged in and it appears that the majority of the members of the group are at least 11 but under 30; (4) the informant in respect of whom the order would be made has reasonable grounds to fear intimidation or harm if he or she were identified as having assisted in the investigation; and (5) the person is able to provide information that would assist the investigation and is more likely than not to provide the information if the order is made. Disclosing information in contravention of an investigation anonymity order is a criminal offence and there are a number of circumstances in which an order will not be contravened.

45. As stated above, Liberty broadly welcomes the introduction of investigation anonymity orders which should help encourage vulnerable witnesses to come forward. We are, however, unsure about the reasoning and rationale for some of the conditions that need to be fulfilled before the orders can be granted. In particular the limitation that the person thought to have committed the offence has to be between 11 and 30. The explanatory notes state that *“the provisions are targeted at informants who are afraid of reprisals from street gangs. The age range set out is the understood age range for membership of such gangs, and the activities are the understood activities of such gangs”*. While we can understand the policy objective in targeting fear associated with a perceived gang culture, it is difficult to see how the results can lead to anything other than arbitrariness. It also presumes that the investigating authorities must already have some intelligence implicating a suspect before an order can be granted. This seems to run contrary to the purpose of these orders – namely to encourage witnesses to come forward where there are little or no leads. We also question the unlimited applicability of the orders and the creation of a criminal offence for breach. We believe that the orders should bind those working in public administration who are involved in the investigation and prosecution of the qualifying offence. Breach of an order could then be dealt with more proportionately through a employment obligation.

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<sup>41</sup> See clause 63.

## Chapter 2 – Anonymity of Witnesses

46. Chapter 2, Part 3 essentially re-enacts the *Criminal Evidence (Witness Anonymity) Act 2008* (CEWAA) (with some modifications) addressing the extent to which the identity of a witness can be hidden from a defendant, his/her lawyers and the public. It is, perhaps, surprising that the statute book remained silent on this issue until July last year. Chapter 2 re-enacts a statutory power for the courts to put in place measures in individual criminal cases in order to ensure witness anonymity. As clause 71(4) recognises the key challenge for the courts in exercising this power must be to ensure that the fairness of the trial, and the validity of the conviction, is not undermined by the reliance on evidence from anonymous witnesses. It is in nobody's interest for the innocent to be wrongly convicted and for the guilty to go free.

47. While we believe that the provisions in this Bill could be improved on we do not take specific issue with this Chapter. The discussion below is included to give parliamentarians a background to the issue of anonymity of witnesses and fair trial. Before considering, more generally, the fair trial implications of witness anonymity it is worth briefly considering the much criticised House of Lords' decision which prompted the original Bill. *R v. Davis* met with an impassioned and in some cases misleading response from some police and sections of the media. Assistant Commissioner Bob Quick, for example, called the ruling "*catastrophic*" and criticised the criminal justice system for "*too much principle and not enough pragmatism*".<sup>42</sup> Headlines included: "*Chaos as Law Lords ruin trials*"; "*Anarchy is unleashed*"; and "*Terrorists, murderers and other violent criminals will escape justice unless emergency laws are passed within weeks*". Thankfully, the response of Government and opposition parties to the decision did not follow suit. It was, in contrast measured and informed.

48. The decision did not, in reality, warrant such an outraged response from the police or the media. Indeed, in Liberty's view, the case was rightly decided and we believe that the same decision would be reached if the measures subsequently enacted were law at the time. Contrary to some media reporting, the ruling did not affect the use of special measures either to conceal the identity of victims and witnesses from the general public or to allow victims to avoid having directly to face a

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<sup>42</sup> Reported by the BBC on 24 June 2008

defendant.<sup>43</sup> Neither did the Law Lords decide that witness anonymity would always be unlawful or render a trial unfair. The question was whether, in Davis' particular case, the measures taken to maintain the anonymity of prosecution witnesses had been lawful and whether they had rendered Davis' trial unfair.<sup>44</sup> The facts of the case, therefore, warrant some consideration.

49. Iain Davis was convicted of murder following the fatal shooting of two men in East London. The sole or decisive evidence against Davis was the testimony of three witnesses who identified him as the gunman but feared for their lives if it became known that they had given evidence. Davis believed that the witnesses were part of a corrupt plot to implicate him in the murder, led by his ex-girlfriend and motivated by revenge. Davis's lawyers were, however, unable to pursue this argument during the trial because the judge had allowed the witnesses to testify under pseudonyms, with all particulars of their identity withheld from the defence. Furthermore, while cross-examining the witnesses, Davis's lawyers were not permitted to put to them any question that might enable them to be identified, could not ask who the witnesses were, where they lived and the nature of their relationship with Davis. The House of Lords decided that, in such circumstances, the degree of witness anonymity rendered the trial unfair.

50. The right to a fair trial is absolute. The risk of convicting and incarcerating the innocent cannot be balanced against the desire to obtain a conviction. What, indeed, could be the countervailing public interest in allowing the guilty to walk free and paying to keep the innocent behind bars? Chapter 2, Part 3 recognises this and clarifies that a court cannot allow witness anonymity where to do so would "be inconsistent with the defendant receiving a fair trial".<sup>45</sup> What exactly is required to ensure a fair trial may, however, differ from case to case. Liberty accepts that in some cases it could be possible to allow a witness to remain anonymous without denying the defendant a fair trial.

51. The right of the defendant to be confronted with and to cross-examine his or her accusers is a fundamental element of a fair trial. The law lords in *R v Davis* traced this right back through centuries of English common law. The right was adopted in

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<sup>43</sup> cf 23-28 of the *Criminal Justice Act 1988* and sections 114-126 of the *Criminal Justice Act 2003*.

<sup>44</sup> [2008] UKHL 36, para 4 (per Lord Bingham).

<sup>45</sup> Clause 71(4).

the Sixth Amendment to the US Constitution, which states: “*In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.*” As a result, protective measures to conceal the identity, or even the address, of a witness from the defence have been held by the US courts to be strictly unconstitutional.<sup>46</sup> The right to confront one’s accusers was also recognised in post-war international human rights instruments. The European Convention on Human Rights, for example, provides that everyone charged with a criminal offence has the right “*to examine or have examined witnesses against him*”.<sup>47</sup> Even during the troubles in and about Northern Ireland, when fear of reprisals from paramilitary organisations was severe, this aspect of the right to a fair trial was upheld.<sup>48</sup>

52. There are clear reasons why witness anonymity can threaten the fairness of a trial. Without knowing the identity of a hostile witness, no defence lawyer can properly assess his/her background or credibility. Withholding the witness’s identity makes it more difficult for the defence to test whether or not the witness was at stated places on stated occasions. As in *Davis*, it can also make it impossible for the defence to test whether the witness has a reason to exaggerate or even fabricate the evidence against the defendant. For a rival gang or an individual with a grudge against the defendant, giving false evidence to ensure a conviction could be an effective way of settling a score. Any attempt by the defence lawyer to cross-examine the witness will be handicapped by his or her inability to ask basic questions of the witness. Lord Bingham in *Davis* compared this to “*taking blind shots at a hidden target*”.<sup>49</sup>

53. In *Davis* it was argued that the concerns about witness anonymity were alleviated by prosecution disclosure obligations. It is true that the prosecution is required to disclose material to the defence including material that is known to the prosecutor to be damaging to an unidentified witness or previous inconsistent statements. Prosecution disclosure may not, however, be an adequate substitute for the cross-examination of a prosecution witness in front of the jury. As Lord Bingham commented in *Davis*:

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<sup>46</sup> See *Alford v United States* 282 US 687 (1931).

<sup>47</sup> Article 6(3)(d).

<sup>48</sup> See *R v Davis* at para 6.

<sup>49</sup> Paragraph 32.

*“the fairness of a trial should not largely depend on the diligent performance of their duties by the prosecuting authorities. All are familiar with notorious cases in which wrongful convictions have resulted from police mispractice, rare though such misconduct is.”*<sup>50</sup>

Even leaving aside the risk of misconduct, the defendant should not be reliant on the police and prosecuting authorities for the formulation of his or her defence. The prosecution might not, for example, realise that they hold material which, combined with other information known to the defendant, could be of great importance to the defence case.

54. Witness anonymity may, therefore, have serious fair trial implications. In some cases a fair trial will not be possible without the identity of a key witness being known. Like the Law Lords in *Davis*, for example, we do not believe that a trial could be fair where the anonymous evidence is the sole or decisive basis on which the defendant is convicted. Neither do we believe that the trial could be fair where the anonymous nature of the evidence prevents the effective cross-examination of the witness. Notwithstanding this, Liberty accepts that, in some cases, it could be possible to allow witness anonymity without denying the defendant a fair trial. We do not, therefore, object to the courts being given a limited statutory power to allow this.

55. Chapter 2, Part 3 re-enacts the statutory power created in CEWAA for a court in criminal proceedings to introduce measures in order to conceal the identity of a witness.<sup>51</sup> The range of permissible measures is very broad.<sup>52</sup> The courts are, of course, best placed to decide whether or not an order would be appropriate in a given case and what measures are required to ensure anonymity and we therefore, welcome the fact that clause 69 would leave the courts with ample discretion.

56. Clause 71 sets out three conditions that must be fulfilled before a judge may grant an order for anonymity: (a) the measures must be necessary to protect the safety of a witness or another person, to protect any serious damage to property, or to prevent real harm to the public interest; (b) the measures must be consistent with the defendant receiving a fair trial; and (c) it must be in the interests of justice to

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<sup>50</sup> Paragraph 31.

<sup>51</sup> The old common law rules relating to anonymous witnesses are abolished.

<sup>52</sup> Clause 69.

make the order. While we are pleased with the inclusion of fair trial considerations, we believe that pre-condition (a) should be limited so as to exclude damage to property. We also believe that the provision allowing the court to grant an anonymity order where it is necessary “*in order to prevent real harm to the public interest*” should be limited. We understand that this measure is framed to allow police or security service under-cover officers to give evidence anonymously, even though their safety is not at risk, where it might jeopardise future operations.<sup>53</sup> It is worth noting that this represents an expansion beyond the original reasons cited for witness anonymity - the problem of witness intimidation. In any event, the provision could be limited to more narrowly reflect its purpose.

57. Clause 72 sets out factors the court must consider when deciding whether the conditions are met, including: (a) the general right of a defendant to know the identity of a witness; (b) the extent to which the credibility of the witness is a relevant factor; (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant; (d) whether the witness’s evidence could be properly tested without his or her identity being disclosed; and (e) whether there is any reason to believe that the witness has any tendency or motive to be dishonest in the circumstances of the case. As we discussed above, witness anonymity may well raise significant fair trial concerns. We are, therefore, pleased that clauses 71 and 72 together recognise that where witness anonymity would be incompatible with a fair trial an order should not be made. In making this determination, the courts would apply the case law of the European Court of Human Rights.<sup>54</sup> As Lord Bingham explained in the lead judgment in *Davis* a clear rule has emerged from that case law:

*“the rule itself as it now stands is vouched by a series of authorities ... It is that no conviction should be based solely or to a decisive extent upon statements or testimony of anonymous witnesses. The reason is that such a conviction results from a trial which cannot be regarded as fair. This is the view traditionally taken by the common law of England.”*<sup>55</sup>

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<sup>53</sup> Explanatory Notes, para 31.

<sup>54</sup> Section 3 of the *Human Rights Act 1998*. The Explanatory Notes states: “*the grant of the order must be compatible with Article 6 of the European Convention on Human Rights*”.

<sup>55</sup> Paragraph 25.

58. Clause 73 requires a judge to “*give such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant.*” Special measures can have a negative impact on the jury. There is an inevitable danger that once the jury sees a witness screened off, with their voice distorted, they will assume that the defendant is a dangerous criminal capable of serious violence. Clause 73 may alleviate the risk but will probably not remove it altogether - another factor which the court should take into account when determining fairness.

59. The Criminal Evidence (Witness Anonymity) Bill was published on 3rd July 2008. All of the Commons stages of the Bill were concluded in a single day (8th July) with all of the Lords stages of the Bill also concluded on a single day, 2 days later (10th July). The history of rushed legislation is not a good one.<sup>56</sup> Where important and complex issues involving civil liberties and the protection of the public are at stake, Parliament should proceed particularly carefully. During the passage of the CEWAA Liberty was concerned about Parliament’s ability properly to perform the important task of subjecting the proposals to detailed and effective scrutiny. We proposed that a sunset clause be included in the Bill and we were delighted that this proposal was accepted. We are glad to see that the Act’s provisions are now to be replaced by new legislation which will enable Parliament better to scrutinise the proposals.

### *Chapter 3 – Vulnerable and Intimidated Witnesses*

#### *Eligibility for Special Measures: offences involving weapons*

60. Section 17 of the *Youth Justice & Criminal Evidence Act 1999* (YJCEA) provides that a witness is eligible for assistance if the court is satisfied that the quality of the witness’ evidence would be reduced on the grounds of fear or distress about testifying. In determining whether this is the case the court must take into account a number of factors<sup>57</sup> as well as any views expressed by the witness<sup>58</sup>. Clause 82

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<sup>56</sup> Examples being the much criticised *Dangerous Dogs Act 1991*, part 4 of the *Anti Terrorism Crime and Security Act 2001* (determined by the House of Lords Appellate Committee to be incompatible with human rights obligations by a majority of 8-1) and the *Prevention of Terrorism Act 2005* which has needed a range of amendments introduced in the current Counter Terrorism Bill to deal with drafting problems.

<sup>57</sup> Factors that must be taken into account under 17(2) include: the nature and alleged circumstances of the offence to which the proceedings relate; the age of the witness; any behaviour towards the witness on the part of the accused, members of the family or associates of the accused, any other person who is likely to be an accused or a witness in the

would extend section 17 to give automatic eligibility for assistance to witnesses in proceedings related to “relevant offences”. Relevant offences are specified gun and knife crimes which are listed in Schedule 12. Under clause 82 the court would not need to be satisfied that the quality of the witness’ evidence will be diminished and a witness can inform the court that he or she does not wish to be eligible for assistance. The explanatory notes contain no explanation or justification for the extension of automatic eligibility to specified offences. We assume that this measure is inspired by the need to be “seen” to be doing something in response to the increasingly high profile of gun and knife-related crime. Liberty believes that whether to direct special measures should be a matter of discretion for the court. It is important that wherever possible witnesses should give live evidence to ensure a fair and open trial process. As section 17 already provides protection for those whose evidence would be reduced on the grounds of fear and distress (and takes into account a wide range of potentially relevant factors) we cannot see any reason why the category of automatic eligibility has to be extended in this way. The extension to certain classes of offences does not stand up to scrutiny and is based on clumsy assumptions. It is imperative that, as far as possible, special measures are left to the discretion of the court to determine on a case-by-case basis. Special measures can have a negative impact on the jury. There is an inevitable danger that once the jury sees a witness screened off, with their voice distorted, they will assume that the defendant is a dangerous criminal capable of serious violence. For this reason, special measures should be used only in exceptional cases where the trauma to a witness outweighs any potential prejudice to the defendant and where this could not be addressed by other means. Section 17 strikes a delicate balance and we can see no reason for extending special measures by class.

### *Special measures directions*

61. Clauses 83 – 86 cover further new amendments to the special measures framework. We do not wish to comment on these in detail at this stage, save than to reiterate the general comments concerning special measures made at paragraph 60 As a matter of general principle, Liberty considers that whether or not witnesses are vulnerable, the presumption must remain that witnesses will give their evidence

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proceedings. There is also discretion to consider: the social and cultural background and ethnic origins of the witness; the domestic and employment circumstances of the witness; and any religious beliefs or political opinions of the witness.

<sup>58</sup> Section 17(3)

directly. Liberty accepts that there are occasions when the fact of giving evidence can significantly increase the trauma to a witness. Where there is direct concern of intimidation or fear, screens can be employed. There may be limited circumstances where evidence can be given by live link. Liberty does not oppose this, provided that this is used only in exceptional cases where the trauma to a witness far outweighs any potential prejudice to the defendant and where this could not be addressed by other means.

#### *Clause 87 – Examination of accused through intermediary*

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

#### *Chapter 4 - Live Links*

63. Chapter 4 amends the *Crime & Disorder Act 1998* (CDA) in relation to the use of live video links. Of the greatest concern is clause 89, which systematically replaces the existing requirements in the CDA that the accused must give his or her consent to the use of a live link at preliminary hearings and sentencing hearings. Instead, the court may direct the accused's attendance by way of a live link "*where it is satisfied*

*that it is not contrary in the interests of justice*” to do so. There is no direction on how this is to be assessed, or whether representations can be made. Similarly, the amendment removes the requirement for consent on the part of the accused to the giving of evidence at preliminary or sentencing hearings. The requirement that the accused consent to live link directions is an important safeguard against potential abuse. The physical appearance of an accused in court at pre-trial and sentencing hearings is a prerequisite for the effective exercise of rights under Article 3 (prohibition on torture and degrading treatment), 5 (right to liberty) and 6 (right to a fair trial) of the HRA. By appearing in court, the court may see first-hand whether the accused has been subjected to any abuse.

64. Clause 89(4) of the Bill provides that the accused may continue from a preliminary hearing by live link directly to a live link sentencing hearing (for example, where he or she pleads guilty) at the direction of the court so that an accused may *never* have the opportunity to present him or herself in court. This of course increases the risk, however minimal this might be perceived, that an abused prisoner may be induced to plead guilty.

#### *Chapter 5 – Miscellaneous*

##### *Clause 95: Admissibility of evidence of previous complaints*

65. Section 120(7) of the *Criminal Justice Act 2003* (CJA) allows for the admission of a previous statement which consists of a complaint by the victim of the alleged offence that satisfies various requirements including the requirement that it was made as soon as could reasonably be expected after the alleged conduct. Clause 95 removes the requirement that the complaint was made as soon as could be reasonably expected. Provided the other criteria for admissibility set out in section 120(7) are met, such complaints will be admissible regardless of when they were made. Liberty takes no particular issue with this amendment. As the explanatory notes states, statements of complaint would still only be admissible if the maker of the statements is available for cross examination. Nothing precludes defence counsel from challenging the timing of the statement and a jury would be able to consider the timing (and any delay) in the making of the statement when considering its value as to truth of the statement made.

*Clause 97: Bail: assessment of risk of committing an offence causing injury*

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

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

68. The 'exceptionality' of the murder charge is already catered for as under the present statutory framework, the tribunal already has recourse to paragraph 9 of Part 1 of Schedule 1 to the BA. The exceptions to the right to bail under Schedule 1 (risk of failure to surrender to custody/risk of committing further offences/ risk of interference with witnesses or otherwise obstructing justice) are, in practice, imbued with the exceptionality of a murder charge. The tribunal considering bail determinations is entitled under paragraph 9 of Schedule 1 to take into account the nature and seriousness of the charge and the likely outcome if convicted. In Liberty's experience bail decisions in murder are already treated with a high seriousness. We also believe that, as currently drafted, clause 97(1) will be inconsistent with article 5(3) of the ECHR (anyone arrested entitled to release pending trial) on the basis that it introduces a presumption against bail incompatible with the liberty of the subject.

69. A parallel can be drawn with section 25 of the *Criminal Justice and Public Order Act 1994* which was originally enacted to provide that there should be no bail for persons charged with offences of homicide and rape after previous conviction for

such offences. The original provision was challenged as being inconsistent with Article 5(3) of the ECHR and the present position is that section 25(1) provides that such persons:

*shall be granted bail in those proceedings only if the court, or as the case may be the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it.*

However, following *R (O) v Crown Court of Harrow (2007) 1 AC 249 HL* this provision is treated by the courts as having no substantive effect on bail determinations and being of utility only in reminding courts of the risks normally posed by defendants to whom it applied. We imagine that clause 97 would be treated in much the same way and read down so we do not see the utility of this proposed amendment.

#### **Part 5 – Miscellaneous Criminal Justice Provisions**

70. Clause 124 and Schedule 15 amend various Acts to implement an EU Directive to ensure that previous convictions imposed by an EU member state are taken into account in criminal proceedings in England, Wales and Northern Ireland to the same extent as convictions imposed here are taken into account. Amendments are being made to ensure that such convictions can be taken into account as evidence as to the bad character of a defendant; to impose a presumption against bail; to consider whether a person should be tried summarily or on indictment; and in sentencing. We have concerns about treating convictions obtained in other countries as the same as those imposed by UK courts. These amendments are based on the presumption that all EU countries have fair and equal trials so that a conviction imposed by a court in an EU member state will have been imposed after a fair trial. However, this presumption is seriously open to question. As the number of cases before the European Court of Human Rights for a breach of article 6 (right to fair trial) of the ECHR demonstrates, there are often serious injustices that occur in the trial processes in many EU countries. UK courts should not automatically be required to assume that a conviction imposed in another country is the same as one imposed by a UK court. Not only is the requirement for convictions imposed by EU countries concerning, hidden away within the detail of Schedule 15 (which is entitled 'Treatment of convictions in member States etc') there are amendments that relate to

convictions imposed in *any* country. See paragraph 1 of Schedule 15 which allows for a conviction in “*any country*” to be considered in ascertaining whether a defendant has a propensity to commit the offence with which he or she is now charged. Additionally, paragraph 6(3) of Schedule 15, provides that a previous conviction by a court either in or outside of a member state, can be treated by the court as an aggravating factor (see also paragraph 7 in relation to service offences). Needless to say, there are many countries in which a fair trial cannot be guaranteed and convictions imposed in such countries should not be automatically applied in UK courts as evidence of bad character or as an aggravating circumstance. We are also concerned by the proposed amendment in paragraph 3 of Schedule 15 as the amendment ensures that, on the basis of such a conviction, there will be a presumption against bail – a presumption that seriously affects a person’s right to liberty (article 5). In addition, paragraph 10 raises similar concerns as a presumption against imposing a custodial sentence or service detention under the *Armed Forces Act 2006* is lifted if a person is convicted in any member state. Safeguards should be built into these provisions to make it clear that such convictions can be disregarded by the Court if the defendant can show, on the balance of probabilities, that the conviction was imposed in breach of article 6 of the HRA (right to a fair hearing).

## **Part 6 – Legal Aid**

71. Section 6 of the *Access to Justice Act 1999* allows the Lord Chancellor to make a direction to require funding of cases that would not otherwise be funded in the circumstances specified in the direction. Clause 128 seeks to amend this to provide that this may apply to one or more areas or localities or specified courts or tribunals. It may also provide that the direction allows funding only for specified classes of persons or persons selected by reference to specific criteria or on a sampling basis. The Explanatory Notes states that this is intended to allow pilot schemes, to “*explore new ways of delivering specialist services*”.<sup>59</sup>

72. While we do not take specific issue with the use of pilot schemes we wonder why this is being done now and are concerned by the potential impact this may have on funding of legal aid in the area of inquests. Representation of bereaved relatives at an inquest is not given automatic funding – there is only some funding because the Lord Chancellor has given a Direction under section 6 for exceptional funding for

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<sup>59</sup> Paragraph 621 of the Explanatory Notes.

certain inquests. We are concerned that this amendment could allow, for example, only inquests held in London, or only inquests involving the death of military personnel or British citizens. Given that the stated aim of this Bill is to standardise inquests and reform the system to deliver a more effective, transparent and responsive service to the public, we wonder why clause 128 would allow such distinctions to be made. Given the importance of inquests into establishing the cause of death of a person and for there to be seen to be a full and public inquiry, as is required under article 2 (right to life) of the HRA,<sup>60</sup> we would hope that the government would more fully explain this amendment and its likely application in practice.

73. Clause 131 introduces greater powers to make regulations about enforcing a court order which requires a person to pay for some or all of the costs of legal representation. These amendments would allow the Legal Services Commission to not only recover the cost of the legal representation but also the cost of trying to enforce an order to pay (which would necessarily include legal costs). This could quite conceivably mean that a person who has been given legal aid funding in a criminal matter but later required to pay for some of his or her legal representation is charged with costs that could exceed the amount of the initial representation. A Recovery of Defence Costs Order can be made against someone who is convicted of an offence in the Crown Court and higher courts and who earns over £22,235, has capital of over £3000 or has more than £100,000 equity in their home.<sup>61</sup> These are not necessarily high income earners or those with substantial assets. Allowing a requirement to be imposed to add on the costs of enforcing an order (which may well exceed the amount of the order itself) does not seem to be fair or proportionate. As part of requiring the person to pay, these amendments also introduce the ability for the court to make an order to sell a person's car in order to pay the debt. We have particular concerns about the ability for such an order to be made in respect of motor vehicles in which the person whom the order has been made against only has an interest in the motor vehicle.<sup>62</sup> This could clearly impact not only on the property rights of the person concerned but also any co-owner of the motor vehicle. No provision has been made to set out the rights of any co-owner to object to such an

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<sup>60</sup> Article 2 of the *European Convention of Human Rights* (ECHR) as incorporated by the HRA.

<sup>61</sup> See regulation 4 of the *Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001*.

<sup>62</sup> As provided for in Schedule 16, proposed new Schedule 3A, clause 5(2).

order being made or to recover their interest in the vehicle, and as such, this seems to clearly breach the right to property in the HRA.<sup>63</sup>

74. We have been concerned for some time about inroads that have been made into legal aid eligibility and entitlements. This is yet another example of such inroads into entitlements which greatly affect a person's ability to gain access to justice. We are particularly concerned about the proposal in clause 131(3) which would allow regulations to be made that could "*provide for the withdrawal of an individual's right to representation in certain circumstances*". Article 6 of the HRA provides for the fundamental right to a fair trial and the right to free legal assistance in the interests of justice. The withdrawal of legal aid for representation in criminal cases is an extremely important matter and should be fully explored in legislation and not left to secondary legislation, particularly in light of the obligations under article 6.

#### **Part 8 – Data Protection Act 1998**

75. Clause 152 introduces a new Part into the *Data Protection Act 1998* (DPA) to allow for 'information sharing' of data if approved by an Order made by a Minister. These proposals seem to have come about because of a recommendation made by Dr Mark Walport and Richard Thomas in their *Data Sharing Review Report* published in July 2008. The government consulted on a number of the recommendations proposed in the report, but recommendation 8 which proposed this type of data sharing was not included as part of the consultation. It is unfortunate that many of the other recommendations which were consulted on have not been included in this Bill but the one provision that allows for greater data sharing has been enthusiastically adopted.

76. Liberty strongly opposes these amendments as the powers it gives are extraordinarily broad and make a mockery of the safeguards contained in the DPA. The amendments would enable the Secretary of State, Treasurer or a Minister<sup>64</sup> in charge of any government department to make an order giving "*any person*" the right to share information, including personal data, by disclosing it to another person or

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<sup>63</sup> See article 1 of Protocol 1 to the ECHR as incorporated by the HRA.

<sup>64</sup> Note that different terms are used in Scotland, Wales and Northern Ireland, but since the effect of the amendments are the same, for the sake of clarity we will refer to the terminology applicable in England.

using the information for a purpose not related to that which the information was initially obtained. Note that the power is not restricted to sharing between government departments as suggested in media reports after this Bill was introduced: it could allow a private company to share personal data so long as an order was made allowing it. In fact, the examples given in the Explanatory Notes of the type of sharing involved include “*when one company provides its client list to another company for commercial purposes*” as well as where a government department obtains information for tax purposes but later uses that information for the provision of benefits and credits<sup>65</sup> (of course the example could be turned around so that information obtained for benefits could be used to form the basis of a tax investigation). The only limit on the entitlement to make such an order is that the information sharing must relate to a matter with which the relevant Minister or department is concerned; it is to secure a policy objective that the Minister has; the provisions in the order are proportionate to the policy objective; and it strikes a fair balance between the public interest and the interests of any person affected by the order. Such an order can confer power on any person; remove or modify any legal prohibition on information sharing and amend or repeal any Act of Parliament whenever passed. The examples given in the Explanatory Notes state:

*“This could be by repealing or amending other primary legislation, changing any other rule of law (for example, the application of the common law of confidentiality to defined circumstances), or creating a new power to share information where that power is currently absent.”<sup>66</sup>*

Before an order is made a general invitation must be given to all those who might be affected by the order to make representations and the Information Commissioner must be given a copy of the order and may submit a report in relation to it (which must be laid before Parliament), but he has no power to amend the order. The order must be approved by Parliament, but Parliament has no power to amend the order.

77. If these amendments are enacted it will give Ministers the power, through secondary legislation, to effectively nullify the protections contained within the DPA, and indeed the very purpose of the DPA. The DPA was introduced to give effect to

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<sup>65</sup> Paragraph 692 of the Explanatory Notes.

<sup>66</sup> Paragraph 697 of the Explanatory Notes.

an EU Data Protection Directive<sup>67</sup> which was aimed at protecting individual privacy in the processing of personal data. The DPA creates a framework which requires that data be processed in accordance with a set of principles that protect the individual and are the foundation of standards of data management that apply to the public and commercial sectors. It sets out eight guiding principles by which all personal data must be handled and expressly provides for additional protection of sensitive personal data.<sup>68</sup> Liberty has argued that while the DPA grants important protection for personal privacy, its provisions are increasingly out-dated and while it might have provided an adequate framework at a time when processing more usually involved the processing of small amounts of data, it is not equipped to cope with mass data processing exercises. We have called for new data protection legislation to reflect changes in data processing techniques and to properly regulate areas such as CCTV.<sup>69</sup> Despite this, the government has instead decided to amend the DPA to potentially render its protections nugatory.

78. In effect, these amendments would allow a Minister to allow any person (including a company or another government department) to share information about any person (including company information) as well as personal information that they hold on any person (e.g. name, address, date of birth, ethnicity, credit history, medical records, DNA and genetic information, tenancy records, social work records etc, the list goes on and on), if to do so serves the government's policy objectives. We do not have to look far for a disturbing example of what could be the subject of an order: the government's own Explanatory Notes to this Bill suggest an order could be made to allow "*NHS Trusts in England to share patient data for the purposes of medical research*".<sup>70</sup> Such an order could also be directed towards GPs allowing them to share the medical records of their patients for research purposes. This could be done without the consent of any of the people whose records are likely to be shared.

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<sup>67</sup> European Data Protection Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (95/46/EC).

<sup>68</sup> 'Sensitive personal data' includes personal information about racial and ethnic origins, political beliefs, religious or other beliefs, membership to trade unions, physical or mental health, sexual life, the (alleged) commission of any offence and any proceedings for any offences committed, their disposal or sentence.

<sup>69</sup> See Liberty's evidence to the Home Affairs Committee Inquiry into a Surveillance Society, 2007, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy07/home-affairs-ctte-surveillance-society.pdf>

<sup>70</sup> Paragraph 700 of the Explanatory Notes.

79. These amendments clearly engage the right to privacy under the *Human Rights Act 1998* (HRA).<sup>71</sup> Any attempt to interfere with this right must be for a legitimate purpose,<sup>72</sup> in accordance with the law and proportionate. It is impossible to know what purpose the orders are intended to achieve, other than a “*policy objective*”. There is no limit on this other than the very general requirement that all Ministers are prohibited under the HRA from acting in a way that is incompatible with human rights. The government argues that this is enough to demonstrate that “*all such orders will be in pursuit of a legitimate aim as per Article 8(2)*”.<sup>73</sup> It is not enough for legislation to give such broad and sweeping powers to make secondary legislation and simply hope that the purpose for which an order is made will be a legitimate one under the HRA.

80. A “*relevant policy objective*” must be limited to the types of matters that could be considered to be a legitimate aim under article 8. Given the breadth of the power it is unclear how this could be considered to be a proportionate interference with the right to privacy. The only argument put forward on proportionality by the government is that there is a requirement that the order be proportionate to the policy objective and strike a fair balance between the public interest and the rights of any person affected by it.<sup>74</sup> However, a blanket discretionary power to allow an order to be made to amend any Act or confer any power to achieve a government policy could never be said to be proportionate and necessary in a democratic society. Further, the requirement to “*strike a fair balance*” between the public interest and the interests of an individual is a convenient yet misleading analysis that involves weighing up the greater good against a particular individual or group of individuals, who will often be hard pressed to show that their interest outweighs the greater public interest. It is only by aggregating the impact of the order across the many people who may be affected that the real extent of the privacy infringement can become clear.

81. Once the details of the proposed amendments are considered more questions arise. If data is shared pursuant to an information-sharing order will any record be made of this and the purpose for which it was shared? Who will monitor this, given the Information Commissioner is given powers to ensure compliance with the data

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<sup>71</sup> Article 8 of the *European Convention of Human Rights* as incorporated by the HRA.

<sup>72</sup> The legitimate purposes permissible under Article 8 are in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>73</sup> Paragraph 964 of the Explanatory Notes.

<sup>74</sup> See proposed section 50A(4)(c).

protection principles, not with any orders made under this Part? The only role the Information Commissioner has is the ability to write a report about the order (within 21 days of being given a copy of the order) which must be laid before Parliament. If an order amends the DPA to revoke the data protection principles in any given case the Information Commissioner will have no authority to investigate any such breach, nor will he have the power to even investigate compliance with the order. We agree with the statement made by the Joint Committee on Human Rights in respect of the appropriateness of leaving data protection safeguards to secondary legislation. It said in its fourteenth report:

*We fundamentally disagree with the Government's approach to data sharing legislation, which is to include very broad enabling provisions in primary legislation and to leave the data protection safeguards to be set out later in secondary legislation. Where there is a demonstrable need to legislate to permit data sharing between public sector bodies, or between public and private sector bodies, the Government's intentions should be set out clearly in primary legislation. This would enable Parliament to scrutinise the Government's proposals more effectively and, bearing in mind that secondary legislation cannot usually be amended, would increase the opportunity for Parliament to hold the executive to account.*<sup>75</sup>

82. Furthermore, proposed section 50B would allow for *any* Act of Parliament to be amended by way of secondary legislation. This would therefore allow the order to amend the DPA itself and, on the face of it, amend the *Human Rights Act 1998*. The concern that secondary legislation could amend the HRA was raised when the Civil Contingencies Bill was going through Parliament which led to an amendment to ensure that the HRA could not be amended in this way.<sup>76</sup> If these provisions are not removed from this Bill (as we strongly propose they should be) at the very least a provision should be included to make it clear that the power to “*modify any enactment*” does not extend to the HRA.

83. It is also questionable, if these amendments are passed, whether the UK would continue to comply with the requirements of the EU Directive which formed the basis of the DPA. There are a number of protections in that Directive which must be

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<sup>75</sup> *Data Protection and Human Rights*, 14<sup>th</sup> report 2007/2008, 4 March 2008, paragraph 20 available at: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/72/72.pdf>

<sup>76</sup> See section 23(5) of the *Civil Contingencies Act 2004*.

satisfied before personal data can be shared, including special requirements for the use of sensitive personal data. These are reflected in the DPA. The UK is required under the Directive to protect the right to privacy as set out in the Directive and the UK will be in breach if it has legislation that fails to do this – in effect this amendment means the legislation no longer complies with the Directive as it would allow an order to be made circumventing it.

84. If there is a need to share information between government departments to ensure that government services are appropriately distributed, this can be dealt with by obtaining the consent of the people whose data is to be shared. Alternatively, if this is not possible, interference with personal privacy should be regulated by primary legislation and fully considered by Parliament. Secondary legislation is not the appropriate vehicle to achieve any of these aims.

85. Clauses 151 and 153 also make amendments to the DPA which give greater protections and oversight to the Information Commissioner which we generally welcome. Clause 153 provides that the Commissioner must prepare a data sharing Code of Practice to give practical guidance about the sharing of personal data. However, a breach of the Code does not of itself render the person breaching the Code subject to any legal proceedings.<sup>77</sup> In addition, there is nothing that would prevent an information-sharing order from giving the power to share information in a way that is incompatible with the provisions of the Code (as an order can “*remove or modify any prohibition or restriction imposed (whether by virtue of an enactment or otherwise) on the sharing of the information*”).<sup>78</sup> In addition, the Code of Practice only relates to the sharing of “personal data” whereas the information-sharing order power relates to *all* data, not just personal data (for example, non personal data includes company information and the personal details of people held by private sector bodies in a manual form). Calling the power of the Information Commissioner to make a Code of Practice a “safeguard” with respect to information-sharing orders is therefore quite a stretch.

**Anita Coles**

**Isabella Sankey**

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<sup>77</sup> Proposed section 52E(1).

<sup>78</sup> See Clause 152, proposed section 50B(1)(b).