



Bar Council response to the Ministry of Justice consultation on changes to fee scheme arrangements for legal aid related to inquests

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice (MoJ) consultation on changes to fee scheme arrangements for legal aid related to inquests.¹

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

¹ [Legal aid for inquests: changes to fee schemes - GOV.UK](#)

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Consultation questions

Question 1: We propose to move to a single fee scheme for inquest legal help. Do you agree?

Yes.

1.1 Please give reasons for your choice:

We broadly support any efforts to streamline and simplify legal aid applications for processes.

However, the fee scheme must be sufficient to achieve the statutory aims. The current proposals would not for the reasons we set out below.

Question 2: We propose that the single fee scheme for inquest legal help be based on the current claims against public authorities (CAPA) fees (set out in table 1 in part 1, and table 7(a) in part 2 of schedule 1 of the Remuneration Regulations.). Do you agree?

2.1 Please give reasons for your choice:

We support consistency and clarity for providers in relation to the fees that they would receive under legal help for inquests. We also support any increase in legal aid fees, including the proposition that cases which would have previously been placed in a lower-paying category of law, would now be paid at the higher single fee scheme based on CAPA fees.

Question 3: Subject to a successful Bill amendment to the Merits Regulations, we propose to amend schedule 4 of the Remuneration Regulations to include fee rates for non-advocacy work alongside existing rates for advocacy work for a family member who receives legal aid under other legal services. Do you agree?

No, we do not agree.

3.1 Please give reasons for your choice:

The crucial principle of ‘parity of arms’ in section 18(1) of the Public Office (Accountability) Bill will only be achieved if a bereaved family member is able to secure advocacy services from a representative with sufficient experience and competence to undertake the case.

As the consultation recognises at p.19 *“many inquests involving public authorities as interested persons involve NHS bodies and we anticipate that, following commencement of the Bill, there may be a greater number of inquest legal aid cases involving clinical negligence themes”*. Other public authorities commonly involved as interested parties at inquests are police forces. Our experience in such inquests is that it is counsel, who for the most part, provide the advocacy for the interested parties, including family members.

Annex A of the consultation proposes that the Barrister rates in Table 2 of Schedule 4 will be retained.

The rates of remuneration fall far short of those required to secure representation by counsel of appropriate experience and competence.

The remuneration set out in Table 2 of Schedule 4 makes no provision for counsel’s involvement in the extensive work that is often required prior to, and not directly, in preparation for the advocacy at the substantive inquest. Counsel’s involvement in an inquest usually starts before the Pre-Inquest Review Hearing with a conference with the family member, advising on gaps in the proposed evidence, advising on whether expert evidence is required, and preparing for and appearing at the Pre-Inquest Review Hearing (where issues of disclosure, witnesses, the scope of the inquest whether Article 2 ECHR is engaged). Skeleton arguments are expected for most such hearings.

The brief fees in Table 2 of Schedule 4 have not been uplifted since the Civil Legal Aid (Remuneration) Regulations 2013 came into force on 01 April 2013. The increases in RPI and CPI since they came into force are 67% and 44% respectively.

A brief fee is intended to compensate the barrister for all preparation for the advocacy at the inquest, together with attendance on the first day, including travel and any overnight expenses. In our experience, the complexity and duration of inquests involving NHS bodies and other public authorities varies widely. Whilst some inquests are a single day, many last a number of weeks. There is a vast difference in the preparation required for the former compared with the latter.

The singular brief fee (£900 for Junior Counsel and £1,800 for Leading Counsel) adopts a 'one size fits all' approach, regardless of the complexity and duration of the inquest. A singular brief fee fails to take account of the significant variation in preparation required depending upon the complexity and duration of the inquest. Such a brief fee will operate as a significant deterrent to counsel accepting a brief on more complex and/or lengthy inquests.

We note that solicitor advocates, paid for preparation at an hourly rate, will not be penalised in the same way. Unlike counsel, their fees for preparation will be influenced by the duration and complexity of the individual inquest in question.

Irrespective of that issue, the level of the brief fee falls very far short of what is required to secure proper representation for bereaved families.

Given that the Bill's intention is to ensure parity of arms between the bereaved family member and the public authority interested party, it is important to compare the rates proposed in Annex A with those applicable to counsel instructed by the public authority. Fees for counsel instructed by an NHS Trusts are based upon the standard hourly rates adopted by NHS Resolution. For police forces, the same applies - the hourly rates for counsel adopted by CLEP (the Collaborative Law Enforcement Procurement Programme).

The proposed brief fees are very significantly lower than those adopted by such public authorities. For instance, for an inquest where a senior junior is instructed and which is listed for one week or more, we estimate the brief fee to be less than 15% of the market rate.

The same issue applies to the proposed refreshers. Refresher fees paid by public authorities significantly exceed the proposed amounts for both junior barristers and silks.

We consider that the fees proposed in Annex A simply will not meet the legislative intent. The fees are insufficient to enable proper representation of bereaved families under the provisions in section 18(1) of the Bill.

Given the significant variations in complexity and duration of the inquests that fall within the scope of that section, we contend that the proper approach would be for counsel's reasonable costs to be assessed by the Legal Aid Agency on a case-by-case basis. At the very least, a scheme should be designed which properly remunerates

pre-inquest work, and which includes brief fees which are graduated by reference to the complexity and/or duration of the inquest, and which remunerates advocates at markedly higher rates than those proposed.

Question 4: We propose that for non-advocacy work under amended schedule 4, we replicate the hourly rates in table 7(a) in part 2 of schedule 1 of the Remuneration Regulations for claims against public authorities. Do you agree?

No

4.1 Please give reasons for your choice:

See answer 3.1 above. Provision should be made for counsel's fees for pre-inquest work at appropriate rates.

Question 5: As inquest legal aid scope is expanded, we intend to closely monitor the impact of the proposed changes to our remuneration arrangements on market capacity for inquest legal aid. What indicators should be considered in order to do this?

We consider that data should be gathered from providers on the number of cases where they have instructed counsel, the number of cases where they have attempted to instruct counsel but not been able to do so, and in every inquest they are involved in, whether the public authority interested parties were represented by counsel or solicitors.

Question 6: When considering taking on inquest legal aid work, what factors (other than remuneration) might act as:

a) an incentive, or

b) a barrier to your firm?

For each factor, please explain why.

Not applicable.

Question 7: Would these proposals have an impact on equalities that we have not identified or given sufficient weight to in the Equalities Impact Assessment published alongside this consultation?

We have no further comment on this point.

Bar Council

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