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Briefing on the Counter Terrorism Bill 2008 for the House of Lords Committee Stage

October 2008

1. About INQUEST

- 1.1 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, immigration detention centres and while detained under the Mental Health Act. We provide a free, confidential advice service to all families who go through an inquest process. In 2007 we worked on more than 250 cases advising over 1,000 family members about their rights in the coroner's courts.
- 1.2 Through our casework over the last 25 years, INQUEST has a unique overview of how the inquest system operates from the perspective of bereaved families and their advisers. We extract policy issues arising from contentious deaths and their investigation and campaign with and on behalf of bereaved families and their legal representatives for changes to be implemented which could prevent further deaths.
- 1.3 We are working closely with the family and legal team of Azelle Rodney, a 24 year old black man who was shot seven times in the head in a pre-planned police operation in April 2005. It was a legal challenge to the Regulation of Investigatory Powers Act 2000 (RIPA) bought by lawyers representing Susan Alexander (Azelle's mother) which prompted the proposals contained in this Bill regarding inquests. These proposals are not supported by Susan Alexander who has found it highly distasteful that the government should suggest that they are being introduced for her benefit.

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1. Executive Summary

- 1.1 INQUEST is strongly opposed to measures contained in Part 6 of the Counter Terrorism Bill 2008 which give the Secretary of State power to intervene in inquests where sensitive information is involved. The proposals amount to a fundamental attack on the independence and transparency of the coronial system in England and Wales. They are fundamentally flawed; unsupported by evidence; disconnected from legal principles; and have been devised without any consultation with stakeholders.
- 1.2 The proposals could result in inquests into highly contentious deaths in custody taking place without juries and partly in private with appointed coroners and appointed counsel. This would exclude bereaved families, their legal representatives and the public at large from the investigation process in breach of article 2 of the European Convention on Human Rights.
- 1.3 Deaths in custody raise important issues of state power and accountability. In a free and democratic society, deaths in state custody should be subject to particularly close public scrutiny. For this reason it is imperative the inquest system is open and transparent so that justice is seen to be done and public confidence in state bodies is upheld.
- 1.4 From our experience as practitioners working on deaths in custody and the inquest system for more than 25 years, we cannot envisage a situation where the proposed legislation is necessary. We have seen no arguments or evidence from the government to justify the imposition of such wide-ranging and draconian proposals.
- 1.5 The wording of the proposals is open to wide interpretation and gives the Secretary of State extensive discretion to intervene in the inquest process. We fear the proposals could be applied to a broad range of inquests.
- 1.6 The government has claimed that as 98% of all inquests take place without juries these current proposals do not amount to a serious attack 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. The removal of public scrutiny from these proceedings is therefore highly significant.
- 1.8 We note that the parliamentary Joint Committee on Human Rights, the Justice committee and the Constitution committee have all called for these sections of the Bill to be removed.
- 1.9 According to the government, this proposed legislation is being brought in order to deal sensitive information in just one case, the inquest into the shooting by police of Azelle Rodney in 2005. But the family of Azelle do not want an inquest to take place where secret evidence could be suppressed from them and do not want this legislation to pass in their name.
- 1.10 INQUEST believes that a more satisfactory way of dealing with the issue of sensitive information at inquests is to temporarily amend the Regulation of Investigatory

Powers Act 2005 (RIPA) to ensure a coroner is able to properly consider intercept material. However it is premature to make such amendments within part 6 of the Bill given that the fundamental principles of the use of intercept material is under consideration following the Chilcot review.

- 1.11 We therefore recommend that Part 6, clauses 77-81 of the Counter Terrorism Bill 2008 be deleted.**

2. Briefing

"[I]t is indispensable that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence"

R (Amin) v Home Secretary [2003] UKHL 51 paragraphs 20(10) and 31.

(The Zahid Mubarek case)

2.1 **CLAUSE 77**

Clause 77 gives the Secretary of State the power to issue certificates which would remove juries from inquests if he or she believes evidence will be heard which should not be made public:

- a) in the interests of national security;
- b) in the interests of the relationship between the UK and another country; or
- c) otherwise in the public interest.

2.2 **Political interference in the inquest system**

Clause 77 would give the Secretary of State unprecedented and wide-reaching powers to intervene in the investigation of contentious deaths. This amounts to excessive political interference in the judiciary in the very circumstances where the state's actions require the most scrutiny. The catch-all phrase of "otherwise in the public interest" makes any potential challenge of a decision of the Secretary of State virtually impossible.

2.3 **Article 2 and inquests**

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 European Convention on Human Rights (ECHR) which protects the right to life. These proposals clearly conflict with Article 2 requirements.

2.4 Article 2 requires the government to have proper procedures in place for ensuring the accountability of agents of the state to maintain public confidence and allay any concerns that arise from the use of lethal force. It places a positive duty on the state to investigate a death in custody with an inquiry that is:

- on the state's own initiative (e.g. not as a result of civil proceedings);
- independent, both institutionally and in practice;
- capable of leading to a determination of responsibility and the punishment of those responsible;
- prompt;
- allows for sufficient public scrutiny to ensure accountability;

- enables the next of kin to participate¹.

2.5 This means that Article 2 requires public scrutiny. The extent of public scrutiny necessary may vary. However, the case-law makes clear that, for controversial deaths involving the responsibility of state agents, it will only be in exceptional cases that it will be lawful for the public to be prevented from seeing all of the relevant evidence²

2.6 In *R (Amin) v Home Secretary* [2003] UKHL 51 (the case of Zahid Mubarek) Lord Bingham summarised the purposes of an inquest under article 2:

“The purposes of such an investigation are clear: 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 death may save the lives of others.”

2.7 If inquests take place behind closed doors it will be hard for bereaved families and the public at large to allay any suspicions of wrong doing. Indeed, the secrecy may fuel fears that the state is attempting to deliberately prevent information reaching the public domain. We believe the public will find it difficult to have confidence that these coroner-only inquests, with key evidence being suppressed from the public domain, could investigate contentious deaths involving state agents independently.

2.8 The importance of juries

Whilst jury inquests account for only 2% of the total number of inquests in England and Wales this is not an indication of their importance as juries are only required at inquests where public interest issues are raised. Under section 8 (3) of the Coroners Act 1988 the Coroner must sit with a jury in cases where a death occurs in prison or when the deceased was in police custody, or resulted from an injury caused by a police officer in the purported execution of his duty. Deaths which raise issues of health or safety to the public such as deaths at work also require jury inquests.

2.9 The government has claimed that as 98% of all inquests take place without juries these current proposals do not amount to a serious attack 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. The removal of public scrutiny from these proceedings is therefore highly significant.

2.10 Juries have a central role in ensuring maximum public scrutiny and are the only opportunity for ordinary people, independent of the state, to participate in the judicial system. They have the effect of diffusing power into the community and in cases of

¹ *Jordan v UK* (2001) 37 EHRR 52, also approved by the House of Lords in the case of *ex parte Amin*

² See *Edwards v United Kingdom* (2002) 35 EHRR 19, and *R (on the application of D) v Secretary of State for the Home Department* [2006] 3 All ER 946).

contentious deaths are often seen by bereaved families as the key safeguard in terms of public accountability

2.11 Sufficiency of current procedures

From our experience as practitioners working on the inquest system for over 25 years we cannot understand why such procedures are suddenly so urgently necessary. The government has failed to produce any evidence for the imposition of such wide reaching and draconian measures and in our view current inquest procedures are suitably sufficient for dealing with issues of sensitive material. Rule 17 of the Coroners Rules 1984 (as enacted by SI 1984 No 552) 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”. Public Interest Immunity certificates can also be issued if necessary.

2.12 The government’s proposals appear to be a knee-jerk reaction to the problem of how to deal with sensitive information at inquests. Yet the proposals are so wide-reaching that they create more problems than they resolve. There a continuum of different situations in which an inquest could operate where sensitive information needs to be addressed. This ranges from total openness and full public scrutiny of all information to secret inquests that take place behind closed doors with government appointed coroners. Had the government consulted with stakeholders such as coroners, NGO’s and legal representatives when faced with whatever problem they are trying to resolve it may have been able to produce a more agreeable set of proposals.

2.13 CLAUSE 79

Clause 79 creates a new category of “specially appointed coroners” to oversee these non-jury inquests alongside “coroner-appointed counsel” to represent bereaved families.

2.14 This Secretary of State has recently moved to amend this clause and replace the person appointing the special Coroners and Counsel from being the Secretary of State to the Lord Chief Justice. But this still does not deal with why a new category of coroner is necessary. There is no evidence of which we are aware that this new category of coroner should be introduced. In exceptional cases involving sensitive matters of public interest or in complex cases, it may be appropriate for a High Court judge to sit as a coroner as is current practice. We would draw attention to the fact that it has not been necessary to create a new category of criminal judge to hear the cases where sensitive material engaging public interest is involved leading us to question why such a provision is necessary for coroners. We similarly question the need for appointed counsel.

2.15 Clause 81

Clause 81 amends section 18 of RIPA to allow disclosure of intercept material to the coroner and persons appointed as counsel at an inquest where a certificate by the Secretary of State has been issued.

- 3.18 Inquest supports the government's intention not to allow the prohibition of disclosure on intercept material to prevent the proper functioning of an inquest. But we do not believe that this equates with removal of a jury.
- 3.19 Many inquests and criminal trials involve the consideration of material that should not be made public. This ranges from personal details about witnesses to operational matters concerning police conduct or matters of national security. The existence of such material does not necessarily mean that a jury cannot or should not hear the case. It may mean that part of the proceedings should be held in camera so that the jury and the interested parties may hear the evidence, or that public may be excluded from that part of the hearing, or that certain details should not be reported by the press.

3. Conclusion

- 3.1 Concern about the proposals has been expressed by the chairs of the parliamentary Joint Committee on Human Rights (JCHR) and the Justice Committee. The Justice Committee has called for the proposals to be "withdrawn pending more detailed scrutiny"³ The JCHR has also called for this section to be removed and 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. Chair of the Committee, Andrew Dismore MP, said:

*"We are seriously alarmed at the prospect that under these provisions inquests into deaths occurring in circumstances like that of Jean Charles de Menezes, or British servicemen killed by US forces in Iraq, could be held by a coroner appointed by the Secretary of State sitting without a jury. Inquests must be, and be seen to be, totally independent, and in public to secure accountability, with involvement of the next of kin to protect their legitimate interests. When someone dies in distressing, high profile circumstances their family need to see and feel that justice is being done, and where state authorities are involved there is a national interest in accountability as well."*⁴

- 3.2 It is clear that the proposals contained in Part 6 of the Counter Terrorism Bill are ill-advised; inappropriate, unnecessary and amount to a breach of fundamental rights. For this reason, these sections of the Bill should be withdrawn.

³ House of Commons Justice Committee, *Counter Terrorism Bill: Third Report of Session 2007-08*, 4/3/08

⁴ House of Commons Joint Committee on Human Rights press release 6/2/2008 accessed from http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/joint_committee_on_human_rights_press_notices.cfm

APPENDIX 1: BACKGROUND TO THE PROPOSALS – THE AZELLE RODNEY CASE

The proposals contained in clauses 77- 81 of the Bill arose from legal challenges brought on behalf of the family of Azelle Rodney over admissibility of intelligence evidence. Azelle Rodney died in April 2005 after a police operation in north London in which he was shot seven times – the circumstances surrounding his shooting had nothing to do with counter terrorism. Azelle was shot after the car he was in was ordered to 'hard stop' after being under police surveillance for more than three 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 under the Regulation of Investigatory Powers Act (RIPA) 2000, which covers information obtained from covert surveillance devices such as telephone taps or bugs. Lawyers acting for the family of Azelle Rodney threatened to take the government to court to show that RIPA was in breach of the Human Rights Act 1998. His family have already been told that their case will be subject to the new measures despite the Bill still progressing through parliament.