THE QUEENS SPEECH 2004

A commentary on the Government's Proposals for legislation

23 November 2004

The Law Society

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INTRODUCTION

In the Queen's Speech on 23 November, the Government announced its legislative programme for the coming Session. These are listed in Appendix 1.

The Society always takes a keen interest in the Government's programme. This does not mean that we lobby on all major Bills. Rather, we select those measures where the profession's experience can make the greatest contribution to improving our law. This still covers a very wide range of Bills – far wider perhaps than many in the media and the public realise.

This booklet sets out the Society's initial response to the Bills on which we expect to be most actively engaged, together with background notes on the measures themselves. A key concern in the forthcoming session is that the Government is in serious danger of overstating the threat to public order and national security and bringing in draconian new laws which will have a disproportionate impact on citizens' rights.

The Society's Parliamentary Unit will work with the Society's policy specialists and expert committees in order to steer representations to Government and to brief MPs and peers as each measure progresses through Parliament.

I believe that the Society's lobbying activity on Bills – often in partnership with like-minded organisations – produces significant results. We need to build on that. For further details of the Society's Parliamentary activity in the last session, see Appendix 2.

If you would like any further information about the Law Society's Parliamentary activity for this Session please contact John Ludlow, Head of our Parliamentary Unit, on 020 7320 5858 or e-mail john.ludlow@lawsociety.org.uk

Janet Paraskeva
23 November 2004

CHARITIES BILL

Background to the Bill

In 2001, the Prime Minister commissioned the No 10 Strategy Unit to carry out a review of the law and regulation of charities. The review "Private Action, Public Benefit" was published in September 2002. The Government is keen to modernise the legal framework in both the charitable and voluntary sectors, to make them dynamic and vibrant, while maintaining public confidence in the charity and voluntary sector brands.

The draft Bill, published in May 2004, was subject to pre-legislative scrutiny by a Joint Committee of both Houses. The Law Society submitted written evidence to the Committee.

The Committee published its Report on 30 September. The Report welcomed the Government's proposals for reform and modernisation of charity law. However, it made a number of recommendations, including that the definition of religion should be clarified and that an additional charitable purpose should be included for "the provision of religious harmony, racial harmony and equality and diversity."

What the Bill does

- Enshrines the Common Law requirement that public benefit must be demonstrated in order for charitable status to be conferred in legislation.

- Requires that charities charging high fees may have to demonstrate that they confer sufficient public benefit to retain charitable status e.g. private schools.

- Introduces additional new definitions of charity in order to broaden the scope of activities which can be designated as charitable. The four existing heads are relief of poverty, advancement of education, advancement of religion and other beneficial purposes. Proposed new heads include advancement of amateur sport; advancement of culture, arts and science; advancement of environmental protection; and the advancement of human rights.

- Changes the constitution of the Charity Commission and creates a Charity Appeals Tribunal which may allow the law to develop by creating a speedier and less expensive route for dispute resolution than is currently available.

- Reforms the framework in which charities operate by, for example, easing the difficulties of charity mergers and by permitting some remuneration of charity trustees.

- Introduces Charitable Incorporated Organisations in a new legal form exclusively available to charities.

- Introduces fuller regulation of the fundraising methods used by charities.

The Law Society's position

The Law Society welcomes the general aim of modernising the legal framework, regulating charities and the voluntary sector. We support the introduction of new heads of charity and in particular the new charitable purpose of advancement of human rights.

While welcoming the establishment of the Charities Appeal Tribunal, which should allow swifter and low cost dispute resolution, we are concerned that the Bill contains insufficient detail to provide certainty as to how the Tribunal will work.

We would also like to see more in the Bill to help charities that wish to merge.

CLEAN NEIGHBOURHOODS AND ENVIRONMENT BILL

Background to the Bill

In July 2004, the Government published a consultation paper, "Clean Neighbourhoods", this followed on from a No 10 Strategy Unit paper "Waste Not, Want Not". The proposals are partly as a result of the need to conform with EU regulations and also as part of a cross-departmental crack down on anti-social behaviour to make Britain "cleaner, safer and greener".

This followed on from the ODPM strategy on public space "Living Places – Cleaner, Safer, Greener" and consultation "Living Places- Powers, Rights and Responsibilities", both published in October 2002.

On 29 October 2004, the Prime Minister announced the extension of the "TOGETHER - the national action plan" to tackle anti-social behaviour, including plans to engage anti-social people in drug treatment, and signalled a renewed commitment to tackle thuggery.

What the Bill does

- Extends the range of offences for which fixed penalty notices can be imposed, such as graffiti, fly posters, dog fouling, litter, nuisance noise and under-age drinking.

- Allows for decisions about whether to use fixed penalty notices for environmental offences to be made at a local level.

- Gives local authorities and the Environment Agency new powers to combat fly-tipping with fines of up to £50,000.

- Allows for households who do not recycle their waste to be taxed.

- Introduces protection for witnesses and victims in Anti-Social Behaviour Order (ASBO) cases, including giving evidence behind screens or via video links.

- Allows courts to compel people given an ASBO to undergo drug treatment without being convicted of a criminal offence.

The Law Society's position

The Government is to be congratulated on seeking to address the negative effects on the environment by an unthinking and criminal minority. New legislative provisions may well be necessary, but new legislation alone will not suffice. It will need resources and commitment on the part of the relevant authorities to achieve a real improvement.

1. Fines for fly-tipping

There will be some difficulties in identifying repeat offenders for more stringent penalties, particularly in the case of companies, as there is the possibility that they can change their corporate arrangements after they have been convicted of a first offence in order to avoid any additional penalties. Keeping track of corporate status and relationships within groups is a real headache for the authorities. The Law Society recognises that increasing fines might work as a deterrent.

2. Fixed Penalty Notices

We remain concerned about the use of fixed penalty notices for under-age drinking. We question whether issuing on-the-spot fines in the street, with little opportunity for independent oversight, is an appropriate method of dealing with children. Making children financially responsible and their parents or local authority (if they are in care) potentially criminally responsible, is not an appropriate means of confronting under-age drinking by children.

CONSTITUTIONAL REFORM BILL

Background to the Bill

On 12 June 2003, the Prime Minister announced the creation of the Department for Constitutional Affairs as the replacement for the Lord Chancellor's Department. The Government intends to include new arrangements for judicial appointments; establish a Supreme Court; and to end the previous role of the Lord Chancellor as a judge and Speaker of the House of Lords.

On 14 July, the Lord Chancellor published "Constitutional Reform: A New Way of Appointing Judges" and "Constitutional Reform – A Supreme Court for the United Kingdom".

The Constitutional Reform Bill was published in February 2004 and had its Second Reading in the Lords on 8 March, where Peers voted to take the unusual step of considering the Bill in select committee. The Law Society gave oral evidence to the Committee.

The Committee published its Report on 2 July; it included more than 400 agreed amendments to the Bill. When the Bill went back to Committee Stage in the Lords, Peers voted to keep the post of Lord Chancellor, defeating the Government by a majority of 32.

The Bill is being carried over to the 2004-2005 session.

What the Bill does

- Establishes an independent Judicial Appointments Commission to recommend candidates to the Secretary of State for Constitutional Affairs to appoint as judges. The Commission will encourage more applications for appointment from those groups who are under-represented in the judiciary, including women and ethnic minorities.

- Creates a Supreme Court to replace the Appellate Court of the House of Lords.

- Abolishes the office of the Lord Chancellor, removing the current office which combines three distinct constitutional roles.

- Transfers devolution issues to the new Court, (powers that are currently within the Judicial Committee of the Privy Council).

The Law Society's position

1. Judicial Appointments

The Law Society supports the Government's proposal to establish an independent Judicial Appointments Commission. The Commission's key objectives must be to underpin the independence of the judiciary; modernise the judicial appointments system; and encourage greater diversity of applicants for judicial appointment.

In order to underpin the independence of the judiciary, the members of the Commission must themselves be seen to be independent of the Government of the day. Therefore they should be appointed by an open application process involving assessment by an independent panel.

The Law Society believes there should be minimal political involvement in the appointment of judges. Therefore we favour a hybrid system by which the Commission would directly appoint at least up to the level of circuit judge, while for higher appointments it would recommend one candidate per vacancy to the Secretary of State or Prime Minister.

The Law Society believes the Commission should comprise half lay members and have a lay chair. We agree with the Government that members should be appointed on Nolan principles rather than nominated, as there can be a perception that nominated members are expected to represent a particular interest.

We propose that the new institution should be democratically accountable by laying an annual report before Parliament and should be amenable to scrutiny by a Select Committee.

2. Supreme Court

The Law Society supports the establishment of a Supreme Court.

We support the principle that serving judges should no longer sit and vote in the House of Lords.

3. Resources and Independence

Substantial resources will be required for the Supreme Court and the Judicial Appointments Commission. The Law Society is concerned that the Government appears to underestimate significantly the resources required for the new institutions to operate effectively.

CRIMINAL DEFENCE SERVICE BILL

Background to the Bill

The Government announced a draft Bill on the Criminal Defence Service (CDS) in the Queen's Speech 2003. This was published in May 2004.

The draft CDS Bill is one of a number of initiatives, introduced by the Department for Constitutional Affairs, designed to address the increasing cost of criminal legal aid. Other measures have included restricting the availability of police station advice as well as a range of measures intended to address the disproportionate costs of the most expensive criminal cases.

The draft Bill received pre-legislative scrutiny by the Constitutional Affairs Committee. The Law Society submitted written and oral evidence to the Committee.

The Committee's Report, published in July 2004, welcomed the underlying aim of the draft CDS Bill to control the rising cost of criminal legal aid. They were however, critical of the fact that the detail of the policies was not contained in the four clauses of the draft Bill would be left to secondary legislation and documentation issued by the Legal Services Commission (LSC). The Committee asked that this be published in draft before the Bill is introduced to Parliament.

The Law Society welcomed the Committee's Report on the draft Bill. The Government says it has taken into account the Committee's recommendation.

What the Bill does

- Transfers power for granting criminal legal aid for legal representation from the magistrates' courts to the Legal Services Commission.

- Enables means testing to be introduced for criminal cases before the magistrates' courts.

The Law Society's position

The recently announced Fundamental Legal Aid Review offers an opportunity for a thorough analysis of the cost drivers of legal aid. The Government must develop a long term plan to ensure adequate supply of good quality advisers so that the most vulnerable people in society know their rights and can obtain legal advice when they need it.

1. Means Testing

The proposed reintroduction of a means test is welcomed if it ensures that those defendants who can afford to pay their legal costs do so, and that those most in need of help continue to have access to justice.

Means testing for criminal legal aid in the magistrates' courts was abolished because the cost of carrying out the assessments was disproportionate. The administrative system of means testing must be cost effective, so that any savings are not

swallowed up by additional bureaucracy. Furthermore, it must not place an additional bureaucratic burden on solicitors, already weighed down with the administration involved in operating under legal aid.

The system must therefore be based on a simple power to refuse legal aid to those who can plainly afford the cost of magistrates' court proceedings, rather than a complex assessment.

2. Transfer of grant of representation

The Law Society recognises the importance of ensuring consistent application of the 'interests of justice' test for the grant of criminal legal aid. The Society would not oppose the transfer of the power to grant legal aid from the courts to the Legal Services Commission, providing arrangements are made to ensure that decision-making is speedy and there are proper avenues of appeal where legal aid is refused. The Law Society would oppose any proposal to devolve the administration of the grant to practitioners.

DISABILITY AND DISCRIMINATION BILL

Background to the Bill

The Government published the draft Disability Discrimination Bill on 3 December 2003. The Government was building on earlier work that established the Disability Rights Commission and the implementation of the Disability Discrimination Act (DDA), which represented an extension of rights for disabled people.

The draft Bill was subject to pre-legislative scrutiny by a Joint Committee of both Houses. The Law Society gave oral and written evidence to the Committee. The Committee published its report on 27 May 2004. The Committee welcomed the Bill as a positive step to providing opportunities for disabled people, but recommended that the Government could go further in a number of areas.

The Government published their response on 15 July. The Minister for Disabled People took this opportunity to state that the Bill would be introduced "as soon as practicable".

What the Bill does

- Extends the scope of the DDA to private clubs of 25 or more members.
- Widens public bodies' existing duties under the DDA and introduces a new positive duty to promote equality for disabled people.
- Allows the possibility of bringing transport operators within the scope of disabilty legislation, meaning that they could face legal action if they refuse to let disabled people use buses, trains or planes.
- Extends duties on reasonable adjustments to landlords and others who manage rented premises.
- Widens the definition of "disability" to bring people with HIV, cancer, and multiple sclerosis into scope from the moment they are diagnosed.

The Law Society's position

The Law Society welcomes the clarification this Bill seeks to achieve. We will be working closely with disability groups to ensure that the stated objectives of the Bill are reflected in the text, and to ensure that any proposals made will be workable.

1. Extension of definition

In particular, we welcome the widening of eligible groups included in the definition of disability to include those with terminal illnesses, but the definition should be extended to include people with mental health problems.

2. Public Sector Duty

The Law Society also welcomes the new public sector duty. We believe it is right to place the onus on public authorities to remove systematic bias and empower disabled service users, rather than requiring individuals to take cases after the harm has been done.

3. Reasonable Adjustments

The Law Society is concerned that the DDA and the Draft Bill included several different tests for making a reasonable adjustment. The existence of several tests for a reasonable adjustment will create confusion in the law. We recommend a single test to be applied throughout the disability legislation which requires a reasonable adjustment to be made when a disabled person has been placed at a 'substantial disadvantage' in comparison with persons who are not disabled.

4. Landlords

The Law Society welcomes the extension of the duty on landlords. However, we also recommend that the Bill should include a provision to prevent landlords unreasonably from withholding consent to a disabled tenant who wishes to make changes to the physical features of premises.

EQUALITY BILL

Background to the Bill

The Government issued a White Paper in May 2004, "Fairness for all: A New Commission for Equality and Human Rights". The Government's intention is to "create a modern, fairer and more prosperous Britain through improved equality and respect for human rights in public services". They plan to achieve this through the establishment of the Commission for Equality and Human Rights (CEHR).

A report published in August by the Joint Committee on Human Rights offered broad support for the new body. The report did call on the Government to clarify whether it should be a duty or simply a function of the Commission to promote human rights.

The Government has stated that one of the first tasks of the CEHR will be to review the legislative framework with the aim of bringing forward a Single Equality Act. However, the Government does not anticipate that the CEHR will be launched before the end of 2006 at the earliest.

In his speech at the 2004 Labour Party Conference, the Prime Minister announced the Government would introduce laws to combat discrimination on the grounds of religion.

At present, the Race Relations Act and case law afford protection to some religious groups (Sikhs and Jews) from discrimination in the provision of goods and services on the grounds of race, but multi-ethnic religions (including Muslims) are not protected.

Since December 2003, it has been unlawful under the Employment Equality (Religion or Belief) Regulations to discriminate against a person on the grounds of their religion or belief in the area of employment and vocational training.

What the Bill does

- Combines the three existing Commissions (the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission), into a single Commission for Equality and Human Rights.

- Gives responsibility to the CEHR for age, religion and sexual orientation discrimination.

- Introduces legislation outlawing discrimination in the provision of goods and services on the grounds of religion.

- Provides the CEHR with a duty to promote a culture of respect for human rights and be able to undertake general investigations into human rights.

- Provides that implementation of the public sector duty to promote equality of opportunity between men and women will be a responsibility of the CEHR.

The Law Society's position

The Law Society welcomes the establishment of the CEHR and the extension of discrimination legislation on the grounds of religion. However, we still have concerns about the status of human rights within the CEHR and, in particular, about the CEHR's independence from Government. The Government must also ensure that sufficient funding is available in order for the CEHR to be able to function properly and effectively.

1. Single Equality Act

We are pleased that the Government has stated that one of the first tasks of the CEHR will be to review the current legislative framework with the aim of developing a Single Equality Act. The Law Society has consistently advocated a Single Equality Act. We are, however, disappointed that the Act will not be introduced sooner, and urge the Government to provide the CEHR with the resources to allow this project to be swiftly concluded.

2. Human Rights

The proposed powers and functions in relation to human rights are inadequate. In particular, the CEHR should have standing to challenge - in court - policies, actions or omissions of a public authority where it believes this has resulted in, or is likely to result in, a breach of the European Convention on Human Rights.

The legislation should also make it clear that the CEHR will be able to target particular bodies in its general human rights investigations.

The CEHR should be able to support stand-alone human rights cases, and conciliation/Alternative Dispute Resolution services should be available for human rights cases. The Law Society will lobby for these to be included in the Bill.

3. Public sector duties

We welcome the announcement that the Government will introduce a statutory duty to promote equality of opportunity for disabled people and between women and men. We consider that this duty should be extended beyond gender, race and disability to cover age, religion or belief and sexual orientation.

We have also called for a public sector duty to promote human rights. In our view, a statutory duty would greatly enhance the ability of the CEHR to influence human rights practice across the entire public sector.

FINANCE BILL

Background to the Bill

The Bill will be preceded by the Pre-Budget report in December 2004 and the Budget expected in March 2005.

What the Bill does

This will be a Bill to implement the tax changes announced in the Budget in March 2005.

The Law Society's Position

It is difficult to comment at this early stage. At the 2004 Budget, it was announced that, with effect from April 2005 there will be a new regime for the taxation of trusts. There have been two consultations on the modernisation of the taxation of trusts, the most recent of which was published in August 2004. Provisions will need to be included in the Finance Bill in 2005 for the regime to be implemented. We will not know until we see the Bill whether concerns we have raised in our responses to the consultations have been addressed.

HM REVENUE AND CUSTOMS BILL

Background to the Bill

In July 2003, the Chancellor announced a major review of the organisations dealing with tax policy and administration. The review was carried out by Gus O'Donnell who published his report in March 2004. The Law Society submitted comments on the O'Donnell report and welcomed its recommendations. The Treasury Committee's Report was published in November 2004.

In the 2004 Budget, the Chancellor confirmed his intention to implement the recommendations and announced the creation of a new revenue department, HM Revenue and Customs (HMRC). The Treasury will take the lead in the formulation of tax policy and HMRC will be responsible for policy implementation.

A Bill is required to create HMRC and is expected soon after the Queen's Speech so that the Bill is enacted before the start of the new financial year in April 2005.

What the Bill does

- Creates the new HM Revenue and Customs.

- Includes transitional provisions setting out how the new body will use existing Customs and Revenue powers to fulfil its revenue collecting functions.

The Law Society's Position

There are clear advantages to one body being responsible for the administration of the tax system. This will be an opportunity not merely to achieve a single set of procedures but also to modernise the law and practice in a number of different areas and to address problems.

We have in the past expressed concerns at the way Revenue departments have operated, for example, the inappropriate use of Police and Criminal Evidence Act powers, the mixed use of criminal and civil powers, and the inappropriate use of regulations and guidance. The merger should be taken as an opportunity to clarify many outstanding issues and to introduce improvements.

We do not expect this Bill to address fully the issue of powers and procedures as this will need a more extensive Bill at a later date. We will be looking closely at the transitional provisions that relate to the powers to be used by HMRC to ensure that these are appropriate for the functions it is to undertake.

IDENTITY CARDS BILL

Background to the Bill

In July 2002, the Home Office published a consultation paper on the introduction of Entitlement Cards to reduce identity theft and fraud.

A draft Bill was published 26 April 2004 and the consultation ended on 20 July 2004.

The draft Bill was subject to pre-legislative scrutiny by Home Affairs Select Committee. The Law Society submitted written evidence and subsequently gave oral evidence to the Committee.

The proposals are in two stages. The first stage involves providing for biometrics on passports and driving licences, on voluntary cards, and on cards for foreign nationals. In phase two it will be compulsory for all citizens to register, but not carry a card at all times. The Home Office publication "Next Steps" states that there will be a vote in both Houses before any move to make cards compulsory.

What the Bill does

- Sets out the legal framework for identity cards to be introduced throughout the UK and builds a base for a compulsory scheme.

- Establishes a National Identity Register – a database of information for all UK residents issued with a card, and data-sharing powers to conduct background checks on applicants.

- Sets out safeguards to protect individuals' data and the circumstances in which specified law enforcement agencies (in cases of serious crime or national security) and other Government departments could have access without an individual's consent.

- Issues a single, universal Identity card for all UK nationals, to be issued alongside passports with costs estimated at £87.

- Sets out what information would be required on the cards and safeguards to ensure this is only available to those who need it.

- Establishes a new executive agency incorporating the UK Passport Service and working closely with the Home Office's Immigration and Nationality Directorate.

- Allows public authorities and private organisations to use the card and the Register with the person's consent to validate identity before providing services.

- Creates new criminal offences around misuse of the card and other identity fraud issues.

- Includes enabling powers so that future access to specified public services could be linked to the production of a valid identity card.

- Creates an on-line verification process.

- Provides a power to set a date when the scheme would become compulsory, including measures against failure to register.

The Law Society's position

The Law Society does not believe that the Government has made out the case for the adoption of an identity card scheme and has serious concerns about the draft Identity Cards Bill. We believe that its drafting provides Government with unnecessary and undesirably wide powers to record, retain and disseminate personal data. In addition, we believe adopting the scheme would increase the administrative burden on those delivering public services and put a heavy financial burden on government and members of the public.

We do not believe that adopting an identity card scheme is a proportionate response to the challenges which the Government is trying to address. Many of the proposed benefits the Government claims for its proposals can be achieved without a costly and complex identity card scheme. Indeed, many current Government projects are addressing the very same goals as this complex scheme, at less cost and less intrusion. Initiatives such as the database of children as outlined in the Children's Bill, and the Iris Recognition Immigration System (IRIS) address concerns raised by the Government.

History shows that all types of cards are forgeable. From National Insurance Numbers to passports, each scheme has been linked with forgery and a profitable black market, has been riddled with technological problems, and has cost taxpayers a great deal of money. Biometrics will create additional hurdles for forgers, but will not make forgery impossible.

INCOME TAX (TRADING AND OTHER INCOME) BILL

Background to the Bill

This is the second income tax bill from the Tax Law Rewrite project. A draft bill was published in February 2004. This was preceded by various exposure drafts dealing with sections of the bill.

What the Bill does

The Bill rewrites tax legislation that deals with the tax provisions applying to trading and other income.

The Law Society's Position

The Law Society is supportive of the Tax Law Rewrite project and is only likely to have technical comments on the provisions, where they have not been addressed to date.

INQUIRIES BILL

Background to the Bill

In February 2004, the Public Administration Select Committee announced that it would be conducting an investigation into the value of inquiries established by Government Ministers into particular controversial events that had given rise to public concern.

In response, the Department for Constitutional Affairs published the consultation paper “Effective Inquiries” in May 2004, setting out a range of ideas for improving the effectiveness of inquiries.

At present, the arrangements under which inquiries can be called are complicated, mainly because they are spread across various pieces of legislation dating back to 1921. This has sometimes made inquiries protracted and costly. In addition, present inquiries legislation does not cover all subject areas.

What the Bill does

- Provides a single statutory framework for inquiries set up by ministers into events of public concern.
- Helps to cut the length and costs of inquiries.
- Aims to provide practical recommendations and valuable conclusions, within a reasonable time, to help prevent similar situations arising again.
- Provides the flexibility for use over the range of subject areas where an inquiry might be needed.
- Provides clarity over the respective roles of the Minister who sets up the inquiry and the chairman of the inquiry.

The Law Society’s position

On the face of it the proposals appear eminently sensible, though we will have to await the publication of the Bill for full details.

Certainly this will be an ideal opportunity to review aspects of current procedure. Inquiries should be held wherever that is the most practical way of meeting serious public concerns about particular events; but it is important to ensure that effective inquiries can be conducted without allowing legal costs to spiral out of control.

The Law Society would also argue that there should be a presumption of a public inquiry in the event of a major disaster, rather than a matter of ministerial discretion, and that consideration should be given to whether to compel witnesses to attend public inquiries. Consideration could also be given to whether ministers should be under a duty to state which recommendations they accept and reject and why.

MANAGEMENT OF OFFENDERS BILL

Background to the Bill

A review of correctional services was announced in July 2002 in the Government's white paper "Justice for All". The review was set up to examine the entire range of correctional services, looking particularly at effectiveness and value for money in the delivery of services to reduce re-offending, and at how to improve the ability to manage the prison population.

In June 2003, Patrick Carter, a non-executive member of the Home Office Board, was asked to undertake a review of the correctional services and prepare a report.

On 6 January 2004, the Home Secretary published the report "Managing Offenders, Reducing Crime" together with the Government's response "Reducing Crime – Changing Lives". In July 2004, the Government also publish a strategy paper "Reducing Re-offending - National Action".

What the Bill does

- Establishes the National Offender Management Service to have direct responsibility for the punishment and rehabilitation of adult offenders in custody and in the community. (Merging the probation service and the prison service).

- Creates 10 regional offender managers, responsible for end-to-end management of offenders.

- Introduces a limited market in correctional services called "contestability".

- Replaces short prison sentences with non-custodial sentences and fines.

- Introduces a system of progressive day fines for court cases which would replace community services and be based on the offender's ability to pay.

- Introduces a statutory framework for the use of satellite tracking of offenders and of polygraph testing for the management of sex offenders in the community.

The Law Society's Position

The Law Society welcomes the introduction of more creative options for sentencing, including non-custodial sentences, while preserving imprisonment as an option of last resort for the most serious offences. We hope appropriate use of non-custodial sentences will focus on effective rehabilitation which short custodial sentences fail to provide.

The increase in non-custodial sentences will create an extra drain on the new National Offender Management System (NOMS). It is essential that adequate resources are made available to support the courts, probation services and offenders.

The Law Society has reservations about the polygraph testing of sex offenders. It is important to ensure that tests are very reliable before information gained from them is used. Our understanding is that the current state of research is not yet conclusive. The results of a test would presumably be used to demonstrate that the person was a risk to children, or that they should even be recalled to prison. On the other hand, a polygraph test could ostensibly show that an offender was of no risk, when in fact they were, and could result in their supervision being less strict than it should otherwise be, with potentially tragic results.

MENTAL CAPACITY BILL

Background to the Bill

The proposals build on the Government's 1999 Policy Statement "Making Decisions" and follow on from the Law Commission's recommendations in 1995 for a statutory framework for decision-making for adults who lack capacity.

In conjunction with the Making Decisions Alliance the Law Society has been campaigning for the introduction of a Mental Capacity Bill over many years and strongly supported the introduction of this Bill.

A Draft Bill was published on 27 June. A Joint Committee of both Houses of Parliament scrutinised the Draft Bill; the Law Society submitted written and oral evidence to the Committee. In their report, published in November 2003, the Committee cautiously welcomed the Bill.

The Bill was published on 18 June. The Bill is currently waiting for a date for Commons Remaining Stages and will be carried over into this session.

What the Bill does

- Sets out a new definition of capacity that focuses on whether an individual is able to make particular decisions for themselves at the time when these decisions need to be made.

- Works from an assumption that someone has capacity to make a decision unless it is shown otherwise.

- Requires that all decisions taken on behalf of someone who cannot make his or her own decisions must be made in that person's best interests.

- Sets out a new checklist of "best interests" factors, to guide decision-makers.

- Creates a number of new decision-making mechanisms that will either allow individuals to plan for a possible future loss of mental capacity or, where this is not possible, will ensure that decisions which need to be made on their behalf are taken by the most appropriate people with the benefit of stringent safeguards. These mechanisms will cover all areas of decision-making, including healthcare and personal welfare rather than just finance as at present.

- Proposes that abuse of someone who lacks capacity should be made a criminal offence.

- Creates new judicial and administrative bodies for mental incapacity issues.

The Law Society's position

The Law Society warmly endorses the Mental Capacity Bill. We believe that this much-needed legislation will help to protect the rights of one of the most vulnerable groups in society; those who lack mental capacity.

The Bill met with opposition from anti-euthanasia groups, despite the fact that nothing in the Bill would permit any form of euthanasia. The Law Society has been at pains to point this out to those who misrepresent the measure in this way.

1. The Definition of Incapacity

The Law Society supports the Bill's core definition of incapacity, which focuses on the particular time a decision has to be made and reflects the important principle that capacity is 'function specific' and must be assessed in relation to the particular decision or activity. The definition also recognises that impairment may be permanent or temporary and that capacity may fluctuate, for example a person with dementia may experience lucid intervals.

2. Best Interests

We fully support the Bill's key principle of 'best interests', which must guide all actions and decisions made on behalf of someone lacking capacity. The Bill sets out a checklist that decision-makers must work through in deciding what is in the best interests of the incapacitated person. This will provide a common standard to ensure consistency in how substitute decisions are made.

3. Acts in connection with care or treatment

The Bill provides professional and informal carers with an express defence against civil liability and criminal prosecution for certain acts. The carer will not incur any liability if reasonable steps are taken to establish whether the person lacks capacity and the action taken is in the person's best interests.

The Law Society believes it is important to provide protection for formal and informal carers making day-to-day decisions for people who lack capacity. However, we are concerned that the scope of this power is unclear and may be too wide in light of the recent European Court of Human Rights judgement in *HL v UK*.

4. Lasting Powers of Attorney

The Society welcomes, in principle, the new Lasting Power of Attorney (LPA), enabling any person with capacity to authorise someone else to take decisions in relation to their property, financial affairs and personal welfare, should they lose capacity in the future.

5. Advance Decisions to refuse treatment

The Law Society supports the inclusion of advance decisions or 'living wills' in the Bill, allowing adults with capacity to refuse specific medical treatments if they lose capacity in the future. This enables the exercise of a right of choice and control over one's own life and body. For example, someone with motor neurone disease could refuse artificial nutrition and hydration in the later stages of their illness when they are close to death. This codifies and clarifies the current common law rules, integrating them into the broader scheme of the Bill. The purpose of the Bill is to empower

people to take individual decisions in the event of future incapacity, if they wish to do so. Nothing in this Bill would permit any form of euthanasia.

SERIOUS ORGANISED CRIME AND POLICE BILL

Background to the Bill

In February 2004, the Home Office published a white paper "One Step Ahead: A 21st Century Strategy to Defeat Organised Criminals" which outlined the Government's strategy to tackle organised crime. The Government has announced that the new agency, to be established by the Bill, will be operational from 1 April 2005. A Chair and Chief Executive have already been appointed.

On 10 November, the Government published a white paper "Building Communities, Beating Crime". This followed on from a consultation published in August, "Policing: Modernising Police Powers to Meet Community Needs", to which the Law Society responded in October. These consultations form part of the Government's ongoing work on police reform. This is the second phase, following on from the Police Reform Act 2002.

The Government's aim is to strengthen the link between the police and the community, increase the accountability and responsiveness of the police service and build the confidence and awareness of the community.

In 2001, the Government failed to get laws introducing the offence of inciting religious hatred passed by Parliament in the wake of the US terror attacks. In his speech at the 2004 Labour Party Conference, the Prime Minister announced the Government would introduce laws to combat discrimination on the grounds of religion.

In July 2004, the Government announced plans to crack down on animal rights campaigners who use terror tactics against scientists, their families and those involved in animal research. The proposals were contained in the consultations "Animal Welfare: Human Rights - Protecting People From Animal Rights Extremists" and "Policing: Modernising Police Powers to meet Community Needs".

What the Bill does

- Creates the Serious and Organised Crime Agency, bringing together the responsibilities of the National Criminal Intelligence Service, the National Crime Squad, and those parts of HM Customs and Excise responsible for tackling organised drug and people smuggling.

- Gives new powers to collect evidence and compulsorily question potential witnesses, including advisers.

- Creates a system of advanced indication of sentence for those contemplating pleading guilty.

- Establishes a new National Witness Protection Service.

- Creates a new offence of "belonging to an organised crime group", and amends existing conspiracy laws.

- Amends the Proceeds of Crime Act 2002.

- Provides the police with the power of arrest for all offences.

- Increases the ability of police officers to apply for and execute warrants issued by the courts enabling multiple uses and targeting of offenders with multiple addresses, (”super-warrants”).

- Gives community support officers (CSOs) greater powers, e.g. to deal with traffic, enforce bylaws and tackle begging.

- Gives powers to drug test suspects for certain 'trigger' offences on arrest (rather than charge). Allows the courts to draw inferences from an individual’s refusal to submit to a search for drugs.

- Improves the use of forensic material, for example by allowing roadside fingerprinting and extending powers to take DNA samples and footwear impressions.

- Allows local councillors to "trigger" action by police by showing that certain conditions have been met.

- Enables police recruits to join at more senior ranks and not start as constables.

- Extends the existing incitement to racial hatred laws, contained in the Public Order Act 1986, by creating a new offence of incitement to religious hatred with a maximum penalty of seven years.

- Makes protesting outside someone’s home in an intimidating manner an arrestable offence. Gives the police greater powers to deal with public demonstrations.

- Enables the police to ban protestors from the vicinity of a person’s home for three months and extends harassment laws so that they can be used to safeguard a group of employees, rather than simply a named individual.

The Law Society’s position

1. Serious Organised Crime Agency

The Law Society welcomes any restructuring of law enforcement that helps the detection and prosecution of crime. However, any new organisational structure should be accountable and transparent in the exercise of its powers.

The proposed powers to be available to these bodies, and the information they will handle, is likely to be considerable. Public accountability and proper channels for complaints are essential to ensure confidence in the exercise of these powers.

2. Extension of investigative powers

The Law Society is concerned about the extension of investigative powers proposed in this Bill. New powers to compel evidence from witnesses, including professional witnesses, must not impinge on legal professional privilege. The right to legal advice

is a fundamental right, which is underpinned by legal professional privilege. It is important that this protection is guaranteed in legislation.

3. Plea bargaining

We support proposals for advanced indication of sentence (or limited plea bargaining), as long as this is accompanied by requisite safeguards to protect vulnerable defendants from being pressured into pleading guilty. There are clear benefits to defendants, witnesses and victims, as well as the management of the criminal justice system, by having a formal procedure to seek an advanced indication of sentence.

4. Witness Protection

We support the creation of a national witness protection scheme to meet the needs of prosecuting serious criminal offences. We consider people trafficking represents a good example of how providing protection to those involved at the lowest level of criminal activity can help in the prosecution of key players in organised crime. Without input from victims and witnesses, offences of trafficking are likely to be very difficult and costly to police, investigate and prosecute. If more people are to be encouraged to give evidence against their criminal masters, the need to protect witnesses will also increase.

5. Money laundering

While continuing to support the thinking behind the money laundering provisions of the Proceeds of Crime Act, we believe that amendments are needed to the reporting and consent provisions to bring about greater clarity and proportionality in their impact on the administration of justice.

6. Power of Arrest

The Law Society is opposed to empowering the police to arrest for all offences. Under the proposals, the police would have a power of arrest for even very minor suspected offences. We do not believe that this represents an appropriate balance between the liberty of the citizen and the needs of the police. There is already a power of arrest where a police officer suspects that a person may have committed a non-arrestable offence has failed to give their correct name and address.

7. "Super-warrants"

The proposed "super-warrant" raises serious questions of police accountability and effective judicial oversight. The warrant weakens judicial control over the exercise of a very serious interference with the rights of a citizen, and appears intended to apply to every property in relation to which a suspect would have rights of occupation, control and access.

It is important to retain a requirement for specific judicial authorisation where the police seek to enter or search property where the subject of the warrant is not the owner or tenant. It is also important to ensure that the provision does not weaken

legal professional privilege through indiscriminate application to solicitors' offices without specific judicial authorisation.

8. Powers of Community Support Officers

While the Law Society can understand the rationale for giving civilian officers the power to search detainees or direct traffic, we are concerned that giving civilians police-type powers risks causing an increased scope for confusion amongst members of the public as to precisely what powers non-police officers have. The provisions will need to be drafted and implemented with care to reduce that risk.

9. Drug testing at the point of arrest

It is unclear whether the proposal is to enable drug-testing at the actual point of arrest, or whether it is being suggested that the police should have the power to conduct the test when the person is first detained at a police station. If it is the former, we would strongly oppose such a provision since it is not appropriate to empower the police to conduct drug-tests in the street.

We would also be concerned if the proposal is that suspects should be drug-tested on detention. The proposal would mean that more than 600,000 persons a year, who are not charged with a criminal offence, could be at risk of being made the subject of compulsory drug-testing. This cannot be justified.

10. Forensic material

The Law Society opposes giving the police the power compulsorily to DNA swab or fingerprint persons suspected of, but not arrested for, an offence. This would represent a major increase of police powers at the expense of the liberty of the individual. It could, given the experience of the use of stop and search powers, have grave implications for the relationship between the police and ethnic minority communities. Furthermore, the destruction provisions in the Police and Criminal Evidence Act section 64 are such that samples and fingerprints would not necessarily have to be destroyed even if the person from whom they are taken is not arrested. That cannot be right.

11. Religious Hate Crime

The Law Society supports the Government's message that criminal behaviour motivated by prejudice or hatred of members of particular groups is unacceptable. However, we are concerned that current legislation does not deal with offences motivated by prejudice against other groups, such as people with disabilities, non-English speakers, gay men or lesbians or other prejudices.

The Law Society considers offences carried out because the victim was in one of those categories should be considered as equally grave as offences motivated by racial or religious hatred. As such, consideration should be given as to how to deal with hate crimes more generally.

12. Animal Extremists Measures

We recognise that the activities of animal extremists have led to serious harassment of individuals involved in animal research and that the present law has proved inadequate to protect the individuals concerned.

We believe, the Government was right to allow company directors to remove their personal details from the register at Companies House.

However, it will be important to ensure that any new provisions are no more widely drawn than is necessary to provide for the protection needed. In particular, individual protestors must not be criminalised for peaceful, non-threatening behaviour and the right to protest peacefully must be respected, provided that it is not carried out in such a way as to amount to harassment.

DRAFT CHILD CONTACT AND INTER-COUNTRY ADOPTION BILL

Background to the Bill

In July 2004, the Government published a consultation paper "Parental Separation: Children's Needs and Parents' Responsibilities". The paper outlined how the Government will better support families who are going through separation. This included proposals to legislate to promote new measures for the enforcement of court orders and revise the arrangements for the use of family assistance orders under the Children Act 1989.

The Government have stated that they plan to legislate "as soon as parliamentary time allows".

What the Bill Does

Provides a fuller range of enforcement provisions to allow:

- Referral of a defaulting parent in a contact/residence case to a variety of resources including information meetings, meetings with a counsellor, or parenting programmes/classes designed to deal with contact disputes.

- Referral of a non-resident parent who has been violent or who has breached an order to a relevant programme.

- Attachment of conditions to orders which may require attendance at a given class or programme.

- Imposition of community-based orders, with programmes specifically designed to address the default in contact.

- The award of financial compensation from one parent to another (for example where the cost of a holiday has been lost).

Law Society's position

We recognise that there are problems with enforcement of contact arrangements and welcome better enforcement of contact orders.

The Law Society believes that Family Assistance Orders have the potential to provide more useful support in contact disputes and supervising compliance, for example referral to parenting courses, subject to the availability of resources to support such orders. We would welcome the inclusion of provisions in the Bill allowing parties to apply for an order or to apply for extension of such an order; and for orders to be mandatory and of longer duration beyond six months.

The Law Society considers that the Children Act 1989 embraces considerable flexibility, both as to the nature of orders made and as to the conditions which might apply to such orders. We do not consider that further legislation is required in

relation to the nature and condition of contact orders. We are pleased that the Government agrees that the interest of the child should be remain paramount in considering arrangements for children after their parents have separated.

The Law Society believes that one contributory factor to conflict between parents about the arrangements for their children is the continuation of fault-based grounds for divorce. Introduction of no-fault divorce could help to reduce the incidence of such conflicts.

DRAFT COMPANY LAW REFORM BILL

Background to the Bill

In 1998, the Government commissioned the independent Company Law Review Steering Group to review the whole of company law with a view to its modernisation and making it more accessible for small and medium sized enterprises. The Steering Group's final report "Modern Company Law for a Competitive Economy" was published in July 2001. The Government responded with a White Paper "Modernising Company Law" including draft clauses forming part of a Companies Bill, in July 2002.

The Government has announced subsequently that it intends to implement the main recommendations from the Company Law Review and in addition to provide powers to re-state and reform company law through secondary legislation subject to public consultation and Parliamentary scrutiny.

What the Bill Does

The Bill will implement the main recommendations of the Company Law Review and:

- Creates a discrete legal framework for smaller companies by providing a model set of articles of association better suited to their purposes.
- Makes it easier to reach decisions by means of written resolutions instead of general meetings.
- Makes the holding of AGMs optional.
- Abolishes the requirement for private companies to have company secretaries.
- Deregulates rules on the registers of present and past members that companies are required to maintain.
- Enhances the role of proxies so that the actual owners of the shares rather than, for example, the bank or stockbroker through whom shares are held are able to participate in a company.
- Simplifies financial reporting for small companies and facilitates reporting to shareholders.
- Reforms capital maintenance rules for private companies.
- Abolishes the requirement for a company to have authorised share capital.
- Improves the system of company names and trading disclosures.
- Clarifies directors' duties by means of a statutory statement.
- Provides a statutory basis for derivative actions whereby shareholders can act for a company to hold to account directors who have breached their duties to

the company.

- Reforms the rules on company meetings and enhance the rights of proxies.
- Clarifies rules on when assets can be transferred at book value between companies in the same group.
- Provides powers to re-state and reform company law by means of secondary legislation.

The Law Society's Position

The Law Society has whole heartedly supported the Company Law Review and the exercise in modernising UK company law. We will want to look closely at the details of the Companies Bill to ensure that it delivers the clarity that companies and their advisers need.

The Law Society supports the list of legislative proposals to be included in the Bill with the exception of a statutory statement of directors' duties.

In addition, we are pressing the Government to address in the Bill the legal uncertainties caused by *Aveling Barford*[1] in relation to the statutory rules on the distribution of a company's assets, to clarify the provisions relating to political donations and to introduce provisions to facilitate the redenomination of share capital.

The Law Society also accepts the Government's two-pronged approach to reform subject to securing the necessary public consultations and Parliamentary scrutiny.

[1] *Aveling Barford Limited v Perion Limited and Others* (1989) 5 BCC 677 [1989] BCLC 626

DRAFT CORPORATE MANSLAUGHTER BILL

Background to the Bill

In 1995 the Law Commission produced a report, "legislating the criminal code-involuntary manslaughter", which suggested that the law surrounding corporate killing should be completely reformed, including the creation of a new offence.

The Government published a consultation paper on reform of the law on involuntary manslaughter in May 2000.

The Government believes that the legislation will address the failure in current legislation to hold companies properly accountable for deaths that occur as a result of systemic management failure.

The Home Secretary, David Blunkett, made an announcement in May 2003 reiterating the Government's intention to move forward on this issue and announced in his speech at the Labour Party Conference that the Government will publish a draft Corporate Killing Bill in the autumn.

What the Bill does

- Clarifies and make coherent the law in this area.

- Makes corporations criminally responsible for deaths attributable to a corporation's negligence or direct actions. Criminal liability is not attached to individual directors under the proposals; rather the focus is to increase corporate liability for manslaughter.

The Law Society's position

The Law Society welcomes the clarification of law in this area and measures to ensure that corporate bodies will be made responsible for their actions.

We have consistently lobbied for corporate killing to include Crown liability and are disappointed that this will not be included in the provisions.

Care will be needed with the definition of the "corporate entity" that will be responsible for the offence. If the definition is too widely drawn then this could deter individuals from accepting the onerous responsibility of becoming a director.

DRAFT COUNTER TERRORISM BILL

Background to the Bill

The Government passed the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) following the September 11 attacks in the US. The powers in the current legislation will lapse in November 2006.

In February 2004, the Government published a consultation paper "Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society". The paper set out the current legislative position, sought to explain the Government's reasons for the powers in the ATCSA and discussed the best way forward.

Following this consultation, the Government is now seeking to enhance current anti-terrorism powers and to set out a long-term regime. In addition, it may need to respond to the impending House of Lords judgment about the lawfulness of the indefinite detention without trial of nine people under Part 4 ATCSA.

What the Bill does

- Allows intercept evidence to become admissible in prosecutions.
- Provides for cases to be heard by judges sitting alone.
- Renews the Part 4 provisions, including the power to detain indefinitely without charge alleged terrorists.
- Creates a new offence of committing acts preparatory to terrorism.

The Law Society's Position

The ATCSA was an emergency measure, rushed through Parliament without full debate and scrutiny. The Law Society fully accepted that it was necessary for the Government to reassess the country's security needs in the aftermath of the September 11 attacks. However it is essential that such emergency legislation does not compromise the Government's democratic duty to uphold the principles of fairness and justice.

A number of the provisions in the ATCSA are not strictly related to the emergency situation but are of a wider and more general application. The Law Society believes that it is inappropriate to mix urgent counter-terrorism measures with mainstream measures covering criminal justice and other issues. The Act should now be replaced by more appropriate and tightly focused legislation dealing exclusively with anti-terrorism measures, distinct from mainstream criminal law and accompanied by clear safeguards.

1. Part 4

The Law Society believes that the Part 4 powers in the ATCSA should be replaced by measures which do not include indefinite administrative detentions. While we

recognise that there are persons who pose a serious risk to the public and to national security, we agree with the Committee of Privy Councillors, established to advise on the ATCSA, that the power of administrative detention is no longer needed. We believe that as an alternative to indefinite detention, the liberty of those considered a risk could be lawfully restricted by bail conditions within the context of criminal proceedings, or in some cases by a civil order issued by a court.

2. Intercept Evidence

The Law Society believes that the case for relaxing the absolute ban on the use of intercept evidence is overwhelming. The majority of common law jurisdictions, including Canada, Australia, South Africa, New Zealand and the United States admit intercept evidence. In light of the use of such evidence by other common law jurisdictions and greater EU co-operation, the introduction of intercept evidence would be a very sensible next step.

However, detailed consideration should be given to the best means of achieving the use of intercept evidence in prosecutions. In particular, the use of different classes of warrants authorising the interception of communications, some allowing evidential use of the product and others not, are worthy of further exploration.

3. Removal of Trial by Jury

The right to trial by jury is a fundamental aspect of our legal system. The Law Society opposes the abolition of jury trial for terrorist offences. This is an unacceptable erosion of the common law right to be tried by one's peers. Juries are perfectly able to follow evidence that is complex or relates to horrific crimes.

In England and Wales the use of juries in terrorism trials has not been detrimental to the rule of law. We recognise that for a period the jury trials in similar cases in Northern Ireland were excluded. However, the social and cultural justifications for the Diplock courts in Northern Ireland are not reflected in England and Wales.

4. Offence of committing acts preparatory to terrorism

The Law Society would support the creation of such an offence if it were shown that there is a clear gap in the law, subject to very careful consideration as to the appropriate drafting.

DRAFT COURTS AND TRIBUNALS REFORM BILL

Background to the Bill

Sir Andrew Leggatt's 2000 report "Tribunals for Users: One System, One Service" proposed radical reform of the structure of tribunals, and ultimately a unified tribunal system. Before the Leggatt Report, tribunals had not been reviewed for 44 years.

In 2001, the Lord Chancellor's Department issued a consultation on the report of the review of tribunals by Sir Andrew Leggatt.

In May 2003, the Council on Tribunals issued its consultation on the Draft Model Rules for Tribunals.

The Bill will implement proposals contained in the White paper "Transforming Public Services, Redress and Tribunals" published in July 2004. The proposals aim to develop policies that help empower citizens; move disputes that could be resolved elsewhere out of the courts and tribunals; change the delivery of service so that the system is fit for purpose and cost-effective; and align the DCA's organisation and infrastructure to best meet the needs of the public.

What the Bill does

- Creates a unified tribunal system. (Although the Employment Tribunal and Employment Appeals Tribunal will remain administratively separate).
- Establishes a new organisation under the remit of the DCA for the largest tribunals, ensuring they are independent and are seen to be independent from those whose decisions they are reviewing.
- Creates a duty on the new organisation to publish its views and analysis of decision-making.
- Introduces and promotes the development of a wide range of dispute resolution services.
- Creates a new administrative appeals tribunal bringing together the jurisdictions with equivalent knowledge and experience to a Lord Justice of Appeal of the Social Security and Child Support Commissioners, the Lands Tribunal, the Transport Tribunal and the new upper tier of the reformed tax tribunals.
- Provides for the Judicial Appointments Commission to have responsibility for recommending candidates for appointments to all tribunal panels.
- Creates a Senior President of Tribunals.

The Law Society's position

We support the Government's commitment to improve the service offered across all tribunals. On the whole, the proposals contained in the White Paper are sensible and measured. However, some further consideration of the particulars of the

proposals is needed.

The Law Society believes that because of the great diversity of tribunals, proposals for a unified structure should take full consideration of the distinctive character of each tribunal.

DRAFT MENTAL HEALTH BILL

Background to the Bill

A draft Bill was first published on 25 June 2002, following a Law Commission Report in 1995. If implemented, the Bill will be the biggest shake-up in mental health legislation in twenty years. It will contain rights to advocacy and a new tribunal system. More controversially, it will increase the number of people who can be detained against their will and made subject to treatment orders.

The Bill was expected in the last session but did not appear, partly as a result of strong opposition from a range of lobby groups led by the Mental Health Alliance.

As a result, a second draft Bill was published on 8 September. A Joint Committee of both Houses has been set up to scrutinise the draft Bill and is due to report by the end of March 2005. As a result of this timetable, the Bill proper is unlikely to be published until after the General Election. The Law Society has submitted written and oral evidence to the Committee.

What the Bill does

- Overhauls the mental health provisions to make the existing Mental Health Act 1983 compliant with the Human Rights Act.
- Proposes a new single definition of mental disorder, as well rights to advocacy and a new tribunal system.
- Proposes compulsory treatment of mentally disordered people living in the community.
- Proposes detention of dangerous people with severe personality disorders even if they have not committed a crime.

The Law Society position

The Law Society believes that important aspects of the Bill are fundamentally flawed. While we welcome some parts of the Bill, such as rights to advocacy and a new tribunal system, the main thrust of the proposals is to increase the number of people who can be detained against their will and made subject to treatment. Furthermore, the Bill lacks any right for people to receive the mental health services they need.

The Law Society has campaigned against the compulsory treatment and detention provisions as part of the Mental Health Alliance. We have consistently argued that the draft Bill focuses too much on issues of risk and compulsory treatment, rather than individual rights to an assessment of needs and effective support and care.

In particular, we are concerned that vulnerable people may be deterred from seeking help for fear of being detained under the much broader criteria. Further, the Bill does not give patients any rights to receive the treatment they may need. We believe many aspects of the Bill may give rise to costly human rights challenges.

We want to see a Bill that includes a legal right to care and treatment; includes a right to advocacy at all stages; reduces the need for compulsion; and accords with human rights legislation.

DRAFT YOUTH JUSTICE BILL

The draft Bill follows on from "Youth Justice: Next Steps", a supplemental consultation paper to "Every Child Matters" both published in September 2003.

The draft Bill sets out proposals for further reforming the law, building on the main youth justice reforms introduced by the Government in the Crime and Disorder Act 1998. It would introduce new arrangements for sentencing of juveniles with a sharper focus on preventing offending and a simplification of sentences, together with strengthening of good quality diversions from custody. It would also improve the operation and effectiveness of the youth justice system.

What the Bill does

- Clarifies the main purpose of juvenile sentencing as prevention of offending.
- Establishes more effective community sentences with a simplified structure and a menu of options for rehabilitation from which courts can compile a suitable package for the individual.
- Establishes the Intensive Supervision and Surveillance Order as a robust alternative to custodial sentencing.
- Provides that a Detention and Training Order would not normally be available unless an Intensive Supervision and Surveillance Order had already been tried, and removing the offender from the community was essential.
- Gives power to place trainees in open conditions and allow temporary release from custody with tagging, to allow more managed re-integration into the community to prevent re-offending.
- Broadens the range of services that deal with young offenders.

Law Society's position

We support many of the draft Bill's proposals establishing more effective community sentences and alternatives to custody, making custody the option of last resort.

We welcome the clarification of the main sentencing purpose with the aim to prevent offending. The welfare and rehabilitation of the child are equal factors to be considered with punishment and deterrence in sentencing juveniles. The primary purpose of preventing re-offending should be clearly underpinned by the positive measures which ensure proper emphasis is given to rehabilitation, which must be the long term goal especially in the case of young offenders.

APPENDIX 1

BILLS FOR THE 2004-2005 PARLIAMENTARY SESSION

(a) Bills announced in the Queen's Speech

Animal Welfare Bill

Charities Bill

Child Benefit Bill

Clean Neighbourhoods and Environment Bill

Consumer Credit Bill

Criminal Defence Service Bill

Crossrail Bill

Disability and Discrimination Bill

Drugs Bill

Education Bill

Equality Bill

European Union Bill

HM Revenue and Customs Bill

Identity Cards Bill

Inquiries Bill

Management of Offenders Bill

National Lottery Bill

Railways Bill

Road Safety Bill

School Transport Bill

Serious Organised Crime and Police Powers Bill

Transport (Wales) Bill

(b) Bills carried over from the last session

Constitutional Reform Bill

Gambling Bill

Mental Capacity Bill

(c) Bills announced in draft

Draft Child Contact and Inter-country Adoption Bill

Draft Commons Bill

Draft Corporate Manslaughter Bill

Draft Counter Terrorism Bill

Draft Courts and Tribunals Bill

Draft Mental Health Bill

Draft Modernising Rural Delivery Bill

Draft Youth Justice Bill

(d) Bills which were not included in the Speech but which will appear:

Draft Company Law Reform Bill

International Organisations Bill

Income Tax (Trading and other income) Bill

Finance Bill

Judicial Pensions Bill

Public Services Ombudsman (Wales) Bill

APPENDIX 2

LAW SOCIETY LOBBYING IN THE 2003/2004 PARLIAMENTARY SESSION

The Society lobbied on a number of bills and draft bills in the last Parliamentary session.

The following is a brief snapshot of some of the issues we worked on and the outcomes.

Asylum & Immigration (Treatment of Claimants etc) Act

The Government were forced to back down on their controversial plans to oust judicial oversight in asylum appeals proposed in the Bill. The Law Society worked closely with the Bar and JUSTICE to put pressure on the Government on this issue. There is now a limited right of appeal to the higher courts, reinstating the judicial oversight principle.

Children's Act

Following lobbying from the Law Society and a number of children's organisations the Government enshrined the UN Convention on the Rights of the Child into the role of the Commissioner.

In addition the Government addressed our concerns about the database of all children to be established by Act. The Government brought forward amendments to include clear descriptions of the information that will be on the database, and the agencies that may access it. The Act also contains reassurances that the databases will not include details of case information.

Civil Contingencies Act

Following representations from the Law Society the Government introduced amendments to ensure that an explicit statement of conformity with the Human Rights Act must be made when a regulation is made under the emergency legislation.

Housing Act

Following representations from the Law Society, the Government agreed to a 'dry run' of home information packs before their launch in 2007, as well as to a full pilot in designated areas. Furthermore, a new clause was inserted into the Bill giving the power to suspend the packs 'in case things go wrong'.

Under pressure from the Law Society, Shelter and Citizens Advice, the Government included a statutory deposit scheme for private sector tenants in the Bill.

Planning & Compulsory Purchase Act

The Law Society lobbied strongly throughout all stages of the Bill.

A number of significant concessions were made by the Government in response to pressure from the Law Society, most notably the preservation of outline planning permission, set to be abolished by the Bill.

In addition, the role of county councils in the planning process was reinstated, guaranteeing them a definite role in the preparation of the Regional Spatial Strategies and securing the influence of the directly elected bodies. The Government's initial proposal had been to remove county councils from the preparation of the Regional Spatial Strategies to replace them with an appointed body, prior to the establishment of regional assemblies. It was argued that this would have led to a democratic deficit.

Draft Criminal Defence Service Bill

The Law Society's concerns about the administrative impact of reintroducing means testing for defendants as a way of cutting legal aid costs influenced the report of the Constitutional Affairs Select Committee, which described the draft Bill as 'unworkable'.