



Bar Council response to the Independent Public Advocate consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper on The Independent Advocate.¹
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.)

Chapter 1: The need for an Independent Public Advocate

1. On 10 September 2018, the Ministry of Justice launched a Consultation on the introduction of an “Independent Public Advocate” (“IPA”). It is suggested that the IPA will assist bereaved families to “enable them to fully understand and engage in the investigation following a disaster”.
2. The Bar Council supports the need for the bereaved and survivors to receive proper support in order to be able to fully participate in any subsequent investigations and inquest/inquiry proceedings. However, we believe that as currently drafted, the proposal does not provide the support that is needed; indeed

¹ Ministry of Justice, “Establishing an Independent Advocate” (2018)

it raises a number of questions which require further consideration.

3. Most importantly, the IPA proposal does not solve the key problem facing the bereaved and survivors during investigations, inquests and inquiries: a lack of funding for independent legal representation. In order to participate fully in the processes which follow a disaster, survivors and the bereaved need access to independent legal services. The support provided should not be limited to "facilitation" or "liaison," but should include advice and advocacy by a solicitor and/or barrister who is able to act in the best interests of their client and who is fully bound by the regulatory framework. This does not describe the IPA, as set out in the Consultation.

4. However, if the government intends to adopt the proposal, there are a number of suggestions which should be considered to ensure the IPA is able to operate effectively. These suggestions include the following:

4.1. The title should be reconsidered to better reflect the position, for example, the "Independent Public Adviser";

4.2. The IPA should be available as of right by statute in cases where there have been multiple fatalities, and at the discretion of the Secretary of State in other cases;

4.3. The IPA should be available to support both the bereaved and survivors;

4.4. The office of the IPA should not consist of a single person, but should be a list of trained and legally qualified individuals, to be available when relevant incidents occur.

Chapter 2: When the support of the IPA will be available

5. The Impact Assessment and Consultation state the following as to the circumstances in which the IPA should be available:

"We propose that the IPA's role would be limited to involvement in events where there are multiple fatalities. We do not envisage, however, that the IPA would become engaged in every event where there is a significant loss of life. Instead, we see their involvement coming where the bereaved have a need for an IPA and there is significant public interest in the potential causes or implications of the event." (Impact Assessment at paragraph 17)

"... we propose that the Independent Public Advocate will only become involved in a limited set of circumstances where ensuring the effective engagement of the families is

felt likely to be a particular challenge.” (Consultation at paragraph 23)

6. The Consultation suggests that whether an IPA becomes involved is determined by considering the number of fatalities/victims and the number of agencies involved in the post-disaster response. Whether an IPA is made available will depend in each case upon the discretion of the Secretary of State.

7. In order to make such a decision, the Secretary of State must have in place a clear set of parameters to ensure consistency and accountability, because if the Secretary of State decides not to provide an IPA, that decision may be subject to review. In addition, the bereaved need clarity as to when assistance will be provided. Lack of clarity may cause delay, which is particularly impactful when one of the merits of the proposal is early liaison by the IPA.

8. The following factors are suggested in the Consultation as being relevant to the decision of the Secretary of State:

8.1. The number of people bereaved or injured as a result of a disaster, including instances of fatal illnesses it may have caused;

8.2. The number, range and type of other agencies or people who have a role or interest in the subsequent inquiry, and the complexity that results;

8.3. The interests of the wider public in understanding the causes of the disaster, such as where there are risks that the disaster could be repeated elsewhere in similar circumstances; and

8.4. Whether the public reaction in the immediate aftermath of a disaster, including the reaction of the bereaved and others involved in the disaster, suggests that the support of the Independent Public Advocate is needed.

9. There are several difficulties which arise from this list. First, as it is envisaged that the IPA will play a role in the immediate aftermath of a disaster, the decision whether to make an IPA available must be made very quickly. This will often mean that a decision must be made before it is known, for example, what the public reaction to the incident will be, or whether there is a risk that it will be repeated elsewhere.

10. Second, some of the factors on the list are very difficult to quantify. For example, the complexity of the response to a disaster is very difficult to predict at the outset and may not be obvious to the Secretary of State at the time when the decision is made.

11. Third, introducing a requirement for the Secretary of State to make a decision about the provision of an IPA during a time of emergency while also coordinating the disaster response seems an unnecessary additional burden. It is not a time at which a reasoned and informed decision can easily be made.

12. It would be simpler and more efficient to make the IPA available as of right to the bereaved following incidents in which there have been a certain number of fatalities or serious injuries. A decision could be made at the discretion of the Secretary of State as to the provision of the IPA in cases where that threshold is not met, but where there are other reasons why the IPA should become involved, taking into account the factors listed above.

13. Respondents have been asked to consider whether the IPA should be made available only in cases where there have been fatalities. It is suggested that this would be too restrictive, as there may be incidents where there has been no loss of life, but where many people suffer serious injuries with long-lasting effects. In such circumstances, an IPA could play a useful role for survivors as well as for the bereaved. The Consultation gives the example of a chemical explosion (at paragraph 31).

Chapter 3: Who the IPA should support

14. The Consultation suggests that the services of the IPA should be limited to the families of the deceased. It states:

"There is an argument to be made that the families of those who died should be the Independent Public Advocate's primary concern and focus; the dead cannot speak for themselves and we should ensure that those who feel their loss most deeply have someone who can help them understand what happened." (at paragraph 45)

15. The support of the IPA should not be made available only to the families of those who are deceased, as there are other relevant persons to whom the same rationale applies. For example, those who survived the event but were injured may be unable to participate, or may be able to participate only in a limited capacity as a result of their injury. Similarly, uninjured survivors may be unable to engage or to navigate the investigative processes due to the trauma which they suffered.

16. At present, the interests of survivors are often less well represented than those of the bereaved. For example, it is rare for survivors' groups to be made interested persons at an inquest. Applications by survivors' groups were refused in the 7/7 inquests and in the Lakanal House Fire inquests. The introduction of the IPA is an opportunity to extend much needed support to survivors.

17. In each of these cases, persons affected by the event are unable to speak for themselves and require assistance. There is no reason why government-funded support should be made available to the family of the deceased, but not to a survivor whose injuries preclude participation.

18. A very difficult question for consideration is whether survivors in an Inquiry such as IICSA (the Independent Inquiry into Child Sexual Abuse) should have access to an IPA. Survivors of sexual abuse may experience trauma in the same way as survivors of a disaster. Their experiences may be linked in the same way as victims who the Consultation suggests should have access to an IPA, such as deaths arising from mismanagement or lack of oversight in a particular NHS Trust. The use of an IPA may assist survivors to understand the inquiry process and may help deceased victims to have their voices heard.

19. However, taking such an approach would broaden the scope of the IPA's role significantly. It would be difficult to differentiate between the provision of IPA support to survivors of abuse during a public inquiry and the provision of support to complainants in a criminal trial.

20. The Consultation also suggests that it should be left to the IPA themselves to determine whether to extend support where there is a dispute. This proposal may be challenging to administer in practice, especially where there are differing interests within families. Instead, there should be clear statutory guidelines setting out who is entitled to receive assistance from the IPA. This should include the next of kin of the deceased, the immediate family of the deceased and survivors of the event.

21. Where there is a dispute or a lack of clarity, then in the context of an inquiry or inquest, the provision of support by the IPA could be linked to the issue of Core Participant or Interested Party status and subject to the same test, at the discretion of the Chair or Coroner.

Chapter 4: What support the IPA should provide and how the IPA should operate

Chapter 5: How the IPA should operate

22. It is not intended that the Independent Public Advocate should undertake legal services on behalf of bereaved persons. The Impact Assessment states:

"We do not envisage that the IPA would provide legal advice or representation, it would not be an 'advocate' in that sense nor secure health or, welfare services for bereaved people. The IPA might, however, advise bereaved families on the implications of engaging lawyers or on where to seek health or welfare support. Bereaved families would remain free to engage legal or other forms of advocacy where the processes allow

for it.”

23. The first point arising from this qualification relates to the title of the role. As the Consultation acknowledges (at paragraph 18), “*there is some potential for confusion over use of the word “advocate”, because the IPA will not be able to undertake legal advocacy on behalf of the bereaved*”.

24. Although the Consultation suggests that this is unlikely to be a problem because the IPA “*will certainly be an advocate for families and we are confident that the role will become clearly understood in the public mind once it has been established*”, this view is not shared by those responding.

25. There has been extensive media coverage of the challenges facing core participants in public inquiries who are unable to obtain legal aid to fund independent representation. Given this context, it is likely that those who are introduced to an “Independent Public Advocate” following a disaster will find it difficult to understand that the IPA is not in fact able to advocate on their behalf in legal proceedings and that the role has not been created in response to demands for the provision of funding for legal representation for victims.

26. The name of the role is inherently misleading. It will fall to the IPA to explain to grieving families in the aftermath of disaster that, despite the title, they are only able to act as an intermediary between the victims and the responding statutory agencies, “*ensuring families are well informed and engaged...*” (paragraph 16). The disjunct between the title and the responsibilities of the IPA may diminish trust in the individual and in the role. A better title may be the “Independent Public Adviser”.

27. It is not clear from the Consultation whether the Independent Public Advocate must always be a legally qualified person. Legal qualifications would be of benefit when navigating the investigative process and considering the appropriateness of investigative findings or the need for a public inquiry.

28. There are other professions which may bring useful expertise to the role, such as social workers. However, the IPA is likely to be giving legal or quasi-legal advice, for example, advice about what is likely to happen in legal proceedings, advice about the rights of participants to access documents, advice about whether to challenge a finding and advice about disclosure obligations. This is a function which persons who are not legally qualified would find difficult, so it is suggested that the IPA should always be a person with legal qualifications.

29. It will need to be clarified whether selection would be by appointment or application and whether the role would be restricted to those with experience in

public inquiries and inquests. It should be made clear whether the role will be a full time permanent post, a shared appointment or whether an IPA will be briefed to act in relation to a particular event or disaster.

30. It is likely that there will be numerous disasters, investigations, inquests and inquiries overlapping in time. For example, at the time of writing, the London Bridge attacks inquest, the Westminster attacks inquest, the Grenfell inquiry, the Birmingham pub bombings inquest and criminal proceedings subsequent to the Hillsborough Inquiry are ongoing (*inter alia*). No single individual would be able to manage the concurrent competing demands of so many inquests and inquiries.

31. Instead, there should be a panel of trained persons who have been cleared to undertake work as an IPA. When a disaster occurs, one person from the roster should be assigned to that incident. They can then provide ongoing support through the investigation and inquest, with the assistance of IPA administrative staff.

32. The second point arising from this qualification is that, if the IPA is a legally qualified person, it will be necessary to delineate the role of the IPA very clearly, in order to ensure that the boundaries between “advocacy” – in terms of liaison and reporting, as envisaged by the Consultation – are distinct from the provision of legal services. It is easy to imagine situations where the boundaries will be blurred and which may trigger the application of that legal professional’s code of conduct; in the case of barristers, the Bar Standards Board Handbook. As noted above, the IPA will very likely be required to provide legal or quasi-legal advice to those whom they are supporting.

33. Given that the proposed threshold for an IPA to become involved in the response to a disaster is that there has been multiple fatalities, the IPA will always be assisting a large number of victims. In a case such as Hillsborough, they may be responsible for liaising with hundreds of bereaved persons. These individuals may have distinct interests and views on the appropriate response to an investigation or inquest. There must be clear guidelines in place to inform the actions of the IPA where their instructions conflict.

34. This problem is recognised in the Consultation (at paragraph 17), which states, “*We do not see the Independent Public Advocate’s function of supporting a potentially diverse group of people whose views may differ, perhaps strongly, as compatible with performing the duties of a legal advocate*”. What is not recognised in the consultation is that this difficulty is not limited to legal advocacy.

35. For example, a situation may arise where some bereaved family members are dissatisfied with the conclusion of an investigation, while others believe that the outcome was appropriate. Some may ask the IPA to advocate that a public inquiry be

established, while others do not wish to pursue that course of action. What should the IPA do in such a situation? A number of questions arise:

35.1. Where the IPA receives conflicting instructions, whose view should be preferred?

35.2. Should the IPA always act on the instructions of the bereaved?

35.3. Should the IPA exercise their independent judgment and form a view as to the appropriate course of action?

35.4. Should there be multiple IPAs for any one disaster?

36. Should the IPA be a barrister, there is real ambiguity as to whether the bereaved should be considered clients of the IPA as defined by the Bar Standards Board Handbook. If they are deemed to be clients, then the IPA has an obligation to exercise their independent judgement and to act in the best interests of those clients. Furthermore, the IPA would have very clear regulatory obligations when a conflict arises, which may include ceasing to act on behalf of some or all of the parties whom they are assisting.

37. In order to circumvent this particular difficulty, it should be set out in legislation that the IPA is not acting in their capacity as a barrister or providing legal services for survivors and the bereaved. Their activities should be ring-fenced to fall outside the scope of the Bar Standards Board Handbook in relation to conflicts. Instead, the IPA should be instructed in a manner where distinct regulatory obligations apply.

38. It is suggested that the IPA will assist the bereaved during an inquiry into the incident. The Consultation states (at paragraph 55):

“Communication between the bereaved and the inquiry team should not be mediated by the Independent Public Advocate but rather enhanced and facilitated by the support the Independent Public Advocate will provide.”

39. The difference between “mediating” and “facilitating” communication between the bereaved and the inquiry team is unclear. In practical terms, it would be difficult for the IPA to act as a conduit for the bereaved up to a certain point, but no further. For example, would the IPA cease to act for the bereaved where the disclosure of evidence sought by the families has been refused, or would they continue to negotiate for the material to be disclosed under the heading of “ensuring that the views of the bereaved are fully understood” (paragraph 60)? Would the latter fall into

the category of “mediating” or merely “facilitating”? The Consultation is unclear.

40. It is suggested that the IPA should assist the bereaved to navigate the inquiry process by advising them and providing them with information, but should not engage in any legal advocacy on their behalf. They should be able to provide them with advice about their rights, but should not make arguments on their behalf or contest legal points. Such work would fall firmly into the category of regulated legal services and should be provided by an independent legal representative. The Consultation suggests that the IPA could draft questions for the inquiry on behalf of the bereaved, but such conduct would cross the line into legal advocacy. The work of the IPA should be restricted to advising the bereaved, rather than acting on their behalf in communications with other parties. This would fit with the title proposed above, of “Independent Public Adviser”.

41. However, this approach would not be compatible with the IPA campaigning for the creation of a public inquiry where one is desired by the bereaved. Instead, we believe this would properly be a task for the legal representatives of the bereaved. As noted above, an IPA may be torn between families with different views about whether an inquiry is needed. An IPA may lose the trust of some of the bereaved if they choose to side with others on a decision of this kind. An IPA that is a barrister may also find themselves engaging in legal advocacy and risk being in breach of the regulatory rules, including that which governs conflicts.

42. In such a situation, the IPA’s role should be to advise the bereaved of the options available to them, including the possibility of resisting the findings of an inquest and campaigning for an inquiry. They may of course direct them to legal support services. It would then be for those of the bereaved who seek an inquiry or for their legal representatives to advocate for further action by the government.

43. It will be important to ensure that each IPA is provided with appropriate training, not only in relation to the investigative processes, but also in relation to the handling of bereaved persons and victims of trauma.

44. It is suggested in the Consultation (at paragraph 70) that the IPA should report to the government on lessons learned or the conduct of future inquiries. The IPA should not be required to report and should not report in a way which discloses sensitive information about the experiences of the bereaved. This would risk damaging the relationship of trust between the bereaved and the IPA, who should maintain the appearance of independence and not appear beholden to the government, even if only by way of reporting requirements.

Bar Council
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*For further information please contact
Natalie Darby, Head of Policy, Regulatory Issues and Law Reform
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7611 1311
Email: NDarby@BarCouncil.org.uk*

² Prepared by the Law Reform Committee for the Bar Council.