

Crime and Courts Bill

House of Commons Second Reading – Monday 14 January 2013

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 welcomes a number of the provisions in the Crime and Courts Bill, many of which will contribute to creating a more modern and effective criminal justice system. However, analysis of the Bill by the Society's Committees – expert practitioners with day-to-day experience of the legal system – has highlighted several areas of concern with the current drafting or apparent omissions:

- **The National Crime Agency (NCA)** – The Society welcomes the creation of the NCA and looks forward to working with the Government to ensure that it meets the bold objectives set out in the Bill.
- **Judicial Appointments** – The Society welcomes the Bill's proposals (as amended in the Lords), but is disappointed that the opportunity has not been taken to formalise the procedure for the appointment of UK judges to international courts or to address the current restrictions on Government lawyers seeking judicial appointment.
- **Televising court proceedings** – The Society welcomes measures which are intended to improve public confidence in, and knowledge of, the justice system but urges that this issue be approached with caution and that sufficient safeguards built in.
- **Self-defence** – The Society considers any change to the law of self-defence to be entirely unnecessary. The amendment proposed in Clause 30 rather than bring clarity, will lead to substantial confusion and increased litigation in the form of expensive appeals.
- **Transfer of immigration and nationality judicial reviews to the Upper Tribunal** – The Society does not oppose this measure in principle, but agrees with the Joint Committee on Human Rights that it must not be implemented until a systematic review of the exercise by the Upper Tribunal of its judicial review jurisdiction has been undertaken.
- **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.

The National Crime Agency

1. Part 1 of the Bill establishes the National Crime Agency (NCA) which will take on the work of the Serious Organised Crime Agency (SOCA) and the National Policing Improvement Agency.
2. The Society commends the work undertaken by SOCA in recent years to disrupt organised crime and to engage with the private sector on combating money laundering and terrorist financing. The creation of the NCA is not an indication of the failure of SOCA, but is designed to ensure better coordination of resources for tackling the local manifestations of national and international criminal activities.

3. The Society looks forward to continuing to work with the Government on the creation of the NCA to ensure that it effectively meets the bold objectives set out in this Bill.

Judicial Appointments

4. The Society welcomes the Bill's provisions in respect of changes to the process by which members of the judiciary are appointed, which will contribute to the creation of a more modern and diverse judiciary.
5. In particular, the Society is pleased that – during the Bill's passage in the House of Lords – the Government addressed concerns relating to the role of the Lord Chancellor in relation to the appointment of the Lord Chief Justice and the President of the Supreme Court and they inserted an express duty on the Lord Chancellor and Lord Chief Justice to have regard to the need to encourage diversity.
6. However, the Society remains concerned about two matters: the absence of proposals about facilitating government lawyers to become judges; and the absence of a statutory clarification of the process for international judicial appointments.

Government lawyers

7. The Government Legal Service (GLS) and the Crown Prosecution Service (CPS) are among the most diverse sections of the legal profession. The Society has long urged¹ practical measures to be taken to encourage government lawyers to seek judicial appointment, thereby contributing to improved diversity among the judiciary.
8. The Society therefore urges Members to consider the recommendation of the House of Lords Select Committee on the Constitution, who stated in their recent report on judicial diversity that:

'Whilst it remains necessary to avoid conflicts of interest, structural impediments to the appointment of government lawyers and prosecutors should be removed. For example, there is an argument in relation to these candidates in favour of relaxing the requirement to have acted as a fee-paid judge and for the JAC to find alternative means of testing their abilities. The provision of mentoring and shadowing opportunities for prospective candidates would be of particular value here. The GLS and CPS must take all possible steps to enable prospective candidates to obtain judicial experience in areas of law where no conflict of interest arises. These solutions may require fuller assessments, but are worthy of serious consideration.'²

The process for international judicial appointments

9. The Society is disappointed that the opportunity has not been taken in this Bill to lay down in statute the process appointing UK judges to international courts such as the Court of Justice of the European Union or the European Court of Human Rights.

Televising court proceedings

10. Clause 28 provides the Lord Chancellor, by order subject to negative procedure made with the concurrence of the Lord Chief Justice, to prescribe court proceedings to which it will be permitted to make audio or visual recordings.

¹ [See, for example, the Society's letter to then Lord Chancellor Jack Straw in 2007.](#)

² <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27206.htm>

11. The Society welcomes measures which are intended to improve public confidence in, and knowledge of, the justice system and – as it has always done – firmly supports the principles of open and transparent justice. However, the Society urges that this power be exercised with extreme caution. There is a risk that broadcasting certain aspects of court proceedings could cause undue stress to victims of crime, witnesses and defendants alike, and could potentially lead to highly selective, sensationalist and/or misleading reporting of trials.
12. The Society therefore welcomes the Government's statement that it only intends to allow the live broadcasting of courts in limited circumstances – initially at the Court of Appeal, and later, the filming of judges' sentencing remarks only. However, the Society also notes that the Clause currently gives the Lord Chancellor (albeit only with the concurrence of the Lord Chief Justice, and subject to the discretion of the court) a wide-ranging power to extend this to other circumstances in the future. Therefore, in line with the House of Lords Delegated Powers and Regulatory Reform Committee³, the Society recommends to Members that the power be subject to the additional scrutiny of the affirmative procedure.

Self-defence

13. At the Report Stage in the House of Lords the Bill was amended by the Government so that the test for self-defence for homeowners defending themselves against intruders is changed from 'reasonable force' to 'not grossly disproportionate force'⁴.
14. The Law Society is opposed to the inclusion of this Clause. The existing law as it relates to self-defence generally, and specifically in relation to self-defence against home intruders, is clear and easily understood by jurors.
15. The introduction of a new test of 'not 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.
16. It is, in fact, 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.
17. 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 and possible arrest. Furthermore, 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, the legal 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.

Transfer of immigration and nationality judicial reviews to the Upper Tribunal

18. 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'.

³ <http://www.publications.parliament.uk/pa/ld201213/ldselect/lddelreg/12/12.pdf>

⁴ <http://www.justice.gov.uk/news/press-releases/moj/more-protection-for-homeowners>

19. The Law Society does not oppose this measure in principle, but agrees with the Joint Committee on Human Rights⁵ that:

- 19.1. 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, so that there is evidence before Parliament of how the Upper Tribunal is performing that significant judicial role; and
- 19.2. 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.

Removal of rights of appeal in relation to family visit visas

- 20. Many British citizens and other 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 34 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.
- 21. The Law 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 Chief Inspector of Borders and Immigration.
- 22. The Law Society therefore agrees with the Joint Committee on Human Rights 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.

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⁵ <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/crime-courts-bill-report/>