



## **INQUEST-LIBERTY-JUSTICE**

**Joint draft proposed amendments  
to the Coroners and Justice Bill 2009  
on the admissibility of intercept  
evidence and the relationship between  
inquests and public inquiries**

## **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.

## **Contact:**

Helen Shaw  
Co-Director  
Inquest  
Direct Line: 0207 263 1111  
Email: [helenshaw@inquest.org.uk](mailto:helenshaw@inquest.org.uk)

Isabella Sankey  
Director of Policy  
Liberty  
Direct Line 020 7378 5254  
Email: [bellas@liberty-human-rights.org.uk](mailto:bellas@liberty-human-rights.org.uk)

Dr Eric Metcalfe  
Director of Human Rights Policy  
JUSTICE  
Tel: 020 7762 6415  
Email: [EMetcalfe@justice.org.uk](mailto:EMetcalfe@justice.org.uk)

The amendments to the Coroners and Justice Bill 2009 suggested below relate to the admissibility of intercept material in inquests and to the relationship between inquests and the *Inquiries Act 2005*. Our organisations intend to produce separate final briefings on the rest of the Bill which will be circulated in due course.

## **Admissibility of Intercept Evidence**

### **Amendment 1**

To move the following clause—

- ‘(1) Section 18 of the Regulation of Investigatory Powers Act 2000 (c. 23) is amended as follows.
- (2) At the end of subsection (7) 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.’.

## Effect

This amends 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.

## Amendment 2

Schedule 20, Part 1, page 212, line 28, at end insert—

‘4A Section [*amendment to RIPA*] 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).’.

## Effect

This amends Schedule 20 which contains transitional provisions to ensure that the amendments in amendment 1 will apply to current and future inquests.

## Amendment 3

To move the following clause—

In section 15 of the *Regulation of Investigatory Powers Act 2000* (c. 23) 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;’.

## Effect

This amends section 15 of RIPA to require that a copy made of any of the intercepted material or data is not destroyed before an inquest if it may be necessary in the investigation (without this amendment, current law and practice means that intercept

material that may be relevant to an inquest is likely to be destroyed as soon as an investigation is complete).

## **Briefing**

1. INQUEST, Liberty and JUSTICE are delighted that the government's proposals for 'secret inquests' have now been dropped in the face of significant cross-party opposition. These proposals were simply unnecessary. INQUEST, as experienced practitioners working on deaths in custody and other contentious deaths for the last 28 years, could not envisage a situation where the proposed legislation would have been appropriate. Similarly, Liberty and JUSTICE, with over 125 years of experience between them in the criminal and coronial justice systems saw no arguments or evidence from the government to justify the proposed broad powers. As well as undermining the rights of the bereaved, the proposals were logically flawed and amounted to a fundamental attack on the independence and transparency of the coronial system in England, Wales and Northern Ireland.

2. While the withdrawal of clauses 11 and 12 is to be welcomed, we believe that a change in the law is required so that inquests that involve intercept material are not unnecessarily stalled. We are aware of one such inquest – that of Azelle Rodney – which has so far been stalled for over four years as a result of the general bar on the admissibility of intercept evidence.<sup>1</sup> We are also concerned by indications that the government considers that an inquiry under the *Inquiries Act 2005* would could effectively substitute for a properly convened inquest. This is discussed in greater detail below (along with suggested amendments addressing the issue).

3. Original clause 13 (and later clause 12) of the Bill amended section 18 of RIPA to allow intercept material to be admissible in inquiries in 'certified investigations' – tacit acceptance by the government that intercept material could and should be made admissible in coronial proceedings. Indeed, the piecemeal removal of the general bar

---

<sup>1</sup> Azelle Rodney,<sup>1</sup> a 24 year old black man, died in April 2005 after a police operation in north London in which he was shot seven times by a Metropolitan Police Service (MPS) officer. The shooting took place after the car he was in was brought to a halt in a 'hard stop' in Edgware, north London, after being under police surveillance for several hours. In July 2006 the Crown Prosecution Service (CPS) announced that there was insufficient evidence for a successful prosecution. After the CPS decision, the family was told by the coroner that the full inquest could not be held because large portions of the police officers' statements had been crossed out, probably pursuant to the *Regulation of Investigatory Powers Act 2000* (RIPA), which excludes information obtained from covert surveillance devices such as telephone taps or bugs from being used as evidence or even being seen by coroners.

on the use of intercept is a continuing trend.<sup>2</sup> The fundamental flaw with the government's proposal was that there was no principled reason why the removal of the general bar on intercept at inquests needed to be restricted to a new breed of 'certified' inquests. Under the proposed amendments above it will remain possible for a judge conducting an investigation to ban or restrict the jury's or public's access to material that would be contrary to the interests of national security. Currently rule 17 of the *Coroners Rules 1984*<sup>3</sup> enables coroners to "*direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security so to do*". A judge can also be appointed to head up the coronial inquest and Public Interest Immunity (PII) certificates can be issued if necessary. These powers are maintained in the present Bill.

4. Inquests (and jury inquests especially) invariably deal with material that is sensitive for one reason or another. The de Menezes inquest was a case in point and involved the consideration of evidence that was highly sensitive, such as the details of the Metropolitan Police's operational response to the threat posed by suicide bombers (including Operation Kratos), the assistance they had had from countries such as Israel and the USA in developing this, and other aspects of undercover and surveillance operations. The widespread concern that the Metropolitan Police had been operating a 'shoot to kill' policy without any parliamentary approval or oversight made it particularly sensitive. A large number of witnesses also sought anonymity before giving their evidence. In fact, the de Menezes inquest managed to deal effectively with highly sensitive evidence and the protection of witnesses whilst remaining largely open and accessible to all, showing that it is perfectly possible to for safeguards to be appropriately applied on a case by case basis. This was done in several ways:

- A High Court judge was appointed as coroner and was able to consider PII applications by the police in respect of highly confidential policies and documents. National security issues were clearly central to the subject matter of the inquest, most importantly the Metropolitan Police strategy for dealing with suicide bombers. Where needed, the coroner granted full PII in relation

---

<sup>2</sup> Intercept evidence may already be used in certain civil proceedings in relation to control orders, communications offences and offences under RIPA, cases before the Special Immigration Appeals Commission or the Proscribed Organisations Appeals Commission and now the *Counter-Terrorism Act 2008* allows intercept evidence to be used in terrorist asset-freezing proceedings.

<sup>3</sup> As enacted by SI 1984 No 552.

to certain documents. However, he ruled that many of the documents could be provided to the legal teams, on strict undertakings as to confidentiality, not making copies, keeping the material secure, etc. On that basis the family's lawyers were permitted to see highly sensitive documents, and to question witnesses based on that material. In relation to the most sensitive material, a summary was prepared of the material that could be shared with the family and their lawyers were provided with the material underlying the summary (again on strict undertakings).

- Where discussion in open court touched upon the contents of any such protected documents, agreements were reached in the absence of the jury and the public as to what could be explored and, although some aspects were regarded as too sensitive to be investigated publicly, overall a reasonably fair exploration of the issues was allowed whilst national security and other policing concerns were protected.
- Suitable arrangements were made for the protection of witnesses without the need for certification. There were over 40 police officers who worked in highly sensitive anti-terrorist operations or covert surveillance whose witness evidence was required at the inquest. They were all granted anonymity by the coroner as a result. They gave evidence from behind a screen in court, and careful provision was made at the venue for their arrival and departure to protect their identities. The inquest was nevertheless able to hear evidence from those witnesses.
- The jury, the family, one of their supporters and the lawyers were all permitted to see the witnesses giving evidence so as to assess their demeanour (the police having carried out police checks on the family members and their chosen supporter beforehand). This was done without any risk or compromise to the identity of any of those witnesses whose anonymity has been maintained despite the huge attention from media organisations.

5. In legal terms the general bar on the admissibility of intercept is an anomaly. The UK is the only country in the world, to maintain the ban on such evidence. Elsewhere in the world, intercept evidence has been used effectively to convict those involved in terrorism and other serious crimes. While RIPA forbids the use of domestic intercepts in open UK court proceedings, foreign intercepts can be used if obtained in accordance with foreign laws. Bugged (as opposed to intercepted)

communications or the products of surveillance or eavesdropping can be admissible even if they were not authorised and interfere with privacy rights. There are no fundamental civil liberties or human rights objections to the use of intercept material, properly authorised by judicial warrant, in criminal or coronial proceedings.<sup>4</sup> The most substantial argument advanced by the government against lifting the bar on intercept evidence is the concern that this would jeopardise security services sources and methods. It has argued that this would, accordingly, jeopardise the ability of the state to protect national security, to detect and investigate future criminal activity. In our opinion, however the significance of this argument has been exaggerated and the Government's position is in any case inconsistent. Foreign intercepts can be used if obtained in accordance with foreign laws.<sup>5</sup> Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping may also be admissible even if they were not authorised and if they interfere with privacy rights. It is difficult to see how this already admissible covert intelligence raises different secrecy concerns to intercept evidence which is not currently admissible. In recognition of concerns about the sensitivity of interception methods our amendment above inserts a specific safeguard to allow the redaction of material that may divulge methods and techniques used in interception.

6. It is nearly 10 years since lifting the bar on intercept evidence was first proposed by Lord Lloyd.<sup>6</sup> In February 2006 the then Home Secretary stated that the government was working *"to find, if possible, a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence"*<sup>7</sup> and promised a report on this matter in 2006.<sup>8</sup> Eventually a Privy Council Review of Intercept as Evidence (the Chilcot Review) was convened and first reported back on 4 February 2008 recommending the abolition of the absolute prohibition contained in section 17 of RIPA.<sup>9</sup> However, progress since then has been slow. In the meantime, the compelling reasons for why, at a minimum, the ban on intercept evidence should be lifted in coronial inquests persist. It remains our position that the ban on the

---

<sup>4</sup> Indeed, Liberty and Justice have long argued that the bar on the use of intercept evidence in criminal proceedings should be lifted. See e.g. Liberty's evidence to the JCHR, 'Relaxing the Ban on the Admissibility of Intercept Evidence', February 2007, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf> and JUSTICE's 2006 report *Intercept Evidence: Lifting the Ban* available at <http://www.justice.org.uk/images/pdfs/JUSTICE%20Intercept%20Evidence%20report.pdf>

<sup>5</sup> Cf *R v. P and Others*, [2000] All ER (D) 2260

<sup>6</sup> Lord Lloyd, *Inquiry into Legislation against Terrorism*, 1996, Cm 3420

<sup>7</sup> HC Deb, 2 Feb 2006, col 479

<sup>8</sup> HC Deb, 2 Feb 2006, col 482

<sup>9</sup> Privy Council review of Intercept as Evidence available at: <http://www.official-documents.gov.uk/document/cm73/7324/7324.asp>

admissibility on intercept evidence should be removed in respect of all proceedings,<sup>10</sup> and it is disappointing that there have been no legislative proposals from the government to achieve the removal of the bar. However as important coronial investigations will remain stalled in the meantime, we believe that the amendments above are urgently necessary.

## **Inquests and Inquiries**

### **Amendment 4**

Schedule 1, Part 1, page 115, leave out lines 28 to 44.

Schedule 1, Part 2, page 117, lines 14 to 47.

Schedule 1, Part 2, page 118, lines 1 to 30.

#### **Effect**

This would remove paragraphs 3 and 8 from Schedule 1 of the Bill. Paragraph 3 allows for an inquest to be suspended if an inquiry is launched under the *Inquiries Act 2005* that would adequately investigate the death. Paragraph 8 deals with the resumption of an inquest suspended if there is an inquiry.

### **Alternative Amendment 4**

Schedule 1, Part 2, page 117, leave out lines 16 to 17 and insert—

‘(a) it must be resumed;’.

Schedule 1, Part 2, page 118, leave out lines 27 to 28.

#### **Effect**

This alternative amendment would amend paragraph 8 to ensure that if an inquest is suspended because an inquiry is being held, the inquest must be resumed once the inquiry is finished (rather than leaving it to the discretion of the senior coroner to resume or not to resume the inquest). It would also remove paragraph 8(11)(a)

---

<sup>10</sup> Particularly if a verdict of unlawful killing is given by an inquest that has heard intercept evidence, as a subsequent criminal investigation that did not have the same access to evidence may not be able to reach a verdict.

which provides that where an inquest is resumed after an inquiry has been held a determination as to the cause of death etc cannot be inconsistent with the outcome of the inquiry, thus effectively tying the hands of the jury or coroner.

## **Briefing**

7. The Secretary of State has now said that the Government will consider establishing, in exceptional cases, an inquiry under the *Inquiries Act 2005* to ascertain the circumstances of a death where evidence cannot be disclosed to a jury. We do not believe that a public inquiry can ever be a substitute for an inquest. Neither do we believe that this was intended by parliamentarians when the Inquiries Act was passed in 2005. Instead it seems that this option is now being promoted as an alternative to secret inquests. We believe that this option should be opposed in its entirety as it would completely undermine the integrity of the coronial system.

8. 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.<sup>11</sup> A Minister, or the Chair of an Inquiry, can restrict attendance at an inquiry, or at a part of the inquiry, and restrict disclosure or publication of any evidence or documents.<sup>12</sup> 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). Individuals can be required to give evidence to the inquiry (failure to comply can lead to imprisonment)<sup>13</sup> and at the end of the inquiry a report must be given to the Minister setting out the facts determined and any recommendations.<sup>14</sup> 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.<sup>15</sup>

9. Under Schedule 1 to the Coroners and Justice Bill a senior coroner will be required to suspend an inquest (and discharge any jury) if an inquiry is being, or will be, held under the *Inquiries Act 2005* which will investigate the cause of death. Once

---

<sup>11</sup> See section 1 of the *Inquiries Act 2005*.

<sup>12</sup> See section 19.

<sup>13</sup> See section 35.

<sup>14</sup> See section 24.

<sup>15</sup> See section 18(7)(c) of the *Regulation of Investigatory Powers Act 2000*.

the inquiry has concluded an inquest may be resumed, but only if the senior coroner thinks there is sufficient reason for resuming it. Thus, there is no requirement for an inquest to be held if an inquiry has been held that investigates the cause of death. Even if an inquest is resumed after an inquiry is held, paragraph 8(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.<sup>16</sup>

10. 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*<sup>17</sup> requires that an investigation into the death must be made on the initiative of the State (i.e. it is not sufficient to rely on civil proceedings brought by family members etc) and the investigation must be independent; effective; prompt; open to public scrutiny; and support the participation of the next-of-kin.<sup>18</sup> 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. It will also 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. 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. However, an inquest should not be suspended pending such an inquiry, and in particular, the inquest must not be bound by any findings of an inquiry. As such, these amendments seek to remove the provisions that would allow this to happen. If parliamentarians do not wish to remove the ability to suspend an inquest pending an inquiry, at the very least the Bill should ensure that any suspended inquest must resume at the end of the inquiry, and the inquest should not be bound by any of the

---

<sup>16</sup> 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.

<sup>17</sup> Article 2 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

<sup>18</sup> *Jordan v UK* (2001) 33 EHRR 38 and *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51.

inquiry's findings. Without these amendments, any inquiry held into a person's death without a corresponding public inquest involving a jury is likely to breach the requirements of article 2 in cases where there are questions of State involvement in the person's death.