NORTHERN IRELAND HUMAN RIGHTS COMMISSION

BRIEFING ON THE COUNTER-TERRORISM BILL 2008 FOR THE SECOND READING, HOUSE OF LORDS, 8 JULY 2008

SUMMARY

The attached briefing is intended to highlight to Peers the very serious human rights implications of the Counter-Terrorism Bill, which is to receive its second reading in the House of Lords on 8 July 2008.

The briefing comments on:

Pre-charge detention (Clauses 22-33)

The Commission continues to assert that the provision in the Bill which would allow individuals to be detained for up to 42 days without charge is not compatible with Article 5 of the European Convention on Human Rights (ECHR).

Post-charge questioning (Clauses 34-39)

The Commission originally supported the introduction of post-charge questioning as an alternative to extending pre-charge detention. Government has not introduced post-charge questioning as such an alternative. In any case, while the Commission does not see the concept of post-charge questioning as inherently incompatible with human rights protections, it is of the view that Articles 5 and 6 ECHR require additional safeguards for persons subject to post-charge questioning which are currently absent in the Bill. The Commission advises that:

- post-charge questioning be authorised by a member of the judiciary at least of the seniority of a resident magistrate
- the right of access to legal advice during post-charge questioning should be contained in primary legislation

- post-charge questioning should be restricted to new evidence
- there should be judicial oversight of interview transcripts

Jurisdiction (Clause 40)

The Commission raises concerns about the proposal that defendants be transferred from one UK jurisdiction to another for trial. In particular the lack of detail in the Bill on how such proposals would operate in practice raise concerns about defendants' rights under Articles 6 and 8 ECHR.

Notification requirements (Part 4, Clauses 51-68)

The Commission is concerned that the notification requirement provisions in the Bill constitute a punitive measure rather than one aimed at managing and assessing risk. The Commission suggests that the need for notification should be decided closer to the time of release rather than triggered automatically at the time of sentencing.

Inquests (Part 6, Clauses 77-81)

The Commission raises serious concerns about the proposal in the Bill that would allow Government to hold inquests with a specially appointed coroner and without a jury on extremely broad and unsatisfactory grounds. The Commission refers to the criteria for an Article 2 ECHR compliant investigation/inquest established in the European Court of Human Rights judgment in *Jordan v UK*. It seriously questions whether Part 6 of the Bill could be considered compliant. The Commission is particularly concerned about the impact of such provisions for the outstanding 'legacy of conflict' related inquests in Northern Ireland.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,[1] advising on legislative and other measures which ought to be taken to protect human rights,[2] advising on whether a Bill is compatible with human rights[3] and promoting understanding and awareness of the importance of human rights in Northern Ireland.[4] In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.

2. It is with regret that the Commission finds itself in the position of making very similar points to the House of Lords in this briefing paper as it did to the House of Commons immediately prior to the second reading of the Bill there. Despite the rigorous analysis that took place in the House of Commons around the extension of pre-charge detention and many other provisions of the Bill, Government has failed to table sufficient amendments that would meaningfully mitigate the very serious adverse human rights impact of it.

Pre-charge detention (Clauses 22-33)

Clauses 22-33 introduce provisions that would allow persons to be held without charge for up to 42 days, where there is a 'grave exceptional terrorist threat'.

3. The Commission is of the view that the arguments around the reserve power, which would allow the Secretary of State to extend the maximum period of pre-charge detention from 28 to 42 days, have been well voiced. It has little doubt that Peers, like this Commission, the 306 MPs who voted against the provision and the Joint Committee on Human Rights (JCHR), are also of the view that the measure is a disproportionate response to the threat of terrorism that fails to protect the individual's right to liberty under Article 5 ECHR. The Government

[1] Northern Ireland Act 1998, s.69(1).
[2] *Ibid*, s.69(3).
[3] *Ibid,* s.69(4).
[4] *Ibid,* s.69(6).

amendments in relation to the provision, intended to be safeguards, are wholly insufficient:

- The judicial safeguards remain unaltered in the Bill and the Commission, therefore, remains of the view that they do not honour the right to a judicial hearing under Article 5(4) ECHR. In any case, the Commission questions whether any judicial safeguards would be sufficient for the proposal in the Bill to hold persons for up to six weeks without charge for the purposes of interrogation. The Commission notes that the JCHR has expressed similar views.

- Regardless of the time within which Parliament is to be notified of the reserve power coming into force or the time allocated for debate, Commission continues to view the Parliamentary scrutiny outlined in clauses 27-29 of the Bill as unsuitable for two reasons. First, the information available to Parliament and the debate will be considerably circumscribed, given the need not to jeopardise an ongoing investigation or prejudice future trials. Second, the Commission does not see Parliament as the body suitable for making decisions on individual cases. This is a matter for the independent judiciary.

- The Commission continues to be of the view that Government has not taken seriously enough the much voiced concerns that such exceptional measures are often counter-productive.

- Government has still not made the case for the need for extending the period of pre-charge detention beyond the already exceptional 28 days.

4. In addition, the Commission is concerned that the trigger for the reserve power and its subsequent availability to the police is not confined to the need to detain any particular individual directly associated with the 'grave exceptional terrorist threat' outlined in clause 22. Indeed, clause 23(3) indicates that once the reserve power is made available anyone held under section 41 of the Terrorism Act 2000 may be held for up to 42 days, regardless of whether they are connected with the investigation into the 'grave exceptional terrorist threat' which triggered the making of the reserve power in the first place.

5. It must be noted that this Commission's position on a number of other provisions, some of which are in the Bill and some of which are absent, has been arrived at because of Government's

ongoing attempts to extend the period of pre-charge detention beyond the already considerably lengthy 28 days. The Commission, of course, acknowledges the fundamental duty of the state to protect those within its territory from the threat of terrorism. That being the case, the Commission has tried to engage in a constructive manner in the debate and, in line with its statutory duty, has put forward feasible alternatives to the extension. For example, the Commission supports the introduction of post-charge questioning as an alternative to extending pre-charge detention. In addition, the Commission has consistently argued that relaxing the ban on the admissibility of intercept evidence in court would be an extremely effective way of ensuring that the police have the means to bring charges more speedily against detained persons. Government has thus far not responded positively to these recommendations or has provided insufficient reasons for failing to do so.

Post-charge questioning (Clauses 34-39)

Clauses 34 to 39 of the Bill introduce new provisions for post charge questioning in relation to certain terrorist related offences.

6. Despite the advice of this Commission, Government has insisted on introducing post-charge questioning *in addition to* the 42-day pre-charge detention provision. Moreover, it would appear that Government has introduced post-charge questioning in a way in which it fails to be a feasible alternative to unacceptably lengthy periods of pre-charge detention. By limiting post-charge questioning to the offence for which the person has been charged, it is unlikely that the mechanism could be used to bring charges for a lower level offence, in the first instance, in order to bring more appropriate related charges at a later stage. The Commission has asserted that, given the gravity of the offence that persons would be linked with in order for the police to justify holding persons without charge, it should be possible to charge with a lower level offence in the first instance and for police to then question post-charge in order to bring the more appropriate related charge. At least once charged, the individual would be under some of the necessary procedural protections required by Article 5 ECHR. In the Commission's view such a situation, provided that stringent safeguards were in statute, could be human rights compliant, unlike the legislative provision to hold persons without charge.

7. The Commission is of the view that Articles 5 and 6 ECHR require additional provisions when persons are being questioned post-charge. The Commission notes clause 36(3) of the Bill, under which:

   - Post-charge questions must be authorised by an officer of at least the rank of superintendent for the first 24 hours.
   - After 24 hours, post-charge questions can be authorised for a maximum of five days by a justice of the peace.
   - Questioning beyond five days requires further authorisation by a justice of the peace.

8. However, the Commission has previously advised that authorisation should always be made by a member of the judiciary and not by a superintendent, as proposed for the first 24 hours. Further, the Commission notes that applications for authorisation beyond 24 hours are made to a justice of the peace and not to a magistrates' court. In Northern Ireland, many of the functions of justices of the peace have been transferred to lay magistrates meaning that the former have only residual responsibilities, such as the swearing in of constables under the Civil Aviation Act 1982 and the issuing of certificates relating to the destruction of meat and fish.[5] The Commission also wishes to draw attention to the fact that the issuing of warrants for further pre-charge detention is a function exercisable *only* by a resident magistrate.[6] Similarly, in Northern Ireland, a warrant for extended pre-charge detention under the Terrorism Act 2000 is issued only by a county court judge or a resident magistrate.[7] The decision to permit post-charge questioning requires at least the same level of oversight and scrutiny as with pre-charge detention and, therefore, authorisation should come from a resident magistrate and not from a justice of the peace.

9. In addition, the amendments allow post-charge questioning to be permitted after the commencement of trial. Even with judicial authorisation, the Commission considers that it is wrong to continue to question a person about an offence once the trial for that offence has commenced.

10. While the Commission notes that clause 36(3) has been inserted in the Bill by way of introducing safeguards, it also notes that they still do not go far enough. In particular, it is disappointing that the very specific amendments proposed by the JCHR,

[5] Paragraph 1(2) of Schedule 4 of the Justice (NI) Act 2002.
[6] Paragraph 3(2)(c) of Schedule 4 of the Justice (NI) Act 2002.
[7] Paragraph 29(4)(c) of Schedule 8 of the Terrorism Act 2000.

including judicial authorisation from the outset, the restriction on post-charge questioning to new evidence that could not reasonably have been discovered beforehand, and the provision for judicial oversight of interview transcripts, have not been included in the Bill.[8]

11. Indeed, restricting post-charge questions to new evidence would ensure that it is used appropriately by the police and not to subject the suspect to unnecessary questioning which might amount to 'badgering'.

12. The Commission welcomes the fact that the Bill now states that codes of practice under the Police and Criminal Evidence (NI) Order 1998 (PACE) *must* (rather than *may*) make provision about the questioning of a person by a constable at the post-charge stage. Nevertheless, the Commission restates its view that the right of access to legal advice should be contained in primary legislation as well as in the PACE Codes. This is essential to ensure the full protection of law in relation to this fundamental fair trial right. It is also in keeping with current safeguards for pre-charge detention as the right of access to legal representation is contained in Article 59 PACE and Paragraph 7 to Schedule 8 of the Terrorism Act 2000. Therefore, the Commission asserts that the right of access to legal advice for post-charge questions should be contained within the Counter Terrorism Bill.

13. While the Commission would prefer that the drawing of adverse inferences from silence is not permitted at the post-charge stage, if such provision exists it must be accompanied by appropriate safeguards. This should include the right of access to legal advice, as enshrined in the primary legislation, and a prohibition on the drawing of adverse inferences where the defendant has not been given the opportunity to consult with a solicitor. As recommended by others, there should also be guidance setting out how the judge should direct the jury where an adverse inference may be drawn.[9] The direction to the jury should reflect the fact that, for an individual having been informed that she or he is being

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[8] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*, Twentieth Report of Session 2007-08, TSO, 2008.

[9] As recommended by the JCHR and also by Professor Clive Walker in evidence to that Committee in Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, Nineteenth Report of Session 2006-07, TSO, 2007, para 171; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter Terrorism Bill*, Ninth Report of Session 2007-08, TSO, 2008, para 35.

prosecuted for a terrorist offence, post-charge represents a particularly stressful stage for the defendant.

Transfer of linked defendants (Clause 40)

14. The Commission wishes to highlight the implications of transferring defendants from Northern Ireland to stand trial in another jurisdiction, who we believe are disadvantaged by jurisdictional geography on a number of levels which would affect family life. The Commission's concerns are heightened by the lack of detail in the Bill on how the transfer provision would work in practice. For example, if a person from Northern Ireland is suspected of even minor involvement in a major terrorist related offence that occurs in another jurisdiction, will they be questioned and charged in Northern Ireland or will they be immediately transferred to the other jurisdiction? If charged and bailed in another jurisdiction, are they free to return home to their family? How will this process be affected by the possibility of post-charge questioning? How will continuity of access to the individual's lawyer of choice be guaranteed while the defendant is potentially being moved from one jurisdiction to another?

15. Finally, as this clause provides for linked offences to be tried in one court, once convicted of a terrorist related offence in a jurisdiction in which the defendant has not lived, is the defendant then imprisoned in this jurisdiction or returned to Northern Ireland to carry out sentence? There are obvious implications of being imprisoned in England and being able to keep in regular contact with one's family in Northern Ireland

16. Pending the answers to the above questions, a situation may arise where the Secretary of State has declared the need for the 42-day reserve power. An individual from Northern Ireland could be identified as suspected of committing a minor terrorist related offence linked to a more serious terrorist offence in London. At which point the suspect would be transferred for questioning to London (senior jurisdiction), where they could be held for up to 42 days pre-charge before being charged with the minor offence, without bail. The defendant could then be held on remand until the trial takes place and, as part of a larger investigation, is likely to be subjected to post-charge questioning. This situation has the potential to become highly pressurised for a defendant who finds himself/herself charged with a minor offence but embroiled in a much larger case for which they may have only a tentative connection, e.g. 'failure to

provide customer information in connection with a terrorist investigation'. In addition, as the defendant is to be tried in court as part of a larger case, it will presumably take longer for the investigation to be completed and for the case to come before the court than it would if the defendant were to be treated as a single case.

17. As a result of the limited knowledge provided on how transfer provisions for linked offences will operate in reality, the Commission has to surmise on the potential affects of clause 40 on the human rights of the suspect/defendant in the scenario outlined above. In this instance, the Commission would highlight the considerable amount of time that could be spent in custody in another jurisdiction and the negative impact this would have on the right to family life, Article 8 ECHR.

18. The Commission cannot at present comprehend how Article 6 ECHR which details the right to a fair trial would be strengthened by clause 40 but can envisage a potential adverse impact. For example, a defendant charged with a minor offence might be unduly prejudiced by inclusion in a larger terrorism case with which they may only have a tentative link or indeed have been unknowingly involved in.

19. The Commission also draws attention to the powers of the Secretary of State under clause 40(2-3), to amend the list of offences for the 'purpose of dealing with terrorism' by the affirmative resolution procedure. This arrangement leaves open the possibility of future interpretations by the Secretary of State of what might constitute an additional offence. Such an arrangement seems susceptible to 'knee-jerk' reactions from Government following a terrorist incident. The affirmative resolution procedure is generally used for a collection of measures rather than, for example, a single offence to be added to the Bill in the future, which is problematic because amendments require to be treated as one package. Considering the severe consequences of being charged with a minor offence, the Commission believes this area of the clause should be clarified and safeguarded against potential abuse. The Commission therefore asserts that the list of offences needs to be included in primary legislation.

20. Peers may be aware that under the Justice and Security (Northern Ireland) Act 2007, the Public Prosecution Service has the power to make a certificate for a non-jury trial for some cases under certain circumstances. The Commission was initially concerned that, given the original wording of clause 40

of the Bill, there could arise a situation in which persons charged with terrorist related offences were transferred to Northern Ireland for non-jury trials. These concerns were later shared in the Public Bill Committee. Subsequent amendments, as the Bill now reads would not allow persons to be subjected to a trial without a jury unless there was a connection with terrorism specific to Northern Ireland. The Commission acknowledges the significance of the concerns of the Public Bill Committee with the possible transfer of defendants to Northern Ireland from another jurisdiction to be tried without a jury. Indeed, the subsequent amendment made by the Secretary of State suggests the belief that the rest of the UK should not be subjected to juryless trial. Therefore, while it would appear that defendants in Great Britain need to be protected from this possibility, the same protection would not be necessarily afforded to citizens in Northern Ireland.

Notification requirements (Part 4, Clauses 51-68)

Clauses 51 to 68 of Part 4 of the Bill introduce notification requirements for persons convicted of certain terrorist related offences where they receive a 'trigger' sentence. Schedule 5 introduces notification orders for 'corresponding foreign offences' and Schedule 6 provides for 'foreign travel restriction orders' applicable in certain circumstances to persons subject to notification requirements.

21. The Commission accepts that there are circumstances where, for public protection and safety, persons convicted of serious terrorist offences may be required to notify their details to the police. However, the Commission is of the view that any notification requirement should be based on an assessment of need at an appropriate time prior to release from prison and not as an automatic trigger at the sentencing stage. A notification regime based on an assessment of necessity and risk is an effective and appropriate use of police resources and is more in keeping with the purpose of notification, which is to act as a monitoring tool rather than a punitive measure. Further, the Commission notes that the wide definition of 'terrorism' means that it is inappropriate to take a decision about notification based on the length of sentence at the sentencing stage.

22. The Commission would also point out that the proper role of the prison authorities includes promoting reintegration and preparing detainees for release. In particular, Rule 58 of the

1977 UN Standard Minimum Rules for the Treatment of Prisoners states that:

> The purpose and justification of a sentence of imprisonment is […] ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.[10]

This principle should apply equally to those convicted for terrorist related offences. The decision to apply notification at the sentencing stage suggests that the Prison Service is unable to discharge its rehabilitative function in terrorist related cases.

23. The Commission accepts that the Bill, as currently drafted, seeks to ensure that notification is applied only to the more serious terrorist related matters. The Bill attempts to do this by applying notification to persons convicted of terrorist related offences only if they receive a 'trigger' sentence. However, the Commission is concerned that this is not a failsafe way to gauge the gravity of a terrorist related offence and that it precludes a proper individual assessment of the risks posed by the person on release. For example, in a case involving a young person, the 'trigger' sentence will be one year or more in a juvenile justice centre or young offenders' centre. It is possible to envisage a young person aged 15 with a history of non-terrorist related convictions having served one or more custodial sentences. While not wishing to detract from the serious nature of terrorist related offences, it is possible that if this young person is convicted of 'encouraging terrorism', she/he may receive a custodial term of one year (or more) not due only to the terrorist nature of the offence but also because of their criminal record. Despite this, on release the young person is subject to notification for 10 years without any assessment of risk and without any opportunity in the intervening period to appeal, review or discharge the notification requirements.

24. In any event, the Commission is of the view that notification for children is not in keeping with the ethos and principles of reintegration contained in the UN Convention on the Rights of the Child (CRC). The Commission notes paragraph 15 of the Committee's General Comment Number 10, which states:

[10] See also the 'Basic Principles' of the 2006 European Prison Rules, Rule 6 "All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty" (Council of Europe Committee of Ministers, Recommendation Rec, 2006, 2).

> The Committee reminds States Parties that, pursuant to article 40(1) CRC, reintegration requires that no actions may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation ....[11]

The Commission considers that the proposals for notification in the Bill are potentially harmful and contrary to the well-being and bests interests of the child.

25. In terms of ensuring the procedural rights of all persons throughout the notification period, the Commission would urge that there is a mechanism within the Bill which would permit applications for appeal, review and discharge of the notification requirements. This is important to ensure that there is a process for challenge and/or to permit any relevant change in circumstances to be taken into account. The right to appeal, review and/or discharge should be available on specified grounds throughout the entire period of notification. The Commission notes that there is provision for appeal in relation to notification for 'corresponding foreign offences' but that there are no appeal rights in relation to 'ordinary' notification orders.

26. In terms of the practical operation of the notification regime, the Commission would still question what would happen in cases where the person subject to notification wishes to travel long-term or to live permanently outside the UK, whether due to family, education, work or other commitments. For instance, would they have to return to the UK for periodic re-notification?

27. The Commission agrees that in certain defined circumstances it may be appropriate to restrict foreign travel by persons convicted of serious terrorist related offences, if they have been assessed as posing a risk to the safety of the public. However, the provisions for foreign travel restriction are insufficiently clear. Any decision to restrict foreign travel must be made on a proper contemporaneous evaluation of the risks posed by the person subject to notification and, of course, must not in any way breach Article 12 of the International Covenant on Civil and Political Rights (liberty of movement).

28. In relation to 'corresponding foreign offences', the Commission does not accept that concerns about convictions obtained through torture can be addressed upon challenge by the person

[11] Committee on the Rights of the Child, *General Comment No. 10:Children's Rights in Juvenile Justice*, 2007, CRC/C/GC/10, para 15.

of the notification order.[12] The Commission is of the view that it is not viable, in terms of protection of rights, to adopt a 'wait and see' approach as to whether a claim relating to torture is raised by the person against whom the notification order is made. It is not reasonable to expect a person, who may be unfamiliar with the rules and procedures of UK courts, to serve a notice challenging the notification order as required under the provisions of the Bill or, in the alternative, to raise her/his concerns by way of judicial review. It must be for the Government to take every possible step to reassure itself that a conviction for a 'corresponding foreign offence' was not obtained through torture before a notification order is served, as well as giving the individual concerned the right to challenge the order.

29. In addition, the Commission is concerned that the definition of 'terrorism' in the UK may permit notification for a 'corresponding foreign offence', where the conduct in question is not terrorism but instead constitutes legitimate opposition to an oppressive regime.

30. Finally, in relation to notification, the Commission restates its view that the notification regime as drafted is onerous, having the potential to impact negatively on the enjoyment of private and family life under Article 8 ECHR. In this respect, the Commission would urge that the practical effect of notification represents a legitimate and proportionate restriction on the exercise of Article 8 rights. In order for notification to constitute a legitimate and proportionate restriction on the enjoyment of private and family life, the Commission again makes the point that notification should be based on an assessment of need tied to the risks posed by the individual.

Inquests (Part 6, Clauses 77-81)

Part 6 of the Bill proposes a number of alterations to the system of inquests in the UK.

31. Part 6 of the Bill relating to inquests has serious implications for the UK's obligations under Article 2 ECHR and the positive duty to conduct an effective investigation where an individual has been killed as a result of the use of force, in particular where such use of force is by state agents.

[12] As discussed during the 11th Sitting of the House of Commons Committee Reading on Tuesday 13 May 2008.

32. The purpose of an inquest was described in *Jordan* by Lord Bingham of Cornhill in the House of Lords, in 2007, as follows

> *Thus I take it to be common ground that the purpose of an inquest is to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances, or where the deceased was in the custody of the state, with the help of a jury in some of the most serious classes of case.*[13]

33. The criteria for an Article 2 compliant investigation/inquest were clearly set out by the European Court of Human Rights in *Jordan v UK.*[14] They require that:

- the inquiry must be on the initiative of the state
- it must be independent
- it must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death
- it must be prompt and proceed with reasonable expedition
- it must be open to public scrutiny to a degree sufficient to ensure accountability, and
- the next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.

34. These criteria have been adopted and applied by the House of Lords in the case of *ex parte Amin.*[15] In that case, the House of Lords made clear that these criteria must be applied in all cases where the right to life was engaged, including cases where a death was alleged to have resulted from negligence on the part of agents of the state, as well as cases where a death had resulted from the use of force.

35. In June 2007, the Committee of Ministers of the Council of Europe examined again the degree to which the UK had complied with the judgment against it in relation to a number of inquest cases from Northern Ireland decided in 2001.[16] The Committee stated that, with regard to individual measures required to be taken by the state party to comply with the

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[13] *Jordan (AP) (Appellant) v Lord Chancellor and Another (Respondents)* (NI), *McCaughey (AP) (Appellant) v the Chief Constable of the PSNI (Respondent)* (NI) 2007 UKHL 14 at para 37.
[14] [2003] 37 EHRR 70 at paras 105-109.
[15] *Regina v Secretary of State for the Home Department (Respondent) ex parte Amin (FC*) [2003] UKHL 51.

judgment: *"Progress has been limited and in none of the cases in question an effective investigation has been completed"*.

36. The Committee of Ministers invited the UK to keep it regularly informed of progress and urged the UK to take, without delay: *"all necessary investigative steps in these cases in order to achieve concrete and visible progress"*.

37. In addition, in 2003, the Government-appointed 'Luce Review' completed a fundamental review of death certification in England, Wales and Northern Ireland.

38. Despite the Strasbourg jurisprudence, the recent concerns of the Committee of Ministers outlined above, and the Luce Review recommendations, Government is insisting on introducing measures that will merely serve to exacerbate the existing problems identified in the coronial system as regards compliance with Article 2 ECHR. Indeed, should the powers in Part 6 of the Bill be applied to 'the legacy' of conflict related inquests, which are finally expected to be heard in the near future in Northern Ireland, the Commission is of the view that the likelihood of an Article 2 compliant inquest would decrease significantly. Any such move would render it more difficult for the UK to comply with the outstanding judgments against it.

What the Bill proposes

39. The thrust of the Bill is that under an extremely broad range of circumstances (discussed in more detail below), the Secretary of State for the Department implicated in the death to be subject to the inquest is empowered to issue a certificate for an inquest to be held with a specially appointed coroner (England and Wales) and without a jury (England, Wales and Northern Ireland).

40. The Commission understands that the circumstances which the Government is seeking to address in these provisions are unusual and rare. However, the provisions proposed could apply across the full range of deaths which come before the coroner; for example, deaths in hospital or prison, as the result of a fatal accident involving public transport as well as inquiries arising from the use of force by state agents.

41. Under the Bill, a certificate may be issued on grounds of national security. However, provision already exists for coroners/the Government to act to protect the content of

sensitive material in the interests of national security. Under Rule 5 of the *Coroners (Practice and Procedure) Rules (Northern Ireland) 1963* the coroner may direct that the public be excluded from an inquest or any part of an inquest, if he considers it would be in the interest of national security to do so (the equivalent rule for England and Wales is Rule 17 of the *Coroners Rules 1984*).

42. In addition, as can be seen from Annex 1 to this briefing, the Government has a well-developed system for recourse to PII certificates in inquest proceedings.

43. However, the grounds upon which the certificate can be issued go well beyond protecting national security. Clause 77 (England and Wales) and clause 78 (Northern Ireland) would allow the Secretary of State to issue a certificate on two additional grounds. First, if to do otherwise would not be "in the interests of the relationship between the United Kingdom and another country" (Section 8A(1)(b)); and, second, if to do otherwise would not be in the public interest (section 8A(1)(c)). The Commission opposes both of these grounds.

44. Following the recent decision of the Divisional Court in the *BAE systems* case,[17] decision-making by the Government in matters relating to the administration of justice is clearly not permissible on the basis of the interests of the relationship between the UK and another country. As Lord Justice Moses stated in the judgment:

> "*No-one, whether within this country or outside is entitled to interfere with the course of our justice. It is the failure of Government and the defendant to bear that essential principle in mind that justifies the intervention of this court.*"[18]

45. The case has been certified for appeal to the House of Lords on behalf of the Serious Fraud Office but remains good law at present. The Commission, therefore, opposes the inclusion of such a ground in the Bill. In addition, the Commission cannot support the notion that the Government would prefer the protection of its relationship with another country over discharging its obligations under Article 2 ECHR.

46. The 'otherwise in the public interest' ground is excessively broad and leaves a huge and virtually unchallengeable amount of

[17] *Corner House Research and Campaign Against Arms Trade v Director of the Serious Fraud Office*, Divisional Court, 10 April 2008, [2008] EWHC 714 (Admin).
[18] As above, No 4, para 171.

discretion to the Government minister who would have responsibility for the conduct of the state agency that would be potentially implicated in the circumstances of the controversial death.

47. As the Bill stands, the Government alone is the decision maker in determining whether to convert the public inquest into a secret one without a jury. While the Secretary of State's decision to do so would be subject to judicial review, the breadth of the grounds is such that any review would be very unlikely to succeed.

48. In addition, the full impact of the certificate under clause 77 (England and Wales) and clause 78 (Northern Ireland) in the Bill is unclear. The clauses make it clear that on the issue of the certificate by the Secretary of State with an interest in the subject matter of the inquest, either the inquest will proceed without a jury or any existing jury will be discharged. The Commission would ask what this could mean for the attendance at the inquest of the next-of-kin and of the lawyer of choice.

49. The European Court of Human Rights has made it clear that an Article 2 compliant inquest must involve the next of kin. Indeed, the weight placed by the Court on the role of the next-of-kin is significant and has been described thus: *"The Court views the protection of the legitimate interests of the next of kin as a driving aspect to the workings of all accountability mechanisms".*[19]

50. The Commission has serious concerns that the inevitable outcome of exclusion of the jury will be the exclusion of the next-of-kin and, potentially, also the lawyer of choice who could be replaced by some form of special advocate. In such a situation, there is unlikely to be disclosure of any significant material to the next-of-kin.

51. The Commission considers the exclusion of the next-of-kin, while not explicit, to be a highly likely outcome of these clauses, and a potential breach of Article 2 ECHR as interpreted by the European Court of Human Rights.

52. It is also interesting that the Northern Ireland Court Service is currently consulting on widening the jury pool for Northern

[19] See: Ni Aolain F, 'Truth–telling, Accountability and the Right to Life in Northern Ireland' in *European Human Rights Law Review*, [220] 572, p 584. This refers to a series of cases from Northern Ireland which had been heard before the European Court of Human Rights.

Ireland. The consultation proposes that the pool of people eligible for jury service should be widened "in order that juries can be more truly representative of society, thereby improving confidence in the justice system as a whole".[20]

53. The proposals in Part 6 of the Bill run counter to the Government's stated aims for juries and propose a power to remove a jury from the inquest- the very forum which, when dealing with controversial deaths involving the state, demands the greatest degree of transparency and public accountability.

Intercept evidence

54. The admissibility of intercept evidence in inquests provided for in clause 81 is premature. The Commission foresees unwanted and unhelpful situations arising as a result of the relaxation of the ban on the admissibility of such evidence in inquests, but not in other proceedings which may arise from the same set of circumstances.

55. The Commission is in favour of a general relaxation of the ban on admissibility of intercept evidence, as recommended by the 'Chilcot Review',[21] and accepted in principle by the Government. These recommendations are currently being progressed by the Chilcot Implementation Group and it would be ill-timed for a 'piecemeal' introduction of intercept evidence into inquests. However, the Commission takes this opportunity to urge Peers to press Government to bring forward the relaxation as a matter of urgency and as a feasible alternative to extending any further pre-charge detention.

56. The Bill, at present, proposes the extension of Part 6 to Northern Ireland with the exception of clause 79-Specially Appointed Coroners. No specific rationale has been given by Government for this but there is speculation that it is because, in Northern Ireland, all Coroners are currently appointed by the Lord Chancellor and must be Solicitors or Barristers of at least five years standing.

57. Nonetheless, the clauses which will extend to Northern Ireland, a society which is emerging from conflict and grappling with complex and emotive issues around dealing with the past, do

[20] Letter from Northern Ireland Court Service to NIHRC, 29 May 2008, with consultation document entitled *Widening the Jury Pool.*
[21] *Privy Council Review of intercept as evidence: Report to the Prime Minister and the Home Secretary,* Cm 7324, 4 February 2008.

bring with them a potential adverse impact on efforts to address that legacy. For the Government, perceived by many as a party to the conflict, to introduce these provisions in Northern Ireland at this time will be seen as very bad faith and potentially very damaging in terms of the many efforts to deal with the past.

58. At the very time when many of the long awaited conflict related "legacy" inquests are due to be progressed following lengthy legal challenges as to their remit and purpose, the Government will be seen to be reserving the right to hold in secret such inquests, which will examine to some degree the role of its agents in both the police and the military.

59. The Government has cited the unacceptable delay for the family in one particular case as the reason why these unprecedented proposals have been fast tracked into the Counter Terrorism Bill. For at least 31 families in Northern Ireland who continue to await the holding of an Article 2 compliant inquest into their family member's death, in some cases decades after the incident in question the sincerity of the Government's concerns regarding unacceptable delay may be in doubt.

60. For the reasons outlined above the Commission urges Peers to oppose the inclusion of Part 6 in the Bill.

Control Orders (Clauses 85-88)

61. The Commission has been opposed to the system of control orders since their creation in the *Prevention of Terrorism Act 2005* and is extremely disappointed that the Bill, if passed in its current form, would not address any of the long-standing human rights concerns with that system. The Commission has previously stated that the system has implications for a raft of individuals' rights under the ECHR, which include Article 3 (the right to be free from torture or cruel or degrading treatment or punishment), Article 5 (liberty and security of person), Article 6 (right to fair trial), Article 8 (right to privacy), Article 9 (freedom of religion), Article 10 (freedom of expression) and Article 11 (right to peaceful assembly).

62. While the domestic jurisprudence in relation to Control Orders, including the House of Lords judgment of October 2007 involving a number of men subject to Control Orders, has not concluded the incompatibility of the system with Government's

human rights obligations, it has identified fundamental problems with it.[22] The Bill, as it stands, fails to address these and in particular the individual rights under Article 6 ECHR.

63. The Commission understands that some of these cases will go to the European Court of Human Rights, where a very different judgment may be reached. In the meantime, the Commission maintains its position and hopes that relevant sections of the *Prevention of Terrorism Act 2005* will be repealed. For the purposes of this Bill, the Commission hopes that Peers will not support the inclusion of clause 85 which strengthens the entry and search powers available to police officers at the expense of the Article 8 rights of controlled persons.

Conclusion

64. In conclusion, the Commission continues to see the Bill as unsatisfactory in terms of meeting the UK's human rights commitments and protecting the UK from terrorist activity. It hopes that Peers will share these concerns as the Bill progresses further through the Parliamentary process.

65. Please direct any further queries, without hesitation, to: Head of Investigations, Policy and Research, Nazia Latif.

July 2008

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[22] *Secretary of State for the Home Department v JJ* [2007] UKHL45; *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v E* [2007] UKHL47 (31 October 2007).

Annex 1

Extract re individual measures from:
Action of the Security Forces in Northern Ireland
(Case of McKerr against the United Kingdom and five similar cases)

Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III
(Adopted by the Committee of Ministers on 6 June 2007, at the 997th meeting of the Ministers' Deputies) Additional information provided by the Government of the United Kingdom to the Committee of Ministers since the first Interim Resolution in these cases (Res/DH(2005)20) on general measures taken so far or envisaged to comply with the European Court's judgments

–The public interest immunity certificate in McKerr had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case
UK Government reply:

Public interest immunity issues at inquests are dealt with in the same manner as in litigation, but modified to take account of the coroner's inquisitorial role. If the coroner identifies documents which contain material the disclosure of which would cause real damage to the public interest, for example the identity of an informant, revelation of whose role would put his or her life at risk (thereby engaging Article 2 of the Convention), then it will be for the relevant Minister (or the Chief Constable) to decide whether a claim for public interest immunity should be asserted.

The Minister (or Chief Constable) will conduct a balancing exercise between the damage to the public interest if the material was disclosed and the public interest in disclosure. If he considers the balance falls in favour of disclosure he will not assert a claim for public interest immunity and the material will be disclosed. If he considers the balance falls against disclosure he will assert a claim for public interest immunity. Whether the claim for public interest immunity is asserted by a Minister or by the Chief Constable will depend on the nature of the information which is to be protected and whether a certificate is required. At present in Northern Ireland all public interest immunity certificates are signed by Ministers.

If the Minister (or Chief Constable) decides to assert a claim for public interest immunity, the coroner will in turn conduct a similar balancing exercise. He may examine the documents in order to

carry out that exercise. The coroner will then make his own decision as to where the balance of the public interest falls. That decision may be that may be that the balance falls in favour of disclosure or against. The coroner is not bound by the Minister's (or Chief Constable's) decision to assert a claim for public interest immunity. If the coroner decides the balance falls in favour of disclosure the document will be disclosed unless the Minister (or Chief Constable) successfully applies for judicial review. A decision by the coroner in agreement with the Minister's (or Chief Constable's) public interest immunity claim could also be challenged by judicial review.

Therefore, a judicial authority makes the ultimate decision about whether material should be disclosed or not, taking into account potentially competing Convention rights and the circumstances of the individual case.

The coroner's decision to allow or disallow a public interest immunity claim may be challenged by judicial review