HOUSE OF LORDS

Select Committee on the Constitution

10th Report of Session 2008–09

Coroners and Justice Bill

Report

Ordered to be printed 13 May 2009 and published 14 May 2009

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 96

Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Coroners and Justice Bill

Introduction

1. The Committee is appointed "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution". In carrying out the former function, we regard our main task as being to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution. In this report we draw to the attention of the House concerns about specific provisions contained in Part 1 of the bill (on coroners) and Part 8 (on amendments to the Data Protection Act 1998).

Scope of the bill

2. More generally, we wish to add our voice to those who have expressed disquiet about the breadth of the bill.[1] It contains 166 clauses and 21 schedules. These deal with a disparate range of subjects, each of considerable significance. As well as reforms to the coroners system and data protection (on which we comment below), the bill makes provision for: reform of homicide; possession of pornography and other offences; a framework for witness anonymity and protection in investigations and trials; a new institutional framework for sentencing; reform of legal aid; and new controls on proceeds from the sale of criminal memoires. **In our view, the ability of Parliament to examine the various proposals risks being made less effective by the Government's decision to include them in a single bill. The constitutionally important process of legislative scrutiny is hindered by omnibus bills, such as this one, which include too wide a range of proposals, all inherently significant in their own right.**

Coroners

3. Clause 11 of the bill makes provision for inquests without juries where the national interest would seem to prelude public examination of all the circumstances surrounding a death.

4. Proposals by the Government for inquests without juries in such circumstances were contained in, and subsequently withdrawn from, the Counter-Terrorism Bill in the 2007–08 Session. In our report on those proposals, we said it was constitutionally inappropriate for a Secretary of State to issue a certificate which would have the effect that a jury should be dispensed with—that should be a matter for the judiciary, ruling on an application made by the Secretary of State to the High Court. We also expressed concern that the list of specially approved coroners would be maintained by the Secretary of State (i.e., the Home Secretary) rather than the Lord Chancellor.[2]

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1 See e.g. the Joint Committee on Human Rights, 8th Report of 2008-09 (HL Paper 57/HC 362), paragraph 1.11.

2 Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary, 10th Report of 2007-08 (HL Paper 167).

5. The proposals now contained in the present bill differ in important respects from those in the Counter-Terrorism Bill. First, while the Secretary of State still has power to issue a certificate if he or she "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" (clause 11(1)(d)), such a certificate will not have the **automatic** consequence that the inquest will be held without a jury. In a letter to the Committee,[3] Lord Bach told us:

> "Clause 11 of the Bill as introduced in the Lords now provides that the consequences of certification are limited to transferring responsibility for the investigation of the specified death from the local coroner to a High Court judge (sitting as a coroner). It would be left to the High Court judge to determine what measures were needed in order to prevent the sensitive matter being made public or unlawfully disclosed. This could include holding the inquest without a jury and excluding the public (including interested persons) from part of the inquest, but the judge might also decide that the inquest could fulfil its statutory purpose, including meeting Article 2 obligations, without hearing evidence about the sensitive matters. In the latter circumstances, the case could proceed with a jury. The High Court judge may also decide that he or she could safely hold the inquest with a jury by putting in place other measures, such as excluding persons from some of the inquest or obtaining undertakings of confidentiality from those present. The measures will be the same as those available to coroners generally in relation to non-certified inquests. Moreover, decisions taken by the High Court judge as to whether or not to summon a jury, or exclude persons from parts of the inquest would be subject to appeal to the Court of Appeal."

6. Secondly, as Lord Bach alludes to, the bill does not rely on a special corps of coroners appointed and dismissable by the Secretary of State to conduct these especially sensitive investigations and inquests. This role will be carried out by High Court judges.

7. The changes to the Government's proposals address the gist of the constitutional concerns we previously expressed. The bill provides for greater judicial control over whether or not a jury will be empanelled than in the earlier proposals. The unsatisfactory arrangements for appointments of special coroners are no longer present.

8. It will be for the House as a whole to consider whether the detail of clause 11 is acceptable. Under the terms of clause 11(6), the High Court judge holding the inquest **must** hold it without a jury if (a) "there is a protected matter that would need to be revealed to the jury" 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". To ensure an adequate degree of judicial control, it would in our view be important for the judge to have sufficient power to probe, on the basis of evidence tested in court, whether there is in fact such a "protected matter" in the particular case (defined in clause 11(1)(c) as the interests of national security, the relationship between the United Kingdom and another country, the preventing or detecting of crime, or in order to protect the safety of a witness or other person).

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[3] Appendix 1.

9. Lord Bach told us in his letter that the Government "remain firmly of the view that the decision to certify an investigation on one of the grounds in clause 11(1)(c) remains properly a matter for the Secretary of State". We accept that in this context the executive, rather than the judiciary, is the primary decision-maker. That does not, however, displace the courts' review role. As Lord Bach acknowledges, the executive's decisions as to whether something is or is not in the interests of national security is subject to judicial scrutiny, albeit of a more limited nature than may apply to government decisions in other contexts. **It should be clear on the face of the bill that a High Court judge when faced with a certificate is not merely to accept a ministerial assertion that the national interest is at stake; the Secretary of State should be expected to demonstrate to the satisfaction of the judge that such a national interest does in fact exist.**

Proposed amendments to the Data Protection Act 1998

10. Part 8 of the bill deals with proposed amendments to the Data Protection Act 1998 ('DPA').

11. Clause 156 amends the DPA to give the Information Commissioner powers to carry out an assessment to determine whether a public body complies with the data protection principles. There is a list of excluded bodies, broadly in the area of intelligence and security, and in certain other law-enforcement fields. The clause allows the Commissioner to enter premises to inspect documents and other material, and to view the data processing activities. These new powers have been welcomed by the Information Commissioner, but they stop short of those called for by both his office and by this Committee in our recent report *Surveillance: Citizens and the State* in that they do not provide for comparable powers to inspect the activities of private-sector data controllers. In our report we said:[4]

> "We welcome the Government's decision to provide a statutory basis for the Information Commissioner to carry out inspections without consent of public sector organisations which process personal information systems, but regret the decision not to legislate for a comparable power with respect to private sector organisations. We recommend that the Government reconsider this matter. Organisations which refuse to allow the Commissioner to carry out inspections are likely to be those with something to hide. In addition, the protection of citizens' data may in the absence of legislation be vitiated given the growing exchange of personal data between the public and private sectors."

12. Moreover, clause 156 does not provide procedures for sanctions in case of non-compliance with an Assessment Notice. We note that the Joint Committee on Human Rights in their scrutiny of the bill suggest that a sanctioning power would be a "human rights enhancing measure".[5]

13. **We are disappointed that the Government have not taken this opportunity to provide the Information Commissioner with powers to assess whether private sector organisations are complying with data protection principles. The failure to provide any sanctions for non-**

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4 See Surveillance: Citizens and the State, 2nd Report of 2008-09, (HL 18), paragraphs 232-237, Recommendation No. 456.

5 8th Report of 2008-09 (HL 57/HC 362), paragraph 1.67.

compliance by public sector bodies with Assessment Notices calls into question the efficacy of the power that is created.

14. In our report *Surveillance: Citizens and the State* we stated:

> "We recognise the need for data sharing across departments and agencies, but the principle of minimisation of data collection and processing must be rigorously observed. The Coroners and Justice Bill was introduced to the House of Commons on 14 January 2009 and contained proposals for extensive data sharing powers for the Government. We will pay particular attention to the parliamentary debates on this bill and conduct our usual bill scrutiny on it when it reaches this House."

15. **We welcome the Government's decision to withdraw the very broad powers on data sharing between departments that had initially been included in the bill and we wish to re-emphasise the principle of minimisation of data-sharing as expressed in paragraphs 274–5 of our report *Surveillance: Citizens and the State*.**

APPENDIX: CORRESPONDENCE ON THE CORONERS AND JUSTICE BILL

Letter from Lord Goodlad to Lord Bach, 23 April 2009

The Constitution Committee is scrutinising the Coroners and Justice Bill. The purpose of this letter is to seek information from you on any consultation that the Government has had with the judiciary on Part 1 of the bill relating to inquests without juries where a minister determines this is required in the public interest.

The Committee has noted that there was considerable debate during proceedings on the bill in the House of Commons as to whether it should be the Secretary of State who issues a certificate requiring a secret investigation. In relation to Opposition proposals to transfer the responsibility for certifying an investigation to the judiciary, Bridget Prentice MP said, "If Opposition Members thought about it, they might find that the judiciary would not be overly keen to make decisions about whether something had a national security implication" (PBC Deb 24 February 2009 c256). The Committee would be interested to know whether the Government have consulted the judiciary on this issue and, if so, what response was received.

I look forward to an early response from you to enable the Committee to complete its scrutiny of this bill.

Response from Lord Bach, 4 May 2009

Thank you for your letter of 23 April about the provisions in clauses 11 and 12 of the Bill in respect of the certification of a coroner's investigation.

You pointed to the considerable debate in the Commons about where responsibility should lie for certifying an investigation. You quoted my ministerial colleague, Bridget Prentice, who said in the Public Bill Committee on 24 February (at column 256 of the Official Report) that "they [Opposition Members] might find the judiciary would not be overly keen to make decisions about whether something has a national security implication". This comment was a prelude to her further remarks, at column 257 to 258, where she pointed to established case law, including the case of *Secretary of State for the Home Department v Rehman* (2001) 11 BHRC 413, where the courts have made clear that the initial decision as to whether something is or is not in the interests of national security is entrusted to the executive. Such a decision is subject to limited judicial review by the courts, which is, for the reasons set out in *Rehman*, less intense than some other judicial reviews. It is for this reason that we remain firmly of the view that the decision to certify an investigation on one of the grounds in clause 11(1)(c) remains properly a matter for the Secretary of State.

We recognise, however, that there were legitimate concerns about the extent of the judicial oversight in the process. We have listened and responded to the representations we received on this matter, including from the Constitution Committee in their report on these provisions as they first appeared in the Counter-Terrorism Bill (10th Report of Session 2007–08). In that report, the Committee concluded that it should be for the court, rather than for ministers, to determine whether a certified inquest should be conducted without a jury. Having reflected on this, we brought forward significant changes to clause 11 at Commons Report stage so that the Secretary of State's certification will no longer automatically mean that an inquest will be conducted without a jury.

Clause 11 of the Bill as introduced in the Lords now provides that the consequences of certification are limited to transferring responsibility for the investigation of the specified death from the local coroner to a High Court judge (sitting as a coroner). It would be left to the High Court judge to determine what measures were needed in order to prevent the sensitive matter being made public or unlawfully disclosed. This could include holding the inquest without a jury and excluding the public (including interested persons) from part of the inquest, but the judge might also decide that the inquest could fulfil its statutory purpose, including meeting Article 2 obligations, without hearing evidence about the sensitive matters. In the latter circumstances, the case could proceed with a jury. The High Court judge may also decide that he or she could safely hold the inquest with a jury by putting in place other measures, such as excluding persons from some of the inquest or obtaining undertakings of confidentiality from those present. The measures will be the same as those available to coroners generally in relation to non-certified inquests. Moreover, decisions taken by the High Court judge as to whether or not to summon a jury, or exclude persons from parts of the inquest would be subject to appeal to the Court of Appeal.

You asked specifically whether the Government has consulted the judiciary on these provisions. It has been normal practice for a considerable period for governments to consult the senior judiciary about the practical impact of proposed legislation on the courts and the judiciary, including the practical aspects of any new powers or responsibilities to be imposed on judges. The views of the senior judiciary were sought, therefore, on the practicality of possible changes to the provisions of clause 11. It was their view that, if the policy in that clause was adopted by Parliament, there was no impediment from a practical perspective to the proposed changes to clause 11 being implemented in the courts structure.