

## Crime and Courts Bill

House of Lords Report Stage – November/December 2012

*The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 160,000 members, promoting the highest professional standards and the rule of law*

### Key points

The Law Society agrees with many of the provisions in the Crime and Courts Bill, most of which will contribute to creating a more modern and effective criminal justice system. However, the Society has some serious concerns with specific proposals in the Bill. This briefing summarises those concerns.

- **Clause 18 and Scheduled 12: Judicial Appointments** – The Society welcomes the Government's decision to amend Schedule 12 to the effect that the Lord Chancellor will not be a member of the selection panel for the President of the Supreme Court and the Lord Chief Justice. This provision threatened the political independence of the judiciary and it is right that it has been removed.
- **Clause 20: Transfer of immigration and nationality judicial reviews to the Upper Tribunal** – The Society supports the view of the Joint Committee on Human Rights, that this measure should not be implemented until a systematic review of the exercise by the Upper Tribunal of its judicial review jurisdiction has been undertaken.
- **Clause 26: Removal of rights of appeal in relation to family visit visas** – The Society does not believe that the Government has provided sufficient justification for the removal of this right. While so many appeals are successful, the Society opposes its inclusion in the Bill.
- **Amendment announced by Lord Chancellor on 27 November: the use of disproportionate force by homeowners against burglars** – The proposed change to the law is entirely unnecessary and potentially serious damaging.

### Clause 18 and Scheduled 12: Judicial Appointments

1. The Law Society indicated at earlier stages that it was concerned that the original proposals in Schedule 12 would fundamentally alter the constitutional settlement reached in the Constitutional Reform Act 2005, which specifically limited the role of the Lord Chancellor in judicial appointments as part of the recognition of the need for a clearer separation of powers between the Executive and the judiciary.
2. The Society opposed the proposals on the grounds that (a) they would increase the danger of political partiality in the appointment of senior judges; and (b) they would potentially undermine the appearance of the senior judiciary's political independence. Both are essential to the UK's international reputation for adherence to the rule of law and should not be given up lightly.
3. The Society therefore welcomes the Government's decision to table amendments removing the provision from the Bill, and thereby protecting the neutrality and political independence of the judiciary.

## **Clause 20: Transfer of immigration and nationality judicial reviews to the Upper Tribunal**

4. Clause 20 provides for the transfer of the immigration and nationality judicial reviews from the High Court to the Upper Tribunal. The Government justifies the amendment on the grounds that immigration and asylum judicial reviews constitute over 70% of the total, and that they would be more efficiently dealt with by the Upper Tribunal, leaving the High Court to 'focus on the complex public law cases for which the court was established'.
5. The Society does not oppose this measure, but agrees with the finding of the Joint Committee on Human Rights<sup>1</sup> that:
  - 5.1. The implementation of the measure should be delayed until after a full and systematic review of the Upper Tribunal's exercise of its judicial review jurisdiction has been carried out; and
  - 5.2. Additional safeguards should be built into the legislation ensuring that immigration and nationality cases in which human rights such as life, liberty or freedom from torture are at stake continue to be decided by high court judges.

## **Clause 26: Removal of rights of appeal in relation to family visit visas**

6. Many British citizens and persons living in the UK have family members living outside of the UK. This results in a high volume of visa applications from people wishing to visit their family in the UK. Clause 26 removes the full right of appeal against refusal of an application for a visa as a family visitor, while retaining a right of appeal only on human rights or discrimination grounds.
7. The Society is strongly opposed to this proposal. The Society has serious concerns about the poor quality of decision making by overseas entry clearance officers, which can lead unnecessary delay and distress for applicants; concerns which have also been noted by the HM Inspector of Borders and Immigration.
8. The Society therefore agrees with the finding of the Joint Committee on Human Rights, when they note that 'we cannot currently support removal of this right while there are so many successful appeals'. With no known action being taken by the UK Border Agency to improve the quality of decision making, the Society is concerned that the loss of appeal rights will remove the only available check on poor decision making.

## **Amendment announced by Lord Chancellor on 27 November: the use of disproportionate force by homeowners against burglars**

9. On 27 November 2012 the Lord Chancellor announced that he would seek to amend the Crime and Courts Bill so that the test for self-defence for homeowners defending themselves against intruders is changed from 'reasonable force' to 'not grossly disproportionate force'<sup>2</sup>.
10. The existing law as it relates to self-defence generally, and specifically in relation to self-defence against home intruders, is clear and sensible, and is already well understood and applied by juries, a point recently reiterated by the Lord Chief Justice<sup>3</sup>.

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<sup>1</sup> <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/crime-courts-bill-report/>

<sup>2</sup> <http://www.justice.gov.uk/news/press-releases/moj/more-protection-for-homeowners>

<sup>3</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/News%20Release/lcj-press-conference-270912.pdf>

11. The introduction of a new test of 'grossly disproportionate', rather than 'reasonable', force will make the law of self-defence generally (i.e. not simply in home intruder cases) confused and unworkable, and will very likely lead to a number of expensive appeals.
12. It is very rare for people to be charged with offences when they defend themselves against intruders. Data from the Crown Prosecution Service shows that they only prosecuted 11 such cases between 1990 and 2005.
13. Where a death has occurred, even of an apparent burglar, it is entirely correct that the police should conduct an investigation. Such an investigation may sometimes mean that householders are subject to investigation.
14. It is entirely correct that where someone uses a degree of force which is 'over the top' and unnecessary for their defence, or which is simply gratuitous violence, it is right that the defence should not apply. There is a risk that the creation of a new legal test may send out a message that it is acceptable for people to take the law into their own hands and engage in acts of vigilantism.

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