



**Inquest-Liberty-Justice Joint Briefing
on Clauses 11-12 of the Coroners &
Justice Bill for Second Reading in the
House of Lords**

April 2009

No need for secret inquests*

* In the Eighth Report of the Joint Committee on Human Rights of 17 March 2009 the question is raised at paragraph 1.37 as to whether the proposals on secret inquest are 'necessary'. At paragraph 1.42 the Committee concludes that "*we are not satisfied that a case has been made*". This Briefing argues that the answer to the Committee's question is simple: there is no need for secret inquests. <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/57/5705.htm>

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

“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 2008²

“And justice seen is justice done...that's only fair to the law abiding majority.”

Prime Minister, Rt Hon Gordon Brown, 23rd September 2008³

¹ Speech by the Lord Chancellor Rt Hon Jack Straw MP on 28 October 2008 to the Royal Society of Arts.

² <http://press.homeoffice.gov.uk/press-releases/crime-justice-pioneer-areas>

³ In his speech to the Labour Party Conference available at:
http://news.bbc.co.uk/1/hi/uk_politics/7631925.stm

Introduction

1. For 28, 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 emphasise the Government's commitment to transparency in the justice system, not least in the interests of victims. While headline-catching measures 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.

3. More fundamentally, these proposals are simply unnecessary. INQUEST, as experienced practitioners working on deaths in custody and other contentious deaths for the last 28 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.

4. As well as undermining the rights of the bereaved, these proposals are logically flawed and amount to a fundamental attack on the independence and transparency of the coronial system in England, Wales and Northern Ireland.⁴ 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.

⁴ In relation to Northern Ireland see clause 40 and Schedule 9 to the Bill.

History of Secret Inquest Clauses

5. Azelle Rodney,⁵ 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 brought to a halt in a 'hard stop' in Edgware, north London, after being under police surveillance for several hours. 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, probably 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 being used as evidence or even being seen by coroners. It appears that it was a legal challenge to RIPA, as being incompatible with the Human Rights Act, brought by lawyers representing Susan Alexander (Azelle's mother) as far back as September 2007, which prompted proposals for secret inquests.

6. 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. Following the withdrawal of the secret inquest provisions from the CTB, the House of Lords debated a proposed amendment to RIPA aimed at enabling the coroner to view and sometimes disclose intercept evidence in inquests. This simple amendment to RIPA would almost certainly have allowed the Azelle Rodney inquest to resume.⁶ Ultimately,

⁵ INQUEST has worked closely with the family of Azelle Rodney.

⁶ See the debate in House of Lords on 21 October 2008, available at: <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81021->

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.⁷ In fact, no such consultation was held, just as the year before the government failed to consult Ms Alexander on Part 6 CTB.⁸

8. The secret inquest clauses as originally re-introduced in the Coroners and Justice Bill were almost identical to those withdrawn from the Counter-Terrorism Bill 2008. After the expression, yet again, of significant cross party opposition (at both Second Reading and Committee Stage of the CJB in the House of Commons) on 17th March 2009, the Justice Secretary announced that the government would be tabling amendments to the provisions. This flawed proposal is, however, not remedied by the last minute amendments and 'safeguards' the government claims to have incorporated into the Bill. In our view the Justice Secretary has simply amended a process that we do not need. INQUEST, Liberty and JUSTICE believe that by making intercept evidence admissible in controlled circumstances in certain inquest proceedings⁹ the need for 'secret inquests' can be entirely avoided. This was also the view of a large number of MPs at Report Stage of the Bill in the House of Commons. As such, an amendment was tabled¹⁰ to delete the secret inquest clauses in their entirety. Speakers from all sides of the House spoke strongly in favour of it, many arguing that the government's last minute

[0002.htm#08102134000002](http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81111-0009.htm); 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>

⁷ Yet the Government remains clear that they expect the secret inquest provisions to apply to the Azelle Rodney inquest. At Report Stage of the CJB in the Commons the Justice Secretary said: "*There may be cases—we think that there is one at the moment—where it is likely to be the judgment, on application to the court by the Secretary of State, that dispensing with a jury is necessary.*"

⁸ 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.*"

⁹ With the necessary safeguards included.

¹⁰ The amendment was signed by a large number of MPs from across the political spectrum.

amendments had failed to shift their opinion. Despite the government's majority being slashed nearly in half by a 19 strong backbench rebellion the amendment was unfortunately ultimately defeated. The Justice Secretary has recently indicated that the government is still open to suggestions. Instead of allowing clauses 11 and 12 to be added to the statute book we urge the government and the House of Lords to consider allowing the admissibility of intercept evidence at Azelle Rodney's inquest - and any future inquests where intercept material may constitute a crucial part of the investigation. INQUEST Liberty and JUSTICE will be suggesting an amendment ahead of Committee Stage of this Bill that would do exactly that.

Last minute Government Amendments

9. As numerous MPs clearly observed during the Report Stage in the Commons, the fundamental nature of these proposals was not altered by the last minute apparent concessions in March 2009. These apparent concessions were threefold. The first means that the Secretary of State can only certify an inquest where he or she thinks it is 'necessary' to prevent disclosure of a matter. Even as originally drafted, we would have hoped that the Secretary of State would not have ordered a certified inquest unless he or she subjectively considered it 'necessary'. The second amendment removed a fifth ground upon which it was originally proposed that an inquest may be certified, which was 'otherwise in order to prevent real harm to the public interest'. This could easily have been expected: it was an astonishingly broad, catch-all, residual power. The Secretary of State can still 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 four 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

10. The third amendment and the one to which the government has drawn most attention concerns the process for certification. As amended certification does not *automatically* lead to a secret inquest – certification now needs to be approved by a High

Court judge. While this tweaks the process it does not prevent (a) executive interference in investigations into deaths; or (b) the exclusion of the jury, the bereaved and the wider public at inquests into potentially highly contentious deaths. Far from being a ‘fundamental recasting’ of the proposals (as claimed by the Justice Secretary) the so-called concessions attempt to re-work a process that is entirely unnecessary and do nothing to alleviate our fundamental concerns.

The clauses as they stand and the exclusion of families from secret inquests

11. Clauses 11-12 (reproduced at annex 1 of this briefing) will effectively allow ‘secret inquests’ to take place partly in private with a High Court judge alone overseeing key evidence. The Bill does not specifically state that other interested persons, such as family or legal representatives, are excluded. However, it is clear that the effect of the very limited amendment to RIPA set out in clause 12 when read together with Clause 11(6)(b) *will remove juries*¹¹ *and* completely prevent the family of the deceased from seeing the secret material and exclude them from any part of the inquest proceedings where this evidence is discussed. This is made clear in the explanatory note to clause 12 (emphasis added):

“Clause 12: Intercept evidence

*104. This clause sets out the necessary amendments to RIPA so that if an investigation is certified by the Secretary of State any material to which RIPA applies can be disclosed to the High Court judge conducting the investigation. This includes the Secretary of State disclosing material to a High Court judge in order for the High Court judge to decide whether to hold the inquest with or without a jury. The judge **may also order disclosure to be made to the judge alone or also to any person appointed as independent counsel to the inquest one of whose roles will be to represent the interests of the deceased’s family at the inquest. Counsel may probe and challenge the evidence on their behalf.** The clause extends to Northern Ireland, where*

¹¹ The words ‘or unlawfully disclosed’ in clause 11(6)(b) will require judges to exclude juries in all cases involving RIPA intercept material

provision similar to that contained in clause 11 will have effect under Schedule 9.¹²

12. Secret inquests will therefore not only exclude juries but bereaved families, their legal representatives, the media and the public at large from key parts of the investigation process. Despite the government's attempt to window-dress their secret inquest provisions, the amended procedure still gravely limits transparency; increases executive control over the inquest process; removes juries from highly controversial inquests and requires bereaved families to be left out of crucial parts of the investigation.

13. Clause 7 of this Bill provides that jury inquests are only convened: where the death took place in State detention and there is suspicion that the death was violent or the cause of death is unknown; or where there is suspicion that the death resulted from the act or omission of a police officer; where there is suspicion that the death was caused by a notifiable accident, poisoning or disease.¹³ Jury inquests will, therefore, by their very nature 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. Indeed, just recently, in the period since this Bill finished its passage in the House of Commons we have seen a tragic example of the type of case where these secret inquest provisions might be invoked. Parliamentarians will be well aware of the death of Ian Tomlinson in the City of London on 1st April 2009. In subsequent days and weeks video footage and photographs taken on the day have revealed that shortly before he collapsed and died, Mr Tomlinson was struck by at least one police officer. At the time of writing an officer from the Territorial Support Group had been questioned under caution for manslaughter. Regardless of whether or not any charge or prosecution goes ahead this case within the criteria for a jury inquest under clause 7 of this Bill. A case of this type could foreseeably attract the secret inquest clauses or at the very least lead to arguments that these clauses should apply. If clauses 11 and 12 came into force, the Secretary of State would conceivably be able to argue that the nature of G20 policing

¹² <http://www.publications.parliament.uk/pa/ld200809/ldbills/033/en/09033x-b.htm>

¹³ INQUEST, Liberty and JUSTICE believe that clause 7 falls short of what is required under Article 2 of the Human Rights Act. We are deeply troubled that this Bill seeks to remove one of the existing grounds for which a jury inquest is required. We have produced separate briefings on the other clauses in this Bill where this issue is explored.

operation was such that in order to prevent certain intelligence information from reaching the public domain the inquest should be held without a jury and partially in secret – thereby excluding the relatives of the bereaved from part of the proceedings.

14. Like the 42 day pre-charge detention provisions which originally accompanied secret inquests, we hope that the Upper Chamber will stand firm in their defence of justice and fairness and demand that clauses 11 and 12 be deleted from the Bill in their entirety. A new clause can then be inserted in the Bill that amends RIPA in a manner that will enable the inquest into the death of Azelle Rodney to finally resume.

Article 2 of the European Convention on Human Rights

15. 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 ECHR¹⁴ 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*”.¹⁵

16. The European Court of Human Rights in *Jordan v UK*¹⁶ 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 to the extent necessary to safeguard their legitimate interests. 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*¹⁷ 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 Article 2 of the European Convention of Human Rights as incorporated by the HRA.

¹⁵ *R (on the application of Hurst) v Commissioner of Police for the Metropolis* [2007] UKHL 13 para 28.

¹⁶ (2001) 33 EHRR 38.

¹⁷ *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51

17. 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 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.”*¹⁸

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.”*¹⁹

18. 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.

¹⁸ *R (on the application of Middleton) v HM Coroner for West Somerset* [2004] UKHL 10, para.3.

¹⁹ *Ibid.*

19. 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.

20. 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*²⁰ and *R on the application of D v the Secretary of State for the Home Department*²¹ both confirmed that when an investigation had not been carried out in public, the publication of a report was insufficient to make the procedure compatible with article 2.

21. 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*²² 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.”

22. 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 ECHR. Despite the government’s optimism, we cannot see how these proposals can fulfill the UK’s legal obligations under article 2. Executive interference and the exclusion of the jury (and the necessary exclusion of the family and wider public from inquests that include a

²⁰ [2004] 1 WLR 796.

²¹ [2006] 3 All ER 946.

²² [2008] EWHC 694 (Admin), see para 37.

consideration of RIPA material) conflict with the requirements of independence, family involvement, public scrutiny and ‘learning lessons’ established in *Jordan v UK*. Government amendments to the provisions tabled immediately prior to Report Stage 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. Moreover, it is only in certified (i.e. secret non-jury inquests) under Clause 11, that the Clause 12 amendments to RIPA apply. This places the judiciary in an impossible position, because a judge will never have the option of retaining the involvement of a jury **and** the family in certified inquests. Failure to involve a jury (and by implication 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.

23. 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 disturbing lack of understanding within government as to their obligations under article 2.

Sufficiency of current procedures

24. We believe that current inquest procedures are sufficient for dealing with issues of sensitive material. Rule 17 of the Coroners Rules 1984²³ 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

²³ As enacted by SI 1984 No 552.

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.²⁴

25. 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 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.

26. 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 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

²⁴ In both *McCann* and *Jordan* referred to above.

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.

27. 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 significant parts of 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.

28. The 2008 inquest into the deaths of 10 RAF personnel who died when a Hercules was shot down in Iraq in 2005 similarly demonstrates the sufficiency of current procedures. The inquest involved the consideration of how to deal with sensitive material and at public pre inquest hearings in 2007 there was extensive legal discussion about the disclosure, redaction and use of sensitive evidence. In the interests of national security the coroner ruled that some documentary material would be disclosed on confidential terms and some evidence would be given in camera. The interested persons at the inquest signed non-disclosure undertakings in relation to documents designated as 'protected documents'. The inquest proper was completed in October 2008 and the vast majority of the evidence was heard in open court. The question of what evidence was not made public was kept under constant review and some material and evidence which was initially adduced in camera was later released into the public domain.

29. While we believe that current procedures provide the necessary framework for even the most sensitive of inquests we do, of course, accept that it is the current procedural bar on admissibility of intercept evidence that has stalled the inquest into the death of Azelle Rodney. Clause 12²⁵ makes clear that the Government believes that intercept can only be made admissible in 'certified' non-jury inquests. While clause 12 continues the piecemeal removal of the general bar on the use of intercept²⁶ (and represents a tacit acceptance of the use of intercept material) we can see no reason why the removal of the ban needs to be restricted to a new breed of 'certified' inquests. In legal terms the general 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

²⁵ Clause 12 amends section 18 of the *Regulation of Investigatory Powers Act 2000* (RIPA) to allow intercept material to be admissible in inquiries in 'certified investigations'.

²⁶ 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.²⁷

30. In addition, 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.²⁸ While we welcome the Prime Minister's initial indication that the government intends to implement the Chilcott conclusions, progress has been slow. In the meantime, at a minimum, the blanket ban on intercept evidence should be lifted in coronial inquests. 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. We will be suggesting an amendment for Committee Stage of the Bill which would do just this. Under such an arrangement it would 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. It remains our position that the ban on the admissibility of intercept evidence should be removed in respect of all proceedings,²⁹ but given the length of delay in the Azelle Rodney inquest (which will remain stalled until this issue is resolved) we believe that this Bill needs to provide an immediate amendment to RIPA.

Public trust and confidence in the Inquest System

31. 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.

²⁷ 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>

²⁸ Privy Council review of Intercept as Evidence available at: <http://www.official-documents.gov.uk/document/cm73/7324/7324.asp>

²⁹ 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.

They would, therefore, give the Secretary of State a key role in the very inquests where the state's actions are most under scrutiny.

32. If these provisions were already in place the government could potentially have justified secrecy in the de Menezes inquest on all four of the proposed 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.

33. 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. Details that have emerged in a series of military inquests have been highly critical of the Ministry of Defence over the deaths of British army personnel in Iraq and Afghanistan. While jury inquests are not convened as a matter of course in military deaths clause 7 of the current Bill leaves open the possibility of a jury inquest "*if the senior coroner thinks that there is sufficient reason for doing so*". Clauses 11 and 12 would allow the Secretary of State to certify investigations into the deaths of serving personnel following a decision by a senior coroner that a jury should be convened.

34. 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.³⁰ The second ground on which inquests can be certified

³⁰ See Daily Telegraph "*Government faces revolt over secret inquests*" 14 March 2009 available at: <http://www.telegraph.co.uk/news/newsttopics/politics/lawandorder/4990965/Government-faces-revolt-over-secret-inquest-bid.html>

under clause 11 certainly reinforces this theory³¹ 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”.*³²

35. 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.³³ 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.”*³⁴

36. 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

³¹ Clause 11(2)(a)(ii) *“In order to protect the interests of the relationship between the United Kingdom and another country”*. While we don’t believe that secret inquests can be justified on any of the four grounds proposed, this ground is surely 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 extremely troubling. 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.

³³ 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>

³⁴ 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”.*³⁵

Whatever the government’s underlying intentions, these examples clearly demonstrate the loss in trust and confidence that such measures invoke. We are aware that in addition to Susan Alexander, the mother of Azelle Rodney, a number of other bereaved victims currently waiting for inquests into the deaths of their loved ones have already been affected by the worry that their inquests might be subject to the secret inquest provisions.

Wider Implications

37. 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.

38. 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 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

³⁵ 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](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)

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?

39. The short history of these specific ‘secret inquests’ provisions has been outlined above. However, the model for this latest measure of ‘exceptionalism’ can be traced back much further. Under clause 12 special counsel will be appointed in certified 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 ruling³⁶ 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:

“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

³⁶ *A v Secretary of State for the Home Department* [2004] UKHL 56.

*knowledge of the accusations being made and without any kind of criminal charge or trial. For me this was untenable.*³⁷

40. 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.

Scrutinizing Government Arguments for Secret Inquests

"PII certificates are problematic in the coronial system"

41. The government has 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.³⁸ 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.

42. 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

³⁷ See:

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

³⁸ See *Binyam Mohamed v Secretary of State for Foreign & Commonwealth Affairs 2009] EWHC 152 (Admin)*.

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.³⁹ 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.

“Jury inquests are only convened in a small minority of inquests”

43. 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.⁴⁰

“Government will not use the provisions often”

44. 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

³⁹ 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.

⁴⁰ For more information on the importance of jury inquests see INQUEST’s website: <http://inquest.gn.apc.org/>

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 catchment areas and to detect litterbugs.⁴¹ As drafted the Secretary of State's certification power could be invoked in numerous inquests. The Shadow Justice Secretary, Dominic Grieve QC MP, made this point very well at Report Stage of the Bill when he said:

"The problem with the planned system is that once it is on the statute book, it will be used far more frequently than any resort to inquiries under section 2 of the Inquiries Act. Once the system is an established procedure, it will be quite easy for Secretaries of State to make applications and, in a sense, to exonerate themselves from the onerous aspects of the responsibility. They will say, "The procedure is there. Parliament has set it up." There are instances in which coroners inquests can take place without a jury, even though there ought to be one."⁴²

45. 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.⁴³ In this particular case the coroner ruled that the inquest could in fact go ahead using current safeguards for sensitive material. However as discussed above we already know of one other case – that of

⁴¹ See the use of powers under the *Regulation of Investigatory Powers Act 2000*.

⁴² Report Stage of the Coroners & Justice Bill (23/03/09) Hansard Column 78

⁴³ The Coroner in the inquest into the death of Terry Nicholas has now ruled that it can go ahead under the existing legal framework.

Azelle Rodney – where it is thought that a secret inquest is required. This is not indicative of a procedure that will be used “only in very exceptional cases”⁴⁴.

“Families will be able to judicially review the certification of an inquest”

46. The government has placed much reliance on the fact that interested persons would be able to judicially review a certification decision made by the Secretary of State. If interested persons, such as the family of the deceased, 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 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, while enabling the family to properly participate in legal argument in this regard.

“Government amendments ‘recast’ the process”

47. 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 amended procedure 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

⁴⁴ Justice Secretary, Jack Straw, during the Report Stage of the Coroners & Justice Bill in the House of Commons.

so on an equal footing with the Secretary of State as they will not be given the full reasons for the need for a non-jury inquest.

48. At Report Stage of the Bill in the Commons, the Justice Secretary attempted to allay fears about proposals by making promises to members about how the judiciary would interpret the clauses. He said: “*the judge would, quite properly, lean over backwards to see whether it is possible to meet the concerns of the Secretary of State without having to dispense with a jury. Only in very exceptional cases—they would be few and far between, but they may arise—would the judge come to the view that a jury should be dispensed with*”.⁴⁵ Despite the Secretary of State’s protestations, on issues of national security, courts have traditionally 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*,⁴⁶ warned against judges who “*show themselves more executive-minded than the executive*”.⁴⁷ 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,⁴⁸ stated:

*“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.”*⁴⁹

49. In *Secretary of State for the Home Department v Rehman*⁵⁰ 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*”.⁵¹ 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*

⁴⁵ Report Stage of the Coroners & Justice Bill (23/03/09) Hansard Column 77

⁴⁶ [1942] AC 206.

⁴⁷ At page 361.

⁴⁸ *R v Secretary of State ex parte Hosenball* [1977] 3 All ER 452.

⁴⁹ At page 457.

⁵⁰ [2002] 1 All ER 122

⁵¹ At [31]; page 135.

*decision. They are entrusted to the executive.*⁵² 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*”.⁵³

50. Even in the landmark *Belmarsh* judgment,⁵⁴ 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*”;⁵⁵ Lord Hope said that “*great weight must be given to the views of the executive*”;⁵⁶ Lord Scott noted that “*the judiciary must in general defer to the executive’s assessment*”;⁵⁷ 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*”.⁵⁸ 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.

51. At Commons Report Stage of the Bill the Justice Secretary failed to convey just how tightly the hands of judges will be tied under these clauses. Under clause 11(6) the High Court judge has no discretion to determine whether material the Secretary of State claims to be protected does in fact warrant its protection. So long as the Secretary of State claims information is ‘protected material’, and the High Court judge agrees revealing it to the jury would involve ‘the matter being made public’, then the judge has no discretion under clause 11(6)(b) to hold the inquest with a jury, even if the judge is satisfied that the Secretary of State’s claims of protection are for example groundless or disproportionate. The hands of the judiciary will be particularly tied where RIPA⁵⁹ material is concerned. The words ‘or unlawfully disclosed’ in clause 11(6)(b) will require judges to exclude juries in all cases involving RIPA intercept material because the clause 12 amendments to RIPA do not widen ‘lawful disclosures’ to juries in inquests

⁵² At [50]; page 139.

⁵³ At [62]; page 142.

⁵⁴ *A v Secretary of State for the Home Department* [2005] 1 AC 68.

⁵⁵ At [29].

⁵⁶ At [112].

⁵⁷ At [154].

⁵⁸ At [226].

⁵⁹ *Regulation of Investigatory Powers Act 2000*.

(or bereaved families). So, even where a judge knows of 'protected matter' (ie RIPA intercept material) that the jury should see in order to properly discharge its statutory functions AND so as to avoid a breach of the ECHR, the judge will be required to exclude the jury. This is of huge concern as there inevitably will be cases where RIPA material will be central to the issues to be resolved at an inquest.

Real Consensus against Secret Inquests

52. Concern about secret inquests has been expressed by the JCHR,⁶⁰ the House of Commons Justice Committee⁶¹ and the House of Lords Select Committee on the Constitution.⁶² The JCHR has expressed particular 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. 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.*"⁶³ Serious concerns have also been raised by the Northern Ireland Human Rights Commission.⁶⁴

Conclusion

53. The government argues that secret inquests are necessary in order for the State to fulfill its Article 2 obligations to allow independent investigation into deaths. This argument is based on the notion that without secret inquests, intercept material cannot be considered and inquests cannot therefore go ahead. As explained earlier, this rests on a false premise that intercept evidence can only be used in cases where juries and families have been removed. It is illogical and circular to say that the state must breach its article 2 obligations (by convening an inquest in which the bereaved cannot be fully

⁶⁰ 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.

⁶¹ House of Commons Justice Committee Report on the Counter Terrorism Bill, HC 405, para 5,

⁶² 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

⁶³ House of Commons Justice Committee Report on the Coroners and Justice Bill, HC 185, 20 January 2009 at para 14.

⁶⁴ See above at paragraph 27.

involved) in order to fulfill its article 2 obligations to have an inquest. INQUEST, Liberty and JUSTICE believe that current procedures can allow for intercept material to be made admissible in jury-inquests. Accordingly, we will be proposing an amendment to the Regulation of Investigatory Powers Act for the Committee Stage of this Bill. We believe that this is all that is required in order to allow for the much-delayed inquest into Azelle Rodney's death to go ahead. We therefore urge parliamentarians to reject these unnecessary, opaque and dangerous provisions and protect the right to open justice in the most difficult and potentially politically contentious of circumstances.

Annex 1 – Clauses 11-12 of the Coroners & Justice Bill

Certification by Secretary of State in interests of national security etc

11 Certified investigations: investigation by judge, inquest without jury

(1) The Secretary of State may certify an investigation under this Part into a person's death if—

- (a) an inquest will be held as part of the investigation,
- (b) the inquest will (if the investigation is not certified) be held by a senior coroner with a jury,
- (c) the Secretary of State is satisfied that the investigation will concern or involve matters (referred to below as “protected matters”) that should not be made public in order to protect the interests of—
 - (i) national security,
 - (ii) the relationship between the United Kingdom and another country, or
 - (iii) preventing or detecting crime, or in order to protect the safety of a witness or other person, and
- (d) the Secretary of State is of the opinion that it is necessary for the inquest to be held without a jury in order to avoid protected matters being made public or unlawfully disclosed.

(2) Where a certification under this section has effect—

- (a) the investigation in question must be conducted by a judge of the High Court nominated by the Lord Chief Justice;
- (b) that judge has the same functions in relation to the body and the investigation as would be the case if he or she were the 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.

Accordingly a reference in a statutory provision (whenever made) to a coroner is to be read, where appropriate, as including a judge conducting an investigation by virtue of this section.

(3) Where the Secretary of State has certified an investigation under this section—

- (a) the Secretary of State must as soon as possible inform the senior coroner of the certification;
- (b) the senior coroner must as soon as possible inform all interested persons whose name and contact details are known to the coroner that the investigation has been certified.

A reference in this subsection to the senior coroner is to the senior coroner who is responsible for conducting the investigation, or would be but for subsection (2).

(4) A certification under this section does not have effect—

- (a) until the end of the period of 14 days beginning with the date of the certification, or
- (b) if proceedings for judicial review of the certification are brought within that period, until the conclusion of those proceedings.

(5) Where a certification under this section has effect, the Secretary of State must inform the judge responsible for conducting the investigation what are the protected matters.

(6) The judge holding an inquest as part of a certified investigation must hold it without a jury if—

- (a) there is a protected matter that would need to be revealed to the jury (if there was one)—
 - (i) in order for the jury to be able properly to discharge its duty under section 10(1), and
 - (ii) in order to avoid a breach of any relevant Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)), and
- (b) the judge is satisfied that it is necessary to hold the inquest without a jury in order to avoid the matter being made public or unlawfully disclosed.

If the judge decides to hold the inquest with a jury, the judge must not allow any protected matter to be revealed to the jury unless it is a matter within paragraph (a).

(7) Where a decision made by a judge conducting an investigation by virtue of this section gives rise to an appeal under section 32, that section has effect—

- (a) as if references in it to the Chief Coroner were references to the Court of Appeal;
- (b) with the omission of subsections (8) and (9).

(8) In this section—

- (a) a reference to conducting an investigation, in the case of an investigation that has already begun, is to be read as a reference to continuing to conduct it;
- (b) a reference to holding an inquest without a jury, in the case of an inquest that has already begun, is to be read as a reference to continuing the inquest without a jury.

Where by virtue of subsection (6) an inquest begun with a jury has to be continued without one, the judge holding the inquest must discharge the jury.

12 Intercept evidence

(1) Section 18 of the Regulation of Investigatory Powers Act 2000 (c. 23) (exclusion of matters from legal proceedings: exceptions) is amended as follows.

(2) In subsection (7), after paragraph (c) insert—

“(d) a disclosure made by the Secretary of State to a judge of the High Court in pursuance of section 11(5) of the Coroners and Justice Act 2009;

(e) a disclosure—

(i) to a judge of the High Court conducting an investigation into a person’s death which has been certified by the Secretary of State under section 11 of that Act, or

(ii) to a person appointed as counsel to an inquest held as part of an investigation so certified, where the judge has ordered the disclosure to be made to the judge alone or (as the case may be) to the judge and the person appointed as counsel to the inquest;

(f) a disclosure made by the Secretary of State to a coroner in pursuance of section 18A(2)(a) of the Coroners Act (Northern Ireland) 1959; or

(g) a disclosure to a coroner or to a person appointed as counsel to an inquest where—

(i) the Secretary of State has certified the inquest under section 18A of that Act, and

(ii) the coroner has ordered the disclosure to be made to the coroner alone or (as the case may be) to the coroner and the person appointed as counsel to the inquest.”

(3) After subsection (8A) insert—

“(8B) A judge of the High Court shall not order a disclosure under subsection (7)(e) except where the judge is satisfied that the exceptional circumstances of the case make the disclosure essential to enable the matters that are required to be ascertained by the investigation to be ascertained.

(8C) A coroner shall not order a disclosure under subsection (7)(g) except where the coroner is satisfied that the exceptional circumstances of the case make the disclosure essential to enable the matters that are required to be ascertained by the inquest to be ascertained.”