



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

CORONERS AND JUSTICE BILL

Briefing for Committee Stage House of Commons February 2009

Background

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 rights³ 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. The Commission has a long standing interest in Coroners inquests in Northern Ireland, in particular those relating to the past. The Commission is currently assisting a family in relation to one of the outstanding inquests arising from the

¹ Northern Ireland Act 1998, s.69 (1).

² *Ibid*, s.69(3).

³ *Ibid*, s.69(4).

⁴ *Ibid*, s.69(6).

actions of security forces in Northern Ireland.⁵ This is one of the cases which were considered by the European Court of Human Rights in its seminal judgement of 2001 on Article 2. Final compliance with these judgments continues to be monitored by the Committee of Ministers of the Council of Europe.⁶

3. The Coroners and Justice Bill was introduced on 14 January 2009 and contains very similar provisions for "secret inquests" to those removed from the Counter-Terrorism Bill. There has been no consultation on the proposals either in advance of the Counter-Terrorism Bill or before their reintroduction in the current Bill.⁷
4. The Commission is extremely disappointed that these provisions have been replicated and indeed extended in this Bill, despite the very serious human rights concerns raised by this Commission, the House of Commons Justice Committee⁸, the Joint Committee on Human Rights⁹, the House of Lords Select Committee on the Constitution¹⁰ and numerous other organisations during the passage of the Counter Terrorism Bill. The provisions were also subject to serious cross party opposition by a wide range of MPs and Peers during the debates on the Counter-Terrorism Bill. Indeed, the JCHR commented that the similar provisions in the Counter-Terrorism Bill were:

⁵ In respect of the inquest into the death of Pearse Jordan in 1992 - at the latest preliminary hearing in respect of this inquest on 22 January 2009 the Coroner stated that the inquest could not start before June 2009 at the earliest. See: <http://www.belfasttelegraph.co.uk/news/local-national/inquest-into-killing-of-ira-man-delayed-again-14152437.html>

⁶ See below at paras 47-49.

⁷ House of Commons Justice Committee Report on the Coroners and Justice Bill, 20 January 2009, HC 185, para 14 which states: *"..we are not aware of any consultation on these provisions having taken place in the intervening period despite reservations having been expressed by the two most relevant committees of the House."*

⁸ House of Commons Justice Committee Report on the Counter-Terrorism Bill, HC 405, para 5, where the Committee stated with regard to the proposals that: *"it is not clear that they sufficiently guarantee independence of investigation and involvement of victims' families"*.

⁹ Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 8th Report: Counter-Terrorism Bill*, 7 February 2008, HC 199, see paras 4-8 and *Counter Terrorism Policy and Human Rights: 13th Report: Counter-Terrorism Bill*, 8 October 2008, paras 110-120.

¹⁰ HL Paper 167, House of Lords Select Committee on the Constitution, 10th report of Session 2007-2008: *"Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary"* pp 17-18.

“[A]stonishing provisions with the most serious implications for the UK’s ability to comply with the positive obligation in Article 2 ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents¹¹.”

5. The Justice Committee of the House of Commons stated on 20 January:

“These clauses, and the changes made to them since their first appearance in the Counter Terrorism Bill, will therefore merit close and careful scrutiny as the Coroners and Justice Bill passes through Parliament. The Government should be prepared to withdraw them once again if it cannot justify these provisions as proportionate and fully compatible with Article 2 of the ECHR.”¹²

6. The Commission sees clear potential for these proposals for certified inquests to breach Article 2 of the ECHR and would oppose their introduction on that basis.
7. In addition, particular issues arise in Northern Ireland relating to the legacy of the troubles and the need to find appropriate ways to deal with our past with over 3,600 deaths in a 30-year period, many of them in contested circumstances yet to be aired in the public domain. There are many genuine private and public attempts to address those issues underway in Northern Ireland today. The *Consultative Group on the Past* reported its proposals on 28 January 2009.¹³
8. The Commission has strongly advised Government over the past year to abandon the proposal to extend such “secret” inquests to Northern Ireland.¹⁴ The Commission is aware of the statement from the Northern Ireland Office Minister Paul Goggins, issued on 27 January 2009:

“The Secretary of State for Northern Ireland has indicated that he does not wish to use these provisions in respect of historic Northern Ireland cases. The MOJ and the NIO will

¹¹ *Op cit* no.9, 8th report, paras 4-8.

¹² House of Commons Justice Committee Report on the Coroners and Justice Bill, HC185, 20 January 2009 at para 14.

¹³ Report published on 28 January available at: <http://www.cgpni.org/>.

¹⁴ In relation to the similar proposals for “secret inquests” in Part 6 of the Counter-Terrorism Bill introduced into the House of Commons on 24 January 2008.

work together to sort out the practical arrangements required to implement this approach.”¹⁵

9. The Commission awaits the detail of Government’s intentions in this regard. The extension of any element of the certified “secret” inquests for historic cases in Northern Ireland would be viewed as very bad faith by the British Government and could seriously jeopardise progress on what is a very politically sensitive issue.
10. The Commission understands that the circumstances which the Government is seeking to address in these provisions are unusual and rare. Yet, it is likely that they will apply in the most controversial and contested of situations. The provisions proposed could apply across the full range of deaths which come before the coroner; for example, deaths in hospital, police custody, immigration detention centre 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.
11. The Government has made a number of changes to the proposals since their withdrawal from the Counter-Terrorism Bill and claims these are safeguards. The Commission considers these to be wholly insufficient. Indeed, it is a matter of great concern that not only has the Government failed to reduce the grounds upon which the Secretary of State can issue a certificate, but rather it has extended the grounds.
12. The Government’s main argument in presenting this Bill as to why existing protections for sensitive information are insufficient is that the state has the choice to withdraw from a criminal prosecution where a PIIC is refused but does not have the same choice in respect of holding an Article 2 compliant inquest. This argument was not raised by Government when introducing similar proposals under the Counter-Terrorism Bill.
13. During the second reading debate on the current Bill, Jack Straw MP, Secretary for State for Justice, drew attention to a “fundamental difference”. He stated:

¹⁵ Statement provided to BBC Radio Ulster’s Good Morning Ulster programme by the NIO, 27 January 2009.

“However, sometimes the PII is not granted. In that case, it is open to the prosecution to withdraw altogether—that sometimes happens. The prosecution therefore has an option to proceed without the PII or withdraw in the public interest... If the court was not willing to grant a PII, it would be improper for the state to abandon the inquest. That is why a proposal has been presented to introduce a special procedure to deal with the problem, which has become more significant in recent years because the courts have quite properly insisted that the inquests become article 2 compliant.”¹⁶

14. It is a matter of concern to the Commission that the main argument being proposed for the need for these provisions is linked to the Government’s ability to withdraw from proceedings. Where a request for a PIIC is turned down by a Coroner, the Government can, of course, challenge that decision by way of judicial review. Where the PIIC is not granted, it is because it has been deemed that the balance of the public interest does not require it.
15. The Secretary of State for Justice stated during the second reading debate that the Government is “*open to amendments*”.¹⁷
16. **The Commission therefore urges Members of the Bill Committee to:**
 - **oppose the inclusion of clause 11 in the Bill;**
 - **oppose the extension of any part of the Clause 11 provisions to Northern Ireland; and**
 - **support the extension of Clause 5(2)¹⁸ and Clause 30¹⁹ to Northern Ireland.**
17. As regards coroners, the only part of the Bill which is extended to Northern Ireland is by amendments to the Coroners Act (Northern Ireland) 1959 made by clause 38 and Schedule 9 – essentially certification of inquests.

¹⁶ Second Reading Debate on the Coroners and Justice Bill, 26 January 2009, Hansard at col 29.

¹⁷ *Ibid*, col 30.

¹⁸ Clause 5(2) provides that: “where necessary, in order to avoid a breach of any Convention rights... the purpose... is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.”

¹⁹ Clause 30 provides for rights of appeal in relation to coroners’ decisions

18. This briefing will concentrate on three aspects of the Bill:
- (i) the provisions for “secret inquests” and their extension to Northern Ireland (Clause 11 as extended to Northern Ireland in Clause 38 and Schedule 9);
 - (ii) the extent to which these proposals fail to comply with the requirements for inquests under Article 2 of the European Convention of Human Rights; and
 - (iii) the failure to extend to Northern Ireland some of the more positive aspects of Coroners reform provided for in the Bill.²⁰

(i) Clause 11- “Secret Inquests” Certification by the Secretary of State

19. Under clause 11, 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 – a High Court Judge nominated by the Lord Chief Justice (England and Wales) and without a jury (England, Wales and Northern Ireland). A specially appointed advocate will then represent the interests of the deceased’s family before the inquest and the family and their lawyer of choice will be excluded. The inquest may be certified under the following circumstances:
- (i) in order to protect the interests of national security (Clause 11(2)(a)(i));
 - (ii) in order to protect the interests of the relationship between the United Kingdom and another country (Clause 11(2)(a)(ii));
 - (iii) in order to protect the interests of preventing or detecting crime (Clause 11(2)(a)(iii));
 - (iv) in order to protect the safety of a witness or other person (Clause 11(2)(b));
 - (v) otherwise in order to prevent real harm to the public interest (Clause 11(2)(c)).
20. The Commission disagrees with the assertion of the Secretary of State for Justice that the Government has “*narrowed the criteria for certification*”.²¹ In our opinion, these criteria are

²⁰ For example, rights of appeal under Clause 30 and the Clause 5(2) requirement in relation to matters to be ascertained.

²¹ *Op cit* no 15 at col 30.

broader than those previously contained in Part 6 of the Counter-Terrorism Bill.

21. 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 a review would be unlikely to succeed.

National Security

22. Under the Bill, a certificate may be issued on grounds of national security. However, provision already exists for Coroners 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/she 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*). The Bill again makes provision for rules to be drawn up to exclude persons from an inquest on the grounds of national security in Clause 34(3) (a) which states:

“(3) Coroners rules may make provision conferring power on a senior coroner—
(a) to give a direction excluding specified persons from an inquest, or part of an inquest, if the coroner is of the opinion that the interests of national security so require;”²²

23. In addition, the Government has a well-developed system for recourse to Public Interest Immunity Certificates in inquest proceedings.²³ In both cases, it is right and appropriate that the decision to exclude information or persons from the inquest is made by an independent member of the judiciary rather than an elected member of the executive with responsibility for the very agency that is to be under scrutiny during the inquest.

²² This provision is in addition to the Clause 11 certification proposals- see the Explanatory Notes accompanying the Bill at para 288.

²³ See annex (1) below for the explanation provided by the UK Government to the Committee of Ministers of the Council of Europe in relation to the operation of PII Certificates in Inquests.

Relationship between the UK and another country

24. 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.

Otherwise to prevent real harm to the public interest

25. This ground is excessively broad and leaves a huge amount of 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.
26. This provision no longer reads “otherwise in the public interest” as in the Counter-Terrorism Bill but rather “otherwise in order *to prevent real harm* to the public interest.” (Clause 11(c) (emphasis added). The Commission does not consider that the test to be applied in relation to harm to the public interest and that of *real harm* to the public interest (emphasis added) is sufficiently different to provide a credible safeguard. The Commission further considers that the opportunities for challenging the belief of the Secretary of State in question as regards harm to the public interest by way of judicial review proceedings will be very limited given the breadth of this ground.

Two additional grounds

27. Clause 11 then adds two additional grounds on which the Secretary of State can issue a certificate, namely: preventing or detecting crime (Clause 11(2) (iii)) and in order to protect the safety of a witness or other person (Clause 11(b)).
28. No rationale has been provided as to the need to include these two additional grounds over and above those originally proposed in the Counter-Terrorism Bill. Indeed, the Explanatory Notes accompanying the Bill are silent²⁴ as regards the Government’s rationale for any of the five grounds upon which a certificate can be issued. Nor did the Secretary of State for Justice elaborate on the rationale for the grounds or their extension during the second reading debate.

²⁴ See paras 99-105 which deal with Clause 11.

Clause 11(1)(b) "safeguard"-no other adequate measures

29. The one potential improvement to the provisions in this Bill from those in the Counter-Terrorism Bill arise in Clause 11(1)(b), which qualifies the power of the Secretary of State to certify an investigation if in his opinion the investigation should not be made public on any of the 5 grounds set out in Clause 11(2). Clause 11(1)(b) adds the "requirement" that *"no other measures would be adequate to prevent the matter being made public"*.
30. In many respects, this "requirement" ought, in the view of the Commission, result in there being no need for recourse to such certificates as we are of the view that the well developed existing arrangements for Public Interest Immunity Certificates (together with the existing power of the Coroner to hold parts of an inquest *in camera*²⁵ in the interests of national security) ought to be sufficient to deal with highly sensitive matters. Again the difficulty is in mounting a successful challenge on this ground given that it is a matter for the opinion of the Secretary of State whether no other measures would be adequate to prevent the matter being made public.

Clause 11(5) "safeguard"-stay of 14 days before certificate takes effect

31. The Commission does not consider this apparent safeguard to be of any great value. The only effect is to stay the coming into force of the certificate for 14 days or, if judicial review proceedings are brought within that period, until the conclusion of the proceedings.

(ii) Failure to comply with the requirements of Article 2 of the European Convention on Human Rights regarding inquests

32. Clause 11 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

²⁵ Note the Bill replicates this power to exclude persons from an inquest on the grounds of national security in Clause 34(3)(a) which states: *"(3) Coroners rules may make provision conferring power on a senior coroner — (a) to give a direction excluding specified persons from an inquest, or part of an inquest, if the coroner is of the opinion that the interests of national security so require;"*

an individual has been killed as a result of the use of force, in particular where such use of force is by state agents.

33. 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”.*²⁶

34. The criteria for an Article 2 compliant investigation/inquest were clearly set out by the European Court of Human Rights in *Jordan v UK*.²⁷ 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.

35. These criteria have been adopted and applied by the House of Lords in the case of *ex parte Amen*.²⁸ 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.

36. Government is intent on introducing measures that will merely serve to exacerbate the existing problems identified in

²⁶ *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.

²⁷ [2003] 37 EHRR 70 at paras 105-109.

²⁸ *Regina v Secretary of State for the Home Department (Respondent) ex parte Amin (FC)* [2003] UKHL 51.

the coronial system as regards compliance with Article 2 ECHR. Indeed, should any part of the powers in Clause 11 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.

Next-of-kin

37. The clause states 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 Bill is not explicit with regard to all of the other consequences of certification however the Explanatory Notes state that:

"The effect of certification is three fold: the investigation will be conducted by a judge of the High Court nominated by the Lord Chief Justice²⁹; the inquest must be held or continued without a jury; and coroners rules will provide for the exclusion of persons from the inquest."³⁰

38. Clause 34(4) states that:

"Coroners rules may make provision requiring a person holding an inquest that has to be held without a jury because of section 11(6) to give a direction excluding persons, except those of a prescribed description, from all or part of the inquest."

39. 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".³¹

40. The Commission has serious concerns that the inevitable outcome of exclusion of the jury will be the exclusion of the

²⁹ This will not be the case in Northern Ireland.

³⁰ See: para 798.

³¹ 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.

next-of-kin. This is a potential breach of Article 2 ECHR as interpreted by the European Court of Human Rights. In addition, in such a situation, there is unlikely to be disclosure of any significant material to the next-of-kin.

Special Advocates

41. Again, while the Bill is not explicit on this point, the Explanatory Notes make it clear that Coroners Rules will provide for the exclusion of the lawyer of choice:

“In order to ensure that the interests of the next of kin are fully protected provision will be made in rules enabling the coroner to appoint independent counsel to the inquest.”³²

42. This means that not only will the family of the deceased be excluded but so too will their lawyer of choice. Such specially appointed counsel are, unable to discuss even the “gist” of the material to which they have access with the person they are supposed to be representing before the inquest.³³ Consequently, they are unable to take instructions from “their client” on the certified portion of the inquest. The Explanatory Notes state:

“Although counsel to the inquest would not be independent of the inquest, the Government considers that this is not vital since the Coroner (who will be a High Court Judge) will be independent...”

43. The exclusion of the lawyer of choice is a further potential interference with the requirements of an Article 2 compliant investigation in so far as without the lawyer of choice the next-of-kin are unlikely to be involved in the proceedings “to the extent necessary to safeguard his or her legitimate interests”.³⁴

44. Andrew Dismore, Chair of the Joint Committee on Human Rights, stated during the second reading debate:

“The system will not give the public confidence that lessons have been learned. Equally importantly, if not more so, it will

³² See para 804.

³³ See for example, Rule 36, Special Immigrations Appeals Commission (Procedure) Rules 2003: Special Advocate: Communications about Proceedings available at: <http://www.opsi.gov.uk/si/si2003/20031034.htm#35>.

³⁴ See *Jordan v the UK op cit.*, no 28.

not give closure to relatives if they and their lawyers of choice are excluded.”³⁵

Role of the jury and public scrutiny

45. The Northern Ireland Court Service recently consulted on widening the jury pool for Northern Ireland. The consultation proposed 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”.³⁶
46. The proposals in Clause 11 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.

The continuing failure of the UK to comply with outstanding judgments of the European Court of Human Rights:

47. The execution of the judgments against the UK concerning the right to life arising from security force action in Northern Ireland decided by the European Court of Human Rights in 2001³⁷ continue to be monitored by the Committee of Ministers of the Council of Europe. 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. The Committee stated that, with regard to individual measures required to be taken by the state party to comply with the judgment: *“Progress has been limited and in none of the cases in question an effective investigation has been completed”*.
48. 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”*.

³⁵ *Op cit*, no 16 at col 108.

³⁶ Letter from Northern Ireland Court Service to NIHRC, 29 May 2008, with consultation document entitled *Widening the Jury Pool*.

³⁷ Cases concerning the actions of the security forces in the United Kingdom: 28883/95 McKerr; 37715/97 :Shanaghan; 24746/94: Hugh Jordan; 30054/96: Kelly and others, judgment of the European Court of Human Rights 4 May 2001.

49. The latest consideration of the cases was in December 2008 when the Committee stated that it would continue to monitor the steps taken to ensure effective Article 2 compliant investigations were carried out with regard to these judgments. The Committee of Ministers will again consider the execution of these judgments at its meeting in March 2009 following the preparation of a draft interim resolution by the Secretariat. The Commission considers that the Clause 11 provision for "secret inquests" is likely to make it more difficult to comply with the judgements of the European Court of Human Rights which have yet to be fully implemented.

(iii) Failure to extend more positive aspects of coroners' reform to Northern Ireland

50. As regards Northern Ireland, the inquest provisions of the Bill present a case of the worst of both worlds. Clause 38 extends the "secret inquests" provisions of Clause 11 without the extension of a number of the positive provisions of the Bill.

51. The explanatory notes which accompany the Bill state that:

"The legislative changes proposed in the Bill are part of an overall package of reform aimed at addressing the weaknesses in the present coroner and death certifications systems."³⁸

52. Unfortunately this is not the case for Northern Ireland where the negative proposals in relation to inquests are not set within a package of general coroner reform. While there has been administrative reform of the coronial system in Northern Ireland in recent years³⁹ the governing legislation remains the Coroners Act (Northern Ireland) 1959 Act.

53. The two most glaring omissions with regard to extending positive provisions to Northern Ireland relate to:

- the failure to extend rights of appeal; and
- the failure to extend to Northern Ireland a broader definition of the purpose of an inquest (which was

³⁸ Explanatory Notes accompanying the Coroners and Justice Bill, published 14 January 2009 at para 17.

³⁹ Such administrative reform has included the establishment of a single Coroners district for Northern Ireland and the appointment of a high court judge as presiding judge together with the appointment of a senior coroner and two other coroners.

included in the Bill with the express purpose of avoiding a breach of the rights under the ECHR).

Rights of appeal

54. The *Coroners and Justice Bill* s.30 provides that an interested person can appeal to the Chief Coroner against a decision made by a senior coroner on a number of grounds. Thereafter, there is a right of appeal from a decision of the Chief Coroner to the Court of Appeal on a question of law.

55. During the second reading debate, the Secretary of State for Justice described rights of appeal thus:

“For the first time, bereaved families and other interested parties will have access to a dedicated appeals system and will not have to rely on seeking a judicial review of an inquest.”⁴⁰

56. Such rights of appeal are not extended to Northern Ireland where the only means of challenge will remain by way of judicial review.

Matters to be ascertained/findings or verdict

57. The *Coroners and Justice Bill* Clause 5(1) provides, *inter alia*, that the purpose of an investigation into a person’s death is to ascertain: who the deceased was; how, when and where the deceased came by his death. In addition, Clause 5(2) provides that:

“where necessary, in order to avoid a breach of any Convention rights... the purpose... is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.”

58. The Explanatory Notes accompanying the Bill state:

“The new provision makes the position expressly clear. The clauses therefore ensure that investigations into deaths under the Bill are compatible with the ECHR as determined by Middleton.”⁴¹

59. In recent years evolving case law has introduced the need for narrative verdicts so as to meet the requirements of Article 2

⁴⁰ *Op cit*, no.16 at col 29.

⁴¹ See: para 796.

compliant investigations for deaths in custody. Lord Bingham in *Middleton* described this as:

“...not simply ‘by what means’ but ‘by what means and in what circumstances’”⁴²

60. Clause 5(2) provides an important legislative statement of that case law requirement and ought to be extended to Northern Ireland.
61. In relation to verdicts, the Coroners Act (NI) 1959 requires only that a verdict states who the deceased person was and how, when and where he came to his death (s.31(1)).

Conclusion

62. The proposal for “secret” inquests in the current Bill is only the latest potential interference with Article 2 rights by the Government and should be opposed. The Commission earlier opposed the introduction of the Inquiries Act 2005 for its failure to meet the requirements for independence under Article 2.⁴³
63. In addition, the exclusion of the lawyer of choice from certified inquests follows the similar approach in relation to the Special Immigration Appeal Commission⁴⁴ and in proceedings challenging Control Orders under the Prevention of Terrorism Act 2005.⁴⁵ Thus, exceptional measures become the norm and are enacted in permanent rather than temporary emergency legislation as in the past (albeit such “temporary” provisions were repeatedly renewed over many years).

⁴² *R (Middleton) v West Somerset Coroner* [2004]2 WLR see paras 34 and 35

⁴³ See the NIHRC briefing on the Inquiries Bill, January 2005 at: <http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/65/147.doc>.

⁴⁴ See: Section 6(1) of the Special Immigration Appeals Commission Act 1997:

Appointment of person to represent the appellant's interests which states:

(1) The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.

⁴⁵ See: Prevention of Terrorism Act 2005: Schedule: Control Order Proceedings etc: S.7(1)Special representation in control order proceedings: “The relevant law officer may appoint a person to represent the interests of a relevant party to relevant proceedings in any of those proceedings from which that party and his legal representative (if he has one) are excluded.”

See also: s 7(5) which states: “A person appointed under this paragraph is not to be responsible to the person whose interests he is appointed to represent”.

64. The Government has cited the unacceptable delay for the family in one or two particular cases as the reason why these unprecedented proposals were fast tracked into the Counter-Terrorism Bill and then re introduced in the current Bill. For a number of 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.
65. **For the reasons outlined above, the Commission urges members of the Bill Committee to:**
- **oppose the inclusion of clause 11 in the Bill;**
 - **oppose the extension of any part of the Clause 11 provisions to Northern Ireland; and**
 - **support the extension of Clause 5(2) and Clause 30 to Northern Ireland.**

February 2009

**Northern Ireland Human Rights Commission
Temple Court, 39 North Street
Belfast
BT1 1NA
Northern Ireland
Telephone: (028) 9024 3987
Textphone: (028) 9024 9066
Fax: (028) 9024 7844
Email: information@nihrc.org
Website: www.nihrc.org**

Appendix I to Interim Resolution ResDH (2007)73 Cases concerning the actions of the security forces in the United Kingdom: 28883/95 McKerr; 37715/97: Shanaghan; 24746/94: Hugh Jordan; 30054/96: Kelly and others, judgment of the European Court of Human Rights, 4 May 2001

General measures

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 Government of the United Kingdom recalls at the outset the information already provided and summarised in the first Interim Resolution in these cases (ResDH(2005)20), adopted at the 914th (DH) meeting (February 2005). They have provided the following additional information with respect to general measures to comply with the European Court's judgments in the present cases. This information is described in more detail in the memorandum on these cases (CM/Inf/DH(2006)4 revised 2) and in the addendum to this memorandum (CM/Inf/DH(2006)4 Addendum revised 3), both of which are public. The information below is categorised similarly as the information reflected in these documents.

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

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 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.