



INQUEST-LIBERTY-JUSTICE

**Joint Briefing on the return of 'secret
inquests' in the Coroners and Justice
Bill**

**Consideration of the House of Lords
Amendments in the House of
Commons**

November 2009

About Inquest

INQUEST is the only charity in England and Wales that works directly with the families and friends of those who die in custody. This includes deaths at the hands of state agents and in all forms of custody; police, prison, young offender institutions, secure training centres and immigration detention centres. We provide a free, confidential advice service to bereaved people and conduct policy and Parliamentary work on issues arising from the deaths and their investigation.

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

About Justice

JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.

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The Victim's Verdict

On 2nd November 2009, Graham Foulkes, whose son, David, was killed in the bombing at Edgware Road on 7th July 2005 said the following:

“When David was 18 I took him to the local pub to have a drink and celebrate his “coming of age”. This coincided with a local election and so led to a chat about voting. I explained that I believed that our greatest product and export is democracy and how proud he should be to live in this country. Frankly, he thought that this was pretty boring.

I have given no more thought to the freedom that we take for granted until now as we wait for the inquest into David's death and I realise that one of the most important tenets of democracy is that when the state may be involved in an individuals' death an independent judicial officer is appointed to conduct the investigation. The investigation must be open, honest, transparent and without any external pressure being brought to bear. This openness is crucial; how can we talk about democracy if the state can hide behind laws like those now proposed?

I believe that the deal I have with government is that I vote, pay tax and follow the law. Government's part is to provide me with safety and when any part of that deal is not kept, the subsequent investigation has to be independent, open and transparent to qualify as democracy.

In recent years a number of laws have been proposed, that we were warned against by George Orwell. The government's current proposals are another step down a dangerous road.

We waited 6 days for confirmation of David's death and another 4 before we travelled to London to the mortuary. We were strongly advised not to view his body. I wanted to hold his hand just one last time, but couldn't. This is the image that I go to bed with each night, but I also go to bed with the belief that the wheels of truthfulness, honesty and democracy will start to go round in the way I have always taken for granted.

This is a bad law please do not discolour democracy with it”

The Coroner's Verdict

On 29th October 2009, Birmingham Coroner Aidan Cotter delivered the following verdict on the resurrection of the Government's 'secret inquest' plans:

“The issue keeps coming back and it needs to be fought all the way. It is disgraceful that the Government is still trying to make inquests secret. The purpose of an inquest is to make sure the public know how somebody died. Once you have the Government saying, even in just one case, ‘no, the public are not to know why’, then as far as I am concerned it is the end of democracy. Twice the Government has said they would not do this and now, again, they are slipping it in. I appreciate there are cases where for the security of this country you cannot allow all the evidence that has been given but the law already provides what they call public interest immunity. If you talk to ordinary people who have been to an inquest they all talk about closure. Unless you know what happened you can’t get closure. If you know the truth, however bad it is, you can accept it. What you can’t accept is not knowing what happened.”¹

Background

1. INQUEST, Liberty and JUSTICE were delighted when the Government decided to abandon its proposals for 'secret inquests' for the second time in May 2009 in the face of significant cross-party opposition. These controversial proposals started life in the Counter-Terrorism Bill 2008 when the Government was first forced to abandon the plans in November 2008. They were reintroduced in the Coroners and Justice Bill and faced a rocky passage in the House of Commons before being once again dropped as the Bill moved to the House of Lords. While the withdrawal of these original clauses² is to be welcomed the Government's planned replacement is not. In a Written Ministerial Statement of 15th May 2009 the Lord Chancellor stated that where it was not possible to proceed with an inquest under current arrangements, the Government would seek powers to establish an inquiry

¹ Birmingham Post, 30/10/09 "Birmingham coroner hits out at Jack Straw over 'secret' inquests" <http://www.birminghampost.net/news/west-midlands-news/2009/10/30/birmingham-coroner-hits-out-at-jack-straw-over-secret-inquests-65233-25048343/>

² Previous clauses 11 and 12 of the Coroners and Justice Bill.

under the *Inquiries Act 2005* instead. Debate at Committee Stage in the House of Lords confirmed that the Government intends to use provisions hidden in Schedule 1 of the Bill to entirely circumvent the inquest process whenever it pleases.

House of Lords Amendments

2. On 21st October 2009 at Report Stage of the Bill, amendments were tabled in the House of Lords intended as an alternative to the Government's policy. Peers tabling these amendments intended to take out the clauses in Schedule 1 of the Bill that would allow inquests to be replaced with inquiries. Amendments were also laid, that were linked to removal of the power for secret inquiries, to allow normal inquests to admit intercept evidence where appropriate and without undermining national security. This was intended as a move to support the main proposal – the removal of the power to suspend inquests and hold secret inquests. However, unfortunately the vote was only moved over the admissibility of intercept at inquests and not the clauses that allow the Government to replace inquests with inquiries. The House did not, as a matter of procedure, allow the amendments to be voted on at the 3rd Reading of the Bill on the 5th November. The Bill now returns to the House of Commons (reportedly on Monday 9th November) for consideration of the Lords amendments.

3. As things stand the Bill contains the power for the Lord Chancellor to effectively replace inquests with inquiries and also the power for inquests to admit intercept evidence in limited circumstances. The power to admit intercept evidence was intended as an alternative to 'secret inquiries'. **However our main priority remains the removal of the power for an inquest to be substituted with an inquiry. We therefore urge MPs to table and support an amendment in lieu of the House of Lords intercept amendments which would remove this power from the Bill (in paragraphs 3 and 9 of Schedule 1). It is this power which has the potential to do so much harm and to so badly undermine the rights of bereaved families.**

Amendment in lieu of Lords amendments on intercept evidence:

Schedule 1, leave out paragraph 3 Schedule 1, leave out paragraph 9.

We urge MPs to support this amendment in lieu to defeat 'secret inquiries'.

How the Government's proposals for secret inquiries would work

4. Although the Government dropped its plans for secret inquests it seems that it always intended to have a 'Plan B'. Clauses that would allow inquests to be suspended at the behest of the Lord Chancellor were hidden in paragraph 3 and 9 of Schedule 1 of the Bill. Under these provisions a senior coroner must suspend an inquest (and discharge any jury) at the Lord Chancellor's request. The Lord Chancellor is empowered to make such a request "*on the ground that the cause of death is likely to be adequately investigated by an inquiry under the Inquiries Act 2005*". Unlike the original 'secret inquest' proposals there are not even any grounds set out on the face of the Bill for when a normal inquest can be superseded. An inquest can be overridden whenever the Lord Chancellor decides that this would be the preferred option. Under these provisions, once an inquiry has concluded, an inquest *may* be resumed, but only if the senior coroner thinks there is sufficient reason for resuming it. As there is no requirement for an inquest to be resumed, an inquiry convened at the behest of the Lord Chancellor can entirely replace an inquest. Even if an inquest is resumed after an inquiry is held, paragraph 9(11) of Schedule 1 greatly restricts the role of the inquest by providing that a determination as to how, when and where the deceased came by his or her death may not be inconsistent with the outcome of the relevant inquiry. This effectively ties the hands of the coroner (and any jury) meaning there can be no true independent and effective inquest.³

5. Under the Government's model⁴:

- A 'secret inquiry' will be convened to replace an inquest whenever the Lord Chancellor decides that this should be the case;⁵

³ Note, currently section 17A of the *Coroners Act 1988* provides that an inquest must be adjourned if a judge is holding an inquiry into the events surrounding a death. The inquest is not required to be resumed, but if it is, it begins afresh and the findings of the inquiry are not binding.

⁴ On 14th October before the issue came before the House of Lords at Report the Government tabled further last minute amendments to their 'secret inquiries' proposals. These amendments did next to nothing to allay concerns about executive impunity and the corresponding impact on public trust and confidence. The only concession made by government is that a senior judge would be appointed to chair the inquiry and the terms of reference (which are set by the executive) will include the same purposes as a coroners investigation (as found in clause 5 of the current Bill).

⁵ An inquiry under the *Inquiries Act 2005* can be held after a Minister calls for an inquiry either because particular events have caused, or are capable of causing, public concern or there is public concern that an event may have occurred (section 1 of the *Inquiries Act 2005*).

- A Minister will appoint a judge of his or her choice to chair the inquiry who will effectively replace a coroner;
- A Minister, or the Chair of an Inquiry, will be able to restrict attendance at an inquiry, or at a part of the inquiry, and restrict disclosure or publication of any evidence or documents;⁶
- Such restrictions can be ordered for a wide variety of reasons, including because it is necessary to do so in the public interest (which is very broadly defined).
- At the end of the inquiry a report must be given to the Minister setting out the facts determined and any recommendations;⁷
- Certain parts of the report may be withheld from publication if it is in the public interest to do so;
- Intercept material can be presented to an inquiry held under the *Inquiries Act 2005*, although the material can only be disclosed to the inquiry panel and to counsel appointed to assist the panel.⁸

‘Secret inquiries’ worse than ‘secret inquests’

6. We do not believe that a public inquiry can ever be a substitute for an independent and open inquest. Neither do we believe that this was intended by parliamentarians when the *Inquiries Act* was passed in 2005. Indeed we believe that the Government’s so-called replacement to ‘secret inquests’ is even worse than the original provisions in safeguarding the rights of victims’ families. As Lord Alton of Liverpool said at the Committee debate in the House of Lords:

We were very pleased that the Government responded to the concerns that were made at earlier stages of the Bill concerning the whole question of secret inquests. However, is replacing those inquests with secret inquiries not a move that could be said to be less transparent? It will involve no jury and may involve greater secrecy than even the original proposal...The Government could run into real difficulty here.

The Government’s original ‘secret inquests’ proposal was subjected to several modifications during its bumpy and ultimately unsuccessful parliamentary passage. In

⁶ See section 19.

⁷ See section 24.

⁸ See section 18(7)(c) of the *Regulation of Investigatory Powers Act 2000*.

particular and most recently, numerous last minute amendments were tabled to the proposals at Report Stage in the House of Commons in an attempt to ward off a Government defeat.⁹ It seems that the Government's new approach has been pursued in the hope that by adapting the remit and purpose of a legislative scheme already in place under a different Act the proposals will seem less controversial than the creation of a parallel 'secret' coronial system was deemed to be. Press coverage after the House of Lords vote on 21st October can leave us in no doubt that this is certainly not the case.¹⁰

Impact on public trust and confidence

7. The extent to which the 'secret inquiries' could undermine public trust and confidence in the accountability of the State cannot be overstated. At Committee Stage in the House of Lords, Baroness Miller of Chilthorne Damer summarised powerfully the unfeasibility of the 'secret inquiry' route:

We do not believe that we can have a situation in which the state, for whatever reason, however justifiable, shoots people, appoints someone under the Inquiries Act to investigate and sets the remit for the inquiry, when there is no jury and little or no openness. In other countries we would criticise that as impunity.

Many contentious deaths raise important issues of State accountability and, in a free democratic society such deaths should be subject to particularly close public scrutiny. For example, in September this year, Black Country coroner, Robin Balmain

⁹ MPs from across the political spectrum voted against 'secret inquests' at Report Stage of the Coroners and Justice Bill in the House of Commons.

¹⁰ Independent (22/10/09)– *Outrage at government plan for secret inquests* <http://www.independent.co.uk/news/uk/home-news/outrage-at-government-plan-for-secret-inquests-1806867.html>

Independent Leader (22/10/09) – Resist these attempts to make justice secret. Inquests should be free from the hand of ministerial interference <http://www.independent.co.uk/opinion/leading-articles/leading-article-resist-these-attempts--to-make-justice-secret-1806775.html>

Mail on Sunday (25/10/09) – *If somebody dies we must know why...it's vital that our inquests stay public* <http://www.dailymail.co.uk/debate/article-1222760/HELEN-SHAW-If-somebody-dies-MUST-know--Its-vital-inquests-stay-public.html>

Birmingham Post (30/10/09) - *Birmingham coroner hits out at Jack Straw over 'secret' inquests* <http://www.birminghampost.net/news/west-midlands-news/2009/10/30/birmingham-coroner-hits-out-at-jack-straw-over-secret-inquests-65233-25048343/>

The Times (29/10/09) - *Coroners and Justice Bill: Jack Straw is determined to try again* <http://business.timesonline.co.uk/tol/business/law/columnists/article6893945.ece>

concluded the inquest into the death of Stuart Dyson, a soldier who was exposed to depleted uranium in the First Gulf War. The jury in that inquest found that “*it was more likely than not Mr Dyson’s death from cancer was caused or contributed to by his exposure to depleted uranium during his service in the First Gulf War.*” This inquest and verdict is exactly the type of case for which use of the ‘secret inquiries’ provisions might in future be used. There has already been significant speculation that if these provisions were already in place they could have been applied to the inquest into the shooting of Jean Charles de Menezes at Stockwell tube station in July 2005. As is made clear in the statement by Graham Foulkes at the beginning of this briefing, bereaved relatives currently awaiting inquests into the deaths of their loved ones are already concerned that the Government’s secrecy provisions are intended for them. It is for their sake imperative that the inquest system remain open and transparent.

Breach of Article 2 of the Human Rights Act

8. Where a death occurs in state custody or where the death is alleged to have resulted from negligence on behalf of state agents, Article 2 of the *Human Rights Act 1998*¹¹ requires that an investigation into the death must be made and the investigation must be independent; effective; prompt; open to public scrutiny; and support the participation of the next-of-kin.¹² An inquiry under the *Inquiries Act 2005* will not necessarily support the participation of the next-of-kin and, given the executive can order restrictions on public access to hearings and documents and the final report. It may well be that the next-of-kin, and the public at large, never find out the precise circumstances surrounding the death. An inquiry under the *Inquiries Act 2005* will not focus exclusively on the cause of death of an individual – by its nature its focus must be on matters more generally of public concern. In contrast, an inquest is concentrated solely on that individual’s death and the bereaved family are heavily involved and often represented. We believe that an inquest should be the first step in an investigation and if wider issues are raised during the course of the inquest which would warrant an inquiry looking at these broader concerns, this can then occur.

¹¹ Article 2 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

¹² *Jordan v UK* (2001) 33 EHRR 38 and *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51.

9. As a result of the current legislative framework and the ongoing protracted delay to at least one inquest as a result, the Government is most likely already in breach of Article 2 in that particular case. In our view the termination of an inquest in favour of an inquiry under the Government's current proposals would certainly put the Government in breach of Article 2 and would be subject to challenge in the courts.

Conclusion

10. We urge MPs from across the House to table and support amendments in lieu of the House of Lords amendments which would include within their scope the removal of the Schedule 1 power for the Lord Chancellor to replace an inquest with an inquiry. This is the only way that the parliamentary battle against 'secret inquests' and the replacement 'secret inquiries' can be won. An in lieu amendment would allow bereaved people to continue to be able to establish the truth about the death of their loved one and hold those responsible for their treatment and care to account.

Amendments voted on to the Bill in the House of Lords

Amendments to the *Regulation of Investigatory Powers Act 2000* (RIPA) to remove the prohibition on intercept material to a judge, counsel, jury members and other interested persons in an inquest when the judge considers it necessary to do so in the circumstances of the case

6 Information for requests

In section 15 of the Regulation of Investigatory Powers Act 2000 (c. 23) (general safeguards), after subsection (4)(c) insert—

“(ca) it is necessary to ensure that an inquest has the information it needs to enable the matters required to be ascertained by the investigation to be ascertained;”.

7 Amendment to the Regulation of Investigatory Powers Act 2000

(1) Section 18 of the Regulation of Investigatory Powers Act 2000 (c. 23) (exceptions to section 17) is amended as follows.

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

“(d) a disclosure to a coronial judge or to a person appointed as counsel to an inquest or to members of a jury at an inquest or to an interested person in which the coronial judge has ordered the disclosure.”

(3) After subsection (8A) insert—

“(8B) A coronial judge shall not order a disclosure under subsection (7)(d) except where the judge is satisfied that the circumstances of the case make the disclosure necessary to enable the matters required to be ascertained by the investigation to be ascertained.

(8C) An order for disclosure made under subsection (7)(d) may include directions enabling the redaction of any material relating to the method or means by which the information was obtained.”

(4) After subsection (13) insert—

“(14) In this section “interested person” has the same meaning as in section 38 of the Coroners and Justice Act 2009.

(15) In this section “coronial judge” means a judge nominated by the Lord Chief Justice under the Coroners and Justice Act 2009 to conduct an investigation into a person’s death and who has agreed to do so.”

Schedule 22, paragraph 4:

4 Section 7 has effect in relation to investigations that have begun, but have not been concluded, before the day on which that section comes into force (as well as to inquests beginning on or after that day).

Amendments that were intended to be moved at Report Stage in the House of Lords to remove secret inquiries

Removing these paragraphs will ensure an inquest is not automatically suspended if an inquiry is launched under the *Inquiries Act 2005*

(Note in the Bill before the House of Commons these page numbers and line numbers will have changed)

Schedule 1, Part 1, page 127, line 30, leave out paragraph 3.

Schedule 1, Part 2, page 129, line 26, leave out paragraph 9.