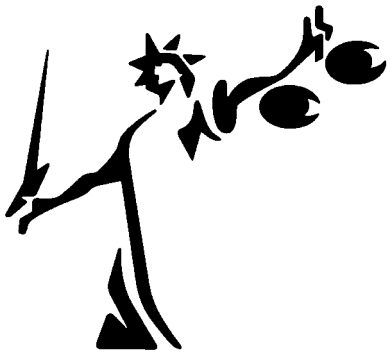

Coroners and Justice Bill

Briefing on Second Reading
House of Commons

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Introduction and summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. JUSTICE has previously commented on many of the proposals in the Bill during their development in consultation papers and previous Bills. The Coroners and Justice Bill is a large 'portmanteu' Bill and contains extremely important changes to the law in several of its Parts. This briefing is intended to highlight our main concerns about its provisions for the Second Reading stage; where we have not commented upon a certain provision in the Bill here, that should not be taken as an endorsement of its contents.

3. In short, our concerns centre upon:

- **the provisions for secret inquests;**
- **the restriction of public comment by inquest jurors and coroners on matters of legitimate public concern;**
- **the holding of inquests without juries in relation to some deaths involving public authorities;**
- **the implementation of new partial defences to murder in the absence of wholesale reform of the law of homicide;**
- **overbroad criteria for the use of anonymous witnesses in criminal trials;**
- **amendments to bail legislation in murder cases which are on their face incompatible with Article 5 European Convention on Human Rights (ECHR);**
- **the near-total undermining of the Data Protection Act 1998 through allowing ministers to authorise disclosure and use of data to serve policy objectives.**

Part 1: Coroners etc

Clause 5 – Matters to be ascertained; Sch. 4 Para 6

4. Sub-clause 5(3) would prevent a senior coroner or an inquest jury from expressing *any opinion on any matter* other than the basic details of who the person was; how, when, and where he came by his death; any registrable particulars of the death; and for inquests engaging Article 2, in what circumstances he came by his death. This is subject to the power of the senior coroner under paragraph 6 of Schedule 4 to make a report to a person who may have power to take action to prevent further deaths from being caused. However, we are very concerned that cl5(3) will prevent the senior coroner and the jury from making any public comment – and indeed in the jury's case any comment whatever – upon the facts which have been put before them.

5. Inquests will often raise matters of cogent public interest: a neglect of consumer or workplace safety by a well-known company; a failure in a duty of care by a public authority; actions and errors leading to a person meeting their death in custody or while serving in the armed forces or while in contact with the police. Jury inquests in particular, if restricted to the circumstances outlined in clause 7 (regarding which, see below), will by their nature concern these issues. The 'muzzling' of the jury and coroner in these circumstances will often, we believe, be contrary to the public interest and may violate Article 10 ECHR.

6. Further, we are concerned that there is no provision in the Bill for the senior coroner's report under para 6 of Sch 4, and the written response to that report provided for in para 6, to be made public where appropriate. The publication of rule 49 recommendations by coroners – the equivalent recommendations under the current Coroners' Rules – has on previous occasions provided powerful ammunition to those pressing for change in public services; for example, in relation to deaths in custody.

Clause 7 – Whether jury required

7. As in a Crown Court criminal trial or a civil action against the police, an inquest jury is a powerful guarantee of independence, transparency and democratic input in the administration of justice. We believe that in addition to the circumstances set out in

clause 7(2), an inquest should take place with a jury wherever the senior coroner has reason to suspect that the death resulted in whole or in part from the act or omission 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. We believe that this should be guaranteed in the legislation. Further, while the number of jurors may vary we believe that rules should provide that the more significant the public interest in the inquest, the larger the jury should be within the band of six to nine people.

Secret inquests

Clause 11 – certified investigations: investigation by judge, inquest without jury

8. Clause 11 allows the Secretary of State to certify an inquest to be held without a jury in order to prevent certain matters being made public. It is essentially the same as what was previously clause 77 of the Counter-Terrorism Bill, although clause 11 purports to offer some additional safeguards.[1]

9. As we noted when the provision was first brought forward in the Counter-Terrorism Bill, the effect of this clause is that in any case where the state is alleged to be responsible for a person's death – for example the killing of Jean Charles de Menezes by Metropolitan Police or the death of Baha Mousa at the hands of British soldiers in Basra – the Secretary of State will be free to appoint a coroner to sit in closed session without a jury so long as he or she is satisfied that it is in the public interest to do so because of the sensitive nature of the material that is likely to be considered. This would also be applicable to inquests into deaths of individuals outside of state custody but raising issues of the state's broader conduct, e.g. an inquest into the death of a soldier killed in Iraq or the inquest into the death of Dr. David Kelly.

10. Nor do we think any of the additional safeguards introduced since the Counter-Terrorism Bill make the proposed use of closed coronial proceedings any fairer or more transparent. For instance, the provision in clause 11(5) for staying proceedings pending judicial review of the decision to certify does no more than what would

[1] The main changes are, first, that the Secretary of State must not only be of the opinion that the investigation concerns 'a matter that should not be made public' but also that 'no other measures would be adequate to prevent the matter being made public' (clause 11(1)). Secondly, the grounds upon which an investigation may be certified have been clarified slightly, including 'preventing or detecting crime' and 'in order to protect the safety of a witness or other person' (Clause 11(2)(a)(iii) and (2)(b), but also narrowed to the extent that 'real harm' to the public interest is now required (clause 11(2)(c)). Thirdly, the investigation will be carried our by a High Court judge (clause 11(3)(a)).

undoubtedly be in the inherent power of the coroner in any event. The involvement of the Lord Chief Justice in selecting the judge (clauses 11(3)(a) and 11(7) does not ameliorate the unfairness caused by the exclusion of the jury, members of the public and the next-of-kin. Lastly, notwithstanding the proviso in clause 11(1)(b) that the Secretary of State may only certify a closed inquest if satisfied that 'other measures' for protecting sensitive material would be inadequate, there is no requirement on the Secretary of State that such certification be *necessary* to protect e.g. 'the safety of a witness' (clause 11(2)(b)).

11. We welcome the much-expanded explanatory notes setting out the government's view about the compatibility of these provisions with the right to life under Article 2 of the European Convention on Human Rights. Unfortunately the government's explanation for its view only serves to highlight the deficiencies of its legal analysis. In particular, the government claims that 'Article 2 does not … give the public and next-of-kin an absolute right to be present at all times or to see all the material relevant to the investigation':[2]

> *The Government considers that the courts are very likely to accept that it is consistent with Article 2 for sensitive material not to be made public or disclosed to the next-of-kin where this is required by a substantial public interest.*

12. However, the government appears to dramatically overestimate the extent to which the European Court of Human Rights (ECtHR) would allow the wholesale exclusion of the public and next-of-kin from coronial proceedings for the sake of some 'substantial public interest' in non-disclosure of sensitive material. In the case of *Rowe and Davis v United Kingdom*, for instance, the ECtHR observed in the context of criminal proceedings that 'the entitlement to disclosure of relevant evidence is not an absolute right'.[3] Nonetheless, the ECtHR in that case never suggested that it would be appropriate to exclude a jury altogether for the sake of safeguarding the public interest in non-disclosure.

13. Indeed, we note that juries regularly hear serious criminal cases which may behind the scenes involve some very difficult questions of disclosure of sensitive information, e.g. terrorism cases involving informants or surveillance evidence. If the exclusion of

[2] Explanatory notes, para 803.

a jury is not deemed to be a proportionate measure in such criminal proceedings, it is very difficult to see how it would be a proportionate measure in the context of an inquest investigating the death of an individual allegedly at the hands of the state. We remain of the view that the Secretary of State's resort to closed inquests sitting without a jury will almost certainly be incompatible with the obligation under Article 2 ECHR to provide an independent and effective investigation, one that properly safeguards the interests of the victim's family and the public at large.

Part 2: Criminal Offences

Chapter 1 – Murder, infanticide and suicide

14. As respondents to both the Law Commission's and the Ministry of Justice's consultations on the reform of homicide law, we have repeatedly stated our concern that the law of homicide is need of *wholesale* reform. The continued existence of the mandatory life sentence and the breadth of the offence of murder necessitate the 'partial defences' - often unsatisfactory legal 'gateways', existing nowhere else in our criminal law, through which defendants in sympathetic cases can escape mandatory terms.

Clauses 39 to 43 – Partial defences to murder

15. We are concerned that in the new formulations proposed in this Chapter there may be deserving cases where no partial defence can be made out. In particular, if a person who is terminally ill or living with unbearable physical or mental anguish requests or desires a mercy killing from a family member, that person cannot assist them without legally being guilty of the offence of murder and subject to the mandatory life sentence – unless, under the new definition of 'diminished responsibility', the family member can prove that he himself is suffering from a 'recognised medical condition' such as clinical depression. While Parliamentary consideration of the prohibition on mercy killing may fall outside the time allowed for debate of this Bill, we believe that at the very least, amendments should be made to allow suitable discretion in sentencing in these cases.

[3] *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 61.

16. Further, where a person acting in self-defence or defence of another person (including for example an armed police officer) uses a degree of force that a jury judges to be unreasonable, resulting in a person's death, he will be guilty of murder under these provisions unless he lost his self-control.

17. We are also concerned that the judge will be able to withdraw the defence of 'loss of self-control' from the jury, since currently juries can consider provocation in circumstances where the defence is one of self-defence. Where a jury judges that self-defence is not made out (for example, because the degree of force used was unreasonable in the circumstances), we believe that they should still be able in appropriate cases to consider whether the defence of loss of self-control applies.

18. We are further concerned by the 'words and conduct' element of the loss of self-control partial defence: defendants with unpopular views or unusual lifestyles may not be found by a jury to have had a 'justifiable sense of being seriously wronged'.

Clauses 44 to 45 – Infanticide

19. We regard this Bill as a missed opportunity not only in relation to homicide generally but also infanticide in particular. The procedural problem that a woman guilty of infanticide may as a result of her medical condition fail to accept responsibility for the killing of her baby, meaning that she is convicted of murder, is not dealt with by these provisions. We recommend that a procedure be put in place that allows a rapid reference to the Court of Appeal in cases where a woman has been convicted of murder but the trial judge considers that there are grounds for concern that she may instead be guilty of infanticide. There are also good arguments for extending this procedure to diminished responsibility cases.

Clause 46 – Suicide

20. We are concerned that, although the government considers that this clause merely updates and clarifies the law on assisting suicide, it in fact expands it. We believe that threatening someone or pressurising them to commit suicide should be a serious criminal offence, and that it is legitimate to criminalise the assisting of suicide in certain circumstances (for example, the selling of poison tablets over the internet). However, these are acts different in kind from, for example, discussion in an internet chat room in which one teenager encourages another to commit suicide. Different

again are actions of assistance by family members in cases such as that of Daniel James, or the situation of Debbie Purdy, where those with incapacitating conditions may choose to end their own lives but be unable to do so without assistance. This clause draws no distinction between these circumstances, meaning that families such as that of Daniel James will continue to be reliant upon prosecutorial discretion to avoid a serious criminal charge.

Clauses 49-56: Images of children

21. Clause 49 creates the offence of being in possession of non-photographic child pornography. The definition of 'child' given by 52(5) is a person under the age of 18. In relation to photographic child pornography, s1A of the Protection of Children Act 1978 provides for an exception to the taking or making etc of an image where the child is over the age of 16 and the defendant is either married to her or living as partners with her in an enduring family relationship. Clause 56 of this Bill extends that defence to pseudo-photographs. However, the Bill does not offer the same defence in relation to non-photographic images. Instead clause 51 provides a defence where the person has a 'legitimate reason' for being in possession of the image. Although it may be more difficult in practice to differentiate an image of a person's spouse or partner from that of another person when the image is not photographic (for example, a painting or cartoon), we believe that, while the age of consent and marital minimum age remain at 16, similar exceptions should apply for spouses and partners of 16-18 year olds.

Clause 58: Hatred against persons on grounds of sexual orientation

22. Section 29JA of the Public Order Act 1986 was introduced following Parliamentary amendment of the Bill that became the Criminal Justice and Immigration Act 2008. S29JA is intended to ensure protection for freedom of expression in the discussion of sexual conduct or practices, by preventing prosecution on that basis for offences relating to the stirring up of hatred on the grounds of sexual orientation. We believe s29JA would be of particular relevance in the context of religious preaching and/or discussion. In the Explanatory Notes to this Bill the government states that '[t]he removal of the section will not affect the threshold required for the offence to be made out'. We believe that they should clarify this statement and explain why they are attempting to remove Parliament's amendment so soon after it was passed.

Part 3 – Criminal Evidence, Investigations and Procedure

Clauses 59-68: Anonymity in investigations

23. These clauses would institute a formal statutory procedure for enforcing the anonymity of people assisting the police in investigations into gun and knife homicides occurring in the context of 'street gangs' of 11-30 year olds. The concept of the police informant, who can be protected by public interest immunity proceedings, is well known, and therefore we question why this different procedure is necessary. In particular, we question why it is thought necessary in relation to this narrow category of cases, when other analogous cases – such as those involving serious organised criminal networks, and other crimes that may be committed in the 'street gang' context (robbery, other firearms offences, non-fatal offences against the person etc) – will not be covered.

24. Further, we are concerned at the effect of such a formal order upon subsequent judicial proceedings; if a defendant is charged and the subject of such an order provides information or evidence that may be relevant to a bail application or to the criminal case (as evidence or unused material), what will be the procedure? We will be concerned to ensure during the passage of the Bill that proper safeguards will be in place to protect procedural rights under Articles 5 and 6 European Convention on Human Rights. We also seek assurances that a person made the subject of an investigative anonymity order would not be subject to the unfair use of self-incriminatory statements or material provided by them to police in any future proceedings against them.

Clauses 69-80: Anonymity of witnesses

25. The right of a defendant to know the identity of a witness against him in criminal proceedings is both a common law principle and a constituent part of the right to a fair trial under Article 6 ECHR, which provides inter alia for the minimum right of a defendant 'to examine or have examined witnesses against him' in criminal cases. The Court of Appeal has made clear in the recent case of *R v Mayers* in relation to the Criminal Evidence (Witness Anonymity) Act 2008 (which this Bill would supplant), that:[4]

[4] [2008] EWCA Crim 1416, para 5.

Notwithstanding the abolition of the common law rules, it is abundantly clear from the provisions of the Act as a whole that, save in the exceptional circumstances permitted by the Act, the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him is maintained.

26. While it may be necessary for a witness to be anonymised in exceptional circumstances, these should be narrowly defined. In particular, we do not believe that the risk of 'any serious damage to property' is sufficient to displace the primary right of the accused to a fair trial and the public interest in the fair and transparent administration of justice. We therefore do not believe that a risk to property should be a qualifying condition under clause 71 of the Bill. The only legitimate circumstances, in our view, where a witness should be even *considered* for anonymity are in order to prevent a risk of death or serious physical harm to the witness or another person, or where the witness is an undercover officer (police, security services, etc). The criterion of 'real harm to the public interest' in subclause 71(3) is in our view too broad, and should be replaced by a criterion referring to undercover officers.

Clauses 81-88: Vulnerable and intimidated witnesses

27. Special measures for witnesses often create a difference between the way that one or more prosecution witnesses, and other witnesses (often including the defendant) give evidence in a case, affecting the principle of equality of arms; they may also, despite any directions given, prejudice a tribunal of fact against the defendant in some cases. They should therefore only be used, apart from any other appropriate criteria (such as age or vulnerability of the witness), where they are necessary and effective to maximise the quality of the witness's evidence.

28. We are therefore strongly opposed to clause 82 which provides that in relation to listed weapons offences all witnesses will be eligible for special measures under s17 Youth Justice and Criminal Evidence Act 1999 unless they inform the court of their wish not to be so eligible. This is in our view incompatible with Article 6 ECHR. It is simply not the case that all witnesses – including the many police and other professional witnesses – in weapons cases will be subject to fear or distress about testifying and that special measures are needed to maximise the quality of their evidence. To allow witnesses to be eligible for special measures unnecessarily may

indeed compromise the quality of their evidence and will be prejudicial to the defendant. We recommend strongly that this provision be removed from the Bill. We are also disturbed by the provision in clause 82 that the list of offences to which the clause applies should be amendable by the Secretary of State via the negative resolution procedure.

29. In relation to child witnesses, the effect of clause 83 is that where a child does not wish to give evidence via video recording plus video link, the presumption will be that they should be screened. However, in our view it should always be demonstrated that the special measures concerned are necessary and effective to maximise the quality of the witness's evidence. It is particularly important that where the defendant is also a child or young person, his trial is not prejudiced through the use of special measures for prosecution witnesses which are not available to him when he gives evidence. This is particularly important bearing in mind that the defendant in a case could be, say, 11 years old but the witness given special measures could be 17.

30. We are also strongly opposed to clause 87, which provides for 'intermedaries' to be used to assist mentally vulnerable defendants to give evidence in court. The right to participate effectively in criminal proceedings is a constituent part of the right to a fair trial under Article 6 ECHR. As the European Court of Human Rights said in *S.C. v United Kingdom*:[5]

> *… "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence…*

31. If the defendant is unable to do all these things then the mere presence of an intermediary when he gives his evidence cannot 'cure' this defect. We also believe

[5] App No. 60958/00, judgment final 10/11/2004, para 29.

that there are inherent dangers in the use of an intermediary when a defendant gives evidence; the intermediary may not be independent of the defendant or the case (for example, a parent or carer) and may, whether independent or not, misinterpret the defendant's speech and that of those asking him questions. Using an intermediary for evidence is quite different from the role of a lawyer or appropriate adult in explaining proceedings to the defendant in conference. We are also concerned that this provision would be used in order to put on trial people who are mentally unfit to stand trial. An intermediary is not merely an interpreter; if an individual is mentally compromised to the extent that they cannot understand and answer questions in simple language from a lawyer or judge, then we believe that they will not be able to participate effectively in their trial and should therefore be judged unfit to plead.

Clauses 89-93: Live links

32. These provisions will extend the circumstances in which criminal proceedings can take place via live link. This is an ongoing trend in recent legislation, against which we counsel caution. The physical presence of the accused in court is a very important safeguard not only against physical ill-treatment of persons arrested and detained, but also against police and prosecutorial oppression and misconduct in the investigation. While these concerns are particularly heightened in relation to people subject to lengthy periods of pre-charge detention (for example, in counter-terrorism investigations) or those arrested for crimes of particular seriousness and/or notoriety, they remain valid in ordinary criminal proceedings, due to the risk of misconduct of individual officers due to personal grudges or localised problems at a particular prison or police station. We therefore believe that live link hearings should take place only with the defendant's informed consent.

Clauses 97-98: Bail

33. We responded to the Ministry of Justice's consultation paper on *Bail and Murder*, which was issued following concern over the cases of Gary Weddell (acknowledged in the consultation paper to have been an unusual one) and Anthony Leon Peart (where failings to ensure proper monitoring of bail and proper communication between judicial areas where the main problems exposed). We do not believe that these unfortunate cases justify changes to the law as to when bail can be granted in murder cases, nor that there should be specific rules for bail in murder cases, since although murder is a charge of the utmost seriousness, the circumstances of a

murder charge can vary – from a professional assassination to a consensual mercy killing by the family member of a terminally ill person. Further, there are other offences that can be committed at an equal degree of seriousness – for example, certain terrorist offences. The seriousness of the charge, while it may be a relevant factor in relation to bail, cannot alone determine whether bail can be granted. One defendant charged with a less serious offence may present a far greater danger to the public than another charged with murder.

35. Furthermore, the right to liberty, as guaranteed under Article 5 ECHR, is not abrogated because a person has been charged with murder. There must still be 'relevant and sufficient' reasons for bail to be withheld.[6] We believe that this clause would either have to be read down under s3 Human Rights Act 1998 (like s25 of the Criminal Justice and Public Order Act 1994) or be judged incompatible with Article 5 ECHR.

36. Article 5 provides the right for a detained person to be brought before a judicial authority within a reasonable time and in our view, an extra delay of 48 hours before the detainee can be released simply because of the fact of the murder charge is not justifiable. If the Crown Court is to make the bail decision at first instance then the jurisdictional rules should be changed so that the person is brought before the Crown Court when they would otherwise have been brought before the magistrates' court. There is also no good reason why the regime in clause 98 should apply to murder but not to other equally serious cases.

Part 4: Sentencing

Clauses 100-118: Sentencing Council for England and Wales

37. We responded to the Sentencing Commission Working Group's consultation on *A Structured Sentencing Framework and Sentencing Commission* in 2008. While we are pleased that the government has rejected the idea of American-style 'sentencing grids', we are concerned that the proposed Sentencing Council should retain suitable diversity of expertise and that it should leave room for sufficient judicial discretion to do justice in individual cases.

[6] *Wernhoff v Germany* (1979) 1 EHRR 55.

38. In particular, we recommend that the Council's judicial membership include those with experience of sentencing in the Youth Court; that its non-judicial membership include those with experience of working with children in the youth justice system; and that the Council reflect the diversity of the community in so far as is possible. Further, we recommend that the Council should have a duty to consider the specific needs of women, children, minorities, and those suffering from mental health problems in the criminal justice system, and to combat both direct and indirect discrimination in sentencing.

Clauses 120-121: Dangerous offenders

39. These clauses extend the 'dangerous offenders' regime of the Criminal Justice Act 2003 to certain terrorism offences. We are unclear, however, what if any courses are available in prisons to address radicalism; indeterminate sentences should not be put in place unless suitable courses are available to reduce the risk posed by terrorist defendants.

40. We are also concerned at the use of these sentences in the context of the existing overbroad definition of terrorism in section 1 of the 2000 Act and the breadth of some of the terrorist offences to which these clauses would apply (for example, s57 Terrorism Act 2000).

Part 8: Data Protection

41. Although we welcome the introduction of new powers in clause 151 to allow the Information Commissioner to carry out mandatory assessments of data holders, we are profoundly disturbed by the other proposals in Part 8 of the Bill. In particular, clause 152 contains a sweeping power to enable Ministers to authorise the sharing of data for the sake of any 'policy objective' of government. As the explanatory notes themselves admit, it creates:[7]

> *… a free-standing power for ministers to enact secondary legislation which will have* ***the effect of removing all barriers to data-sharing*** *between two or more persons, where the sharing concerns at least in part the sharing of*

[7] Explanatory notes, para 962.

personal data, where such sharing is necessary to achieve a policy objective…[emphasis added]

42. By contrast, the right to respect for privacy under Article 8 of the European Convention on Human Rights permits interference with privacy (such as the sharing of personal data by government) only for one of the legitimate aims set out in Article 8(2):

> *the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

43. In addition, such interference must necessary in a democratic society and be proportionate *to the legitimate aim under Article 8(2)*. In the explanatory notes, the government claims:[8]

> *Because the order must be necessary to achieve a policy objective of a minister then reading it in light of the ECHR, combined with the fact that Ministers are bound to act in accordance with the provisions of the HRA, all such orders will be in pursuit of a legitimate aim as per Article 8(2).*

44. This analysis puts the cart squarely before the horse, for the question of whether or not the terms of any given data-sharing order would be compatible with the requirements of Article 8 ECHR will inevitably depend on the facts of each particular case, the nature of the data being shared, the necessity for it, and – of particular importance – whether the policy objective falls within one of the legitimate grounds identified in Article 8(2).

45. We note that the recommendation of provision for data-sharing orders of the Data Sharing Review was far more limited and cautious than the proposals contained in Part 8. In particular, the Review noted the 'exceptional and potentially controversial nature' of such orders,[9] and emphasised the need for 'necessary conditions and safeguards'.[10] In our view, the grossly general provisions of Part 8 in no way

[8] Ibid, para 964.
[9] Para 8.40.
[10] Ibid.

constitute an adequate set of safeguards against the potential for disproportionate interference with Article 8 that data-sharing orders are likely to involve.

JUSTICE

January 2009