



**Liberty's Report Stage Briefing and  
Amendments on the Coroners and  
Justice Bill in the House of Commons**

**March 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.

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## Overview

1. 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, particularly in relation to secret inquests. Given the and seriousness of our, concerns about secret inquests we have produced a stand alone joint briefing with INQUEST and JUSTICE in relation to clauses 11 to 13 of this Bill.

2. In this briefing we focus on the remainder of the Bill. We wish to draw particular attention to Amendment 3 (when juries are required) and Amendment 25 (privacy impact statements). While we have serious concerns about the information sharing power now contained in clause 154, we are heartened by the Justice Secretary's indication that the government intends entirely remove this provision from the Bill. We are relieved that the government has listened to the concerns raised by Liberty and many others. Building on this, we hope that the parliamentarians might take the opportunity presented in this Bill to strengthen the *Data Protection Act 1998* by enacting a Privacy Impact Assessment to ensure that all legislative amendments fully consider any possible privacy implications. An amendment to this effect is included in this briefing. In this briefing we set out Liberty's suggested amendments to this Bill.

## Part 1 – Coroners etc

### Amendment 1 - Clause 5(2): Narrative verdicts

Clause 5, page 4, line 1, after 'necessary' insert 'in the interests of justice or'.

Clause 5, page 4, line 3, after 'ascertaining' insert

'—  
(i) '.

Clause 5, page 4, line 4, at end insert—

- '(ii) whether and to what extent systematic failings were a factor in the death,
- (iii) whether appropriate precautions could have been taken to prevent the death,
- (iv) whether, if the deceased took his or her own life, this was, in whole or in part, because the risk of their doing so was not recognised by those acting on behalf of the State,
- (v) any other factor relevant to the circumstances in which the deceased came by his or her death.'

### **Effect**

3. This amendment would allow for a non-exhaustive list of relevant factors to be considered in the making of 'narrative verdicts'. The amendment would also allow 'narrative verdicts' where necessary in the interests of justice. As currently drafted 'narrative verdicts' would only apply when Article 2 is engaged.

### **Briefing**

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". Sub clause (2) represents a positive recognition of the State's duties under Article 2 of the *Human Rights Act 1998* (HRA)<sup>1</sup> to investigate the wider circumstances of a death where State action (or inaction) may be involved. While it is welcome it does not go far enough. Over recent years, narrative verdicts (which go beyond what is strictly required under current legislation) 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>2</sup> This has been held to include "whether and to what extent systematic failings were a factor in death"<sup>3</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>4</sup> It is crucial that verdicts continue to consider the wider circumstances around a death, particularly where the State is in some way implicated. A list of potentially relevant factors will help to ensure that this practice continues.<sup>5</sup>

5. As currently drafted, 'narrative verdicts' would only be permitted in Article 2 cases. 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 give an inadequate explanation of the circumstances of death and can be applied inconsistently. Liberty believes the extending the possibility of a narrative verdict to all inquests (where appropriate in the interests of justice) would provide better answers to questions the

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<sup>1</sup> Article 2 (right to life) of the European Convention of Human Rights as incorporated into UK law by the HRA.

<sup>2</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 coroner's inquest in determining how a person came by their death required "how" to be interpreted as "by what means and by what circumstances".

<sup>3</sup> Paragraph 298, p 85 JCHR report *Deaths in Custody*, Third Report of the 2004-2005 Session.

<sup>4</sup> Paragraph 42, Inquest Submission to CAC.

<sup>5</sup> The explanatory notes state that the Bill does not define the precise circumstances where a coroner should conduct an Article 2 investigation to "allow for flexibility in the future should case law determine that Article 2 inquests should extend to cover additional matters". Our suggested amendment is non-exhaustive and would in no way bind or limit the flexibility of a coroner's investigation. Rather it would ensure a minimum floor of factors required for consideration.

bereaved have about the circumstances of the death as well as prevent further fatalities.

### **Amendment 2 – Clause 5(3) – Expressions of opinion**

Clause 5, page 4, line 5, leave out lines 5 to 11.
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#### **Effect**

6. This amendment will remove clause 5(3), which prevents a senior coroner or juror from expressing any opinion on any matter other than: who the deceased was; how, when and where (and sometimes in what circumstances) the deceased came by his or her death; and particulars concerning the death which are required to be registered under the *Births and Deaths Registration Act 1953*.

#### **Briefing**

7. Clause 5(3) would prevent a senior coroner or an inquest jury from expressing 'any opinion on any matter' other than the basic details provided for under subsection (1). This is an unprecedented and unjustified gagging provision. The explanatory notes contain no clarification as to why the clause is deemed necessary. By definition, jury inquests consider those matters most relevant to the wider public interest. Clause 5(3) would disproportionately interfere with the function of jury inquests and may potentially breach article 10 of the HRA (the right to freedom of expression).

### **Amendment 3 - Clause 7(2) – when juries are required**

Clause 7, page 4, line 31, at end insert—

- ‘(d) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health and safety of the public or any section of the public,
- (e) that the death resulted from an act or omission of a person discharging functions under the control of a public authority or an entity which falls to be considered as a public authority for the purposes of the Human Rights Act 1998.’

#### **Effect**

8. Proposed new paragraph (d) inserts an additional ground as to when jury inquests are required. The suggested paragraph replicates a provision that currently exists under the *Coroners Act 1988*. Proposed new paragraph (e) allows for a jury inquest to be convened when a senior coroner has reason to suspect that a death has resulted in whole or in part from the act or omission of a public authority.

#### **Briefing**

##### *Proposed new paragraph (d)*

9. As drafted clause 7(2) removes one of the existing grounds for when juries are required at an inquest. The Government has given no policy justification for the removal of this ground, other than to say<sup>6</sup> that clause 7(3) gives a senior coroner a discretion to hold a jury if “*there is sufficient reason for doing so*”. Article 2 (right to life) is often said to be the basic precondition for the enjoyment of other rights. The first sentence of Article 2(1) emphasises that a person’s right to life “*shall be protected by law*”. It has been held that this requires the state not only to refrain from the unintentional and unlawful taking of life but also to take steps to safeguard the

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<sup>6</sup> See Bridget Prentice’s comments to the Public Bill Committee on this Bill on 10 February 2009, in Hansard, available at: <http://www.publications.parliament.uk/pa/cm200809/cmpublic/coroners/090210/pm/90210s05.htm>

lives of those within its jurisdiction.<sup>7</sup> In essence this places a positive obligation on states to ensure that the necessary regulatory framework is in place to protect the right to life. It is not sufficient to merely give a senior coroner the discretion to hold an inquest with a jury in such circumstances, this should be a guaranteed requirement.

10. The proposed amendment which is currently in the *Coroners Act 1988*, was invoked in a 2007 High Court case<sup>8</sup> to ensure that a jury was summoned at the inquest into the deaths of Princess Diana and Dodi Al Fayed. It was the ability of the paparazzi to behave as they did in the hours before the deceased came by their deaths which was held to satisfy the requirement that ‘circumstances’ existed which were potentially prejudicial to public health and safety. Such circumstances can potentially exist if the State has failed to regulate an area of activity which it might be required to do in order its fulfil its article 2 obligations.

11. Liberty is also intending to use this provision to challenge a decision by a coroner not to call a jury in the inquest into the murder of Naomi Bryant. Naomi Bryant was murdered following the early release from custody of Anthony Rice. Liberty believes that his release was in breach of article 2 of the HRA (right to life) and we are intending to argue that the circumstances surrounding the release requires a jury to be convened. Juries should necessarily be convened where there is a chance that the State has neglected its regulatory obligations. It is also crucial that juries are involved in such cases to ensure public confidence. Independent scrutiny is vital in situations where government inaction may have indirectly caused or contributed to loss of life.

*Proposed new paragraph (e)*

12. The European Court of Human Rights in *Jordan v UK*<sup>9</sup> examined the state’s obligations under article 2 (right to life) following a death in state custody. It held that the state must ensure the deceased’s family are provided with the truth; that lessons are learnt to improve public health; and that, if appropriate, criminal proceedings be brought. In particular, it held that an investigation into the death must be made on the initiative of the state (i.e. it is not sufficient to rely on civil proceedings brought by

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<sup>7</sup> *Osman v UK* (1999) 29 EHRR 245.

<sup>8</sup> See *R (on the application of Paul) v Deputy Coroner of the Queen’s Household and Assistant Deputy Coroner for Surrey*; *R (on the application of Al Fayad) v Deputy Coroner of the Queen’s Household and Assistant Deputy Coroner for Surrey* [2007] EWHC 408 (Admin).

<sup>9</sup> (2001) 33 EHRR 38.

family members etc) and the investigation must be independent; effective; prompt; open to public scrutiny; and support the participation of the next of kin. The Court held that failure to meet these requirements will, in itself, constitute a breach of article 2. This position was confirmed by the House of Lords in *Amin*<sup>10</sup> which established that these requirements should not only apply where state agents were actively involved in the death of a person but also “*where the death was alleged to have resulted from negligence on the part of state agents*”. We fully support this and believe there should be an article 2 compliant inquest in all cases where the state has failed in its obligation to protect life. As currently drafted, clause 7 recognises this only in part by including situations where the death resulted in an act or *omission* of a police officer or member of a service police force. This needs to be extended to cover other situations where the omissions of those acting on behalf of the state (other than the police) require investigation. This should include cases where the early, inappropriate release of a prisoner has directly led to a person being murdered by that ex-prisoner.

**Amendment 4 – Schedule 1, Part 2 – resumption of suspended inquests**

Schedule 1, Part 2, page 120, line 20, leave out ‘if,’ and insert ‘if—  
(a) ’.

Schedule 1, Part 2, page 120, line 21, after ‘resuming it’ insert—  
, or

- (b) resumption is required in order to secure compliance with article 2 of the Convention within the meaning of the Human Rights Act 1998 (c. 42)’.

Schedule 1, Part 2, page 121, line 16, leave out ‘if,’ and insert ‘if—  
(i)’.

Schedule 1, Part 2, page 121, line 17, leave out ‘it;’ and insert—  
‘it; or

- (ii) resumption is required in order to secure compliance with article 2 of the Convention within the meaning of the Human Rights Act 1998’.

Schedule 1, Part 2, page 122, line 32, after ‘paragraph 4’ insert ‘—

<sup>10</sup> *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51

(a)

Schedule 1, Part 2, page 122, line 34, leave out 'it.' and insert—

'it, and

(b) must be resumed if resumption is required in order to secure compliance with article 2 of the Convention within the meaning of the Human Rights Act 1998'.

### **Effect**

13. Where inquests are suspended (whether at the coroner's discretion or to allow time for other investigations to take place) the coroner would have a duty to resume the inquest where obligations under article 2 of the HRA (right to life) remain outstanding.

### **Briefing**

14. Part 2 of Schedule 1 governs the arrangements for resuming investigations suspended either: because criminal charges may be brought; certain criminal proceedings have been brought; an inquiry is pending under the *Inquiries Act 2005*; or if it appears to the coroner that it would be appropriate to suspend. As currently drafted, resumption of inquests in the three latter cases is left entirely to the discretion of the coroner. The explanatory notes offer an example of when an inquest could be resumed: "*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*". The explanatory notes further state that "*Indeed the effect of section 6(1) of the HRA is that the senior coroner, as a public authority, would be legally obliged to resume the investigation if this was necessary in order to secure compliance with Article 2*". 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 adequately reflected on the face of the legislation. Liberty believes that it would save confusion and possible unnecessary litigation if the HRA duty was made explicit.

**Amendment 5– Paragraph 4 of Schedule 4**

Schedule 4, page 130, at the end of line 41 insert—

‘(7) The Secretary of State must issue a code of practice in connection with the entry and search of land and the seizure of anything on the land by a senior coroner.’

**Effect**

15. This will introduce a new paragraph 4(7) into Schedule 7 to require the Secretary of State to issue a code of practice to deal with the powers of senior coroners to enter and search land and seize anything on the premises.

**Briefing**

16. 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 a Code of Practice, which we submit should have the same safeguards and requirements as set out in Code of Practice B issued under the *Police and Criminal Evidence Act 1994*.

**Amendment 6 - Paragraph 6 of Schedule 4**

Schedule 4, page 131, line 24, leave out ‘should’ and insert ‘could’.

Schedule 4, page 131, line 27, leave out ‘coroner may’ and insert ‘coroner must’.

Schedule 4, page 131, line 30 at end insert—

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| <p>(3) A senior coroner must, every 12 months, prepare a report on all reports made under subsection (1) within the preceding 12 months and provide this to the Lord Chancellor.</p> <p>(4) The Lord Chancellor must lay a report received under subsection (3) before both Houses of Parliament within 30 days of receiving the report’.</p> |
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### **Effect**

17. These amendments place a duty on a senior coroner to make a report to a relevant person where the coroner believes necessary action *could* be taken. As currently drafted the coroner has only an enabling power to do so and the power need only be exercised if he or she thinks that action *should* be taken. This amendment also places a duty on a senior coroner to make an annual report to be laid before Parliament concerning recommended actions the coroner has made to prevent other deaths.

### **Briefing**

18. 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.

## Amendment 7 - Clause 30

Clause 30, page 16, line 26, leave out subclause (5).

### Effect

19. This would remove clause 30(5) which currently allows the Lord Chancellor to amend by order the category of decisions which an interested person can appeal to the Chief Coroner.

### Briefing

20. Clause 30 provides interested persons with a right of appeal to the Chief Coroner against decisions that fall within clause 30(2).<sup>11</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 coroner's decision, short of judicial review.<sup>12</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 concerns 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. It is a criticism that Liberty has made often in recent times that primary legislation leaves far too much wide-ranging power in the hands of the executive. This is another such example. The Lord Chancellor should not be left with discretion to amend the category of appealable decisions. This could potentially have a significant effect on the rights of interested persons and orders made at moments which appear politically expedient could result in allegations of executive interference in the coronial process.

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<sup>11</sup> These include, 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.

<sup>12</sup> Applications can be made to the High Court under section 13 of the *Coroners Act 1988* if a coroner refuses to hold an inquest or where a fresh inquest is required but there is no general appeal route.

## **Amendment 8 –new clause 32A**

To move the following clause—

### **‘32A Report to Lord Chancellor**

- (1) The Chief Coroner must give to the Lord Chancellor an annual report which—
  - (a) contains matters that the Chief Coroner wishes to bring to the attention of the Lord Chancellor,
  - (b) includes matters which the Lord Chancellor has asked the Chief Coroner to include in the report,
  - (c) contains an assessment for that year of the consistency of standards between coroner areas,
  - (d) contains a summary for that year of the number, nature and outcome of appeals under section 30, and
  - (e) contains a summary of the recommendations made by senior coroners under paragraph 6(1) of Schedule 4.
- (2) A report covering one year must be given to the Lord Chancellor by 1 July the following year;
- (3) The Lord Chancellor must publish all reports provided under this section and must lay a copy before each House of Parliament within 60 days of receiving a copy of the report.’

### **Effect**

21. This proposed new clause requires the Chief Coroner to make annual reports to the Lord Chancellor concerning coroner functions and recommendations. To ensure public and Parliamentary accountability the clause requires the Lord Chancellor to publish the report and to lay it before Parliament within 60 days of receiving the report.

## Briefing

22. Coroners have, in the past, made identical findings and recommendations which were not implemented.<sup>13</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 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 provided on the face of the Bill.

23. 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 the 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.

24. The suggested amendment provides for a basic report to be made annually which details the activities and recommendations made by coroners in the previous year. There is, of course, a lot more that could be included to make better provision for the implementation of recommendations. This could include: provision for guidelines on cases where recommendations should be made; duties on the part of other agencies to respond and implement recommendations; and provision for the monitoring of implementation of recommendations.

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<sup>13</sup> These are referenced in Liberty's 2003 Report: *Deaths in Custody: Redress and Remedy*. More recently a number of coronial verdicts have been highly critical of the Ministry of Defence over the deaths of British personnel in Iraq and Afghanistan: ([www.guardian.co.uk/2008/oct/23/military-iraq-mod-esf-hercules](http://www.guardian.co.uk/2008/oct/23/military-iraq-mod-esf-hercules))

## **Amendment 9 - Clause 36**

Clause 36, page 20, line 38, leave out paragraph (k).

Clause 36, page 21, line 10, leave out subclause (5).

### **Effect**

25. This will remove the Independent Police Complaints Commission (IPCC) from the list of 'interested persons' in relation to a deceased person or investigation.

### **Briefing**

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. This is intended as a probing amendment as we believe that the Government's policy behind this extension should be articulated. At the very least the decisions which the IPCC would be able to appeal should be limited in scope.

## **Part 2 – Criminal Offences**

*Murder, Infanticide and Suicide*

### **Amendment 10 – clauses 39 and 40**

Clause 39, page 24, line 5, at the end of (a) insert 'or from developmental immaturity'.

Clause 40, page 24, line 27, at the end of (a) insert 'or from developmental immaturity'.

## **Effect**

27. This would amend clause 39(1) (which amends section 2(1) of the *Homicide Act 1957*), to allow a charge of murder to be reduced to manslaughter if the person who killed another was suffering from an abnormality of mental functioning which arose from developmental immaturity (and all the other conditions laid out in clause 39 are met). It would also amend clause 40(1) which has the same provision in respect of Northern Ireland.

## **Briefing**

28. This is intended to generate discussion about whether to include the Law Commission's recommendation that developmental immaturity be a possible basis for reducing murder to manslaughter. Liberty believes 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 the current 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. This proposed amendment would mean that if a child could show that the killing took place because he or she suffered from an abnormality of mental functioning that arose because of developmental immaturity, and this substantially impaired the child's ability to understand the nature of his/her conduct, to form a rational judgment or to exercise self-control and this provides an explanation for the child's actions, this could reduce a murder charge to manslaughter. These are still substantial hurdles to overcome and a successful plea will still result in a manslaughter conviction. As the mandatory life sentence (or detention at Her Majesty's pleasure) for murder is not being abolished, we believe this amendment should be seriously considered and debated. In Committee the government said that this amendment should not be introduced because they had not seen any evidence to show that it would be necessary and because many children would raise this as a defence.<sup>14</sup> This is not a sufficient basis to exclude such a defence. It only takes one

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<sup>14</sup> See the comments by Maria Eagle at the Public Bill Committee on the Coroners and Justice Bill, 11<sup>th</sup> sitting on 3 March 2009, column 417-8, available at: <http://www.publications.parliament.uk/pa/cm200809/cmpublic/coroners/090303/am/90303s03.htm>

case of future injustice, which can be easily imagined, to justify the inclusion of a defence to what would otherwise be a mandatory life sentence or detention at Her Majesty's Pleasure. The mere fact that this defence might be relied on, but ultimately not succeed, in the relatively few cases involving child murderers, can also not justify the government's position. Greater explanation must be provided by the government to justify the exclusion of this potentially important defence.

#### **Amendment 11 – clause 41**

Clause 41, page 25, line 17, leave out 'considered'.
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#### **Effect**

29. This will remove the word 'considered' in clause 41(4), so that subsection (1) (which reduces murder to manslaughter) will not apply if in doing or being a party to the killing, a person acted in a desire for revenge.

#### **Briefing**

30. This is intended as a probing amendment to seek greater clarity on the exception relating to a "*considered desire for revenge*". As this partial defence is being extended to situations where a person need not have lost control suddenly, the inclusion of a clause exempting the defence when acting as a result of revenge is extremely necessary. However, we are concerned how this provision will interact with the provision that includes, as a qualifying trigger, that things done or said caused the defendant "*to have a justifiable sense of being seriously wronged*". We are concerned that, given the amendment only restricts a 'considered' desire for revenge, this could give rise to a situation where the killing has a vigilante element to it if done on the spur of the moment. The provisions in the Bill are complicated amendments to long-standing common law rules and as such should be treated with extreme caution and heavily debated before being accepted.

31. By way of background to clauses 41 and 42, these arose out of the government's response to the Law Commission's Murder Report in November 2006.<sup>15</sup> The Murder Report was intended to form the first stage in the review of the law governing murder.

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<sup>15</sup> See the Law Commission's report, *Murder, Manslaughter and Infanticide*, available at: <http://www.lawcom.gov.uk/docs/lc304.pdf>.

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. In our response to the government's consultation<sup>16</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. 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.

#### **Amendment 12– clause 42**

Clause 42, page 26, line 8, at the end insert 'unless in exceptional circumstances the court considers it to be a relevant factor'.

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<sup>16</sup> Liberty's response, October 2008, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy08/murder-manslaughter-consultation.pdf>

## **Effect**

32. This will insert additional words into clause 42(6)(c) to provide that in determining whether a loss of self-control had a qualifying trigger, the fact that a thing done or said constituted sexual infidelity is to be disregarded *unless in exceptional circumstances the court considers it to be a relevant factor*.

## **Briefing**

33. As set out above, there is a danger when legislation prescriptively sets out the circumstances when a complicated defence can apply and limits the discretion of the judge and jury. It is impossible for legislation to envisage all situations that might arise that raise exceptional circumstances. It is therefore important to leave certain matters to be decided on a case-by-case basis. While we believe that a person's sexual infidelity will rarely, if ever, be a matter for appropriate consideration in reducing a murder charge to manslaughter, we can see that there may be exceptional circumstances where it may be a relevant factor. We believe the proposed amendment will still send a clear signal that sexual infidelity is to be disregarded in most instances, but in exceptional circumstances the court can decide whether it is a matter for the jury to ultimately decide on (in addition to all other relevant circumstances).

*Suicide*

## **Amendment 13 – clauses 46-48 and Schedule 10**

Page 27, line 2, leave out Clause 46.

Page 28, line 1, leave out Clause 47.

Page 28, line 41, leave out Clause 48.

Page 142, line 24, leave out Schedule 10.

## **Effect**

34. These amendments will remove clauses 46, 47 and 48 and Schedule 10 from the Bill.

## Briefing

35. The intention of these amendments is to remove the clauses amending the law of suicide from the Bill to ensure there can be a proper consultation process before the law is amended in a way that may have unintended consequences. The amendments to the law of suicide have not been adequately consulted on. There is a huge need to have a public debate on the law surrounding assisted suicide and the liability of those who assist friends and family in committing suicide. No amendments to this area of the law should take place until this has occurred.

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>17</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

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<sup>17</sup> Paragraph 327 of the Explanatory Notes.

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).

*Hatred against persons on grounds of sexual orientation*

**Amendment 14– clause 58**

Page 34, line 5, leave out Clause 58.
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**Effect**

39. This would remove clause 58 from the Bill.

**Briefing**

40. 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, and believes in light of this, clause 58 should be removed from this Bill.

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

#### **Amendment 15- Clause 72**

Clause 72, page 42, line 14, leave out ‘or to prevent any serious damage to property’.

Clause 72, page 42, line 16, leave out from beginning ‘real harm’ to end of line 18 and insert ‘the identity of a person in the police or the security services being revealed if the disclosure of his or her identity might prejudice future law enforcement operations.’.

Clause 72, page 42, line 29, leave out—

‘or

(b) that there would be serious damage to property.’.

#### **Effect**

41. This amends clause 72 to limit the grounds on which a witness anonymity order may be granted.

## Briefing

42. 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 or 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 *R v Davis*,<sup>18</sup> 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>19</sup>

43. 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.

44. As currently drafted clause 72(3)(a) allows witness anonymity orders to be granted "*in order to protect the safety of a witness or another person, or to prevent any serious damage to property*". As stated above we accept that witness anonymity may sometimes be granted without denying a defendant a fair trial. We do, however, believe that the circumstances in which anonymity may granted need to be tightly drawn. As such we are proposing that this subclause is limited so as to exclude damage to property.

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<sup>18</sup> [2008] UKHL 36. This was the case where the defence was not able to properly cross-examine important anonymous witnesses.

<sup>19</sup> Paragraph 32.

45. We also believe that the clause 72(3)(b) which currently allows a court to grant an anonymity order “*in order to prevent real harm to the public interest*” should be further restricted. 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>20</sup> It is worth noting that this represents an expansion beyond the original reasons cited for witness anonymity - the problem of witness intimidation. The provision should therefore be limited to more narrowly reflect its purpose and safeguard the right to a fair trial.

#### **Amendment 16– Clause 84**

Page 47, line 30, leave out Clause 84.
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#### **Effect**

46. This removes clause 84 from the Bill, which has proposed amendments to the *Youth Justice & Criminal Evidence Act* aimed at giving automatic eligibility for special measures to witnesses in proceedings related to gun and knife crime.

#### **Briefing**

47. Section 17 of the *Youth Justice and 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>21</sup> as well as any views expressed by the witness.<sup>22</sup> Clause 84 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 84 the court would not need to be satisfied that the quality of the witness’ evidence will be diminished and a

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<sup>20</sup> Explanatory Notes, at para 31.

<sup>21</sup> Factors that must be taken into account under section 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 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>22</sup> Section 17(3).

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 of the YJCEA 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 of the YJCEA currently strikes a delicate balance and we can see no reason for extending special measures by class.

#### **Amendment 17- Clause 88**

Clause 88, page 51, line 14, leave out from beginning to end of line 15.
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#### **Effect**

48. This would remove the ability for intermediaries for vulnerable accused persons to explain questions put to, and answered by an accused.

## **Briefing**

49. 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 88 increases the powers available providing for the use of an intermediary where certain vulnerable accused persons are giving evidence in court. Clause 88 inserts new sections 33BA and 33BB to the YJCEA. 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 88. 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.

## **Amendment 18- Clause 90**

Page 52, line 33, leave out Clause 90.
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## **Effect**

50. This would remove clause 90 from the Bill which seeks to remove the requirement of consent of an accused person before a live link is used at preliminary and sentencing hearings.

## **Briefing**

51. Chapter 4 amends the *Crime & Disorder Act 1998* (CDA) in relation to the use of live video links. Of the greatest concern is clause 90, 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 articles 3 (prohibition on torture and degrading treatment), 5 (right to liberty) and 6 (right to a fair trial) of the HRA.<sup>23</sup> By appearing in court, the court may see first-hand whether the accused has been subjected to any abuse.

52. Clause 90(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.

### **Amendment 19- Clause 98**

Page 58, line 25, leave out Clause 98.
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#### **Effect**

53. This would remove clause 98 from the Bill which amends the *Bail Act 1976* to reverse the presumption of liberty in bail proceedings following a murder charge.

#### **Briefing**

54. Clause 98 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

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<sup>23</sup> Rights set out in the European Convention of Human Rights as incorporated into the HRA.

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. 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.

55. 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 degree of seriousness. We also believe that, as currently drafted, clause 98(1) will be inconsistent with article 5(3) of the HRA (anyone arrested is entitled to release pending trial) on the basis that it introduces a presumption against bail incompatible with the liberty of the subject.

56. 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 HRA 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*<sup>24</sup> this provision has been 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 98 would be treated in much the same way and be read down, so we do not see the utility of this proposed amendment.

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

### **Amendment 20– Schedule 15 (clause 125)**

In each amendment in Schedule 15, insert the following subsection—

‘( ) This section does not apply if the defendant can show that his or her conviction imposed outside England and Wales [or the United Kingdom] resulted from a trial that would have, if the trial had taken place in England and Wales [or the United Kingdom], breached article 6 of the Convention rights within the meaning of the Human Rights Act 1998.’

#### **Effect**

57. The amendment (which would need to be made to every amendment included in Schedule 15, and slightly redrafted for each one) would insert an additional subsection to provide that a conviction obtained in a foreign country does not need to be taken into account by courts in England and Wales if the defendant can show that he or she was convicted in a foreign court after an unfair trial.

#### **Briefing**

58. Clause 125 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. The amendments in the Bill would ensure that such convictions can be taken into account as evidence as to

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<sup>24</sup> (2007) 1 AC 249.

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.

## **Part 6 – Legal Aid**

### **Amendment 21– clause 130**

Clause 130, page 78, line 18, leave out subsection (2).
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## **Effect**

59. This will remove clause 130(2) from the Bill (which seeks to amend section 6 of the *Access to Justice Act 1999*). 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 130(2) seeks to amend this to provide that this may apply to one or more areas or localities or specified courts or tribunals or funding only for specified classes of persons or persons selected by reference to specific criteria or on a sampling basis.

## **Briefing**

60. This is intended as a probing amendment to find out what impact this amendment 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 of the *Access to Justice Act 1999* for exceptional funding for 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>25</sup> we would hope that the government would more fully explain this amendment and its likely application in practice.

## **Amendment 22– clause 133**

Clause 133, page 82, leave out lines 23-27.
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## **Effect**

61. This will remove paragraphs (a) and (b) from proposed new section 17A(2A) to the *Access to Justice Act 1999*, which would allow regulations to be made to allow

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<sup>25</sup> Article 2 of the *European Convention of Human Rights* (ECHR) as incorporated by the HRA.

costs incurred in enforcing a contribution order to be made against the person against whom the order is sought, and would allow regulations to provide for the withdrawal of a person's right to legal representation.

## **Briefing**

62. The proposed amendment to section 17A to the *Access to Justice Act 1999* would allow regulations to set out that the Legal Services Commission could not only recover the cost of the legal representation from a person so represented, 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 his or her legal representation is ordered to pay 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>26</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.

63. Proposed new paragraph (b) to section 17A(2A) would allow regulations to be made that could “*provide for the withdrawal of an individual's right to representation in certain circumstances*”. This is particularly concerning. 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 in criminal cases could breach the right to a fair trial. Failure to pay a costs order should not result in removal of representation (for example, at any subsequent appeal). This is not a matter that should be left to secondary legislation, particularly in light of the obligations under article 6. This paragraph should be omitted, and if the government can demonstrate a particular need for such an amendment it should set out in primary legislation the circumstances in which representation may be removed, and explain how this meets the right to a fair trial.

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<sup>26</sup> See regulation 4 of the *Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001*.

### **Amendment 23– Schedule 16 (clause133)**

Schedule 16, page 178, line 25, at end insert–

‘(c) that making such an order would not cause substantial hardship to any person.’.

Schedule 16, page 178, line 36, leave out ‘an interest’ and insert ‘a substantial interest’.

#### **Effect**

64. This will amend Schedule 16, paragraphs 4 and 5, to ensure that enforcement regulations must provide that before a court makes a clamping order in respect of a person’s motor vehicle it must be satisfied that doing so would not cause substantial hardship to any person and that a motor vehicle is only ‘owned’ by a person if he or she has a substantial interest in it.

#### **Briefing**

65. The Bill introduces the ability for a court to make an order to sell a person’s motor vehicle in order to pay the costs of legal representation. We have particular concerns about the ability for such an order to be made in respect of motor vehicles, particularly where the person in respect of whom the order has been made only has an interest in the motor vehicle. 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 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>27</sup> It also fails to deal with the situation where the making of clamping order would give rise to extreme hardship of either the owner of the vehicle or any other person. For example, a person may lose his or her only means of livelihood if their vehicle were taken from them, impacting not only on them but also on dependent family members. A motor vehicle could also be used to transport ill family members for treatment at hospital etc. The court should be able to refuse to make a clamping order if to do so would lead to substantial hardship (and this should be left to the courts to determine on the facts of

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<sup>27</sup> See article 1of Protocol 1 to the ECHR as incorporated by the HRA.

each case). An order should also not be made where the person in respect of whom the order is made only has a small interest in the motor vehicle – a substantial interest (as determined by the courts) should be demonstrated. The rights of a co-owner could also be considered by the courts in determining if substantial hardship would be suffered by *any* person.

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

66. We very much welcome the government's indication<sup>28</sup> that it intends to remove what is now clause 154 from this Bill. While it would have been preferable for this clause to have never been introduced in this Bill we are pleased to see that the government have responded positively to the many concerns advanced in relation to this concern, and we commend them for doing so.

### **Amendment 25 (new clause)**

To move the following Clause—

“After section 67 of the Data Protection Act 1998 (c. 29) insert—

#### **‘67A Privacy Impact Statements**

- (1) If a provision in a Bill enables or requires the processing of personal data, a Minister of the Crown in charge of the Bill in either House of Parliament must, before Second Reading of the Bill, lay before Parliament a privacy impact assessment.
- (2) A privacy impact assessment must include—
  - (a) a statement of the objectives of the relevant provision;
  - (b) a statement explaining the effect of the proposed provision, including the effect of the provision on the applicability of this Act;
  - (c) a statement explaining why other means of achieving the aims of the provision are not appropriate;

<sup>28</sup> As initially announced in the press on 8 March 2009 and confirmed by Justice Minister Bridget Prentice in the Public Bill Committee on this Bill on 10 March 2009, 15<sup>th</sup> sitting, available at:  
<http://www.publications.parliament.uk/pa/cm200809/cmpublic/coroners/090310/am/90310s01.htm>

- (d) a statement from the Information Commissioner stating whether or not the Commissioner is satisfied that the provision is compatible with article 8 of the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
- (3) A privacy impact assessment must be in writing and be published in such manner as the Minister making it considers appropriate.”.

### **Effect**

67. This will introduce a new clause into the Bill to amend the *Data Protection Act 1998*.

### **Briefing**

68. Rather than undermine the principles of the *Data Protection Act 1998*, the role of Parliament and the right to privacy, this Bill should take the opportunity to strengthen the role of Parliament in scrutinising legislation that impacts on privacy. We agree with the proposition that amendments to legislation that have major impacts on privacy are not given the full attention and debate that they deserve. This is often because such measures are included as just one provision in large and unwieldy omnibus Bills. Such amendments can therefore go by with little attention or time for debate. Liberty believes that a privacy impact assessment should be required before such provisions are introduced so that the issues can be fully explored and debated by Parliament. This proposed amendment would require that before any legislation is introduced that impacts on the principles contained in the DPA, a statement would need to be laid before Parliament setting out the effects of the provision, the likely impact on the DPA and whether any alternative measures could be considered. The Information Commissioner’s Office (ICO) will also have a role in considering compliance with article 8 (right to privacy) of the HRA. If the ICO considers that the legislation is in breach of article 8 this will not prevent the amendment being made, but it will alert Parliament as to the ICO’s considered view. A privacy impact assessment is intended to put Parliament on notice of the proposed amendment to ensure it is given the appropriate level of attention and to make sure that the government has fully considered the likely impact the amendment will have on data protection principles. At a time in which the public is becoming increasingly

concerned about the use, sharing and retention of their personal data we believe it is essential that Parliament seeks to exercise greater oversight over such matters rather than introduce provisions enabling the Executive to make orders bypassing data protection principles.

### **Amendment to abolish common law offence of sedition and s 1-2 *Criminal Libel Act 1819***

69. Liberty supports the amendment laid by Dr Evan Harris MP on 11 March 2009 that seeks to abolish the common law offence of sedition and seditious libel and to repeal two sections of the *Criminal Libel Act 1819*. These offences are redundant (they are very rarely invoked) and unnecessarily limit freedom of speech. The common law offences of sedition and seditious libel date back to medieval times, and were one of the offences prosecuted by the Star Chamber.<sup>29</sup> Historically it was used to stifle criticism of government policy.<sup>30</sup> It seems clear that the modern day common law offence is more restricted than that and requires the publication or speaking of words that intend create hatred or contempt the government etc with the aim of inducing reform by unlawful means or promoting class warfare, in a way which has a tendency to incite public disorder involving violence.<sup>31</sup>

70. Clearly incitement to violence should be (and already is) a criminal offence. However, the common law offence of sedition and seditious libel is now outdated and unnecessary. There are already numerous offences on the statute book that relate to this issue. It is, of course, an offence under the common law to solicit or incite another to commit a crime.<sup>32</sup> Incitement to hatred on the grounds of race,<sup>33</sup> religion<sup>34</sup> and sexual orientation<sup>35</sup> are also all offences. The *Public Order Act 1986* also

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<sup>29</sup> As the Star Chamber offered the government a convenient forum for prosecuting sedition when juries might not cooperate. See JH Baker, *An Introduction to English Legal History*, 4<sup>th</sup> edition, 2002 page 119.

<sup>30</sup> See Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, 1883, vol II, pages 299-376.

<sup>31</sup> See Eric Barendt, *Freedom of Speech*, 2<sup>nd</sup> edition, 2005, pages 163-4.

<sup>32</sup> See *DPP v Armstrong (Andrew)* [2000] Crim LR 379 DC and *R v Claydon* [2006] 1 Cr App R 20 CA.

<sup>33</sup> This was originally criminalised in the *Race Relations Act 1965* and is now an offence under Part III of the *Public Order Act 1986*.

<sup>34</sup> See Part IIIA of the *Public Order Act 1986*, as introduced by the *Racial and Religious Hatred Act 2006*.

<sup>35</sup> See Part IIIA of the *Public Order Act 1986*, as introduced by the *Criminal Justice and Immigration Act 2008*.

creates offences of using threatening, abusive and insulting words.<sup>36</sup> There are also a number of other statutes dealing with incitement (many of which should themselves be reviewed). For example, section 91 of the *Police Act 1996* makes it an offence for a person to cause or attempt to cause, or do anything which is intended to cause, disaffection among members of the police force, or to cause etc a member of a police force to withhold his or her services. In addition, the *Incitement to Disaffection Act 1934* makes it an offence to “*maliciously and advisedly*” endeavour to seduce members of the armed forces from their duty or allegiance to the UK, including by possessing material designed to do this (from the moment of its inception, Liberty (the National Council of Civil Liberties) campaigned against this provision).<sup>37</sup>

71. Having an unnecessary and overbroad common law offence of sedition, when the same matters are dealt with under other legislation, is not only confusing and unnecessary, it may have a chilling effect on freedom of speech and sends the wrong signal to other countries which maintain and actually use sedition offences as a means of limiting political debate. Professor David Feldman has said in relation to the common law offence:

*It is properly for Parliament, not the courts, to impose restrictions on freedom of expression, whether in the interest of state or of social harmony. ... The uncertainty surrounding the scope of the offence makes it particularly objectionable as a restriction on expression, since people potentially may be ... afraid to exercise political rights guaranteed under Articles 9, 10 and 11 of the European Convention of Human Rights. The potential is present, despite the fact that the charge is rarely laid.*<sup>38</sup>

72. The amendments to the *Criminal Libel Act 1819* relate to the abolition of the common law offence as sections 1 and 2 give power to seize copies of seditious libel and dispose of the seized copies. For the reasons given above, Liberty supports the abolition of the common law offences and these associated statutory provisions and urge parliamentarians to support this amendment.

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<sup>36</sup> See sections 4 and 5.

<sup>37</sup> Unfortunately this provision remains on the statute book and was even amended in 2005 to extend the time under a warrant by which the police could enter premises to search for commission of this offence. See the *Serious Organised Crime and Police Act 2005*, section 174(1) and Schedule 16, paragraph 1.

<sup>38</sup> David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2<sup>nd</sup> edition, 2002, pages 900-901.

## **Amendment in relation to the use of ‘insulting’ words/behaviour**

73. Liberty also supports another amendment laid by Dr Evan Harris MP on 12 March 2009 that seeks to amend section 5 of the *Public Order Act 1986* (POA). Section 5 makes it an offence for a person to use threatening, abusive or insulting words or behaviour, or display writing or signs which are threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress. This amendment would amend this to remove the term ‘insulting’. The term ‘insulting’ has been held not to bear an unusual legal meaning, but has its ordinary meaning. Lord Reid in a House of Lords decision in 1972 (in respect of an equivalent provision in the *Public Order Act 1936*) stated:

*We were referred to a number of dictionary meanings of ‘insult’ such as treating with insolence or contempt or indignity or derision or dishonour or offensive disrespect. Many things otherwise unobjectionable may be said or done in an insulting way. There can be no definition. But an ordinary sensible man knows an insult when he sees or hears it.*<sup>39</sup>

74. This effectively means that an insult is in the eyes or ears of the ‘reasonable’ beholder. While the courts may be reluctant to convict a person in relation to using ‘insulting’ words or signs, the mere fact that this is a criminal offence is enough to stifle freedom of expression. A recent example of this was the case of a young man (who Liberty advised) who was threatened with prosecution under section 5 for peacefully holding a placard<sup>40</sup> that read “*Scientology is not a religion it is a dangerous cult*”. While no prosecution ultimately went forward the fact that a peaceful protester who was merely expressing his opinion could be threatened with prosecution demonstrates the clear need for this offence to be more tightly restricted. Liberty has long believed that many of the provisions of the POA are worryingly broad and that there should be a wholesale review of these provisions. In the meantime, we support the amendment to remove the vague notion of ‘insulting’ behaviour from section 5 of the POA and urge parliamentarians to support this amendment.

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<sup>39</sup> See *Brutus v Cozens* [1972] 2 All ER 1297 at 1300.

<sup>40</sup> On 10 May 2008.