Coroners and Justice Bill

Briefing and suggested amendments for Committee Stage
House of Lords

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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 Parliamentary briefings for earlier stages. The Coroners and Justice Bill is a large 'portmanteu' Bill and contains extremely important changes to the law in several of its Parts. 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. This briefing deals with our main concerns regarding the Bill at Committee stage with the exception of the admissibility of intercept evidence and the relationship between inquests and public inquiries. These are the subject of joint draft proposed amendments from JUSTICE, Liberty and INQUEST which have been circulated separately to Peers. Our concerns in relation to the remainder of the Bill centre upon:

   - **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;**
   - **the failure of the Bill to deal with consensual mercy killing and assisted suicide of the seriously ill who wish to end their lives but are unable to do so without assistance;**
   - **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).**
- **The implementation of an EU Council Framework Decision which requires convictions from across the EU to be considered in criminal proceedings along with domestic convictions, but does not propose any mechanism by which to do so.**

4. For reasons of brevity we have not suggested amendments to Northern Ireland provisions here but where they mirror the England and Wales provisions in which we have suggested amendments we would suggest that similar amendments be made to them. Consequential amendments may also be needed if our suggested amendments are adopted.

Part 1: Coroners etc

Clause 5 – Matters to be ascertained; Schedule 4, paragraph 6

Amendments

Page **4**, line **3** [*Clause 5*], leave out paragraph (3)

Schedule **4**, page **127**, line **28** [*paragraph 6*], at end insert –

(2) The coroner making the report under paragraph (1) –

(a) must send a copy of the report to –

(i) the Lord Chancellor; and

(ii) the spouse or a near relative or personal representative of the deceased whose name and address are known to the coroner; and

(b) may send a copy of the report to any person who the coroner believes may find it useful or of interest.

(3) On receipt of a report under paragraph (2)(a)(i), the Lord Chancellor may –

(a) publish a copy of the report, or a summary of it, in such manner as the Lord Chancellor thinks fit; and

(b) send a copy of the report to any person who the Lord Chancellor believes may find it useful or of interest (other than a person who has been sent a copy of the report under paragraph (2)(b)).

Schedule **4**, page **127**, line **30** [*paragraph 6*], at end insert –

containing

(a) details of any action that has been taken or which it is proposed will be taken whether in response to the report or otherwise; or

(b) an explanation as to why no action is proposed

within the period of 56 days beginning on the day on which the report is sent.

Briefing

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 of the European Convention on Human Rights (ECHR), 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 sub-clause 5(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.

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. We therefore suggest here the removal of sub-clause 5(3) from the Bill.

Further, we are concerned that the provision for the coroner to make reports in order to avert the risk of future deaths under paragraph 6 of Schedule 4 is considerably less stringent than the corresponding requirements in the Coroners (Amendment) Rules 2008. In particular, there is no provision regarding publication of the report or response, or any time limit for a response or requirements as to what it must contain. The publication of rule 43 reports 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. We therefore suggest amendments to reinsert powers of publication for reports and requirements as to the timing and contents of the response similar to those in the Coroners (Amendment) Rules 2008. The 2008 Amendment Rules also contain provision for the publication of responses, which we further recommend be considered.

Clause 7 – Whether jury required

Amendments

Page **4**, line **29** [*Clause 7*], at end insert –

or

(d) that the death otherwise resulted from an act or omission of a public authority.

Page **4**, line **37** [*Clause 7*], at end insert –

(5) For the purposes of subsection (2)(d) a person or body is a "public authority" if he or it would be so considered under section 6 of the Human Rights Act 1998 (c. 42).

Briefing

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.

Part 2: Criminal Offences

Clauses 42 and 43 – Persons suffering from diminished responsibility

Amendments

Page **27**, line **20** [*Clause 42*], at end insert

( ) A person ("D") who kills or is party to the killing of another is not to be convicted of murder if D was under the age of eighteen and his developmental immaturity -
(a) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
(b) provides an explanation for D's acts and omissions in doing or being a party to the killing.

Page **27**, line **21** [*Clause 42*], after "(1)(c)" insert "and subsection ( )(b)"

Page **27**, line **22** [*Clause 42*], after "functioning" insert "or D's developmental immaturity"

Briefing

We are generally concerned at the government's decision to enact these reforms to the partial defences to homicide in the absence of a fundamental review of the law of homicide and, further, without properly considering that the Law Commission's proposals on which they are based were intended for a three-tier, not a two-tier, structure of homicide offences. We are also concerned that they have appeared in such a large Bill containing so many important provisions. It is unlikely that there will be sufficient time for the debate these clauses deserve.

However, we are at this stage putting forward specific amendments to address some of the particular, rather than general, problems with the government's clauses on homicide in the Bill. In relation to diminished responsibility, the amendments above would reinstate the Law Commission's recommendation that the diminished responsibility partial defence be available to a child or young person under 18 if their developmental immaturity substantially impaired their ability to understand the nature of their conduct, form a rational judgment or exercise self-control at the time of the killing. They would be guilty of manslaughter rather than murder and therefore the judge would have a full range of sentencing options.

Clause 44 – Partial defence to murder: loss of control
Clause 45 – Meaning of "qualifying trigger"

Amendment

Clause **44**, page **28**, leave out paragraph (6)

Briefing

This amendment would remove the Bill's provision that the jury may only consider 'loss of control' as a partial defence to murder if evidence is adduced on which in the judge's opinion a jury, properly directed, could conclude that the defence might apply. We are concerned that this may cause problems where a defence of self-defence is put forward to a murder charge. In some circumstances where this is rejected, the jury should also go on to consider whether the defendant acted in fear of serious violence in order to satisfy clause 44 so that the correct verdict is one of manslaughter. We are concerned that they may not be able to do this if sub-clause (6) remains in place.

Alternative amendments

Clause **44**, page **28**, leave out clause.

New clause

Partial defence to murder: fear of serious violence

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if –
  (a) D's acts and omissions in doing or being a party to the killing resulted from D's fear of serious violence from V against D or another identified person, and
  (b) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) In subsection (1)(b) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(3) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(4) For the purposes of this section, D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution prove beyond reasonable doubt that it is not.

(6) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(7) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Briefing

This new clause is the first of two new clauses designed to offer alternative partial defences to those proposed by the government under the heading 'Partial defence to murder: loss of control'. We suggest that these two new clauses be inserted in place of the existing clause 44, and are followed by clause 45 as amended according to our suggestions below. Our first new clause provides a partial defence of fear of serious violence designed for situations where the defendant acts in self-defence but the degree of force used is judged to be excessive by the jury. We are concerned that some cases where a murder conviction is not justified may remain, legally, murder under the government's proposals. This is due to the retention of the 'loss of self-control' requirement in relation to the partial defence of fear of serious violence. For example, where an armed police officer responds with fatal force in good faith to protect the public to a person who appears to be armed and dangerous, but the jury conclude that that degree of force was unreasonable in the circumstances, we are concerned that a manslaughter conviction should be available. This is particularly pertinent since the government have failed to adopt the Law Commission's recommendations to divide the offence of murder into two categories; murder resulting in the mandatory life sentence will now still include cases where there was no intention to kill nor even foresight on the defendant's part that death could result from his actions.

The removal of the loss of self-control requirement would make a manslaughter conviction possible in appropriate cases of excessive self-defence or defence of another. We are also

concerned that the requirement of 'loss of self-control' in 'fear of serious violence' cases may continue to prejudice women who kill abusive husbands or partners due to ongoing abuse and fear. We have therefore removed that requirement for the 'fear of serious violence' cases.

New clause

Partial defence to murder: loss of control

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if –

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger; and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution prove beyond reasonable doubt that it is not.

(6) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(7) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Page **29**, lines **4-5** [*Clause 45*], leave out from "D's loss" to end and insert –

(a) D did not intend to kill V; and

(b) D's loss of self-control was attributable to a state of extreme emotional disturbance.

Briefing

The suggested new clause "Partial defence to murder: loss of control" and the suggested amendments to clause 45, deal with circumstances where we believe a loss of control should reduce a murder conviction to manslaughter. We have retained the government's 'words or conduct' element but have added an additional circumstance through our amendment to clause 45: where the defendant was extremely emotionally disturbed and – crucially – acted to cause serious harm *but not to kill the victim*. For example, where an exhausted parent 'snaps' and assaults a crying child intending to cause serious harm but with no intention to kill, a manslaughter verdict would not be available under the Bill's provisions.[1] We emphasise that we do not seek to condone such conduct, which would rightly remain a serious criminal offence. However, there may be circumstances outside the 'words and conduct' element of the government's clause 44 where a manslaughter conviction, and discretion in sentencing, should be available. The criterion that a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way would still be present as a safeguard against unmeritorious cases.

[1] Cf *R v Doughty* (Stephen Clifford) (1986) 83 Cr App R 319; (1986) Crim LR 625

Clauses 49-51: Encouraging or assisting suicide

Amendment

Page **30**, line **23** [*Clause 49*], at end insert –

(1BA) A person is not guilty of an offence under this section if he proves that his actions were reasonable in the circumstances.

Briefing

The new clauses relating to encouraging or assisting suicide fail to deal with the situation highlighted by recent cases reported in the media: that of a seriously ill person who wishes to end his or her life but is physically unable to do so without assistance and therefore will require the aid of a partner, relative or friend to do so. We suggest this amendment in order to emphasise that there may be circumstances in which coming to the aid of a loved one who wishes to end his or her life but cannot do so alone should not expose both the seriously ill person and the person who they wish to help them to the fear that prosecution for a serious indictable offence will result.

Part 3: Criminal Evidence, Investigations and Procedure

Clause 62: Anonymity in investigations – Qualifying offences

Amendments

Page **37**, line **22** [*Clause 62*], before "the condition" insert "in relation to the offences listed in subsections (2)(a) – (d),"

Page **37**, line **24** [*Clause 62*], at end insert "or attempted murder"

Page **37**, line **25** [*Clause 62*], 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).

Page **37**, line **26** [*Clause 62*], after "death" insert ", wound, or grievous bodily harm inflicted or intended"

Clause **37**, line **30** [*Clause 62*], leave out paragraph (4)

Briefing

These amendments are 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 is given 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. We do not understand 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 66 – Conditions for making order

Amendments

Page **40**, line **33** [*Clause 66*], leave out paragraph (4).

Page **40**, line **42** [*Clause 66*], leave out paragraph (b).

Page **41**, line **2** [*Clause 66*], leave out "has reasonable grounds for fearing" and insert "fears, on reasonable grounds,".

Page **41**, line **2** [*Clause 66*], after "harm" insert "to himself or another person"

Page **41**, line **10** [*Clause 66*], 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 66 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 66(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 75 – Witness anonymity orders: Conditions for making order

Amendments

Page **45**, lines **32-33** [*Clause 75*]*,* leave out " or to prevent any serious damage to property"

Page **45**, lines **34-36** [*Clause 75*], 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;

Page **46**, line **5** [*Clause 75*], 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:[2]

> *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 75 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

[2] [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 75(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 86: Eligibility for special measures: offences involving weapons

Amendments

Clause **86**, page **50**, leave out clause.

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.[3] 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.

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

Clause 91 – Examination of accused through intermediary

Amendments

Clause **91**, page **54**, leave out clause.

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 91 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 101 and 102 – Bail

Amendments

Clause **101**, page **62**, leave out clause.

Clause **102**, page **62**, leave out clause.

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 101 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 102 should apply to murder but not to other equally serious cases.

Part 5 – Miscellaneous Criminal Justice Provisions

Clause 128 and Schedule 15: Treatment of convictions in other member States etc

Amendment

Clause **128**, page **79**, leave out clause.
Schedule **15**, page **161**, leave out entire schedule.

Briefing

Schedule 15 to the Bill amends domestic legislation pertaining to the consideration of criminal convictions pre-trial (bail), during trial (character) and post conviction (sentence) by imposing a mandatory requirement upon a tribunal to include convictions from other Member States in this consideration.

The purpose of the amendments is to transpose the *Council Framework Decision of 24 July 2008 (2008/675/JHA) on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings*[6] ("the Framework Decision") into UK law. The Proposal for the Framework Decision explained[7] that currently there is no consensus between Member States as to how convictions from other Member States are considered, which is contrary to the mutual recognition principle and puts the citizens of Europe on an unequal footing.

The Proposal follows a White Paper[8] which sets out that the current system under Articles 13 and 22 of the 1959 *European Convention on Mutual Assistance in Criminal Matters*[9] has three problem areas: the difficulty in rapidly identifying the Member States in which individuals have already been convicted; the difficulty in obtaining information quickly and by a simple procedure; and the difficulty in understanding the information provided. To this end, two stages were proposed, the first in which recognition of convictions is established, and the second where the means by which the convictions can be obtained is created. Both have resulted in framework decisions setting out the principles to be incorporated into domestic

[6] O.J. L 220, 15.8.2008, P. 32
[7] Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings Brussels, 17.03.2005 COM(2005)91 final, p 2.
[8] White Paper on exchanges of information on convictions and the effect of such convictions in the European Union, COM(2005) 10 final.
[9] And supplemented by Article 4 of the Additional Protocol dated 17 March 1978

law. Council Framework Decision on taking account of convictions must be implemented by 15th August 2010.

Council Framework Decision on the organisation and content of the exchange of information extracted from the criminal record between Member States was adopted in the Justice and Home Affairs Council on the 26th February 2009[10] and must be implemented by 26th February 2012. Article 1 defines the purpose of this second framework decision as being:

> *(a) to define the ways in which a Member State where a conviction is handed down against a national of another Member State (the "convicting Member State") transmits the information on such a conviction to the Member State of the convicted person's nationality (the "Member State of the person's nationality");*
> *(b) to define storage obligations for the Member State of the person's nationality and to specify the methods to be followed when replying to a request for information extracted from criminal records;*
> *(c) to lay down the framework for a computerised system of exchange of information on convictions between Member States to be built and developed on the basis of this Framework Decision and the subsequent decision referred to in Article 11(4).*

Whilst we agree overall with the Explanatory Notes to the Bill that the amendments do not change the existing provisions and simply extend the ambit of a court's consideration to include foreign convictions, without a comprehensive and regulated system in place, there is no way of *effectively* recognising convictions from other Member States. The second Framework Decision attempts to achieve this and produces a pro forma by which to understand the non-domestic conviction, but is not incorporated into the Bill.

We consider that the following non-exhaustive examples highlight the practical problems tribunals will face in giving effect to the amendments as they currently stand whilst continuing to fulfill their obligations to act in the interests of justice:

- Proposed section 73(2)(c) provides that a certificate, signed by the proper officer of the court where the conviction took place, giving details of the offence, conviction, and sentence will be proof of conviction. This presumes that the type of offence, conviction and sentence are equivalent to that of the UK. In the context of 27

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countries with different cultural and historical premises upon which their punitive systems are based this will not be the case.

- Where a particular type of offence or repeat offending results in a particular sentence under UK law, the non-UK conviction would have a significant bearing upon the outcome.

- No mechanism is included in the Bill to indicate how a tribunal might take account of the information received to conclude a decision on bail, character, or sentence.

- There are no provisions by which explanatory information as to the penal or sentencing system(s) in the other Member State(s) may be requested by the tribunal, upon which an attempt to equate the conviction(s) with the UK counterpart can be made.

- No procedure is constructed in the Bill to deal with *obtaining* those foreign convictions. Should adjournments be granted where full convictions are not to hand or are not understood, thereby extending the period during which a Defendant is remanded in custody?

- No mechanism is proposed to consider the trial procedure that gave rise to the conviction(s) and whether that should have an effect on its application. For example, how is the tribunal to know whether the conviction was rendered in absentia, and whether that complies with UK law? Irrespective of whether the defendant was present at the trial, was evidence accepted that would be excluded in a UK case? Did the trial comply with UK standards with respect to representation and/or interpretation?

- No consideration is given to what happens to the information once it has been provided. Is there an obligation upon the UK to retain that information and incorporate it into the PNC on that person? How does that accord with data protection considerations? If not incorporated, what measures are to be taken to explain why the sentence passed was imposed?

- The Framework Decision requires the provision of details of convictions rendered in the UK to other Member States. No proposal deals with how this would be effected.

- Spent convictions are not protected in the Framework Decision. The Select Committee on European Scrutiny in its Second Report of 2005 whilst considering the Framework Decision raised this issue. The then Parliamentary Under-Secretary of State at the Home Office (Andrew Burnham) in his Explanatory Memorandum of 23 May 2005 explained that a spent conviction was not a concept commonly found in other Member States and whilst acting within the atmosphere of mutual recognition,

  [W]e would wish to ensure that UK nationals do not receive unfair treatment on account of spent convictions. It may be that we will seek to include a reference to spent convictions not being taken into account by an overseas court, if that spent conviction would not be taken into account by a United Kingdom court[11]

This was not achieved and the result is that each Member State is to take account of convictions in accordance with their national law. It follows therefore that where a conviction is spent for the purposes of criminal proceedings in the UK and would not be relied upon in a UK court, the conviction may be used in another Member State to impose more onerous conditions upon a Defendant's treatment.

Article 11 of the second Framework Decision states that a standardised format shall be adopted for the transmission of convictions. To this end, *Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision2009/315/JHA*[12], envisages the creation of a system based on decentralised information technology, where criminal records data will be stored solely in databases operated by Member States and are transferable. A uniform format for transmission is proposed which adopts a numerical code to identify each crime and method of involvement. A Committee is envisaged to oversee the technical development of the programme. Pilot projects are currently being undertaken as to the use of such a system. The Council adopted this Decision on 6th April 2009.

The European Data Protection Supervisor, Peter Hustinx, offered an opinion on the Proposal on 16th September 2008[13] in which he voiced the following concerns, with which we concur:

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[11] Select Committee on European Scrutiny, Chap. 6, *Taking previous convictions into account in new criminal proceedings*, HC, 13.07.05 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-ii/3408.htm, para 6.21

[12] OJ L 93, 7.4.2009, P. 33

> *The processing of personal data relating to criminal convictions is of a sensitive nature, and the confidentiality and integrity of criminal records data sent to other Member States must be guaranteed. It is therefore paramount that high standards of data protection be applied to the functioning of the system, which should ensure a solid technical infrastructure, a high quality of information and an effective supervision.*

We also share the EDPS' views that the use of automatic translations**,** as proposed in the instruments, should be clearly defined and circumscribed, so as to favour mutual understanding of criminal offences without affecting the quality of the information transmitted. Clearly much work is needed to create a system in which convictions can be exchanged with confidence and understanding.

Whilst we acknowledge that there is an obligation to implement the Framework Decision within a finite period, passing that obligation on to the criminal justice system by means of amendments proposed in the 15th Schedule to an already heavily burdened Bill is an inappropriate means of giving effect to the instrument's intentions and affording sufficient time to its consideration. Furthermore, now that the second Framework Decision has been adopted, it is incumbent upon Parliament to consider both Decisions together in order to give proper scrutiny to implementation measures.

We consider that the wide-ranging effect of Schedule 15 should not be taken forward until the mechanisms for mutual recognition are included. No benefit lies in imposing a mandatory obligation upon UK criminal tribunals and practitioners to take into consideration convictions from other Member States when the implementing system by which to do so has not been provided. We therefore oppose the Schedule in its entirety and propose a redraft which gives a prominent position to this important change to criminal procedure and to the mechanism through which the principle of mutual recognition can be achieved in practice.

As a minimum, an assurance from the Minister that these provisions will not be brought into force until the mechanism contained in the second Framework Decision is fully transposed must be forthcoming. Whilst this approach would be piecemeal, it would allow for scrutiny through Parliament of that mechanism before the courts are obligated to grapple with these provisions.

JUSTICE, June 2009

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[13] http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2008/08-09-16_ECRIS_EN.pdf