



HOUSE OF LORDS

Library Note

Coroners and Justice Bill (HL Bill 33 of 2008–09)

The Coroners and Justice Bill contains provisions in relation to coroners, criminal offences including murder, infanticide, suicide and images of children, criminal evidence, investigations and procedure, sentencing, legal aid, criminal memoirs and the Data Protection Act 1998. The Bill has completed its passage through the House of Commons and is due for a second reading debate in the House of Lords on 27th April 2009.

This House of Lords Library Note summarises some of the key issues debated at the report stage in the House of Commons. In particular, it focuses on the debates on certification of inquests by the Secretary of State in the interests of national security, hatred against persons on grounds of sexual orientation and the Sentencing Council for England and Wales.

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20th April 2009
LLN 2009/004

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1. Introduction

The Coroners and Justice Bill 2008–09 (HC Bill 9) was introduced in the House of Commons on 14th January 2009, and was read for a second time on 26th January (HC *Hansard*, cols 26–125). An amendment to oppose the second reading moved by David Howarth, Liberal Democrat Shadow Secretary of State for Justice, was defeated by 278 votes to 47.

The Bill was considered in 16 sittings of a Public Bill Committee between 3rd February and 10th March. The committee took evidence from a variety of organisations during the first four sittings, and has published evidence submitted in writing.

The report stage took place on 23rd and 24th March, with the third reading debate following the end of the report stage on 24th March (HC *Hansard*, cols 188–260, 260–274). The Bill (HL Bill 33) was presented to the House of Lords on 25th March.

The Bill is based upon a variety of consultations and reports, which are detailed in the *Explanatory Notes*. As introduced in the House of Lords, the Bill comprises 166 clauses and 21 schedules, and is divided into nine parts:

Part 1 reforms the law in relation to coroners and to the certification and registration of deaths. It replaces the existing framework for the investigation of certain deaths by coroners in the Coroners Act 1988 (the 1988 Act); that Act was a consolidation of existing coroner legislation, dating back to the early 1900s. In replacing the 1988 Act, this Part introduces a few new concepts. There will be a Chief Coroner to lead the service, with powers to intervene in cases in specified circumstances, including presiding over an appeals process designed specifically for the coroner system. There will be a senior coroner for each coroner area (presently known as coroner districts) with the possibility of appointing area coroners and assistant coroners to assist the senior coroner for the area (in place of the existing deputy coroners and assistant deputy coroners). The 1988 Act refers almost exclusively to “inquests” as what coroners work is about. However, there is a significant amount of work that goes on which does not lead to court proceedings and which is largely unrecognised in the current Act. This work is reflected in the Bill as it imposes a duty on a senior coroner to conduct an “investigation” into a death - it also reflects that senior coroners may need to make preliminary inquiries to establish whether the death comes within his or her jurisdiction.

Chapter 1 of Part 1 makes provision for investigations into deaths by senior coroners and enables the Secretary of State to certify an investigation if it will concern or involve a matter that should not be made public (“protected matters”). Such certified investigations will be referred to, and conducted by, a High Court judge nominated by the Lord Chief Justice. The judge will determine whether an inquest which forms part of the investigation will be held with a jury. Chapter 2 relates to the notification of deaths to the coroner and provides for the appointment of medical examiners and for the independent scrutiny and confirmation of medical certificates of the cause of death. Chapter 3 makes further provision in respect of investigations concerning treasure. Chapter 4 makes provision for coroner areas and for the appointment of senior, area and assistant coroners and provides for their funding. Chapter 5 sets out the powers of senior coroners and offences relating to jurors, witnesses and evidence, and makes provision for payments to jurors, witnesses and others. Chapter 6 provides for the appointment of a Chief Coroner and Deputy Chief Coroners,

provides for inspection of the coroners system and establishes a new appeals system in respect of certain decisions made by a senior coroner. The Chapter also enables the Chief Coroner, or a judge appointed by the Lord Chief Justice at the request of the Chief Coroner, to conduct an investigation into a person's death, instead of the senior coroner who would otherwise have jurisdiction. Chapter 7 contains other supplementary provisions, including conferring powers on the Lord Chancellor to make "Coroners regulations" in respect of coroners' investigations and for "Coroners rules" in respect of coroners' inquests to be made by the Lord Chief Justice or his nominee. This chapter also provides for the abolition of the office of coroner of the Queen's household.

Part 2 contains amendments to the criminal law. Chapter 1 amends the law in respect of the partial defences to murder and the offence and defence of infanticide, and simplifies the wording of the offence of assisting suicide. Chapter 2 creates a new offence of possession of prohibited images of children. Chapter 3 makes provision about conspiracies to commit offences in other parts of the UK. It also repeals section 29A of the Public Order Act 1986 which contains a saving for discussion or criticism of sexual conduct in respect of the offence of inciting hatred on grounds of sexual orientation.

Part 3 contains amendments relating to criminal evidence, investigations and procedure. Chapter 1 contains provisions for investigation anonymity orders. Chapter 2 re-enacts the Criminal Evidence (Witness Anonymity) Act 2008 (CEWAA) with some modifications. Chapter 3 contains provision about measures taken in court proceedings for vulnerable and intimidated witnesses. Chapter 4 contains provision about the use of live links in criminal proceedings. Chapter 5 contains other miscellaneous provisions including provision extending the Queen's evidence provisions in the Serious Organised Crime and Police Act 2005 to the Financial Services Authority (FSA) and the Department for Business, Enterprise and Regulatory Reform (BERR), and provisions about the grant of bail in cases where a defendant is charged with murder.

Part 4 relates to sentencing. Chapter 1 establishes the Sentencing Council for England and Wales (replacing the Sentencing Guidelines Council (SGC) and the Sentencing Advisory Panel (SAP)) and makes provision about the Council's functions and the duties of courts to follow its guidelines. Chapter 2 contains other provisions relating to sentencing. These provide for extended driving bans for persons also given custodial sentences and amend the law relating to extended sentences for dangerous offenders.

Part 5 contains some further criminal justice provisions. It makes amendments relating to the Commissioner for Victims and Witnesses established under the Domestic Violence, Crime and Victims Act 2004; enables criminal offences created by regulations (under section 2(2) of the European Communities Act 1972) implementing Directive 2006/123/EC on Services in the Internal Market (the Services Directive) and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-Commerce Directive) to have penalties exceeding those permitted by the European Communities Act 1972; amends a range of criminal procedure legislation to take account of the European Union Framework Decision 2008/675/JHA regarding the treatment in the UK of criminal offences committed elsewhere; and makes provision about the retention of knives confiscated from persons entering court and tribunal buildings.

Part 6 contains provisions about civil and criminal legal aid, including provision for pilot schemes in relation to civil legal aid, and provisions about the enforcement of contribution orders made in cases where criminal legal aid is granted.

Part 7 introduces a new civil recovery scheme through which courts can order offenders to pay amounts in respect of assets or other benefits derived by them from the exploitation of accounts about their crimes, for example, by selling their memoirs, or receiving payments for public speaking or media interviews.

Part 8 makes a number of amendments to the Data Protection Act 1998 (the 1998 Act), including extending the inspection and audit powers of the Information Commissioner.

Part 9 sets out supplementary provisions about orders and regulations, commencement, extent, repeals and so forth.

(Coroners and Justice Bill 2008–09, *Explanatory Notes*, paragraphs 5–14)

The Bill was considered by the House of Commons Justice Committee, who published their report on 23rd January 2009 (HC 185). The government's response to the report was published on 6th March (HC 322). The Justice Committee's report focuses on coroners, the Information Commissioner and sentencing. The Joint Committee on Human Rights also published a report on the Bill, on 20th March (HL 57), which deals with the provisions on certified or "secret" inquests, data protection, coroners reform, witness anonymity, and changes to criminal law and procedure.

The House of Commons Library have produced a number of publications on the Bill. Of particular importance are those prepared for the second reading in the House of Commons—*Coroners and Justice Bill: Coroners and Death Certification* (22nd January 2009, RP 09/07) and *Coroners and Justice Bill: Crime and Data Protection* (22nd January 2009, RP 09/06)—and the Note prepared for the report stage in the House of Commons, *Coroners and Justice Bill: Committee Stage Report* (19th March 2009, RP 09/27).

At the report stage, a number of amendments were selected and discussed. These covered certification by the Secretary of State in the interests of national security, death of service personnel abroad, hatred against persons on the grounds of sexual orientation, data handling by government departments, the Sentencing Council for England and Wales, and witness anonymity. The focus of the remainder of this Note is on the report stage debates on certification by the Secretary of State in the interests of national security, hatred against persons on the grounds of sexual orientation and the Sentencing Council for England and Wales.

2. Certification by Secretary of State in the Interests of National Security

The Coroners and Justice Bill 2008–09, as introduced in the House of Commons, enabled the Secretary of State to certify that an inquest should not be made public, if he was of the opinion that the matter involved risk to national security, the relationship between the United Kingdom and another country, the prevention or detection of a crime, the safety of a witness or other person, or otherwise to prevent real harm to the public interest (HC Bill 9, clause 11(1), (2)). The effect of the certification would be for the investigation to be conducted by a judge of the High Court nominated by the Lord Chief Justice without a jury (clause 11(3), (6)). The provision proved to be controversial.

Similar provisions had been included, without prior consultation, in the Counter Terrorism Bill of 2007–08, but were withdrawn by the government. At that time, the House of Commons Justice Committee and the Joint Committee on Human Rights had expressed concern over the compliance of the proposed provisions with article 2 (right to life) of the European Convention on Human Rights¹. In order to comply with article 2, an investigation of a death in circumstances involving the State's obligation to protect life must be initiated by the state, independent of all parties, effective and prompt, open to public scrutiny and involve the next of kin².

In their report on the Coroners and Justice Bill, the House of Commons Justice Committee commented that the re-introduced provisions had not in the intervening period been subject to any consultation despite the reservations of the Justice and Human Rights Committees. They concluded that:

These clauses, and the changes made to them since their first appearance in the Counter Terrorism Bill, will therefore merit close and careful scrutiny as the Coroners and Justice Bill passes through parliament. The government should be prepared to withdraw them once again if it cannot justify these provisions as proportionate and fully compatible with article 2 of the ECHR.

(House of Commons Justice Committee, *Coroners and Justice Bill* (23rd January 2009), session 2008–09, HC 185, paragraph 14)

The government responded that there had been insufficient time to consult, given the need to resolve two inquests that had been halted, and that the debates on the Counter Terrorism Bill and discussions with stakeholders meant that views were well known (House of Commons Justice Committee, *Coroners and Justice Bill: Government Response* (6th March 2009), session 2008–09, HC 322, p 4). Furthermore, as a result of the concerns expressed on the provisions of the Counter Terrorism Bill, significant changes had been made to the provisions before they were re-introduced in the Coroners and Justice Bill.

The Joint Committee on Human Rights also looked at the Coroners and Justice Bill. They discussed a number of issues including the requirements of article 2 ECHR, scope, safeguards (special advocates and judicial review) and whether the proposals were necessary. In relation to the changes made to the provisions between the Counter

¹ House of Commons Justice Committee, *Counter Terrorism Bill* (20th March 2008), session 2007–08, HC 405, paragraph 5; and Joint Committee on Human Rights, *Counter Terrorism Policy and Human Rights: Counter Terrorism Bill* (8th October 2007), session 2007–08, HL 172, paragraph 116

² Joint Committee on Human Rights, *Legislative Scrutiny: Coroners and Justice Bill* (20th March 2009), session 2008–09, HL 57, paragraph 1.15

Terrorism Bill and the Coroners and Justice Bill, they concluded that “the proposals are broadly the same and raise the same concerns” (Joint Committee on Human Rights, *Legislative Scrutiny: Coroners and Justice Bill* (20th March 2009), session 2008–09, HL 57, paragraph 1.14). They thought that there was still “a significant risk that the proposed scheme will operate in a way which is incompatible with article 2 ECHR” (paragraph 1.20). Although the government had “intended to tighten up the grounds for certification”, they considered that “the changes have not significantly altered the very broad scope of the original proposals” (paragraph 1.26). The committee thought that the government had not “provided a satisfactory justification for its view that there is no need to set out, on the face of the Bill, a requirement that the Minister’s view be honestly and reasonably held” (paragraph 1.34). They concluded that the government had not made their case for the need for these mechanisms, and that the provisions should therefore be deleted from the Bill (paragraph 1.42).

As a result of the concerns over certification and its consequences expressed during the committee stage (6th and 7th sittings), the government announced on 17th March 2009 that they would table amendments at the report stage to narrow the range of circumstances in which an inquest could be certified:

- a. The Secretary of State may only certify an investigation if satisfied that it is necessary to do so to prevent a matter being made public for any of the reasons in clause 11(2) (ie in order to protect the interests of national security, relations with another country or preventing or detecting crime, or to protect the safety of a witness or other person). The necessity test would raise the threshold compared with the existing formulation—“is of the opinion that”.
- b. Remove the ability to certify an investigation on the grounds of preventing ‘real harm to the public interest’.
- c. Alter the consequences of certification so that the effect would be limited to transferring responsibility for the investigation of the specified death from the local coroner to a High Court judge. It would no longer follow automatically from the issue of a certificate that the inquest would be held without a jury. Instead it would be left to the High Court judge appointed to conduct the investigation/inquest to determine what measures were needed in order to prevent the sensitive matter being made public. This could include holding the inquest without a jury and excluding the public (including interested persons) from part of the inquest, but the decision to hold the inquest without a jury would be for the High Court judge (sitting as a coroner) to take. The judge might also decide that the inquest could fulfil its statutory purpose, including meeting Article 2 obligations, without hearing evidence about the sensitive matters. The High Court judge may also decide to hold the inquest with a jury and put in place other measures, such as excluding persons from some of the inquest or obtaining undertakings of confidentiality from those present. The measures will be the same as those available to coroners generally in relation to non-certified inquests.
- d. The decision by the Secretary of State to certify an investigation would be subject to judicial review and decisions taken by the High Court judge sitting as coroner as to whether or not to summon a jury, or exclude

persons from parts of the inquest would be subject to appeal to the Court of Appeal.

(Ministry of Justice, *Coroners and Justice Bill: Report Stage Amendments* (Letter to Dominic Grieve MP) (17th March 2009), pp 2–3)

At the report stage, David Howarth, Liberal Democrat Shadow Secretary of State for Justice, proposed a new clause, the effect of which would be to prevent juries from being excluded from inquests, regardless of the circumstances (new clause 14). This was, he said, where the Liberal Democrats fundamentally differed from the government: “the government’s concessions are insufficient precisely because they still allow the jury to be entirely removed” (HC *Hansard*, 23rd March 2009, col 70). Mr Howarth argued that his new clause would also allow the family to attend the proceedings after certification at the coroner or judge’s discretion, while the government’s proposals meant that the family were excluded in all circumstances.

Jack Straw, Secretary of State for Justice and Lord Chancellor, intervened, saying “there is no suggestion that the family should be excluded, even were there to be an inquest conducted by a High Court judge rather than with a jury, except from the protected material” (col 71). However, Mr Howarth thought that in practice it would not be possible to allow the family in for the rest of the case once they had been excluded from the protected material. The issues could be resolved by allowing intercept evidence into inquests, which the government only allowed when the jury had been removed, and by taking measures to protect the identity of police undercover agents and informants (cols 72, 73). Although he welcomed the government’s attempts to amend the proposals, he did not believe they had gone far enough, particularly in relation to juries and families.

The Secretary of State for Justice and Lord Chancellor responded that although David Howarth had welcomed the changes proposed by the government with the qualification that they had not gone far enough, the Bar Council and the Criminal Bar Association had not qualified their positive responses to the changes. He said that the purpose of the Bill’s provisions on coroners as a whole was to “strengthen and improve how the coronial system operates” (col 74). More specifically:

There will be a chief coroner, who will be a High Court judge, a deputy coroner, and there will be much greater co-ordination between coroners; we will be able to provide a better service than what has been possible until now. Furthermore, there will be proper rights of appeal when there are concerns. It will no longer be necessary judicially to review coroners’ decisions, because proper rights of appeal are embedded in the Bill.

(col 74)

In relation to inquests without juries, Mr Straw hoped that there would be few situations in which the court, and not Ministers, thought that an inquest without a jury would be necessary, and he did not anticipate that military service inquests would be involved. The government amendments proposed to the clauses on certification meant that the criteria had been reduced, significantly tightened, the catch-all criteria had been removed and the Secretary of State had to be “of the opinion that it is necessary for the inquest to be held without a jury”, rather than simply “of the opinion” (cols 74, 75). The provisions were now “a million miles from how they started out in the Counter Terrorism Bill”. The present Bill was quite different, and the Secretary of State was “certainly open to further consideration in the other place about how we should further tighten the criteria without losing the whole purpose of the measures” (col 76).

Furthermore, it was now for the court to make the decision after certification of “whether it is really essential—necessary—to dispose with a jury or to have other measures”. Mr Straw thought that there would be situations in which the Secretary of State “believes that it is necessary not to have a jury but the court comes to a different decision. I very much hope that will happen, and the Secretary of State is put to proof” (cols 76, 77). The court would examine measures available other than dispensing with the jury, such as “gisting”, ie summarising secret evidence, a strategy that was used in the inquest into the death of Jean Charles de Menezes. This case “shows that the courts have been ingenious and imaginative in setting down certain conditions by which highly sensitive information is protected and, none the less, the jury is able to get the full facts” (col 77). The formulation of the provisions meant that few applications would be made, and even fewer would be granted.

Mr Straw turned to inquiries under the Inquiries Act 2005, and explained that where a Secretary of State was faced with a situation in which the evidence was so sensitive that it could not go beyond a High Court judge, he “may decide to resort to not proceeding with an inquest but instead going down the route of an inquiry under the Inquiries Act 2005, which would have the effect of dispensing with a jury”. Although this would comply with article 2 ECHR, as there was no provision for juries under the convention, Mr Straw wanted “to achieve a situation whereby the Secretary of State is never faced with that decision but always has to go to the courts”.

The Shadow Justice Secretary and Shadow Attorney General, Dominic Grieve, intervened, saying that the main purpose of an inquest was:

to satisfy the families, not to provide an explanation for the benefit of the state alone, yet the system that is to be set up will never satisfy families. In those circumstances, it would be better to take the inquiry route, which would of course lead to a great deal of condemnation but would at least be clear that there is no attempt to skew the coronial system in a way that was never intended.

(col 78)

Jack Straw responded that the decision to hold an inquest under the Inquiries Act 2005 was made by the Secretary of State, and could only be challenged through judicial review. Under the Coroners and Justice Bill, however, “scrutiny by the court will be much more intense than it would be under judicial review, because it will be for the judge to make the decision not to review others’ decisions”. Mr Grieve nevertheless thought that once the system was on the statute book, it would “be used far more frequently than any resort to inquiries under section 2 of the Inquiries Act”. Mr Straw did not accept that there would be more applications. He thought that the same issue arose under the Inquiries Act as under the current proposals, such as what evidence the family could hear. The difference between the two systems was that a judge made the decisions under the Coroners and Justice Bill, whereas the Secretary of State made the decision under the Inquiries Act 2005.

Mr Grieve began the response for the Opposition by commenting that he was “mindful of the extent to which the government have moved on this matter”, and that through the briefings provided to him by the government they had made a case that there was a problem. However, “another voice makes itself felt within me, saying that there is absolutely no point in setting up a process to bypass the ordinary principle of the coroner system—that there will be a jury, particularly in cases of death at the hands of the state—if the result is that it will not command public confidence and support” (col 83). The inquests would “be devalued to the point that they effectively cease to be any real use” if families are deprived of juries.

Mr Grieve thought that:

the sort of inquests that we are considering will be highly emotive, give rise to serious public concern and be surrounded by a great deal of polemic, and the moderating influence of a jury, which I have extolled in other contexts in the criminal justice system—it also applies to libel cases—seems to be highly effective in reassuring the public that what is happening is not a procedure that is merely for the convenience of the state authorities.

(col 83)

He went on to argue:

The Secretary of State's model is unsatisfactory because the way such things work suggests that every time an inquest presents a difficulty, instead of trying to find every means of resolving it in the existing system—the onus and pressure being on the government to act in that way—there will be a temptation to say, “Well, we have a procedure voted on by Parliament, and we should go and see the judge, who'll make decisions and we may end up with an inquest without a jury.” In my view, that is no better—and cannot be any better—than an inquiry, which will involve the polemic of the Secretary of State's coming here.

(col 84)

He supported the deletion of the relevant provisions, and concluded:

Although there may be inconvenience, although problems will remain and although Secretaries of State may not enjoy coming to the House and, in extremis, having to announce that they are going down the inquiry route, the truth is that if the provision is not necessary, there are ways through the problem that do not do what I consider to be the genuine mischief, which is to undermine confidence in the coroner's court system.

(col 86)

David Howarth closed the debate, commenting that discussions had been dominated by the themes of public confidence in verdicts of inquests without a jury and the exclusion of the family from the process. He felt that there was “broad scope to abuse these powers”, and that it was not known “what the government might propose if we were to excise the clause, but excise it we must, in order to allow further and better debate on this subject in another place” (col 117). He withdrew his new clause, but pressed to a vote an amendment he had tabled that would have removed the certification clause from the Bill (amendment 2). The vote was lost, with 229 members voting in favour, and 263 against removing the mechanism from the Coroners and Justice Bill.

3. Hatred against Persons on the Grounds of Sexual Orientation

The Criminal Justice and Immigration Act 2008 added the offence of inciting hatred against persons on the grounds of sexual orientation to those of race and religion under the Public Order Act 1986. During the passage of the Criminal Justice and Immigration Bill 2007–08 through the House of Lords, Lord Waddington proposed an amendment,

which was accepted by 81 votes to 57³, and has been described as a “free speech clause” or “savings clause”:

For the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

This clause is now contained in section 29JA of the Public Order Act 1986. Both the government and the Liberal Democrats were opposed to the provision during the debate on the Criminal Justice and Immigration Bill 2007–08, and clause 61 of the Coroners and Justice Bill 2008–09 (HL Bill 33) removes section 29JA from the Public Order Act 1986. According to the *Explanatory Notes* to the Coroners and Justice Bill, removing section 29JA does not affect the threshold required for the offence to be made out, and that the offences of stirring up hatred on grounds of sexual orientation are compatible with articles 9 (Freedom of Thought, Conscience and Religion) and 10 (Freedom of Expression) of the European Convention on Human Rights regardless of section 29JA (Coroners and Justice Bill 2008–09, *Explanatory Notes*, paragraphs 392, 864–5).

The Joint Committee on Human Rights reported on the original offence under the Criminal Justice and Immigration Bill, but not on the savings clause, and found that the provision “provides an appropriate degree of protection for freedom of speech”⁴. In their report on the Coroners and Justice Bill, the joint committee stated:

We reiterate our earlier view that the offence of incitement to hatred on the grounds of sexual orientation contains adequate safeguards for the right to freedom of expression without the addition of a savings clause. Clause 58 [now clause 61] would not lead to a significant risk of incompatibility with article 10 ECHR.

(Joint Committee on Human Rights, *Legislative Scrutiny: Coroners and Justice Bill* (20th March 2009), session 2008–09, HL 57, paragraph 1.179)

At the report stage in the House of Commons, David Howarth, Liberal Democrat Shadow Secretary of State for Justice, began by explaining that some religious groups were concerned about the new law because “their religion strongly disapproves of homosexuality, and their representatives or preachers want to continue to say so publicly” (HC *Hansard*, 24th March 2009, col 189). However, under the Public Order Act 1986, “the words have to be both threatening and intended to stir up hatred. It is not enough for the words to be insulting or offensive; they have to threaten. Nor is it enough that the words may have the effect of stirring up hatred; they have to be specifically intended to do so”. He thought that the crime was difficult to prove, and he could not see how anyone could think that an offence had been committed where “a charge was brought against a saintly religious leader whose intention was to save souls”.

However, the problem was not with what the law said, “but the fact that some rather odd investigations have been started out”. These investigations had not been brought under the provisions under discussion, as they had not yet been brought into force, but under different ones. Dominic Grieve, Shadow Secretary of State for Justice and Shadow Attorney General, intervened, commenting that cases in which people had been exposed to intensive investigations, “even though no prosecutions have been brought, have been those where the existing laws have been stretched even further to warrant the police

³ HL *Hansard*, 21st April 2008, cols 1365–1378

⁴ Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Justice and Immigration Bill* (25th January 2008), session 2007–08, HL 37, paragraphs 1.61–1.65

coming and knocking on their doors". For this reason, Mr Howarth thought it was important to have specific legislation and to provide guidance on its implementation.

David Howarth thought that there were two possible solutions. The first was to follow section 29JA of the Public Order Act 1986, which was added "after extensive ping-pong between this House and the other place last year, when the government eventually gave way. I thought they were wrong to do so, and divided the House right at the end of that process. They did it because they were up against a deadline on another provision in the Bill about industrial action in prisons. However, they made it clear that they were with me in spirit, if not in the Lobby" (col 190). The problem with section 29JA, was that it did not resolve the issues it set out to, as the issue was not with the content of the law, but with its possible misinterpretation: "if the police pay no attention to the wording of the offence itself, why should we believe that they will pay attention to the wording of the Waddington amendment?". Furthermore, the provision did either not achieve anything at all "or is attempting to do something that we should oppose". He explained:

If it really is "For the avoidance of doubt" it adds nothing to the law at all, but if it is read in a different way, as a "deeming" provision, it is entirely unacceptable.

A "deeming" provision is a statutory section that tells the courts to ignore reality but to treat one thing as another.

(col 190)

He thought that the government were right to seek to remove the provision as it was either useless or dangerous. He did not think, however, that the government were right to offer nothing in its place. This led him to advocating a second solution, his new clause, which would require the Director of Public Prosecutions to issue guidance to prosecutors on the meaning of the offence, and would require Chief Constables to make the content of the guidance known to police officers (new clause 11).

David Howarth proposed a second new clause, the purpose of which was to include in the definition of incitement to hatred on the grounds of sexual orientation words, behaviour or written materials that asserted or implied an association between sexual orientation and a propensity to commit child sex offences (new clause 37):

It is an attempt to ensure that a particularly despicable form of homophobic intimidation comes within the meaning of "threatening" in the Act. That is the disgusting technique employed by certain political groups including the British National Party, alleging that gay people have a propensity to be paedophiles and to commit offences against children. That particular form of intimidation is not just unpleasant but literally life-threatening.

(col 192)

David Taylor, Labour/Co-operative MP for North West Leicestershire, proposed an amendment that would have retained section 29JA of the Public Order Act 1986, and on which the House later divided (amendment 1). He was pleased that the Liberal Democrat front bench recognised the need for reassurance about free speech, but could not understand why they opposed the inclusion of a free speech clause, which was "more likely to be read and followed by police and prosecutors than page after page of guidance". He thought that if the offence had been in force, which it was not, and the free speech clause was being abused, then the government's and the Liberal Democrat's case would be stronger. The free speech clause did "not lend itself to the drastic misuse that is alleged. Even Stonewall ... does not appear to think that it does.

Its briefing note ... stated that clause 58 'could mean that a very small number of people with extreme views attempt to avoid prosecution'" (col 193).

He continued:

Whenever the House legislates, we engage in a balancing act. In the case that we are considering, on one side of the scales, we have freedom of speech, freedom of religion and the pressing need for reassurance about the prevention of potentially widespread abuses of civil liberties. On the other side, according to Stonewall, we have a tiny number of extremists who might point to the free speech clause when they are charged, but almost certainly without success. The organisation does not, therefore, make a strong argument against a free speech clause.

(col 193)

In relation to the new clause proposed by David Howarth, he said that he did "not believe that we can leave it up to guidance to protect the precious civil liberty of freedom of speech". He concluded by saying: "the existing wording asserted by Parliament less than a year ago provides clarity and reassurance; we must keep it" (col 196).

Dominic Grieve, for the Conservatives, stated that there was common ground between his party and the Liberal Democrats in terms of the protection of the right to freedom of speech and expression. There had, unfortunately, been a number of examples in which laws had been stretched, and "applied in an oppressive way against perfectly respectable people" (col 197). He did not feel that guidelines were sufficient, as if they were ignored, there was nothing to stop the legal process until the matter got to court.

However, he thought that a savings clause would help, as it would "provide comfort and reassurance to people that they can continue to express their views". He went on to say that he did not think that it was possible to "have a working democracy without the underpinning of freedom of speech, which also requires tolerance of opinions that we may consider to be bonkers or which we may dislike. As long as hatred is not stirred up, which is the mischief that we have been trying to address—as long as the civil order of society is not being undermined—we must tolerate such opinions" (col 198). Dominic Grieve therefore intended to support David Taylor's amendment to retain section 29JA of the Public Order Act 1986.

Bridget Prentice, the Parliamentary Under-Secretary of State for Justice, responded for the government. Although David Taylor's amendment dealt with freedom of speech, it was "important to remember that we are also talking about the freedom of gay people to live their lives free from hatred and bigotry" (col 199). The measure had been inserted for the avoidance of doubt, but she felt that safeguards had already been built into the offence. The House had previously rejected Lord Waddington's amendment, and she invited it to do so again.

On the subject of guidance, Bridget Prentice explained that the Ministry of Justice, the Crown Prosecution Service and the Association of Chief Police Constables would all issue guidance before the offence came into force:

However, I am quite persuaded by the argument put by the hon. Member for Cambridge [David Howarth], and I would like to reflect on it. Therefore, although I ask him to withdraw new clause 11, I invite him to take up the opportunity of

meeting the Director of Public Prosecutions to consider whether it would be appropriate to make the guidance statutory.

(col 201)

Although she understood the motivation behind David Howarth's other new clause on incitement to hatred on grounds of sexual orientation and association with child sex offences, she did not believe that it was necessary to specifically mention them in the offence: "in many instances, allegations linking sexual orientation with child sex offences will be threatening as well as distasteful, and will be caught by the offence. However, when the circumstances mean an allegation is not threatening, it will not be caught, and we think that is right".

As a result of the offer made by Bridget Prentice, David Howarth withdrew his new clause on guidance. The House divided on David Taylor's amendment to retain section 29JA of the Public Order Act 1986 (amendment 1). The amendment was rejected, with 328 members voting against, and 174 members in favour of the amendment.

4. Sentencing Council for England and Wales

The Coroners and Justice Bill 2008–09 abolishes the Sentencing Advisory Panel and the Sentencing Guidelines Council and creates a single Sentencing Council for England and Wales (Part 4, Chapter 1). The Sentencing Advisory Panel was established by the Crime and Disorder Act 1998, and is an independent body of judges, academics, criminal justice practitioners and public representatives. The panel advises the Sentencing Guidelines Council. The Sentencing Guidelines Council was established by the Criminal Justice Act 2003. Its role is to issue sentencing guidelines to assist courts in England and Wales, to help encourage consistent sentencing. The council is chaired by the Lord Chief Justice, and has seven further judicial members and four non-judicial members with experience of policing, criminal prosecution, criminal defence and the interests of victims. The Chairman of the Sentencing Advisory Panel and a person appointed by the Lord Chancellor with experience of sentencing policy and the administration of sentences also attend the council. The council took over developing sentencing and allocation guidelines from the Court of Appeal and Magistrates' Association. The panel previously provided advice to the Court of Appeal.

The impact assessment accompanying the Coroners and Justice Bill 2008–09 provides an outline of the problem with the current arrangements:

Current system for producing sentencing guidelines involves two bodies, the Sentencing Advisory Panel (SAP) and the Sentencing Guidelines Council (SGC) which results in cumbersome procedures for creating and consulting on guidelines. There is currently no assessment of the impact of guidelines or the nature of adherence to guidelines. This means it is not possible to predict the impact of guidelines and sentencing on correctional services or plan effectively to meet changes in demand. There is also no independent assessment of the impact of government policies or legislation.

(Ministry of Justice, *Impact Assessment of Sentencing Council for England and Wales* (1st January 2008 [sic]), version 1, downloaded from the Ministry of Justice website March 2009)

The amalgamated body would consist of 14 members, eight of whom would be judicial members and six of whom would be non-judicial members. In drawing up the guidelines, the council “must have regard to current sentencing practice, the need to promote consistency in sentencing, the need to promote public confidence in the criminal system, the cost of different sentences and their effectiveness in reducing re-offending, and the council’s monitoring of the application of its guidance” (Coroners and Justice Bill 2008–09, *Explanatory Notes*, paragraph 547). The guidelines would have to be first published in draft, and certain groups would have to be consulted (clause 106).

In their report on the Bill, the House of Commons Justice Committee queried whether they would still be consulted on sentencing guidelines in advance of their issue, to which the government responded in the affirmative (House of Commons Justice Committee, *Coroners and Justice Bill: Government Response* (6th March 2009), session 2008–09, HC 322, p 9).

At the report stage of the Coroners and Justice Bill in the House of Commons, a number of amendments to Part 4, Chapter 1 on the Sentencing Council for England and Wales were proposed. David Howarth, Liberal Democrat Shadow Secretary of State for Justice, spoke to his amendment which would have required the Sentencing Council for England and Wales to have regard to the cost-effectiveness of different sentences in preventing re-offending (amendment 20).

He began by saying that he supported the basic idea of the Bill to have more consistent sentencing and a greater understanding of the sentences passed. However, “the difficulty has always arisen with going beyond the simple aim of extra consistency with extra understanding” (HC *Hansard*, 24th March 2009, col 224). Where the government have tried to save money and tried to make the criminal justice system more predictable, the incentive was created “to make the guidelines far too rigid, to the extent that one could end up with the position in some United States jurisdictions, where the guidelines are so rigid that there is no judicial discretion”. The government had, though, moved away from such a rigid model.

He was not opposed to “going beyond aiming for consistency in sentencing guidelines”, and his concern was not the total amount spent on sentencing, but the direction of the criminal justice system: “I especially want the guidelines to help further the aim of turning the criminal justice system around so that its main purpose is to reduce re-offending by imposing sentences that work, as opposed to those that simply sound tough”.

Mr Howarth thought that the “best way of achieving that is not through individual sentencers learning more about the evidence, but through the guidelines” (col 225). A more dynamic system was needed in which the results of research are “built into the process of drawing up the sentencing guidelines” (col 226).

Mr Howarth went on to say that he had “absolutely no objections to considering the relative costs of sentences in deciding what should be in the guidelines. It seems obvious that if two sentences are equally effective in reducing re-offending, we should use the cheaper one, because we can do more of it and prevent more crime in the long term”. However, it was important to distinguish the relative costs of different sentences, and the total resources available to the criminal justice system: “sentencing guidelines should take into account relative costs, but that does not mean that they should take into account the total resources available to the system ... It is for the government to ensure that the resources are available to make sentencing in the criminal justice system work”.

Although sentencing guidelines caused problems by reducing judicial discretion, something which judges would resent, “if we have only unguided judicial discretion, people in the Secretary of State’s position will have to make resource provision for a vast

number of sentences that are never used. That would massively increase the cost in the system and mean that resources were not being put to their best use for reducing crime” (col 227).

The Shadow Minister for Justice, Edward Garnier, proposed two amendments, one which dealt with whether the courts should “follow” or “have regard to” the sentencing guidelines (amendment 43). The second amendment dealt with the resource implications of sentencing: “Whilst the courts may have regard to the availability of correctional resources, for the avoidance of doubt the courts must not pass a sentence that is wholly determined by resource assessments which are expressly intended for the guidance of the Secretary of State in planning for and providing such custodial or community sentences as he advises Parliament, and it considers, necessary in the light of such assessments” (amendment 44).

He began by saying that he thought that “sentencing is probably the most difficult thing that a judge has to do in the criminal justice system”, and that guidance was always helpful and very useful (col 229):

We accept that judges have to sentence within a range of sentences laid down by statute or by the guidance of the higher courts and by the Sentencing Guidelines Council. Where I think we—that is to say, the government and the Conservative Party—differ is on the tightness of the link between the sentencing guidelines and the independence of the judge or the magistrate to apply the sentence that is just in the case before him.

(cols 229–230)

There was a possibility of “an improper connection between money and justice”, and it was this that his amendment (amendment 44) sought to remedy (col 230):

When deciding what should be the maximum sentence for robbery, burglary, murder, rape or any other criminal offence, Parliament will need to understand that increasing the maximum sentence or providing a minimum sentence will cost a certain amount of money, and will require additional prison places, probation officers or other facilities to deal with the offenders concerned. Having understood that, however, and having decided on the basis of that information and advice what the appropriate maximum sentence, minimum sentence or range of sentences should be, Parliament should not descend into the courtroom, either directly or via the Sentencing Council, to tell judges precisely what to do. I believe that without amendment 44 or a similar provision, we shall be in danger of moving Parliament and the Executive into the courtroom in an improper constitutional fashion.

(col 231)

His second amendment was also concerned with “intruding in the courtroom” (amendment 43). Currently, sentencers had to “have regard to” the guidance issued by the Sentencing Guidelines Council—they were not obliged to follow it. Although sentencers had to explain their reasons for acting outside the guidance, he did “not think that anyone has been surprised by, or unjustly dealt with by, judges having regard to or taking account of the guidance as opposed to following it”.

However, under clause 111 of the Coroners and Justice Bill, sentencers would have to follow any sentencing guidelines:

Only the judge or magistrate has the facts of the case before him—the facts relating to the victim, and the facts or the local knowledge in relation to the effect of the crime on the local community; that is particularly true of magistrates—along with some understanding of the antecedents and the earlier life of the defendant or defendants before him or her. That, I suggest, renders the judge or magistrate best placed to deal with the sentence.

(col 231)

It was vital that sentencers should be allowed a wide remit “to do justice to the defendant, society as a whole, the victim and the victim’s family, and to play their part in the reduction of re-offending” (col 232).

The Secretary of State for Justice and Lord Chancellor, Jack Straw, began his response by outlining the development of the policy on sentencing guidelines, before discussing some of the government amendments which had been tabled as a result of discussions at the committee stage.

In relation to Edward Garnier’s amendment on “have regard to” rather than “follow”, Mr Straw explained that the parliamentary drafters had followed the recommendations of the Sentencing Commission Working Group chaired by Lord Justice Gage⁵:

The Gage report said:

“A majority of the Working Group”—

the chairman was part of that majority—

“recommends that the test for departures from the guidelines be made more robust by providing that the court may only pass a sentence outwith the guidelines if it is of the opinion that it is in the interests of justice to do so. A minority of the Working Group recommends that there should be no amendment to the statutory tests contained in the Criminal Justice Act 2003.”

Earlier in the report, the working group considered the responsibilities that should be imposed on the Sentencing Council, but—critically—the reader is referred to annexe C where the working group proposes a change to sections 172 and 174 of the 2003 Act. The working group suggests the wording:

“Every court must...in sentencing an offender, apply any guidelines which are relevant to the offender’s case unless it is of the opinion that it would be contrary to the interests of justice to do so”.

(col 240)

Mr Straw thought that there was a difference between “have regard to” and “follow” or “apply”: “my point is that ... we are seeking to apply or to follow—not have regard to—what Lord Justice Gage and his colleagues recommended. They wanted a closer connection between the guidelines and what the courts are doing”. However, the provisions contained a clear exception: if judges thought that a sentence was outwith the

⁵ The group’s report was published in July 2008 as *Sentencing Guidelines in England and Wales: An Evolutionary Approach*.

guidelines, “they are entitled to pass it if they believe that it would be contrary to the interests of justice to stay within the guidelines” (col 241).

Through the provisions, the government:

are trying to ensure respect and proper protection for the independence and autonomy of sentencers when they pass their sentences. That is critical: we need to provide considerable discretion, but we must also ensure that that discretion is exercised in a structured way that the public and other sentencers can understand. We are not fettering the judiciary, but we are saying that there should be a carefully moderated body of guidance. That guidance will be moderated by the process of drafting by the Sentencing Council and by the consideration that it will be given—not in the partisan bear pit of the House of Commons but in the more bipartisan Justice Committee.

When the guidance is finally endorsed by the Sentencing Council, perhaps following amendment, it will become the framework that sentencing judges and magistrates will be expected to follow. It will give them a great deal of flexibility, although they will have to make judgments about the starting point. For example, the existing robbery matrix offers considerable flexibility. Judges and magistrates have to make judgments about additional aggravating and mitigating factors—they can decide that those factors cover the whole of the range laid down for a sentence and not just one category of case within an offence range—and they can depart from the whole thing, if they consider that to be necessary and in the interests of justice. My hope is that we shall end up with greater consistency, which would be in the interests of justice, and of the public.

(col 241)

Finally, Mr Straw commented that in response to amendments tabled suggesting that the purpose of the Sentencing Council should be explicitly stated, he would look at this matter and at whether the importance of victims should also be explicitly stated, before and during the passage of the Bill through the House of Lords.

The House divided on Mr Garnier’s amendment to replace “follow” with “have regard to” (amendment 43). The amendment was not accepted by the House, with 134 members voting in favour, and 319 voting against.

