



Bar Council response to the Ministry of Justice review of Legal Aid for Inquests

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice (MoJ) review of Legal Aid for Inquests¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB.)

Overview

4. The main author of the Bar Council's response is a specialist practitioner in inquests and co-author of a leading textbook on the subject. It is not the intention of the Bar Council to address every question. Some of the questions are very specific, relating to knowledge of individual cases. The Bar Council recommends that the MoJ engages with a victim/family organisation such as INQUEST to obtain more specific examples. INQUEST are putting in submissions and these will provide a body of knowledge in relation to some of the more individual areas. The Bar Council contribution addresses some of the more general questions.

¹ <https://consult.justice.gov.uk/digital-communications/review-of-legal-aid-for-inquests/> The Bar Council is grateful to the MoJ for the granting of a one week extension for this submission.

Question 1: Do we need to make any changes to the existing financial means assessment process to make it easier for applicants to complete? If so, please suggest prospective changes.

5. The process should be made easier for families. It is often said by members of bereaved families, 'why am I not entitled to funding, despite the fact I pay my taxes and did not cause or contribute to the death of my loved one, and yet I am helping to fund the police or other public body through the taxes I pay?'

6. Funding for article 2 inquests and state-related death cases should be non-means tested. This already happens in certain cases; for example public inquiries and some very high-profile inquests. A similar system is currently used for public disasters. The Hillsborough inquest and Grenfell Tower Public Inquiry are two recent examples. Existing financial means assessment process should be replaced by the introduction of automatic non-means tested funding for families to cover specialist legal representation.

7. Funding for representation for families should be at an equivalent level to state bodies and private bodies carrying out state functions.

8. There should be greater flexibility in the rules to allow for funding of more than one family legal representative where a real and insurmountable conflict exists.

9. The definition of conflict should be wider than a legal conflict in the strict sense. It is well known that death can be divisive between families. It is not uncommon for there to be genuine and real disputes over the deceased. Some of these disputes may be a hold-over situation from when the deceased was alive, for example, siblings not speaking to each other, conflicts about money, to those between parents and spouses. The range is wide and cannot be categorised here.

10. The simple point is the current system is unfair and unjust and leads to greater division between families and loved ones of the deceased. The current system where who first applies gets legal aid is not helpful, nor is the Legal Aid Agency (LAA) looking at something as unsophisticated as 'close blood relations'.

11. The grieving process can be made easier if the pain and resentment in the LAA application process is removed. It is one less thing for a grieving family to worry about. Particularly so when the inquest is often a time where the death of the deceased has absolutely nothing to do with the family, but was caused or happened in the hands of the state.

12. Further, funding should be extended to allow family participation not only when they give their evidence, but should also include financial support for families, to include interpreters where necessary, travel and subsistence, overnight accommodation, loss of wages.

13. The inquest is often the last and only chance for the family to have effective and meaningful participation in the investigation of the death of their loved one. The Coroner's court, unlike, say, a public inquiry, is the only forum in which they have a right to ask and put questions to witnesses. A reasonable and well-run hearing greatly helps with the grieving process.

Question 2: Do we need to make any changes to the current legal help process where a waiver is being sought? If so, please provide suggested changes.

14. Yes. The case for change has already been made out. The LAA could adopt the model used in public inquiries where families have non-means tested legal aid. See the answer to question 1 above.

Question 3: Are you aware of any cases where it would have helped to have had a lawyer assisting the bereaved family at the point a coroner is making a decision to trigger Article 2?

15. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 4: Are you aware of any cases where there have been difficulties in establishing whether Article 2 has been triggered? What sorts of cases are these?

16. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 5: If yes to question 4, what impact have these difficulties had on the bereaved family's experience of the proceedings and the legal aid application?

17. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 6: Are you aware of any cases where an applicant has applied for and not been awarded legal aid for legal representation for a case where Article 2 has been triggered? Please provide details.

18. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 7: In your experience, is Article 2 ever triggered in cases where the death has not occurred in state custody or state detention? If yes, please can you include details on these types of cases.

19. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 8: Where applications for legal help and/or legal representation are refused, does the LAA give clear reasons for this decision?

20. The gold standard is for the LAA to give clear transparent and cogent reasons for its decisions. Sometimes it achieves this. On other occasions, there can be confusion surrounding the refusal of legal help and/or legal representation, with practitioners finding that the LAA decision changes with each new letter trying to explain the last, making the situation a fluid and ever-changing one, which then becomes unclear why funding was refused initially.

21. Whenever reasons change from the initial reasons given for a refusal, the family loses confidence that the LAA is handling their case competently and this undermines the process and system of justice.

Question 9: Are there any ways in which the LAA can provide greater clarity regarding their decision-making?

22. This could be improved by better training for LAA caseworkers on the law. It could also be improved with better oversight by senior lawyers, particularly on complicated cases.

Question 10: In your experience, have there been inquests where Article 2 is not engaged that have met the criteria considered by the Director? Please provide details.

23. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 11: Is the current definition of 'wider public interest' in the context of the granting of legal aid for inquests easy to understand? If not, please suggest areas for improvement.

24. This definition needs to be clearer and more transparent.

25. By establishing the facts surrounding state-related deaths, the inquests process can save lives by identifying mistakes and make recommendations to prevent future deaths.

26. Funding can also be granted on public interest grounds, but in reality, legal aid is rarely granted on this basis.

27. The current definition of 'wider public interest' should be broadened to include an inquest uncovering systemic failures and moving towards prevention.

Question 12: Are you aware of any inquests that have been awarded legal aid through the ECF scheme under the 'wider public interest' determination? If so, please can you provide details of these cases.

28. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 13: Do you think that families are still able to understand and engage with the proceedings in cases where they are not legally represented at the inquest? Please provide reasoning for your response.

29. The experience of barristers is that there have been many cases where the family looked confused and bewildered when they have appeared without representation. This being despite the best efforts of the coroner to explain the process to them.

30. The lead author of this response has personally been involved in inquests where he has represented one side of the family and the other side of the family have approached him after the hearing and asked, 'what happened and what did the coroner mean?'. This is not surprising given the complexity of legal argument on process and substantive law in these hearings.

31. Even when clients are represented, often points have to be repeated several times to ensure clients understand. It should be remembered that these cases affect families at a time when they are often at their most vulnerable, having lost a close loved one.

Question 14: In your experience, how could we ensure that available legal aid funds provide the most value to bereaved families going through the inquest system?

32. The Bar Council would suggest that criteria could be devised in consultation with family groups/bodies/lawyers as to prioritising the types of deaths that would qualify for non-means tested funding.

33. For example – mass public disasters; police shootings; police pursuit deaths; deaths of vulnerable adults in state-controlled institutions or shortly following their release; a death which is likely to have a large impact on a section of the population.

34. There should also be discretion within the system to allow for genuinely deserving cases which fall outside the criteria.

35. This is not an exhaustive list, but these are a few examples of the work that could go into devising such a criteria.

Question 15: In your opinion, do inquests where the state has legal representation meet the criteria used to determine the need for a financial means test?

36. Generally speaking, the answer is yes. It is a reasonably good litmus test that if funding is provided by state agents for its own representation then the case is usually sufficient serious for similar funding to be provided for the bereaved families.

Question 16: In your experience, at inquests where both the state agents and the family have legal representation, does the family receive the required level of support and representation from their legal representative to enable them to understand and properly participate in the proceedings? Please give examples where possible.

37. The answer to this question should be yes, but in reality, the answer is often no.

38. Two quotes are illustrative of this. Firstly, by a Hillsborough Family member:

“I think the second inquest was wholly different from the initial one because the odds were stacked against us at the first inquest. The police officers had a whole team of solicitors, whereas we only had one.” Paul Joynes, brother of Nicholas Joynes p.39

(Source: The patronising disposition of unaccountable power’ A report to ensure the pain and suffering of the Hillsborough families is not repeated by Reverend James Jones KBE dated 1 November 2017

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655892/6_3860_HO_Hillsborough_Report_2017_FINAL_WEB_updated.pdf)

39. Secondly, by INQUEST:

“It is common for state bodies to be represented by QCs and junior barristers. Frequently there will be multiple legal teams for the range of state bodies,

private companies and individuals employed by these organisations. For example, almost all police deaths now routinely involve QC level representation.

Yet for the families, Legal aid for QC and a junior barrister is often refused, even in more complex and contentious cases.

The LAA guidance specifically states that the fact that the state party is represented by a QC is not sufficient reason to grant the family funding for a QC. The family barrister has to work within a highly restrictive framework (for example very low ceilings for fees, limited amounts of time allowed for complex work, pre-inquest review hearings not always separately funded) and is usually the only advocate pushing for a thorough exploration at the inquest as against a team of other advocates seeking to restrict the scope of the inquiry. A system where all participants are funded on a roughly equal basis is the only way to address this fundamental imbalance."

(Source: INQUEST (2017a) INQUEST submission to the Review of the Hillsborough Families' Experiences by the Rt. Rev Bishop James Jones. <https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=02aadb9f-0b93-46d7-a612-039327086cd5>)

Question 17: For cases where the bereaved family has legal representation, do you feel their lawyer(s) are effective in representing the family's interest? Please give examples where possible.

40. Yes. Barristers work fearlessly and tirelessly for their clients when representing them at inquests, and there are many examples where a barrister's presence has made a big difference to the outcome of the case, than if the client had been unrepresented. Examples in inquests include lawyers for the family successfully:

- being instrumental in ensuring that the legal process is properly understood by their clients;
- arguing and securing juries where this is in the court's discretion;
- securing a broader scope of investigation under article 2 when often the state agencies wish this to be narrowed;
- persuading the court to have site visits;
- calling for a broader scope of the disclosure;
- assisting in the formulation of questions for the narrative or other conclusions;
- assisting the court with themes to be explored at the inquest which are of concern to the family;
- knowing their clients' instructions, stories, feelings, and their concerns better than any other advocate and therefore being able to allow the family to effectively participate in the inquest process.

41. The bereaved family know that it is their lawyers who are best able to ensure all the questions they need answering get asked, having built up a relationship with them prior to the hearing. Further, they know that it is their lawyers who will know what vital follow up questions need to be asked of a particular witness. And they know that the Coroner or counsel to the inquest can never hope to emulate the intimate knowledge and familiarity with their stories that their lawyers possess.

Question 18: In your experience, what impact does the number of lawyers representing the state have on the experience of the bereaved family?

42. The bereaved family will often experience the following feelings which impact on them: complete disappointment, confusion, distress, frustration, upset and anger. Sometimes this is due to the inquest process and not because anything improper has been done. On other occasions external factors can make the situation worse for the family, such as:

- insensitivity of the advocates of other interested persons representing the state;
- a feeling that the deceased is being attacked at the inquest hearing with no opportunity to defend him/herself;
- a feeling that there is a lack of equality of arms, with several lawyers representing the interests of the state, all saying the same thing, whereas the deceased's family may only have one advocate arguing his/her interests;
- a failure to understand why multiple advocates are being allowed to ask the same or similar questions;
- a lack of understanding of the concerns of the family;
- a sense that the proceedings are merely an excuse to exonerate the conduct of the authorities or state agents.

Question 19: In cases where there are multiple lawyers representing the state, would the family benefit from receiving information about the role each one plays, and the type of legal position they are assuming? Please give examples where possible

43. Yes, it is clearly desirable and should be adopted as a matter of standard practice. It assists in helping the family understand the process and allowing them to effectively participate.

Question 20: Can you provide any examples of cases where a lawyer has adopted an inappropriate advocacy style or approach? If so, was the lawyer representing the state or the bereaved family?

44. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 21: Do you consider that the MoJ Guide meets the needs of bereaved people? If not, what do you suggest?

45. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 22: Have you found any other information useful? If so, please can you give details.

46. The MoJ should refer to the submissions of specialist bodies such as INQUEST for examples.

Question 23: What else do you think could be done to support bereaved families better throughout the inquest process?

47. There should be a simplified and easier process for assessing and deciding legal aid applications for inquests.

Question 24: Is there anything else you would like us to consider?

48. No

**Bar Council
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