Coroners and Justice Bill

Suggested amendments for Committee Stage
House of Commons

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Introduction and summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. JUSTICE has previously commented on many of the proposals in the Bill during their development in consultation papers and previous Bills and in our briefing on Second Reading. The Coroners and Justice Bill is a large 'portmanteu' Bill and contains extremely important changes to the law in several of its Parts. These amendments are intended to highlight our main concerns about the provisions in Part 1 of the Bill; where we have not commented upon a certain provision in the Bill here, that should not be taken as an endorsement of its contents.

3. In short, our concerns in relation to Part 1 centre upon:

   - **the provisions for secret inquests;**
   - **the restriction of public comment by inquest jurors and coroners on matters of legitimate public concern; and**
   - **the holding of inquests without juries in relation to some deaths involving public authorities.**

4. We are also concerned that families of the deceased should be given the right to representation at inquests unless they are determined to be able to pay for it, following fair and realistic means testing. We have further concerns that Coroner's Rules and guidance should be produced by a committee that is sufficiently independent of the Lord Chancellor. We will be putting forward suggested amendments in relation to these issues at later stages of the Bill.

Part 1: Coroners etc

Clause 5 – Matters to be ascertained; Schedule 4, paragraph 6

Amendments

Clause **5**, page **4**, leave out paragraph (3)

Schedule **4**, page **129**, line **28**, at end insert –

(2) The coroner making the report under paragraph (1) –

(a) must send a copy of the report to –

(i) the Lord Chancellor; and

(ii) the spouse or a near relative or personal representative of the deceased whose name and address are known to the coroner; and

(b) may send a copy of the report to any person who the coroner believes may find it useful or of interest.

(3) On receipt of a report under paragraph (2)(a)(i), the Lord Chancellor may –

(a) publish a copy of the report, or a summary of it, in such manner as the Lord Chancellor thinks fit; and

(b) send a copy of the report to any person who the Lord Chancellor believes may find it useful or of interest (other than a person who has been sent a copy of the report under paragraph (2)(b)).

Schedule **4**, page **129**, line **30**, at end insert –

containing

(a) details of any action that has been taken or which it is proposed will be taken whether in response to the report or otherwise; or

(b) an explanation as to why no action is proposed

within the period of 56 days beginning on the day on which the report is sent.

Briefing

4. Sub-clause 5(3) would prevent a senior coroner or an inquest jury from expressing *any opinion on any matter* other than the basic details of who the person was; how, when, and where he came by his death; any registrable particulars of the death; and for inquests engaging Article 2, in what circumstances he came by his death. This is subject to the power of the senior coroner under paragraph 6 of Schedule 4 to make a report to a person who may have power to take action to prevent further deaths from being caused. However, we are very concerned that sub-clause 5(3) will prevent the senior coroner and the jury from making any public comment – and indeed in the jury's case any comment whatever – upon the facts which have been put before them.

5. Inquests will often raise matters of cogent public interest: a neglect of consumer or workplace safety by a well-known company; a failure in a duty of care by a public authority; actions and errors leading to a person meeting their death in custody or while serving in the armed forces or while in contact with the police. Jury inquests in particular, if restricted to the circumstances outlined in clause 7 (regarding which, see below), will by their nature concern these issues. The 'muzzling' of the jury and coroner in these circumstances will often, we believe, be contrary to the public interest and may violate Article 10 ECHR. We therefore suggest here the removal of sub-clause 5(3) from the Bill.

6. Further, we are concerned that the provision for the coroner to make reports in order to avert the risk of future deaths under paragraph 6 of Schedule 4 is considerably less stringent than the corresponding requirements in the Coroners (Amendment) Rules 2008. In particular, there is no longer provision regarding publication of the report or response, or any time limit for a response or requirements as to what it must contain. The publication of rule 43 reports by coroners – the equivalent recommendations under the current Coroners Rules – has on previous occasions provided powerful ammunition to those pressing for change in public services; for example, in relation to deaths in custody. We therefore suggest amendments to reinsert powers of publication for reports and requirements as to the timing and contents of the response similar to those in the Coroners (Amendment) Rules 2008. The 2008 Amendment Rules also contain provision for the publication of responses, which we further recommend be considered.

Clause 7 – Whether jury required

Amendments

Clause **7**, page **4**, line **29**, at end insert –

" or

(d) that the death resulted from an act or omission of a public authority

Clause **7**, page **4**, line **37**, at end insert –

(5) For the purposes of subsection (2)(c) a person or body is a "public authority" if it would be considered as such under section 6 of the Human Rights Act 1998 (c. 42).

Briefing

7. As in a Crown Court criminal trial or a civil action against the police, an inquest jury is a powerful guarantee of independence, transparency and democratic input in the administration of justice. We believe that in addition to the circumstances set out in clause 7(2), an inquest should take place with a jury wherever the senior coroner has reason to suspect that the death resulted in whole or in part from the act or omission of a public authority or an entity which falls to be considered as a public authority for the purposes of the Human Rights Act 1998. We believe that this should be guaranteed in the legislation.

Clauses 11-13 – Secret inquests

Amendments

Clause **11**, page **6**, stand part

Clause **12**, page **7**, stand part

Clause **13**, page **7**, stand part

Briefing

8. Clause 11 allows the Secretary of State to certify an inquest to be held without a jury in order to prevent certain matters being made public. It is essentially the same as what was previously clause 77 of the Counter-Terrorism Bill, although clause 11 purports to offer some additional safeguards.[1]

9. As we noted when the provision was first brought forward in the Counter-Terrorism Bill, the effect of this clause is that in any case where the state is alleged to be responsible for a person's death – for example the killing of Jean Charles de Menezes by Metropolitan Police or the death of Baha Mousa at the hands of British soldiers in Basra – the Secretary of State will be free to appoint a coroner to sit in closed session without a jury so long as he or she is satisfied that it is in the public interest to do so because of the sensitive nature of the material that is likely to be considered. This would also be applicable to inquests into deaths of individuals outside of state custody but raising issues of the state's broader conduct, e.g. an inquest into the death of a soldier killed in Iraq or the inquest into the death of Dr. David Kelly.

10. Nor do we think any of the additional safeguards introduced since the Counter-Terrorism Bill make the proposed use of closed coronial proceedings any fairer or more transparent. For instance, the provision in clause 11(5) for staying proceedings pending judicial review of the decision to certify does no more than what would

[1] The main changes are, first, that the Secretary of State must not only be of the opinion that the investigation concerns 'a matter that should not be made public' but also that 'no other measures would be adequate to prevent the matter being made public' (clause 11(1)). Secondly, the grounds upon which an investigation may be certified have been clarified slightly, including 'preventing or detecting crime' and 'in order to protect the safety of a witness or other person' (Clause 11(2)(a)(iii) and (2)(b), but also narrowed to the extent that 'real harm' to the public interest is now required (clause 11(2)(c)). Thirdly, the investigation will be carried our by a High Court judge (clause 11(3)(a)).

undoubtedly be in the inherent power of the coroner in any event. The involvement of the Lord Chief Justice in selecting the judge (clauses 11(3)(a) and 11(7) does not ameliorate the unfairness caused by the exclusion of the jury, members of the public and the next-of-kin. Lastly, notwithstanding the proviso in clause 11(1)(b) that the Secretary of State may only certify a closed inquest if satisfied that 'other measures' for protecting sensitive material would be inadequate, there is no requirement on the Secretary of State that such certification be *necessary* to protect e.g. 'the safety of a witness' (clause 11(2)(b)).

11. We welcome the much-expanded explanatory notes setting out the government's view about the compatibility of these provisions with the right to life under Article 2 of the European Convention on Human Rights. Unfortunately the government's explanation for its view only serves to highlight the deficiencies of its legal analysis. In particular, the government claims that 'Article 2 does not … give the public and next-of-kin an absolute right to be present at all times or to see all the material relevant to the investigation':[2]

> *The Government considers that the courts are very likely to accept that it is consistent with Article 2 for sensitive material not to be made public or disclosed to the next-of-kin where this is required by a substantial public interest.*

12. However, the government appears to dramatically overestimate the extent to which the European Court of Human Rights (ECtHR) would allow the wholesale exclusion of the public and next-of-kin from coronial proceedings for the sake of some 'substantial public interest' in non-disclosure of sensitive material. In the case of *Rowe and Davis v United Kingdom*, for instance, the ECtHR observed in the context of criminal proceedings that 'the entitlement to disclosure of relevant evidence is not an absolute right'.[3] Nonetheless, the ECtHR in that case never suggested that it would be appropriate to exclude a jury altogether for the sake of safeguarding the public interest in non-disclosure.

13. Indeed, we note that juries regularly hear serious criminal cases which may behind the scenes involve some very difficult questions of disclosure of sensitive information, e.g. terrorism cases involving informants or surveillance evidence. If the exclusion of

[2] Explanatory notes, para 803.

a jury is not deemed to be a proportionate measure in such criminal proceedings, it is very difficult to see how it would be a proportionate measure in the context of an inquest investigating the death of an individual allegedly at the hands of the state. We remain of the view that the Secretary of State's resort to closed inquests sitting without a jury will almost certainly be incompatible with the obligation under Article 2 ECHR to provide an independent and effective investigation, one that properly safeguards the interests of the victim's family and the public at large.

14. Clause 13 would allow the disclosure of evidence in a secret inquest to a High Court judge sitting as the coroner and to counsel to the inquest. This is consistent with, for example, the provision in section 74 of the Counter-Terrorism Act 2008, allowing disclosure to counsel to a panel of inquiry. We note that the government is continuing to study the report of the Chilcot committee of Privy Councillors who reported in February 2008, recommending that the bar on the use of intercept evidence be lifted pending the meeting of certain tests. In our view it would be inappropriate to allow for the introduction of intercept evidence in coronial proceedings without also legislating for its use in criminal proceedings.

15. In the explanatory notes to the Bill, the government asserts that 'there is no possibility of a coroner's investigation reaching a different conclusion to criminal proceedings'. This is a reference to the proposed requirement in paragraph 8(11) of Schedule 1 of the Bill which would, among other things, prohibit an inquest that has been stayed pending criminal proceedings from arriving at an outcome that was inconsistent with those criminal proceedings. We do not believe that any UK court, whether coronial or criminal, should be prevented from rendering an accurate verdict based on the evidence because of such restrictions.

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[3] *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 61.