Inquest-Liberty-Justice Joint Briefing on Clauses 11-13 of the Coroners & Justice Bill for Report Stage in the House of Commons

March 2009

“But what about the victims?”*

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*“*But what about victims? The government as a whole has worked very hard to give a central voice and priority to victims, but we hear far less often from these lobbies about the needs of the victim. I think that they sometimes forget who the victim is, so lost do they become in a fog of platitudes….”*

Speech by the Lord Chancellor Rt Hon Jack Straw MP on 28 October 2008.

About Inquest

INQUEST is the only charity in England and Wales that works directly with the families and friends of those who die in custody. This includes deaths at the hands of state agents and in all forms of custody; police, prison, young offender institutions, secure training centres and immigration detention centres. We provide a free, confidential advice service to bereaved people and conduct policy and Parliamentary work on issues arising from the deaths and their investigation.

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

About Justice

JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.

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"The government as a whole has worked very hard to give a central voice and priority to victims…" [1]

"*Victims are the most important people in the criminal justice system. We must ensure their voice is heard loud and clear by policy-makers and campaigners*"

Justice Secretary, Jack Straw, 26th January 2009 [2]

"*I'm determined to continue the transformation of the justice system into a service for victims and witnesses one where people know it is on the side of the law-abiding majority. To do this we must open up the system further, making it more transparent…"*

Justice Secretary, Jack Straw, 4th November 2008[3]

"*And justice seen is justice done…that's only fair to the law abiding majority*."

Prime Minister, Rt Hon Gordon Brown, 23rd September 2008[4]

[1] Speech by the Lord Chancellor Rt Hon Jack Straw MP on 28 October 2008 to the Royal Society of Arts.
[2] http://www.justice.gov.uk/news/newsrelease260109a.htm
[3] http://press.homeoffice.gov.uk/press-releases/crime-justice-pioneer-areas
[4]in his speech to the Labour Party Conference available at: http://news.bbc.co.uk/1/hi/uk_politics/7631925.stm

HOW IT MIGHT WORK IN PRACTICE?

Clause 11 of the Coroners and Justice Bill allows the Secretary of State to ‘certify’ an inquest on the basis that the investigation will concern or involve matters that should not be made public. Once certified an inquest that would normally require a jury to be convened could take place without a jury. Following last minute Government amendments to the Bill the removal of a jury will now be subject to the approval of a High Court judge. The government’s amendments are discussed in more detail below. Suffice to say that despite the government’s attempt to window-dress their secret inquest provisions, an amended procedure would still gravely limit transparency and increase executive control over the inquest process. The removal of juries will effectively allow ‘secret inquests’ to take place partly in private with a High Court judge alone overseeing the evidence. This could include inquests into highly contentious deaths such as deaths in custody or deaths of individuals outside of state custody but where issues of the state’s broader conduct are raised, for example, an inquest into the death of a soldier killed in Iraq or the inquest into the death of Dr David Kelly. The Bill does not specifically state that other interested parties, such as family or legal representatives, are excluded. However, the basis for deciding that a jury should be excluded is that the inquest will involve consideration of material that should not be made public. By implication anyone who is not security cleared will be excluded from proceedings in the same way that they would be from, for example, closed sessions in control order proceedings. Secret inquests could then exclude bereaved families, their legal representatives, the media and the public at large from the investigation process. Below are some examples of how the secret inquest provisions could work in practice even if recent Government amendments are accepted. The hypothetical scenarios below are inspired by real events or a combination of real events that have taken place in recent years. It is worth noting that bereaved victims currently waiting for inquests into the deaths of their loved ones to go ahead have already been affected by the worry that their inquests might be subject to the secret inquest provisions.

Ground 1: "To protect the interests of national security"

In March 2007 José Romeros left Chile and came to London on a student visa. He enrolled in full time course at a central London college and moved in with a group of other students in Hammersmith. On 23rd April 2007, José caught a bus to Hammersmith tube station where he disembarked. He took the tube to Russell Square and while he was in the lift noticed that two men standing either side of him were acting suspiciously. Once he was past the barriers he began walking quickly and headed straight to the centre of Russell Square. He noticed that he was being followed by the men in the lift and broke into a jog. Thinking that he had given them the slip, José darted into a café in the Square. As he entered the café José heard shouting and fast heavy footsteps behind him, before he was shot seven times in the back. Initial media reports stated that a suspected suicide bomber had been shot by specialist counter-terrorism officers. After 24 hours it transpired that the victim was in fact a student who had been caught up in a tragic case of mistaken identity. An investigation into José's death was commenced but suspended after a few days following the announcement that the Criminal Prosecution Service (CPS) were considering whether criminal charges should be brought. After numerous delays no prosecutions were brought. In February 2010 the coroner's investigation into José's death was resumed. A jury was convened and witness testimony began. Two days into the inquest the Secretary of State issued a certificate under section 11 of the *Coroners and Justice Act 2009*. After hearing private representations from the Secretary of State, the judge determined that the jury should be disbanded. José's relatives were excluded from most of the coronial proceedings. The coroner returned a verdict of unlawful killing. On the day that the verdict was announced, José's family released a statement saying that they felt sidelined and ignored. They said that they had always thought that the UK stood for fairness and justice but that they had been denied justice for their son. They accused the government of a whitewash.

Ground 2: "To protect the interests of the relationship between the United Kingdom and another country"

On 8th April 2009, Lance Corporal Jane Summers and Lance Corporal John Mustill of the First Battalion (1 PWRR) of the Prince of Wales's Royal Regiment were sent on their first deployment in Afghanistan as part of Operation Relic. On 15th April 2009 while on a

British reconnaissance patrol, their five vehicle patrol came under heavy artillery bombardment killing Lance Corporal Summers and Lance Corporal John Mustill instantly. Close relatives of both soldiers were informed immediately. Lance Corporal Summers, aged 24, had been married for only 23 days at the time of her death. Lance Corporal Mustill, aged 32, left behind two young children. On 16th April their bodies were repatriated to the UK via RAF Brize Norton. Following the incident, the Ministry of Defence issued a statement that an investigation was underway but that the full facts were as yet unknown. Reports soon began to emerge that the soldiers had been killed in a 'friendly fire' incident and that two American A-10 Thunderbolt II aircraft were responsible for the attack. On 8th January 2010, the relatives of both soldiers were informed that the Minister of Justice had issued a certificate under section 11 of the *Coroners and Justice Act 2009*. After hearing private representations from the Minister of Justice the judge felt she had no real choice but to hold the inquest without a jury. The inquest was commenced on 13th February 2010 and the bereaved families were excluded from large parts of the proceedings. On 26th March 2010, a High Court judge sitting as a coroner in the case returned a verdict of 'unlawful killing'. No further details were revealed. On 27th March 2010, Samantha Mustill, widow of John Mustill, released a statement which read: *"Nothing can bring John, a devoted and loving father, back to us. Not an hour goes by when I don't wish that he was still here. While he served his country with pride, the inquest into his death was less than honourable. Until there is an open public inquiry into the circumstances that led to his death justice will not be served and our wounds will not start to heal".* The following week several army charities and organisations organised a silent march in Whitehall in protest at the secrecy surrounding the inquest.

Ground 3: "To protect the interests of preventing or detecting crime"

On 15th January 2008, Chantelle Felix took her newborn son for dinner at Pizza Hut in Tottenham, North London, with her friend Tracey Pullman. Unknown to her, she was under surveillance by an undercover, unmarked police car. After dinner Chantelle and her friend drove to her flat nearby. Chantelle jumped out of the car to open the garage door. She noticed an unmarked police car with two plain-clothed police officers watching her as she did so. She started to approach the car, shouting at the occupants to get out of the car. As she did so one of the plain-clothed officers shot Chantelle three times

point-blank. Her baby was still on the back seat of the car. The Criminal Prosecution Service (CPS) launched an investigation into Chantelle's death and concluded in July 2009 that no prosecution would take place. The Independent Police Complaints Commission also launched an investigation but their report shed little light on the events leading up to Chantelle's death. In November 2009 a North London coroner launched an investigation and a jury inquest was assembled. Much of the evidence contained in the police report to the coroner contained redacted evidence that was inadmissible under the *Regulation of Investigatory Powers Act 2000.* Three days after the jury was summoned the Minister of Justice issued a certificate under section 11 of the *Coroners of Justice Act 2009*. After hearing private representations from the Minister of Justice the judge reluctantly ordered that the jury be discharged. The inquest went ahead in secret and a verdict of unlawful killing resulted. Following the verdict, Chantelle's brother released a statement that accused the police and the government of colluding to suppress information about illegal wrongdoing.

Ground 4: "To protect the safety of a witness or another person"

In August 2002, Jamil Malik, a 19 year old British resident from Liverpool, flew to Afghanistan to visit relatives in Helmund province. In February 2003 as he was trying to leave the country he was picked up by Afghanistan security forces and imprisoned at Bagram Air Base. His family in the UK made representations to the UK Foreign and Commonwealth Office about Jamil's disappearance, but no information was provided to his family as to his whereabouts. After 6 months of captivity in solitary confinement Jamil was rendered by the CIA to Eqypt where he was held incommunicado for the next 6 years. He was told by United States agents that the law had been changed and there were no lawyers. He was regularly severely beaten and subjected to sleep and food deprivation. While in Egypt Jamil was questioned on several occasions. Those questioning him knew intimate details about his life, family and friends in the UK. Finally, weak, and barely able to walk, Jamil was rendered from Egypt back to Afghanistan in late 2009. He was released and picked up by UK soldiers in a remote part of Helmund province on 17th November 2009 and detained. One week later, while in British custody, Jamil died from internal bleeding as a result of the injuries he sustained in Egypt. His family was informed of his death and his body was brought back to the UK in May 2009. A public outcry ensued on the return of Jamil's body. The soldiers who found Jamil in

Helmund province leak their account to the press and report the allegations that Jamil made about his unaccounted 6½ years. Thousands take to the streets to demand a criminal investigation into the UK's complicity in Jamil's torture and death. The Foreign Secretary refers the matter to the Attorney General who announces in March 2010 that there is not enough evidence for a criminal investigation to take place. An independent public inquiry into widespread allegations of the UK's complicity in extraordinary rendition and torture is never initiated. In June 2010 it is announced that the Secretary of State has certified the investigation under section 11 of the *Coroners and Justice Act 2009*. A High Court judge sitting as coroner hears private representations from the Minister concerning 'protected matters'. The inquest in to the death of Jamil will be held in secret. It is widely believed that certification was ordered to protect the safety of M15 agents who will be called to give testimony on what they knew about Jamil's whereabouts and what information was provided to the Americans. In July 2009 an inquest into Jamil's death is convened without a jury and Jamil's family are excluded from almost all of the proceedings.

BRIEFING

"…but we hear far less often from these lobbies about the needs of the victim. I think that they sometimes forget who the victim is, so lost do they become in a fog of platitudes…." [5]

1. In a speech last year, the Justice Secretary mused that certain lobby groups overlook the needs of victims in arguing for the rights of all. He contended that in making their case, such groups get lost in their own 'platitudes'. To respond in platitude: actions speak louder than words. For 25, 75 and 52 years respectively, INQUEST, Liberty and JUSTICE have fought for the rights of all in our justice system. We know that the best way of ensuring the victims and families of the bereaved get the justice they deserve is by sticking to a bundle of fundamental rights and values: transparency; due process; the right to life; accountability; fairness; and the separation of powers. It is disheartening that in 2009, these values still seem to be up for discussion.

2. The quotes at the beginning of this briefing are some indication of how, if care for victims was measured in rhetoric and posturing, the government would have a clean bill of health. However, while headline-catching gimmicks claiming to put victims at the heart of the justice process are frequently announced, the proposals in clauses 11-12 attempt to do quite the reverse. If enacted, these proposals would dangerously sideline the families of the bereaved, leaving them outside of the justice process and allowing them only partial involvement in uncovering the cause of their loved-one's death. As well as undermining the rights of the bereaved, we believe that these proposals are unnecessary, logically flawed and amount to a fundamental attack on the independence and transparency of the coronial system in England, Wales and Northern Ireland.[6] We also believe that, if enacted, clauses 11-12 would be in breach of the government's legal obligations under the *Human Rights Act 1998* (HRA). Despite promises to the contrary, the proposals have been introduced (now on two occasions) with no consultation with stakeholders.

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[5] Speech by the Lord Chancellor Rt Hon Jack Straw MP on 28 October 2008 to the Royal Society of Arts.

[6] In relation to Northern Ireland see clause 38 and Schedule 9 to the Bill.

3. INQUEST, as experienced practitioners working on deaths in custody and other contentious deaths for the last 25 years, cannot envisage a situation where the proposed legislation would be either necessary or appropriate. Similarly, Liberty and JUSTICE, with over 125 years of experience between them in the criminal and coronial justice systems can see no arguments or evidence from the government to justify the proposed broad powers.

History of Secret Inquest Clauses

4. Azelle Rodney,[7] a 24 year old black man died in April 2005 after a police operation in north London in which he was shot seven times by a Metropolitan Police Service (MPS) officer. The shooting took place after the car he was in was ordered to halt in a 'hard stop' after being under police surveillance for over three hours in Edgware, north London. In July 2006 the Crown Prosecution Service (CPS) announced that there was insufficient evidence for a successful prosecution. After the CPS decision, the family was told by the coroner that the full inquest could not be held because large portions of the police officers' statements had been crossed out pursuant to the *Regulation of Investigatory Powers Act 2000* (RIPA), which excludes information obtained from covert surveillance devices such as telephone taps or bugs from use as evidence etc. It appears that it was a legal challenge to the use of RIPA, brought by lawyers representing Susan Alexander (Azelle's mother) as far back as September 2007, which prompted proposals for secret inquests.

5. Proposals for secret inquests were originally contained in Part 6 of the Counter Terrorism Bill 2008 (CTB). The proposals faced significant cross-party opposition in the House of Commons when it was first introduced. When the CTB reached its report stage on 10 June 2008 an amendment to remove the provisions was ultimately defeated by 310 votes to 287. After the House of Lords resoundingly rejected 42 days pre-charge detention last October the secret inquest provisions in Part 6 of the CTB were eventually withdrawn by the government on 14 October 2008. It had become clear that they faced another defeat in the House of Lords.

[7] INQUEST has worked closely with the family of Azelle Rodney.

6. Following the withdrawal of the secret inquest provisions from the CTB, the House of Lords debated a proposed amendment to RIPA aimed at removing the bar on intercept in coronial proceedings. The making of such an exception, or indeed the removal of the general bar, would allow the Azelle Rodney inquest to resume.[8] Ultimately, the proposed amendment to RIPA was defeated, inevitably delaying yet further the resumption of the inquest which has now been completely stalled since August 2007. After the final Parliamentary debate of 24 November 2008, INQUEST is aware that Susan Alexander's lawyers and her MP, Alan Keen, received clear assurances, as did INQUEST, that Susan Alexander would be given the courtesy of a short consultation period concerning the relevant provisions of the Coroners and Justice Bill 2009 (CJB) before its publication. In fact, no such consultation was held, just as the year before the government failed to consult Ms Alexander on Part 6 CTB.[9]

7. Media reports surrounding the re-introduction of the provisions in the current Bill have indicated that 'secret inquests' have returned with greater safeguards in place.[10] This is not, in fact, the case. The grounds for the removal of a jury and the exclusion of the family, their lawyers, and the public (which were already extremely broad in the CTB) are instead extended to additionally cover situations where the Secretary of State is of the opinion that material should not be made public (i) in the interests of preventing or detecting crime or (ii) in order to protect the safety of a witness or another person.

8. The Bill in its current form provides that determinations as to whether an inquest will be held without a jury are to be made solely by the Secretary of State. The only potential challenge to a decision to hold an inquest without a jury would be by way of

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[8] See the debate in House of Lords on 21 October 2008, available at: http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81021-0002.htm#08102134000002; Debate in House of Lords, on 11 November 2008, available at: http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81111-0009.htm; Debate in the House of Commons, on 17 November 2008, available at: http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081119/debtext/81119-0009.htm; and Debate in the House of Lords on 24 November 2008 available at: http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81124-0003.htm

[9] See the House of Commons Justice Committee Report on the Coroners and Justice Bill, 20 January 2009, HC 185, para 14 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*."

[10] For further examples see paragraphs 9-11 below.

judicial review (JR) in the High Court.[11] As currently drafted,[12] the Secretary of State could certify an inquest where he or she is 'of the opinion' that the investigation will concern or involve a matter that should not be made public on any of the five following grounds:

1) in the interests of national security;
2) in the interests of a relationship with another country;
3) in the interests of preventing or detecting crime;
4) in order to protect the safety of a witness or another person
5) otherwise in order to prevent real harm to the public interest

Safeguards?

9. On 17th March 2009, the Justice Secretary announced that the government would be tabling amendments to the Bill to reflect concerns that have been raised. Unfortunately the amendments tabled fail to address the fundamental problems with the proposals. If accepted, the amendments would mean:

(i) that the Secretary of the State can only certify an inquest when he or she thinks it 'necessary' to prevent disclosure of a matter;
(ii) that the fifth ground on which an inquest may be certified ('to prevent real harm to the public interest') is removed; and
(iii) certification does not *automatically* lead to a partially secret inquest – this would need to be approved by a High Court judge.

With regard to (i) we would hope that (even if the Bill was enacted in its current form) the Secretary of State would not order a certified inquest unless he or she subjectively considers it 'necessary' to prevent disclosure of a 'matter'. Thus, this amendment adds very little. The second amendment - removal of the fifth ground for certification - could have been expected. It was an astonishingly broad, catch-all, residual power. As for the last proposed amendment, while it changes the process it does not prevent (a) executive

[11] While JR of a decision not to allow a jury would have always been possible under the proposals in the CTB, clause 11(5) in the current Bill inserts a 14 day staying period before certification can have effect to allow for any JR challenge. This appears to have been included in an attempt to show that concerns over 'secret inquests' have been addressed.
[12] Without reference to the government's amendments tabled on 17 March 2009.

interference in investigations into deaths; or (b) the possibility of the exclusion of the bereaved and the wider public at inquests into what may be highly contentious deaths. The limited impact of this third amendment is discussed in greater detail at paragraphs 28 – 31 below.

10. It is also worth noting that none of the previous so-called safeguards (introduced since the provisions first appeared in the CTB) 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 undoubtedly be in the inherent power of the coroner in any event. If interested persons, and the family of the deceased in particular, are unaware of the content of the material in question they will be in no position to make an informed decision as to the efficacy of a legal challenge nor, if one is brought, will the parties be able to put any legal arguments to the Courts in this regard. The limits of judicial review are inherently unsatisfactory as a way of keeping in check the abuse of the power granted to the Secretary of State under clause 11. Including a judicial review option in the Bill simply begs the question as to why a High Court judge cannot simply be invited, by way of an application on the part of the Secretary of State, to withhold certain evidence from a jury. Further, 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. Further, the government's new amendments allowing an appeal from the decision by a judge to hold the inquest without a jury does not remedy this unfairness. Challenging a decision that was made on the basis of secret information will remain extremely difficult.

11. Like the 42 day pre-charge detention provisions which originally accompanied secret inquests, we hope that these provisions will be deleted from the Bill in their entirety. We are delighted that a cross party amendment has already been laid which would do just that.[13] INQUEST, Liberty and JUSTICE urge MPs to add their names to

[13] As of 13 March 2009, the amendment had the following ten signatories: David Howarth MP; Neil Gerrard MP; Elfyn Llwyd MP; John McDonnell MP; Dominic Grieve QC MP; Henry Bellingham MP; Edward Garnier QC MP; Eleanor Laing MP; David Burrowes MP; Edward Timpson MP. We understand that a great deal more MPs have now added their signature to this amendment.

this amendment and to support the deletion of the clauses at Report Stage of the Bill on 23rd and 24th March 2009.[14]

Article 2 of the Human Rights Act

12. The standard by which any investigation of a death in custody must be measured against is the obligation laid down by article 2 of the HRA[15] which protects the right to life. It is well established that "*wherever state bodies or agents may bear responsibility for [a] death*, *a procedural duty to investigate the death arises under Article 2*".[16]

13. The European Court of Human Rights in *Jordan v UK*[17] examined the state's obligations under article 2 following a death in state custody. It held that the State must ensure the deceased's family are provided with the truth; that lessons are learnt to improve public health; and that, if appropriate, criminal proceedings be brought. In particular, it held that an investigation into the death must be made on the initiative of the State (i.e. it is not sufficient to rely on civil proceedings brought by family members etc) and the investigation must be independent; effective; prompt; open to public scrutiny; and support the participation of the next-of-kin. The Court held that failure to meet these requirements will, in itself, constitute a breach of article 2. This position was confirmed by the House of Lords in *Amin*[18] which established that these requirements should not only apply where state agents were actively involved in the death of a person but also "*where the death was alleged to have resulted from negligence on the part of state agents*".

14. In *Middleton* the House of Lords acknowledged that:

> *"The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it*

[14] We have also proposed further amendments which are annexed to this Briefing which we hope will be tabled.
[15] Article 2 of the European Convention of Human Rights as incorporated by the HRA.
[16] *R (on the application of Hurst) v Commissioner of Police for the Metropolis* [2007] UKHL 13 para 28.
[17] (2001) 33 EHRR 38.
[18] *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51

appears that one or other of [article 2] obligations has been, or may have been violated and it appears that agents of the state are, or may be, in some way implicated.[19]

Middleton also set out that:

> *"there must be a sufficient element of public scrutiny of an investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved to the extent necessary to safeguard his or her legitimate interests*."[20]

15. It is now well established that the primary way in which the UK fulfils its procedural duties under article 2 is by coronial inquests which, in their current form, are open to public scrutiny and the full participation of the next of kin of the deceased. In *Amin* Lord Bingham listed the purposes of an 'article 2 compliant' investigation:

- to ensure as far as possible that the full facts are brought to light;
- that culpable and discreditable conduct is exposed and brought to public notice;
- that suspicion of deliberate wrongdoing (if unjustified) is allayed;
- that dangerous practices and procedures are rectified; and
- that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his or her death may save the lives of others.

16. Culpable and discreditable conduct cannot be brought to public notice in the absence of a public examination of the core facts surrounding the circumstances of a death. Neither can suspicion of deliberate wrongdoing be allayed. Similarly, it is difficult to see how lessons can possibly be learnt where core evidence is kept secret – it is even harder to see how relatives can be satisfied of this when they are denied crucial information about their loved one's death.

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[19] *R (on the application of Middleton) v HM Coroner for West Somerset* [2004] UKHL 10, para.3.
[20] Ibid.

17. While the European Court of Human Rights has not prescribed a single model for article 2 compliant investigations, the Court has stated in *Jordan v UK*, that the bare minimum requirements include "*a sufficient element of public scrutiny*" and the involvement of the next of kin "*to an appropriate extent*". By way of example, *R on the application of Sacker* v *HM Coroner for West Yorkshire*[21] and *R on the application of D v the Secretary of State for the Home Department*[22] both confirmed that when an investigation had not been carried in public, the publication of a report was insufficient to make the procedure compatible with article 2.

18. In relation to the involvement of the next of kin, *Amin* found that "*the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests*". Mr Justice Collins elaborated on this in the case of *Smith* v *The Assistant Deputy Coroner for Oxfordshire*[23] by saying:

> *"in an Article 2 case it will be difficult to justify any refusal to disclose relevant material. Where material is not just relevant, but goes to the core of the circumstances of a death, there can be no justification for denying either next of kin or the public generally the opportunity to scrutinise that evidence."*

19. The government has included much-expanded explanatory notes setting out its view about the compatibility of these provisions with the right to life under article 2 of HRA. Despite the government's optimism, we cannot see how these proposals can fulfill the UK's legal obligations under article 2. Executive interference and exclusion of the jury, family and public would seem to conflict with the requirements of independence, family involvement, public scrutiny and 'learning lessons' established in *Jordan v UK*. The Government amendments tabled on 17th March 2009 do not make these provisions article 2 compliant. The amendments explicitly recognise that a jury (and by inference the family and the wider public) may need to consider certain material in order to avoid a breach of article 2. At the same time the amendments give a judge the power to authorise the exclusion of a jury if he or she is satisfied that it is necessary to avoid public disclosure. This is a circular argument. Failure to involve a jury (and by implication

[21] [2004] 1 WLR 796.
[22] [2006] 3 All ER 946.
[23] [2008] EWHC 694 (Admin), see para 37.

the family and the wider public) itself may breach article 2. The duty not to disclose protected material must not automatically trump the interests of the relatives and the wider public.

20. The government's track-record for understanding its article 2 obligations is less than convincing. Following the racially motivated murder of Zahid Mubarek by his cellmate Robert Stewart in Feltham Young Offenders Institute in 2000, the then Home Secretary, David Blunkett, resisted calls from the victim's family to initiate a public investigation into the death. The Home Secretary fought the case all the way to the House of Lords where their Lordships ruled that an independent public investigation must be initiated. The inquiry revealed a catalogue of institutional shortcomings which in turn had led to Zahid being incarcerated with a known violent racist. This case, at the very least, demonstrates a lack of understanding within government as to their obligations under article 2.

Political interference in the inquest system

21. As shown in the hypothetical examples at the beginning of this briefing, political interference in the inquest system, as proposed, could have serious implications for public trust and confidence. Even with the last minute Government amendments, these proposals give the Secretary of State unprecedented power to intervene in the investigation of contentious deaths. Almost by definition the inquests to which these provisions would apply are likely to involve controversial or violent deaths. They would, therefore, give the Secretary of State a key role in the very inquests where the state's actions are most under scrutiny.

22. If these provisions were already in place it is likely that they could have been applied to the inquest into the shooting of Jean Charles de Menezes. The government could potentially have justified secrecy on all four of the proposed remaining grounds. Any decision to hold the de Menezes inquiry in secret would have been extremely politically contentious. There would inevitably have been allegations of a whitewash and a cover up. Any such decision will be inherently political. Other inquests might raise similar issues to the de Menezes inquiry but not have the same profile or risk the same political fallout. Arbitrariness, unfairness and injustice will result if contentious deaths

(that don't necessarily capture the public's imagination) are held in secret following a trigger by the executive.

23. If inquests take place behind closed doors it will be hard for bereaved families and the public at large to allay any suspicions of any wrongdoing. Indeed, it may actually intensify suspicion of the State and their possible culpability. Certainly public trust and confidence is already being affected by the existence of the secret inquests clauses. There is much speculation that the government is seeking to enact the provisions in order to avoid the type of public inquests that have proved politically embarrassing over recent years. A series of inquests have been highly critical of the Ministry of Defence over the deaths of British army personnel in Iraq and Afghanistan. For example –

- Corporal Andrew Wright was killed in a minefield in Afghanistan in 2006. Assistant deputy Oxford coroner Andrew Walker was told that he would not have died if a helicopter with a winch had been available to extract him.

- 14 RAF servicemen were killed when a plane blew up shortly after re-fuelling. Assistant deputy Oxford coroner Andrew Walker recommended that the entire fleet should be grounded.

24. As well as the narrative verdicts that result from these inquests, information aired during these public inquests has been hugely damaging for the government's reputation. During one such inquest in 2008 a string of Hercules pilots and crew revealed that they did not know of the lack of explosion suppressant foam (ESF) in their planes and almost all had not even heard of ESF. One said he was 'astonished' another 'horrified' that they had not been informed about the availability of ESF. While the secret inquest provisions in this Bill would not, of themselves, prevent narrative verdicts, the level of public scrutiny afforded to an inquest would be deeply undermined, particularly as juries are frequently more openly critical than coroners.

25. There is also already intense speculation that the secret inquest provisions are motivated by the desire to protect the US Government from embarrassing revelations

about 'friendly fire' incidents.[24] The second ground on which inquests can be certified under clause 11 certainly reinforces this theory[25] and this has not been lost on armed forces personnel and their families. In their evidence to the JCHR on 27 February 2009, the Royal British Legion submitted:

> *"As long as Clause 11 remains in the Bill, we regret it may not be possible to dislodge the perception that crucial evidence will be heard behind closed doors. Additionally, the grounds for certification, as defined, seem to suggest the objection of another country/or diplomatic relations will be placed above the need for the grieving family to find the truth".*[26]

26. Suspicions have also been aroused that the secret inquest provisions will be invoked to deal with outstanding inquests into the deaths of people killed by British security forces in Northern Ireland during the Troubles.[27] This speculation led to a statement from the Northern Ireland Office Minister Paul Goggins 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 work together to sort out the practical arrangements required to implement this approach."*[28]

27. The Northern Ireland Human Rights Commission has expressed grave concerns about the potential for secret inquests to be applied to outstanding inquests:

> *"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*

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[24] See Daily Telegraph "*Government faces revolt over secret inquests*" 14 March 2009 available at: http://www.telegraph.co.uk/news/newstopics/politics/lawandorder/4990965/Government-faces-revolt-over-secret-inquest-bid.html

[25] Clause 11(2)(a)(ii) "*In order to protect the interests of the relationship between the United Kingdom and another country*".

[27] See The Observer "*Inquests into Troubles Deaths to be Kept Secret*" 25th January 2009 available: http://www.guardian.co.uk/politics/2009/jan/25/northern-irish-troubles-inquest

[28] Statement provided to BBC Radio Ulster's Good Morning Ulster programme by the NIO, 27th January 2009

Northern Ireland would be viewed as very bad faith by the British Government and could seriously jeopardize progress on what is a very politically sensitive issue".[29]

Whatever the government's underlying intentions, these examples clearly demonstrate the loss in trust and confidence that such measures invoke.

Judicial decision making rather than the Secretary of State

28. The government will seek to argue that their recent amendment to allow a High Court judge (rather than the Secretary of State) to decide whether an inquest can be held without a jury addresses concerns about overt executive interference. Sadly, this is not the case. The principal problem with the measures is the secrecy entailed once an inquest of this nature goes ahead without a jury. In addition, a judge making such a decision will necessarily have to rely heavily on submissions made by the Secretary of State as to what is necessary. Under the government's new amendments a decision whether an inquest should take place without a jury is likely to be made after hearing submissions in private (given the material is said to be so confidential a jury should not be involved). Therefore the decision, once made, will have been made without the involvement of the bereaved family. Even if the bereaved family is given an opportunity to make representations as to why a jury should be involved they will not be able to do so on an equal footing with the Secretary of State as it is unlikely they will be given the full reasons for the need for a non-jury inquest.

29. Moreover, on issues of national security, courts have often shown great deference to decisions of the executive. Lord Atkin in his famous dissenting judgment in the World War II case of *Liversidge v Anderson*,[30] warned against judges who "*show themselves more executive-minded than the executive*".[31] Some years later, Lord Denning in the Court of Appeal, in a case involving deportation on national security grounds and a denial of a right of appeal,[32] stated:

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[29] NIHRC Briefing for Committee Stage of Coroners and Justice Bill, February 2009 available at: http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Coroners_and_Justice_Bill__Briefing__to_House_of_Commons_Committee_Stage_(February_2009).pdf
[30] [1942] AC 206.
[31] At page 361.
[32] *R v Secretary of State ex parte Hosenball* [1977] 3 All ER 452.

"our history shows that when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back. Time after time Parliament has so enacted and the courts have loyally followed."[33]

30. In *Secretary of State for the Home Department v Rehman*[34] Lord Steyn in the House of Lords held that it "*is self-evidently right that national courts must give great weight to the views of the executive on matters of national security*".[35] Lord Hoffman considered that "*the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive*."[36] His Lordship went on to say that in national security matters judges should "*respect the decisions of ministers of the Crown*", in part because the executive "*has access to special information and expertise in these matters*".[37]

31. Even in the landmark Belmarsh judgment,[38] in which the court issued a declaration of incompatibility under the HRA, 6 out of the 7 judges deferred to the executive's decision in relation to a threat to public security. Lord Bingham said this was "*a pre-eminently political judgment*";[39] Lord Hope said that "*great weight must be given to the views of the executive*";[40] Lord Scott noted that "*the judiciary must in general defer to the executive's assessment*";[41] and Baroness Hale said that "*[a]ssessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government*".[42] It is clear then that entrusting this decision to the courts will not necessarily result in decisions that will differ greatly from the Secretary of State's decision to certify.

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[33] At page 457.
[34] [2002] 1 All ER 122
[35] At [31]; page 135.
[36] At [50]; page 139.
[37] At [62]; page 142
[38] *A v Secretary of State for the Home Department* [2005] 1 AC 68.
[39] At [29].
[40] At [112].
[41] At [154]
[42] At [226].

Justice Diluted

> *"Justice is a cornerstone of a democratic, free and civilised society. And it is at its most powerful when it has the full confidence of the people. Without public faith that the system of justice reflects reality, protects the innocent…its legitimacy and effectiveness is compromised. This faith is hard won and can't be taken for granted."*
>
> The Rt Hon Dr John Reid, (as Home Secretary), July 2006[43]

32. The short history of these specific 'secret inquests' provisions has been outlined in paragraphs 4-8 above. However the model for this latest measure of 'exceptionalism' can however be traced back much further. Under clause 12 'independent counsel' will be appointed in certified secret inquests. They will be charged with acting in the interests of the bereaved and will be directed by the coroner to take responsibility for 'testing' the evidence which cannot be disclosed publicly or to the next of kin. This mechanism was originally devised for application in the immigration system. The Special Immigration Appeals Commission (SIAC) was established in 1997 for immigration appeals that involved sensitive information. The special advocate procedure was born. Special advocates were appointed by the government and instructed to act in the interests of those whose appeals went before the Commission. Unlike legal representatives, special advocates are unable to disclose material to the applicants and are instead meant to put forward contest evidence on the basis of guesswork and estimation. In 2001 this fundamentally flawed process was transferred into the normal court system when special advocates were appointed for foreign nationals detained indefinitely under the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA). Following the House of Lords' Belmarsh ruling[44] and the replacement of indefinite detention with control orders, special advocates remained. The special advocate procedure has been brought into disrepute on a number of occasions and a number of special advocates have resigned on principled grounds. In 2004 Ian MacDonald QC resigned as a Special Advocate "*for reasons of conscience*" and said:

[43] Foreword to 2006 Home Office review: *Rebalancing the criminal justice system in favour of the law-abiding majority* available at: http://www.homeoffice.gov.uk/documents/CJS-review.pdf/CJS-review-english.pdf?view=Binary
[44] *A v Secretary of State for the Home Department* [2004] UKHL 56.

"I resigned because I felt that whatever difference I might make as a special advocate on the inside was outweighed by the operation of a law, fundamentally flawed and contrary to our deepest notions of justice. My role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial. For me this was untenable."[45]

33. 2009 is not the year to be bringing more nips, tucks, bells and whistles into the justice system. It is not the year for more special advocates or more 'exceptional' procedures. 2009 is not the year to once again transpose this unhappy model into a new sphere. By their nature, contentious deaths raise important issues of accountability. In a free democratic society such deaths should be subject to particularly close public scrutiny. The inquest system should remain fundamentally transparent so that justice can be seen to be done.

Importance of Jury and Public Involvement

34. We believe that the jury system is the cornerstone of the criminal and coronial justice process. Juries have a central role in ensuring maximum public scrutiny and inquest juries are often seen by families as the key safeguard in terms of public accountability. Further, for most people, jury service is one of the few occasions where they will have direct input into the criminal or coronial justice systems. It seems ironic to us that a government which speaks so much of 'community justice' appears to be so keen to take the public out of the justice process.

35. Moreover, allowing isolated exceptions in the coronial system does not stand up to scrutiny. As the Chairman of the JCHR, Andrew Dismore MP, pointed out during the Second Reading of the Bill, jury trials are available in both terrorist and espionage cases where issues of national security evidently also come in to play. Parliamentarians might therefore want to consider whether once precedent has been set in determining that a type of inquest is too sensitive to allow an inquest jury, identical arguments will be made for scrapping juries in terrorism trials. The government has, for example, regularly

[45] See:
http://www.gcnchambers.co.uk/index.php/gcn/content/download/1161/7517/file/Counsel_200503_mcdonald.pdf

pointed out that many terrorism trials involve a large volume of highly sensitive evidence. If the principle of jury inquests is undermined in this Bill, what is to say that this won't be extended to its logical conclusion? And if this is not the case, what type of message does this send? Is the government trying to argue that victims in the criminal justice system should receive a Rolls Royce system of justice while those in the coronial system might only be eligible for a diluted standard? Is there a different standard of justice for victims when government interests are involved?

Grounds for jury removal

36. We believe that current inquest procedures are sufficient for dealing with issues of sensitive material. Rule 17 of the Coroners Rules 1984[46] enables coroners to "*direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security so to do*". A judge can also be appointed to head up the coronial inquest and Public Interest Immunity (PII) certificates can be issued if necessary. These powers are and should be maintained in the present Bill. It is also worth noting that PII certificates and the withholding of certain evidence from a jury have been held to be article 2 compliant.[47]

Ground 1 - National Security

37. It has been observed that the de Menezes inquest is one that, under the terms of the Bill if passed, could have been subjected to certification had this procedure been available. The de Menezes inquest certainly did involve the consideration of evidence that was highly sensitive, such as the details of the Metropolitan Police's operational response to the threat posed by suicide bombers (including Operation Kratos), the assistance they had had from countries such as Israel and the USA in developing this, and other aspects of undercover and surveillance operations. The widespread concern that the Metropolitan Police had been operating a 'shoot to kill' policy without any parliamentary approval or oversight made it particularly sensitive. A large number of witnesses also sought anonymity before giving their evidence. The inquest would

[46] As enacted by SI 1984 No 552.
[47] In both *McCann* and *Jordan* referred to above.

therefore potentially have been covered by all of the reasons under clause 11(2) of the Bill that would justify certification under clause 11(1). In fact, it seems difficult to imagine a death that would be riper for secrecy under these provisions.

38. In fact, the de Menezes inquest managed to deal effectively with highly sensitive evidence and the protection of witnesses whilst remaining largely open and accessible to all, showing that it was perfectly possible to conduct a full inquest without the need for certification. This was done in several ways:

- A High Court judge was appointed as coroner and was be able to consider PII applications by the police in respect of highly confidential policies and documents. National security issues were clearly central to the subject matter of the inquest, most importantly the Metropolitan Police strategy for dealing with suicide bombers. Where needed, the coroner granted full PII in relation to certain documents. However, he ruled that many of the documents could be provided to the legal teams, on strict undertakings as to confidentiality, not making copies, keeping the material secure, etc. On that basis the family's lawyers were permitted to see highly sensitive documents, and to question witnesses based on that material. In relation to the most sensitive material, a summary was prepared of the material that could be shared with the family and their lawyers were provided with the material underlying the summary (again on strict undertakings).
- Where discussion in open court touched upon the contents of any such protected documents, agreements were reached in the absence of the jury and the public as to what could be explored and, although some aspects were regarded as too sensitive to be investigated publicly, overall a reasonably fair exploration of the issues was allowed whilst national security and other policing concerns were protected.
- Suitable arrangements were made for the protection of witnesses (a reason for certification under clause 11(2)(b) of the Bill) without the need for certification. There were over 40 police officers who worked in highly sensitive anti-terrorist operations or covert surveillance whose witness evidence was required at the inquest. They were all granted anonymity by the coroner as a result. They gave evidence from behind a screen in court, and careful provision was made at the

venue for their arrival and departure to protect their identities. The inquest was nevertheless able to hear evidence from those witnesses.

- The jury, the family, one of their supporters and the lawyers were all permitted to see the witnesses giving evidence so as to assess their demeanour (the police having carried out police checks on the family members and their chosen supporter beforehand). This was done without any risk or compromise to the identity of any of those witnesses whose anonymity has been maintained despite the huge attention from media organisations.

39. In this case there was a huge public interest in hearing as much evidence as possible in open court. We believe that by applying the safeguards such as those identified above, the inquest was able to remain public and accessible, yet with due respect for the concerns set out in clause 11(2). Had this inquest been certified in accordance with the Bill then the family might have been prevented from participating in the inquest, and the actions of the police would not have been exposed to the full public scrutiny that article 2 requires. We believe that the de Menezes case shows that in practice, certification is unnecessary; and in principle, it is wrong.

Ground 2 - To protect the interests of the relationship between the UK and another country

40. As discussed, there is already significant speculation that this ground is the key driver behind the proposals more generally. While we don't believe that secret inquests can be justified on any of the five grounds proposed, this ground is the most breathtaking of all. That the government believes that diplomatic relations with another State should supersede the rights of victims and the bereaved is shocking. Where such matters are at stake (most likely where deaths occur in allied combat) there needs to be more, and not less, transparency if public confidence in the government's commitments to the bereaved is to be restored.

Grounds 3 and 4: To protect the interests of preventing or detecting crime; or in order to protect the safety of a witness or other person

41. Over the last decade or more, a large number of measures have been introduced to protect witnesses in the criminal and coronial systems. As demonstrated in the de Menezes inquest, a large number of measures are available and coroners may go to great lengths to order such safeguards. As with the other grounds discussed above, we can see no reason why determinations and actions on matters such as the safety of witnesses should not be left – as currently is the case – to coroners.

Government Arguments and Current Practice

Jury inquests are only convened in a small minority of inquests

42. One of the main planks in the government's argument seems to be that because jury inquests account for only 2% of the total number of inquests in England and Wales the proposals for secret inquests won't have a huge impact on fundamental rights. This is a false and misleading argument. It is the investigation of the most serious and most contentious deaths that will be affected by this legislation – deaths at the hands of state agents. In these cases bereaved families do not care that their loved one's inquest falls within a minority category. Justification with reference to such statistics merely adds insult to injury.[48]

Government will not use the provisions often

43. In attempting to make its case for secret inquests, the government has pleaded that it will not use the certification powers often. Putting aside the fact that secret inquests are wrong in principle, such assurances are insufficient. Powers are frequently sought on the basis that once enacted the government will only use it in very limited circumstances. When intrusive surveillance powers were passed in 2000, the examples given by the government involved serious criminality and terrorism. Eight years later it emerged that intrusive surveillance was being used by local authorities to police school

[48] For more information on the importance of jury inquests see INQUEST's website: http://inquest.gn.apc.org/

catchment areas and to detect litterbugs.[49] As drafted the Secretary of State's certification power could be invoked in numerous inquests.

44. Similarly, once enacted it is highly likely that secret inquests will be actively sought by various groups. INQUEST has been working closely with the lawyers for the family of Terry Nicholas, a 52 year old black man who was shot dead by MPS officers at Hanger Green, London on 15 May 2007, after he had left the rear of a restaurant premises. In October 2008 it emerged that the inquest touching on this death was stalled. We understand that the Metropolitan police made representations to the coroner that the inquest should be stalled ahead until after the secret inquest provisions in the CTB came into force. This is indicative of the type of lobbying and representations that will undoubtedly be made to the Secretary of State and relevant High Court judges should the secret inquest provisions be enacted.[50]

Secret inquests are required to allow for admissibility of intercept evidence

45. Clause 13 amends section 18 of the *Regulation of Investigatory Powers Act 2000* (RIPA) to allow intercept material to be admissible in inquiries in 'certified investigations'. The piecemeal removal of the general bar on the use of intercept is a continuing trend[51] and represents a tacit acceptance of the use of intercept material. There is, however, no reason why the removal of the ban needs to be restricted to a new breed of 'certified' inquests. In legal terms this bar is an anomaly. The UK is the only country in the world, to maintain the ban on such evidence. Elsewhere in the world, intercept evidence has been used effectively to convict those involved in terrorism and other serious crimes. While RIPA forbids the use of domestic intercepts in open UK court proceedings, foreign intercepts can be used if obtained in accordance with foreign laws. Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping can be admissible even if they were not authorised and interfere with privacy rights. There are

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[49] See the use of powers under the *Regulation of Investigatory Powers Act 2000*.

[50] The Coroner in the inquest into the death of Terry Nicholas has now ruled that it can go ahead under the existing legal framework.

[51] Intercept evidence may already be used in certain civil proceedings in relation to control orders, communications offences and offences under RIPA, cases before the Special Immigration Appeals Commission or the Proscribed Organisations Appeals Commission and now the *Counter-Terrorism Act 2008* allows intercept evidence to be used in terrorist asset-freezing proceedings.

no fundamental civil liberties or human rights objections to the use of intercept material, properly authorised by judicial warrant, in criminal or coronial proceedings.[52]

46. On 4 February 2008 the Privy Council Review of Intercept as Evidence (the Chilcot Review) recommended the abolition of the absolute prohibition contained in section 17 of RIPA.[53] We welcome the Prime Minister's initial indication that the government intends to implement the Chilcott conclusions, however progress has been slow. In the meantime, there are compelling reasons why, at a minimum, the ban on intercept evidence should be lifted in coronial inquests (such as in the Azelle Rodney case). However, this should not be restricted to cases where a certificate has been issued using the secret inquest provisions. If a High Court judge heads up a coronial inquiry intercept evidence should be made available where it is relevant to the investigation into the death. In the Annexure we propose a set of amendments which would give effect to this. It will remain possible for the judge conducting the investigation, as part of the court's inherent powers, to ban or restrict the jury's or public's access to material that would be contrary to the public interest, for example on the ground that it would threaten national security. While the circumstances for the applicability of public interest immunity in coronial inquests is not perfectly clear, the proposed amendments have the benefit of enabling all intercept evidence to be admissible unless it can be shown that it is contrary to the public interest to admit it, and to generate debate about whether the test of the public interest, particularly on national security grounds, should be set out in the legislation. Further proposed amendments may be suggested to address this issue as the Bill progresses. Obviously it remains our position that the ban on the admissibility on intercept evidence should be removed in respect of all proceedings,[54] but as important coronial investigations will remain stalled in the meantime, this amendment is necessary.

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[52] Indeed, Liberty and Justice have long argued that the bar on the use of intercept evidence in criminal proceedings should be lifted. See e.g. Liberty's evidence to the JCHR, 'Relaxing the Ban on the Admissibility of Intercept Evidence', February 2007, available at: http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf and JUSTICE's 2006 report *Intercept Evidence: Lifting the Ban* available at http://www.justice.org.uk/images/pdfs/JUSTICE%20Intercept%20Evidence%20report.pdf

[53] Privy Council review of Intercept as Evidence available at: http://www.official-documents.gov.uk/document/cm73/7324/7324.asp

[54] Particularly if a verdict of unlawful killing is given by an inquest that has heard intercept evidence, as a subsequent criminal investigation that did not have the same access to evidence may not be able to reach a verdict.

PII certificates are problematic in the coronial system

47. The government has also sought to argue that PII certificates are ill-suited to the coronial system. They have argued that unlike a criminal prosecution, in coronial proceedings the State does not have the discretion to withdraw should a PII certificate not be granted. While this may be true it is false to claim that coronial proceedings are the only ones where they have no control over continuation: in the recent High Court judgment concerning Binyam Mohammed, for example, the government was the respondent, not the appellant.[55] The State applies for PII certificates in civil proceedings and judicial reviews. As with the coronial system, the prerogative of withdrawing from these proceedings does not lie with the State.

48. Further, if the government was ordered by a court to disclose classified material but refused to do so, there are at least two possible outcomes based on established precedents that would allow the court to proceed to determine the inquest. First, it would be open to the court to disregard the government's submissions insofar as they are based on the undisclosed material – this is the rule contained in paragraph 4(4) of Schedule 1 of the *Prevention of Terrorism Act 2005*. Alternatively, if the government refused to disclose material that the coroner considered critical to the determination of the inquest, it would be possible for the court to make an open ruling setting out its conclusions, but set out its reasoning in relation to the undisclosed material in a closed judgment. This, again, has been the approach of the Court of Appeal in hearing control order appeals.[56] We should stress that we do not support the use of closed judgments in this or any other context. But it is patently wrong for the government to claim that withdrawal would be the only option. More importantly, if there is to be resort to undisclosed material by coroners, it would be better for it to come at the end of a PII process in which the court has determined for itself the weight to be given to government claims of secrecy. The de Menezes inquest is a recent example of how PII certification can work effectively in the coronial process. As a result of PII applications the inquest was held partly in private and this was achieved without opening the floodgates in the manner proposed in by this Bill.

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[55] See *Binyam Mohamed v Secretary of State for Foreign & Commonwealth Affairs 2009] EWHC 152 (Admin).*

[56] See e.g. the open and closed judgments issued by the Court of Appeal in *AE, AF and AN v Secretary of State for the Home Department* [2008] EWCA Civ 1138.

Real Consensus against Secret Inquests

49. Concern about secret inquests has been expressed by the JCHR,[57] the House of Commons Justice Committee[58] and the House of Lords Select Committee on the Constitution.[59] The JCHR expressed concern that the proposals could compromise the independence of controversial inquests into the deaths of terrorism suspects in police operations or the deaths of service personnel in Iraq. In relation to these clauses, the Justice Committee of the House of Commons has stated that these clauses will require close and careful scrutiny and 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*."[60] Serious concerns have also been raised by the Northern Ireland Human Rights Commission.[61]

Conclusion

50. The government argues that secret inquests are necessary in order for the State to fulfill its article 2 obligations. This argument is based on the notion that without secret inquests, as certain coronial investigations cannot be heard in public, no investigation can take place. As explained earlier, this rests on a false premise that intercept evidence can only be used in cases where juries have been removed. It is an illogical and circular argument to say that the state must breach its article 2 obligations (of having an inquest in which the bereaved cannot be fully involved) in order to fulfill its article 2 obligations to have an investigation. We believe that the amendments we propose in the Annexure will enable the State to meet its article 2 obligations and allow stalled inquests to proceed. We urge parliamentarians to reject these unnecessary, opaque and dangerous provisions and protect the right to an open jury inquest in the most difficult and potentially politically contentious of circumstances.

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[57] 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.
[58] House of Commons Justice Committee Report on the Counter Terrorism Bill, HC 405, para 5,
[59] 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
[60] House of Commons Justice Committee Report on the Coroners and Justice Bill, HC 185, 20 January 2009 at para 14
[61] See above at paragraph 27.

ANNEXURE – AMENDMENTS

Secret Inquests amendments

Page 6, line 2, leave out clause 11. Page 7, line 1, leave out clause 12. Clause 38, page 23, line 28, leave out ‘and in sections 11 and 12’. Schedule 9, page 141, line 19, leave out paragraph 3. Schedule 9, page 142, line 20, leave out paragraph 4. Schedule 9, page 141, line 22, leave out paragraph 5. Schedule 20, Part 1, page 215, leave out lines 17-32.

- Amendments to Schedule 9 relate to equivalent ‘secret inquest’ amendments to the Coroners Act (Northern Ireland) 1959.
- Amendments to Schedule 20 are transitional amendments relating to clauses 11 to 13 that will become redundant if these clauses are removed.

Removing the bar on intercept evidence in Inquests

Amendment 1 Page 7, line 18, leave out clause 13. **Amendment 2** To move the following clause— ‘In section 18(1) of the Regulation of Investigatory Powers Act 2000, after paragraph (e) insert—

(ea) any proceeding before a judge of the High Court who has been appointed under section [*appointment of judge when intercept evidence necessary*] of the Coroners and Justice Act 2009 to conduct an investigation into a person's death;'.

Amendment 3

To move the following clause—

'(1) A senior coroner who is under a duty under section 1(1) to conduct an investigation into a person's death must refer the investigation to the Chief Coroner if it appears to him or her that the disclosure of intercept evidence is necessary for the proper investigation into the death.

(2) If an investigation is referred to the Chief Coroner under subsection (1), the Chief Coroner must appoint a judge of the High Court to conduct the investigation.

(3) If a judge of the High Court is appointed under subsection (2) to conduct an investigation—

(a) the judge is under a duty to do so;

(b) the judge has the same functions in relation to the body and the investigation as would be the case if he or she were a senior coroner in whose area the body was situated;

(c) no senior coroner, area coroner or assistant coroner has any functions in relation to the body or the investigation.

(4) Accordingly a reference in a statutory provision (whenever made) to a coroner is to be read, where appropriate, as including a judge appointed under this section.

(5) If a judge appointed under this section is conducting an investigation that gives rise to an appeal under section 30, that section has effect as if references in it to the Chief Coroner were references to a judge of the Court of Appeal.

(6) In this section “intercept evidence” means any intercepted communication or any related communications data within the meaning of section 17 of the Regulation of Investigatory Powers Act 2000 (c. 23).’.

Amendment 4

Clause 30, page 16, line 6, at end insert—

‘( ) a decision under section [*appointment of judge when intercept evidence necessary*] to refer, or not to refer, an investigation to the Chief Coroner;’.

Amendment 5

Schedule 20, Part 1, page 215, line 16, at end insert—

‘4 Sections [*appointment of judge when intercept evidence necessary*] and [*amendment to RIPA*] has effect in relation to investigations that have begun, but have not been concluded, before the day on which that section comes into force (as well as to inquests beginning on or after that day).’.

- Amendment one removes clause 13 from the Bill which allows intercept evidence to be admissible in inquiries in ‘certified investigations’, which will become redundant if clauses 11-12 are removed.
- Amendment two seeks to amend section 18 of the *Regulation of Investigatory Powers Act 1998* (RIPA) to disapply section 17 of that Act, which excludes intercepted evidence from being admissible, in coronial case involving a High Court judge.
- Amendment three seeks to introduce a new clause into the Bill that would require a senior coroner to refer an investigation to the Chief Coroner, who must then appoint a High Court judge to carry out the investigation. This would occur if it appears to the senior coroner that intercept evidence is necessary to properly carry out the investigation. Once a judge is appointed, subclauses (3) – (5) are miscellaneous amendments that properly give effect to the amendment.

- Amendment four is a consequential amendment, which seeks to amend clause 30 to enable an interested person to appeal the senior coroner's decision to, or not to, refer the investigation to the Chief Coroner.
- Amendment five is a transitional provision to apply these changes to inquests that have already begun but not concluded before the commencement of these amendments.