

**INQUEST submission to the Justice Select Committee  
inquiry on *The Future of Legal Aid***

***November 2020***

1. INQUEST is the only charity providing expertise on state related deaths and their investigation. INQUEST provides expertise to bereaved people, lawyers, advice and support agencies, the media and parliamentarians. Our specialist casework includes deaths in prison and police custody, immigration detention, mental health settings and deaths involving multi-agency failings or where wider issues of state and corporate accountability are in question. INQUEST's Executive Director, Deborah Coles, sits on the cross-government Ministerial Board on Deaths in Custody and is a member of the Independent Advisory Panel on Deaths in Custody.
2. We welcome this inquiry on the future of legal aid and focus our submission on the situation regarding legal aid for inquests. For decades, INQUEST, and the families and lawyers we work with, have called for:
  - Automatic non means tested legal aid funding to families for specialist legal representation immediately following a state related death to cover preparation and representation at the inquest and other legal processes.
  - Funding equivalent to that enjoyed by state bodies/public authorities and corporate bodies represented.
3. With regard to the Committee's terms of reference, we focus on the challenges for legal aid and reforms needed to address these, the role of the Legal Aid Agency, and the impact of COVID-19 on the situation regarding legal aid for inquests. Our recent submission to this Committee's inquiry on the Coroner's Service is directly relevant to this inquiry. We refer also to the INQUEST and INQUEST Lawyers' Group submissions to the Ministry of Justice call for evidence for its 2018 Review of Legal Aid for Inquests which provide further detail on the points made below.<sup>1</sup>

## **Challenges for Legal Aid**

4. The role of an inquest is to ascertain who the deceased was, and how, when and where the deceased came by his or her death.<sup>2</sup> INQUEST is concerned with inquests into state related deaths. These are deaths that have occurred during or following contact with state agents (or state funded private providers) where Article 2 is or *may* be engaged.<sup>3</sup>

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<sup>1</sup> See INQUEST's briefing *Now or never! Legal Aid for Inquests*, <https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=a1ec7dcc-9ed6-405c-8af6-2639438e8d00> and INQUEST Lawyers Group response to the Ministry of Justice Review of Legal Aid for Inquests, <https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=c07bc721-0e43-418c-98ea-9a3f446e2ab9>

<sup>2</sup> S.5 CJA 2009.

<sup>3</sup> There are cases where Article 2 automatically applies including: the unnatural, self-inflicted or violent death of anyone detained or *de facto* detained in police, prison, immigration detention or mental health in-patient settings; deaths following use of force by the state (or agents of the state); self-inflicted deaths of military personnel. INQUEST also includes in its definition of state related

The Article 2 (right to life) procedural duty requires an effective investigation into a death where the State may be in some way responsible; an effective investigation requires the involvement of the deceased's family.

5. The inquest process is the principal way for a bereaved family to find out about what happened to their relative. It is the mechanism they have been given by the State. Inquests can and should be a forum from which deficiencies in organisations and institutions can be uncovered and any harmful practices can be exposed to enable learning from which crucial beneficial changes can flow. This is in both the family and public interest.
6. Properly conducted inquests, in which families have been legally represented, can help ensure scrutiny and examine and address the systems and practices that are meant to ensure safety and prevent deaths. Currently, state bodies receive automatic legal representation at inquests, at taxpayers' expense, without any merits or means test. Families do not: there is no equivalent right to automatic non means tested funded representation for families. This causes a fundamental inequality of arms: families are forced to take part in a process that they have not chosen to initiate, which will take place whether they are able to participate effectively or not, and which affects them more profoundly than any other participant. It cannot be right that effectively, a bereaved family whose loved one has died in the care of the state or after the state has used force, and it is left to them to pay to find out what happened.

*"It is horrendous and unfair that the process cost us over £30,000. The Trust had a very expensive barrister paid for by our taxes."* Anonymous family member

*"I have had to spend £15,000 in legal fees to my solicitor and barrister so far and I am yet to have had the final hearing. My solicitor expects the final bill to be near £30,000 - I have had to use my sister's pension money to pay for it."* Anonymous family member

*"No legal aid was available to our family to fund the work done by our legal team preparing for the inquest. We self-funded and were reduced to 'crowd funding' in order to raise money to help us with legal fees. However we were able to apply for special funding for article 2 inquest which we received, but not before filling out the most personal and intrusive questionnaire forms. It does not make sense that when a family is challenging a state body such as the Met Police that the family should have to fund themselves whilst the police have their costs covered by the taxpayer, which essentially means families are paying for the police and other state bodies to oppose them in court."* Ann Power

*"Legal Aid was not available, and me and my family cannot afford to pay for representation. I had to do the majority of work and had some free advice and assistance from legal professionals. I did the advocacy for the pre-inquest hearing and we had a barrister volunteer to cover the inquest for us. I was lucky enough to be able to access this*

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deaths those of people in state care and detention settings in circumstances in which Article 2 may apply, including, for example: the self-inflicted death of a child placed by CAMHS in a privately-run mental health hospital; a detained patient who dies following discharge in circumstances where inadequate support and community-based arrangements have been put into place; the so called 'natural cause' death of a prisoner who fails to receive necessary medical care; the unnatural death of a person with a learning disability who dies in a care setting; cases involving complex or systemic medical concerns.

*because I work in law. This is an incredibly lucky and privileged position to be in, but even this was one of the most stressful times of my life.” Alice Gambell*

*“The lack of funding meant I had to cross examine the pathologist myself on my dead daughter’s body - something no parent should ever have to do.” Liz de Oliveira*

*“No legal aid - had to crowd fund this was an added stress. Not only is it difficult to be asking complete strangers for money but in order to do we had to disclose information about our daughter that we would have liked to keep private.” Anonymous family member*

*“We want to understand how M died and if it could have been avoided. We have many concerns and cannot match the other agencies, in any way, without legal representation. Yet we can only do so if we pay for it ourselves. This is not fair. We have one pupil barrister in court, with five barristers and a number of other solicitors present, all aiming to shift blame from their clients. We just want to get to the truth and help others in M’s position.” Anonymous family member*

7. Where bereaved families would not normally be eligible for public funding as a result of their income or capital they need to apply for a Legal Help waiver (which funds solicitors’ work in preparing for the inquest)<sup>4</sup> and all families need to make an Exceptional Case Funding application (to cover the costs associated with representation at any hearings) to the Legal Aid Agency for support. According to statute and guidance,<sup>5</sup> exceptional funding should be granted where Article 2 is arguably engaged, and can also be granted where advocacy is necessary because of the wider public interest of the issues arising at the inquest.
8. To have any chance of legal aid funding, a bereaved family must jump through multiple hoops, answering extensive personal questions. It is a protracted, intrusive and distressing process at an already intensely painful time. For Exceptional Case Funding applications families are required to provide information from the past three months for all their bank accounts (even ones which may just have a couple of pence in and are in essence dormant). This can also include accounts for which they may be signatories for example for children or elderly parents. They are asked to provide information about any transactions they have made over £2,500 in the past 12 months, the value of their car, and whether they have any valuable items such as jewellery. Those with unconventional incomes have difficulties in terms of the proof they must provide. The form is not built to deal with those people who are in all but name ‘employed’ but are classified as self-employed. There can often be significant back and forth with the Legal Aid Agency before sufficient acceptable proof of means is provided. For some reason this is done at the same time as the merits assessment and therefore a family could have spent many months providing numerous additional documents to satisfy the means information requirements before they are told they do not qualify for Exceptional Case Funding on the basis of the merits test in any event.
9. While some bereaved families do manage to get access to legal aid, many do not or face paying large sums towards legal costs. The denial of legal aid has left many in desperate

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<sup>4</sup> Families apply for this if their income or capital exceeds the usual funding thresholds. If they are below the means thresholds then their solicitor can ‘grant’ to them.

<sup>5</sup> LASPO 2012; Lord Chancellor’s Exceptional Funding Guidance (Inquests).

financial situations. When legal aid is denied, bereaved families are forced to represent themselves in complex legal hearings. Some resort to crowdfunding to cover their lawyers' fees. Some families disengage from the inquest itself or resign to attending without legal representation because the process to secure funding is so intrusive and places such a burden on them.

10. Alongside automatic non means tested legal aid funding for families following state related deaths, funding should also be granted in cases involving wider state and corporate accountability and multiple deaths such as Hillsborough, Grenfell and terrorist attacks. The little used 'public interest' category of funding needs to be expanded and clarified to broaden the scope to cover important cases raising issues of wider public concern and benefit. The extremely limited number of grants on public interest grounds demonstrates that the current test, and the way in which it is applied by the Legal Aid Agency, is not currently fit for purpose.
11. We elaborate further on some of the practical hurdles and problems which pose significant challenges to bereaved families and their legal representatives.
12. **Delays that hinder important and urgent action:** As soon as a death occurs, complex legal processes are triggered, involving multiple 'interested persons' and agencies. Families often need expert advice on areas such as access to and release of the body, post mortems, communication with investigation teams, securing of evidence and criminal investigations. All of the work that families have to do to gather documents about their means come at a time when they have been recently bereaved.
13. **Deciding whether Article 2 is engaged:** Quite frequently, the Legal Aid Agency will refuse a Legal Help waiver or an Exceptional Case Funding application until there has been a positive ruling on the engagement of Article 2 by the coroner. This causes unnecessary delay, and even when Article 2 has been found to be engaged by the coroner, funding will not necessarily be granted to the family if the Legal Aid Agency is not satisfied that the 'operational duty' has been breached. We have seen cases in which a coroner has determined that Article 2 is engaged but the LAA has disagreed and refused funding, and vice versa. Families without legal representation may be forced to argue the Article 2 relevance of the case themselves, against other lawyers who seek to reduce the scope of the inquest.

*"If you are rich you don't have to wait for article 2 before applying for legal Aid. If you apply yourself without legal representation, unless you have an IQ for legal language, it is near impossible to get the application right in which case you will be denied LAA assistance. Not having legal representation gives you a distinct disadvantage."* Anonymous family member

*"At the actual hearing I had to secure and fund a barrister to argue for Article 2, at a time when you are in a complete state of shock and emotionally drained, having to worry about finding money to pay for professional services is a huge burden and added to the emotional drain."* Lee Fryatt

14. **Appealing a decision:** The appeal process available to bereaved families who are refused the Legal Help waiver is unclear.

15. **Ensuring sufficient funds:** Lawyers have to provide a schedule of costs but inquests can run over expected time, throw up issues (often due to late disclosure) that require urgent work beyond that factored in the schedule. This further cements inequality into the process, as it requires bereaved families' lawyers to worry about their costs being covered or relies on their willingness to work, neither of which are concerns for tax payer funded representatives.

*"We did eventually get some legal aid but it didn't cover our expenses."* Andrew McCulloch

*"I managed to obtain legal aid, through my legal team, for their attendance at the inquest only. Not for their preparation time etc. This was raised by crowd funding, and publicising the situation. This meant many media interviews to raise awareness and fundraising- this all took its toll on me and my family."* Rachel Hammerton

16. **Representation for complex and contentious cases:** We are aware of complex and contentious inquests where lawyers have been told that a QC is not required to represent a bereaved family. This is often despite other state interested parties being represented by a QC.

17. **Multiple legal teams for state/private bodies:** The inequality of arms between bereaved families and the state can be seen most clearly in the presence of multiple lawyers representing state bodies, individuals and private providers. For families who have secured legal aid for their representation, this will be one representative (very exceptionally a QC and junior counsel). Multiple teams for state bodies are able to split work between them, and will often support each other's legal argument particularly around scope, witnesses and inquest outcomes despite such legal arguments often having no relevance to their client. A single lawyer acting for the bereaved family, often under significant time pressure, has to cover more ground as they ask most of the questions at the inquest, while other interested parties only ask questions when there is a need to defend their client. For example, at the inquest into the death of Kevin Clarke, there were six other represented parties yet the family were initially refused funding for an experienced QC. The four week inquest concluded that his death was contributed to by restraint and highlighted a series of serious failures by the police, NHS trust and assisted housing provider<sup>1</sup>. Had Kevin's family not had specialist legal representation, such systemic failures might not have come to light. Legal representatives instructed by the State in the cases we see rarely adopt a neutral position, attending just to assist the coroner, they will actively try to ensure there is no criticism of their client and may resist prevention of future death reports despite the obvious public benefit this can bring.

18. Inquests where families are represented have resulted in important changes to policy and practice in the treatment and care of vulnerable people. Funding for families therefore has a wider public benefit, far beyond individual rights and interests. Without specialist legal representation for families, the issues uncovered at many inquests would have remained unchallenged and hidden from public view.

19. To find that those representing the state are funded from the public purse and do not face the same financial scrutiny and obstacles serves only to generate further suspicion and break down of trust in the justice system. As indicated above, the current system does not guarantee that legal aid is granted in all cases where it is needed.
20. This inequality of arms is profound. INQUEST uncovered figures to suggest that in 2017, the Ministry of Justice signed off a budget for the Prison and Probation Service to spend 46 times more on their own legal representation than is granted via the Legal Aid Agency to bereaved families for prison inquests.<sup>6</sup>
21. Such disparity of funding is not unique to inquests into deaths in prison, but is an injustice that persists in the coronial system, whether a death happens in police custody or in a mental health setting. Figures exposed by Julie's Mental Health Foundation, for example, showed that half of NHS mental health trusts in England spent over £4m representing themselves at inquests in 2017/18, 34 times the total amount granted for families representation (£118k).<sup>7</sup>
22. There is also a question about the sustainability of this sector. Hourly rates and Counsel's brief fees have stayed the same since LASPO came into force. The government is essentially relying on the good will of those lawyers who do this sort of work, but unless their firms remain financially viable this will become impossible in the future. Furthermore, the need to attract good junior barristers to this work must be considered.

## What reforms are needed

*"The power imbalance between bereaved families and the state is the most significant injustice of the coronial process. Yet the Ministry of Justice have disregarded the evidence and ignored the voices of bereaved families. INQUEST and the families we work with refuse to be silenced. We call on the government to act now and urgently introduce fair public funding for legal representation at inquests, to end this unequal playing field."* Deborah Coles, Executive Director, INQUEST<sup>1</sup>

*"I will say it again, and again, and again, until it is well known: the purpose of Legal Aid funding for inquests is to give the coroner the best possible opportunity to prevent future deaths, by hearing submissions from the family's barrister. There is no way that a family member can fill the professional role of a barrister. The family's barrister is there in court solely to assist the coroner to identify the legal issues in play in the inquest, all for the ultimate purpose of preventing future deaths. This simply cannot be achieved without Legal Aid. Does anyone now think Legal Aid for inquests is unimportant? Who is going to assist the coroner in his/her work if the family don't have a barrister?"* Deborah Lockett

*"If we hadn't had legal aid, we would have just had to sit back and accept that R was gone and we'd never know why. We couldn't afford a solicitor. Without legal aid, people like us would just bury our sons with no questions asked. Legal aid makes a massive difference."*

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<sup>6</sup> MOJ spent £4.2 million on Prison and Probation Service legal representation at prison inquests, while granting just £92k in legal aid to bereaved families through the Exceptional Case Funding scheme. "New figures highlight gross injustice faced by bereaved families at inquests"

<https://www.inquest.org.uk/legal-aid-inquest-figures>

<sup>7</sup> "New figures reveal 'shocking' funding injustice faced by bereaved families at inquests"

<https://www.inquest.org.uk/legal-aid-fileon4>

*Legal aid gives us that voice. Without legal aid, we have to sit back and accept it. We would be even more devastated if we couldn't find any answers." Dawn Boyle*

23. This groundswell of support for reform led the Ministry of Justice to launch a review of legal aid for inquests, issuing a call for evidence in July 2018. INQUEST and the families we work with were assured that this was the first step towards change and that coming out of the evidence review would be a consultation on new guidelines for legal aid funding for inquests. Yet in their final report, they rejected these calls, saying "*we have decided that we will not be introducing non-means tested legal aid for inquests where the state has representation*".<sup>8</sup>
24. Instead, the Ministry of Justice set out proposals focussed on improving guidance and signposting for families and their representatives to make the process easier to "*understand*". Families, the report says, "*need better awareness of when legal aid is available*". We understand that since the review the Ministry of Justice is mapping the process of why bereaved families disengage with their applications for legal aid, and that the Legal Aid Agency is looking at its own decision-making and inconsistencies in decisions. The review set in motion a welcome provision to backdate the 'legal help waiver' to fund early legal advice for bereaved families that are entitled to funding.
25. While improvements to the current system are of course welcome, they are a wholly inadequate response to the scale of the problem: it ignores the evidence that it is the system and processes are at fault and fails to address the fundamental inequality of resources experienced by bereaved families. Leaflets and information will not address the power imbalance faced by families where legal processes are stacked in favour of state and private providers. In response, INQUEST launched a Legal Aid for Inquests campaign in February 2019. At the campaign launch, chaired by Bishop James and attended by over 40 bereaved families and parliamentarians from across the political spectrum, called for the introduction of automatic non-means tested legal aid funding for bereaved families following state related deaths.
26. We recommend that the Justice Committee:
1. Call on the Ministry of Justice to urgently reconsider its 2018 decision, and introduce automatic non means tested legal aid for inquests.
  2. Support and scrutinise all efforts by the Ministry of Justice and Legal Aid Agency to address the problems faced by bereaved families with the current system until automatic non means tested legal aid for inquests has been introduced.

INQUEST, November 2020

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<sup>8</sup> <https://www.gov.uk/government/publications/review-of-inquests>

## Annex 1. Official support 1999-2020

1999	<p><b>Macpherson – <a href="#">Stephen Lawrence Inquiry</a></b></p> <p>Report of the Stephen Lawrence Inquiry.</p>	<p><i>That consideration be given to the provision of Legal Aid to victims or the families of victims to cover representation at an Inquest in appropriate cases.</i></p>
2003	<p><b><a href="#">Independent Review of the Coroners Services</a> - Commissioned by the Home Office, chaired by Tom Luce</b></p> <p>Death Certification and Investigation in England, Wales and Northern Ireland: the Report of a Fundamental Review.</p>	<p><i>We consider that the inquest should so far as possible be conducted in a style that is accessible to unrepresented lay people, and that the current criteria for awarding legal aid at inquests are broadly satisfactory. We recommend, however, that there should be a more liberal interpretation of the criteria in cases where a public authority is represented.</i></p>
2004	<p><b>Joint Committee on Human Rights</b></p> <p><a href="#">Deaths in custody</a>, Third Report of Session 2004-05, Vol 1 2004.</p>	<p><i>Participation of the next of kin in the investigation into a death in custody is an essential ingredient of Article 2 compliance... In all cases of deaths in custody, funding of legal assistance should be provided to the next of kin.</i></p>
2007	<p><b><a href="#">Corston Report</a></b></p> <p>A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system.</p>	<p><i>Public funding must be provided for bereaved families for proper legal representation at inquests relating to deaths in state custody that engage the state's obligations under Article 2 of the European Convention on Human Rights. Funding should not be means tested and any financial eligibility test should be removed whenever Article 2 is engaged. Funding should also cover reasonable travel, accommodation and subsistence costs of families' attendance at inquests.</i></p>
2015	<p><b><a href="#">Harris Review</a></b></p> <p>Changing Prisons, Changing Lives: Report of the Independent Review into Self Inflicted Deaths in Custody of 18-24 year olds by Lord Toby Harris.</p>	<p><i>Families of the deceased should have a right to non-means tested public funding for legal representation at an inquest.</i></p>

2016	<p>HHJ Peter Thornton QC, Chief Coroner</p> <p><a href="#">Report of the Chief Coroner to the Lord Chancellor: Third Annual Report: 2015 – 2016.</a></p>	<p><i>The Chief Coroner therefore recommends that the Lord Chancellor gives consideration to amending his Exceptional Funding Guidance (Inquests)<sup>35</sup> so as to provide exceptional funding for legal representation for the family where the state has agreed to provide separate representation for one or more interested persons.</i></p>
2017	<p><b>Angiolini Review</b></p> <p>Report of the Independent Review of Deaths and Serious Incidents in Police Custody by Rt. Hon. Dame Elish Angiolini DBE QC.</p>	<p><i>For the state to fulfil its legal obligations of allowing effective participation of families in the process that is meaningful and not “empty and rhetorical” there should be access for the immediate family to free, non-means tested legal advice, assistance and representation immediately following the death and throughout the Inquest hearing.</i></p>
2017	<p><b>Bach Commission</b></p> <p>The Right to Justice: The final report of the Bach Commission.</p>	<p><i>Where the state is funding one or more of the other parties at an inquest, it should also provide legal aid for representation of the family of the deceased.</i></p>
2017	<p><b>Hillsborough Review</b></p> <p>The patronising disposition of unaccountable power: A report to ensure the pain and suffering of the Hillsborough families is not repeated by The Right Reverend Bishop James Jones.</p>	<p><i>Publicly funded legal representation should be made available to bereaved families at inquests at which a public authority is to be legally represented. This could be achieved through amendments to the Ministry of Justice’s Lord Chancellor’s Exceptional Funding Guidance (Inquests) and should not need primary legislation. The requirement for a means test and financial contribution from the family should also be waived in these cases. Where necessary, funding for pathology or other expert evidence should also be made available.</i></p>
2017	<p>HHJ Mark Lucraft QC, Chief Coroner</p> <p><a href="#">Report of the Chief Coroner to the Lord Chancellor. Fourth Annual Report: 2016-2017.</a></p>	<p><i>The Chief Coroner therefore recommends that the Lord Chancellor gives consideration to amending the Exceptional Funding Guidance (Inquests) so as to provide exceptional funding for legal representation for the family where the state has agreed to</i></p>

		<i>provide separate representation for one or more interested persons.</i>
2018	<b>Joint Committee on Human Rights</b>  <a href="#">Enforcing human rights. Tenth Report of Session 2017-2019.</a>	<i>While inquests are theoretically inquisitorial, in practice they often have a more adversarial nature. If inquests are to remain inquisitorial, families must be given non-means tested funding for legal representation at inquests where the state has separate representation for one or more interested persons.</i>
2018	<b>Ministry of Justice: Review of legal aid for inquests</b>  <a href="#">Call for evidence</a> , July 2018.	<i>Recent reports have highlighted the need to examine the provision of legal aid for death in custody cases and deaths where the state may have been involved. A better understanding of cases where the state has legal representation is needed to inform discussions about equality of arms for bereaved people more generally.</i>
2018	<b>Independent Office for Police Conduct</b>  <a href="#">Consultation response</a> : to MoJ's call for evidence regarding legal representation for families at Inquests.	<i>We believe legal aid should be automatically available to bereaved families following deaths in custody or other state detention. This is particularly critical at inquests, as legal proceedings are often complex and other parties, including the police, will ordinarily be represented.</i>
2019	<b>Final report of the Independent Review of the Mental Health Act</b>  Modernising the Mental Health Act: Increasing choice, reducing compulsion chaired by Sir Simon Wessely.	<i>Funding should be available for the families of those who have died unnaturally, violently or by suicide whilst detained, to receive non means tested legal aid. This would be to help families to understand the processes, their rights, and what steps they can take. This would include funding to attend the inquest, but should also be available to support families immediately after the death of the patient.</i>

2019	<p>Ministry of Justice, Final Report: Review of legal aid for inquests</p>	<p><i>We have decided that we will not be introducing non means tested legal aid for inquests where the state has representation.</i></p>
2019	<p>Joint Committee on Human Rights</p> <p><a href="#">The detention of young people with learning disabilities and/autism</a>, Second Report of Session 2019</p>	<p><i>Families must be given non-means tested funding for legal representation at inquests where the state has separate representation for one or more interested persons.</i></p>
2020	<p>JUSTICE working party</p> <p><a href="#">'When Things Go Wrong: The response of the justice system'</a></p>	<p><i>The current arrangements mean that legal representation at inquests is out of reach for the vast majority of bereaved people... state and corporate interested persons are typically able to deploy ranks of solicitors, junior barristers and QCs to advise and advocate on these issues. In this context, to claim that families' effective participation can be guaranteed by the coroner and the "inquisitorial" nature of the process is to ignore the reality.</i></p>

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