House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny:
Coroners and Justice
Bill (certified inquests)

Sixteenth Report of Session 2008-09

Report, together with formal minutes and
written evidence

Ordered by The House of Lords to be printed 12 May 2009
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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

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Powers

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The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), Emily Gregory and John Porter (Committee Assistants), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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Summary

We previously reported on the Coroners and Justice Bill in March and concluded, amongst other things, that the Government’s proposal to certify certain inquests, so that at least part of the inquest could proceed without a jury and without the participation of the bereaved family, should be dropped. We were concerned that certified inquests would contravene Article 2 of the European Convention on Human Rights, in particular the requirement that inquests should involve participation by the next of kin. We argued that the Government had provided insufficient evidence of the need for the new provision and that the human rights of bereaved families were inadequately protected.

The Government published amendments to the relevant clauses on 17 March, the day our initial report was agreed. We consider these amendments in this report. Our overall conclusion is that the amendments do not assuage our concerns and we reiterate our call for the proposal to be dropped.

We also deal with a number of detailed points concerning the application of the Government’s proposals on coroners’ reform to Northern Ireland.
Government Bills

Bills drawn to the special attention of each House

1 Coroners and Justice Bill

| Date introduced to first House | 14 January 2009 |
| Date introduced to second House | 25 March 2009 |
| Current Bill Number | HL Bill 33 |
| Previous Reports | 8th Report |

Introduction

1.1 The Coroners and Justice Bill will have its second reading in the House of Lords on 18 May 2009. We published our first report on the Coroners and Justice Bill on 20 March 2009. In that report, we highlighted a number of significant human rights issues in the Bill. We proposed a number of amendments to the Bill to meet our concerns.1

1.2 On 17 March 2009, the day that our first report was agreed, the Government tabled a number of significant amendments to the Bill. We regret however, that many of the concerns that we raised in that report have not yet been adequately addressed by the Government. We publish a revised list of proposed amendments, updated to refer to the latest version of the Bill, as an Annex to this Report.

1.3 We welcome the Government’s decision to remove its proposal to introduce enabling provisions to allow new information sharing gateways to be created by secondary legislation. It remains our view that these proposals were too widely drawn and contained inadequate safeguards for the protection of the right to respect for private information, as protected by Article 8 ECHR and the Data Protection Act 1998.

Certified or “secret” inquests

1.4 We limit the remainder of our comments in this report to the Government’s changes to its proposals for certified or ‘secret’ inquests and their implications for our conclusions in our first report. We concluded that the original provisions in Clauses 11 – 13 were capable of operating in a way which could risk incompatibility with the procedural requirement for an effective investigation in cases when the right to life is engaged (Article 2 ECHR). We considered that the Government had not provided evidence to support its case that the proposals were necessary and that adequate safeguards had not been provided. We recommended that these proposals should be deleted from the Bill.2

The Government amendments

1.5 After the publication of the Government amendments, we asked the Minister for a revised statement of the compatibility of these proposals with Convention rights. The Minister wrote to us on 2 April 2009, including a copy of the relevant section of the

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2 First Report, Chapter 2.
updated Explanatory Notes which were prepared for the Bill’s introduction to the House of Lords. The principal changes are:

- In order to certify an investigation, the Secretary of State must now be:
  - ‘satisfied’ that an investigation will involve matters which should not be made public (replacing the original test based on his or her ‘opinion’); and
  - ‘of the opinion that’ it is necessary for the inquest to be held without a jury in order to prevent the disclosure of protected matters.3

- A “catch-all” public interest trigger for certification, which we previously criticised, has been removed. The other broad grounds for certification are largely unchanged.4

- Under the original proposals, the Secretary of State would have a duty to inform interested parties of the certification. This duty is now on the coroner.

- Under the original proposals, a certificate would automatically require an inquest to be held without a jury. The new provisions introduce some degree of discretion for the High Court judge hearing the certified inquest. The judge must hold the inquest without a jury if:
  - the protected information would need to be revealed to the jury in order to meet the purposes of the inquest or to avoid a breach of Convention rights; and
  - the judge is satisfied that it is necessary to hold the inquest without a jury in order to avoid the protected matters being made public.5

- The judge may only continue to hold an inquest with a jury – and disclose to the jury any protected information necessary to meet the purposes of the inquest or to avoid a breach of Convention rights – if the information can otherwise be prevented from being made public or unlawfully disclosed.6

- Where a certificate is issued after a jury inquest has begun, the jury must be discharged.7

- The decision to certify remains subject to judicial review and similar arrangements are extended to Northern Ireland.8

1.6 In the Government’s view, these proposals mean that the responsibility for the protection of certified information will now pass to the High Court judge hearing the inquest. It will be for the judge to determine what measures are necessary to meet the requirements of Article 2 ECHR, while continuing to ensure that the protected information does not enter the public domain.9

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3 Clause 11(1)(c) – (d)
4 Clause 11 (1)(c)
5 Clause 11(6)(a) – (b)
6 Clause 11(6)(b)
7 Clause 11(8)
8 Clause 40 and Schedule 9 contain the provisions in the Bill which would extend similar measures to Northern Ireland.
9 Letter from Bridget Prentice MP to Dominic Grieve MP, dated 17 March 2009
Safeguards

1.7 In our last report, we expressed our concern about a) the degree of judicial oversight in the original proposals and b) the ability of families to participate in non-jury inquests where they were excluded in order to protect certain information.

Judicial oversight

1.8 The Secretary of State retains the power to certify that certain information must not be made public nor disclosed unlawfully, subject to judicial review. The Secretary of State must now be “satisfied” that the inquest will involve matters which should not be made public and that in his opinion, it is “necessary” to hold the inquest without a jury in order to prevent those matters becoming public. In our view, this is largely a cosmetic change which is unlikely to lead to a higher degree of scrutiny than the original test of whether certification is necessary in the Secretary of State’s “opinion”. In any event, the change is not sufficiently significant to override the Committee’s original concern that these provisions are deliberately framed in a subjective way in order to avoid the scrutiny to which the Secretary of State would be subject on an application for public interest immunity (or an application for any other special measures currently available).

1.9 During Report State in the House of Commons, the Secretary of State for Justice suggested that the new provisions would, in effect, involve an application by the Secretary of State for protection of the matters which he considered should not be made public:

The certificate simply triggers the application, so it is hardly necessary to go behind it, although the learned judge will want to know the reasons for it because they will be germane to the evidence to be protected. The question then is whether there are ways in which to protect the material other than being without a jury. 10

1.10 The use of the term ‘application’ presents a rather benign picture of the proposals in the Bill and risks misleading members of both Houses. It suggests that the process of certification will involve a presentation of evidence by the Secretary of State to a judge with the power to refuse protection of the information concerned, as in any application for public interest immunity (PII). This is not what the Bill proposes.

1.11 The proposals create a special procedure for certain inquests. The certification by the Secretary of State that certain information must be protected, determines that this procedure should apply. After certification, it will be for the High Court judge hearing the inquest to determine how to keep that information out of the public domain. The judge will have some discretion to disclose that information to a jury, in order to achieve the purposes of the inquest. 11 However, the judge will not have any broader discretion to decide that the information is not worthy of protection or needs to be disclosed to the

10 HC Deb, 23 March 2009, Col 114
11 The decision of the High Court judge hearing the inquest to exclude a jury or in relation to any other measures used to keep the certified matters secret will be subject to appeal to the Court of Appeal. An appeal to the Court of Appeal will involve a challenge to the judge’s determination on the facts and the law as to whether the information could be protected in the circumstances proposed by the judge. The Secretary of State could appeal a proposal to appoint a jury. Similarly, a family could appeal the decision not to appoint a jury; the decision to appoint a jury but to exclude the family members or any other order designed to keep the protected matters out of the public domain. The Court of Appeal, in our view, could not consider an appeal based on an allegation that the matters being protected were not appropriate for protection and should be disclosed in the public interest.
bereaved family or the public in order to meet the requirements of Article 2 ECHR. The High Court judge hearing the inquest cannot challenge the decision of the Secretary of State that the certified information should be kept secret. If a family member or another interested party wishes to challenge this decision, their only redress is judicial review.

1.12 **The introduction of a degree of judicial discretion is an improvement on the earlier proposals.** However, the power of the Secretary of State to issue a certificate remains very broad and the effect of certification will be to bind a judge to ensure that that protected information does not come into the public domain. This is a far cry from the PII process, where the Secretary of State must make an application for protection, then persuade the coroner, or the relevant judge, that it is necessary to prevent publication in the public interest.

**Participation of bereaved families**

1.13 We concluded that if bereaved families were to be excluded from an inquest, at the very least their interests should be protected by a special advocate appointed for that purpose. The Government must explain how the effective participation of bereaved families will be achieved under the new proposals:

- Will a judge determining how to prevent publication of protected material have the power to appoint a special advocate to represent the interests of bereaved family members or other interested parties?
- If this is the intention, should this not be expressly provided for on the face of the Bill?
- If not, how will their interests be protected?

1.14 **In our view, nothing in the amendments introduced by the Government meets our concern about how the effective participation of bereaved families might be secured in a certified inquest.**

**Are these provisions necessary?**

1.15 Our principal conclusion in our earlier report was that these proposals were not necessary. Only one case, involving intercept evidence, which would not ordinarily be admissible, has been produced as justification for the certification proposals. The IPCC told us that they could not see any other reason why a certification process might be necessary. Other witnesses, including Inquest, told us that other existing measures available to coroners would be adequate to protect the type of information which the Secretary of State wished to protect.

1.16 The Government amendments do not meet our overriding concerns about the scope of these proposals and their necessity. The Government has not yet explained why these proposals are necessary beyond the need to make provision for the admissibility of intercept evidence. In the case of intercept evidence, which we deal with below, the Government have not explained why existing provisions, including the public interest immunity procedure, are inadequate to protect matters which it would not be in the public interest to disclose to public scrutiny. Before proceeding with these proposals, the Government must explain why these measures are necessary, in light of existing procedural
measures designed to protect witnesses and sensitive information (for example through PII or other measures, such as were deployed in the *de Menezes* case); and in circumstances other than cases involving relevant intercept evidence (i.e. wider national security issues, relations with another country, protection of witnesses and prevention of crime).

1.17 We are not persuaded that these proposals are necessary or accompanied by adequate safeguards to protect the right to life, as guaranteed by Article 2 ECHR. We recommend that Clauses 11 – 12, and the equivalent provisions relating to Northern Ireland in Clause 40 and Schedule 9, are deleted from the Bill.

**Intercept evidence and inquests**

1.18 Justice, Liberty and Inquest have produced a joint-briefing on the amended proposals. At Report Stage in the House of Commons, they argued for an alternative amendment to the Bill, which would admit intercept evidence in coroners inquests. The coroner would then be able to use existing measures to protect any sensitive material, including public interest immunity. They propose to suggest a similar amendment at Committee Stage in the House of Lords. Although, they argue, that this issue should be resolved together with the wider issue of admissibility of intercept evidence, the Azelle Rodney inquest has been delayed long enough to justify a stand alone amendment to this Bill to permit the admissibility of intercept evidence in inquests.

1.19 We are concerned that, if these proposals are intended to deal with the admissibility of intercepted evidence in inquests, they are overly broad and disproportionate. In any event, we are concerned that the Government has decided to wait for the implementation of the recommendations made by the *Chilcot* review on admissibility of intercept evidence in criminal trials, but has chosen to press ahead with its proposals in this context. We have already made a number of detailed recommendations on the admissibility of intercept evidence in criminal trials. In the past, we have accepted that certain safeguards might need to be in place to protect the sensitive nature of intercept evidence and its provenance, but that there were no insuperable obstacles in identifying appropriate safeguards, which could include the use of public interest immunity in certain circumstances.

1.20 During Report Stage in the House of Commons, the Secretary of State for Justice explained that the Government continued to be “cautious” about allowing the use of intercept evidence in criminal trials. He noted that existing exemptions in the Regulation of Investigatory Powers Act 2000 – for admissibility in closed proceedings before the Special Immigration Appeals Commission (SIAC) and the Proscribed Organisations Appeal Commission - provide a precedent for the exemption proposed in relation to inquests. The Government considers that inquests, being civil proceedings, have little in common with criminal trials.

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12 Inquest, Liberty and Justice, Joint Briefing on Clauses 11 – 12 of the Coroners and Justice Bill for Second Reading in the House of Lords, March 2009

13 Inquest, Liberty and Justice, Joint Briefing on Clauses 11 – 12 of the Coroners and Justice Bill for Report Stage in the House of Commons, March 2009


15 HC Deb, 23 March 2009, Col 113
1.21 While we welcome this further explanation of the Government’s approach to these proposals, we are concerned that its view fails to acknowledge the important role played by inquests in meeting the obligations of the United Kingdom under Article 2 ECHR, and the requirement for an effective investigation in cases engaging the right to life. As we explained in our last report, the effectiveness of an investigation may hinge on its independence, the degree of public scrutiny it affords and the involvement of family members of the deceased.

1.22 We have raised concerns about the compatibility of existing procedures in SIAC closed hearings with the individual right to a fair hearing (Article 6 ECHR), including the right of the individual concerned to have access to the “gist” of the material before SIAC and for broader powers for Special Advocates appointed to represent their interests.16 We are concerned that the increasing trend for the use of closed procedures in judicial proceedings at the instigation of the Secretary of State. In this case, it remains our view that these proposals may operate in a manner which is inconsistent with the procedural obligations of the United Kingdom under Article 2 ECHR, which requires an independent, effective investigation of any death involving the State. The certification process may only apply in cases where a jury is appointed, including deaths in detention or after contact with the police or other state authorities.

1.23 We are not persuaded by the Minister’s argument that SIAC procedure provides a transferable model for the protection of sensitive information in inquests. Not least, the model in the Bill does not follow the SIAC process and makes no specific provision for the use of special advocates to represent the interests of bereaved family members or other interested parties. We recommend that the Government provide a clear explanation of its view that the proposal for certification is necessary in order to protect information gathered through intercept and subject to the Regulation of Investigatory Powers Act 2000, including why the operation of public interest immunity and other options currently open to coroners are considered inadequate. We recommend that this explanation should be supported, where possible, by evidence.

Using the Inquiries Act?

1.24 During Report Stage in the House of Commons, there was some debate over whether an inquiry under the provisions of the Inquiries Act 2005 could provide an alternative to the proposals in the Bill. The Shadow Secretary of State for Justice, Dominic Grieve MP, suggested that this would be a “second best” approach to achieving the Government’s goals:

The inquiry route currently exists, but has hardly been used. When we considered 42 day pre-charge detention, we pointed out that the Civil Contingencies Act 2004 provided a mechanism in extremis for resolving an issue and extending detention, and that that was a better route than extension to 42 days. Although I have no desire for an inquiry to substitute for an inquest, if the problem is reduced, in the final analysis, to the one or two cases over a long period that the Government say that they cannot take before a jury in an inquest – I still hope that ways to enable that to

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happen could be found, especially if we ever reach the point when intercept is admissible for all juries, and having vetted juries, if necessary – let the Government at that point come to the House, make a statement, after which there would doubtless be questions from hon. Members of all parties and polemic and end up with the second best option. Although an inquiry may answer the Government’s questions, I doubt whether it answers those of the public.

1.25 We have raised separate concerns about the compatibility of inquiries operating under the Inquiries Act 2005, to meet the requirements of Article 2 ECHR, in light of the degree of control exercised by a Minister over the scope and form of an individual inquiry, including the circumstances when the public may be excluded from the inquiry.17

1.26 As we pointed out in our last report, although they traditionally play a role in fulfilling our Article 2 ECHR obligation for public involvement, the ECHR does not require a jury to play any role in an effective inquiry into a death. In principle, an inquiry panel or Chair, could conduct an Article 2 compliant investigation. However, the Secretary of State has significant control over the appointment of any panel or Chair18 and may make restriction notices in respect of any evidence before the inquiry or to allow the inquiry to proceed in private.19

1.27 If an inquiry was established for the purpose of keeping matters out of the public domain in any case in which Article 2 ECHR were engaged, we consider that there would be a significant risk that the inquiry would have inadequate independence to satisfy the procedural requirements of the right to life. Equally, attempts to exclude public scrutiny or the involvement of family members through the use of restriction notices would raise the same concerns about the effectiveness of the inquiry raised by the provisions in Clauses 11 – 12 of the Bill. In our view, any Inquiries Act 2005 inquiry specifically designed to circumvent an inquest, in order to meet the Government’s concerns about disclosure of sensitive information would raise the same or similar issues as Clauses 11 – 12 about the independence and effectiveness of that inquiry for the purposes of Article 2 ECHR.

Application to Northern Ireland

1.28 The Northern Ireland Human Rights Commission (NIHRC) has raised concerns about the application of these provisions to inquests in Northern Ireland. The system of inquests in Northern Ireland have historically differed from the system in England and Wales and they are governed by separate legislation and administrative arrangements.20 The only proposals for reform in this Bill which are extended to Northern Ireland relate to certified inquests, coroners powers in relation to witnesses and evidence and the ability to hear inquests in respect of bodies returned to a district when a death has occurred elsewhere. The remaining arrangements for inquests, including in respect of the scope of the inquest and the powers of the coroner will not be changed. The NIHRC has expressed their concern that a) the proposals for certification are overly broad and unnecessary (we deal with this issue above); b) in any event, the certification process should never be used in respect of outstanding ‘legacy’ cases in Northern Ireland; c) that the positive proposals in

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18 Section 4, Inquiries Act 2005.
19 Section 19, Inquiries Act 2005.
20 See for example, Coroners Act (Northern Ireland) 1959.
the Bill relating to the scope of an investigation (Clause 5(2)) and the right to appeal a decision of the coroner (Clause 30) should be extended to inquests in Northern Ireland.21

Legacy cases

1.29 There are a number of outstanding historical cases in Northern Ireland where no inquest and no other Article 2 ECHR compatible inquiry has yet taken place (“the legacy cases”). Some of these cases concern the involvement of the Royal Ulster Constabulary or the Armed Forces in killings during the Troubles. A number of these cases have made their way through the domestic courts and to the European Court of Human Rights (ECtHR). We have expressed concern about the Government’s delay in responding to six outstanding ECtHR judgments finding breaches of Article 2 in respect of the investigation of deaths in Northern Ireland.22

1.30 When these proposals were first announced, significant concern was expressed that they would be extended to Northern Ireland in order to allow these inquests to take place in secret by the NIHRC, British Irish Rights Watch and others. The following statement was issued by 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 Ministry of Justice and the Northern Ireland Office will work together to sort out the practical arrangements required to implement this approach.23

1.31 During Committee Stage in the House of Commons, the Minister, Bridget Prentice MP, said:

I would like to make it clear that there are no cases in Northern Ireland in which it would be necessary to apply a clause 11 certification. I hope that will provide sufficient reassurance…The Secretary of State for Northern Ireland has made very clear that the provisions will not apply to investigations into the legacy cases. He knows from his experience in Northern Ireland about the sensitivity of those cases, as do I. The legacy cases will not be affected; nevertheless, highly sensitive cases or material may come before an inquest in future, so the provisions will be available in Northern Ireland as well.24

1.32 In response to a question on the floor of the House of Commons, the Secretary of State for Justice has confirmed that the Northern Ireland Secretary does not intend these provisions to be applied to legacy cases:

My right hon. Friend the Secretary of State for Northern Ireland has said that he will not use the provisions in the Bill, and that they will not apply to legacy cases.25

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21 NIHRC, Briefing for Committee Stage, House of Commons, February 2009
22 See for example, Twenty-first Report of Session 2007-08, Monitoring the Government’s Response to Human Rights Judgments, HL Paper 173, HC 1078
23 Statement provided to BBC Radio Ulster’s Good Morning Ulster programme by the NIO, 27 January 2009.
25 HC Deb, 3 Feb 2009, Col 685
1.33 We welcome the Government’s reassurance that these provisions are not intended to apply to historical cases in Northern Ireland. We share the concerns of some, including the NIHRC that the implications of the use of certified inquests in respect of historical killings in Northern Ireland would not only be politically sensitive, but would risk another finding of incompatibility with Article 2 ECHR by the European Court of Human Rights (ECtHR). The guiding principles of the requirements of an Article 2 ECHR compliant inquest were laid down by the ECtHR in *Jordan*, a Northern Ireland case.\(^{26}\) There has as yet, been no acceptable Article 2 ECHR inquiry in this case, although an inquest is expected to begin after summer 2009. Mr Jordan died in 1992. We have already expressed our concern at the delay in this case.\(^{27}\) In our view, it would be disappointing, having reached the point where an inquest is about to begin, it would be subject to a new procedure which would be open to challenge as incompatible with the requirements of Article 2 ECHR as set out by the ECtHR in 2001.

1.34 We welcome the Government’s decision to clarify their approach to Northern Ireland. We are concerned that, so far, the statements made by the Government in relation to the legacy cases fall short of a clear undertaking on the floor of the House that these provisions do not and cannot apply to historical cases from Northern Ireland. Although the Government has been clear that the current Secretary of State for Northern Ireland does not intend to do this – subject to discussion with the Ministry of Justice – there is nothing in the Bill to exclude its application to those cases should the policy of the Secretary of State or a future Secretary of State change. The public statements do not state clearly which cases the Government consider to be legacy cases. **We recommend that, should these proposals remain part of the Bill, the Government should provide a clear explanation of its view that the Bill should not be amended to ensure that the certification process has no retrospective effect in respect of historical deaths in Northern Ireland. In the alternative, the Government should give a clear undertaking on the floor of the House that it will not use these powers in respect of protected matters arising from legacy cases in Northern Ireland which would support certification under Clause 40 and Schedule 9. This undertaking should clarify which cases the Government considers legacy cases.**

**Scope of application to Northern Ireland**

1.35 The NIHRC have also raised a concern that only certain changes extend to Northern Ireland. They are particularly concerned that positive elements of the Bill are limited to England and Wales, such as the new provisions on the scope of inquests and the right of interested parties to appeal decisions of the coroner. In our last report, although we suggested some amendments, we generally praised the reform of the coroners system as a human rights enhancing measure, which would support the ability of the United Kingdom to comply with its obligations under Article 2 ECHR. During Report Stage in the House of Commons, the Secretary of State for Justice explained the Government’s view that “the arrangements have to be slightly different for Northern Ireland, for reasons that I think everyone accepts”.\(^{28}\)

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\(^{27}\) See note 23, above.

\(^{28}\) HC Deb, 23 Mar 2009, Col 82
1.36 We understand that the Government is currently proposing the devolution of crime and justice matters to the Northern Ireland Assembly, and that, traditionally, the coroners courts in Northern Ireland have been treated separately from the coroners courts in England and Wales. The Government has chosen to apply the certification process to Northern Ireland, together with other discrete parts of this Bill. Against this background, we consider that if the human rights enhancing measures in the Bill are not be extended to Northern Ireland, the Minister should provide sufficiently cogent reasons. It is not enough to say that we are all agreed that the situation must be different in Northern Ireland. If reform of the coroners system is to be left to the Northern Ireland Assembly, the Government should explain whether, in its view, this is required by the devolution settlement or is a policy decision designed to meet a decision or request by the Northern Ireland Assembly.
2    Bills not requiring to be brought to the attention of either House on human rights grounds

Government Bills

2.1 We consider that the following Government bills do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them:

• Perpetuities and Accumulations Bill; and
• Local Democracy, Economic Development and Construction Bill.

2.2 We wrote to Baroness Andrews, Parliamentary Under Secretary for State on 10 February 2009, raising some human rights issues related to local authorities and local democracy. She replied on 23 March 2009. We publish this correspondence with this Report to inform parliamentary and wider public debate.
Annex: Proposed Committee Amendments

In this Annex, we suggest amendments to the Coroners and Justice Bill to give effect to some of the recommendations in this and our first report on the Bill, and to assist parliamentarians in ensuring that some of the matters we have raised are debated in Parliament.

Certified or secret inquests

These amendments are intended to remove the Government’s proposals on certified inquests from the Bill.\textsuperscript{31}

Leave out Clause 11.

Leave out Clause 12.

Page 25, line 40, leave out “, and in section 11”

Page 138, line 18, leave out from beginning to end of line 35 on page 139.

New powers for the Information Commissioner

This amendment is intended to extend the proposed power for the Information Commissioner to issue Assessment Notices to data-controllers in the private sector.\textsuperscript{32}

Page 102, Line 25 leave out from the second "is" to the end of line 29 and insert "not an excluded body".

This amendment is intended to treat failure by a public authority to comply with an Assessment Notice as contempt of court.\textsuperscript{33}

Page 105, line 11, insert

\begin{verbatim}
“(41C) Failure by a government department or public authority to comply with an assessment notice

(1) If a government department or public authority has failed to comply with an assessment notice the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

(2) Where failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the government department or the public authority, and after hearing any statement that may be offered in defence, deal with the failure to comply as if it were a contempt of court.”
\end{verbatim}

\textsuperscript{31} First report, paras 1.12 – 1.42.

\textsuperscript{32} First report, paras 1.59 – 1.67

\textsuperscript{33} Ibid.
**Duty to investigate**

This amendment clarifies the circumstances when, for the purposes of the Bill, an individual shall be “in state detention.” This is a non-exhaustive list.34

Page 1, line 13, insert:

"( ) For the purposes of this section, the circumstances when the deceased should be considered to have been in 'state detention' include:

(a) detention by a constable or other public authority pursuant to statutory or common law powers;

(b) detention or deprivation of liberty pursuant to the requirements of mental health legislation, including the Mental Health Act 1983 and the Mental Capacity Act 2005, as amended by the Mental Health Act 2007;

(c) the placement of a child in secure accommodation;

(d) detention pursuant to immigration and asylum legislation; and

(e) the detention of any person in custody or otherwise detained while he or she is being transported from one place to another.”.

**Purpose of investigation and matters to be ascertained**

This amendment is intended to clarify that the purpose of an investigation will be to ascertain the circumstances of a death in cases where there could be a risk to public health and safety or in any other circumstances that the coroner determines in the public interest.35

Page 4, line 2, at the end insert-

"(2A) The senior coroner may determine that the purpose of any investigation shall include ascertaining the circumstances the deceased came by his or her death where

(a) the senior coroner is satisfied that there are reasonable grounds to determine that the continued or repeat occurrence of those circumstances would be prejudicial to the health and safety of members of the public, or any section of it; or

(b) the senior coroner is satisfied that there are reasonable grounds to consider such circumstances in the public interest.”.

**Outcome of the investigation**

This amendment clarifies that the limitation in clause 10(2) cannot affect the overriding duty on the coroner to fulfil the purpose of his investigation.36

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34 First report, paras 1.74 – 1.75
35 First report, paras 1.76 – 1.81
36 First report, paras 1.82 – 1.85
Page 5, line 40, at the end insert-

"(3A) Subsection 2 shall not affect the duty on the coroner to conduct an investigation which meets the requirements of Section 5."

**Juries**

These amendments remove the Government's proposals to change the composition of inquest juries and restate the current position in the Coroners Act 1988.37

Page 4, line 29, at the end insert-

"(d) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public."

Page 4, line 39, leave out "six, seven, eight or nine" and insert "not less than seven nor more than eleven".

Page 5, line 17, leave out paragraph (a) and insert-

"(a) the minority consists of not more than two, and"

**Legal aid**

This amendment requires the Secretary of State to initiate a review of Legal Aid and other funding for bereaved families in relation to inquests.38

After Clause 27

Insert the following new Clause-

"Review of access to legal aid in inquests

(1) The Secretary of State shall, within one year after the date on which this Act receives Royal Assent, lay before both Houses of Parliament a report on access to legal aid and other funding for bereaved families in relation to inquests.

(2) The report under subsection (1) shall be prepared by a person appointed by the Secretary of State following consultation with

(a) the Lord Chief Justice; and

(b) such other persons as the Secretary of State shall consider appropriate to consult."

37 First report, paras 1.86 – 1.95
38 First report, paras 1.108 – 1.145
**Witness anonymity**

These amendments propose additional safeguards in respect of the Government’s proposals for witness anonymity.\(^{39}\)

Page 41, line 10, insert-

"(8A) The condition in this subsection is that the Director of Public Prosecutions has given his consent to the application."

Page 45, line 23, insert-

"(7A) The court has the power to appoint special counsel to represent the interests of the defendant in his or her absence, if it appears to the court to be appropriate to do so in the circumstances of the case."

**Public order offences**

This amendment removes insulting words or behaviour from the Public Order Act offences of harassment, alarm or distress.\(^{40}\)

After Clause 61

Insert the following new clause-

**Harassment, alarm or distress: insulting words or behaviour**

(1) The Public Order Act 1986 (c. 64) is amended as follows.

(2) In sections 5(1)(a) and 5(1)(b), the words “abusive or insulting” are replaced by the words “or abusive”.

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\(^{39}\) First report, paras 1.115 – 1.145

\(^{40}\) First report, para 1.180
Conclusions and recommendations

Certified or Secret Inquests

Judicial oversight

1. The Secretary of State retains the power to certify that certain information must not be made public nor disclosed unlawfully, subject to judicial review. The Secretary of State must now be “satisfied” that the inquest will involve matters which should not be made public and that in his opinion, it is “necessary” to hold the inquest without a jury in order to prevent those matters becoming public. In our view, this is largely a cosmetic change which is unlikely to lead to a higher degree of scrutiny than the original test of whether certification is necessary in the Secretary of State’s “opinion”. In any event, the change is not sufficiently significant to override the Committee’s original concern that these provisions are deliberately framed in a subjective way in order to avoid the scrutiny to which the Secretary of State would be subject on an application for public interest immunity (or an application for any other special measures currently available). (Paragraph 1.8)

2. The introduction of a degree of judicial discretion is an improvement on the earlier proposals. However, the power of the Secretary of State to issue a certificate remains very broad and the effect of certification will be to bind a judge to ensure that protected information does not come into the public domain. This is a far cry from the PII process, where the Secretary of State must make an application for protection, then persuade the coroner, or the relevant judge, that it is necessary to prevent publication in the public interest. (Paragraph 1.12)

Participation of bereaved families

3. In our view, nothing in the amendments introduced by the Government meets our concern about how the effective participation of bereaved families might be secured in a certified inquest. (Paragraph 1.14)

Are these provisions necessary?

4. We are not persuaded that these proposals are necessary or accompanied by adequate safeguards to protect the right to life, as guaranteed by Article 2 ECHR. We recommend that Clauses 11 – 12, and the equivalent provisions relating to Northern Ireland in Clause 40 and Schedule 9, are deleted from the Bill. (Paragraph 1.17)

Intercept evidence and inquests

5. We recommend that the Government provide a clear explanation of its view that the proposal for certification is necessary in order to protect information gathered through intercept and subject to the Regulation of Investigatory Powers Act 2000, including why the operation of public interest immunity and other options currently
open to coroners are considered inadequate. We recommend that this explanation should be supported, where possible, by evidence. (Paragraph 1.23)

Using the Inquiries Act?

6. In our view, any Inquiries Act 2005 inquiry specifically designed to circumvent an inquest, in order to meet the Government’s concerns about disclosure of sensitive information would raise the same or similar issues as Clauses 11 – 12 about the independence and effectiveness of that inquiry for the purposes of Article 2 ECHR. (Paragraph 1.27)

Legacy cases

7. We recommend that, should these proposals remain part of the Bill, the Government should provide a clear explanation of its view that the Bill should not be amended to ensure that the certification process has no retrospective effect in respect of historical deaths in Northern Ireland. In the alternative, the Government should give a clear undertaking on the floor of the House that there are no protected matters arising from legacy cases in Northern Ireland which would support certification under Clause 40 and Schedule 9. This undertaking should clarify which cases the Government considers legacy cases. (Paragraph 1.34)

Scope of application to Northern Ireland

8. We consider that if the human rights enhancing measures in the Bill are not be extended to Northern Ireland, the Minister should provide sufficiently cogent reasons. It is not enough to say that we are all agreed that the situation must be different in Northern Ireland. If reform of the coroners system is to be left to the Northern Ireland Assembly, the Government should explain whether, in its view, this is required by the devolution settlement or is a policy decision designed to meet a decision or request by the Northern Ireland Assembly. (Paragraph 1.36)
Formal Minutes

Tuesday 12 May 2009

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness
Lord Dubs
The Earl of Onslow
Baroness Prashar

John Austin MP
Dr Evan Harris MP
Mr Virendra Sharma MP

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Draft Report (Legislative Scrutiny: Coroners and Justice Bill (certified inquests)), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 2.2 read and agreed to.

Summary read and agreed to.

Annex read and agreed to.

Resolved, That the Report be the Sixteenth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence reported and ordered to be published on 31 March was ordered to be reported to the House for printing with the Report.

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[Adjourned till Tuesday 19 May at 1.30pm.]
Written Evidence: Local Democracy, Economic Development and Construction Bill

Letter from the Chairman to Baroness Andrews, Parliamentary Under-secretary of State, Department for Communities and Local Government, dated 10 February 2009

The Joint Committee on Human Rights is currently scrutinising this Bill for compatibility with the United Kingdom’s human rights obligations.

We note that a significant part of the Bill relates to the governance of local authorities and their duties in respect of local participation in democracy and decision making.

We, and our predecessor Committee, have both recommended that all public authorities, including local authorities, should be subject to an express positive duty to protect and promote the Convention rights guaranteed by the Human Rights Act 1998. In our 2008 Report on Adults with Learning Disabilities we argued:

> The creation of a positive duty to respect human rights would help kick-start a change of attitude to the role of the Human Rights Act and to rights more generally. We doubt that, at least in the short term, oversight by the Equality and Human Rights Commission will encourage individual authorities to take a more proactive approach. On the other hand, witnesses to [our inquiry on human rights and adults with learning disabilities], including the Minister for Care Services and the Minister for Disabled People, stressed their view that the potential impact of the Disability Equality Duty will be to change fundamentally the way that public authorities look at disability rights. We remain persuaded that the same is true of positive duties and the Human Rights Act. We reiterate our recommendation that the Government consider the introduction of an express positive duty on public authorities to promote respect for human rights, where the European Convention on Human Rights imposes a positive obligation on the State.41

The ECHR, and the HRA 1998 already impose positive duties on local authorities to take action to protect the rights of individuals, in some circumstances. We consider that, like the positive duties under existing equality legislation, a clear, express positive duty on local authorities to protect and promote Convention rights could change the approach of councils to their obligations under the HRA 1998.

I would be grateful if you could provide some more information on the Government’s approach to the equality and human rights duties associated with local authorities:

a) Does the Government agree that local authorities’ positive equality duties have enhanced protection for individuals from discriminatory treatment in relation to local

41 Seventh Report of Session 2007-08, paragraph 117-
b) Does the Government consider that the financial or administrative burdens placed on local authorities by existing equality duties have been proportionate to any benefits achieved for local residents? If not, why not?

c) Does the Government agree that local authorities are already under positive duties to take action to protect the Convention rights of their residents in certain circumstances?

d) Can you give us some explicit examples of steps taken by Government to make it clear to local authorities that their duties under the HRA 1998 include positive duties?

e) Can you give us any clear examples which show that local authorities have taken steps to meet those positive duties, where necessary, through changes to their policies and practices?

f) Are you aware of any local authorities which have conducted an audit of their existing policies and practices for compatibility with the Convention rights guaranteed by HRA 1998? If so, we would be grateful if you could provide us with the details of any such audits and their outcomes.

I would be grateful for a response by 24 February 2009 and if you could email an electronic copy of any reply, in Word, to jchr@parliament.uk. I have copied this letter to Trevor Phillips, Chair of the Equality and Human Rights Commission (EHRC), in the light of the Commission’s ongoing investigation into the implementation of the Human Rights Act 1998. We would welcome any comments which the EHRC would like to make about implementation of the Human Rights Act 1998 by local authorities.

Letter from Baroness Andrews to the Chairman, dated 23 March 2009

Thank you for your letter of 10 February 2009 in relation to the above Bill. I am extremely sorry for the delay in responding.

You asked about the equality and human rights duties placed upon local authorities. This is in the context of your Committee’s suggestion that there should be "an express positive duty on public authorities to promote respect for human rights, where the European Convention on Human Rights imposes a positive obligation on the State".

A positive obligation under human rights law denotes an obligation on the State to take positive steps actively to protect human rights; these steps may include the creation of legal or institutional structures, for example, or the allocation of resources. By way of a specific example, the European Court of Human Rights has held that States are under a positive obligation under Article 2 (the right to life) to put in place and enforce criminal law to deter the commission of offences against the person. Similarly, the Court has found that States are under a duty under Article 6 (the right to a fair trial) to provide free legal assistance in criminal trials to impecunious people.

By virtue of section 6 of the Human Rights Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(6) clarifies that "an act" include a failure to act. Therefore, where the Convention rights incorporate the imposition
of a positive obligation upon the United Kingdom, that positive obligation is also placed upon public authorities that are subject to the Act. Any further provision making reference to specific positive obligations under the Convention would therefore be otiose.

Positive obligations should not however be confused with the idea of a general obligation upon public authorities to promote respect for the Convention rights, which your Committee has also previously advocated. However, as the Government has previously explained, it is of course only public authorities themselves that have an obligation under the Human Rights Act to respect the Convention rights. Such a general obligation could therefore only require public authorities to promote respect for the Convention rights to other public authorities. In any case, it would seem unlikely that such a general duty would be within the scope of the Local Democracy, Economic Development and Construction Bill.

This proposal for a general duty to promote respect for the Convention rights can of course be distinguished from the duties already contained in the Bill to promote democracy. These aim to make citizens more aware of the democratic process, enabling them to understand better who makes decisions about their local services, how to influence and take part in making those decisions, and how to stand for or seek appointment to civic roles such as councillor, school governor and magistrate. Although the duties are placed on local authorities, their policy aim is to increase awareness amongst citizens, not among public authorities themselves.

Since the passage of the Human Rights Act in 1998, the Government's aim has been to encourage a culture in public authorities in which fundamental human rights principles are seen as integral to the design and delivery of policy, legislation and public services. Following the Review of the Implementation of the Human Rights Act completed in July 2006 by the former Department for Constitutional Affairs (DCA), the Ministry of Justice – the successor to the DCA - has led a programme of work to implement the recommendations of the Review.

The Ministry of Justice produced generic guidance for public authorities, which they encouraged public authorities to adopt and adapt to suit their own requirements. As of March 2009, over 115,000 copies have been distributed of the suite of guidance, which comprises the handbook *Human Rights: Human Lives* and the summary booklet and DVD *Making Sense of Human Rights*; these have been distributed within central Government, to departments’ sponsored bodies, and to other public sector organisations. This guidance discusses all the obligations, including positive obligations, that arise from the Convention rights.

One local authority that has taken particularly proactive steps in relation to its human rights obligations is the London Borough of Southwark. It has integrated human rights into its decision-making process as part of the Equality Impact Assessment. It has established an Equalities and Human Rights Scheme, and has identified a lead Member to champion equalities and human rights, currently Councillor Adele Morris, the executive member for communities, equalities and citizenship.

The Council’s starting point was to audit two key service areas (housing and social services, as they were then called) to see if their policies and procedures were compliant with human
rights. The Council also identified training needs and commissioned the services of the British Institute of Human Rights (BIHR) as their training provider. The training was piloted in their social services and housing departments before developing a rolling programme of training. Over 600 staff and some councillors have received the training. The Council has now added an action planning section to the training, which assists staff to think about how they can embed human rights approaches into the way that they work and provide services. Feedback from the training is very positive and staff have continued their development through the application of a human rights framework to their day-to-day activities.

The Council has an ongoing partnership arrangement with the BIHR, building on the training they have provided, to promote best practice within Southwark and other organisations. For example, their local Primary Care Trust is taking part in the Department of Health project "Human rights in health care: a framework for local action". Risk assessment processes have also been improved within the Council so that staff take into account human rights considerations when implementing new legislation, policies, practices and procedures.

I note in conclusion that you copied your letter to Trevor Phillips, Chair of the Equality and Human Rights Commission (EHRC). It is of course part of the duties of the EHRC, as set out in section 9(1) of the Equality Act 2006, that they should encourage public authorities to comply with section 6 of the Human Rights Act 1998. As noted above, this would include promoting compliance with the positive obligations that arise from the Convention rights.

I am copying this letter to Trevor Philips.
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