



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **CORONERS AND JUSTICE BILL**

### **Certified Inquests- extension to Northern Ireland Clause 40 and Schedule 9**

#### **Briefing for Second Reading House of Lords 18 May 2009**

### **Background**

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission has a long-standing interest in Coroners inquests in Northern Ireland, in particular those relating to the past. The Commission is currently assisting a family in

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<sup>1</sup> Northern Ireland Act 1998, s.69 (1).

<sup>2</sup> *Ibid.*, s.69(3).

<sup>3</sup> *Ibid.*, s.69(4).

<sup>4</sup> *Ibid.*, s.69(6).

relation to one of the outstanding inquests arising from the actions of security forces in Northern Ireland.<sup>5</sup> This is one of the cases which were considered by the European Court of Human Rights in its seminal judgment of 2001 on Article 2. Final compliance with these judgments continues to be monitored by the Committee of Ministers of the Council of Europe.<sup>6</sup>

3. The Coroners and Justice Bill was introduced on 14 January 2009 and contains very similar provisions for “secret inquests” to those removed from the Counter Terrorism Bill. There has been no consultation on the proposals, either in advance of the Counter Terrorism Bill or before their reintroduction in the current Bill.<sup>7</sup>
4. The Commission is disappointed that these provisions have been replicated and indeed extended in this Bill, despite the very serious human rights concerns raised by this Commission, the House of Commons Justice Committee,<sup>8</sup> the Joint Committee on Human Rights,<sup>9</sup> the House of Lords Select Committee on the Constitution<sup>10</sup> and numerous other organisations during the passage of the Counter-Terrorism Bill. The provisions were also subject to serious cross party opposition by a wide range of MPs and Peers during the

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<sup>5</sup> In respect of the inquest into the death of Pearse Jordan in 1992. At the latest preliminary hearing in respect of this inquest on 22 January 2009 the Coroner stated that the inquest could not start before June 2009 at the earliest. See <http://www.belfasttelegraph.co.uk/news/local-national/inquest-into-killing-of-ira-man-delayed-again-14152437.html>. It now appears that a date is being agreed for a hearing no earlier than September 2009. Delays continue related to disclosure and screening issues.

<sup>6</sup> The Committee of Ministers of the Council of Europe which monitors compliance with judgments of the European Court of Human Rights issued its third interim resolution in respect of these cases on 25 March 2009. This is dealt with below at Section I.

<sup>7</sup> House of Commons Justice Committee Report on the Coroners and Justice Bill, 20 January 2009, HC 185, para 14 which 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”.

<sup>8</sup> House of Commons Justice Committee Report on the Counter Terrorism Bill, HC 405, para 5, where the Committee stated with regard to the proposals that “it is not clear that they sufficiently guarantee independence of investigation and involvement of victims’ families”.

<sup>9</sup> Joint Committee on Human Rights, *Counter Terrorism Policy and Human Rights: 8<sup>th</sup> Report: Counter-Terrorism Bill*, 7 February 2008, HC 199, see paras 4-8 and *Counter Terrorism Policy and Human Rights: 13<sup>th</sup> Report: Counter-Terrorism Bill*, 8 October 2008, paras 110-120.

<sup>10</sup> HL Paper 167, House of Lords Select Committee on the Constitution, 10<sup>th</sup> report of Session 2007-2008: “*Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*” pp 17-18.

debates on the Counter Terrorism Bill<sup>11</sup> and by MPs during the Commons stages of the current Bill.

5. The Justice Committee of the House of Commons stated on 20 January 2009:

*“These clauses, and the changes made to them since their first appearance in the Counter Terrorism Bill, will therefore merit close and careful scrutiny as the Coroners and Justice Bill passes through Parliament. 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.”*<sup>12</sup>

6. The Commission prepared a detailed briefing on the “secret inquests” proposals for Committee Stage in the House of Commons, in addition to a general principles brief for second reading in the House of Commons.<sup>13</sup>
7. The Commission sees clear potential for these proposals for certified inquests to breach Article 2 of the ECHR and would oppose their introduction on that basis.
8. In addition, particular issues arise in Northern Ireland relating to the legacy of the Troubles and the need to find appropriate ways to deal with our past with over 3,600 deaths in a 30-year period, many of them in contested circumstances yet to be aired in the public domain. There are many genuine private and public attempts to address those issues underway in Northern Ireland today. The Consultative Group on the Past reported its proposals on 28 January 2009.<sup>14</sup>
9. The Commission has strongly advised Government over the past 16 months to abandon the proposal to extend such

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<sup>11</sup> Indeed, the JCHR commented that the similar provisions in the Counter-Terrorism Bill were: *“astonishing provisions with the most serious implications for the UK’s ability to comply with the positive obligation in Article 2 ECHR to provide an adequate and effective investigation where an individual has been killed as a result of the use of force, particularly where the death is the result of the use of force by state agents”*, Op cit no 9, 8<sup>th</sup> report, paras 4-8.

<sup>12</sup> House of Commons Justice Committee Report on the Coroners and Justice Bill, HC 185, 20 January 2009 at para 14.

<sup>13</sup> The Commission’s briefing for Committee Stage in House of Commons is available at: [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Coroners\\_and\\_Justice\\_Bill\\_\\_Briefing\\_\\_to\\_House\\_of\\_Commons\\_Committee\\_Stage\\_\(February\\_2009\).doc](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Coroners_and_Justice_Bill__Briefing__to_House_of_Commons_Committee_Stage_(February_2009).doc). In addition, the Commission prepared a general principles brief for the second reading in the House of Commons which is available at: [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Briefing\\_on\\_Coroners\\_and\\_Justice\\_Bill\\_Jan\\_2009.doc](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Briefing_on_Coroners_and_Justice_Bill_Jan_2009.doc).

<sup>14</sup> Report published on 28 January, available at: <http://www.cgpnri.org>.

“secret” inquests to Northern Ireland.<sup>15</sup> The Commission is aware of the statement from the Northern Ireland Office Minister, Paul Goggins, issued 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.”<sup>16</sup>*

10. Unfortunately, despite the recent provision of some further detail as to the Government’s intentions in respect of certified inquests in Northern Ireland, the Commission’s concerns remain.<sup>17</sup> These concerns are dealt with in detail in this briefing. The Commission reiterates its position that the extension of any element of the certified “secret inquests” for historic cases in Northern Ireland would be viewed as very bad faith by the British Government and could seriously jeopardise progress on what is a very politically sensitive issue.
11. The Commission understands that the circumstances which the Government is seeking to address in these provisions are unusual and rare. Yet, it is likely that they will apply in the most controversial and contested of situations. The provisions proposed could apply across the full range of deaths which come before the coroner; for example, deaths in hospital, police custody, immigration detention centre or prison, as the result of a fatal accident involving public transport, as well as inquiries arising from the use of force by state agents. With the amendment of section 13 of the Coroners Act (Northern Ireland) 1959 (by way of clause 40(1) of the current Bill), such inquests in Northern Ireland could also relate to a death which has taken place outside of Northern Ireland, for example, if the body of a deceased serviceman /woman is repatriated to Northern Ireland.<sup>18</sup>
12. The Government introduced a number of amendments to the proposals just before Report Stage in the House of Commons and claims these are safeguards. The Commission considers these to be wholly insufficient.

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<sup>15</sup> Initially, in relation to the similar proposals for “secret inquests” in Part 6 of the Counter-Terrorism Bill introduced into the House of Commons on 24 January 2008.

<sup>16</sup> Statement provided to BBC Radio Ulster’s Good Morning Ulster programme by the NIO, 27 January 2009.

<sup>17</sup> Letter from Mr Paul Goggins MP, Minister of State for Northern Ireland to Professor Monica Mc Williams, Chief Commissioner, NIHRC, 7 April 2009.

<sup>18</sup> This was by way of a Government amendment which was agreed at Report Stage of the Coroners and Justice Bill on 23 March 2009.

**The Commission therefore urges Peers to:**

- **oppose the inclusion of the certified inquests provisions in the Bill;**
- **oppose the extension of any part of the certified inquest provisions to Northern Ireland (by way of clause 40 and schedule 9); and**
- **support the extension of Clause 5(2)<sup>19</sup> and Clause 32<sup>20</sup> to Northern Ireland.**

**Should the certified inquests provisions be retained, the Commission urges Peers to support the Commission's call for a temporal limitation on the face of the Bill as to the application of the provisions to Northern Ireland**

13. This briefing will concentrate on three aspects of the Bill:

- (i) the extent to which these proposals fail to comply with the requirements for inquests under Article 2 of the European Convention of Human Rights;
- (ii) the potential to adversely impact on outstanding legacy inquests in Northern Ireland; and
- (iii) the failure to extend to Northern Ireland some of the more positive aspects of Coroners reform provided for in the Bill.<sup>21</sup>

**(i) The extent to which these proposals fail to comply with the requirements of Article 2 of the European Convention on Human Rights**

14. The Commission's concerns with regard to the potential of Clauses 11 and 12<sup>22</sup> to breach Article 2 are set out in detail in our brief for the Committee Stage in the House of Commons.<sup>23</sup> The amendments to these clauses tabled by the Home Secretary, just before Report Stage in the House of Commons, do not allay the Commission's concerns. The

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<sup>19</sup> Clause 5(2) provides that: *"where necessary, in order to avoid a breach of any Convention rights... the purpose... is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death"*.

<sup>20</sup> Clause 32 provides for rights of appeal in relation to coroners' decisions.

<sup>21</sup> For example, rights of appeal under Clause 32 and the Clause 5(2) requirement in relation to matters to be ascertained.

<sup>22</sup> See the corresponding Northern Ireland provisions in Clause 40 and Sch 9.

<sup>23</sup> See NIHRC brief for Committee Stage in the House of Commons, February 2009, paras 32-46, available at: [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Coroners\\_and\\_Justice\\_Bill\\_\\_Briefing\\_\\_to\\_House\\_of\\_Commons\\_Committee\\_Stage\\_\(February\\_2009\).doc](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Coroners_and_Justice_Bill__Briefing__to_House_of_Commons_Committee_Stage_(February_2009).doc).

fundamental premise underlying the clauses is flawed and therefore nothing short of their removal from the Bill will suffice.

15. Clause 11 of the Bill relating to inquests has serious implications for the UK's obligations under Article 2 ECHR, and the positive duty to conduct an effective investigation, where an individual has been killed as a result of the use of force, in particular where such use of force is by state agents.

16. The purpose of an inquest was described in *Jordan* by Lord Bingham of Cornhill in the House of Lords, in 2007, as follows:

*"Thus I take it to be common ground that the purpose of an inquest is to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances, or where the deceased was in the custody of the state, with the help of a jury in some of the most serious classes of case."*<sup>24</sup>

17. The criteria for an Article 2 compliant investigation/inquest were clearly set out by the European Court of Human Rights in *Jordan v UK*.<sup>25</sup> They require that:

- the inquiry must be on the initiative of the state
- it must be independent
- it must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death
- it must be prompt and proceed with reasonable expedition
- it must be open to public scrutiny to a degree sufficient to ensure accountability, and
- the next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.

18. These criteria have been adopted and applied by the House of Lords in the case of *ex parte Amin*.<sup>26</sup> In that case, the House of Lords made clear that these criteria must be applied in all

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<sup>24</sup> *Jordan (AP) (Appellant) v Lord Chancellor and Another (Respondents) (NI)*, *McCaughey (AP) (Appellant) v the Chief Constable of the PSNI (Respondent) (NI)* 2007 UKHL 14 at para 37.

<sup>25</sup> [2003] 37 EHRR 70 at paras 105-109.

<sup>26</sup> *Regina v Secretary of State for the Home Department (Respondent) ex parte Amin (FC)* [2003] UKHL 51.

cases where the right to life was engaged, including cases where a death was alleged to have resulted from negligence on the part of agents of the state, as well as cases where a death had resulted from the use of force.

19. This Bill introduces measures that will merely serve to exacerbate the existing problems identified in the coronial system as regards compliance with Article 2 ECHR. Indeed, should any part of the powers in Clause 11 of the Bill be applied to 'the legacy' of conflict related inquests, which are finally expected to be heard in the near future in Northern Ireland, the Commission is of the view that the likelihood of an Article 2 compliant inquest would decrease significantly.

### **Exclusion of families from legacy inquests**

20. The Explanatory Notes to the Bill state that:

*"The main effects of certification are that the investigation will be conducted by a judge of the High Court nominated by the Lord Chief Justice,<sup>27</sup> that such an inquest may be held without a jury, and that persons could be excluded from it."<sup>28</sup>*

21. Clause 36(4) of the Bill makes provision for rules to be drawn up to exclude persons from a certified inquest:

*"Coroners Rules may make provision conferring power on a person holding an inquest as part of an investigation that has been certified under section 11 to give a direction excluding persons from all or part of the inquest."*

22. The European Court of Human Rights has made it clear that an Article 2 compliant inquest must involve the next-of-kin. Indeed, the weight placed by the Court on the role of the next-of-kin is significant and has been described, thus:

*"The Court views the protection of the legitimate interests of the next of kin as a driving aspect to the workings of all accountability mechanisms."<sup>29</sup>*

23. The Commission has serious concerns that the inevitable outcome of exclusion of the jury will be the exclusion of the

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<sup>27</sup> This will not be the case in Northern Ireland.

<sup>28</sup> See: House of Lords Explanatory Notes at para 795.

<sup>29</sup> See: Ni Aolain F, 'Truth-telling, Accountability and the Right to Life in Northern Ireland' in *European Human Rights Law Review*, [220] 572, p 584. This refers to a series of cases from Northern Ireland which had been heard before the European Court of Human Rights.

next-of-kin. This is a potential breach of Article 2 ECHR as interpreted by the European Court of Human Rights. In addition, in such a situation, there is unlikely to be disclosure of any significant material to the next-of-kin.

24. The Minister's letter confirms that this provision in the Bill enabling rules to be made that provide for persons to be excluded from certified inquests does not extend to Northern Ireland.<sup>30</sup> However, this statement provides little reassurance. Existing coronial law is not to be repealed in Northern Ireland and, therefore, the existing provision in the *Coroners (Practice and Procedure) Rules (Northern Ireland) 1963* which provides for the exclusion of the public will be retained.
25. Under Rule 5 of the *Coroners (Practice and Procedure) Rules (Northern Ireland) 1963* the coroner may direct that the public be excluded from an inquest or any part of an inquest, if he/she considers it would be in the interest of national security to do so.<sup>31</sup>
26. In historic legacy cases it would therefore still be open to the presiding coroner to exclude families of the deceased on the grounds of national security.

### **Special advocates**

27. Clause 12 refers to the role of a "person appointed as counsel to an inquest". The Explanatory Notes make it clear that in certified inquests Coroners Rules will provide for the exclusion of the lawyer of choice:

*"...to help ensure that the interests of the next of kin are fully protected, the judge will be able to appoint independent counsel to the inquest."<sup>32</sup>*

28. This means that, not only will the family of the deceased be excluded, but so too will their lawyer of choice. Such specially appointed counsel are unable to discuss even the "gist" of the material to which they have access with the person they are

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<sup>30</sup> Op cit no 17.

<sup>31</sup> Note: the current equivalent rule for England and Wales is Rule 17 of the *Coroners Rules 1984*.

<sup>32</sup> Explanatory Notes Coroners and Justice Bill as brought from the House of Commons on 25 March 2009, para 799.

supposed to be representing before the inquest.<sup>33</sup> Consequently, they are unable to take instructions from “their client” on the certified portion of the inquest. The Explanatory Notes state:

*“Although counsel to the inquest would not be independent of the inquest, the Government considers that this is not vital since the Coroner (who will be a High Court Judge) will be independent...”*<sup>34</sup>

29. The exclusion of the lawyer of choice is a further potential interference with the requirements of an Article 2 compliant investigation, insofar as without the lawyer of choice the next-of-kin are unlikely to be involved in the proceedings “to the extent necessary to safeguard his or her legitimate interests”.<sup>35</sup>

30. Andrew Dismore, Chair of the Joint Committee on Human Rights, stated during the second reading debate:

*“The system will not give the public confidence that lessons have been learned. Equally importantly, if not more so, it will not give closure to relatives if they and their lawyers of choice are excluded.”*<sup>36</sup>

### **Role of the jury and public scrutiny**

31. The Northern Ireland Court Service last year consulted on widening the jury pool for Northern Ireland. The consultation proposed that the pool of people eligible for jury service should be widened “in order that juries can be more truly representative of society, thereby improving confidence in the justice system as a whole”.<sup>37</sup>

32. The proposals, in Clause 11 of the Bill, run counter to the Government’s stated aims for juries and propose a power to remove a jury from the inquest – the very forum which, when dealing with controversial deaths involving the state, demands the greatest degree of transparency and public accountability.

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<sup>33</sup> See, for example: Rule 36, Special Immigrations Appeals Commission (Procedure) Rules 2003: Special Advocate: Communications about Proceedings, available at: <http://www.opsi.gov.uk/si/si2003/20031034.htm#35>.

<sup>34</sup> See House of Lords Explanatory Notes at para 799.

<sup>35</sup> See *Jordan v the UK* [2003] 37 EHRR 70.

<sup>36</sup> House of Commons, Second Reading Debate, Coroners and Justice Bill at col 108.

<sup>37</sup> Letter from Northern Ireland Court Service to NIHRC, 29 May 2008, with consultation document entitled *Widening the Jury Pool*.

33. In his recent correspondence with the Commission, Mr Goggins stated that he was:

*"...absolutely clear that I do not intend to use the provisions to certify that an inquest may be held without a jury in historic Northern Ireland cases."<sup>38</sup>*

34. While this assurance is welcome, the Commission has concerns regarding the definition of a "historic Northern Ireland" case. These concerns regarding definition are explored in more detail below.

## **(ii) The potential to adversely impact on outstanding legacy inquests in Northern Ireland**

35. There has been a lack of clarity as to the Government's intentions in relation to the application of the "secret inquest" provisions to Northern Ireland. The Commission has been particularly concerned about the potential for the "secret inquests" provisions to be applied to the long awaited legacy inquests in Northern Ireland.
36. The Chief Commissioner, therefore, raised a number of queries in writing with the Northern Ireland Office. The Commission received a written response from Mr Goggins MP, Minister of State, dated 7 April 2009.

### **Application of the provisions to "legacy inquests" in Northern Ireland**

37. In response to the Commission's request for a definition of what the Government means by a "legacy inquest" in Northern Ireland, Mr Goggins stated:

*"I am clear that when speaking about historic Northern Ireland cases I mean that group of inquests into the deaths of certain persons at the hands of the security forces that are **currently underway** (emphasis added). This includes those cases that were the subject of judgments by the European Court of Human Rights, where the UK was found to be in breach of Article 2 of the ECHR because there had not been an effective investigation into the deaths."<sup>39</sup>*

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<sup>38</sup> Op cit no 17.

<sup>39</sup> Letter from Mr Paul Goggins MP, Minister of State for Northern Ireland to Professor Monica Mc Williams, Chief Commissioner, NIHRC, 7 April 2009.

38. The Commission is concerned that there may be some legacy inquests in Northern Ireland which would not be caught by that definition as they are not “currently underway”.

### **The continuing failure of the UK to comply with outstanding judgments of the European Court of Human Rights**

39. The execution of the judgments against the UK concerning the right to life arising from security force action in Northern Ireland, decided by the European Court of Human Rights in 2001,<sup>40</sup> continue to be monitored by the Committee of Ministers of the Council of Europe. In June 2007, the Committee of Ministers of the Council of Europe examined again the degree to which the UK had complied with the judgment against it in relation to a number of inquest cases from Northern Ireland decided in 2001. The Committee stated that, with regard to individual measures required to be taken by the state party to comply with the judgment: *“Progress has been limited and in none of the cases in question an effective investigation has been completed”*.
40. The Committee of Ministers invited the UK to keep it regularly informed of progress and urged the UK to take, without delay, *“all necessary investigative steps in these cases in order to achieve concrete and visible progress”*.
41. The latest consideration of the cases was in March 2009, when the Committee noted with concern that progress with regard to the individual measures in these cases has been limited.<sup>41</sup> The Committee:

*“strongly urges the authorities of the respondent state to take all necessary measures with a view to bringing to an end, without further delay, the ongoing investigations **while bearing in mind the findings of the Court in these cases.**”<sup>42</sup> (emphasis added)*

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<sup>40</sup> Cases concerning the actions of the security forces in the United Kingdom: 28883/95 McKerr; 37715/97 : Shanaghan; 24746/94 : Hugh Jordan; 30054/96 : Kelly and others, judgment of the European Court of Human Rights 4 May 2001.

<sup>41</sup> *“...in particular, in the case of Jordan, where the inquest will not start before June 2009 although it was announced previously that it would begin in April 2008”*. The Commission understands that a date for hearing will not now be fixed before September 2009.

<sup>42</sup> *Interim Resolution CM/ResDH (2009)44, Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases)*, 25 March 2009.

42. The Commission considers that the Clause 11 provision for “secret inquests” is likely to make it more difficult to comply with the judgments of the European Court of Human Rights which have yet to be fully implemented.

### **Temporal limitation for Northern Ireland**

43. The Commission’s advice to Government is to withdraw these provisions. Should, however, the provisions be retained, the Commission considers that this ministerial undertaking should be given legislative effect by a statement on the face of the Bill that the “secret inquests” provisions of the Bill have no effect in Northern Ireland, in respect of inquests arising from circumstances which precede the coming into force of the Bill. This would also address the concerns raised above as to the limitation of the Government’s undertaking to those legacy inquests “currently underway”.
44. This should not be problematic as Government has repeatedly asserted that the circumstances, in which these provisions of the Bill could be applicable, are extremely rare and it would therefore be a simple exercise for Government to satisfy itself that no inquests (other than historic legacy inquests which the Government has already pledged to exclude) arising from circumstances which preceded the coming into force of the legislation, would trigger these provisions.

### **(iii) The failure to extend more positive aspects of coroners’ reform to Northern Ireland**

45. As regards Northern Ireland, the inquest provisions of the Bill present a case of the worst of both worlds. Clause 38 extends the “secret inquests” provisions of Clause 11 without the extension of a number of the positive provisions of the Bill.
46. The House of Commons explanatory notes, which accompanied the Bill state, that:

*“The legislative changes proposed in the Bill are part of an overall package of reform aimed at addressing the weaknesses in the present coroner and death certifications systems.”<sup>43</sup>*

47. Unfortunately this is not the case for Northern Ireland, where the negative proposals in relation to inquests are not set within

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<sup>43</sup> House of Commons Explanatory Notes accompanying the Coroners and Justice Bill, published 14 January 2009 at para 17.

a package of general coroner reform. While there has been administrative reform of the coronial system in Northern Ireland in recent years,<sup>44</sup> the governing legislation remains the Coroners Act (Northern Ireland) 1959 Act.

48. The two most glaring omissions with regard to extending positive provisions to Northern Ireland relate to:
- the failure to extend rights of appeal; and
  - the failure to extend to Northern Ireland a broader definition of the purpose of an inquest (which was included in the Bill with the express purpose of avoiding a breach of the rights under the ECHR).

### **Rights of appeal**

49. The Coroners and Justice Bill, clause 32, provides that an interested person can appeal to the Chief Coroner against a decision made by a senior coroner on a number of grounds. Thereafter, there is a right of appeal from a decision of the Chief Coroner to the Court of Appeal on a question of law.
50. During the second reading debate, the Secretary of State for Justice described rights of appeal, thus:

*“For the first time, bereaved families and other interested parties will have access to a dedicated appeals system and will not have to rely on seeking a judicial review of an inquest.”<sup>45</sup>*

51. Such rights of appeal are not extended to Northern Ireland where the only means of challenge will remain by way of judicial review.

### **Matters to be ascertained/findings or verdict**

52. The Coroners and Justice Bill Clause 5(2) provides, *inter alia*, that the purpose of an investigation into a person's death is to ascertain: who the deceased was; how, when and where the deceased came by his death. In addition, Clause 5(2) provides that:

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<sup>44</sup> Such administrative reform has included the establishment of a single Coroners district for Northern Ireland and the appointment of a high court judge as presiding judge together with the appointment of a senior coroner and two other coroners.

<sup>45</sup> Op cit no 35 at col 29.

*"where necessary, in order to avoid a breach of any Convention rights... the purpose... is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death."*

53. The House of Lords Explanatory Notes accompanying the Bill state:

*"The new provision makes the position expressly clear. The clauses therefore ensure that investigations into deaths under the Bill are compatible with the ECHR as determined by Middleton."<sup>46</sup>*

54. In recent years, evolving case law has introduced the need for narrative verdicts so as to meet the requirements of Article 2 compliant investigations for deaths in custody. Lord Bingham in Middleton described this as:

*"...not simply 'by what means' but 'by what means and in what circumstances'"<sup>47</sup>*

55. Clause 5(2) provides an important legislative statement of that case law requirement and ought to be extended to Northern Ireland.

56. In relation to verdicts, the Coroners Act (NI) 1959 requires only that a verdict states who the deceased person was and how, when and where he came to his death (s.31(1)).

57. The Commission is not reassured by the response of the Minister, Mr Goggins in respect of the failure to extend more positive aspects of the Bill to Northern Ireland.<sup>48</sup> In general terms, the Minister states that it is his hope that:

*"if there is to be substantial reform of this area of the law it can be dealt with by locally accountable elected representatives in the Northern Ireland Assembly rather than in Westminster."*

58. This would, of course, have to await the devolution of policing and criminal justice to the Northern Ireland Assembly.

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<sup>46</sup> House of Lords Explanatory Notes Coroners and Justice Bill as brought from the House of Commons on 25 March 2009, para 790.

<sup>47</sup> *R (Middleton) v West Somerset Coroner* [2004]2 WLR, see: paras 34 and 35

<sup>48</sup> Op cit no 17.

59. In particular, the Commission questions the Government's position in relation to the failure to extend clause 5(2) to Northern Ireland. The Minister's letter states:

*"You are right that clause 5(2) does not extend expressly to Northern Ireland, but the House of Lords decision in the Middleton case is binding on Northern Ireland and a coroner is similarly obliged to investigate the circumstances of a death where Article 2 applies. In summary, the position in Northern Ireland is the same as that in England and Wales even though the statutory position does not apply in Northern Ireland. Replicating it is a point that might be considered in any specific review of inquest law in Northern Ireland."*

60. Under both international law and the domestic law of the Human Rights Act, UK Government obligations in respect of compliance with Article 2 of the European Convention on Human Rights are the same in all jurisdictions of the UK. Legislative provision in respect of the interpretation of these obligations should not be made for some, but not all, of the jurisdictions of the UK.

## Conclusion

61. The proposal for "secret" inquests in the current Bill is only the latest potential interference with Article 2 rights by the Government and should be opposed. The Commission earlier opposed the introduction of the Inquiries Act 2005 for its failure to meet the requirements for independence under Article 2.<sup>49</sup>
62. In addition, the exclusion of the lawyer of choice from certified inquests follows the similar approach in relation to the Special Immigration Appeal Commission<sup>50</sup> and in proceedings challenging Control Orders under the Prevention of Terrorism Act 2005.<sup>51</sup> Thus, exceptional measures become

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<sup>49</sup> See: NIHRC briefing on the Inquiries Bill, January 2005 at:

<http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/65/147.doc>.

<sup>50</sup> See: Section 6(1) of the Special Immigration Appeals Commission Act 1997:

*Appointment of person to represent the appellant's interests* which states:

(1) The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.

<sup>51</sup> See: Prevention of Terrorism Act 2005: Schedule: Control Order Proceedings etc: S.7(1)Special representation in control order proceedings: *"The relevant law officer may appoint a person to represent the interests of a relevant party to relevant proceedings in any of those proceedings from which that party and his legal representative (if he has one) are excluded"*.

the norm and are enacted in permanent rather than temporary emergency legislation as in the past (albeit such "temporary" provisions were repeatedly renewed over many years).

63. The Government has cited the unacceptable delay for the family, in one or two particular cases, as the reason why these unprecedented proposals were fast tracked into the Counter-Terrorism Bill and then re-introduced in the current Bill. For a number of families in Northern Ireland, who continue to await, the holding of an Article 2 compliant inquest into their family member's death, in some cases decades after the incident in question, the sincerity of the Government's concerns regarding unacceptable delay may be in doubt.

**For the reasons outlined above the Commission urges Peers to:**

- **oppose the inclusion of the certified inquests provisions in the Bill;**
- **oppose the extension of any part of the certified inquest provisions to Northern Ireland (by way of clause 40 and schedule 9); and**
- **support the extension of Clause 5(2) and Clause 32 to Northern Ireland.**

**Should the certified inquests provisions be retained, the Commission urges Peers to support the Commission's call for a temporal limitation on the face of the Bill as to the application of the provisions to Northern Ireland.**

**May 2009**

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See also: s 7(5) which states: "A person appointed under this paragraph is not to be responsible to the person whose interests he is appointed to represent".