

**INQUEST and INQUEST Lawyers Steering Group
Judicial Review and Courts Bill**

**Briefing for Committee Stage: Crucial and overdue opportunity to end the
inequality of arms at inquests by introducing public funding for bereaved
families**

“It is now for government to put the experiences of bereaved people at the front and centre, and ensure equality of arms, accountability and oversight, and candour. There can be no more false starts, broken commitments, or shelved recommendations.”

Deborah Coles, INQUEST Executive Director

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. The INQUEST Lawyers’ Group is a national network of several hundred lawyers who provide legal advice and representation to bereaved families – often acting pro bono where funding is unavailable – as well as promoting and developing knowledge and expertise in the law and practice of inquests.
2. In the last 10 years alone, INQUEST has actively worked on over 2,000 cases through inquest and investigation processes to secure more effective scrutiny of the state when people die. These have ranged from deaths in police or prison cells or following contact with state agents and deaths in a health or social care setting, to deaths following major disasters such as Hillsborough and more recently Grenfell. Currently we are supporting the families of 483 cases. Our briefing is informed by the experiences of these families and others we have supported over our 40 years of work. Most recently, we gathered the views and experiences of the inquest system from over 50 bereaved families to inform our recommendations for change.¹
3. In this briefing, we set out the case for including an **amendment to introduce automatic non-means tested public funding for bereaved families at inquests in the Judicial Review and Courts Bill**. The inequality of arms faced by many bereaved

¹ INQUEST Family Evidence Submission to the Justice Committee Inquiry on the Coroner Service
<https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=41a24ded-3add-4099-979a-ad8adf080789>
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families at inquests is a travesty of justice. That bereaved families often struggle for legal representation while public authorities have unlimited access to lawyers at the taxpayers' expense has long been highlighted by INQUEST and others.

4. 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 are no merits or means tests and it is paid for at taxpayers' expense and/or from professional organisations, trade unions or private companies. The Judicial Review and Courts Bill is an opportunity to address this long-standing issue.

The situation currently: funding for bereaved families at inquests

'We haven't had the inquest yet, but I don't have much faith that we will get the answers or outcome we would like because we don't have representation and everything is stacked against us. All the services involved have representation - how can that be fair?'
Anon

'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. The thought that justice is not available to families is terrible.' Anon

'Without legal aid, people like us would just bury our sons with no questions asked. Legal aid makes a massive difference. 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

'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

'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

Quotes taken from [INQUEST family evidence submission to the Justice Committee](#)

5. There is a fundamental inequality of arms at the heart of the inquest process.² State bodies and representatives have unlimited access to public funding for the best legal teams and experts. Families have to fall within a strict, draconian framework to be granted legal aid, and face complex and demanding funding application processes. Many are forced to pay large sums towards legal costs or represent themselves. Others have had to resort to crowdfunding.
6. The funding scheme that currently exists is having a damaging and distressing effect on families; is further frustrating the inquest process by adding an additional layer of complexity and delay; and is thwarting the process of scrutiny and the potential for learning.
7. The suggestion put forward by the Ministry of Justice that inquests are inquisitorial, informal processes where families can either represent themselves and ask questions about the death of their relative or ask others to answer their questions is a myth. Currently, an unrepresented family is confronted by a bank of lawyers representing other interested persons at the inquest. As the Chair of the Justice Committee recently highlighted, it is often the actions of lawyers representing public bodies that make what is supposed to be an inquisitorial process adversarial.³ The inquest process requires specialist knowledge of organisational policies, procedures and the law.
8. 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 this year, 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 report on the Coroner Service, 2021
9. The past few years have seen unprecedented focus on how agencies investigate and scrutinise contentious state related deaths. Momentum for change is now overwhelming, with our call for funding echoed from every possible quarter – Dame Elish Angiolini, Bishop James Jones, Lord Bach, two Chief Coroners, Baroness

² INQUEST, Now or Never! Legal aid for inquests

<https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=a1ec7dcc-9ed6-405c-8af6-2639438e8d00>

³ Sir Robert Neill MP, Westminster Hall debate on the government response to the Coroners Service inquiry, <https://hansard.parliament.uk/commons/2021-10-28/debates/F483FD31-8745-4031-90E7-AFFDBB421A48/TheCoronerService>, 28 October 2021

Corston, Lord Harris, 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 Office for Police Conduct.⁴

“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.” Dame Elish Angiolini, 2017

“Publicly funded legal representation should be made available to bereaved families at inquests at which a public authority is to be legally represented”. Bishop James Jones, 2017

10. Furthermore, without funded representation, families are denied their voice and meaningful participation in the processes of investigation, learning and accountability. It undermines the preventative potential of inquests to interrogate the facts and ensure harmful practices are brought to light.

*“By seeking legal representation to assist them through this long, complex and daunting process they hope to prevent future deaths; in contributing to that objective some meaning and purpose can be given to their loss.” INQUEST, *Unlocking the Truth*, 2007*

11. In contrast, 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. 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.

Current government policy and plans

12. The Government’s response to a critical Justice Committee report on the Coroner Service⁵ was published on 10 September 2021. In their report, the Justice Committee recommended the Government *“by 1 October 2021, for all inquests where public authorities are legally represented, make sure that non-means tested legal aid or*

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

⁵ Justice Committee, The Coroner Service, <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/68/6802.htm>, May 2021

other public funding for legal representation is also available for the people that have been bereaved”.

13. In response to the above recommendation, the Government announced a plan to remove the means test for Exceptional Case Funding (ECF) and the means test for legal help, where ECF is granted. This is a considerable step forward to ensure bereaved families involved in inquests where Article 2 (the right to life) is engaged are funded without having to go through a complex and intrusive application process. However, INQUEST is disappointed that while plans to remove the means test for ECF through secondary legislation appear well advanced, work on the legal help process is a long way off reaching fruition. Legal advice is not only needed during the inquest hearing but from the point of death. There is a clear link between meaningful access to justice and the outcome of the legal process as legal early advice has a significant impact on the scope and quality of inquests.
14. Further, this policy reform - while welcome - does not go nearly far enough, nor does it satisfy the requirements set out in recommendations made by countless reviews referenced above to ensure that bereaved families at *all inquests* where the state is represented or involved are publicly funded for their legal representation.

What more needs to be done

a. Make funding available for cases that would or may sit outside ECF but where the actions of state bodies require scrutiny

15. Many key findings on the conduct of state bodies arise from cases that fall within Article 2 and are therefore eligible for ECF. However, such findings also crucially arise from many cases in which Article 2 may not be arguable, such as in the following cases:
 - Deaths in custody which are healthcare related, in which currently the Prison Service/Police/Mental Health Trust will be legally represented at an inquest but the family would not be eligible.
 - Self-inflicted deaths in mental health settings of voluntary patients or those detained under the Mental Health Act, in which if the Coroner rules that Article 2 on the “Rabone” test⁶ is not engaged, the family do not get funding. There is considerable inconsistency in coroners’ decisions on Article 2 in this

⁶ As per the Supreme Court’s decision in *Rabone v Pennine Care NHS Trust* [2012] 2 WLR 1460, ECF guidance concedes that there may be an arguable breach of the substantive Article 2 obligation in the case of a death of a patient suffering from mental ill health who was undergoing treatment as a voluntary patient, where the state knew or ought to have known there to be a ‘real or immediate’ risk to their life and they did not do all that could be reasonably expected to avoid that risk.

context, and currently a large number of cases which may actually qualify for Article 2 are not being funded and families left unrepresented.

- Self-inflicted deaths where the person is under the direct care of a Mental Health Trust but is living in the community.
- Deaths in supported accommodation where the person has been placed by a public body.
- Self-inflicted deaths of people who have presented in mental health crisis at a hospital but the hospital is not willing to admit them.
- Deaths in care settings where placements are funded by a local authority, which would include the deaths of people with learning disabilities.
- Cases involving complex or systemic medical concerns.

16. The above cases would not benefit from the changes currently proposed by the Ministry of Justice and so must be included in the criteria for non means-tested funding for bereaved family's legal costs during the entire inquest process.

b. Ensure funding covers the early stages of legal work involved in representing families

17. 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, inquest scope, witnesses, Article 2, criminal investigations and so on. As previously highlighted, legal help can significantly impact on the scope and quality of an inquest. It is imperative that families secure specialist legal advice from the earliest possible stage. Until the Government remove the means test for legal help, this will not be possible for a significant number of families.

c. Strengthen the 'public interest test' for funding

18. 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.

Case examples

19. The following cases illustrate why the Government's proposed reforms to ECF are limited and an amendment to the Judicial Review and Courts Bill must be introduced to ensure funding for *all inquests* where the state is involved.

Connor Sparrowhawk

Connor 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 able to pay for legal representation out of pocket 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 never have come to light.

Case D

INQUEST worked on the case of D, involving a death in private supported accommodation. The individual had recently been released from prison and was placed in accommodation which the local council noted was unsanitary. The inquest was originally listed as a rule 23 inquest (i.e., a documentary inquest without hearing from key witnesses). Lawyers were able to argue that article 2 was in fact engaged and funding was eventually granted. Without legal representation, it is likely this case would never have proceeded to a full inquest hearing.

Matthew Copestick

Matthew 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 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 ECF. 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 it was 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 legal representation mainly paid for by the state.

Harry Richford

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 which NHS Trust lawyers dropped 1,400 pages of new evidence on the morning of the second day 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 Sarah, his mother.

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 struggle to find pro-bono representation.

How to put this right: introduce an amendment in the Judicial Review and Courts Bill to ensure fairer funding for families at inquests

20. It is our view that it is only by amending LASPO 2012 to establish the principle of equality of arms between families and public authority Interested Persons (IPs) can the goal of achieving fairer inquest funding for families be achieved. The Judicial Review and Courts Bill presents a crucial and timely opportunity to do this and we urge MPs at Committee Stage to bring forward an amendment to this effect.
21. An amendment must:
- Require funding to be provided to family members (including personal representatives and individuals who are recognised as Interested Persons because of their relationship to the deceased) **in any case where one or more public authorities are Interested Persons within s.47(2) of the Coroners and Justice Act 2009 or are likely to be designated as such.**
 - Ensure that automatic, non means-tested public funding for legal representation is available from the point of death.
 - Avoid any requirement to list examples of instances in which funding must be provided, which may encourage a restrictive approach.
 - Allow for funding to continue to be delivered through the LAA, which is a well-established agency set up for this purpose.
22. Over the course of our campaign for legal aid for inquests, we have made attempts to calculate how much money public authorities spend on legal representation at inquests, yet most of the organisations we requested this information from were unable to evidence the cost.
23. Inevitably, an amendment to LASPO to ensure equality of arms at inquests will have cost implications. However, INQUEST believes short term investment in greater legal aid capacity for families at inquests will contribute to long term savings: deaths are expensive, investigations and inquests are often retraumatising for bereaved people. Any efforts to strengthen the preventative qualities of inquests – which funding will do – is crucial and would help to facilitate learning and avert future deaths and risks to health and safety more generally. That is the aspiration of bereaved people and one that serves us all.

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Annex I: Timeline of official support for funding for bereaved families at inquests

1999	Macpherson – <u>Stephen Lawrence Inquiry</u> Report of the Stephen Lawrence Inquiry.	<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>
2003	<u>Independent Review of the Coroners Services - Commissioned by the Home Office, chaired by Tom Luce</u> Death Certification and Investigation in England, Wales and Northern Ireland: the Report of a Fundamental Review.	<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>
2004	<u>Joint Committee on Human Rights</u> <u>Deaths in custody</u> , Third Report of Session 2004-05, Vol 1 2004.	<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>
2007	Corston Report A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system.	<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>
2015	Harris Review Changing Prisons, Changing Lives: Report of the Independent Review into Self Inflicted Deaths in Custody of 18-24 year olds by Lord Toby Harris.	<i>Families of the deceased should have a right to non-means tested public funding for legal representation at an inquest.</i>

- 2016 HHJ Peter Thornton QC, Chief Coroner**
Report of the Chief Coroner to the Lord Chancellor: Third Annual Report: 2015 – 2016.
- The Chief Coroner therefore recommends that the Lord Chancellor gives consideration to amending his Exceptional Funding Guidance (Inquests)³⁵ 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.*
- 2017 Angiolini Review**
Report of the Independent Review of Deaths and Serious Incidents in Police Custody by Rt. Hon. Dame Elish Angiolini DBE QC.
- 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.*
- 2017 Bach Commission**
The Right to Justice: The final report of the Bach Commission.
- 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.*
- 2017 Hillsborough Review**
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.
- 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.*
- 2017 HHJ Mark Lucraft QC, Chief Coroner**
Report of the Chief Coroner to the Lord Chancellor. Fourth Annual Report: 2016-2017.
- 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 provide separate representation for one or more interested persons.*

- 2018 Joint Committee on Human Rights**
Enforcing human rights. Tenth Report of Session 2017-2019.
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.
- 2018 Ministry of Justice: Review of legal aid for inquests**
Call for evidence, July 2018.
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.
- 2018 Independent Office for Police Conduct**
Consultation response: to MoJ's call for evidence regarding legal representation for families at Inquests.
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.
- 2019 Final report of the Independent Review of the Mental Health Act**
Modernising the Mental Health Act: Increasing choice, reducing compulsion chaired by Sir Simon Wessely.
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.
- 2019 Ministry of Justice, Final Report: Review of legal aid for inquests**
*We have decided that **we will not be introducing non means tested legal aid for inquests** where the state has representation.*
- 2019 Joint Committee on Human Rights**
The detention of young people with learning disabilities and/or autism
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.

	JUSTICE working party	
2020	'When Things Go Wrong: The response of the justice system'	<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>
	The Bar Council	
2021	Running on Empty: Civil Legal Aid Research Report	<i>There is a serious problem with inequality of arms when it comes to bereaved families being represented at inquests.</i>
	Justice Select Committee	
2021	The Coroner Service	<i>Bereaved people should not be put through the difficult and time-consuming process of meeting the exceptional cases requirements and the means test for legal aid where public authorities are legally represented at public expense at the inquest into the death of their loved one. The Ministry of Justice should by 1 October 2021, for all inquests where public authorities are legally represented, make sure that non-means tested legal aid or other public funding for legal representation is also available for the people that have been bereaved.</i>
	Victims' Commissioner	
2021	The Victims' Commissioner calls for legal aid for inquests in letter to Lord Chancellor	<i>I am writing to you to set out the case for your Department to undertake a review of the funding of legal representation at inquests in all cases where someone has died whilst in the custody or care of public authorities, or where a public authority is involved in the circumstances of the death.</i>
	Westminster Commission on Legal Aid	
2021	Inquiry into the Sustainability and Recovery of the Legal Aid Sector	<i>Expand access to legal aid for bereaved families for inquests</i>