
# Coroners and Justice Bill

## Suggested amendments for Committee Stage Part 3 House of Commons

## February 2009

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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 and in our briefing on Second Reading. The Coroners and Justice Bill is a large 'portmanteu' Bill and contains extremely important changes to the law in several of its Parts. These amendments are intended to highlight our main concerns about Part 3 of the Bill at Committee stage; where we have not commented upon a certain provision here, that should not be taken as an endorsement of its contents.

3. In short, our concerns about Part 3 centre upon:

   - **overbroad criteria for the use of anonymous witnesses in criminal trials;**
   - **the availability of special measures in cases where they would not maximise the quality of the witness's evidence;**
   - **the use of intermediaries for mentally vulnerable defendants who are in fact unable to participate effectively in their trial;**
   - **amendments to bail legislation in murder cases which are on their face incompatible with Article 5 European Convention on Human Rights (ECHR).**

4. We have not commented upon Northern Ireland provisions in this briefing for reasons of brevity. Consequential amendments may be needed if our amendments are adopted.

**Part 3: Criminal Evidence, Investigations and Procedure**

*Clause 59: Anonymity in investigations – Qualifying offences*

**Amendments**

Clause **59**, page **34**, line **16**, before "the condition" insert "in relation to the offences listed in subsection (2)(a) – (d),"

Clause **59**, page **34**, line **18**, at end insert "or attempted murder"

Clause **59**, page **34**, line **20**, after "death" insert ",wound, or grievous bodily harm"

Clause **59**, page **34**, line **19**, at end insert –

(c) an offence under section 18 of the Offences Against the Person Act 1861 (wounding or inflicting grievous bodily harm with intent);
(d) an offence under section 20 of the Offences Against the Person Act 1861 (wounding or inflicting grievous bodily harm);
(e) an offence under section 16 of the Firearms Act 1968 (possession of firearm with intent to endanger life);
(f) an offence under section 16A of the Firearms Act 1968 (possession of firearm or imitation firearm with intent to cause fear of violence);
(g) an offence under section 18 of the Firearms Act 1968 (carrying firearm or imitation firearm with intent to commit an indictable offence or to resist arrest);
(h) an offence under section 19 of the Firearms Act 1968 (carrying firearm in public place).

Clause **59**, page **34**, line **24**, leave out paragraph (4)

Briefing

This amendment is designed to explore why the government believe that these provisions are necessary in addition to the normal procedures for police informants and public interest immunity. The Bill provides for only two qualifying offences (murder and manslaughter); even attempted murder is excluded. It also provides that the death must have occurred by means of a gun and/or a knife. The Secretary of State has an extremely broad order making

power, however, to add to the list of offences and remove, add to or modify the gun/knife requirement. An order-making power with such serious consequences for criminal prosecutions is in our view wrong in principle, and therefore this amendment would remove it, instead adding other relevant firearms offences and offences against the person to the list of qualifying offences. As this is a probing amendment, this list is not exhaustive. We do not understand, however, why the government claims that these powers are necessary in relation to murder and manslaughter investigations but not in relation to other serious gun crimes, woundings and even attempted murder, where presumably many of the same circumstances – including the fears of potential witnesses – apply.

*Clause 63 – Conditions for making order*

**Amendments**

Clause **63**, page **37**, leave out paragraph (4).

Clause **63**, page **37**, line **40**, leave out paragraph (b).

Clause **63**, page **37**, line **43**, leave out "has reasonable grounds for fearing" and insert "fears, on reasonable grounds,".

Clause 63, page 37, line 43, after "harm" insert "to himself or another person"

Clause **63**, page **38**, line **8**, at end insert –

"and

(c) would be unwilling or unable to provide such information if the order were not made."

Briefing

This amendment would remove the requirement that the alleged perpetrator is between the ages of 11 and 30, and the requirement that the criminal group of which he was likely to have been a member is mostly made up of people within that age range. Investigation anonymity orders would therefore apply to qualifying offences committed by members of criminal groups of any age.

We are concerned that this legislation appears to be targeting groups of children and young people with measures that would not be available in relation to criminal groups – including organised criminal networks – dominated by older offenders. The fear of giving information to police is likely to be felt by potential witnesses in relation to organised crime, whatever the age of the perpetrator or the criminal group members. We therefore question the legitimacy of this age-related restriction.

These amendments also seek to tighten up the criteria to be satisfied before an order can be made. In particular, clause 63 nowhere requires that the subject of the order be in fear of intimidation or harm or that there are even reasonable grounds to believe this. Further, we

think it illogical that such fear should not extend to harm or intimidation of another person – for example a friend or relative. Otherwise, threats towards a relative or friend would be irrelevant to the decision as to whether to make an order. We further suggest that sub-clause 63(8) is amended so that the court must be satisfied that there are reasonable grounds for believing that the person would be unwilling to provide the information if the order were not made. If they are not in fact in fear and would be willing in all events to provide information then it must be questioned why the order is being made.

*Clause 71 – Witness anonymity orders: Conditions for making order*

**Amendments**

Clause **71**, page **42**, lines **9-10**, leave out " or to prevent any serious damage to property"

Clause **71**, page **42**, lines **11-13**, leave out paragraph (b) and insert –

> (b) in order to avoid compromising the practice of undercover policing and/or undercover operations by police, law enforcement agencies or the security services, whether in relation to specific operations or generally;

Clause **71**, page **42**, line **25**, leave out paragraph (b)

Briefing

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:[1]

> *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.*

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, and suggest an amendment here to remove references to property damage. The only legitimate circumstances, in our view, where a witness should be even *considered* for anonymity are in

[1] [2008] EWCA Crim 1416, para 5.

order to prevent a risk of death or serious physical harm to the witness or another person, or in order to protect undercover operations (by police, security services, etc). The criterion of 'real harm to the public interest' in sub-clause 71(3) is in our view too broad, and should be replaced by a criterion referring to undercover officers. We therefore suggest a more specific amendment here. If the government does have other circumstances in mind that would fall within the Bill's "public interest" criterion, we believe that these should be specified in debate.

*Clause 82: Eligibility for special measures: offences involving weapons*

**Amendments**

Clause **82**, page **47**, stand part

Briefing

JUSTICE believes that special measures should only be used if their use does not compromise the defendant's right to a fair trial, *and* they are genuinely useful in that they help maximise the quality of the witness's evidence, where that quality would otherwise be compromised because of age, fear, vulnerability or disability or where protection of identity is otherwise exceptionally necessary.[2] It is simply not the case that all witnesses in weapons cases will fulfil these criteria. Where special measures will not help to maximise the quality of a witness's evidence they should not be used, because firstly, they can have a prejudicial impact upon the defendant's trial (by suggesting, for example, that he is a person to be feared); and secondly, because we are concerned that they could impair the quality of evidence if used in inappropriate cases. In relation to defendants who are under 18, or have mental health problems or learning disabilities, there are grounds for particular concern since the defendant may also be very young and/or vulnerable to a similar or even greater degree than the witnesses.

Decisions as to special measures should not depend on the witness's wishes but upon the interests of justice. We therefore suggest that this clause be removed from the Bill. Without it, special measures would continue to be available under the normal criteria of the Youth Justice and Criminal Evidence Act 1999. We believe that these criteria are sufficient to provide for special measures in appropriate cases.

[2] For example, in relation to undercover and test purchase officers where if oral evidence is necessary screening may be appropriate.

*Clause 83: Special measures directions for child witnesses*

**Amendments**

Clause **83**, page **47**, leave out clause 83

**OR**

Clause **83**, page **47**, leave out lines 31 and 32 and "part," in line 33

Clause **83**, page **48**, line **3**, leave out paragraph (a)

Clause **83**, page **48**, line **18**, at end insert –

( ) where a defendant is under the age of 18, the age and maturity of that defendant;

Briefing

Two alternative groups of amendments are suggested in relation to Clause 83. The first is a stand part amendment, since we are not convinced that these changes to the special measures legislation would be in the interests of justice. Special measures should only be used if their use does not compromise the defendant's right to a fair trial, and they are genuinely useful in that they help maximise the quality of the witness's evidence, where that quality would otherwise be compromised because of age, fear, vulnerability or disability or where protection of identity is otherwise exceptionally necessary.[3] We do not believe that they should be used where they would not help to maximise the quality of the witness's evidence, since they can be prejudicial to the defendant and we are concerned that they could impair evidence if used inappropriately.

Our alternative amendments relate to our concerns that a defendant under the age of 18 may also be very young and/or vulnerable to a similar or even greater degree than the witnesses, and that decisions as to special measures should not depend on the witness's wishes but upon the interests of justice. They would remove the requirement that a witness 'opt out' of a

[3] For example, in relation to undercover and test purchase officers where if oral evidence is necessary screening may be appropriate.

measure, and would require the court to consider the age and maturity of any defendants under 18.

*Clause 87 – Examination of accused through intermediary*

**Amendments**

Clause **87**, page **50**, stand part

Briefing

Where a defendant's level of intellectual ability or social functioning is so compromised that he is unable to understand and respond to questions asked in language appropriate to their age by a prosecutor, defence lawyer or the court, it is very probable that he will be unable to participate effectively in his trial for the purposes of that trial being fair according to Article 6 European Convention on Human Rights. In these circumstances he should not be on trial but should be diverted to an appropriate alternative process, whether through the 'fitness to plead' procedure or a new, alternative, procedure. We believe that Clause 87 reflects an attempt by the government to deal with the case of *SC v United Kingdom*[4] in which it was ruled that the trial of an intellectually impaired 11 year old in the Crown Court had violated Article 6. The court said that:

> *… "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…*

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 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. We therefore believe that this clause should not form part of the Bill.

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

*Clauses 97 and 98 – Bail*

**Amendments**

Clause **97**, page **58**, stand part

Clause **98**, page **59**, stand part

Briefing

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 were the main problems exposed). These tragic cases do not 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. 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 – as can the strength of the evidence against the accused and the degree of their alleged involvement. 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.

Crucially, 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.[5] We believe that clause 97 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.

Article 5 ECHR provides the right for a detained person to be brought before a judicial authority within a reasonable time. In our view an extra delay of 48 hours before the detainee can be released simply because of the fact that the charge is murder is not justifiable. If the Crown Court is to make the bail decision at first instance then the

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

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.

**JUSTICE**

**February 2009**