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INQUEST BRIEFING ON RIPA AMENDMENTS IN COUNTER TERRORISM BILL 2008

THE NEED FOR THE DISCLOSURE OF INTERCEPT EVIDENCE AT INQUESTS

1. Introduction

- 1.1 INQUEST urges MP's to support the new clause 77 of into the Counter Terrorism Bill 2008 which amends the Regulation of Investigatory Powers Act 2005 (RIPA).
- 1.1 This new clause is not about the general issue of how to deal with sensitive information at inquests discussed in the government's initial proposals in the old part 6 of the Counter Terrorism Bill 2008. It is about a small change to RIPA to allow an article 2 compliant inquest to take place where such material exists and when, crucially, a High Court judge determines that the material concerned is central in ascertaining how a person came to die.
- 1.2 Accepting this clause would bring the treatment of such material at inquests broadly in line with the way it is treated in criminal proceedings. It deals with an anomaly in RIPA, because RIPA simply did not envisage such material causing any problems in inquest proceedings.
- 1.3 This amendment is necessary for the inquest into the police shooting of Azelle Rodney (April 2005) to take place. At the moment, coronial law/RIPA does not allow for the coroner to see (let alone disclose) *any* RIPA related material to any properly interested persons. This legal lacuna appears to be the reason why the Azelle Rodney inquest has been put on hold.
- 1.4 Article 2 of the European Convention on Human Rights requires the government to have proper procedures in place for ensuring the accountability of agents of the state to maintain public confidence. It places a positive duty on the state to investigate a death in custody with an inquiry that is:
 - on the state's own initiative
 - independent, both institutionally and in practice;
 - capable of leading to a determination of responsibility and the punishment of those responsible;

- prompt;
- allows for sufficient public scrutiny to ensure accountability;
- enables the next of kin to participate.¹

At present, the anomaly in RIPA means there cannot be an article 2-compliant inquest in the Azelle Rodney case.

2. What the clause changes

- 2.1 This clause 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 a High Court judge in such cases) believes the information contained in the intercept is central in finding out how a person died. Such an appointment is already possible under section 14 of the Coroners Act 1988. See point 3.3 below.
- 2.2 The High Court Judge sitting as a coroner would then have sight of the material and would decide who the material would be disclosed to.
- 2.3 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. Section (8B) of the amendment sets out the exceptional circumstances where such disclosure would need to take place in order for the inquest to go ahead – it is a 'necessity test' and would not allow the indiscriminate disclosure of any RIPA related material, only if and when it was essential.
- 2.3 This amendment means that decision over whether or not RIPA material is disclosed at an inquest will therefore be solely a judicial one. It has no bearing on the release of any other 'sensitive material' such as those covered normally by Public Interest Immunity decisions at inquests, only RIPA-related material.

3. INQUEST's response to the government's comments at Committee and Report Stage in the House of Lords

- 3.1 Speaking on behalf of the government at the committee and report stage debates on the Counter Terrorism Bill in the Lords, Lord West of Spithead made several assertions regarding this clause which were legally and factually incorrect.
- 3.2 He claimed that the amendment would allow the "wide disclosure of very sensitive material." This is simply not true. It would only allow the disclosure of RIPA-related material and only when a High Court judge sitting as a coroner is satisfied that the material is essential in finding out how someone died. It would not necessarily mean the material would be subject to public disclosure if it was deemed to be too sensitive. A whole series of options are currently available and are used in inquests which could be decided by the coroner, such as imposing

¹ *Jordan v UK* (2001) 37 EHRR 52, also approved by the House of Lords in the case of *ex parte Amin*

reporting restrictions on proceedings or deciding that in the interests of national security certain sections of the proceedings take place *in camera* and properly interested persons agreeing to confidentiality undertakings.

- 3.2 Lord West also said “it is unclear how the new clause would work in practice in the absence of any legislative mechanism to ensure a High Court judge is appointed to hold inquests.” This is legally wrong. Under the power of section 14 of the Coroners Act 1988, coroners can apply for the jurisdiction of an inquest to go to a Circuit or High Court judge². High Court judges have sat as coroners at inquests quite recently in two high profile death in custody cases, both at the inquest into the death of Gareth Myatt which took place in 2007 and the current ongoing inquest into the shooting of Jean Charles de Menezes.
- 3.3 Lord West also said that it is necessary to balance the interests of the family and the public interest when discussing material that cannot be disclosed publicly. We agree and think that a balance is achieved in this amendment.
- 3.4 Finally, Lord West agreed that this debate should take place within the Coroners and Death Certification Bill but this would a) result in significant delay; and b) return to a wider debate about the disclosure of all kinds of sensitive information at inquests. This may be necessary but does not deal with the narrower and urgent issue of RIPA-related material which appears to be holding up the inquest into the case of Azelle Rodney

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² It is laid down in a number of case judgments listed in *Inquests: A practitioner's guide*, L. Thomas *et al*, (2008), Legal Action Group, p48.

Appendix 1

Counter Terrorism Bill 2008. Clause 77 Inquests: intercept evidence

77 Inquests: intercept evidence

(1) In section 18 of the Regulation of Investigatory Powers Act 2000 (exceptions to
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section 17), after subsection (7)(c) insert—

“(d) a disclosure to a coroner or to a person appointed as counsel to
an inquest or to members of a jury or to any properly interested
person where—

(i) the coroner holding the inquest is a judge of the High
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Court; and

(ii) the coroner has ordered the disclosure to be made to the
coroner alone or (as the case may be) to the coroner and
the person appointed as counsel to the inquest or to
members of a jury or to any properly interested person.”

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(2) After subsection (8A) insert—

“(8B) A coroner shall not order a disclosure under subsection (7)(d) except
where the coroner is satisfied that the exceptional circumstances of the
case make the disclosure essential to enable the matters that are
required to be ascertained by the inquest to be ascertained.”

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(3) After subsection (11) insert—

“(11A) References in this section to a coroner apply only where the coroner is
a judge of the High Court.”

(4) This section has effect in relation to inquests that have begun, but have not
been concluded, before the day on which it comes into force as well as to

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inquests beginning on or after that day.