

**Legal Aid Means Test Review 2022****INQUEST response****June 2022**

1. INQUEST is the only charity providing expertise on state related deaths and their investigation. For four decades, INQUEST has provided 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.
2. Our response to this consultation focusses on questions 49 and 50 on proposals for the means test for legal help at inquests.

Question 49: do you agree with our proposal to remove the means test for legal help at inquests where the case relates to a potential breach of ECHR obligations or significant wider public interest? Please state yes/no/maybe and provide reasons.

3. INQUEST welcomes the Ministry of Justice's proposal to remove the means test for legal help for cases which may breach rights under the European Convention on Human Rights (ECHR). However, we have two key areas of concern with the proposals as currently drafted. Firstly, the proposals do not solve the ongoing problem of inequality of arms in the inquest system, including for families looking to challenge a coroner's decision. Secondly, the proposals contain imprecise wording regarding the inquest funding process.

*Inequality of arms*

4. INQUEST welcomes the proposal to remove the means test for legal help for cases which relate to a potential breach of the Human Rights Act. We believe the Government's recently implemented reforms to remove the means test for legal representation at inquests for cases which meet the Exceptional Case Funding criteria is a positive step forward.<sup>1</sup>
5. We also welcome plans to remove the means test for legal help on cases which meet the criteria for 'wider public interest'. However, we believe there needs to be clearer guidance issued by the Legal Aid Agency on what the specific criteria for meeting the merits-test for 'wider public interest' is.
6. Overall, however, we are of the view the proposal set out in this consultation is limited and does not go far enough. This is because the proposed reform will only provide non-means tested funding for legal help for bereaved families whose case

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<sup>1</sup> INQUEST, December 2021, NEWS: Means test removed in legal aid for inquests campaign progress <https://www.inquest.org.uk/legalaid-ecf>

relates to a possible breach of rights under the ECHR. This will exclude bereaved families whose case does not meet the high threshold of Article 2 but are still involved in inquests where state bodies are represented, and their conduct is to be interrogated.

7. **We strongly urge the Ministry of Justice to reconsider this proposal to ensure automatic, non-means tested legal aid or other public funding is available for bereaved families at inquests where state bodies are involved.**
8. Examples of the circumstances which may not qualify under these proposals for non-means tested legal help or representation include:
  - a. healthcare-related deaths in detention;
  - b. self-inflicted deaths of *voluntary* patients in mental health settings or under the direct care of a mental health trust in the community;
  - c. deaths in supported accommodation or in care settings where the person has been placed by a public body or local authority;
  - d. armed forces veteran suicides involving both mental health trusts and the Ministry of Defence.
9. The types of cases outlined above make up a large percentage of INQUEST's case load and have serious financial and emotional implications for many of the families we work with. Not only have these families experienced a traumatic bereavement, but they then have to navigate the protracted inquest and funding systems.
10. The following cases illustrate why the Government's reforms outlined in this consultation are limited. More must be done to ensure automatic, non means tested funding for all families in inquests where the state is involved. Further, the below cases highlight repeated concerns in similar cases and show wider public interest concerns.

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**Alison Henley** was 53 years old when she died of an overdose at her home in Glossop, Derbyshire on 25 August 2016. She had been prescribed strong opiate pain medications due to a range of physical health conditions and was also experiencing serious mental ill health. Alison was engaged with mental health services at Pennine Care NHS Foundation Trust, and had previously seriously self-harmed and overdosed, including weeks before her death. She had been diagnosed with Emotionally Unstable Personality Disorder, anxiety and depression and had spent significant time in the mental health unit in Tameside General Hospital.

The inquest into her death in October 2020 examined the monitoring of Alison's medication and physical healthcare, as well as the response to her mental ill health and previous suicide attempts by Tameside General Hospital, GPs and Community Psychiatric Nurses from Pennine Care NHS Foundation Trust and Cohen's Chemist. Alison's sister Kathryn was not

entitled to legal aid for the inquest. She had to pay £36,000 in legal costs and face five other Interested Persons at the inquest who were all represented, with many at public expense.

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**Alexandra Greenway**, a 23-year-old transgender woman from Bristol, died on 11 May 2019. Alexandra had long term issues with mental ill health, including depression and previous suicide attempts dating back to her teens. Just over a month before her death, on 10 April 2019 Alexandra was detained by police (under Section 136) after attempting to jump from a bridge. She was taken to the Bluebell Unit at Green Lane Hospital, who assessed that there was no imminent risk to her safety. Alexandra was discharged to the care of her GP and she was provided with the number of a crisis line in case things got worse.

In October 2020, the coroner deemed that Article 2 had not been engaged in this case. Crucially, this meant Alexandra's family were not able to access legal aid for representation at the inquest, despite the fact the NHS were represented at the inquest at public expense. Through the help of INQUEST, a barrister was able to attend some of the inquest's hearings on a pro-bono basis. However, Alexandra's family felt the scope of the inquest was severely limited. Key systemic failings with regard to the quality-of-care Alexandra received from her GP or mental health professionals at Avon and Wiltshire Mental Health Partnership NHS Trust were not examined. Without consistently funded representation throughout the process, the family found it extremely hard to make their wishes known to the coroner and engage meaningfully in the process.

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**Coco Rose Bradford**, a six-year-old girl with autism, was taken to hospital in Cornwall and died unexpectedly on 31 July 2017. In January 2022 the inquest into her death concluded, finding her death to be of natural causes (a finding Coco's family disputes). Coco's mother, Rachel Bradford, told the inquest how she watched her daughter die in front of her and how the hospital dismissed the family's concerns even though Coco was in glaringly obvious pain. Rachel gave evidence that Coco's autism played a role in how she was treated by medical staff and that the professionals wrongly viewed her as being uncooperative and non-compliant. This is a concern raised by other families in similar circumstances involving the death of someone with autism and/or a learning disability.

Members of the local community donated to contribute toward the family's legal costs for the inquest. Coco's mother said in a personal statement: *"Without our barrister offering to act pro bono at the inquest hearing we're not sure what would have happened. It seems desperately unfair that we have had to crowdfund to cover our legal fees, and rely on our barrister waiving her charges, when the hospital's legal team are paid for by our taxes."*

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**Matthew Copestick** died on 8 January 2019. The inquest concluded that his death was sudden, unexpected and linked to alcohol dependency. Matthew's family were keen for his inquest to be as broad as possible in scope to understand the circumstances around his

death. They paid privately for legal representation to make the case for the inquest to be Article 2 during the pre-inquest review, given the systemic issues around detoxification pathways from A&E. Ultimately, the coroner decided that Article 2 was not in breach in this case, and therefore Matthew's family were not eligible for legal aid under Exceptional Case Funding. At the inquest in January 2021, crucial failings were identified in the care Matthew received, including the fact that Matthew should have been admitted for inpatient detoxification four days prior to his death and that there was poor communication between staff on his case.

Although the coroner ultimately decided that Matthew's case did not engage Article 2, with help from lawyers the inquest into his death revealed critical findings about his care at the hands of the state. Given the state's involvement, Matthew's family should not have been forced to pay out of pocket for legal representation especially when the five other interested legal parties all had representation mainly paid for by the state.

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**Connor Sparrowhawk** died after he drowned in a bath as a result of an epileptic seizure on 4 July 2013. He was admitted to a now closed-down Short Term Assessment and Treatment Unit run by Southern Health NHS Foundation Trust. Connor's death was originally viewed as being from natural causes, meaning it would have been extremely difficult to be assessed as eligible for legal aid under ECF. The coroner eventually determined that Article 2 had in fact been engaged, and at the inquest into his death in 2015, the jury found Connor's death was contributed to by neglect. Connor's family were not eligible for legal aid and relied on pro bono advice and representation.

As Connor's family told the Joint Committee on Human Rights in 2018, lawyers for the multiple state agencies involved in their son's death adopted an adversarial and obstructive approach preceding and during Connor's inquest. Therefore, without legal representation it is likely the significant findings made about neglect in Connor's care would not have come to light. Connor's case also highlights the benefits of providing non mean tested funding from the outset.

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Although not an INQUEST case, we also wish to draw your attention to the case of **Harry Richford** who died seven days after childbirth at the Queen Elizabeth the Queen Mother hospital in Margate, Kent. Harry's family were not able to pay for specialist legal help needed to navigate the complex inquest process in January 2020 (including NHS lawyers disclosing 1,400 pages of new evidence on the second morning of the inquest). The family worked with their local MP and the organisation Advocate to secure pro-bono legal representation. Following the inquest into Harry's death, the Care Quality Commission confirmed it would be criminally prosecuting the Trust for unsafe care and treatment of both Harry and his mother Sarah, his mother and the NHS commissioned a major independent investigation into maternity services in East Kent.

Without legal representation, Harry's family may never have found out what went wrong in their son's care and there would have been no accountability for his death. It is unfair that state agencies were able to be represented at taxpayers' expense while Harry's family had to rely on pro-bono representation.

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11. Widening the current proposal to include funding for all families where the inquest involves one or more state bodies would address the ongoing inequality of arms at inquests – an issue which was debated at length by cross-party parliamentarians during recent debates on the Judicial Review and Courts Act.<sup>2</sup> The current funding scheme allows state bodies unlimited access to public funding for the best legal teams and experts while families often face complex and demanding funding application processes. Many are forced to pay large sums towards legal costs or represent themselves. Others must resort to crowdfunding or rely on lawyers offering pro-bono representation for part or all of the inquest.
12. Properly conducted inquests in which families have been legally represented from the beginning of the process can provide necessary scrutiny to help prevent future deaths. Inquests can help save lives and are a vital way of exposing unsafe systems of care and holding public and private services to account. Funding for families therefore performs a wider public benefit far beyond individual rights and interests. Further, legal representation for families at the early stages of the inquest process can help to determine the scope of the inquest which involves complex legal arguments. This is important as INQUEST have previously evidenced the ways in which state lawyers commonly argue against Article 2 and widening the scope at inquests.<sup>3</sup>
13. Countless authoritative reviews and inquiries have all reached the same conclusion: the current funding arrangements for inquest representation needs fundamental reform. As recently as May 2021, the Justice Committee concluded:  
  
*"...it is unfair that public funding is available for bereaved people to be legally represented at inquests only in exceptional cases and subject to a means test. This is the case even at inquests that involve many public bodies each of which are legally represented at public expense"* Justice Committee, 2021
14. The case for automatic public funding for bereaved people at inquests has been supported by Dame Elish Angiolini, Bishop James Jones, Lord Bach, two Chief

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<sup>2</sup> See INQUEST, Inquest Lawyers Group and JUSTICE's briefings on the Judicial Review and Courts Bill here <https://www.inquest.org.uk/investigation>

<sup>3</sup> See INQUEST submission to 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>

Coroners, Baroness Corston, Lord Harris, the Justice Committee, the Joint Committee on Human Rights, the Independent Review of the Mental Health Act, the Westminster Commission on Legal Aid and from agencies including the Independent Advisory Panel On Deaths In Custody and the Independent Office for Police Conduct.<sup>4</sup>

15. Without exception, in every state-related death with which INQUEST has been involved, the state has been represented by publicly funded expert legal teams routinely supported by relevant experienced professionals and senior personnel. All of this is automatically in place for state bodies. There do not face merits or means tests and it is paid for at taxpayers' expense and/or from professional organisations, trade unions or private companies. We therefore believe the Ministry of Justice must urgently address the unfair funding system for families and provide automatic public funding for those involved in inquests following state-related deaths.
16. In conclusion, it is our view the Government should extend the proposed and implemented reforms to legal aid to include all families who are involved in inquests where state bodies are also involved, thereby addressing the inequality of arms at inquests. This extension would be a logical and fair next step to the reforms already proposed and brought in to force.
17. Additionally, we believe legal aid entitlements should be extended to bereaved families pursuing a public challenge of a coroner's decision in an inquest involving a state agency. At present there is no automatic appeals system in the coroner's service. Bereaved families must use the Judicial Review process to challenge a coroner's decision on important issues such as the scope of an inquest and the applicability of Article 2. The Judicial Review process is costly and comes at great financial risk to a bereaved family if they were to ultimately lose the challenge. If they are not financially eligible for Legal Aid they cannot apply for funding to enable them to pursue this route.
18. Therefore, in the absence of an automatic appeals system in the coroner's service, Coroner's rulings are often left unchallenged regardless of the fairness or lawfulness of the ruling. We feel that it is important to ensure bereaved families who have grounds to challenge a decision are able to do so without facing financial risk or being deterred because of a lack of funding to do so.

*Imprecise wording*

19. INQUEST's second area of concern relates to the accuracy of the consultation's wording with respect to removing the means test for legal help for inquests in some cases. The Ministry of Justice propose to "retain the option to apply for legal help for

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<sup>4</sup> See the timeline of official support for public funding at inquests here: <https://www.inquest.org.uk/legal-aidfor-inquests-timeline>

inquests via the existing route, which is delegated to providers.” The wording is confused as there is currently no formal application process for legal help. Rather, a lawyer can ‘self-grant’ via their own firm’s functions. Given this imprecise wording we are therefore unclear what is being proposed.

20. Further, the current test to obtain a legal help waiver is “where it is equitable to do so”, having regard to Article 2 ECHR. However, the wording in paragraph 338 of this consultation (i.e., to “remove the means test for legal help in relation to inquests when the inquest relates to a possible breach of rights under the ECHR”) is closer to the test for ECF. This suggests the merits test for means-free legal help might be higher than it currently is for a waiver. While we trust it is not the intention of the new proposals to put a higher test in place, it is not clear from the wording in this consultation.

Question 50: do you agree with our proposal to amend backdating provisions so that providers can continue to have funding for legal help in relation to an inquest backdated to the date of application (whether for standalone legal help or following a successful ECF grant)? Please state yes/no/maybe and provide reasons.

21. While INQUEST agrees with the proposal to amend backdating provisions, we are concerned these proposals are inconsistent with the Legal Aid Agency’s Provider Pack. It is not clear what the ‘application’ being referred to in paragraph 342 and question 50 is. The Provider Pack states the Legal Aid Agency will “generally backdate the determination to the date the Controlled Work form was signed and dated by the applicant”<sup>5</sup> whereas this proposal will amend backdating provisions to the date of application. We are concerned by this inconsistency as new proposals might mean work done prior to an application for a legal help waiver being made is not valid for backdating.

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<sup>5</sup> Legal Aid Agency, January 2022, Inquests – Exceptional Case Funding – Provider Pack, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1045705/ECF\\_Provider\\_Inquest\\_Pack\\_January\\_2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1045705/ECF_Provider_Inquest_Pack_January_2022.pdf)