INQUEST briefing on inadmissibility of intercept evidence in inquests

October 2012
Summary

The issue of how sensitive material such as intercept evidence is dealt with at inquests has been a matter of government and parliamentary concern for over five years.

INQUEST were pleased that, in the face of significant cross-party opposition, the government decided to abandon its proposals for closed material proceedings or ‘secret inquests’ in the Justice and Security Bill currently before parliament. These proposals were simply unnecessary. As experienced practitioners working on deaths in custody and other contentious deaths for the last 30 years, INQUEST could not envisage a situation where the legislation proposed in the government’s green paper would have been appropriate. As well as undermining the rights of bereaved people, the proposals were logically flawed and amounted to a fundamental attack on the independence and transparency of the coronial system. During those debates INQUEST argued that analysis of the government’s concerns suggested that they were, in reality, related to the inadmissibility of intercept evidence in inquests.

The backbench debate on a motion relating to the “use of intercept evidence in courts and inquests” is an important opportunity to discuss the issues and solutions to the current impasse. As well as outlining the key points relating to the admissibility of intercept evidence in inquests and the relationship between inquests and the Inquiries Act 2005, this briefing contains suggestions for possible amendments the Regulation of Investigatory Powers Act 2000 (RIPA).

The problem – inadmissibility of intercept evidence in inquests

1. The issue of how sensitive material is dealt with at inquests has been a matter of government and parliamentary concern for over five years. What has been important in these discussions is to distinguish the different types of sensitive material. The material can be broadly delineated into these three categories:
   a. Sensitive evidence pertaining to national security and operational matters relating to state agencies (the police, the military, the security services).
   b. Sensitive evidence that cannot be disclosed because of the harm test.

2. During the course of substantial debate on the Justice and Security Bill, INQUEST set out the measures adopted within the current legal framework to conduct inquests that comply with Article 2 and protect either the interests of national security and/or sensitive policing matters. These practical measures have also protected families’

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1 Set out in Regulation 4 of the Police (Conduct) Regulations 2008 http://www.legislation.gov.uk/uksi/2004/643/regulation/12/made
participation in the inquest process and the principles of open justice and transparency and deal adequately with categories a. and b. The opportunity to codify these measures arises with the imminent implementation of the Coroners and Justice Act 2009 and the recent appointment of the first Chief Coroner, HHJ Peter Thornton QC, who can issue guidance to coroners drawing on current good practice.

3. Scrutinising the government’s proposals for closed material proceedings in inquests in the Justice and Security green paper, the Joint Committee on Human Rights (JCHR) commented:

138. We do not consider that the Government has produced any evidence to demonstrate the need to introduce fundamental changes to the way in which inquests are conducted. There is no evidence of cases in which a coroner’s investigation has been less thorough and effective because sensitive material has had to be excluded, and there appears to be only one case in which a coroner has been unable to conclude the investigation, and that appears to have been due to the inadmissibility of intercept evidence. In our view, the burden of the evidence is clear that coroners have proved resourceful in devising ways of ensuring that full and effective investigations can take place notwithstanding the relevance of sensitive material to central issues in the case.

139. To the extent that the evidence shows that inquests may not be able to be completed because of the inadmissibility of intercept ….. there may be a case for some much less fundamental reform of inquests than that proposed in the Green Paper3. [our emphasis in bold]

4. INQUEST agrees that the barriers to open inquests relate to category c. evidence: material that is subject to RIPA.

5. Intercept evidence is currently inadmissible in all legal proceedings including inquests. However, in deaths where the right to life under Article 2 of the European Convention on Human Rights is engaged (for example, deaths following the use of force by police), the state is under a duty to instigate an independent, effective and prompt investigation into a death which is open to public scrutiny and which supports the participation of the next-of-kin. For certain deaths, the state will be under a duty to allow intercept evidence to be considered by the independent investigation in order for that investigation to meet the necessary standards of effectiveness, transparency, and next-of-kin involvement.

6. There has to date been one fatal shooting by police where the inquest has been unable to proceed – that of Azelle Rodney who died in April 2005. The inquest into his death was withdrawn from the coronial jurisdiction/court and a public inquiry headed by a high court judge started in September 2012. The inquest was unable to proceed because the redactions required as a consequence of RIPA rendered the evidence meaningless. The redacted matters went to the heart of explaining the reasons Mr Rodney was shot

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and as such meant that the inquest could not meet the criteria to satisfy the state’s obligations under Article 2 or to answer that key question for an inquest in such cases – how and in what circumstances a person met their death.

**Why do we need a change in the law relating to admissibility of intercept evidence in inquests?**

7. A change in the law is urgently required so that inquests that necessarily involve intercept material are not unnecessarily stalled as a result of the general bar on the admissibility of intercept evidence.

8. The possibility of the inquest not being able to proceed into the fatal shooting by police of Mark Duggan has been raised by the IPCC. The presentation of the matter has caused huge confusion and concern for the family, the community, the media and the wider public. Obviously the context of Mr Duggan’s death means it is vitally important that the inquest goes ahead with a jury in 2013 as is currently planned.

9. It is over 16 years since lifting the bar on intercept evidence was first proposed by Lord Lloyd. 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” and promised a report on this matter in 2006. 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. 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 with the JCHR reiterating in April 2012 “our and our predecessor Committee’s recommendations that legislation to provide for the admissibility of intercept as evidence be brought forward as a matter of urgency”. It is disappointing that there have been no legislative proposals from the government to achieve the removal of the bar.

10. In legal terms the general bar on the admissibility of intercept is an anomaly. INQUEST (in joint briefings with Liberty and JUSTICE) have previously highlighted that 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 in legal proceedings. 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. Indeed there are human rights arguments in favour of admitting intercept evidence in legal proceedings including that fatalities (whether of members of the public, police officers

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4 In INQUEST’s knowledge, the only inquest which has been unable to proceed as a result of the bar on the admissibility of intercept evidence is that of Azelle Rodney

5 Para 50, JCHR report cited at 3 above

6 See for example the joint briefing from INQUEST, Liberty and JUSTICE for the Coroners and Justice Bill available from: [http://inquest.gn.apc.org/website/pdf/INQUEST_Liberty_Justice_Briefing_Intercept_Evidence_and_Inquiries_CJB_Lords_Committee_Stage.pdf](http://inquest.gn.apc.org/website/pdf/INQUEST_Liberty_Justice_Briefing_Intercept_Evidence_and_Inquiries_CJB_Lords_Committee_Stage.pdf)
or suspects) could be avoided if intercept material was admissible evidence in criminal proceedings. Currently, as prosecutions are unable to rely on intercept evidence, police operations can be artificially prolonged while waiting for admissible evidence to emerge with opportunities to make arrests earlier being allowed to pass by. This can increase the likelihood of operations resulting in “hard stop” situations where police use lethal force.\footnote{For example in McCann v United Kingdom (1995) 21 EHRR 97, a case examining the shooting of three unarmed IRA suspects by the SAS in Gibraltar, the European Court of Human Rights found a breach of the right to life in Article 2 because the planning by the Authorities was not “strictly proportionate” to the objectives to be achieved; i.e. saving lives. First, the court found a breach in the failure to arrest the suspects at the Gibraltar border so as to safeguard all human lives concerned. Second, the court found that the authorities did not consider the correctness of intelligence that the suspects were armed with detonators and/or explosives (which turned out to be wrong). Thirdly, the use of SAS soldiers - combat teams trained to shoot to kill - amounted to a procedural failure in planning the mission.}

11. The most substantial argument advanced by the government against lifting the bar on intercept evidence is the concern that this would jeopardise sources and methods of state agents. It has argued that this would undermine the ability of the state to protect national security and to detect and investigate future criminal activity. However the significance of this argument has been exaggerated and the Government’s position is in any case inconsistent. 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 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 below inserts a specific safeguard to allow the redaction of material that may divulge methods and techniques used in interception.

12. It should also be noted that there is already a trend towards piecemeal removal of the general bar on the use of intercept. 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 the Counter-Terrorism Act 2008 allows intercept evidence to be used in terrorist asset-freezing proceedings.

**The difference between inquests and inquiries**

13. An inquest is the appropriate forum for a death at the hands of state agents to be properly scrutinised. INQUEST believes that a public inquiry can never be a substitute for an inquest. Neither do we believe that this was intended by parliamentarians when the Inquiries Act was passed in 2005. An inquiry under that Act will not necessarily support the participation of the next-of-kin and the government can order restrictions on public access to hearings and documents and the final report. It may well be that the bereaved family, and the public at large, never find out the precise circumstances surrounding the death. An inquiry under the Act 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. INQUEST believes 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.

14. The importance for families of holding full, transparent inquests into deaths at the hands of state agents rather than more limited inquiries has been underlined by recent developments in the Azelle Rodney Inquiry. Six years before Mark Duggan was shot by police in Tottenham, Azelle Rodney was shot dead by Metropolitan Police Officers in April 2005 following a “hard stop” of the car he was travelling in. As outlined in paragraph 6, an inquiry instead of an inquest is being held into Mr Rodney’s death.

15. In her witness statement to the Inquiry of 30 August 2012 Susan Alexander, the mother of Azelle Rodney, said:

I also wish to make clear that, whilst I have seen a lot of evidence relating to the events leading up to and after Azelle’s death, and I will hear more about this at this inquiry, some evidence continues to be shrouded in secrecy and I remain worried that I am being prevented, and will be prevented, from seeing or hearing every single relevant piece of evidence. I cannot help feeling that some evidence may still be suppressed. Also, I want everyone to know that I am angry about being denied a timely inquest, say in 2007, because it partly involved some people saying to me by my lawyers that I could not be trusted to see some sensitive evidence which left me feeling like a criminal or suspected criminal. That is intolerable and unjust and the reasons given to me for not holding an inquest years ago are unacceptable. Despite all the above, I sincerely hope the inquiry will now leave no stone unturned in the search for the truth and accountability for my son’s death.8

16. Since the Inquiry hearings commenced in September 2012, Azelle Rodney’s mother, Susan Alexander, has been continually presented with documents that fail to disclose relevant evidence to her. Important words are redacted from the documents. She has received some documents with different redactions to those in earlier versions of the same documents which reveal that earlier redaction decisions were not made on a legitimate basis. In October 2012 she learned that one secret hearing occurred in June 2012 and she has been present at two hearings where the rest of the public was excluded, while she and her legal team were also excluded from part of a hearing on 2 October 2012. She can only speculate that there have been other secret hearings that she may or may not ever be told about. Most recently, the Metropolitan Police asked the High Court9 to overturn a ruling by the Inquiry Chair that members of her legal team should be able to see aerial surveillance video footage of the two hours prior to the fatal

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8 Official transcript of the hearing on 4 September 2012 (pages 151-152) available from: http://azellerodneyinquiry.independent.gov.uk
9 For BBC coverage of the High Court ruling see: http://www.bbc.co.uk/news/uk-england-london-19944462
shooting. The High Court dismissed the Metropolitan Police’s attempt to keep the material from her lawyers.

17. These experiences have tended to undermine assurances given to Azelle Rodney’s mother that secrecy would be kept to an absolute minimum in accordance with the strict requirements of RIPA. Susan Alexander’s continuing struggle to find out why her son was shot dead over seven years ago is not only deeply distressing to her but raises significant concerns for the public who are also waiting for all the evidence to be scrutinised.

Previous parliamentary consideration of the admissibility of intercept evidence in inquests

18. The issue of how to deal with RIPA material and inquests was debated in parliament twice in both the Counter Terrorism Bill 2008 and the Coroners and Justice Bill 2009.

19. The House of Lords twice amended draft legislation before it, during debates on these two separate Bills, to amend RIPA with a view to making it possible for RIPA material to be disclosed during inquests in very limited circumstances and with appropriate safeguards. Those proposed legislative amendments, supported at the time by both the Conservatives and Liberal Democrats in both Houses but that were ultimately rejected by the House of Commons, should be the starting point for RIPA reform in this area.

20. Those proposed legislative amendments, updated as below would potentially permit the disclosure of RIPA material in a highly structured, judicially-controlled manner to the family of the deceased, their counsel and the jury at an inquest. But only on the proviso that the coroner (who must be nominated/designated by the Chief Coroner) believes the information contained in the intercept is central in finding out how a person died. This coroner would then have sight of the material and would decide who the material would be disclosed to. The coroner’s decision would be his/hers alone and any of the other parties would be able to make submissions to him/her about the decision or challenge it in the usual manner.

21. Once a security cleared coroner was satisfied of the direct and central relevance of the RIPA evidence to the circumstances of the death, he/she would certify that it must be disclosed to the jury and to the Properly Interested Persons (PIPs) at an inquest, which in turn will lead to an authorised disclosure of that material to jury members and PIPs on the basis of confidentiality agreements that will include a reference to the fact that any unauthorised disclosure of RIPA material is a criminal offence. In such exceptional cases, Rule 17 of the Coroners Rules can also be utilised to hold some of the inquest in camera.

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10 House of Lords Hansard 24 Nov 2008 : Column 1296
Suggested amendment to enable RIPA material to be heard as evidence in public at an inquest

**Amendment 1**

An amendment to s.18(1) is necessary for that an we suggest the following:

'(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 the Chief Coroner or a senior coroner designated by the Chief Coroner, or to a person appointed as counsel to an inquest or to members of a jury at an inquest or to an interested person or to the public in which the Chief Coroner or a senior coroner designated by the Chief Coroner has ordered the disclosure.’.

(3) After subsection (8A) insert

‘(8B) The Chief Coroner or a senior coroner designated by the Chief Coroner shall not order a disclosure under subsection (7)(d) except where the coroner 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 or is otherwise in the public interest.

(8C) An order for disclosure made under subsection (7)(d) may include directions enabling the redaction of any material which would reveal the method or means by which the information was obtained. But such redaction may only be made where strictly necessary in the public interest and proportionate to that interest’.

4) After subsection (13) insert

‘(14) In this section “interested person” has the same meaning as in section 47 of the Coroners and Justice Act 2009.

(15) In this section “coroner” means the Chief Coroner or a senior coroner nominated by the Chief Coroner 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 chief coroner or a senior coroner nominated by the Chief Coroner, counsel, jury members and other interested persons in an inquest when the chief coroner or a senior coroner nominated by the Chief Coroner considers it necessary to do so in the circumstances of the case.

**Amendment 2**

Within a commencement order, made under s.182(5) of the Coroners and Justice Act 2009

‘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
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).

22. Section 3 of the Coroners and Justice Act 2009 provides for some flexibility in the allocation of cases in order to deal with particularly complex cases. There is already a cadre of highly experienced and skilled coroners who sit in some of the most complex and challenging deaths in custody cases who could be designated by the Chief Coroner as a specialist panel who would sit in such cases.

23. The two main justifications for section 17 of RIPA are to protect the privacy of the subject, and to protect the source of intelligence. Where the subject has been killed, hearing information relevant to why s/he was killed normally outweighs any concerns as to his/her privacy. The source of intelligence will be protected by the amendments proposed above.

What is the view of other organisations?

24. INQUEST’s position on this issue is similar to a number of others who also believe that a change in the law is required so that inquests that necessarily involve intercept material are not unnecessarily stalled. As well as the JCHR urging change in this area (see paragraphs 3 and 9 above), both the Independent Police Complaints Commission (IPCC) and the Metropolitan Police have made public statements saying they would welcome reform in this area.

25. On 29 March Deborah Glass, IPCC Deputy Chair said: “As a general rule we seek to find ways round any such obstacles. However, in some circumstances our hands are tied by the law. One such provision is s.17 of the Regulation of Investigatory Powers Act 2000.

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11 See also paragraphs 5 and 6 of ‘Main Activities of the Chief Coroner’ contained in Reform of the coroner system – next stage Ministry of Justice consultation paper CP06/10 (pages 97-101) available at http://www.justice.gov.uk/consultations/docs/coroner-reform.pdf
The impact of this is that not only can some information not be disclosed, we cannot even explain why we cannot disclose the information, as this itself would be a breach of the law. “In our view this places investigatory bodies in the invidious position of being unable to provide families, and the public, with meaningful information on the investigation or even explain why that information cannot be provided. We believe this law needs to be changed.”

26. The Metropolitan Police made the same proposal in their response to the Justice and Security Green Paper in March 2012. They said: “It is submitted that RIPA material should be admitted in coronial proceedings...Inquests, unlike civil proceedings, cannot be settled with compensation nor can they be withdrawn (unlike a criminal prosecution) and must proceed on the basis of the admitted evidence. Where RIPA material is not admitted, the remaining evidence may provide a skewed picture of the circumstances leading to the death. Consideration should be given to the admission of RIPA material in the exceptional and rare inquests where such evidence is pivotal to the actions taken by police.”

Conclusion

27. The law relating to the use of intercept evidence in inquests should be amended urgently to enable coroners to consider all information and evidence relating to deaths. The lessons from Hillsborough show us more than ever how important a full and thorough investigatory process and inquest is. It is imperative that a full inquest into Mark Duggan’s death takes place as soon as possible.

For more information on any of the issues contained in this briefing please contact:

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12 http://www.ipcc.gov.uk/news/Pages/pr290312_ripa_statement.aspx;
ABOUT INQUEST

INQUEST is the only independent organisation in England and Wales that provides a specialist, comprehensive advice service on contentious deaths, their investigation and the inquest process to bereaved people, lawyers, other advice and support agencies, the media, parliamentarians and the wider public. It has a proven track record in delivering an award-winning, free, in-depth complex casework service on deaths in state detention or involving state agents. It works on other cases that also engage article 2, the right to life, of the European Convention on Human Rights and/or raise wider issues of state and corporate accountability. It monitors public interest inquests and inquiries into contentious deaths to ensure the issues arising inform our strategic policy and legal work.

INQUEST was fully engaged in the legislative debates around proposed “secret inquests” during the passage of both the Counter Terrorism Bill 2008 and the Coroners and Justice Bill 2009. We met with concerned parliamentarians, produced detailed briefings on the proposals (including a joint briefing with Liberty and JUSTICE on amendments to the Coroners and Justice Bill on the admissibility of intercept evidence in inquest proceedings).

INQUEST co-ordinates the INQUEST Lawyers Group (“ILG”) which is a national network of over two hundred lawyers who are willing and able to provide preparation and legal representation for bereaved families. Membership is open to all lawyers who represent bereaved families and ILG members have been involved in thousands of inquests into contentious deaths over the last thirty years. These range from inquests into deaths in custody and following other contact with state agents, such as police shootings, through to major disasters such as the Marchioness, Hillsborough, Zeebrugge and rail crashes, as well as the deaths of military personnel. Many of these cases involve highly sensitive material touching on national security, sensitive sources, capabilities and techniques and government relationships with international partners. Particularly notable recent examples in which ILG members have been involved include the 7/7 London bombing inquests, the Azelle Rodney case and the inquests into the deaths of Diana, Princess of Wales, Jean Charles de Menezes and the Ministry of Defence research scientist Terence Jupp.

For more information see: www.inquest.org.uk.