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The Joint Committee on Human Rights
House of Commons
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Dear Andrew,

Draft Coroners Bill

Thank you for your letter of 19 December about the human rights compatibility of the draft Coroners Bill.

The main purpose of the Bill is to improve the way that the coroners system serves the public interest and meets bereaved families' concerns. The Bill will give families involved in the inquest process a clear legal standing in the system. For the first time, families will have rights, through the introduction of a charter for bereaved people, laying out the level of service in relation to information and consultation that families can expect, and through a new appeals system, enabling them to challenge a coroner's decision.

A second important aim is to create a national structure for coroners' work. For the first time there will be a Chief Coroner who will provide national leadership for coroners, as the Lord Chief Justice does for judges. This will be supported by national standards, a coronial advisory council, a proper inspection system and national training for coroners and their officers.

And the third main aim of reform is to strengthen coroners' work and make the appointment system more transparent. The Bill will provide coroners with new powers and procedures to conduct more effective investigations, and will establish a proper appointments system, approved by the Judicial Appointments Commission.

You have sought additional information about certain aspects of the Bill in relation to human rights compatibility. I have set out below your questions together with my response for ease of reference.

1. We would be grateful if you could update us on the Government's progress on the draft Bill and whether it is likely that the Government will continue with its proposed reforms in this Parliamentary session. If not, why not?

The Coroners Bill is not part of the main programme for this session, but this gives us



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additional time for further detailed work, including more consultation with stakeholders, so that the legislation can be improved. We will also explore, in consultation with those who deliver and fund the service and those who represent people with experience of it, whether there are other changes that can be made to improve the system in advance of and to complement legislation. The comments of the Joint Committee on Human Rights are therefore particularly welcome and timely.

Coroners' Investigations: Recommendations of the Coroner

2. Has the Government any plans to enhance the powers of the Chief Coroner to act on recommendations made by coroners with a view to identifying patterns in deaths which require investigation and preventing similar fatalities, in the light of the recommendations of the Constitutional Affairs Committee?

Clause 12(2) of the draft Bill gives the coroner power to report his findings to a person who may have power to take action to prevent the recurrence of fatalities similar to that which is being investigated, with a view to preventing similar deaths in the future.

Following the consultation process, I am considering amending the Bill to make it a requirement for the Chief Coroner to include - in his or her annual report to the Lord Chancellor (who is, in turn, required to lay it before Parliament) - a summary of the reports made by coroners and responses to such reports. I am also considering making it a requirement for the person to whom the report is made to formally respond. More details on procedures to support these new arrangements will be dealt with in secondary legislation.

Coroners' Investigations: Evidence

3. What has persuaded the Government that it is appropriate to grant the Lord Chancellor a wide power to direct the Coroners' treatment of evidence?

4. In what circumstances do the Government consider that this power could be exercised in a case engaging Article 2 ECHR, without unduly restricting effectiveness of the Coroners' investigation for the purposes of Article 2 ECHR?

The Bill provides coroners with a power to compel a person to attend to give evidence (clause 42). Powers to compel evidence are a necessary corollary of the state's duty to discharge obligations under Article 2. Lack of power to compel witnesses may diminish the effectiveness of an inquiry.¹ A person may argue that he may not be compelled to give evidence where it would not be reasonable (clause 42(4)). A further procedural safeguard enables a person to argue that he should not be required to give, produce or provide evidence if doing so will tend to incriminate him, if the evidence is covered by legal professional privilege or on the grounds of public interest immunity (clause 43).

The Government is currently reviewing whether these provisions are a sufficient safeguard for witnesses and whether the provision in clause 43(2) is necessary. If further provision is considered to be necessary it is intended that the Bill will list the evidence or documents to which section 42 does not apply and that the Lord Chancellor's power will be limited to altering this list by subordinate legislation, which will follow the affirmative resolution procedure.

¹ *Edwards v United Kingdom* [2002] ECHR 46477/99

Suspension of Coroners Inquests

5. Has the Government considered how to ensure that Coroners will, in practice be free to reopen suspended investigations in circumstances where a prosecution or other investigation has not met the UK's obligation to conduct an effective inquiry into a death?

a. Has the Government considered Liberty's suggestion that there should be a presumption, on the face of the Bill, that where an investigation which triggers the suspension of an inquiry fails to satisfy the requirements of Article 2 ECHR (and fails to identify by what means and in what circumstances a person came by their death) that the inquest will automatically resume?

b. Does the Government intend to provide guidance to Coroners which emphasises the role which Coroners will play in ensuring that the UK's obligations under Article 2 ECHR are met?

6. Does the Government consider that a reasonable belief that the inquiry proposed by the Lord Chancellor under the Inquiries Act 2005 was unlikely to meet the requirements of Article 2 ECHR, because the scope of that inquiry was restricted, or because there was a risk that the inquiry would not be considered independent, would be an "exceptional reason" which would justify a refusal to suspend an investigation?

The Bill requires the coroner to suspend an investigation in the event that certain criminal proceedings may be brought, have been brought, or in the event of an inquiry under the Inquiries Act 2005 (clauses 17 to 19). A coroner who suspends an investigation on the ground that criminal proceedings might be brought (clause 17) is required to resume the investigation once the period of suspension has ended. A coroner who suspends an investigation on the ground that criminal proceedings have been brought (clause 18) or that an inquiry is being held (clause 19) has power to resume the investigation once the proceedings or inquiry is complete if he or she thinks there is sufficient reason for doing so. This gives him the power to resume an investigation, for example, where he or she thinks that the State's obligations have not been met under the ECHR.

I consider that the provision as currently worded is sufficient to ensure ECHR compliance. Since a coroner is a public authority and, whether or not the Bill requires him or her to, at the end of the criminal proceedings or inquiry, as the case may be, he or she will be required to assess whether those proceedings met the Article 2 obligation and, if not, he or she will be required to resume the inquest in any event, unless the obligation will be met in any other way.

As to whether the government will issue guidance to coroners emphasising the role which they should carry out in ensuring the obligations of Article 2 are met, this will be a responsibility of the proposed new Chief Coroner as part of his or her leadership role, which will include a requirement to ensure consistency across coroner areas.

Finally, on your question about inquiries under the Inquiries Act, the Government does consider that a reasonable belief that the inquiry proposed by the Lord Chancellor would not meet Article 2 requirements because of its scope, would be an exceptional reason which would justify a coroner's refusal to suspend an investigation.

7. What has persuaded the Government that the discretion afforded to the Coroner under Clause 30(1), and to the Lord Chancellor under Clause 67, is adequately defined to ensure that the public scrutiny is not circumscribed arbitrarily or inappropriately and that the provisions in the Bill, which permit the restricted publication of the Information relating to an investigation are compatible with Article 2 ECHR?

Clause 30 provides a senior coroner with the power to give a direction prohibiting publication of the name of the deceased and any interested person within clause 76(2)(a) and any information which could lead to the identification of the deceased. Any publication in contravention of a direction will constitute a contempt of court. When considering whether to give such a direction, a coroner will be bound by existing case law as to the circumstances in which it is appropriate to allow a name to be withheld. In addition and so as to ensure the public scrutiny of an investigation is not compromised, I am considering amending this clause so as to limit the discretion of a coroner to cases where he or she considers that exceptional circumstances apply to justify the imposition of reporting restrictions. It may also be amended so that a coroner will no longer be able to make a direction under clause 30 of his own motion but only where an application is made by an interested party. In his or her function of providing leadership to coroners, the Chief Coroner will have power to issue guidance to coroners setting out the type of exceptional circumstances that would justify the coroner exercising his discretion.

In the Government's view, exceptional circumstances are only likely to exist if there is a reason for not publicising the name and the case does not raise issues of public interest or matters of public protection or if there is no third party or organisation implicated in or connected to the death. In addition, the Chief Coroner will monitor use of this discretionary power, and he or she will be required to report to the Lord Chancellor the number and outcome of applications under this provision, including the number and outcome of any appeals.

Clause 41 is likely to be amended so that the cases where an inquest may be held in private will be set out on the face of the Bill. The only circumstance when this will be permitted is if there are national security issues.

Legal Assistance for Bereaved Families

8. What has persuaded the Government that the current provision for legal funding for bereaved families is adequate to ensure that their participation in Coroners' investigations is effective for the purposes of the procedural requirements of Article 2 ECHR?

In some cases, Article 2 ECHR places a substantive investigative obligation on the State. In any case that requires an inquest, it is necessary to consider whether the investigative duty under Article 2 is triggered on the facts of the case and if there is such a duty, whether what has become known as the "Jordan fifth" criteria applies. The Jordan criteria derives from the judgement in the case of *Jordan (Hugh Jordan v. the United Kingdom - 24746/94 [2001] ECHR 327 (4 May 2001))*, and is that "the next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests" (para. 109). If that criteria does apply, a further issue arises,

namely whether or not this requires the grant of public legal funding for the coroner's inquest.

The courts have also made clear that that in the vast majority of inquests the coroner can conduct an effective investigation, with the family's participation, without the family of the deceased needing to be legally represented. For example, in the case of *Khan*, the court found that:

"...the function of an inquest is inquisitorial, and in the overwhelming majority of cases the coroner can conduct an effective judicial investigation himself without there being any need for the family of the deceased to be represented..." (para 74., *Khan v Secretary of State for Health [2003] EWCA Civ 1129*).

This view was subsequently reiterated in the case of *Challender* where the court considered that that:

"I see nothing in the cases post-dating *Khan* to support a broader approach than that expressed in *Khan* itself when it was said that in the overwhelming majority of cases the coroner can conduct an effective judicial investigation himself and that only in exceptional cases will article 2 require legal representation for the family of the deceased" (p.71, *R (Challender) v Legal Services Commission [2004] EWHC 925 (Admin)*)

Normally, the holding of the inquest will be sufficient to discharge the State's Article 2 obligations to conduct an effective investigation into the death. For those exceptional circumstances, funding may be required. In such cases, the Lord Chancellor or his Ministers can grant funding, where it requested by the LSC, under the powers granted by section 6(8)(b) of the Access to Justice Act 1999.

In addition to this, Legal Help is available for an inquest, (subject to financial eligibility and the usual test sets out in the LSC funding code). Legal Help would fund all the preparatory work associated with the inquest, which may include preparing written submissions to the Coroner. Legal Help will also fund someone to attend the inquest as a 'Mackenzie Friend', to offer informal advice in Court, providing the Coroner gives permission.

Other than in exceptional cases, funding for representation at an inquest is not usually available because an inquest is a relatively informal inquisitorial process, rather than an adversarial one. The role of the coroner is to question witnesses and to actively elicit explanations as to how the deceased came by his death. An inquest is not a trial. There are no defendants, only interested parties, and witnesses are not expected to present legal arguments. I am, however, concerned about coroners' investigations where the substantive investigative duty under Article 2 is not triggered and when public authorities choose to be legally represented at inquests, where a bereaved family member is not entitled to public funding for representation. This is something I am considering further.

Reporting Restrictions

9. What has persuaded the Government that the power to impose reporting restrictions provided by the Bill is proportionate to the need to protect bereaved families' right to respect for their private life?

10. Will members of the press be considered "interested persons" for the purposes of asking the senior coroner to vary a direction imposing reporting restrictions, or bringing an appeal against such a direction?

Draft clause 30 polarised opinion in the responses to our public consultation. Some strong views were received from the media, who felt that the proposal was against the principle of open justice and would not be in the public interest. On the other hand, many voluntary groups were supportive of the proposal and felt it was an important step towards protecting families in sensitive cases where there is no justification for names being made public.

The exercise of this power may engage Article 8 and Article 10. The decision to give a direction will involve a balancing of these rights. There is no automatic precedence as between these Articles and both are subject to qualification where, among other considerations, the rights of others are engaged. The coroners will follow the approach of the House of Lords in *Re S (a child)*² that the foundation of the inherent jurisdiction to impose reporting restrictions now derives from Convention rights.

As mentioned at paragraph 7, I am considering a number of amendments to this clause to ensure compliance with the ECHR.

It is intended that the amendments will allay the fears, expressed by the media, that there will be a 'widespread ban' on the reporting of inquests and investigations, yet still provide the necessary protection for vulnerable families in cases where there is no public interest in the publication of information that could lead to the identification of those involved. In clause 76(2), the media will be included as an 'interested person' who may appeal a direction on reporting restrictions.

Powers of search and seizure

11. Have the Government considered whether there are adequate safeguards on the face of the draft Bill to ensure that any interference with the right to respect for the home and private life and the right to the peaceful enjoyment of possessions is proportionate? Have the Government considered incorporating safeguards, similar to those set out in Part II of the Police and Criminal Evidence Act 1984, and if not, why not?

Clause 50 enables a coroner to enter and search premises and to seize property or inspect and take copies of documents. Clause 51 enables property seized to be retained. Reasonable force may be used in the exercise of the power.

The powers of search and retention of property may engage Article 8 rights. However, I consider that any interference will be justified in accordance with Article 8(2) as any search is likely to be in the interests of either public safety, prevention of crime or for the protection of the rights and freedoms of others. The inability to acquire evidence and material may inhibit the coroner's duty to conduct an effective investigation.

I consider that the powers are proportionate to the achievement of a legitimate aim. The power to enter and search may only be used if the Chief Coroner has given his or her authorisation (clause 50(2)). Furthermore, authorisation will only be given if the coroner has reasonable cause to suspect that there may be anything on the premises which relates to a matter which is relevant to the investigation (clause 50(3)); and either—

² in [2004] UKHL 47

it is not practicable to communicate with a person entitled to grant permission to enter and search the premises,

permission to enter and search the premises has been refused, or

the coroner has reason to believe that such permission would be refused if requested (clause 50(4)).

The power to seize anything on the premises and inspect and take copies of documents may only be used if the coroner believes that it may assist the investigation and, in the case of seizure, only if it is necessary to prevent the item being concealed, lost, altered or destroyed (clause 51(1)).

The power to seize articles may engage rights to peaceful enjoyment of possessions under Article 1, Protocol 1. However the Department considers that interference with this right is justified in the public interest and is proportionate. Any items seized will only be retained for as long as is necessary in all the circumstances (clause 51(4)). Furthermore, by virtue of clause 66(2)(f) and (g), the Lord Chancellor has power to make regulations which may contain provision, in relation to authorisations under clause 50(2), which is equivalent to that made by any provision of sections 15 and 16 of the Police and Criminal Evidence Act 1984 and which may contain provision, in relation to the power of seizure of property, which is equivalent to that made by any provision in section 21 of the Police and Criminal Evidence Act 1984. It is intended that the regulations will require a coroner to provide a record of items seized to a person who is the occupier of premises from which the item was seized or who had control of the item before it was seized. It is also intended that such a person will be allowed access to the item for the purpose of photographing it.

A coroner's decision to seize and retain an item will be capable of challenge by way of appeal to the Chief Coroner. Article 6 rights may be engaged in this context, in which case the appeal proceedings which the Bill puts in place will be capable of meeting its requirements.

*Yours
Harriet*

HARRIET HARMAN