

# Criminal Justice Alliance

## Coroners and Justice Bill 2009

Report stage  
House of Lords  
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## About the Criminal Justice Alliance

The Criminal Justice Alliance (formerly the Penal Affairs Consortium) is a coalition of organisations committed to improving the criminal justice system. It has 46 members - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions (for a full list of members see <http://criminaljusticealliance.org/organisations.htm>) - bringing together a wide range of organisations involved in policy and practice across the criminal justice system.<sup>1</sup>

## Context: Prison facts and figures

- The prison population on 9 October 2009 was 84,521, of whom 80,264 were male and 4,257 female.
- In 2007, 125,880 people entered prison in England and Wales.
- The number of prisoners in England and Wales increased by 30% in the decade from 1997 to 2007.
- The increase in the prison population was not a result of a significant increase in people being sentenced by the courts. The total number of offenders sentenced in 2007 was 1,414,700, an increase of only 2% from 1997. In 1997 the average prison population was 61,114. The number of serious cases being sentenced has also been relatively static for most of the period in which the prison population has grown.
- Approximately 70% of the increase in demand for prison places between 1995 and 2005 is estimated to have arisen owing to changes in the custody rate and in sentence lengths.
- Total prisons expenditure has increased from £2.843 billion in 1995 to £4.325 billion in 2006 (both at 2006 prices).
- The Ministry of Justice has projected that by June 2015 there will be up to 93,900 people in prison.
- Following Lord Carter's review of the prison system, published in December 2007, the Government has committed to increasing prison capacity to 96,000 by 2014, including building five 1,500-place prisons (which have replaced proposals for three 'Titan' prisons, each providing up to 2,500 places).
- HM Prison Service defines 'the good, decent standard of accommodation that it aspires to provide all prisoners' for each prison, called the Certified Normal Accommodation (CNA) level. This is the level above which prisons become officially overcrowded. As of 30 June 2009, the prison population was 111% of the CNA level, exceeding the CNA level by 8,605.
- 85 of the 139 prisons in England and Wales, 61%, are officially overcrowded.
- The provisions of this Bill are projected to result in the need for 300 additional prison places, at a cost of £60 million in capital costs and £12 million in resource costs (Explanatory notes, paragraph 769).

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<sup>1</sup> Although the Criminal Justice Alliance works closely with its members, this briefing should not be seen to represent the views or policy positions of each individual member organisation.

## **Contents of the Bill**

The Criminal Justice Alliance's primary focus is around prison overcrowding, the prison population and sentencing. The main elements of the Bill that relate to these issues are examined in this briefing. They are:

- Partial defence to murder: diminished responsibility and Partial defence to murder: loss of control and Infanticide (Clauses 46-52)
- Examination of the accused through an intermediary (Clause 94)
- Bail in murder cases (Clauses 104-105)
- Sentencing Council for England and Wales (Clauses 108-126)
- Dangerous offenders (Clauses 128-129)
- Criminal memoirs: Exploitation proceeds orders (Clauses 144-161)

## **PART 2: CRIMINAL OFFENCES**

### ***Partial defence to murder: diminished responsibility and Partial defence to murder: loss of control and Infanticide (Clauses 46-52)***

The Criminal Justice Alliance is concerned that the Government's decision to attempt to reform the law of homicide piecemeal is a mistake. The Criminal Justice Alliance believes that the law on homicide needs wholesale reform. In particular, the Government should abolish the mandatory life sentence for homicide. This would give an appropriate level of discretion to sentencers and negate the need to introduce partial defences of this kind, which are intended in part to allow some defendants to be instead convicted of manslaughter and to therefore avoid a mandatory life sentence. These clauses should therefore be removed from the Bill with a firm commitment to reform the law on homicide as a whole at the earliest possible opportunity.

If these clauses remain in the Bill, an amendment should be made to Clause 46 (Persons suffering from diminished responsibility) to reinsert the Law Commission's recommendation that the diminished responsibility partial defence should be available to a child or young person under the age of 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 consequently be guilty of manslaughter rather than murder and the judge would have a full range of sentencing options.

## **PART 3: CRIMINAL EVIDENCE, INVESTIGATIONS AND PROCEDURE**

### ***Examination of the accused through an intermediary (Clause 94)***

Clause 94 of the Bill allows for the use of an intermediary where vulnerable defendants are giving evidence in court. The intermediary would relay questions to the accused and relay the answers to the questioner. In doing so the intermediary would be able to explain to the accused what the questions mean and to the questioner what the answers mean.

The Criminal Justice Alliance believes that if a defendant, due to their level of intellectual ability or social function, is unable to understand or answer questions unaided, he or she should not be on trial in a criminal court. Indeed, it is unlikely that a defendant who was unable to answer questions without the help of an intermediary would be able to participate sufficiently in their trial for the trial to be fair according to Article 6 of the European Convention on Human Rights. There is also the risk that an intermediary could, inadvertently

or otherwise, misinterpret the defendant's answers or incorrectly explain questions, potentially leading to miscarriages of justice.

Clause 94 should therefore be omitted from the Bill, and alternative ways should be found to ensure that defendants who are not fit to be tried are safely and appropriately diverted from the criminal justice system.

### ***Bail in murder cases (Clauses 104-105)***

Clauses 104-105 of the Bill amend the *Bail Act 1976* so that a defendant who is charged with murder may not be granted bail unless the court believes that there is no significant risk that he or she would commit an offence that would be likely to cause physical or mental injury to another person (Clause 104) and so that a person who is charged with murder may not be granted bail except by a Crown Court judge (Clause 105). The Criminal Justice Alliance opposes these changes.

#### ***Clause 104***

Firstly, it is not clear why this new test should apply to murder but not to other offences, given that some offences (for example terrorism offences or serious sexual offences) may be of near comparable seriousness, especially given the range of circumstances that can lead to a murder charge. In addition, while offence seriousness is one consideration in deciding whether bail is granted, it is not the only consideration. Somebody charged with murder might, in some circumstances, be considerably less likely to commit a further offence causing harm than somebody charged with another, 'lesser' offence. As a result, changing the requirements for bail for murder but not for other offences would be illogical.

Furthermore, it is not clear why these changes are necessary. The consultation on bail in murder cases, which has led to these proposals, arose primarily from two cases, those of Gary Weddell and Anthony Leon Peart. However, the case of Gary Weddell was an extremely unusual one and not in itself a reason to change the law. The case of Anthony Leon Peart was complex, but highlighted a number of failings primarily in the application of the law rather than in the law itself. The Criminal Justice Alliance is therefore not convinced that changes to the law would have prevented these tragic cases or that these changes are necessary now to prevent future offences.

Evidence also suggests that bail is already used very rarely in cases of murder, and only in exceptional circumstances. Although the statistical data is not available to confirm this, it seems very likely that defendants charged with murder only receive bail in unusual circumstances and that considerable caution is already applied to granting bail in these cases. Indeed the assessment of the impact of the Bill on the prison population (Explanatory notes, paragraph 769) makes no reference to these clauses, suggesting that the Government does not believe that any more defendants will be imprisoned on remand than is currently the case. This therefore suggests that by the Government's own assessment, Clause 104 is unnecessary. However, in our view it is likely that if Clause 104 were to be introduced, it would have a general effect of raising the bar at which bail is granted, resulting in more defendants being unnecessarily remanded to custody and further inflating the prison population.

It is also likely that Clause 104, as it is currently formulated, would be incompatible with Article 5 of the European Convention on Human Rights. JUSTICE has argued 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 of the European Convention on Human Rights.

#### *Clause 105*

Clause 105 specifies that '[a] person charged with murder may not be granted bail except by order of a judge of the Crown Court'. For the reasons set out above, the CJA does not believe that this requirement should apply to murder but not to any other offence.

Clause 105 also allows for an additional 48 hours for the Crown Court to make a decision about bail, after the magistrates' court has referred the case to the Crown Court, to allow time for the case to be brought to the Crown Court. In our view, this additional delay is unacceptable, and is also likely to be incompatible with Article 5 of the European Convention on Human Rights. If the decision is taken that bail decisions in murder cases must be made in the Crown Court, then arrangements should be made for defendants charged with murder to be brought before the Crown Court in the first instance, rather than the magistrates' court.

The Criminal Justice Alliance therefore recommends that Clause 104 and Clause 105 should be removed from the Bill.

## **PART 4: SENTENCING**

### ***Sentencing Council for England and Wales (Clauses 108-126)***

Clauses 108-126 of the Bill introduce a Sentencing Council for England and Wales, to replace the existing Sentencing Advisory Panel and Sentencing Guidelines Council.

#### *Background*

A sentencing commission was proposed by Lord Carter in his review of prisons (*Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales*), which recommended that: 'A structured sentencing framework and permanent Sentencing Commission should be developed, with judicial leadership, to improve the transparency, predictability and consistency of sentencing and the criminal justice system'. Lord Carter envisaged that a sentencing commission would develop and oversee a structured sentencing framework, which he described as 'a single comprehensive set of indicative guideline ranges. This would cover sentence lengths, types of community sentences and the level of financial penalty, for groups of all offences, ranked by seriousness and offender characteristics (e.g. criminal history and culpability).' This was based on systems used in North Carolina and Minnesota in the US, which are centred on a 'grid' system and allow sentencers very limited discretion.

As recommended by Lord Carter, a working group, the Sentencing Commission Working Group, was subsequently set up 'to consider the advantages, disadvantages and feasibility of a structured sentencing framework and permanent Sentencing Commission'. The working group was made up of a mixture of judicial and non-judicial members and chaired by Lord Justice Gage. In its final report, *Sentencing Guidelines in England and Wales: An evolutionary approach*, the working group broadly welcomed the establishment of a sentencing commission. However, the working group rejected Lord Carter's proposals for a structured sentencing framework based on a rigid 'grid' system, arguing that 'structured sentencing frameworks on the US grid model increase consistency and predictability of sentences but at the cost of an inflexibility that makes them unsuitable and unacceptable in England and Wales.'

The Sentencing Council proposed in the Bill largely reflects the recommendations made by the working group.

#### *Proposals for a Sentencing Council*

The Criminal Justice Alliance welcomes the introduction of a Sentencing Council, and supports in the most part the proposals set out in the Bill. The Criminal Justice Alliance responded to the Sentencing Commission Working Group's consultation on *A Structured Sentencing Framework and Sentencing Commission* and supports the decision to reject sentencing 'grids' and to implement the recommendations of the Sentencing Commission Working Group's final report.

The Criminal Justice Alliance believes that a Sentencing Council can promote stability and consistency in sentencing and improve the availability of data and other information about sentencing. The structure of the current Sentencing Advisory Panel and Sentencing Guidelines Council is unwieldy and results in undue delay in producing new guidance. A single Sentencing Council, led by the judiciary but also encompassing non-judicial members, can maintain judicial confidence while also playing a role in reviving public confidence in sentencing.

In particular, the Criminal Justice Alliance welcomes:

- *The introduction of tighter restrictions on the courts on departure from the guidelines (Clause 115)*

At present, the courts must 'have regard to' the guidelines when passing sentence. Under the proposals in the Bill, sentencers must follow the guidelines 'unless the court is satisfied that it would be contrary to the interests of justice to do so'. This should improve consistency without unduly fettering judicial discretion. A survey carried out by the Sentencing Commission Working Group found that of 222 sentences examined, 14% (32) were below the guideline ranges for the level of offence seriousness described and 32% (71) were above the guideline ranges for the level of offence seriousness described. While there may have been legitimate reasons for these variations, these findings suggest that guidelines are frequently not being followed and that greater consistency would be beneficial. However, considerable flexibility would remain, both within the range offered by the guidelines and to depart from the guideline when appropriate, ensuring that justice can be done in individual cases.

- *The proposed duty on the Council to assess the resource implications of their guidelines on the prison, probation and youth justice services (Clause 117) and to assess the impact on resources of policy and legislative proposals (Clause 122)*

The latter is particularly important given the unplanned impact on the prison population of previous legislation, for example the introduction of Indeterminate Sentences for Public Protection (IPPs) in the *Criminal Justice Act 2003*. In that case, the Government estimated that IPPs would result in an increase in the prison population of around 900. Yet by the end of March 2009, 5,243 people had been given an IPP since the sentence was introduced and only 58 people had been released. This resulted in what HM Chief Inspector of Prisons described as 'a perfect storm' in the criminal justice system, which was unable to deal with the influx of prisoners on IPPs. To prevent a repeat of this, the Sentencing Council, by publishing its assessment of the impact of policy and legislative proposals on penal capacity, will ensure that parliament is able to make informed decisions about proposed legislative changes and that the government and the National Offender Management Service can plan appropriately.

- *The proposed duty on the Council to monitor the operation and effect of its guidelines (Clause 118)*

At present there is very limited information on the extent to which courts follow the guidelines of the current Sentencing Guidelines Council, and therefore how effective they are in promoting consistency in sentencing. As stated above, a survey carried out by the Sentencing Commission Working Group suggested that guidelines are frequently not being followed. However, this was just a single survey of limited scope. More information on the extent to which guidelines are being followed, and the reasons given for departing from guidelines, will be essential in ensuring that the proposed Sentencing Council is operating effectively.

As stated, the Criminal Justice Alliance supports in the most part the proposals set out in the Bill. However, the Criminal Justice Alliance would also like to see:

- *An enhanced community engagement function for the Sentencing Council*  
The Criminal Justice Alliance supports the proposals in Clause 119 (Promoting awareness), which relate to the proposed Sentencing Council's work in better informing the public about sentencing. However, the provisions do not go nearly far enough. Community engagement should be central to the Council's work. It should encompass public consultation, proactive involvement in the public and media debate around sentencing, and providing accessible statistics and other information on sentencing. The public are generally misinformed about sentencing, believing that the courts are much more lenient than they are, and a Sentencing Council with a strong community engagement function could play a leading role in correcting this. It could therefore contribute to improving public confidence in the criminal justice system. This role is already successfully taken on by existing sentencing commissions, for example the Sentencing Advisory Council in Victoria, Australia, which describes its mission as 'to bridge the gap between the community, the courts and Government by informing, educating and advising on sentencing issues'. The Criminal Justice Alliance supports the conclusions of experts Professor Mike Hough, Professor Julian Roberts and Jessica Jacobson that 'a key function of an enhanced Sentencing Guidelines Council should be to engage with the public. By providing the public with reliable, detailed and user-friendly information on sentencing, as well as undertaking public consultation on guidelines, the Sentencing Guidelines Council could generate constructive debate about sentencing and thereby help to break the spiral of penal populism.'<sup>2</sup>
- *Experience of sentencing in the youth court represented on the Sentencing Council*  
Schedule 14 (Paragraph 3) sets out requirements for the judicial membership of the Sentencing Council. The Sentencing Council will develop guidelines for sentencing young people under the age of 18 and to ensure that this is informed by first-hand experience of sentencing young people, at least one of the judicial members should have experience of working in the youth court.
- *Expertise in the youth justice system and in working with women offenders represented on the Sentencing Council*  
Schedule 14 (Paragraph 4) sets out requirements for the non-judicial membership of the Sentencing Council. In addition to the expertise set out in this paragraph, the Sentencing

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<sup>2</sup> p. 57: Jacobson, J., Roberts, J.V., and Hough, M. (2008) 'Towards more consistent and predictable sentencing in England and Wales' in M. Hough, R. Allen and E. Solomon (eds.) *Tackling Prison Overcrowding* Bristol: The Policy Press.

Council should also include in its membership:

- Expertise in working with children in the youth justice system, to inform its work on guidelines for sentencing young people under the age of 18.
  - Expertise in working with women offenders, to ensure that the differences between male and female offenders are recognised in the development of sentencing guidelines, for example in the identification of mitigating factors that the Sentencing Council considers relevant [see Clause 111(6)(b)].
- *A duty on the Sentencing Council to promote sentencing that is effective in reducing reoffending*  
Reducing reoffending should be central to sentencing and central to the work of the Council in drawing up sentencing guidelines and in commissioning research on the effectiveness of sentencing. The Sentencing Council should therefore be required to promote effective measures to reduce reoffending in all of its work.
- *A duty on the Sentencing Council to consider the needs of minority groups in the criminal justice system - including women, young people, young adults (aged 18-25) and ethnic minorities*  
The Sentencing Council should consider minority groups in developing sentencing guidelines and in its broader work programme, to ensure that the needs of these groups are addressed. The Sentencing Council should also have a positive duty to prevent direct and indirect discrimination in sentencing.

Further discussion of the merits of a Sentencing Council is available in *A Sentencing Commission for England and Wales: an opportunity to address the prisons crisis*, published by the Prison Reform Trust and available at:  
[http://www.kcl.ac.uk/depsta/law/research/icpr/publications/FINAL\\_SENTENCING.pdf](http://www.kcl.ac.uk/depsta/law/research/icpr/publications/FINAL_SENTENCING.pdf)

### ***Dangerous offenders (Clauses 128-129)***

Clauses 128-129 of the Bill extend the use of Indeterminate Sentences for Public Protection (IPPs) for a range of terrorism offences.

IPPs were introduced in the *Criminal Justice Act 2003*. Prisoners receive a minimum tariff, at the end of which the Parole Board decides whether they should be released, based on whether they are judged to pose a risk. The initial scope of these sentences was very wide, covering a broad range of offences and offering very limited discretion to sentencers as to when they should be used. The *Criminal Justice and Immigration Act 2008* restricted the use of IPPs, including introducing a minimum tariff of two years for prisoners serving IPPs (intended to ensure that IPPs could only be given for more serious offences), limiting the number of offences that IPPs can be given for, and allowing courts greater discretion as to when to impose an IPP.

However, by the end of March 2009, 5,243 people had been given an IPP. While 1,621 prisoners were beyond tariff, and therefore eligible for release, only 58 people who had served an IPP had ever been released from prison.

The Criminal Justice Alliance welcomes the changes made to IPPs in the *Criminal Justice and Immigration Act 2008*. However, the Criminal Justice Alliance believes that IPPs remain a fundamentally flawed and unworkable sentence, and opposes their extension to cover further offences.

In particular, we are concerned that people convicted of terrorism offences would not be able to prove that they had addressed their offending behaviour. In order to prove that they no longer pose a risk, and should therefore be released at the end of their tariff, prisoners on IPPs are normally required to attend offending behaviour programmes. However, at present we are not aware of any available programmes that would specifically be relevant to offenders convicted of terrorism offences. These prisoners would therefore be unable to prove that they were ready for release, and would be at risk of being detained permanently.

The Criminal Justice Alliance therefore recommends that Clauses 128 and 129 should be removed from the Bill.

## **PART 7: CRIMINAL MEMOIRS**

### ***Exploitation Proceeds Orders (Clauses 144-161)*<sup>3</sup>**

The Bill proposes a new civil recovery scheme to seize any proceeds an ex-offender may make from describing their crimes, including benefits to third party organisations, through the creation of Exploitation Proceeds Orders. This includes selling their memoirs, but also covers any form of art or media participation.

The Criminal Justice Alliance is concerned that the proposals could potentially damage valuable rehabilitative work with ex-offenders. Payments to former offenders frequently occur as part of constructive and rehabilitative work. Organisations working in this area have stated that the proposals would inevitably put such work at risk. In addition, writing by former offenders is often in the public interest, revealing important information about crime and the criminal justice system. While the public interest would be taken into account when deciding whether an Exploitation Proceeds Order should be issued, it is only one factor among many that would be considered and it could therefore be overridden if another factor, for example ‘the extent to which any victim of the offence, the family of the victim or the general public is offended by the respondent obtaining exploitation proceeds from the relevant offence’ [Clause 151(3)(f)]. This decision will be made by the Attorney General. This introduces subjectivity into the decision, and puts at risk the publication of material that is genuinely in the public interest.

While we welcome the Government’s proposed amendment to remove ‘or the general public’ from Clause 151(3)(f), and their proposed amendments to Clause 148 which would mean that these provisions only applied to offenders that have committed an indictable offence, we do not think that this is sufficient to protect important work with former offenders. Clauses 144-161 should therefore be removed from the Bill and the Government should reconsider how it can best ensure that inappropriate publications are prevented without putting valuable rehabilitative work at risk.

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<sup>3</sup> The issues relating to Part 7 or the Bill are discussed in more detail in a briefing from English PEN, available at [http://www.englishpen.org/usr/pen\\_criminal\\_memoirs\\_brief.pdf](http://www.englishpen.org/usr/pen_criminal_memoirs_brief.pdf)